FOREWORD

Embracing Administrative Common Law

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ABSTRACT

This Foreword begins with the descriptive claim that much of administrative law is really administrative common law: doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies. Although governing statutes exert some constraining force on judicial creativity, the primary basis of these judge-fashioned doctrines lies in judicial conceptions of appropriate institutional roles, along with pragmatic and normative concerns, that are frequently constitutionally infused and developed incrementally through precedent. Yet the judicially created character of administrative law is rarely acknowledged and often condemned by courts.

Turning from descriptive to more normative, this Foreword argues for explicit judicial recognition and acceptance of administrative common law. Administrative common law serves an important function in our separation of powers system, a system that makes it difficult for Congress or the President to oust the courts as developers of administrative law and makes administrative common law inevitable. Moreover, courts have employed administrative common law as a central mechanism through which to ameliorate the consti-

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tutional tensions raised by the modern administrative state. Administrative common law also represents a legitimate instance of judicial lawmaking. Much administrative common law has a statutory and constitutional basis, and the factors that justify federal common law in other instances—unique federal interests at stake, a need for uniformity, and the impropriety of relying on state law—dominate federal administrative contexts. Finally, openly acknowledging the role that judicial lawmaking plays is critical to clarifying and improving administrative law.

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INTRODUCTION

Judicial review of agency action is hardly a topic wanting for attention. A multitude of statutory provisions and cases address the subject, not to mention endless reams of academic commentary. But

for all the ink spilled, disagreement continues over a fundamental feature of judicial review: the role of administrative common law.

By administrative common law, I am referring to administrative law doctrines and requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies.[1] Much of administrative law falls into this common law category.[2] To be sure, most administrative law is ostensibly linked to statutory provisions authorizing judicial review or imposing obligations on agencies, and these governing statutes exert some constraining force on judicial creativity. But the judge-fashioned doctrines that comprise modern administrative law venture too far afield from statutory text or discernible legislative purpose to count simply as statutory interpretation. Instead, their primary basis lies in judicial conceptions of appropriate institutional roles, along with pragmatic and normative concerns, that are frequently constitutionally infused and developed incrementally through precedent.

Yet the judicially created character of administrative law is rarely acknowledged by courts. As Professor Jack Beermann has noted, courts are "reluctant to be open about their use of common law in the administrative law arena, especially when a statute contains an answer or a germ of an answer."[3] *FCC v. Fox Television Stations, Inc.*,[4] a recent 5-4 decision, provides a good example. There, the Supreme Court emphatically rejected the suggestion that an agency generally must supply greater explanation for a change in policy than for adopting a new policy when none previously existed.[5] In reaching this result, Justice Scalia's majority opinion emphasized that the governing judicial review provision—§ 706(2)(A) of the Administrative Procedure Act ("APA")[6]—"makes no distinction . . . between initial agency

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1 The term "administrative common law" is also sometimes used to refer to common law created by agencies, for example through adjudication, Kenneth Culp Davis, *Essay in Law, Administrative Common Law and the* Vermont Yankee *Opinion*, 1980 UTAH L. REV. 3, 3, or perhaps longstanding agency interpretations, Richard W. Murphy, Hunters *for Administrative Common Law*, 58 ADMIN. L. REV. 917, 918 (2006).

2 *See* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 3 (2011); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 508–11 (2010). *But cf.* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998) (acknowledging common law character of administrative law but discerning in 1998 a trend towards more statutory analysis).

3 Beermann, *supra* note 2, at 2. Scholars have been more honest, but have addressed the topic only episodically. *See infra* text accompanying notes 132–34.

4 FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

5 *Id.* at 1810–12.

6 5 U.S.C. §§ 551 et. seq. (2006).

action and subsequent agency action undoing or revising that action."[7] What the majority did not mention, however, was that analysis of whether § 706(2)(A) is violated regularly entails a searching inquiry that is not mandated by the provision's directive to courts to set aside agency action found to be "arbitrary, capricious," or "an abuse of discretion."[8] Nor did the majority note that its own exception—requiring greater justification when "serious reliance interests" were implicated—could not be derived from statutory text or purpose alone, but rested instead on concerns of fairness and due process.[9]

Indeed, to the extent that courts do acknowledge judicial development of administrative law requirements, they usually condemn the practice. A recent instance of this is *Milner v. Department of the Navy*,[10] a 2011 decision in which the Court overruled a longstanding lower court interpretation of Exemption 2 of the Freedom of Information Act ("FOIA") as at odds with statutory text.[11] The dissent criticized the majority for engaging in "linguistic literalism" rather than constructing "workable agency practice."[12] But, writing for an eight-Justice majority, Justice Kagan was undeterred, insisting that "[t]he judicial role is to enforce th[e] congressionally determined balance [embodied in FOIA] rather than . . . to assess case by case, department by department, and task by task whether disclosure interferes with good government." [13]

This Foreword argues for explicit judicial recognition and acceptance of administrative common law. Administrative common law serves an important function in our separation of powers system, a system that makes it difficult for Congress or the President to oust the courts as developers of administrative law. In particular, the institutional features of administrative law—the role it plays in structuring relationships between different government institutions and the requirements it imposes on how agencies operate—create strong pressures on courts to play a lawmaking role. Moreover, courts have employed administrative common law as a central mechanism through which to ameliorate the constitutional tensions raised by the modern administrative state. These features combine to make administrative

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7 *Fox*, 129 S. Ct. at 1811.

8 5 U.S.C. § 706(2)(A) (2006). For a discussion of how courts have applied § 706(2)(A), see *infra* text accompanying notes 22–27.

9 *Fox*, 129 S. Ct. at 1811.

10 Milner v. Dep't of the Navy, 131 S. Ct. 1259 (2011).

11 *Id.* at 1271.

12 *Id.* at 1276, 1278.

13 *Id.* at 1266 n.5.

common law inevitable. Although in theory courts could forego administrative common law, in practice any such result is both highly unlikely and quite undesirable.

As significant, administrative common law represents a legitimate instance of judicial lawmaking. The very same factors that support federal common law in other instances—unique federal interests at stake, a need for uniformity, and the impropriety of relying on state law—dominate federal administrative contexts. Federalism concerns are thus absent, and administrative common law actually serves separation of powers values. Administrative common law's legitimacy also follows from recognizing that no sharp divide separates statutory and common law. Much administrative common law has a statutory basis to which it is at least loosely tethered. Moreover, administrative common law's constitutional character—reinforcing constitutional prohibitions on arbitrary governmental action and advancing values of fairness, checked power, and political accountability—counsels against imputing congressional displacement. Indeed, this constitutional basis means that administrative common law closely resembles other well-established invocations of constitutional values in statutory interpretation.

The argument for embracing administrative common law goes beyond establishing that it is ubiquitous, inevitable, and legitimate. Openly acknowledging the role that judicial lawmaking plays in administrative contexts is critical to clarifying and improving administrative law. Some may fear that the potential for opening the door to greater judicial experimentation is a reason to avoid overt acceptance of administrative common law. But the courts' failure to acknowledge their development of administrative law is unlikely to stop the practice. Instead, the result is simply less transparency and engagement as to the proper form such judicial development should take, along with greater confusion about how courts should approach recurring issues in administrative law. Equally troubling, to the extent that this failure does inhibit administrative common law, it may lead courts to forego developing administrative law in new and potentially beneficial ways.

Part I of this Foreword begins by describing administrative common law's continuing importance, notwithstanding periodic renunciation and lack of express acknowledgement. It then turns to identifying administrative common law's key features. Part II argues that administrative common law is inevitable, and Part III explains why it is also legitimate. Part IV explores the benefits of overt acknowledgement of administrative common law, focusing on two as-

pects of judicial review: first, how courts respond to agency policy change—the issue in *Fox*—and second, how courts take administrative structure and internal agency practices into account.

I. THE CURRENT STATUS OF ADMINISTRATIVE COMMON LAW

The first step in assessing administrative common law is to make clear the extent to which it surfaces and the form it takes. A brief overview of core administrative law doctrines demonstrates the dominance of administrative common law, notwithstanding periodic Supreme Court rejection of the common law approach in favor of closer adherence to statutory text. This overview also underscores several key features of administrative common law: the interweaving of administrative statutory and common law, the incremental development as well as pragmatic and normative basis of most administrative law doctrines, the institutional focus of these doctrines, and the lack of judicial acknowledgement of administrative law's judicially constructed character.

A. Dominance and Occasional Rejection

Twenty-five years ago, Professor Cass Sunstein remarked that "[m]uch of administrative law is common law,"[14] and the same remains true today. Numerous administrative law doctrines are judicially created at their core. Two central examples are the reasoned decisionmaking requirement[15] and the *Chevron*[16] framework for reviewing agency statutory interpretations.

The requirement that agencies provide a statement of the basis of their actions—the reasoned decisionmaking requirement—dates back to decisions at the birth of the modern administrative state.[17] Today it is rooted in § 706(2)(A)'s prohibition on "arbitrary" or "capricious"

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14 Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 271 (1986). Others had made this assessment before him. *See e.g.*, LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 328–29 (1965); Davis, *supra* note 1, at 3 ("Most administrative law is judge-made law, and most judge-made administrative law is administrative common law.").

15 *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983).

16 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

17 *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 982 (2007) (noting two early strands of nondelegation doctrine: the agency must meet standards specified by Congress before invoking the granted authority or the agency must otherwise supply an express statement of the basis for its action even when the statute does not require such a statement).

agency action.[18] As the Court put it just this term in *Judulang v. Holder*,[19] the arbitrary and capricious standard embodies the courts' "important . . . [role] in ensuring that agencies have engaged in reasoned decisionmaking."[20] Despite insisting that judicial scrutiny under the standard should be "narrow," the arbitrary and capricious inquiry articulated by the Court in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* often results in a searching "hard look" review.[21] Under the *State Farm* standard, a court assesses whether the agency examined relevant data and offered a satisfactory explanation for its policy choices that is "based on . . . relevant factors" and does not "fail[ ] to consider an important aspect of the problem" or run "counter to the evidence."[22]

This inquiry represents a significant judicial elaboration of § 706(2)(A)'s text.[23] On their face, the statutory terms "arbitrary" and "capricious" seem to suggest a more minimal judicial inquiry, one that simply excludes agency decisions lacking determinative principles or rational basis and is less focused on the details of an agency's reasoning process.[24] Significantly, the arbitrary and capricious standard was understood to impose such fairly thin requirements when the APA was adopted in 1946.[25] Moreover, no basis exists on which to

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18 *See* 5 U.S.C. § 706(2)(A) (2006); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) (stating that an agency must articulate a satisfactory explanation for its action to be upheld under arbitrary and capricious review).

19 Judulang v. Holder, 132 S. Ct. 476 (2011).

20 *Id.* at 483–84.

21 *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43–44 (1983).

22 *Id.* at 43. In *State Farm*, for example, the majority faulted the Department of Transportation in part for rescinding its rule requiring airbags or passive seatbelts without adequately investigating the effect of inertia on the use of detachable seatbelts. *Id.* at 51–57. To be sure, courts apply the arbitrary and capricious standard with varying degrees of rigor and invoke *State Farm* inconsistently. *See* Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm, *and the EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10,371, 10,394–95 (2001); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1066–68 (1995) (arguing that the *State Farm* arbitrary and capricious standard remains "relatively indeterminate").

23 *See* 5 U.S.C. § 706(2)(A) (2006).

24 *See id.*; *see, e.g.*, BLACK'S LAW DICTIONARY 100, 203 (9th ed. 2009) (defining arbitrary as "depending on individual discretion, founded on prejudice or preference rather than on reason or fact" and capricious as "unpredictable or impulsive"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 59 (10th ed. 2001) (defining arbitrary as "depending on individual discretion" and "existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will").

25 *See* United States v. Carmack, 329 U.S. 230, 243 n.14 (1947) (relying on dictionaries from 1944 to 1945 to define "arbitrary" as "without adequate determining principle," "unreasoned," and "[f]ixed or arrived at through an exercise of will or by caprice," and "capricious" as

infer a congressional purpose that agencies should closely study and respond to the record in all contexts, subject to probing judicial scrutiny. Instead, a fundamental compromise underlying the APA was that Congress imposed greater procedural rigor and judicial scrutiny only on more formal agency proceedings, leaving less formal proceedings, such as notice and comment rulemakings, subject to minimal constraints.[26] Yet it is precisely with respect to such rulemakings that courts have applied the arbitrary and capricious standard with particular rigor.[27]

The Court's *Chevron* jurisprudence offers an even clearer instance in which the governing standards for judicial review have been elaborated upon and transformed far from their textual roots in the APA. As numerous administrative law scholars have noted, *Chevron*'s requirement that courts defer to a permissible interpretation of an ambiguous statutory provision offered by the agency charged with its implementation[28] stands in tension with the APA's instruction that courts "shall decide all relevant questions of law" and "interpret con-

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"apt to change suddenly; freakish; whimsical; humorsome."); *see also* Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1110 n.28, 1134–43 (1988) (arguing that arbitrary and capricious standard is applied like minimal rational review of legislation). For an example of the type of deferential scrutiny originally thought to be the measure of arbitrary and capricious review, see Pac. States Box & Basket Co. v. White, 296 U.S. 176, 182 (1935) ("With the wisdom of such a regulation we have, of course, no concern. We may inquire only whether it is arbitrary or capricious.").

26 *See* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–54 (1986). Thus, the APA requires agencies to rule on each finding, conclusion of law, or exception presented at a formal hearing, 5 U.S.C. § 557(c)(3) (2006), but only provide notice and opportunity to comment and "a concise general statement" of the basis and purpose of an informal rule, *id.* § 553(c). In addition, the APA's requirement that decisions conducted in on-the-record administrative proceedings must be set aside if "unsupported by substantial evidence," as opposed to simply reviewed under the arbitrary and capricious standard, suggests that such formal proceedings were intended to receive more searching scrutiny. *See* Beermann, *supra* note 2, at 24–25 (stating that the substantial evidence standard is "supposed to be a more stringent standard of review than the arbitrary and capricious test"). Yet over time, and perhaps as a result of the heightening of arbitrary and capricious review, courts have essentially equated these two standards—a position the Supreme Court appears to endorse. *See* Ass'n of Data Processing Serv. Org., Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) ("[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same."), *cited in* Dickinson v. Zurko, 527 U.S. 150, 158 (1999).

27 *See* Metzger, *supra* note 2, at 491.

28 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (stating that if a statute does not directly address the precise question at issue, courts should defer to the agency's interpretation if it is a "permissible construction of the statute," rather than imposing its own construction on the statute).

stitutional and statutory provisions."[29] The Court made no mention of the APA in *Chevron* itself, and so far the statute has only played a minor role in subsequent decisions.[30] True, *Chevron* deference can be viewed as an interpretation of the underlying statute on which an agency acts rather than of the APA.[31] And *Chevron*'s presumption that Congress implicitly delegates interpretive authority when it expressly delegates policymaking authority may be a reasonable account of congressional intent.[32] Yet despite these rationalizations, *Chevron* analysis represents judicially created administrative law.[33] The *Chevron* framework is not tied to any particular statute; it governs all judicial review of agency statutory interpretations and is not based on investigation of congressional intent in specific statutory contexts.[34]

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29 5 U.S.C. § 706 (2006); *see* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 9–11 (1996) (arguing that the text of § 706 makes clear that "it is wrong for the courts to abdicate their office of determining the meaning of the agency regulation" and that courts are meant to be neutral interpreters of agency action); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788–89 (2010) (arguing that both the text of § 706 and legislative history appear to clearly assign primary responsibility of resolution of legal issues to reviewing courts, not to administrative agencies); Duffy, *supra* note 2, at 189–211 (arguing that the text, structure, and legislative history of § 706 show that courts are meant to have de novo review of legal questions). Not all administrative law scholars agree. Professor Peter Strauss argues that § 706's requirement that courts determine relevant questions of law is satisfied when a court determines that a statute has committed the choice among different interpretations to the agencies. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them* "Chevron *Space" and* "Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1160–61 (2012). At that point, all § 706 demands is that the agency's choice not be arbitrary or capricious—or that it be supported by substantial evidence in more formal procedural contexts. *Id.*

30 *See* United States v. Mead Corp., 533 U.S. 218, 241–42 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite. But it was in accord with the origins of federal-court judicial review."); *see also* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711 (2011) (stating that under "*Chevron* step two . . . we may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004))).

31 *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2108–18 (1990) (discussing *Chevron* itself as an interpretive principle that may conflict with other interpretive norms). For pre-*Chevron* justification of deference in these terms, see Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 31–34 (1983) (suggesting that deference to agency interpretations is rooted in the courts' duty to ensure that administrative action stays within the zone of discretion committed to the agency by the organic statute).

32 *See* Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2043–41 (2011) (arguing that *Chevron*'s presumption that Congress implicitly delegates interpretive authority is supported by evidence of Congress's behavior).

33 For similar views, see Beermann, *supra* note 2, at 21–24; Duffy, *supra* note 2, at 189–98.

34 *See, e.g.*, *Mayo*, 131 S. Ct. at 713 (extending the "principles underlying *Chevron* . . . with full force in the tax context" and declining to "carve out an approach to administrative review

Instead, the Court justified this framework on general assumptions about congressional intent, constitutional considerations about the appropriate bounds of the judicial role, and the relative accountability of courts and agencies.[35]

Chevron's judicial basis is reinforced by *United States v. Mead Corp.*,[36] the Court's most important recent elaboration of the *Chevron* framework. In *Mead*, the Court linked *Chevron* deference more closely with actual congressional intent, stating that *Chevron* deference is only available when Congress delegates authority to issue interpretations with the "force of law" and the agency wields such authority in promulgating the interpretation at issue.[37] According to the Court, a key indicator that these conditions are met is congressional authorization for, and agency use of, notice and comment rulemaking and formal adjudication procedures.[38] Again, even if this linkage of deference to procedures has more of an empirical basis than critics allow,[39] it remains a general judicial presumption about congressional intent. Nor can *Mead* easily be grounded in APA statutory terms. Although the Court's approach accords with the identification of notice and comment rulemaking under § 553 as carrying legal force, the APA expressly removes interpretive rules from § 553's requirements, does not require use of particular procedures to set general policy, and generally does not link its procedural and judicial review requirements.[40]

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good for tax law only" in upholding Treasury Department's interpretation as reasonable.) This is not to claim that the *Chevron* framework is applied consistently, or that courts in practice adhere to its requirements, just that it is the analysis that is formally applied. For empirical analysis of the extent to which courts adhere to *Chevron* and its impact, see sources cited *infra* note 122.

35 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . . In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

36 United States v. Mead Corp., 533 U.S. 218 (2001).

37 *Id.* at 226–27; *see also* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002) ("*Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent. . . . The opinion makes clear the ultimate question in every case is whether Congress intended the agency, as opposed to the courts, to exercise primary interpretational authority.").

38 *Mead*, 533 U.S. at 230.

39 *Compare* Bressman, *supra* note 32, at 2025–30 (arguing for such a linkage based on positive political theory's account of how Congress uses procedures to control agencies), *with Mead*, 533 U.S. at 243 (Scalia, J., dissenting) ("There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law.")

40 *See* 5 U.S.C. § 553 (2006); NLRB v. Bell Aerospace Co., 416 U.S. 267, 291–94 (1974)

In short, notwithstanding its shift to greater emphasis on actual congressional intent, *Mead* nonetheless represents judicial refinement of a general doctrinal framework grounded in judicial precedent. In so doing, *Mead* continued a pattern of common law development of judicial review of agency statutory interpretations that dates back to before *Chevron* and even before enactment of the APA.[41] Indeed, any doubt about *Mead*'s common law aspect is dispelled by the decision's reinvigoration of the deference approach the Court had earlier developed in *Skidmore v. Swift & Co.*[42] for contexts in which *Chevron* does not apply.[43] As the Court noted, under *Skidmore,* deference "var[ies] with . . . the degree of the agency's care, its consistency, formality, and relative expertise, and . . . the persuasiveness of the agency's position."[44] While these may be factors that would matter to Congress, the Court made no effort to justify them on that basis. Instead, the *Mead* Court simply referenced the general normative concerns it had invoked in *Skidmore* (a pre-APA case): the benefits of "specialized experience," the "broader investigations and information available to the agency," and "the value of uniformity."[45]

State Farm and *Chevron/Mead* hardly stand alone as exemplars of administrative common law.[46] A similar common law character dominates administrative law in a number of diverse areas. Several juris-

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(finding that the choice between rulemaking and adjudication is left to the discretion of the agency). The sole APA provision to expressly link judicial review and procedures is 5 U.S.C. § 706(2)(E) (imposing "substantial evidence" standard for review of facts in on-the-record proceedings). For a discussion of *Mead*'s accord with restrictions on the force of nonlegislative rules, or rules that were not promulgated through § 553 notice and comment, see Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 822–38 (2001). Justice Scalia also argued that *Mead* was at odds with § 559's requirement that the APA's requirements apply unless expressly modified. *See Mead*, 533 U.S. at 242 n.2 (Scalia, J., dissenting) ("[The majority's] opinion . . . is no more observant of the APA's text than *Chevron* was—and indeed is even more difficult to reconcile with it.").

41 *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 971–75 (1992) (describing pre-*Chevron* review); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 22–28 (2007) (arguing that "[t]he law governing judicial review of agency interpretations of statutes evolved from a rather ad hoc, case-by-case approach to a more formal structure," and describing gradual emergence of greater deference after the New Deal).

42 Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

43 *Mead*, 533 U.S. at 234–35.

44 *Id.* at 228 (citing *Skidmore*, 323 U.S. at 139–40).

45 *Id.* at 234 (internal quotation marks omitted); *see also* Bressman, *supra* note 32, at 2044–45 (arguing that procedures represent a likely basis on which Congress would tie deference).

46 Administrative common law is also quite frequent at the state level. *See* MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW ch. 10 (2011).

dictional doctrines—ripeness and preclusion doctrines, as well as zone of interest standing—also have a judge-made cast.[47] So too do some doctrines addressing agency procedures, such as governing law regarding rulemaking procedure or agencies' general freedom to choose between rulemaking and adjudication as policymaking mechanisms.[48] Remedial approaches, like remand without vacatur, also have a notable common law aspect.[49]

The picture is not entirely one-sided, however. At times, the Supreme Court has rejected judicial creativity in administrative law in favor of close adherence to the text of the APA or other governing statutes.[50] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[51] is still the best known example. There, the Court characterized the APA as a "comprehensive regulation" of administrative procedure and the result of a political compromise that

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47 *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (describing the zone of interests requirement as one of "several judicially self-imposed limits on the exercise of federal jurisdiction"); Duffy, *supra* note 2, at 166–81 (describing and critiquing the common law character of ripeness doctrine); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 739–40 (1990) (describing "common law of preclusion" that governs courts' approach to judicial review limitations); *see also* Webster v. Doe, 486 U.S. 592, 608–09 (1988) (Scalia, J., dissenting) (arguing that the APA's preclusion provision incorporates common law jurisdictional doctrines).

48 *See* Davis, *supra* note 1, at 4–5 (describing rulemaking procedural requirements as administrative common law); *see also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 291–94 (1974) (holding that the choice to proceed by rulemaking or adjudication is left primarily to informed agency discretion and basing this rule on precedent without citing the APA); *see also* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–46 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part) (noting that current doctrine imposes judge-made procedural requirements on agencies not supported by the text of the APA).

49 *See* Checkowsky v. SEC, 23 F.3d 452, 462–63 (D.C. Cir. 1994) (arguing that remand without vacatur is at odds with the APA's text); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 319–20 (2003) (tracing the development of remand without vacatur through historical and modern cases and finding that reviewing courts employ judicial discretion to fashion equitable remedies to avoid disrupting administrative agencies).

50 *See* Darby v. Cisneros, 509 U.S. 137, 144–46, 153–54 (1993) (holding that section 10(c) of the APA (codified at 5 U.S.C. § 704), providing for judicial review of "final agency action for which there is no other adequate remedy in a court," prevented courts from imposing exhaustion requirements not provided for by statutes or regulations); *see also* Dickinson v. Zurko, 527 U.S. 150, 154–61 (1999) (emphasizing the text of the APA and the understandings of the 1946 Congress in applying the substantial evidence standard to review of Patent and Trademark Office decisions); Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 272–76 (1994) (rejecting "true doubt rule" as at odds with the APA requirement—§ 556(d)—that the proponent of a rule or order has the burden of proof and defining the burden of proof in accordance with its meaning at the time the APA was enacted).

51 Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978).

courts must respect.[52] As a result, it concluded that § 553's procedural requirements for notice and comment rulemaking represented a congressional ceiling that precluded further judicial impositions: "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."[53] Yet despite its stern language, *Vermont Yankee* has not prevented substantial judicial expansion of § 553's minimal procedural demands.[54] The Court appears to have sanctioned these developments, or, at a minimum, has made no effort to rebuff them.[55]

This pattern of judicial common law development punctuated by periodic resistance is the background against which the Court issued *Fox* and *Milner v. Department of Navy*.[56] Both decisions stand out for their emphasis on statutory text in the administrative law context. *Fox* involved a change in the FCC's policy regarding when the use of expletives on the airwaves constitutes indecency banned by the Communications Act.[57] The Second Circuit had reversed two FCC orders finding liability on the basis of a single or fleeting expletive, holding that the FCC had failed to provide a reasoned explanation for changing from its prior approach that had required deliberate and repeated use of particular words.[58] That decision was, in turn, reversed by the Court.[59] Justice Scalia's majority opinion read the lower court's decision as requiring an agency to provide more justification for policy changes than needed when adopting a new policy and condemned this

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52 *Id.* at 523 (internal quotation marks omitted).

53 *Id.* at 524. In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the Court held that *Vermont Yankee*'s prohibition on courts adding procedural requirements also applied to informal adjudication, a context in which the APA imposes fewer procedural requirements, thereby rejecting any suggestion that this procedural thinness made a difference in how courts should read the APA. *Id.* at 653–56.

54 *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–47 (2008) (Kavanaugh, J., concurring in part) (arguing that current requirements for rulemaking, disclosure, and notice are at odds with the APA's text); *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (endorsing the logical outgrowth test for adequacy of rulemaking notice).

55 *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.8, at 661 (5th ed. 2010) (noting that courts can still require procedures by interpreting the APA); Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 859–60, 882–900 (2007) (calling on the Court to rein in the growth of administrative law doctrines that seem to conflict with *Vermont Yankee*, such as prohibitions on agency ex parte contacts and prejudgment interest in rulemaking, and the expansion of notice requirements).

56 Milner v. Dep't of Navy, 131 S. Ct. 1259 (2011).

57 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 505 (2009).

58 Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 462 (2d Cir. 2007), *rev'd*, 556 U.S. 502 (2009).

59 *Fox*, 556 U.S. at 530.

approach as at odds with the text of the APA.[60] It also rejected out-of-hand the suggestion that the First Amendment concerns raised by the FCC's action provided a separate basis for more searching scrutiny under the arbitrary and capricious standard, once again arguing that such an approach was at variance with the APA's text.[61] Yet the majority acknowledged "a more detailed justification" may be required when a new policy rests on "factual findings that contradict those which underlay its prior policy . . . or when its prior policy has engendered serious reliance interests," claiming that "it would be arbitrary or capricious to ignore such matters."[62]

Writing the main dissent, Justice Breyer adopted an analytic frame much more reflective of an administrative common law orientation. Rather than emphasizing that reviewing courts are limited to authority conferred by the APA, Justice Breyer underscored the need for careful judicial review given the FCC's "comparative freedom from ballot-box control" as an independent agency.[63] He also traced judicial constraints on agency discretion to "the days of Sir Edward Coke."[64] In the process, he articulated a more elaborate account of the arbitrary and capricious standard: "The law has . . . recognized that . . . it is a *process*, a process of learning through reasoned argument, that is the antithesis of the 'arbitrary' . . . An agency's policy decisions must reflect the reasoned exercise of expert judgment."[65] In contexts of changed policy, this meant that an agency must "focus upon the reasons that led the agency to adopt the initial policy, and to explain why it now comes to a new judgment."[66] Although framed in the APA's terms, this account of judicial review rests as much on nor-

60 *Id.* at 514–15 (Section 706(2)(A)'s authorization for courts to "'set[ ] aside agency action . . . found to be . . . arbitrary or capricious' . . . makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." (citation omitted))

61 *See id.* at 516 n.3 (describing dissent's suggested remand for the FCC "to reconsider its policy decision in light of constitutional concerns" as a "strange and novel disposition . . . better . . . termed the doctrine of judicial arm-twisting or appellate review by the wagged finger" (internal quotation marks omitted)). *Fox* also insisted that such a heightened justification requirement for policy change was not supported by the Court's precedent in *State Farm*. *Id.* at 514. Even here, however, the Court put heavy weight on the APA's text, stating that *State Farm* simply required greater justification for rescissions of prior action than for failures to act and that this distinction "makes good sense, and has basis in the text of the statute, which likewise treats the two separately." *Id.* at 514–15.

62 *Id.*

63 *Id.* at 547–49 (Breyer, J., dissenting).

64 *Id.* at 548–49.

65 *Id.*

66 *Id.* at 550.

mative concerns with unchecked power and judicial views of what constitutes reasoned decisionmaking as on statutory language.[67]

A similar contrast is evident in *Milner*, although there the Court's alignment was far more lopsided. *Milner* addressed the question of whether FOIA's Exemption 2, which shields from disclosure documents "related solely to the internal personnel rules and practices of an agency,"[68] extended to cover data and maps used to store explosives at a naval base.[69] Support for such a reading came from lower court precedent, in particular a 1981 D.C. Circuit decision largely adhered to by lower courts for three decades, which had held that Exemption 2 extended to predominantly internal materials the disclosure of which "significantly risks circumvention of agency regulations or statutes."[70] In an 8-1 decision, the Court adamantly disagreed.[71] Justice Kagan's majority opinion insisted that extending Exemption 2 in this fashion was simply incompatible with its text[72]: "An agency's 'personnel rules and practices' are its rules and practices dealing with employee relations or human resources," nothing more.[73] The majority disputed that lower courts had consistently adhered to the D.C. Circuit's broader view.[74] But its emphasis on statutory text over judicial development was evident in its claim that, even if true, thirty years of consistent lower court practice was "immaterial, . . . because we

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67 Justice Breyer's emphasis on constructing workable practice in administrative law is in keeping with his jurisprudential philosophy generally. *See* STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK 82–83, 119–20 (2010).

68 5 U.S.C. § 552(b)(2) (2006).

69 Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1261–62 (2011).

70 Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1056–57, 1074 (D.C. Cir. 1981).

71 *Milner*, 131 S. Ct. at 1259.

72 *Id.* at 1262 (finding that "Exemption 2 does not stretch so far" as to reach data and maps on the storage of explosives at a naval base on the grounds that releasing such information would risk circumvention of agency regulations or statutes). Professor John Manning argues that *Milner* represents a "new purposivism," one that is in particular attuned to statutory text as an indicator of congressional intent about how a statute should be implemented. *See* John F. Manning, *The New Purposivism and Congressional Power Over the Means and Ends of Legislation*, 2012 SUP. CT. REV. (forthcoming 2012) (manuscript at 23–27) (on file with author).

73 *Milner*, 131 S. Ct. at 1265; *see also id.* at 1267 ("[T]he *Crooker* interpretation, as already suggested, suffers from a patent flaw: It is disconnected from Exemption 2's text."). The majority also underscored that reading Exemption 2 as limited to human resources matters accorded with FOIA's purpose of broad disclosure and Congress' adoption of the provision to limit the "expansive withholding" that occurred under the prior APA exemption for internal management matters. *Id.* at 1265–66. It further noted that national security concerns implicated in the case could be addressed by the government classifying the materials at issue, which would allow their withholding through Exemption 1. *Id.* at 1271.

74 *Id.* at 1268–69.

have no warrant to ignore clear statutory language on the ground that other courts have done so."[75] According to the majority: "The judicial role is to enforce th[e] congressionally determined balance [embodied in FOIA], rather than . . . to assess case by case, department by department, and task by task whether disclosure interferes with good government."[76]

In contrast, Justice Breyer's lone dissent offered a much more capacious view of the judicial role. He attacked the majority's "linguistic literalism" as fundamentally misplaced for "the FOIA (and the [APA] of which it is a part)" because these statutes "must govern the affairs of a vast Executive Branch . . . Too narrow an interpretation, while working well in the case of one agency, may seriously interfere with congressional objectives when applied to another."[77] And devising rules that work was, in Justice Breyer's view, the fundamental task of judicial review: "[I]t is for the courts, through appropriate interpretation, to turn Congress' public information objectives into workable agency practice."[78] That meant adhering to a longstanding judicial interpretation of Exemption 2 that "Congress has taken note of . . . in amending other parts of the statute, . . . is reasonable, [and] . . . has proved practically helpful and achieved commonsense results."[79] This adherence is all the more appropriate when "a new and different interpretation raises serious problems of its own, and . . . would require Congress to act . . . to preserve a decades-long status quo."[80]

Fox and *Milner*'s shared textual focus might suggest a broader movement by the Roberts Court away from a common law approach in administrative law. But several other recent administrative law decisions cast doubt on that reading. Two notable decisions from last term, *Mayo Foundation for Medical Education and Research v. United States*[81] and *Talk America, Inc. v. Michigan Bell Telephone Co.*,[82] are clearly in the common law vein. In *Mayo*, a unanimous Court concluded that interpretations of tax regulations by the Treasury Department should be subject to the *Chevron* framework and not subject to special review rules.[83] In so holding, the Court invoked "the princi-

75 *Id.* at 1268.

76 *Id.* at 1266 n.5.

77 *Id.* at 1276.

78 *Id.* at 1278.

79 *Id.*

80 *Id.*

81 Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

82 Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254 (2011).

83 *Mayo*, 131 S. Ct. at 714.

ples underlying *Chevron*" as well as the importance of uniformity in judicial review of administrative action, stating that it was "not inclined to carve out an approach to administrative review good for tax law only" absent a justification for doing so.[84] Uniformity is a recognized purpose underlying the APA's enactment,[85] but the Court did not justify its invocation of uniformity directly in APA terms; instead, it based its assertion of uniformity's importance on precedent, including a case addressing constitutional doctrine as well as one interpreting the APA.[86]

In *Talk America*, another unanimous Court emphasized the deference due agency interpretations of ambiguous agency rules.[87] In support of this proposition, the Court invoked its precedent rather than governing statutes, and it also emphasized the importance of consistency in the agency's views.[88] Most striking, however, was the concurrence, in which Justice Scalia—textualist extraordinaire and the APA's invoker in *Fox*—suggested that the Court should alter its approach of deferring to agency interpretations of their own rules because of functional and constitutional concerns.[89] He contended that allowing an agency both to promulgate and to interpret law was "contrary to fundamental principles of separation of powers," and it would encourage the agency "to enact vague rules which give it the power, in future adjudications, to do what it pleases."[90] Any such result "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."[91] Whether these concerns outweigh the countervailing values supporting deference that Justice Scalia also

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84 *Id.* at 713.

85 *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950) ("One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."). For a recent argument that, despite such emphasis on uniformity, administrative law contains substantial agency-specific precedent, see Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 515–51 (2011).

86 *Mayo*, 131 S. Ct. at 713 (citing Dickinson v. Zurko, 527 U.S. 150, 154 (1999) and Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 222–23 (1989)).

87 *Talk Am.*, 131 S. Ct. at 2265.

88 *Id.* at 2260–61, 2263–65.

89 *Id.* at 2265–66 (Scalia, J., concurring).

90 *Id.* at 2266.

91 *Id.* For a critique of deference to agency interpretations of their own rules as leading to agency self-aggrandizement, cited by Justice Scalia, see John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654–74 (1996) (arguing that deference to agency interpretations of their own rules creates a separation of powers problem because the agency has an incentive to promulgate vague rules, which can undercut the deliberative process, give inadequate notice to the public, and enhance the influence of interest groups).

noted—easing the task of judicial review and "impart[ing] . . . certainty and predictability to the administrative process"[92]—is debatable. It seems unlikely that the current Court shares Justice Scalia's concerns.[93] Regardless, consideration of such free-floating normative and functional concerns in setting administrative law deference doctrines represents a prime instance of administrative common law reasoning.[94]

B. Administrative Common Law's Key Features

The foregoing discussion highlights the extent to which core administrative law doctrines are derived by courts in response to judicial perceptions of what constitutes appropriate institutional roles and acceptable agency decisionmaking processes. This judge-made character is what most centrally underlies my description of administrative law as a form of common law. Yet this discussion also flags several other key features that reinforce, as well as complicate, the administrative common law account.

Perhaps the most important feature is the lack of any clear divide between administrative common law and administrative statutory law.[95] Most administrative common law can find some statutory hooks—frequently the APA, but sometimes (as in *Chevron*) the specific substantive statutes the agency is charged with implementing.[96] This characteristic is not unique to administrative common law; it is a frequently identified feature of federal common law generally. "The difference between 'common law' and 'statutory interpretation' is a

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92 *Talk Am.*, 131 S. Ct. at 2266.

93 *See* Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 517–19 (2011) (finding that the Supreme Court upholds agencies' interpretations of their own rules ninety-one percent of the time and concluding that the Court has not been persuaded by Professor Manning's argument).

94 Similarly, a third decision from the most recent term, *Judulang v. Holder*, 132 S. Ct. 476 (2011), relies on judicial precedent and interpretations of the reasoned decisionmaking requirement to invalidate an approach used by the Board of Immigration Appeals in determining eligibility for discretionary relief. *Id.* at 483–84, 490. Interestingly, however, *Judulang* also contains a footnote suggesting that the Court may now be equating *Chevron*'s step two with arbitrary and capriciousness review, and thereby integrating *Chevron* more into the APA judicial review framework. *See id.* at 483 n.7.

95 Beermann, *supra* note 2, at 3–4; *but see* Duffy, *supra* note 2, at 118 (distinguishing "statutorily-authorized common law" and "standard administrative law doctrines . . . [for which] the textual home in statutory law either is nonexistent or has never been identified," contending that "statutorily-based law presents no theoretical difficulties").

96 As noted below, some administrative common law is also constitutionally grounded. *See infra* Part II.B.

difference in emphasis rather than a difference in kind."[97] The statutory dimension of administrative common law is evident even in Justice Breyer's *Milner* dissent, which—though castigating the majority for its linguistic literalism—took pains to justify the established understanding of FOIA's Exemption 2 as a reasonable interpretation of the statute and not just a workable practice.[98]

Notably, however, the statutory tether for administrative common law is often loose and quite attenuated from doctrinal substance. Indeed, as mentioned, some doctrines—such as *Chevron* deference, *State Farm* hard look review, and rulemaking notice requirements—are in tension with statutory text.[99] Hence, despite its statutory basis, administrative law in important respects is "federal judge made law."[100] The "content" of the "federal rules of decision" that make up administrative law "cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands."[101] This includes not just textualist interpretive approaches, but also purposivist methodologies that put primacy on legislative objectives in making sense of statutory enactments.[102] Current administrative law doctrines often have little connection to what a reasonable legislator would have understood the relevant APA terms to mean when the APA was adopted in 1946, and the Court does not generally base its doctrinal requirements on the congressional aims underlying specific statutes.[103] Instead, the courts apply administrative law doctrines

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97 Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980).

98 Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1275–76 (2011) (Breyer, J., dissenting).

99 *See supra* text accompanying notes 19–39; *see also* Shapiro, *supra* note 26, at 461, 475 ("[T]he structure of the APA, its sketchy language, the political and administrative ideologies of the times, the compromise nature of the statute, the compromisers' interests, and the contemporaneous statutory interpretation support nothing like today's [administrative law].")

100 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

101 RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 607 (6th ed. 2009); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (defining federal common law somewhat more broadly as "any rule of federal law created by a court . . . *when the substance of that rule is not clearly suggested by federal enactments*").

102 *See* United States v. Am. Trucking Ass'n, 310 U.S. 534, 543 (1940) (asserting that when applying a statute's plain meaning would yield a result "plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words" (internal quotation marks omitted)); John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 75–78, 85–91 (2006).

103 *See supra* text accompanying notes 25–27 (discussing changed understanding of arbitrary and capriciousness review). Congressional intent does factor into the *Chevron*/*Mead* framework, but even that framework rests on general presumptions about congressional intent that span numerous statutory schemes. *See supra* text accompanying notes 31–40.

broadly across many different substantive statutes and regulatory schemes.

Administrative common law more closely resembles forms of purposivism that read statutes with an eye to achieving some quite generalized policy goals, such as fostering informed or deliberative administrative decisionmaking in the case of the APA.[104] It also bears a family resemblance to dynamic statutory interpretation because, like a dynamic approach, much administrative common law could be understood as efforts to update existing statutory constructs to better fit new administrative realities.[105] Even these analogies are inaccurate, however, in portraying the task of administrative law development as primarily driven by statutes. To be sure, statutory interpretation is often involved, and certain administrative law approaches may be precluded—or required—by governing statutes. But viewing administrative law as primarily a statutorily driven enterprise fails to take adequate account of the extent to which courts devise administrative law doctrines in response to independent, judicially posited normative and functional concerns, frequently ones with constitutional overtones.[106]

These normative and functional concerns are often overlapping and cut across a wide array of different administrative law doctrines. Thus, *Chevron* rests on a pragmatic recognition of agency substantive expertise, the likelihood of statutory ambiguity, and the inseparability of policy and interpretation.[107] But it equally embodies normative

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104 *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 35 (1988) (arguing that the purposivist approach articulated in Hart and Sacks's *The Legal Process* focused not on particular objectives attached to the statute at hand, but rather on elaborating statutory meaning to cohere with the general purpose underlying the legal system); Manning, *supra* note 72, at 8–10, 37–45 (describing traditional purposivism as generalized in this fashion and contrasting it to current purposivist approaches that are more keyed to specific statutory implementation choices).

105 *See* WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 48–80 (1994) (describing forces that lead courts to interpret statutes in a more dynamic and evolutionary manner, including changes in society and law as well as cultural developments and political pressures); Aleinikoff, *supra* note 103, at 54–62 (describing and defending "nautical" statutory interpretation that undertakes such updating); *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 7 (1982) (arguing that the need for statutory updating justifies courts in taking a more overtly common law approach to statutory interpretation).

106 *Cf.* DAVID A. STRAUSS, THE LIVING CONSTITUTION 36–37 (2010) (defining the common law as a system in which "precedents evolve, shaped by notions of fairness and good policy" and contrasting it with a command-based approach in which "to determine what the law is, you examine . . . the words the sovereign used, evidence of the sovereign's intentions, and so on").

107 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, 865 (1984).

concerns with respecting congressional choices and limiting the policy-forming role of nonpolitically accountable courts.[108] Similarly, judicial expansions of informal-rulemaking procedural requirements reflected judicial belief that greater scrutiny, deliberation, and justification would improve rulemaking decisions while providing important checks on broad agency authority and ensuring fairness.[109] Similar understandings underlie *State Farm*'s hard look review.[110]

The importance of normative and functional concerns is a feature that administrative common law shares with common law reasoning generally.[111] The two are also alike in that they both develop incrementally over time and put a heavy emphasis on precedent.[112] The recent refinement of the *Chevron* framework—with the addition of *Mead*, revitalization of *Skidmore*, and further twists offered by subsequent decisions—is a prime example. But the central role courts accord precedent is a common feature of administrative law jurisprudence. In *Mayo*, for example, the Court framed its analytic challenge as choosing which of two governing precedents to follow.[113]

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108 *See id.* at 844, 864–66; Metzger, *supra* note 2, at 494–96.

109 *See* Conn. Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 530–31 (D.C. Cir. 1982) (emphasizing the connection between enhanced notice and participation requirements and checks on agency decisionmaking); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251–52 (2d Cir. 1977) (stating in general that "no sound reasons [exist] for secrecy or reluctance to expose to public view . . . the ingredients of the deliberative process" and "[i]t is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered"); Portland Cement Ass'n v. Ruckelhaus, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that . . . is known only to the agency."); *see also* Pension Benefit Guar. Corp. v. LTV Corp., 875 F.2d 1008, 1020–21 (2d Cir. 1989) (invoking seemingly due process-based concerns of fundamental fairness), *rev'd*, 496 U.S. 633 (1990).

110 *See* Sunstein, *supra* note 14, at 281–87 (describing doctrines as enhancing deliberative character); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 29–32 (2009) (discussing expertise in hard look review); *infra* text accompanying notes 235–39 (discussing constitutional underpinnings of the reasoned decisionmaking requirement).

111 *See* Jeffrey A Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 822 (2010) (emphasizing that common law reasoning is pragmatic, historical, and analogical); Gerald J. Postema, *Philosophy of the Common Law and Legal Theory*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588, 602–04 (Jules Coleman & Scott Shapiro eds., 2002) (same).

112 *See* STRAUSS, *supra* note 106, at 37–41 (discussing the importance of precedent to common law reasoning); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 238 (1999) (emphasizing reliance on precedent as a critical common law feature of the American legal system).

113 Mayo Found. for Med. Educ. and Research v. United States, 131 S. Ct. 704, 711–12, 714 (2011) (choosing *Chevron*/*Mead* framework rather than multifactor *National Muffler* framework

Even *Fox*, with its prominent invocation of § 706(2)(A)'s text, directed some of its analytic energy to distinguishing the Court's earlier decision in *State Farm*.[114]

What distinguishes administrative common law from other common law approaches, including recognized forms of federal common law, is its focus on institutional relationships and the general shape of judicial review, rather than on primary private conduct.[115] This institutional focus reflects the fact that administrative law aims at controlling the government. Whereas most federal common law doctrines target primary private conduct, administrative common law operates at a secondary level and targets the regulatory activities of governmental institutions. Moreover, administrative law not only controls how agencies act, but also structures the relationships among agencies and the legislative, executive, and judicial branches.[116] Administrative law's institutional focus additionally results from the Court's supervisory function over the federal courts and from the need to develop doctrines that can be consistently applied and overseen across a wide array of administrative contexts.[117]

Some might question whether doctrines setting out requirements for judicial review, such as the reasoned explanation requirement or *Chevron*, constitute common law at all. On this view, these doctrines represent a form of judicial self-governance rather than lawmaking for others and are an inherent aspect of the judicial function. Insofar as this objection amounts to a rejection of including doctrines with an

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to review tax regulation because it found express congressional intent to delegate issue to the agency).

114 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009).

115 *See* Pojanowski, *supra* note 111, at 822 (identifying common law reasoning as "focused on the resolution of concrete, particular disputes" and identifying this trait as its pragmatic character).

116 A similar institutional focus is evident in prudential jurisdictional doctrines, such as abstention or limits on jus tertii standing, which are also judicially derived and appear with some frequency in administrative law contexts. *See* FALLON ET AL., *supra* note 101, at 153–60, 1061–62; *see also* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 76, 88 (1984) (criticizing abstention as a judicial rejection of jurisdiction granted by Congress because it amounts to usurpation of legislative authority).

117 On the importance that the Court's supervisory role has played in the development of administrative law, see Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1099–100, 1133 (1987) (arguing that the Court's limited resources affect its ability to supervise federal courts and the development of *Chevron* can be understood as a product of this limitation). Also, see Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 371–73 (1978) (discussing supervision of the D.C. Circuit).

institutional focus within the rubric of federal common law, my response is that such a narrow account of federal common law is unjustified. In addition, however, this argument for excluding judicial review doctrines is empirically mistaken. Doctrines of judicial review can have a profound effect on how agencies operate; for example, one of the central critiques of the *State Farm* arbitrary and capricious standard is that it forces agencies to undertake procedural measures such as providing extensive responses to rulemaking comments.[118] Moreover, administrative law doctrines of judicial review are treated as governing federal law, binding on state and federal courts alike.[119] This binding effect necessarily follows to the extent that these doctrines are tied to the APA or other federal statutes.[120] Indeed, the presence of statutory standards governing judicial review of agency action in § 706 and numerous other provisions is strong evidence against viewing the development of these doctrines as stemming simply from the judicial function.[121] Instead, it is precisely the way that courts have independently developed these statutory standards that gives administrative law judicial review doctrines their common law character.

Administrative common law's institutional focus means that it sometimes has a dual aspect. By definition, as judge-made, administrative common law represents a judicial assertion of authority. But—like some other judge-made doctrines, such as standing and abstention doctrines—its substantive content actually may result in a retraction of the courts' role. *Chevron* encapsulates this dynamic. The Court there assumed authority to craft the framework governing judicial review of agency statutory interpretations. Yet the framework it adopted ostensibly limited the power of the courts to determine the meaning of ambiguous agency-implemented statutes.[122] The same is

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118 *See, e.g.*, 1 PIERCE, *supra* note 55, § 7.4, at 593–601 (emphasizing the connection between arbitrary and capricious review, and detailed requirements of agency explanation and responses, as well as the burdens that the latter impose on agencies).

119 *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 2011 n.320 (2011) (noting that "state courts universally state they are bound to apply *Chevron*/*Mead* when they review federal agency interpretations, and the U.S. Supreme Court describes *Chevron*/*Mead* as a doctrinal framework that binds it and lower courts as a matter of stare decisis")

120 *See* Nw. Airlines v. Trans. Workers Union of Am., 451 U.S. 77, 95 (1981) ("Broadly worded . . . statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition.").

121 *See, e.g.*, 5 U.S.C. § 706(2)(A) (2006) (setting out six standards of judicial review); 15 U.S.C. § 2618(c)(1)(B)(i) (2006) (requiring a court to set aside a final rule promulgated under the Toxic Substances Control Act that it finds is not supported by substantial evidence).

122 *See supra* notes 28–31 and accompanying text. Whether it has actually had that effect to any significant degree is a matter of much debate. For recent scholarship on point, see William

true of a number of administrative common law doctrines: for instance, the presumption of unreviewability for agency enforcement decisions and other limits on judicial review, ripeness and exhaustion requirements, and preclusion doctrines.[123] Interestingly, although courts have not deviated from their administrative common law practices, over time the substance of the rules they have thereby derived has become somewhat more restrictive of judicial intervention in administration.[124] To be sure, many examples of administrative common law point in the other direction and yield substantive expansion of the courts' role.[125] Moreover, the courts' resistance to broad grants of jurisdiction over administrative law claims could be seen as an assertion of judicial power vis-á-vis Congress, even if the effect is a retraction in the courts' role in administrative disputes.[126] Nonetheless, the potential for administrative common law to end up limiting the judicial role is an important feature that complicates any effort to describe the process as an assertion of judicial lawmaking power.

The final salient feature of administrative common law is its largely tacit status. The Court rarely acknowledges the substantial spin it puts on administrative statutes or expressly identifies its administrative law creations in common law terms, even as it is willing to identify its common law-creating role in other contexts. In this regard, the contrast between *General Dynamics Corp. v. United States*[127] and *Mayo* last term is striking. The Court openly characterized its decision in *General Dynamics*—addressing the remedial rules that should govern contractual disputes implicating state secrets—as an exercise

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N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098–99, 1120–24 (2008) (arguing that *Chevron* did not revolutionize the Court's approach because it continues to exist alongside other deference schemes, and even in cases that are eligible for *Chevron* deference the Court may not apply the framework); *see also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006) (finding that the judges' ideological predispositions, both in the courts of appeals and Supreme Court, affect the degree to which they choose to apply *Chevron* deference).

123 *See supra* note 47 and accompanying text.

124 Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1041 (1997) (arguing that judicial doctrines, such as the availability of review, scope of review, and constitutional understanding, have shown a trend toward greater restrictiveness of judicial review).

125 Examples include expansive judicially enforced procedural requirements for rulemaking or substantive scrutiny of agency decisionmaking under hard look review. *See supra* text accompanying notes 17–25, 55.

126 *See* Duffy, *supra* note 2, at 162–81 (describing ripeness doctrine); Redish, *supra* note 116, at 76–79, 88 (discussing how abstention doctrines can overrule legislative power, even as they prevent courts from adjudicating administrative disputes).

127 Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900 (2011).

of its "common-law authority."[128] But the Court never referred to its decision in *Mayo* as an example of common law creation, despite that decision's common law features. In this regard, *Milner*'s explicit discussion of the role of the courts in administrative law is an outlier.[129] Moreover, that discussion represented an instance in which eight Justices rejected the propriety of a common law judicial focus on constructing workable agency practice.[130] Indeed, the Court's jurisprudence displays a remarkable imbalance: notwithstanding the ubiquity of administrative common law, the instances in which the Court has overtly rejected such judicial development and posited administrative law as statutorily rather than judicially determined greatly outnumber those in which it has acknowledged the common law aspect of its administrative law endeavors.[131]

Administrative law scholars have fared better, but not by much. Leading administrative law theorists in the post-New Deal period, like Professors Louis Jaffe and Kenneth Culp Davis, openly celebrated administrative law's common law character.[132] Such acknowledgements are much rarer today.[133] Moreover, the assessments offered are far

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128 *Id.* at 1906.

129 *See supra* notes 74–80 and accompanying text.

130 *See supra* text accompanying notes 72–78.

131 For rare acknowledgments of administrative common law, see Heckler v. Chaney, 470 U.S. 821, 832 (1985) (arguing that the APA "did not intend to alter th[e] tradition" that enforcement decisions were presumed immune from judicial review, and citing Kenneth Davis's *Administrative Law Treatise* for the proposition that "the APA did not significantly alter the 'common law' of judicial review."). Also, see Darby v. Cisneros, 509 U.S. 137, 146 (1993) (acknowledging that "federal courts may be free to apply, where appropriate, . . . prudential doctrines . . . to limit the scope and timing of judicial review" if Congress has not provided to the contrary, but finding Congress had so provided there); Steadman v. SEC, 450 U.S. 91, 95–96 (1981) (Court has "felt at liberty to prescribe" the degree of proof required in an administrative proceeding when Congress has not done so, but concluding Congress had done so there); Webster v. Doe, 486 U.S. 592, 608–09 (1988) (Scalia, J., dissenting) (arguing that the APA's reference to "committed to agency discretion by law" in § 701(a)(2) embodies administrative common law).

132 *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE III-V (1st ed. 1958); JAFFE, *supra* note 14, at 164, 329, 336–37, 372; *see also* Duffy, *supra* note 2, at 134–36; Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1160, 1183 (1997) (describing Jaffe's jurisprudence and support for administrative common law).

133 Articles by Professor John Duffy, *see* Duffy, *supra* note 2, and more recently, Professor Jack Beermann, *see* Beerman, *supra* note 2, represent the most sustained and direct treatments of administrative common law generally since the 1980s, when articles on the APA's 50th anniversary provoked some references to administrative law's common law nature, *see* Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1392–93 (1996) [hereinafter Strauss, *Changing Times*]; Sunstein, *supra* note 14, at 271. Professor Kevin Stack also emphasized the disconnect between doctrines of judicial review and the APA's authorization for judicial review. *See* Kevin M. Stack, *The Statutory Fiction of Judicial Review of Administrative*

more negative, with the leading recent treatment of administrative common law happily predicting its coming demise in favor of a more statutorily based approach.[134]

This reluctance to acknowledge administrative common law likely reflects the disfavor with which federal common law is now generally viewed.[135] This is true not just of federal common law, but of judicial lawmaking more generally. It is a practice that judicial nominees now regularly disown in their confirmation hearings.[136] By comparison, the heyday of administrative common law, when the common law basis of administrative law was affirmed by leading administrative law scholars, coincided with an era in which federal common law was more broadly championed.[137] On this view, the courts' failure to admit their role in developing administrative law is part of a wider phenomenon of judicial insistence on tying their law creations closely to some enacted text, constitutional or statutory. Relatedly, *Vermont Yankee*'s characterization of the APA as detailing the full extent of procedural obligations that ordinarily can be imposed on agencies[138] may reinforce the perception that the judicial development of common law judicial administrative law is inappropriate.

A more administrative law-specific factor may be current skepticism about the likely benefits from expanded judicial requirements on the administrative process. Professor Thomas Merrill has identified

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Action in the United States, in EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE 317 (Christopher Forsyth et al. eds., 2010). I have previously written on administrative law as a form of constitutional common law. *See* Metzger, *supra* note 2. In addition, Professor Peter Strauss analyzed the evolving nature of interpretations of the APA and the statute's relationship to FOIA. *See* Peter L. Strauss, *Statutes That Are Not Static*, 14 J. CONTEMP. LEGAL ISSUES 767, 785–88 (2005) [hereinafter Strauss, *Statutes*].

134 *See* Duffy, *supra* note 2, at 118–20 (tracing the evolution from a common law method to a more statutorily based method in four doctrinal areas: exhaustion, ripeness, agency procedure, and standard of review).

135 *See* FALLON ET AL., *supra* note 101, at 607 (noting questions about the legitimacy of federal common law making); Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 899 (1996) (discussing how the Supreme Court has restricted the common lawmaking powers of federal courts); Henry P. Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 758 (2010) ("The relatively freewheeling era of federal judicial lawmaking . . . is long gone.").

136 *See* Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 152 (2011) (noting that rejection of judicial lawmaking underlies recent efforts by judicial nominees to analogize the judicial role to that of a baseball umpire, calling balls and strikes).

137 *See* Duffy, *supra* note 2, at 134–38 (underscoring the simultaneous advocacy of administrative common law by Professors Louis Jaffe and Kenneth Davis and the "new federal common law" by Judge Friendly and others).

138 *See supra* note 52 and accompanying text.

such skepticism as an explanation for why courts became less assertive in crafting common law rules that involved robust judicial oversight.[139] It also could account for judicial reluctance to acknowledge the court-based nature of administrative requirements more generally. This skepticism dominates in the modern academic literature. The support for judicially developed administrative law that characterized the writings of Professors Jaffe and Davis has been muted by criticism of judicial interventions as imposing unjustified costs and undermining effective administration.[140] In addition, administrative law scholarship has stressed the political and ideological dimensions of judicial review,[141] and concerns about judicial bias likely also play a role in antipathy to administrative common law. Overt judicial inventiveness in a context with such political overtones appears especially suspect—

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139 Merrill, *supra* note 124, at 1044, 1053, 1073 (arguing that there is general skepticism about all forms of government activism today and that skepticism about judicial activism has been reinforced by studies on the unintended consequences of heightened judicial review).

140 *See, e.g.*, Jerry L. Mashaw & David L. Harfst, THE STRUGGLE FOR AUTO SAFETY 225 (1990) ("The result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules."); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–96, 1400–03, 1419 (1992) (detailing adverse consequences of increasing the burdens and rigidities of informal rulemaking and identifying judicially imposed analytic requirements as a major cause).

For recent arguments in this vein, see Frank Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1020–27 (2000) (discussing the claim that rulemaking has ossified because of extensive judicial requirements); Sidney Shapiro & Richard Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 13–15, 18–28 (2009) (describing a number of problems with judicial review and specific doctrines); *see also* Wendy E. Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1749, 1752–56, 1760, 1771–72 (2012) (arguing that the threat of litigation makes agencies more responsive to regulated industry and concluding that, although public interest groups won significant legal victories against EPA rules they challenged, they challenged only a small percentage of rules and the agency delayed repairing the rules and failed to follow judicial precedents). For more optimistic assessments, see sources cited *infra* note 324.

141 *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal*, 107 YALE L.J. 2155, 2169 (1998) (arguing that courts are more likely to grant *Chevron* deference when the agency's policy is consistent with the majority's partisan policy preference); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–26 (2006) (finding that judges' convictions affect the application of the *Chevron* framework); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 768 (2008) (finding that there is "significant evidence of a role for judicial ideology in judicial review of agency decisions for arbitrariness"). For recent suggestions that ideology may be less of a factor, see Pierce & Weiss, *supra* note 93, at 520–21; David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 178–80 (2010) (finding that "[i]n aggregate, judges were quite similar, regardless of the party of the president who appointed them").

even if the effect of judicial creativity is at times greater deference to the political branches.

Yet none of these accounts suffices to fully explain the courts' failure to own up to their reliance on administrative common law. Federal common law may be disfavored today, but as *General Dynamics* demonstrates, its legitimacy is not questioned in certain contexts.[142] The courts' very willingness to amplify the APA's thin requirements to the extent that they have strongly suggests that they do not view the statute as precluding such efforts. Similarly, skepticism about the benefits of judicial intervention and the potential for judicial bias should not merely preclude courts from openly acknowledging the common law aspects of administrative law. Instead, if genuinely held, this skepticism should lead courts to forgo administrative common law as a practice. But that has not happened. Courts continue to develop administrative common law doctrines and to employ those already in their doctrinal arsenal, such as hard look review, with regularity and vigor.[143]

II. THE INEVITABILITY OF ADMINISTRATIVE COMMON LAW

The judicial pattern over the last few decades is thus one of periodic rejections of administrative common law that, to date, have had little lasting impact on administrative law jurisprudence. Notwithstanding occasional stern rhetoric condemning administrative common law and no express judicial defense, the judicial practice of creating administrative law remains very much alive. This sets up the puzzle that is the focus of Part II. Why don't courts dispense with judicial development of administrative law if they are so unwilling today to acknowledge the practice? What explains administrative common law's tenacity?

The answer is that administrative common law cannot be discarded because it plays too important a role in enabling the courts to navigate the challenges of modern administrative government under our constitutional separation of powers system.[144] Of course, this sys-

142 For a discussion of current doctrine on when judicial derivation of federal common law is justified, see *infra* text accompanying notes 262–66.

143 *See supra* text accompanying notes 127–28; *see also* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

144 This is not to imply that administrative common law is only likely to occur in a separated powers system like that in the United States. An interesting comparison is the United Kingdom's parliamentary system. There, courts have traditionally played a limited role in reviewing administrative proceedings, but in more recent decades they have developed an increasingly expansive concept of judicial review, particularly in adjudicative contexts. *See* WILLIAM

tem—vesting legislative authority in Congress subject to the requirements of bicameralism and presentment—is what underlies the claim that administrative common law is an unjustified judicial assertion of lawmaking power. At the same time, however, constitutional separation of powers operates to make development of administrative common law practically inevitable.[145] The separation of legislative and executive power, combined with the impediments that bicameralism and presentment impose on Congress, mean that courts necessarily play a central role in enforcing constraints on administrative agencies and policing the executive branch. Administrative common law doctrines serve not simply to implement congressional instructions, but also to structure the complicated institutional relationships that characterize modern administrative government. Equally important, these doctrines are a key mechanism in alleviating the constitutional tensions that such government presents.

Emphasizing the systemic and constitutional pressures that lead to administrative common law does not deny that administrative common law may also have a more insidious basis in judicial policy biases and judicial self-aggrandizement. Although I am skeptical of accounts suggesting that judges intentionally develop doctrines simply to advance their preferred political or ideological views, such motivations may unconsciously play a role in judicial reluctance to cede control over the shape of administrative law.[146] But that does not preclude the possibility that other, more benign forces may also push towards judicial development of administrative law. As discussed in Part III, recognizing these forces suggests that even those who view adminis-

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WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 301 (10th ed. 2009) (describing highly deferential approach originally taken by English courts to reviews of agency action); CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 116 (3d ed. 2009) (describing the now-more stringent standard of review). This new judicial role appears to represent a common law development in large part, although the Human Rights Act of 1998 may increasingly provide a statutory hook. *See* PAUL CRAIG, ADMINISTRATIVE LAW 7–10, 537–44, 621–22 (6th ed. 2008); *see also* ZAIM M. NEDJATI & J.E. TRICE, ENGLISH AND CONTINENTAL SYSTEMS OF ADMINISTRATIVE LAW 3–4 (1978) (tying U.K. courts' deference to administrative action to parliamentary control and doctrines of ministerial responsibility).

145 *Cf.* Davis, *supra* note 1, at 14 ("Administrative common law is so clearly indispensable to a satisfactory system that the Supreme Court should not—and cannot—prevent its further development.").

146 *See, e.g.*, Richard J. Pierce, Jr., *What do the Studies of Judicial Review of Agency Action Mean?*, 63 ADMIN. L. REV. 77, 97 (2011) (voicing the view "that courts will never announce a doctrine that cannot accommodate the powerful tendency of judges and Justices to act in ways that are consistent with their strongly held political and ideological perspectives"); Shapiro & Levy, *supra* note 22, at 1063–64 (arguing that judges' outcome preferences have led to the development of indeterminate administrative law norms).

trative law in starkly political and ideological terms might do well to acknowledge the reality of administrative common law.

A. *Administrative Common Law and the Realities of American Governance*

Administrative common law is traditionally tied to a view of the courts as crucial overseers of the regulatory process, responsible for guarding against administrative abuses and ensuring fair, reasoned, and accountable decisionmaking. From this "liberal idealist" view of the judicial function,[147] the need for judicial creativity in administrative law is fairly obvious; courts must respond flexibly to changing administrative conditions and fashion solutions to new problems as they arise. Alternative accounts posit Congress and the President as the main controllers of administrative agencies, actively wielding their powers to advance their own political interests or those of their constituents. Yet the practical realities of our separated powers system entail a substantial role for administrative common law even under such a nonjuriscentric, political approach.

1. *Congressional Impediments and Ex Ante Controls*

One basic reality of our separation of powers system is Congress's limited ability to legislate quickly and effectively. A major factor impeding Congress is the constitutional requirement of bicameralism and presentment—that is, the need for legislation to pass both houses and be agreed to by the President, or alternatively, to have two-thirds supermajoritarian support in both houses so as to overturn a presidential veto.[148] On top of this are the additional obstacles or "veto gates"[149] created by congressional structure and internal procedures, such as the committee system or the senatorial filibuster. Other factors—in particular, the frequent presence of divided government, loose party discipline in Congress, and increasing party polarization—add further barriers.[150]

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147 Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 272–79 (1990).

148 *See* U.S. CONST. art. I, §§ 7, 8.

149 McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992) (coining the term "veto gate" to describe the multiple kill points for national legislation).

150 William N. Eskridge, Jr., *Vetogates,* Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008); *see also* SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCE OF LEGISLATIVE GRIDLOCK 32–33, 55–56, 79–83 (2003) (identifying policy disagreements between the two chambers, party polarization, and unintended developments—such as the central role of parties and of the Senate in policy disputes—as factors explaining congressional gridlock); Daryl

The net effect is that Congress will often delegate quite broad authority to administrative agencies to set policy, whether because those are the only terms on which legislative agreement could be reached, uncertainty and lack of information preclude more limited delegations and create a need for agency expertise, or members of Congress seek to gain political credit and minimize political blame.[151] Moreover, the constitutional rejection of a parliamentary system and requirement of separation between the legislative and executive branches mean that Congress cannot retain formal control over agency officials charged with implementing broad mandates.[152] Some scholars maintain that Congress nonetheless retains substantial ability to control administrative decisionmaking through two sorts of mechanisms: (1) ex post monitoring, through committee hearings, congressional investigations, budgetary restrictions and the like; and (2) ex ante limitations in the form of structures and procedures imposed on delegated administrative decisionmaking.[153] Ex post monitoring can

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J. Levinson & Richard H. Pildes, *Separation of Parties Not Powers*, 119 HARV. L. REV. 2311, 2340–41 (2006) (describing divided government as a barrier to legislation).

151 For differing accounts of why Congress delegates, see generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695–96 (1975). Also, see Peter H. Aronson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–62 (1982) (arguing that Congress delegates to gain political credit and avoid blame); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 950, 960–67 (1999) ("[L]egislators will delegate those issue areas where the normal legislative process is least efficient relative to regulatory policymaking by executive agencies."); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 106–12 (2000) (arguing that Congress delegates for expertise).

152 *See* U.S. CONST., art. I, § 6; Bowsher v. Synar, 478 U.S. 714, 723–27 (1986) (striking congressional removal authority over officers executing laws based on separation of powers concerns); Myers v. United States, 272 U.S. 52, 161 (1926).

153 The classic positive political theory ("PPT") account of Congress's ability to control administration is offered by Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, writing collectively as McNollgast. *See* McNollgast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 253–71 (1987) [hereinafter McNollgast, *Administrative Procedures*]; McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 468–81 (1989) [hereinafter McNollgast, *Structure and Process*]; *see also* Lisa Schulz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1767–71 (2007) (describing the PPT argument); David R. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 415–19 (1999) (same). For critiques of PPT's thesis that Congress is able to use structure and process to control agencies, see Steven Balla, *Administrative Procedures and Political Control of Bureaucracies*, 92 AM. POL. SCI. REV. 663, 663 (1998) (arguing that PPT arguments are not supported by empirical testing); Mashaw, *supra* note 147, at 289–94; Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance,'* 12 LEG. STUD. Q. 475 (1987).

be quite effective and allows for more direct congressional control.[154] But it also has liabilities: committee hearings and congressional investigations take time, agencies have substantial informational advantages over their congressional overseers that can make it difficult for Congress to identify administrative deviation from congressional preferences, and partisan agreement with the executive branch may limit congressional interest in undertaking oversight.[155] In addition, disciplining wayward agencies may prove difficult, given the usual obstacles to enacting legislation—plus the greater likelihood of presidential opposition and the possibility that Congress's preferences may have changed from when it enacted the legislation under which the agency is acting.[156]

Ex ante controls on administrative process and structure avoid some of the foregoing limitations. Procedural demands, such as the requirement that agencies provide notice of proposed rules, allow affected parties to raise "fire alarms" with Congress if they disagree with the direction an agency is heading and thereby may enable more effective congressional oversight than general monitoring or "police patrols" can provide.[157] Moreover, structural features—such as limiting an agency's jurisdiction to encompassing one industry or providing parties with rights to participate in agency proceedings or challenge agency action—can make an agency particularly sensitive to certain interests, and by thus "stacking the deck" decrease the likelihood that the agency will deviate from congressional preferences in the first place.[158] In addition, ex ante controls will remain in force until re-

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154 *See* Jack Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 121–44 (describing congressional oversight and informal supervision of administration); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767–70 (2010) (documenting the use of hundreds of appropriations riders on an annual basis to overturn agency policy decisions).

155 *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 151–62 (2006) (detailing limited oversight under unified government during the Bush administration); McNollgast, *Administrative Procedures*, *supra* note 153, at 248–53; McNollgast, *Structure and Process*, *supra* note 153, at 434–35, 481.

156 McNollgast, *Administrative Procedures*, *supra* note 153, at 248–53; McNollgast, *Structure and Process*, *supra* note 153, at 434–35, 481.

157 Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); McNollgast, *Administrative Procedures*, *supra* note 153, at 244, 259.

158 Jonathan R. Macey, *Organizational Design and the Political Control of Administration*, 8 J.L. ECON. & ORG. 93, 99–108 (1992); McNollgast, *Administrative Procedures*, *supra* note 153, at 261–63, 264–71; McNollgast, *Structure and Process*, *supra* note 153, at 440–44.

pealed, and thus are not as dependent on continuing congressional agreement with earlier policy choices.

On this view, ex ante controls will prove particularly important for preserving legislative control of administration in a separated powers, nonparliamentary system like ours.[159] Ex ante controls, however, need an enforcement mechanism—preferably one not dependent on congressional action and thus not subject to the same impediments detailed above.[160] And courts are the prime enforcement mechanism, by way of judicial review of agency action.[161] As Professors Daniel Rodriguez and Barry Weingast argue, the ultimate effect is to make judicially enforced administrative law inevitable.[162]

Of course, that does not mean that administrative *common* law is inevitable. Congress could leave little room for judicial discretion by enacting statutes that comprehensively specify substantive and procedural requirements to which agency action and judicial review must conform. Indeed, Professors Rodriguez and Weingast emphasize that Congress frequently does impose such detailed constraints on agencies, portraying the environmental, safety, and health statutes that characterized the public interest era of the late 1960s and early 1970s as prime examples.[163] Moreover, even if Congress leaves more latitude, courts may choose not to fill in the resultant gaps with judicially developed law. Instead, courts could respond with what Professor Daniel Meltzer has called "judicial passivity," insisting that "responsi-

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159 *See* JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY 39–40, 72 (2002); Christian B. Jensen & Robert J. McGrath, *Making Rules about Rulemaking: A Comparison of Presidential and Parliamentary Systems*, 64 POL. RES. Q. 656, 659 (2011).

160 Ex ante controls have other potential weaknesses; for example, procedures can be used by interest groups other than those the enacting Congress favored, Congress may lack the information or agreement needed to impose detailed constraints, or such constraints may limit Congress's ability to benefit from administrative expertise. *See* Jacob Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); Jeffrey S. Hill & James E. Brazier, *Constraining Administrative Decisions; A Critical Examination of the Structure and Process Hypothesis*, 7 J. L. ECON. & ORG. 373, 380–90 (1991); Mashaw, *supra* note 147, at 292.

161 *See* Hill & Brazier, *supra* note 160, at 390–91; McNollgast, *Administrative Procedures*, *supra* note 153, at 263. .

162 Daniel B. Rodriguez & Barry R. Weingast, *Is Administrative Law Inevitable?*, L. & Econ. Workshop, U.C. Berkeley 41 (2009) *available at* http://escholarship.org/uc/item6mx3s46p (last visited Mar. 7, 2012). Judicial review is also practically inevitable because of the central role it plays in legitimizing administrative power; in Professor Jaffe's famous words: "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power that purports to be legitimate." JAFFE, *supra* note 14, at 320.

163 Rodriguez & Weingast, *supra* note 162, at 41; *see also* Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1283–95 (1986) (detailing statutes in this era).

bility for fleshing out the operation of schemes of federal regulation" falls to Congress.[164] The rise of textualism in statutory interpretation generally runs counter to any suggestion that judicial enforcement *per se* makes common law development inevitable.[165] *Milner* is a good demonstration of both of these phenomena, with the Court there rejecting judicial administrative law development in favor of a textually focused approach with respect to a relatively detailed statute.[166]

Yet several reasons exist to think that the courts' role in enforcing ex ante statutory constraints on agencies often will lead to substantial judicial elaboration, and that, in practice, administrative common law may be the inevitable result.[167] Congress's ability to specify answers to administrative issues in advance is limited; often it will lack the expertise and foresight required to anticipate all the issues that arise, as well as the political and organizational capacity to address those issues that it does identify.[168] Even the apparently detailed procedural requirements in more modern regulatory statutes can leave ample room for judicial discretion, as seminal administrative law decisions interpreting procedural requirements of FOIA and the National Environmental Policy Act attest.[169] This point is also shown by the currently

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164 Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343–44.

165 *See, e.g.*, William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 625 (1990); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–21 (2005); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3–23 (2006).

166 *See supra* notes 68–76 and accompanying text.

167 Both PPT scholarship and PPT critiques note instances in which intervention by the courts undercuts ex ante procedural and structural constraints imposed by legislation. *See* Hill & Brazier, *supra* note 160, at 392–98; McNollgast, *Structure and Process*, *supra* note 153, at 450–68; *see also* McNollgast, *Administrative Procedures*, *supra* note 153, at 272 ("[S]ome possibility for court encroachment is simply a necessary cost of decentralized political control.").

168 Meltzer, *supra* note 164, at 383–90; Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 342–43 (2001).

169 *See, e.g.*, NLRB. v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978) (interpreting FOIA to require judicial balancing of Congress's intended goals); Church of Scientology of Cal. v. IRS, 792 F.2d 146 (D.C. Cir. 1986) (finding that FOIA's procedural requirement of judicial review was not superseded by substantive act); Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1112, 1115 (D.C. Cir. 1971) (describing detailed procedural requirements of National Environmental Policy Act, but noting that whether agency met standards is to be interpreted by courts); *see also* Mashaw, *supra* note 147, at 289–90 (disputing extent to which modern regulatory statutes incorporate particularized procedural controls). *Milner* itself signals the possibility of such flexibility: at the same time that it rejected the government's invocation of Exemption 2 as incompatible with the provision's plain meaning, the majority flagged Exemptions 1, 3, and 7 as better options for shielding national security information—an analytic move unnecessary to its argument and in some tension with FOIA's disclosure emphasis, but reflecting judicial responsiveness to the broader policy concerns that the government raised. *See* Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1271 (2011); *see also id.* at 1271–73

proposed Regulatory Accountability Act,[170] which would nearly double the APA's length with new, highly detailed procedural restrictions.[171] More unusual is that the proposed act directs the Office of Information and Regulatory Affairs ("OIRA") to issue guidelines that would govern agency compliance with the new requirements.[172] Yet despite this detail, room for future judicial interpretation is evident on key questions, such as how much deference would be due to OIRA's guidelines and determinations of compliance.[173]

Part of the problem that Congress faces here is the difficulty of comprehensively specifying the full scope of the court-agency relationship. As Professor Marshall Breger and others have commented: "It remains difficult, perhaps impossible, to capture in statutory language the precise mixture of respect and skepticism with which courts should approach administrative determinations."[174] Interestingly, enactment of detailed procedural and structural requirements in specific substantive statutes has not led to the desuetude of general administrative law constraints such as the APA.[175] Instead, Congress continues to rely on such generic measures, and courts often interpret general and specific statutes in tandem, thereby incorporating doctrines devised to implement the APA into the understanding of specific statutes and vice versa.[176] Congress's failure to remove ambiguity and its continued re-

(Alito, J., concurring) (arguing more strongly that other exemptions are applicable); *id.* at 1277–78 (Breyer, J., dissenting) (noting limitations of these exemptions and arguing that overclassification for purposes of Exemption 7 is a "more serious threat to the FOIA's public information objectives").

170 H.R. 3010, 112th Cong. (1st Sess. 2011)

171 *See id.*

172 *See id.* § 3(k).

173 *See id.* § 3(k)(4) (stating that "deference" is due to OIRA's determinations of compliance with the Information Quality Act); *id.* § 7 (proposing to amend 5 U.S.C. § 706 to provide that courts are not to defer to agency cost-benefit assessments that do not comply with governing guidelines and that agency denials of petitions for a hearing under the Information Quality Act are subject to review for abuse of discretion).

174 Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 355 (1986); Bressman, *supra* note 153, at 1772–73 ("The standards for assessing agency action—whether stringent, like the reasoned decisionmaking requirement, or lenient, like *Chevron* deference, are not susceptible to precise codification. They are too amenable to case-by-case elaboration, rather than legislative consensus."). *But see* Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2665–68 (2003) (arguing that Congress could play more of a role than acknowledged through use of authorization statutes).

175 Mashaw, *supra* note 147, at 289–91 (noting that process-specific procedural constraints seem "dwarfed by the degree to which the Congress acts generically," making this point about Congress in addition to the courts).

176 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40–44 (1983) (reading the APA and Motor Vehicle Safety Act in tandem despite the latter's incorporation of substantial evidence as the governing standard).

liance on general statutes may indicate that it expects courts to develop administrative common law, at least within certain overall statutory parameters.[177]

Congress is also limited in its ability to respond to judicial decisions that deviate from its desired approach. Congress's incapacity here is not complete; it overrides judicial interpretations with greater frequency than is often recognized.[178] The fact remains, however, that Congress cannot easily update statutes. In part, the obstacles that Congress faces here are the same that impede enactment of initial legislation. But amending a statutory regime may prove harder than acting on a clean state because the baseline against which the new measures are assessed has changed.[179] The transsubstantive nature of administrative law potentially creates an additional barrier, as interest groups may mobilize more readily to repeal specific results in particular regulatory contexts than broader judge-fashioned doctrines.[180] Section 559 of the APA may well enhance this problem by prohibiting a subsequent statute from superseding the APA unless "it does so expressly."[181] Moreover, presidential opposition seems likely, particularly in a period of divided government, at least if Congress seeks to strengthen constraints on agencies.[182] Greater procedural constraints not only make it harder for the executive branch to act, but also carry obvious political ramifications. The APA's enactment history pro-

177 Several possible bases exist for members of Congress to support such development. Perhaps they perceive Congress as having limited ability to finely tune ex ante controls, or view judicially created administrative law as, on the whole, furthering congressional interests. *See* Bressman, *supra* note 153, at 1768–69, 1776–805. *But see* Mashaw, *supra* note 147, at 292–94 (writing skeptically about judicial review's service of congressional interests). Or they might support judicial development for less immediately self-interested reasons—because they perceive independent judicial constraints as important to the legitimacy of administrative action, or simply because judicial development has been a frequent feature of American administrative law. *See, e.g.*, JAFFE, *supra* note 14, at 323; Mashaw, *supra* note 147, at 273 (describing the role of the judiciary in the development of administrative law).

178 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335–53 (1991) (providing data on congressional overrides in the 1970s and 1980s); *see also* Daniel B. Rodriguez & Barry R. Weingast, A Positive Political Theory of the Reformation of Administrative Law 17, 23 (Oct. 2010) (unpublished manuscript), *available at* www.law.northwestern.edu/searlcenter/papers/Rodriguez_Weingast_Admin.pdf.

179 *See* Eskridge, *supra* note 178, at 377–89; William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 529–31, 536–37 (1992); McNollgast, *Structure and Process*, *supra* note 153, at 435–40; Meltzer, *supra* note 164, at 390–95.

180 Eskridge, *supra* note 179, at 359–66 (discussing the role of interest groups in achieving overriding).

181 5 U.S.C. § 559 (2006).

182 John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. ORG. 1, 12–19 (1990) (analyzing the threat of presidential veto on Congress's agency policy).

vides evidence of the politically contested character of administrative procedural reforms, as do recent Republican proposals to constrain rulemaking.[183]

Two results follow from the difficulty that Congress faces in updating administrative law constraints. First, courts may often be asked to enforce statutory requirements that no longer accord with the world of contemporary governance. In doing so, they will face substantial temptation to read these provisions in a way that increases their relevancy.[184] Such an updating effort is evident in the history of the APA, with the modern explosion in rulemaking and concerns with regulatory capture leading courts to read the APA's rulemaking and judicial review provisions expansively.[185] In fact, the APA is the prime example of how judicial creativity can be central to ensuring that ex ante controls function in a way that serves Congress's interests. It is judicial elaboration of § 553, rather than the minimal requirements incorporated into § 553 itself, that allowed this provision to foster congressional oversight by forcing agencies to disclose detailed information on regulatory actions in advance.[186] Judicial expansion of the APA's notice and disclosure requirements for rulemaking also accorded with increased congressional commitment to disclosure and

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183 On the APA, see Shapiro, *supra* note 26, at 452–54; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557, 1560–61 (1996). On recent Republican proposals, see Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 778 n.268 (2011) (noting Republican Congress members' introduction of the Regulations from the Executive in Need of Scrutiny Act and claiming that it was "controversial because it would reverse the paradigm under which executive branch agencies have been issuing regulations pursuant to delegated authority for more than two centuries"); Pete Kasperowicz, *Administration Threatens Veto of Deregulatory Bills*, HILL (Nov. 29, 2011, 6:35 PM), http://thehill.com/blogs/floor-action/house/196049-administration-threatens-veto-of-house-deregulation-bills (noting that the Obama administration criticized the proposed Regulatory Accountability Act and the Regulatory Flexibility Improvements Act as imposing unprecedented procedural limitations on agencies).

184 *See* Beermann, *supra* note 2, at 26–27 (arguing that new problems and concerns over time underlay the dynamic approach courts took to interpreting the APA). This phenomenon is not unique to administrative law. *See* ESKRIDGE, *supra* note 105, at 52–53; *see generally* CALABRESI, *supra* note 105 (arguing for judicial updating of statutes, akin to judicial updating of the common law, to address the problem of obsolescence).

185 *See* Metzger, *supra* note 2, at 491; Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 684–92 (1992) (describing the development of hard look review and expanded standing as judicial efforts to protect structurally disenfranchised groups).

186 *See* Bressman, *supra* note 153, at 1771 n.131; McNollgast, *Administrative Procedures*, *supra* note 153, at 256–59 (emphasizing APA procedures as a source of congressional control).

open government generally, evident in FOIA's enactment in 1966.[187] This underscores that judicially developed administrative law need not come at the expense of congressional control of administration. Instead, congressional and judicial forms of administrative oversight can coexist and prove mutually reinforcing.[188]

Second, congressional difficulty in responding means that, realistically, courts do not need to fear legislative overruling of administrative common law decisions.[189] As a result, reliance on courts to enforce ex ante controls provides them with a reliable opening through which they can advance concerns separate from those that animate governing statutes and regulations.[190] That courts often have such different concerns is evident from the caselaw in which courts force agencies to take additional interests into account.[191] Moreover, even if Congress overrules specific decisions that deviate from its desired approach, Congress's dependence on the courts for enforcing ex ante constraints means that courts will continue to have opportunities to craft doctrines that reflect their concerns.

Many of these features—Congress's limitations and the problem of obsolescent statutes—exist outside the administrative law context as well. Indeed, this argument for the inevitability of administrative common law might seem to prove too much, in that it implies that we

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187 *See* Strauss, *Statutes*, *supra* note 133, at 785–88. Professor Peter Strauss has argued that FOIA should be read as amending § 553 and that judicial development of § 553's requirements was justified because it was statutorily driven. *Id.*

188 *See* Rodriquez & Weingast, *supra* note 178, at 21–24 (emphasizing judicial-congressional partnership in developing administrative law).

189 *See* Bressman, *supra* note 153, at 1773; *see also* James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 747–67 (1980) (detailing failed effort to overturn *Chevron* through the Bumpers Amendment). Interestingly, current proposals to amend the APA would in part codify judicial elaboration of the APA's requirements with respect to notice and disclosure. *See* Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. § 3.

190 *See* HUBER & SHIPAN, *supra* note 159, at 226 (noting that "in common law systems, where judges are less reliable allies . . . the absence of legislative details can come back to haunt legislators" and the "existence of strong courts pushes legislators to include specific policy details in laws in order to tie the hands of justices").

191 *See* Hill & Brazier, *supra* note 160, at 391–94 (detailing instances in which courts have deviated from enacted coalition's agreements); McNollgast, *Structure and Process*, *supra* note 153, at 450–54 (arguing that judicial decisions under the 1970 Clean Air Act Amendments requiring the EPA to prevent significant deterioration in air quality deviated from congressional intent); *see also* Macey, *supra* note 185, at 702 (contending that "[t]he independent judiciary, which is not a party . . . to the original interest group deals that lead to the establishment of administrative agencies . . . has no incentive to enforce such deals"). This point also is a central conclusion of scholarship that emphasizes the political and ideological dimensions of judicial review. *See supra* note 141 and accompanying text.

should see common law approaches dominating across the board.[192] But specific aspects of administrative law suggest that the pressures these features create for courts to take a common law stance are particularly acute in this context. For example, the difficulty Congress faces in clearly delineating judicial review standards and the President's likely opposition to new procedural requirements are especially tied to administrative law. Of prime importance, however, is administrative law's institutional and structural character. Administrative law is the central mechanism through which courts oversee lawmaking and law application by other government institutions—agencies and the President—as well as structure the relationships among these institutions, Congress, and the courts themselves.[193] These institutional and structural dimensions, in particular the heavy focus on judicial review, may lead courts to see their efforts as more appropriate to the judicial role, and less as instances of independent judicial lawmaking.[194] In a sense, they make administrative law akin to preemption disputes—a statutory interpretation context that similarly implicates governance structures, albeit between the federal government and the states, and one in which the Court has been notably more willing to play an active lawmaking role.[195]

These institutional and structural features also reinforce the need for a greater judicial role in fashioning governing law. They thus make it more likely that courts will engage in broader elaboration of governing requirements, instead of being content to simply push at statutory text to ensure realization of specific statutory purposes in changed circumstances. The concerns raised by statutory obsolescence are magnified when the effect of such obsolescence is not simply a particular out-of-date regulatory regime, but rather inadequate controls and frameworks to guide agency regulatory activities across a whole host of regulatory areas. Moreover, the institutional character of administrative law renders problematic the standard device of updating regulatory schemes through administrative action.[196] Deferring to agencies in this context would allow them to determine the basic constraints governing their own actions, a result at odds with the insti-

192 Some scholars have argued that the obstacles Congress faces generally justify a more activist judicial stance. *See, e.g.*, Meltzer, *supra* note 164, at 378–95.

193 *See supra* text accompanying notes 115–17 (noting institutional and structural dimension of administrative common law).

194 *See supra* text accompanying notes 118–21.

195 Meltzer, *supra* note 164, at 370–78.

196 *See* Aleinikoff, *supra* note 104, at 42–44 (describing *Chevron* deference as an important mechanism for updating statutory interpretation).

tutional checking function that administrative law serves.[197] Similarly, courts cannot effectively enforce some statutory specifications, such as rulemaking deadlines or mandated agency actions, without taking into account their institutional role and limited competencies compared to agencies.[198]

Thus, even an account that gives pride of place to congressional control of administration will likely entail judicially developed administrative common law. The extent and scope of that common law will no doubt vary. In some contexts, detailed statutory provisions may limit its scope, while in contexts where statutes speak more generally it will be more central. But some form of its presence is inevitable.

2. *Presidential Accountability and the President-Congress Dimension*

One of the key institutional issues at the core of administrative law concerns the proper scope of the President's role. Expanding presidential control over administration is the central dynamic of contemporary national governance.[199] Held politically accountable for the actions and performance of the executive branch, Presidents since Nixon have sought greater control over its operations.[200] Perhaps more importantly, Presidents have turned to administration to achieve policy goals not attainable through legislation, whether due to divided

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197 This checking function is particularly evident in the evolution of current hard look review in lieu of more deferential scrutiny under the arbitrary and capricious standard. *See infra* text accompanying notes 235–38 (describing how current arbitrary and capricious scrutiny deviates from original expectations); *see also supra* text accompanying notes 24–27 (same). By contrast, courts occasionally defer to agency interpretations of governing procedural requirements. *See, e.g.*, Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 17–18 (1st Cir. 2006) (giving *Chevron* deference to agency's interpretation of APA provision concerning when a formal hearing on the record is triggered). *But see* William Funk, *The Rise and Purported Demise of* Wong Yang Sung, 58 ADMIN. L. REV. 881, 891 (2006) (noting that *Dominion Energy* undermined previous reluctance to defer to agency interpretation of APA elements, such as hearing on the record); William S. Jordan, III, Chevron *and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 265–67 (2009) (critiquing *Dominion Energy* as at odds with original understanding of the APA).

198 Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 974–75 (2008); *see also* Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

199 Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 466 (2003); Cynthia R. Farina, *The Consent of the Governed: Against Simplistic Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–88 (1997).

200 Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 159 (1999).

government or even to policy disagreements within the President's own party.[201] Increased presidential control manifests itself in the use of White House policy czars,[202] greater politicization of agencies,[203] and centralized regulatory review and control of administrative processes.[204] The latter measures in particular have resulted in a number of White House-initiated constraints on agency processes, ranging from requirements for expanded disclosure and early notification in rulemaking, to cost-benefit analysis, to best practices requirements that govern use of agency guidance.[205]

Presidential accountability has also moved center stage in judicial understandings of administrative legitimacy. Most recently, in *Free Enterprise Foundation v. Public Company Accounting Oversight Board*,[206] the Court invoked presidential oversight as the key protector against rule by bureaucrats—indicating not only the dominance of the presidential accountability view, but also judicial doubt about traditional justifications of administration in terms of apolitical expertise.[207] The prime embodiment of this move to presidential accountability is the *Chevron* doctrine, with its emphasis on the inseparability of policy and interpretation and agencies' political accountability through the President for their policy choices.[208] *Chevron*'s emphasis

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201 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2309–15 (2001).

202 Aaron J. Saiger, *Obama's 'Czars' for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2583–84 (2011).

203 David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1099–1105 (2008); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 460–62, 491–98 (2008) (presenting data demonstrating presidential political influence over independent agency officials).

204 *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

205 *See* Exec. Order No. 12,866, 3 C.F.R. 638 (promulgating early identification and coordination and assessment); Exec. Order No. 13,563, 76 Fed. Reg. at 3821–22 (expanding disclosure and suggesting sixty-day comment period); OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

206 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

207 *Id.* at 3153–57 (asserting importance of presidential control over agency officials, including those with technical expertise).

208 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865–66 (1984) ("[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is . . . ."). Numerous scholars have rallied to the presidentialist cause, arguing variously that enhanced presidential control is constitutionally mandated, enhances democratic accountability, and protects against administrative failures such as tunnel vision and unreasonable regulation. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994) ("[T]he Constitution unambiguously gives the President

on presidential accountability suggests a model under which the President, rather than the courts, bears main responsibility for policing administration, thereby rendering judicial policing efforts, and administrative common law, at best unnecessary and at worst an illegitimate intrusion on the President's prerogatives.

Yet on closer inspection, *Chevron* also reveals why expanding presidential administration is unlikely to undermine the need for administrative common law. On the one hand, presidential oversight reinforces democratic accountability for policy choices made by administrative officials acting pursuant to congressionally delegated authority, particularly if the alternative is policy choices made by unelected judges. On the other hand, that oversight increases the risk that agencies will seek to expand their powers beyond statutory confines to achieve presidential goals not sanctioned by Congress. Before courts can defer to presidential control, they need some metric by which to determine when such presidential control is legitimate and when it represents an unlawful diversion of administrative power from legislative to presidential ends. They also need a mechanism for navigating the tensions between judicial supervision and presidential authority, one that allows courts to enforce statutory requirements but also recognizes the distinct competencies and powers of the President as compared to the judiciary. Congress also plays an important oversight role that courts need to factor into the equation.[209] In Professor Lisa Bressman's words: "[A]gencies are subject to *two* political principals" and "the Court might see its role as mediating the needs of both political branches for control of agency decisionmaking."[210]

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the power to control the execution of all federal laws."); Kagan, *supra* note 201, at 2331–46 (arguing that direct presidential authority increases administrative accountability and effectiveness); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 94–106 (1994) (arguing that the "strong presumption of unitariness is necessary in order to promote the original constitutional commitments" to "accountability and avoidance of factionalism"). But criticisms of enhanced presidentialism also abound. *See, e.g.*, Bressman, *supra* note 199, at 514–15 (challenging claims that presidential oversight yields political accountability and administrative legitimacy); Farina, *supra* note 199, at 989–93 (same); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702–04 (2007) (arguing against presidential directive or decisional authority over agency activity).

209 *See* Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981) (deeming it "entirely proper" for individual members of Congress to seek to influence administrative rulemaking, provided they "do not frustrate the intent of Congress as a whole as expressed in statute").

210 Bressman, *supra* note 153, at 1753; *see also* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 982–83 (1997) (describing the need for courts to police the distinction between law and politics).

These institutional challenges are the breeding grounds for administrative common law. Courts have developed doctrines to ensure that congressional instructions are honored while preserving room for presidential policy control—or, put in more traditional terms, to police the divide between law and politics. *Chevron* is one example; *State Farm* and the reasoned decisionmaking requirement is another. Under *Chevron*, courts defer to reasonable agency interpretations of ambiguous statutes, but before deferring often engage in substantial statutory analysis to ensure that agencies are acting within the powers Congress granted.[211] Under *State Farm*, courts defer to agency decisionmaking provided that agencies reasonably explain how such decisionmaking accords with the record, statutory goals, and other concerns, thereby limiting the extent to which politics alone can justify policy choices.[212] *Heckler v. Chaney*[213] offers another example. In *Chaney*, the Court held that agency nonenforcement decisions are presumptively unreviewable, thereby acknowledging that this is an area generally better left to the executive branch while simultaneously granting Congress room to mandate review and limit agency enforcement discretion.[214]

Moreover, judicial development of these doctrines is a continual process, spurred on by the need to apply extant doctrinal frameworks to new contexts. Occasionally, judicial perceptions of presidential and executive branch overreach lead to creative justifications for rejecting agency decisions, such as the antiparroting rule the Court applied in *Gonzales v. Oregon*[215] to justify not deferring to the Attorney General's interpretation of Department of Justice regulations as preempting Oregon's Death with Dignity Act.[216] At other times, however,

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211 *See* Beermann, *supra* note 29, at 817–22 (noting intensification of *Chevron* review).

212 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action . . . ."); *id.* at 59 (Rehnquist, J., concurring) (hinting at agency's departure from former rule due to changed presidential political party); *see also* Indep. Tanker Owners Comm. v. Dole, 809 F.2d 847, 851–53 (D.C. Cir. 1987) ("[Concise general statement] should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve."). For a discussion of the extent to which agencies may invoke political factors in demonstrating the reasonableness of their policy choices, see *infra* text accompanying notes 363–65.

213 Heckler v. Chaney, 470 U.S. 821 (1985).

214 *Id.* at 832–33.

215 Gonzales v. Oregon, 546 U.S. 243 (2006).

216 *Id.* at 256–58; *see also* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (arguing that searching scrutiny employed by the Court in *Massachusetts v. EPA* reflected concerns that political factors had trumped expertise in the EPA's decisionmaking on greenhouse gases).

judicial perceptions of the important policy interests at stake and limited judicial competency in certain contexts may lead courts instead to be extremely deferential.[217] The plasticity of administrative common law, and its amenability to judicial refinement as context demands, is thus an important strength in assisting courts in performing their institution-policing role.

In sum, administrative common law is the central tool available to courts to navigate the tension between presidential and congressional control of administration, and relatedly to map the appropriate scope of judicial involvement. Accordingly, increased presidential control over administration is unlikely to dispense with a judicially felt need for administrative common law. Indeed, increased presidential control may serve to intensify the courts' reliance on common law doctrines in order to chart the appropriate congressional-presidential balance in unfamiliar terrain.

B. Administrative Common Law's Constitutional Basis

Thus far, this Foreword has argued that administrative common law is inescapable even under accounts that emphasize congressional and presidential oversight of administrative action. This inescapability becomes even clearer once the focus turns to the normative concerns that underlie administrative common law. As the discussion above indicates, many of the concerns animating administrative common law doctrines are constitutionally based—though, like the practice of administrative common law generally, this constitutional foundation is rarely acknowledged by the Court today.[218]

That our national administrative state poorly fits our constitutional framework is well known.[219] Where the Constitution divides legislative, executive, and adjudicatory power among the three branches and guarantees due process, modern administrative schemes instead consolidate all three functions in a single agency and thereby risk biased decisionmaking.[220] Where the Constitution vests the legis-

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217 *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1133, 1136–38 (2009).

218 *See* Metzger, *supra* note 2, at 483–86 (noting connection between administrative common law and constitutional common law, yet courts' reluctance to acknowledge reliance upon either).

219 For an elegant statement of the constitutional complaints that follow, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–49 (1994).

220 *Id.* at 1248–49; Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 425–48.

lative power in the hands of elected officials and creates significant obstacles to legislation in the form of bicameralism and presentment, modern administrative practice involves the delegation of expansive lawmaking authority to administrative officials who are, at best, indirectly politically accountable through the President and often subject to minimal statutory constraints.[221] Where the Constitution guarantees independence and life tenure to federal judges, modern administrative schemes vest adjudicative authority in agency officials, who sometimes possess minimal independence protections and whose decisions are generally subject to review and redetermination by an agency's political head.[222] Where the Constitution vests the executive power in a single President, modern administrative regimes often delegate decisionmaking authority to principal officers who serve for multiyear terms and who are protected from presidential removal by good cause requirements.[223] In addition, broad federal regulation has fundamentally altered our federalist system, undermining the states' regulatory authority and independent role.[224]

But to note that our administrative state raises constitutional tensions is not to say that it actually *is* unconstitutional. The Constitution says remarkably little about federal administration.[225] Nothing in the Constitution expressly prohibits the combination of different functions in one agency, broad policymaking delegations, administrative adjudication, or removal protections.[226] Constitutional limits on ad-

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221 *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 155–58 (1993); Aronson, et al., *supra* note 151, at 21–37

222 *See* Lawson, *supra* note 219, at 1246–48 (questioning constitutionality of agency adjudication); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 199–201 (critiquing attempts to justify conferral of adjudicatory powers to non-Article III judicial bodies).

223 *See* Calabresi & Prakash, *supra* note 208, at 592–99 (arguing that the President must retain specific controls over agency officials to meet the constitutional unitary executive mandate).

224 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001) (critiquing expansive readings of the Commerce Clause as inconsistent with original intent); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 8–9 (2004) (describing modern constitutional law's departure from the text of the Constitution in allowing breadth of federal regulation).

225 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984); *see also* Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 659–60 (2009) ("[T]here is a hole in the Constitution where administration might have been.").

226 *See* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 998–99 (2001) (critiquing the unitary executive account as not constitutionally mandated); Todd D. Rakoff, *The Shape of the Law in the American Ad-*

ministrative arrangements must therefore be implied from constitutional text and structure, but inferences of such constraints must be squared with a core statement the Constitution does expressly make: Congress has broad authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the powers granted Congress "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[227] Due process concerns can be satisfied by separation of functions requirements; and in any event, as currently understood, procedural due process provides only minimal constraint in many administrative contexts.[228] And the federal government's dominance reflects the changed nature of the national economy and society—changes that the Constitution's text arguably authorizes, however far we have now travelled from original expectations of a state-centered federalism.[229]

Perhaps more importantly, since the New Deal the Court has shown little interest in sustaining constitutional challenges that would fundamentally undermine national administrative governance. Last term's decision in *Stern v. Marshall*[230] is the most recent illustration of the Court's reluctance to challenge the fundamental characteristics of the modern administrative state. Although the Court there invalidated statutes granting jurisdiction over state law counterclaims to bankruptcy courts, it went out of its way to distinguish administrative adjudication as a different phenomenon.[231] The rather unmistakable message of *Stern*'s repeated carve-outs preserving administrative adjudication—like the earlier carve-out of the civil service, administrative law judges, and other removal protections from invalidation in *Free*

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ministrative State, 11 TEL AVIV U. STUDIES LAW 9, 20–24 (1992) (arguing that the Constitution only prescribes delegations that are both omnicompetent and omnipowered); Strauss, *supra* note 225, at 596–98 (arguing that the Constitution does not require separation of functions below "very pinnacle of government").

227 *See* U.S. CONST. art. I., § 8, cl. 18; Strauss, *supra* note 225, at 598 (reading the Constitution's frequent silence on administrative structure to mean that "the job of creating and altering the shape of the federal government" falls to Congress under the Necessary and Proper Clause).

228 Metzger, *supra* note 2, at 487–90 (discussing the limited scope of procedural due process); Strauss, *supra* note 225, at 577–78 (describing "separation of functions" approach as based in due process concerns).

229 *See e.g.*, Wickard v. Filburn, 317 U.S. 111, 123–29 (1942) (finding interstate commerce where activity had substantial effect on commerce, even if not formally between states). *Compare* Barnett, *supra* note 224, at 102 (arguing that an originalist reading of the Constitution supports a narrow reading of Commerce Clause), *with* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1 (2010) (arguing for a broader reading of "commerce" as "intercourse").

230 Stern v. Marshall, 131 S. Ct. 2594 (2011).

231 *See id.* at 2608, 2613–15.

Enterprise Fund[232]—is that although the Court may tinker with administrative arrangements at the edges, the core structure of the modern administrative state is here to stay.

Instead of invalidating modern administration on constitutional grounds, the Court has often addressed the constitutional concerns that modern administrative governance raises through administrative common law doctrines.[233] *State Farm*'s reasoned decisionmaking requirement is a prime example.[234] As Justice Kennedy emphasized in his *Fox* concurrence, reading that requirement into § 706(2)(A) "stem[s] from the administrative agency's unique constitutional position. . . . If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances."[235] Requiring agencies to offer contemporaneous explanations and justifications for their decisions creates internal checks on arbitrary agency action, encouraging agencies to take evidence and expertise into account and fostering internal deliberation.[236] These internal checks are particularly important when agencies act pursuant to broad delegations and thus have substantial discretion over the choice of what policy to pursue. Indeed, Professor Kevin Stack identified early demands that agencies supply a contemporaneous justification for their actions as originating in concerns about administrative delegations.[237] But the reasoned decisionmaking requirement also reinforces the strength of external checks on agency

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232 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3160 (2010).

233 Much of the argument that follows is drawn from Metzger, *supra* note 2, at 490–97.

234 *See supra* note 212 and accompanying text.

235 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 536 (2009); *see* Shapiro & Levy, *supra* note 220, at 425–28 (detailing history of the reason-giving requirement and its basis in separation of powers); *see also* Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 111 (2007) (noting the constitutional basis of the reasoned decisionmaking requirement); Richard W. Murphy, *The Limits of Legislative Control Over the "Hard-Look,"* 56 ADMIN. L. REV. 1125, 1132–34 (2004) (same).

236 *See* Jody Freeman & Adrian Vermeule, *supra* note 216, at 53–54 (discussing hard look review as "expertise-forcing"); *see also* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1051–55 (2011) (discussing the effects of hard look review requirements on agencies); Merrill, *supra* note , at 1043 ("[M]any federal judges became convinced that agencies were prone to capture and related defects and—more importantly—that they were in a position to do something about it."); Sunstein, *supra* note 14, at 284–86 (discussing deliberation).

237 Stack, *supra* note 17, at 982–89; *see also* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1295–315 (1986) (describing the judicial turn to close supervision in response to suspicions about agency good faith and expertise combined with increasing scientific and technological complexity and high-stakes rulemaking).

action, by enhancing the ability of Congress, the President, and the courts to police administrative determinations.[238]

Administrative common law also operates to address constitutional concerns beyond separation of powers. In recent years, the Court has used strengthened review of agency statutory interpretations as a surrogate for constitutional federalism concerns, and has employed deference as a carrot to incentivize greater administrative attention to state interests in preemption contexts.[239] As noted, judicial expansions of rulemaking procedures under the APA were often animated by concerns to ensure fair treatment of affected interests, as well as by functional justifications based in the nature of the rulemaking process.[240] Yet constitutional doctrines that predated the modern administrative state made clear that procedural due process has no traction in legislative contexts such as rulemaking. Ordinary administrative law not only provided an easier route by which to address such fairness concerns, but it also allowed the Court to avoid having to reconsider its existing constitutional understandings.[241]

Importantly, the constitutional concerns underlying administrative law doctrines often surface in an indeterminate form, and they impose few hard and fast requirements. The resultant doctrines "are constitutionally rooted but not constitutionally required."[242] This is in part a reflection of the nature of the constitutional principles involved, such as separation of powers, which frequently take on such an indeterminate cast. It also reflects the fact that the courts were able to rely on subconstitutional sources such as the APA in developing these doctrines, and thus rarely had to specify exactly what kinds of administrative controls are constitutionally mandated.[243] In fact, few administrative law doctrines could be defended solely on constitutional grounds. For example, the Court recently rejected the suggestion that how an administrative agency wields its delegated powers is relevant to assessing whether the underlying delegation is unconstitutionally broad.[244] Similarly, although the Court initially justified *Chev-*

238 *See supra* note 157 and accompanying text.

239 *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2062–74 (2008) [hereinafter Metzger, *Administrative Law*]; Gillian Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 45–46 (2011) [hereinafter Metzger, *Federalism*].

240 *See supra* text accompanying note 109.

241 Metzger, *supra* note 2, at 505–06.

242 *Id.* at 511.

243 *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–45 (2011) (noting and critiquing the free-floating and indeterminate character of much of separation of powers analysis); Metzger, *supra* note 2, at 505–06.

244 Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472–73 (2001).

ron in part on the grounds that "[o]ur Constitution vests . . . responsibilities [for policy choices] in the political branches,"[245] interpreting ambiguous statutes is an ancient judicial task.[246] Hence, it is hard to make out a case that *Chevron* deference to reasonable agency statutory interpretations is constitutionally compelled. Congress thus has broad power to alter the substance of administrative common law despite its constitutional character. As I have argued elsewhere, administrative law doctrines are a form of constitutional common law.[247]

The constitutional role that administrative common law plays is a significant factor underlying its staying power. Administrative common law provides a mechanism by which courts can navigate the constitutional tensions raised by the modern administrative state without having to confront those tensions head on. Courts could take a different approach, one in which they drew a clear line between ordinary administrative law and constitutional law and then addressed constitutional concerns directly. But that approach would prove highly disruptive. It would call into question many of the ordinary administrative law doctrines that courts have devised in order to alleviate constitutional concerns and force courts to address constitutional issues long sidestepped by resort to subconstitutional administrative law. Moreover, the indeterminacy of the constitutional concerns involved makes more direct enforcement quite difficult. Indeed, one lesson to be gleaned from the constitutional character of administrative common law is that a clear divide between constitutional and subconstitutional administrative law may not be possible. These two dimensions have developed in tandem and it is impossible to know the shape either would have taken separately.[248]

On this view, administrative common law operates as a constitutional avoidance doctrine. This means, among other things, that congressional rejection of administrative common law requirements will not be lightly inferred. Just as courts adopt statutory readings that avoid constitutional problems, they will similarly reach for interpreta-

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245 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 866 (1984) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 n.56 (1978)).

246 *See* Farina, *supra* note 199, at 1023–24 (discussing the legitimizing effect of courts' interpretation of statute); Molot, *supra* note 165, at 7–8 (discussing the Founders' view of courts' responsibility to interpret ambiguous statutes).

247 Metzger, *supra* note 2, at 484, 506, 511. For the classic articulation of the phenomenon of constitutional common law, see generally Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

248 Metzger, *supra* note 2, at 516–19.

tions that preserve core administrative common law requirements.[249] More importantly perhaps, it means that courts will continue to develop administrative common law doctrines as new constitutional concerns occur. The Court's contemporary application of federalism-inspired heightened scrutiny in response to aggressive administrative preemption efforts is just one example of this recurring phenomenon.[250] Similarly, Justice Scalia's *Talk America* opinion indicates his belief that the doctrine governing review of agency interpretations of their own regulations is an area in need of constitutionally inspired refinement.[251]

III. THE LEGITIMACY OF ADMINISTRATIVE COMMON LAW

This account of administrative common law's inevitability leaves open the question of its legitimacy. We might fully recognize the pressures that lead courts to play such a lawmaking role, yet insist that courts should stand firm and refuse to develop administrative common law because it represents a constitutionally illegitimate assertion of lawmaking power on the part of the federal courts. But such castigation of administrative common law is unwarranted. Administrative common law is a legitimate and unexceptional form of federal judicial lawmaking.

The challenge to administrative common law derives from the Supreme Court's famous statement, in *Erie Railroad Co. v. Tompkins*,[252] that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law."[253] According to the Court in a later case: "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of federal authority under Art[icle] I mean that federal courts are free to develop a common law to govern . . . until Congress acts."[254] This limitation on federal judicial authority is rooted in large part in constitutional federalism and

249 Indeed, insofar as these requirements claim a basis in the APA, § 559 sanctions such a demand for a clear statement before reading statutes to repeal core administrative law requirements. 5 U.S.C. § 559 (2006) (provisions of the APA "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law").

250 *See supra* note 239 and accompanying text.

251 *See supra* text accompanying notes 91–94.

252 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

253 *Id.* at 78.

254 Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981) (internal citation omitted).

separation of powers principles.[255] Specifically, the federal government is limited to enumerated powers, and its policymaking powers are "vested in the legislative, not the judicial branch of government."[256] The electoral accountability of Congress reflects "the principle that public policy should be made by officials who are answerable to the people through periodic elections."[257] Moreover, Congress operates subject to the rigorous procedural requirements of bicameralism and presentment, which preserves room for state authority by making federal lawmaking difficult.[258] Although the scope of federal lawmaking authority is now quite expansive, constitutional federalism still exists as a constraint on judicial lawmaking.[259] As important, federalism is embodied in the Rules of Decision Act,[260] which the Court in *Erie* held requires federal courts to apply state law "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress."[261]

On this view, judicial development of administrative law doctrines—at least doctrines that go beyond what governing statutes or the Constitution clearly require—appears constitutionally illegitimate. In fact, however, this is not the case. Such judicial development is quite in keeping with other instances of judicial law creation that the Court has sanctioned. Nor is it at odds with the APA or governing statutes. Indeed, given its underlying constitutional character, much administrative common law creation appears analogous to invocation of the constitutional canons in statutory interpretation generally.

A. Federal Common Law and Federal Administration

A defense of administrative common law begins by noting that the Supreme Court has never enforced as absolute a prohibition on the development of federal common law as the foregoing account would suggest. Instead, it has long acknowledged that Congress can

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255 *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13–24 (1985).

256 Nw. Airlines v. Trans. Workers Union of Am., 451 U.S. 77, 95 (1981); *see also Erie*, 304 U.S. at 78; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248 (1996) ("[J]udicial lawmaking [is] a task at least in tension with federal separation of powers.").

257 Merrill, *supra* note 255, at 24.

258 U.S. CONST. art. I, § 7; Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324–25, 1338–42 (2001).

259 Merrill, *supra* note 255, at 15; *see also* Clark, *supra* note 256, at 1249–50 (identifying an additional federalism concern that "the Constitution's reference to the 'supreme Law of the Land'" that displaces state law "does not obviously include federal judge-made law").

260 28 U.S.C. § 1652 (2006).

261 *Erie*, 304 U.S. at 78.

authorize federal courts "to formulate substantive rules of decision,"[262] and that even absent such authorization, federal common law will govern when "necessary to protect uniquely federal interests."[263] According to the Court, the latter "narrow areas" represent "instances [in which] our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control."[264] Although cases presenting such federal interests often involve federal statutes "somewhere in the background," such legislation is too remote to determine the content of the federal rules said to govern.[265] Indeed, some would explain the federal courts' creation of common law in such contexts as "deriv[ing] from the Constitution": state law is preempted because state interests "are constitutionally irrelevant in face of the overriding federal interest" involved.[266]

Federal administrative law satisfies these criteria for when judicial specification of governing rules is justified. To be sure, administrative law is hardly a narrow area or an "enclave."[267] But the courts are not seeking to impose rules that govern primary private conduct, displacing otherwise applicable state law.[268] Instead, what is at issue is judicial formulation of procedural and remedial rules to control the government's actions and to govern judicial review of those actions. The arguments above for allowing federal courts to devise common law apply with full force in this context. Agencies are "authorit[ies] of

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262 Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

263 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964); *see also* Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1942) (holding that the rights and duties of the United States under government-issued commercial paper are governed by federal law fashioned by courts "according to their own standards" in the absence of a governing congressional statute).

264 *Tex. Indus.*, 451 U.S. at 641.

265 Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1037 (1967).

266 *Id.* at 1042; *see also* Clark, *supra* note 256, at 1251 (recasting "enclaves of federal common law" as instances in which federal rules are "consistent with, and frequently required by, the constitutional structure"); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957) ("[B]asic constitutional structure" and "effective [c]onstitutionalism requires recognition . . . of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation."). For discussion of efforts to ground federal common law in the Constitution, see Monaghan, *supra* note 135, at 758–65.

267 *Sabbatino*, 376 U.S. at 426.

268 *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 507–08 (1988).

the Government of the United States,"[269] and the rules governing how they can and must act, as well as how their actions are reviewed, have a profound impact on the federal government's sovereign authority. The Court "has consistently held that federal law governs questions involving the [substantive] rights of the United States arising under nationwide federal programs."[270]

True, the precedents invoked here have involved the proprietary dimensions of federal programs, such as the priority of government liens[271] or the rules governing United States commercial paper.[272] But it is difficult to see why the federal government's sovereign interests would be less implicated when promulgation of a generally governing regulation or binding order is at stake. In both contexts the federal government is exercising "a constitutional function or power,"[273] with the result that "federal interests are sufficiently implicated to warrant the protection of federal law."[274] In addition, uniformity concerns have particular purchase with respect to federal administrative law, which "govern[s] the primary conduct of the United States . . . [and] its agents."[275] Subjecting the federal government to administrative law requirements that vary by state could create real impediments of uncertainty and inconsistency in federal programs.[276]

Indeed, unlike substantive federal common law which frequently incorporates state law as the rule of decision, the Court has repeatedly said that it is inappropriate for state law to control federal administration, and has preempted the application of state tort law on this basis.[277] This antipathy to some state efforts to control federal officials dates back to early decisions such as *McClung v. Silliman*[278] and *Tar-*

269 5 U.S.C. § 551 (2006).

270 United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979).

271 *Id.* at 718.

272 Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1942).

273 *Kimbell*, 440 U.S. at 726 (quoting *Clearfield Trust*, 318 U.S. at 366–67).

274 *Id.* at 727.

275 O'Melveny & Myers v. FDIC, 512 U.S. 79, 88 (1994).

276 To be sure, similar inconsistency may exist if different lower federal courts adopt different approaches to governing statutes or regulations, but such conflict at least can be potentially resolved by the Supreme Court or by doctrinal frameworks such as *Chevron*. *See* Strauss, *supra* note 117, at 1121 (viewing *Chevron* as a means of securing "national uniformity in the administration of national statutes" in a world of constrained judicial resources).

277 *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001) (describing relationship between federal agency and entity it regulates as "inherently federal in character" and emphasizing that "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied" (internal citation omitted)).

278 McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821).

ble's Case,[279] in which the Court rejected state assertions of habeas and mandamus power over federal officials as inappropriate intrusions of state judicial process into the federal domain.[280] True, state tort actions against federal officers also have a long history, and a categorical constitutional bar on all state remedies against federal officers for violations of substantive law would be difficult to sustain.[281] But this caselaw demonstrates that uniformity concerns and the need to protect federal sovereignty are considered particularly strong with respect to efforts to set aside federal administrative action or control federal actions in the future. Such efforts are at the core of modern administrative law, and thus this precedent offers substantial support for concluding that federal administration represents an appropriate occasion for fashioning federal common law. In Professor Paul Mishkin's words, *Erie*'s prohibition on federal courts' derivation of general common law in favor of application of state law "is not controlling on problems implicated in the operation of a congressional program. . . . As to such questions, state law cannot govern of its own force; there must be competence in the federal judiciary to declare the governing law."[282] Mishkin was referring to declaring the governing substantive law, but his analysis applies a fortiori to matters of agency organization and process.

Separation of powers principles similarly offer no obstacle to judicial development of administrative law. Again, the institutional dimension of administrative law is central. In structuring relationships among agencies and the three branches so as to preserve checks and balances and avoid a single branch's aggrandizement, administrative

279 Tarble's Case, 80 U.S. (13 Wall.) 397 (1871).

280 *Id.* at 407–08 (rejecting state habeas over a federal officer on the ground that the federal and state governments were "distinct and independent . . . within their respective spheres of action" and that "neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy"); *McClung*, 19 U.S. (6 Wheat.) at 604–05 (finding that state court lacks authority to issue a mandamus to a federal official); Richard S. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1386–97 (1964) (discussing the relevant mandamus and injunction-based caselaw). Although these decisions are now often understood as concluding that Congress had prohibited the state actions involved, this determination is based on the fact that federal statutes granted or prohibited federal courts from exercising jurisdiction over similar actions. *See* Metzger, *Federalism*, *supra* note 239, at 60–61. But this reconceptualization does not affect the propriety of federal common law here, which is equally legitimate on the view that mere congressional grant of federal court jurisdiction over federal officials serves to preempt state law actions.

281 *See* Metzger, *Federalism*, *supra* note 239, at 58–64 (analyzing and rejecting such a categorical bar as not constitutionally supportable).

282 Mishkin, *supra* note 266, at 799.

common law actually can advance separation of powers values. It can have a similar effect by fostering effective congressional and presidential controls on administrative action, thereby enhancing political accountability.[283] Although the courts determine which of these values merits greatest protection in different contexts, that feature is also true of constitutional separation of powers jurisprudence.[284] The fact that Congress retains power to overrule judicial administrative law determinations serves as a check on the courts claiming an excessive role for themselves.[285] Moreover, the pattern of administrative common law has not been solely in the direction of judicial self-aggrandizement; instead, numerous administrative law doctrines operate to limit the judicial role.[286] And Congress often sanctions the role the courts play by incorporating provisions for judicial review into regulatory statutes.[287]

Thus, a separation of powers attack on administrative common law must rest on the claim that any law created by the courts, even if loosely tethered to governing statutes and capable of being overridden by Congress, is constitutionally illegitimate. That represents quite a narrow view of the judicial power that has little support in judicial

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283 In a recent article, Professor John Manning critiques such reliance on general separation of powers values, arguing that "the Constitution adopts no freestanding principle of separation of powers. . . . Rather, in the Constitution, the idea of separation of powers . . . reflects many particular decisions about how to allocate and condition the exercise of federal power." Manning, *supra* note 243, at 1944–45. But as Manning himself acknowledges, separation of powers jurisprudence regularly invokes general concerns with ensuring political accountability as well as checks and balances. *Id.* at 1952–58, 1961–71; *see, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010) (emphasizing the importance of accountability through the President); Bowsher v. Synar, 478 U.S. 714, 722–23, 727 (1986) (invoking general principle of separated powers to invalidate congressional role in removal of executive officers); United States v. Nixon, 418 U.S. 683, 707 (1974) (finding that granting the President an absolute privilege for nonmilitary and nondiplomatic confidential information "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Article III"). Indeed, the argument against the legitimacy of federal common law rests on exactly such general inferences from specific separation of powers provisions and general federalism concerns. *See supra* text accompanying notes 254–59.

284 *See Free Enter. Fund*, 130 S. Ct. at 3165–67 (Breyer, J., dissenting) ("[T]he question presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles [(Congress's necessary and proper power to structure the government and the separation of powers' vesting of the executive power in the President)]. And no text, no history, perhaps no precedent provides any clear answer.").

285 *See* Monaghan, *supra* note 247, at 28–30 (emphasizing the congressional-judicial interplay in constitutional common law); *see also* Metzger, *supra* note 2, at 530–34 (emphasizing the greater power of the political branches to respond when constitutional concerns are addressed through administrative action).

286 *See supra* text accompanying notes 122–26.

287 *See, e.g.*, 47 U.S.C. § 402 (2006).

practice.[288] Any number of doctrines—such as preclusion and abstention rules, adherence to stare decisis, or application of substantive canons in statutory interpretation—rest ultimately on judicial lawmaking choices.[289] In particular, the claim that separation of powers principles preclude the federal courts from playing *any* lawmaking role, even in the absence of governing federal statutes or applicable state law, is at odds with current federal common law doctrine. Once it is acknowledged that federal courts can sometimes create law, even if only in limited contexts, then any such absolute separation of powers prohibition becomes untenable and the inquiry shifts to whether a particular instance of judicial lawmaking falls within the acceptable range.

B. *The APA and the Case Against Congressional Displacement of Administrative Common Law*

In light of the foregoing discussion, claims that administrative common law is illegitimate must rest on a much narrower argument: that Congress has precluded such federal judicial development by statute. That Congress can and often has displaced federal common law by statute is uncontested: "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[290]

The APA is the most obvious source of general displacement of administrative common law.[291] Professor John Duffy, who authored the most extensive recent treatment of administrative common law, argues that the APA should have had precisely such a displacing effect.[292] On his account, the APA was intended to be a "'comprehen-

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288 It is also historically contestable. *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776 – 1806*, 101 COLUM. L. REV. 990, 1083 (2001) (analyzing historical understandings of the judicial power to include a common law development role). *But see* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 84 (2001) (disputing Professor Eskridge's claim of historical foundation for a common law approach).

289 *See, e.g.*, Eskridge, *supra* note 288, at 1083 (equitable canons); Levin, *supra* note 47, at 739–40 (preclusion); Manning, *supra* note 288, at 84 (equitable canons); Redish, *supra* note 116, at 75 (abstention); Strauss, *supra* note 112, at 237–40 (stare decisis).

290 Milwaukee v. Illinois, 451 U.S. 304, 314 (1981); *see also* Am. Elec. Power v. Connecticut, 131 S. Ct. 2527, 2537 (2011) (discussing standards for congressional displacement of federal common law).

291 Specific substantive statutes could have such a displacing effect as well, but it would be limited to the development of administrative law doctrines to implement those statutes.

292 Duffy, *supra* note 2, at 130–31.

sive statement of the right, mechanics, and scope of judicial review'" that rendered illegitimate further judicial elaboration and development of administrative law doctrine not thoroughly grounded in the Act's text.[293]

That the APA should be viewed as broadly displacing judicial development of administrative law is far from clear. Unbiased statements about the APA's import at the time of its enactment are hard to find. Duffy argues persuasively that the Attorney General strategically sought to characterize the APA as merely a codification of extant common law rules so as to mitigate the new statute's impact, particularly its expansions of judicial review.[294] Those pushing for a broader reading of the APA, however, appear equally manipulative. According to Professor George Shepherd: "As the [APA]'s enactment became imminent, each party to the negotiations over the bill attempted to create legislative history—to create a record that would cause future reviewing courts to interpret the new statute in a manner that would favor the party."[295] He relates that the House and Senate Committees and members of Congress characterizing the APA as comprehensive were concerned that "the ambiguity of many of the bill's provisions" might lead "later reviewing courts [to] interpret away the bill's teeth," and they sought to foster a more conservative and restrictive account of the Act.[296]

That said, the Court (speaking in the substantive law context) has indicated that "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue."[297] In particular, it has rejected the suggestion that courts should demand "evidence of clear and manifest congressional purpose" to displace federal common law.[298] Moreover, the APA directly addresses when judicial review is

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293 *Id.* at 130 (quoting 92 CONG. REC. 5654, 5649 (1946) (statement of Rep. Walter)).

294 *See* Duffy, *supra* note 2, at 133–34. Even if true, those existing standards were continually evolving. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 945 (2011).

295 George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557, 1662–63 (1996).

296 Davis, *supra* note 1, at 11–12 (arguing that the APA's legislative history demonstrates that its backers intended it to impose minimal requirements and not to be comprehensive); Shepherd, *supra* note 295, at 1673; *see also id.* at 1662–75 (discussing these efforts to create legislative history);.

297 Am. Elec. Power v. Connecticut, 131 S. Ct. 2527, 2537 (2011) (internal quotations and alterations omitted).

298 *Id.*; *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 316–17 (1982) (holding that the "same sort of evidence of a clear and manifest purpose" required for preemption of state law is

available, the scope of review to be applied, and the procedural requirements for certain agency proceedings.[299] As a result, under this test, an argument could be made that the APA should displace most independent creation of administrative common law.

Even so, however, room for judicial development of administrative common law would remain. The APA's text is silent on several key issues, such as the procedures to govern informal adjudication and agency choice of which procedures to use in setting policy.[300] Reading the APA's silences as indicating that these issues should be left to agency discretion requires viewing the statute as a comprehensive and exhaustive statement of judicial review, one designed to displace further judicial development even of issues not expressly addressed. Although the Court sanctioned such a reading with respect to informal adjudication in *Pension Benefit Guarantee Corp. v. LTV Corp.*,[301] this approach appears at least in tension with the APA's own statement that its provisions "do not limit or repeal additional requirements imposed by statute or otherwise recognized by law."[302] At other points, the APA uses terms capable of supporting a broad range of meanings that overlap in potentially conflicting ways—for example, its authorization for courts to set aside "agency action . . . found to be . . . arbitrary, capricious, [or] an abuse of discretion," along with its preclusion of judicial review of "agency action . . . committed to agency discretion by law."[303] As Professor Duffy acknowledges, the APA "did not spell out every detail of administrative law; Congress intentionally wrote some provisions broadly to provide courts with a measure of flexibility in interpreting the Act."[304] According to the Court: "Broadly worded . . . statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition."[305]

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not required for displacement of federal common law because the assumption is "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law").

299 5 U.S.C. §§ 553–57, 701–06 (2006).

300 *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 371 (11th ed. 2011).

301 Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653–56 (1990).

302 *See* 5 U.S.C. § 559 (2006); Davis, *supra* note 1, at 10 (stating that *Vermont Yankee*'s prohibition on administrative common law is "directly and specifically" at odds with 5 U.S.C. § 559).

303 *Compare* 5 U.S.C. § 706(2)(A) (2006), *with id.* § 701(a)(2).

304 Duffy, *supra* note 2, at 130.

305 Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981).

Hence, viewing the APA as displacing administrative common law serves to reframe the debate in statutory interpretation terms, rather than to dispense with judicial development of administrative law. At this point, debates over administrative common law collapse into debates over statutory authorization and appropriate methods of statutory interpretation.[306] One result, however, is that questions about administrative common law's constitutional legitimacy should dissipate.[307] As numerous scholars emphasize, the Constitution vests legislative power in Congress and specifies bicameralism and presentment as the process by which statutes must be enacted, but it "does not say anything explicit about what to do when a dispute arises about what a duly-enacted statute requires or permits."[308]

Equally important, the constitutionally inspired character of much administrative common law supports imposing a more rigorous threshold for finding congressional displacement of such judicial law development. Insofar as administrative common law serves as a mechanism for enforcing constitutional separation of powers or due process principles, it seems more akin to preemption contexts where constitutional federalism concerns have led the Court to demand greater evidence that Congress intended to prevent application of state law.[309] Indeed, given its constitutional underpinnings, administrative common law bears a close resemblance to the use of constitutionally based canons of interpretation and clear statement rules. Just as the Court will not adopt statutory interpretations presenting serious constitutional concerns or that alter the federal-state balance unless

306 *Cf.* FALLON ET AL., *supra* note 101, at 607 ("[T]he fact is that common lawmaking often cannot be sharply distinguished from statutory and constitutional interpretation. As specific evidence of legislative purpose with respect to the issue at hand attenuates, all interpretation shades into judicial lawmaking.").

307 Duffy, *supra* note 2, at 118 ("[S]tatutorily authorized common law—a rule based on an interpretation of a broad, vaguely worded statute . . . presents no theoretical difficulties, for it conforms to the fundamental requirement that federal courts ground their decisional law in some constitutional or statutory text."); Meltzer, *supra* note 164, at 367–68 (discussing the lack of concern by the Court, including by generally textualist members, with using common law approaches to settle preemption questions).

308 David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1573 (1997); *see also* Meltzer, *supra* note 164, at 382 (noting that bicameralism and presentment were not meant to preclude a traditional common law role for the courts); Merrill, *supra* note 255, at 3–7 (discussing the overlapping border between federal common law and regular statutory interpretation).

309 *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); *see also* Am. Elec. Power v. Connecticut, 131 S. Ct. 2527, 2537 (2011) (distinguishing preemption of state law from displacement of federal common law and noting the presumption that applies against preemption); *supra* text accompanying note 195 (analogizing administrative law questions to those involving preemption).

those interpretations are mandated by the plain meaning of a statute, so too should it impose a high threshold before concluding that further judicial development of administrative law is precluded.[310]

Recognizing the constitutional role that administrative common law often plays also supports its legitimacy generally. True, administrative common law doctrines do not represent constitutional enforcement in the more familiar form of outright constitutional invalidation.[311] These doctrines are thus vulnerable to the criticism that they represent unjustified limits on Congress and agencies based on amorphous constitutional concerns as opposed to actual constitutional violations.[312] But that identical complaint can and is raised against the constitutional canons of interpretation and other similar forms of indeterminate constitutional enforcement. Notably, however, the constitutional canons are a frequently invoked doctrinal device, one that the Supreme Court in particular regularly and overtly employs.[313] So long as the Court is willing to sanction use of the constitutional canons, the legitimacy of administrative common law's role as a mechanism for indirect constitutional enforcement is hard to question.

C. *The Limits on Administrative Common Law*

In short, attacks on administrative common law as a constitutionally illegitimate form of judicial lawmaking are unpersuasive. This does not mean that courts have free rein to create administrative law

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310 *E.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2605 (2011) (discussing the constitutional avoidance canon and its limitations).

311 Metzger, *supra* note 2, at 517–18.

312 *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (arguing that the effect of the canon is to create "judge-made constitutional 'penumbra[s]'" and thereby "enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution"); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 89 ("[T]he idea that the court is avoiding a constitutional decision [under the avoidance canon] is illusory. It is in fact making one . . . without the necessity of the full statement of reasons supporting the constitutional decision."); *see also* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 860–64, 875–76 (2000) (noting the concerns about constitutional penumbras voiced by Judge Posner and Professor Schauer and arguing that the canons also illegitimately intrude on the President's Article II power to "take care that the laws be faithfully executed").

313 *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204–06 (2009); *see also* Kelley, *supra* note 312, at 832 (noting that constitutional avoidance has "been repeatedly affirmed to the point that it has achieved rare status as a cardinal principle that is beyond debate" (internal quotation marks omitted)); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1192–93 (2006) (discussing centrality of the avoidance canon).

as they see fit.[314] Some judicial moves may be deemed unsupportable because they simply conflict too much with governing statutes, even acknowledging the legitimacy of judicial development in general. That is a plausible justification for the Court's rejection of the administrative common law created by the lower courts in *Vermont Yankee*[315] and *Milner*.[316] Administrative law scholars have argued that the APA restricts the specific procedures sought in *Vermont Yankee*—crossexamination and discovery—to more formal, on-the-record proceedings.[317] As for *Milner*, FOIA's detailed articulation of nine specific grounds for withholding documents, against the background of Congress's rejection of broader withholding of matters related to internal agency management and clear intent fostering broad disclosure, does not easily allow reading Exemption 2 to extend beyond personnel matters.[318]

In other cases, even seemingly clear text, fairly read, may leave room for judicial development. A contested example here involves the procedural requirements for informal rulemaking in § 553 of the APA. That section speaks in strikingly minimalist terms, allowing notice of rulemaking to be limited to "a description of the subjects and issues involved" and requiring only "a concise general statement of [a rule's] . . . basis and purpose."[319] But the APA also provides additional textual hooks on which courts can base greater notice and explanation requirements, such as the requirement that an "agency . . . give interested persons an opportunity to participate," that an agency "consider[ ] . . . the relevant matter presented," as well as the requirement that courts review and set aside agency actions deemed "arbi-

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314 Professor David Strauss has made this point well in his defense of common law constitutionalism:

> The common law approach explicitly envisions that judges will be influenced by their own views about fairness and social policy. . . . This doesn't mean that judges can do what they want. Judgments of that kind can operate only in limited ways: in the area left open by precedent, or in the circumstances in which it is appropriate to overrule a precedent.

STRAUSS, *supra* note 106, at 45.

315 *See supra* notes 50–52 and accompanying text.

316 *See supra* notes 68–73 and accompanying text.

317 *See* Strauss, *Changing Times*, *supra* note 133, at 1411–12 ("[T]he Court went no further than to reject new procedural requirements that could not be tied to the language of the statute[.]"); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 381–82 (1974) ("There is an important difference between interpreting section 553 creatively and simply disregarding it.").

318 *See* Manning, *supra* note 72, at 26–27 (arguing that the specificity of FOIA indicates clear congressional purpose with respect to how it should be implemented).

319 5 U.S.C. § 553(b)–(c) (2006).

trary" or "capricious."[320] Moreover, the requirement that agencies disclose studies and other documents underlying their decisions gains further statutory reinforcement from FOIA.[321] Constitutional concerns with ensuring fair treatment and use of public power in reasoned ways also support a more expansive approach to § 553.[322] As a result, the high threshold needed to find congressional displacement is not met, and judicial elaboration of notice and explanation requirements remains legitimate.

More significantly, that the practice of administrative common law is constitutionally legitimate and not statutorily precluded says nothing about whether developing administrative common law is a good approach for the courts to pursue. Much of administrative law scholarship is devoted to demonstrating the ill effects of searching judicial review and advocating a far more minimalist judicial approach. On these accounts, judicial review has ossified agency rulemaking and redirected agencies to more ad hoc forms of regulation, administrative law decisions are ideologically driven, and core administrative law doctrines are incoherent and inconsistently applied.[323] These claims, not surprisingly, encounter scholarly rejoinders.[324] In that vein, the discussion above outlined several important benefits of administrative

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320 *Id.* §§ 553(c), 706; *see* Wright, *supra* note 317, at 381 ("Section 553 contemplates that rules will be made through a genuine dialogue between agency experts and concerned members of the public."). For contrary views, see Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that the current judicial doctrine "cannot be squared with the text" of the APA); Beermann & Lawson, *supra* note 55, at 874 (arguing that *Vermont Yankee* holds that courts cannot impose requirements on agencies that are not grounded in clear APA text).

321 *See* Strauss, *supra* note 133, at 1406–07.

322 *See supra* text accompanying notes 235–36; *see also* MCI Telecomm. Corp. v. FCC, 57 F.3d 1136, 1140–41 (D.C. Cir. 1995) ("[The rulemaking notice] requirement serves both (1) 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'; and (2) 'to assure that the agency will have before it the facts and information relevant to a particular administrative problem.'" (quoting Nat'l Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)).

323 *See, e.g.*, *supra* notes 140–41. For critiques of *Chevron*, see generally Beermann, *supra* note 30; Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

324 *See, e.g.*, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 490–91, 522–26, 543–47 (2002) (drawing on the psychology of decisionmaking to argue that arbitrary and capricious review may "improve the overall quality of rules"); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414 (2012) (arguing that claims of ossification of rulemaking are exaggerated); *see also* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 964 (2008) (providing data suggesting that agency rulemaking may not be as ossified as critics have claimed).

common law, such as updating administrative law to contemporary circumstances, ensuring that agencies exercise their discretion in a reasoned fashion, and mediating the demands of congressional and presidential oversight.[325] Yet the extent of the criticism surely justifies some skepticism about whether the benefits of administrative common law are worth the costs.

This suggests a need to distinguish between the practice of administrative common law and the specific doctrines and analyses by which this practice is instantiated. Little is gained by resisting the general practice of administrative common law as ill-conceived, given the central function it now serves as a means by which courts can navigate the tensions created by our constitutional separation of powers system and our current governance needs. But particular doctrines may be ill-conceived, or on experience shown to have harmful effects. For many, one such harmful doctrine is the rigorous scrutiny or "hard look" review often applied to determine if an agency's informal rulemaking determinations represented reasoned decisionmaking.[326] Again, the conclusion that judicial elaboration of the reasoned decisionmaking requirement is legitimate says nothing about whether the Court's current account of what reasoned decisionmaking entails is appropriate. One advantage of acknowledging the legitimacy of administrative common law is that it allows for frank and full judicial discussion of doctrinal innovations that the courts could pursue to address current problems in administrative law.

IV. THE NEED FOR TRANSPARENCY

Administrative common law differs from other instances of federal common law and interpretive tools like the constitutional canons in one important regard: the lack of transparency surrounding its use. To be sure, courts are often not up front about their lawmaking activities, particularly today given frequent popular condemnation of judicial lawmaking.[327] Yet federal courts *do* expressly acknowledge the common law basis of their decisions in cases like *General Dynamics*,[328] which fall into recognized federal common law enclaves. They are also quite overt about their application of the canons, expressly invoking

325 *See supra* text accompanying notes 167–217.

326 *See, e.g.*, McGarrity, *supra* note 140, at 1419–20; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 79–81 (1995).

327 *See* Davis, *supra* note 1, at 5 ("A truly basic fact about the common law is that judges who create new law customarily purport not to."); Sherry, *supra* note 136, at 24.

328 Gen. Dynamics v. United States, 131 S. Ct. 1900, 1906 (2011).

the canon of constitutional avoidance or federalism clear statement rules to justify the statutory interpretations they reach.[329] That openness is strikingly absent when it comes to the practice of administrative common law. As noted above, courts rarely acknowledge the judicially created basis of administrative law doctrines or the constitutional concerns that animate them.[330]

This lack of transparency poses the real legitimacy challenge for administrative common law. Judicial development of administrative law is harder to square with the principle of democratic government if the fact that the courts play this lawmaking role is shielded from public acknowledgement and scrutiny. When judicial choices "are normative, candor allows the public to assess both the appropriateness in general of judges' making such choices and the desirability of the particular normative choice at issue."[331] The reality that judges make normative choices does not mean that they should be free to make such choices without "the sanctions of criticism and condemnation that honest disclosure of their motivation may entail."[332] As Professor Peter Smith has written: "One need not be categorically troubled by judges making . . . normative choices to be troubled by their masking them with purportedly non-normative determinations."[333] Put somewhat differently, lack of judicial candor, more than judicial development, is the real threat to the rule of law, because "the fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders."[334]

Equally significant, lack of candor may impede the political branches' ability to respond effectively to these judicial moves. Members of Congress may perceive administrative law decisions as discrete statutory determinations not meriting response, when in fact these decisions actually reflect broader judicial trends with larger impact. And new statutory enactments that fail to address underlying judicial concerns, especially when those concerns have constitutional roots, are

329 *See, e.g.*, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204–06 (2009); Wyeth v. Levine, 555 U.S. 555, 565 (2009); Solid Waste Agency v. U.S. Army Corps of Eng'rs., 531 U.S. 159, 173–74 (2001).

330 *See supra* text accompanying notes 127–31.

331 Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1483 (2007); *see also* STRAUSS, *supra* note 106, at 45 ("[B]ecause it is legitimate to make judgments about fairness and policy, in a common law system those judgments can be openly avowed and defended—and therefore can be openly criticized.").

332 David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987); *see also* Smith, *supra* note 331, at 1483–84.

333 Smith, *supra* note 331, at 1490.

334 Shapiro, *supra* note 332, at 750.

unlikely to effectively constrain judicial decisionmaking. Lack of transparency about administrative common law creates similar impediments to effective response at the agency level, with agencies limited in their ability to take judicial concerns into account in a way that would minimize future invalidations of administrative actions.

Yet the argument for greater transparency about administrative common law is not without counter. Courts do provide rationales for their administrative law decisions, even if they do not acknowledge these decisions' common law character. As a result, the lack of judicial acknowledgement has not prevented scholars from critiquing the decisions' reasoning or the normative choices underlying administrative law doctrines. Moreover, the rationales courts provide for their decisions may matter less in triggering political response than the interests that these decisions impact.[335] Most importantly, greater transparency about administrative common law might actually lessen constraints on courts and lead to more freewheeling judicial lawmaking, insofar as this transparency signals that such doctrinal development is an accepted ingredient of judicial review of agency action. In particular, the Supreme Court's periodic rejection of administrative common law may represent an effort to rein in lower court administrative law creativity.[336] One need not find administrative common law "categorically troubl[ing]"[337] to think that judicial development of administrative law should occur cautiously and primarily at the highest level, where it is most visible and where clarity, consistency, and uniformity—core administrative common law concerns—are most easily achieved.

In the end, predictions about the beneficial effects of transparency are contested empirical questions about which it may be hard to reach a firm conclusion either way.[338] Nonetheless good reasons exist to be skeptical of such arguments against greater candor. Fully assessing instances of administrative common law entails not simply critiquing judicial reasoning and normative choices, but also assessing whether independent judicial development was the appropriate response in that particular context—a task that is harder to do when courts deny their lawmaking role. Similarly, open acknowledgement

335 *See, e.g.*, Eskridge, *supra* note 178, at 359–67 (examining which interest groups are most successful at obtaining congressional legislation to overrule court decisions).

336 *See* Scalia, *supra* note 117, at 359 (describing *Vermont Yankee* as an effort to rein in the D.C. Circuit and other lower courts).

337 Smith, *supra* note 331, at 1490.

338 Shapiro, *supra* note 332, at 745.

of this judicial role remains important for informed and effective legislative response, even if what ultimately motivates Congress to act is the impact of judicial decisions on politically influential interests.

Fear of opening the door to excessive judicial creativity seems on the surface a more valid concern, but ultimately it too is not persuasive. All the reasons why courts develop administrative common law remain whether the practice is acknowledged or not.[339] If anything, lack of acknowledgement seems likely to make it harder for the Supreme Court to control such development, as lower courts may not flag their creative efforts for the Court's attention and instead cloak them as simply applications of governing doctrines or statutory requirements. Lower courts will also lack guidance on how to understand the Supreme Court's own creations, leading to confusion and potentially broader doctrinal expansion than the Court intended.[340] Similar confusion and uncertainty is created by the Court's decisions rejecting administrative common law, such as *Milner*.[341] Whatever one thinks of the merits of the Court's holding about the scope of FOIA's Exemption 2, its insistence on textualism over consistent judicial practice leaves real questions about the status of other well-established administrative law doctrines whose textual foundations are dubious.[342]

Finally, even if lack of candor does serve to inhibit development of administrative common law, that may not be a good thing. It might well result in courts forgoing valuable improvements and refinements in already extant judicially developed doctrines. Moreover, some of these forgone developments might operate to limit the court's involvement in overseeing administrative agencies in favor of other institutions, and thus better serve concerns with narrowing the judicial role than would a flat rejection of administrative common law.[343]

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339 *See supra* Part II (discussing reasons why administrative common law is inevitable). For this reason, it also seems unlikely that greater candor will lead to courts significantly curtailing their use of administrative common law, or Congress imposing real limits on the practice.

340 *See* Metzger, *Administrative Law*, *supra* note 239, at 2100–01 (stating that the Court should be more open about the extent to which it is applying administrative law doctrines in a special fashion in response to federalism concerns, to avoid spillover of these approaches into other administrative law contexts lacking the federalism dimension).

341 *See supra* notes 68–76 and accompanying text.

342 *See* STRAUSS ET AL., *supra* note 300, at 471.

343 The focus here is on offering a pragmatic defense for more openness about administrative common law. Greater judicial candor about administrative common law could also be justified on less instrumental grounds: The courts' failure to acknowledge the real basis and character of their decisions seems intuitively at odds with their role as impartial and principled decisionmakers. *See* Micah Schwartzmann, *Judicial Sincerity*, 94 VA. L. REV. 987, 990 (2008)

Two examples provide a useful illustration of the costs attached to failure to embrace administrative common law. One involves the issue of how courts should respond to instances of administrative inconsistency and policy change—an area of doctrinal confusion that *Fox*'s resistance to administrative common law is likely to worsen. The second concerns the doctrinal role assigned to regulatory structures and internal administrative practices. Although such structural features currently figure relatively little in judicial review of administrative action, courts could potentially improve judicial review by developing this role further.

A. Administrative Common Law and Agency Policy Change

Consistency in administrative decisionmaking has long posed a challenge for administrative law. The demand of consistency draws upon core values of equality and fairness. It limits the ability of government officials to wield their power arbitrarily or to single out those whom they favor for preferential treatment. It also protects those who justifiably rely on administrative decisions and rulings in choosing how to act.[344] Courts traditionally have identified administrative consistency as an important value, and they continue to do so today.[345] Yet the ability of agencies to alter their policies is equally well established, and for good reason. Precluding policy change would defeat much of the purpose of administrative government; agencies' ability to respond flexibly to changed circumstances and to draw upon their expertise and growing experience would be severely hampered. Insisting that agencies adhere consistently to policy once set would also worsen the political accountability concerns raised by administrative government, as Presidents and politically appointed agency leaders would be bound by policies and priorities set by earlier administrations.[346]

("[J]udges must make public the legal grounds for their decisions to justify the use of collective force that such decisions can entail."); Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 71 HARV. L. REV. 1, 19 (1959).

344 *See* Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1001 (2005).

345 Merrill, *supra* note 41, at 975 (noting that "some factors—such as the importance of longstanding and consistent or contemporaneous administrative constructions—have been invoked as reasons for deferring to executive interpretations for over 150 years"); Strauss, *supra* note 29, at 7–8; *see also* Barnhart v. Walton, 535 U.S. 212, 219–20 (2002) (emphasizing the importance of long-standing agency positions as a factor in favor of deference).

346 *See* Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 133–34 (2011); Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIAMI L. REV. 555, 561–62 (2011); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517–19.

The challenge for administrative law is how best to accommodate these conflicting demands. Over time, a general framework has emerged. First, an agency's statutory interpretations still qualify for deference under *Chevron* even if the agency has changed its view about what the statute means.[347] Although the resultant shifts in statutory meaning may raise rule of law concerns, this conclusion follows from *Chevron*'s determination that interpretation of an ambiguous statute is a policy matter left primarily to the discretion of the implementing agency.[348] Second, the rubric for addressing the acceptability of agency policy changes and claims of agency inconsistency is largely arbitrary and capricious review and the reasoned decisonmaking requirement.[349] Third, agencies may also face procedural constraints on their ability to apply changed policies retroactively.[350]

But beyond this level of general description, uncertainties and tensions appear in the courts' treatment of agency change. Although consistency is not required, some decisions nonetheless identify agency change as a factor counseling in favor of deference for agency statutory interpretations.[351] Some courts have suggested that changed agency interpretations require use of notice and comment procedures,

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347 Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("'[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" (quoting Smiley v. Citibank (S.D.), N. A., 517 U.S. 735, 742 (1996))).

348 Kozel & Pojanowski, *supra* note 346, at 147. In a recent article, Professors Randy Kozel and Jeffrey Pojanowski argue for a distinction between statutory interpretations that rely on prescriptive reasoning about policy and those that rely on expository reasoning about congressional intent or judicial precedent, contending that changed agency interpretations justified in expository terms are at odds with rule of law ideals and should not receive deference. *See id.* at 141–59. But their distinction among different interpretations of ambiguous statutory language is itself in tension with *Chevron*, which instead draws its line between instances of statutory clarity and statutory ambiguity. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Moreover, as they acknowledge, their approach would lead to fundamental alteration in the *Chevron* framework, as all agency interpretations based on expository reasoning (changed or not) would no longer qualify for deference. *See* Kozel & Pujanowski, *supra* note 346, at 159–67.

349 *Brand X Internet Servs.*, 545 U.S. at 981.

350 Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (stating that retroactive rulemaking requires clear statutory authorization); NLRB v. Bell Aerospace Co., 416 U.S. 267, 294–95 (1974) (stating that agencies have broad discretion to choose between rulemaking and adjudication in setting new policy but acknowledging potential reliance constraints); Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1100, 1102–03 (D.C. Cir. 2001) (allowing agency to change governing rule in adjudication but precluding retroactive application to impose liability as manifestly unjust).

351 *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 219–21 (2002) (giving importance to a "long-standing" interpretation); United States v Mead Corp., 533 U.S. 218, 228 (2001) (considering an agency's care, consistency, formality, expertise, and persuasiveness); Skidmore v. Swift & Co.,

while others have rejected that approach.[352] The extent of justification required by agencies has varied, with the Supreme Court at times articulating a "presumption" in favor of adhering to "settled rule[s],"[353] at times demanding little explanation for agency change,[354] and at times suggesting that the extent of explanation required "will depend on the facts of individual cases."[355] This last issue of how much explanation to require for agency change was of course the central issue in *Fox*, with the Court rejecting greater scrutiny of instances of agency change in most situations and basing this conclusion on the APA's failure to distinguish between initial and subsequent policy choices.[356]

Substantively, *Fox*'s openness to agency policy change may represent the best result, but the majority's effort to base this approach on the APA is singularly unpersuasive and confusing. Indeed, the majority's opinion itself shows how little turns on the APA's text here. Although insisting that agency policy change generally does not trigger a need for greater justification, the majority acknowledged that sometimes it does, in particular when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[357] Moreover, an agency ordinarily must "display awareness that it *is* changing position."[358] But the APA nowhere expressly states that agencies must acknowledge change, that factual variation requires explanation, or that serious reliance interests must be taken into account.[359] Instead, the issue is de-

323 U.S. 134, 140 (1944) (weighing thoroughness, validity, consistency, and persuasiveness of agency interpretations).

352 *Compare* Alaska Prof'l Hunters Assoc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (notice and comment required), *with* United States v. Magnesium Corp. of Am., 616 F.3d 1129, 1140–41 (10th Cir. 2010) (notice and comment not required).

353 Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. Of Trade, 412 U.S. 800, 808 (1973); *see also* Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (quoting *Atchinson* and stating: "Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

354 *Brand X Internet Servs.*, 545 U.S. at 981–82.

355 Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993).

356 *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009). The question of what standard of review governs agency changes in the form of revocations of rules was also addressed in *State Farm*, 433 U.S. at 40–42.

357 *Fox*, 556 U.S. at 514–15.

358 *Id.*

359 *See* 5 U.S.C. § 706 (2006).

termining what "arbitrary, capricious, or an abuse of discretion" means in specific contexts of agency policy change.[360]

More importantly, the majority's opinion obscures the fact that administrative common law is the mechanism by which courts have addressed the problem of agency policy change and agency inconsistency. And necessarily so. Determining the appropriate judicial response to agency policy change involves balancing conflicting values that are difficult to fully grasp in the abstract or capture in a statutory formulation. In addition, views about how these concerns balance—how much weight to give to political control and agency flexibility compared to fairness concerns and the danger of administrative irrationality—are themselves subject to change over time and context.

Openly acknowledging the role of administrative common law here would have allowed the Court to offer greater guidance to lower courts facing future instances of agency change. The Court's longstanding difficulty in devising a clear approach to agency policy change—its own inconsistency towards agency inconsistency—is strong evidence that the issue is not likely to be definitively resolved through a single decision.[361] Hence, lower courts will need to chart a path that distinguishes between acceptable and unjustified instances of agency inconsistency. Had the Court been more forthcoming about the common law character of consistency doctrines, it could have better signaled what considerations might be relevant in making this distinction. Although *Fox* identified two relevant factors—whether the initial policy was fact-based and whether it had engendered serious reliance—it offered little assistance on how courts should take these factors into account.[362] Even less insight was provided as to whether any additional considerations might affect judicial review of agency change.

Yet another reason to acknowledge administrative common law is that underlying the question of how to review agency policy changes lies disagreement about the appropriate role politics should play in agency reasoning. Not surprisingly, politics is often a major force behind agency policy changes. Judges who are more willing to allow agencies to change their policies often defend politics as a legitimate

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360 *Id.* § 706(2)(A).

361 *See, e.g.*, Watts, *supra* note 110, at 21–23 (discussing the multiple standards that the Court has applied when reviewing agency policy change.).

362 *See Fox*, 556 U.S. at 514–15.

criterion for agencies to consider.[363] At other times, judicial rejection of such changes appears to stem from judicial perceptions of excessively politicized agency decisionmaking.[364] This dispute over the appropriate role of politics in administrative policymaking admits of no easy answers. On both sides are serious constitutional accountability concerns as well as pragmatic considerations about the impact on agency functioning and the institution of judicial review.[365] It seems quite unlikely that courts will be able to reach agreement on whether and how to incorporate politics in judicial review unless they engage this issue in a forthrightly case-by-case, common law manner.

B. Administrative Common Law and Agency Structure

Failure to embrace administrative common law thus represents a lost opportunity for greater clarity in developing doctrine on agency policy change. That failure also means that courts may forgo developing doctrine in useful directions altogether. An example is the courts' current muted response to agency structure and other internal features of the regulatory process.

Administrative structure is an increasing focus of academic scholarship. Political scientists have long analyzed structural characteristics of agencies—such as an agency's location in the executive branch, its jurisdiction, and its internal organization—as ex ante mechanisms by which Congress seeks to control future agency action.[366] Similarly, administrative law scholarship has studied the impact of removal restric-

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363 *See id.* at 522–24 (Scalia, J., plurality); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

364 *See Fox*, 556 U.S. at 546–47 (Breyer, J., dissenting); Freeman & Vermeule, *supra* note 216, at 54.

365 The extent to which agencies can and should acknowledge the political factors that play into their decisions is an ongoing issue of scholarly debate. *Compare* Watts, *supra* note 110, at 8–9 (arguing that certain political influences should be considered valid reasons for agency action under arbitrary and capriciousness review), Levin, *supra* note 346, at 562 (agreeing with Watts), *and* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decisionmaking*, 108 MICH. L. REV. 1127, 1172–74 (2010) (suggesting that courts should be particularly deferential to agency decisions that reflect presidential value choices but emphasizing the need for greater transparency and resisting political influence on technical or legal assessments), *with* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849 (2012) (rejecting overt consideration of politics), *and* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capriciousness Review* (FSU College of Law, Pub. Law Research Paper No. 565), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961753.

366 *See, e.g.*, Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63 (1995); Macey, *supra* note 158, at 94. According to Professor David Spence, sometimes the aim of such controls is to affect an agency's policy preferences and sometimes it is to give authority to agencies known already to have particular policy inclinations. *See* Spence, *supra* note 153, at 416–17.

tions and other structural independence protections on agency functioning.[367] More recently, administrative law scholars have produced an abundance of work analyzing the effect of different regulatory structures, including assigning different agencies overlapping regulatory responsibilities, employing joint rulemaking, requiring interagency consultation and coordination, imposing statutory deadlines, and the like.[368] Constitutional law theorists have gotten into the act too, examining the implications of different internal agency structures for separation of powers and other constitutional concerns.[369]

Similar attention to agency design is evident in the political arena. Administrative structure was a central focus of the major financial and health care reforms of President Obama's first term. Political battles were waged—and continue to be waged—over the placement and structure of the new Bureau of Consumer Financial Protection.[370] In the health reform context, it was the structural relationships between the federal and state governments that dominated, particularly with respect to state health exchanges and other key new regulatory responsibilities.[371] For example, the Department of Health and Human Services ("HHS") is instructed to consult with an association of state insurance commissioners and other state stakeholders on a variety of issues central to implementation of the Patient Protection and Afford-

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367 *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27–30 (2010) (summarizing doctrinal dimensions of removal power); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 463 (2008) (discussing political dimensions of removal power).

368 *See, e.g.*, Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 750–65 (2011) (highlighting the scope and breadth of interagency interactions); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2298 (2005) (describing interagency lobbying as a "widespread, but relatively invisible" dynamic); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *supra* note 160; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181 (2011); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1699–700 (2006) (considering interagency interactions between intelligence agencies); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1461–83 (2011) (examining interactions of multiple agents as a mechanism for information gathering).

369 *See* Barkow, *supra* note 367, at 31–32; Neal Kumar Katyal, *Toward Internal Separation of Powers*, 116 YALE L.J. Pocket Part 106, 109–10 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L J. 423, 435–37 (2009).

370 Barkow, *supra* note 367, at 72–78; Edward Wyatt, *White House Pushes Vote on Consumer Agency Chief*, N.Y. TIMES, Dec. 8, 2011, at B1.

371 Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 572–81 (2011).

able Care Act ("ACA"), and in some cases must defer to the association's determinations.[372]

But there is one place where this focus on administrative structure and institutional design has yet to permeate as deeply: judicial review of agency action, particularly at the Supreme Court. Sometimes administrative structure is simply ignored and does not enter judicial analysis, other than perhaps in the description of background. A prominent example is *Whitman v. American Trucking Ass'n*.[373] There, the Court made barely any mention of the fact that the Clean Air Act requires the EPA to explain any departure from air pollution emission levels recommended by a statutorily created Clean Air Scientific Advisory Committee ("CASAC") in assessing whether the agency's authority to set emission limits was unconstitutionally broad.[374] When courts do take administrative structure into account, they often take a simplistic approach, frequently relying on overlapping regulatory responsibilities as grounds to deny agencies deference or presuming that only one agency has law-interpreting authority—what Professor Jacob Gersen has termed a presumption of exclusive jurisdiction.[375] Missing from this account is a more sophisticated assessment of whether such administrative structures and regulatory designs might support greater judicial deference. Courts also rarely discuss the impact that different administrative law doctrines have on agency structures and on how agency decisions get made.[376]

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372 *Id.* at 578–79.

373 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

374 *See id.* at 470. CASAC's determinations were featured more prominently in the D.C. Circuit's decision on remand, which sustained the air pollution standards at issue against the charge that they were arbitrary and capricious. *See* Am. Trucking Ass'ns v. EPA, 283 F.3d 355, 377 (D.C. Cir. 2002); *see also* Peter L. Strauss, *On Capturing the Possible Significance of Institutional Design and Ethos*, 61 ADMIN. L. REV. 259, 262–71 (2009) (noting the lack of attention given institutional design in *Whitman* and in the Court's earlier decision in *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980)); Adrian Vermeule, *The Parliament of the Experts*, 58 DUKE L.J. 2231, 2241 (2009) (describing judicial treatment of expert determinations as schizophrenic).

375 Gersen, *supra* note 160, at 355; *see also* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208–10 (2007). A similar simplistic approach is evident in separation of powers contexts, in which courts focus on assessing whether internal constraints and structures unconstitutionally intrude on presidential authority and rarely include the potential separation of powers benefits from such arrangements in checking excessive presidential aggrandizement. *See* Metzger, *supra* note 369, at 428–29.

376 *See* Magill & Vermeule, *supra* note 236, at 1041–56, 1061–72 (2011); *see also* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 242, 258 (arguing that the level of official issuing an interpretation should be key to deference, and faulting *Mead* for instead emphasizing procedures).

Occasionally, Supreme Court decisions engage more fully with agency structure and regulatory design. *Mead* is one instance. There, in denying *Chevron* deference to tariff classification rulings, the Court underscored the lack of centralized control over the rulings, which could be issued by any port-of-entry customs office as well as customs headquarters.[377] A similar concern with centralized agency control over interpretation results from *Mead*'s emphasis on the procedures by which interpretations are promulgated, as notice and comment rulemaking and formal adjudications are more likely to trigger attention from high-level agency officials.[378] Even *Mead*'s engagement with administrative structure is limited, however. Rather than expressly tying deference to whether an interpretation is adopted by an agency's leadership, *Mead* put prime focus on congressional authorization and agency use of more formal procedures, and it gave no weight to the fact that the tariff ruling in question had been issued by central headquarters.[379]

Lower courts have shown more willingness to respond to administrative structure, but their moves are still somewhat limited. Some courts appear to grant greater deference to agency determinations that accord with the views of expert advisory committees and treat determinations that reject such views with more skepticism.[380] Similarly, courts often defer to agencies that rely on views of sister agencies, and favor agency compliance with such views.[381] Courts also appear to give particular weight to the views of sister agencies in assessing whether an agency's decision was reasonable.[382] These moves

377 United States v. Mead Corp., 533 U.S. 218, 233–34 (2001).

378 *See* Magill & Vermeule, *supra* note 236, at 1062–63.

379 *Mead*, 533 U.S. at 238 (noting that the statute did not differentiate between tariff rulings coming from customs headquarters and those issued by different customs offices across the country).

380 *Compare* Coal. of Battery Recyclers Ass'n v. EPA, 604 F.3d 613, 619 (D.C. Cir. 2010) (emphasizing that the EPA cited CASAC and accepted some of its recommendations), *with* Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512, 521 (D.C. Cir. 2009) (criticizing the EPA's failure to adequately explain why it rejected CASAC's recommendation).

381 *See, e.g.*, Wild Fish Conservancy v. Salazar, 628 F.3d 513, 532 (9th Cir. 2010) (disfavoring noncompliance); Am. Bird Conservatory, Inc. v. FCC, 516 F.3d 1027, 1034–35 (D.C. Cir. 2008) (favoring reliance); City of Tacoma v. FERC, 460 F.3d 53, 75 (D.C. Cir. 2006) (same).

382 *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 269 (2006) ("The deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment."); W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 492 (9th Cir. 2011) (faulting the Bureau of Land Management for failing to address concerns of its own experts and its sister agency, the Fish and Wildlife Service); League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1192 (9th Cir. 2002) (faulting Forest Service for failing to "respond[ ] directly to its sister agency's concern[s]" and noting that "[o]ther circuits

linking judicial review to internal structures are not expressly acknowledged as such and often involve statutes which mandate some internal consultation and advice. As a result, they may reflect less independent judicial sensitivity to internal structure and specific agency expertise than judicial enforcement of governing statutes.[383] But there are occasions when courts have put weight on internal features, such as the level of an official issuing an opinion or different agencies' comparative expertise, even when such internal constraints are not statutorily required.[384]

Why have courts been reluctant to take administrative structure into greater account in formulating administrative law doctrines? One central reason is the indeterminacy of administrative structure as an indication of congressional purpose. Congress may delegate overlapping regulatory responsibilities for a number of reasons. Perhaps such a delegation represents an effort to spur development of expertise through administrative competition, but it could equally be an effort to guard against regulatory gaps or a signal that Congress did not intend any agency to claim special implementing authority. While the first account might justify granting deference to agencies for expertise even in such shared regulatory regimes, the second might limit deference to instances when the different agencies involved all agree, and the third militates against granting any deference at all.[385] A second factor may be that courts are ill-equipped to judge the actual effect of different agency structures or assess the adequacy of such structures to improve the quality of agency decisions.[386] This is all the more true

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have held that where sister agencies pose comments such as this, the responsible agency must respond"); Silva v. Lynn, 482 F.2d 1282, 1285–86 (1st Cir. 1973) (faulting Department of Housing and Urban Development ("HUD") for failing to respond to concerns of several sister agencies with "expertise . . . equal to or greater than that of HUD").

383 For example, the Clean Air Act establishes the CASAC, and while the EPA is not bound by the committee, it must explain deviations from committee recommendations. 42 U.S.C. § 7607(d)(3) (2006). Similarly the Endangered Species Act requires federal agencies to consult with either the National Marine Fisheries Service or Fish and Wildlife Service before taking or proposing action that may affect endangered species or habitats. 16 U.S.C. § 1536(a)(2) (2006). Although action agencies need not adhere to the Services' opinions, if they do so they qualify for a safe harbor that exempts them from liability for incidental harm to endangered species. *Id.* § 1536(o)(2); Bennett v. Spear, 520 U.S. 154, 169–70 (1997).

384 *See, e.g.*, Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 696 (D.C. Cir. 1971) (viewing interpretive rulings issued by agency heads as presumptively final); *see also Bennett*, 520 U.S. at 169 (noting action agencies' comparative lack of expertise).

385 *Compare* Gersen, *supra* note 375, at 211–16, 226–27, *with* Marisam, *supra* note 368, at 184.

386 *See, e.g.*, Duff Wilson, *Health Guideline Panels Struggle with Conflicts of Interest*, N.Y. TIMES, Nov. 11, 2011, at B1 (describing the complex web of interactions federal public health panel members have with the health industry).

when agency interactions and consultations are informal and not statutorily mandated. A third explanation is the tension—if not outright conflict—that according weight to administrative structure can create with administrative law normative concerns. Granting deference to multiple agencies' different statutory interpretations risks undermining regulatory consistency, supporting congressional efforts to stack the deck in favor of particular interests may reinforce agency capture, and independence protections may protect administrative expertise at the expense of presidential political accountability.

Yet the courts' resistance to engaging with administrative structure imposes substantial costs as well. As Professors Elizabeth Magill and Adrian Vermeule emphasize, judicial doctrines affect allocations of power within agencies whether courts seek to do so or not.[387] Courts therefore need to at least be aware of the potential structural implications of their decisions. The emphasis on structure in recent regulatory reforms provides another impetus. Under such schemes, courts may have no choice but to begin to grapple with administrative structure in determining how to review agency action. For instance, courts will need to consider how the ACA's federalist structure should affect their review of HHS determinations made under this statute.[388]

As significant, administrative structure can offer courts an untapped resource for improving judicial review. Expert bodies, like CASAC, are often better able to understand the substantive issues involved in a complicated regulatory determination than judges. Their internal position also means that their involvement in reviewing agency decisionmaking may be less disruptive than subsequent judicial review.[389] Scholarship on regulatory structures that employ one agency to check or oversee another—such as statutory requirements that the Federal Energy Regulatory Commission consult environmental agencies in hydropower relicensing decisions—suggests that such structures can help ensure that agencies take crosscutting secondary concerns into account as well as their primary programmatic goals.[390] Courts might therefore subject agency determinations sanctioned by

387 Magill & Vermeule, *supra* note 236, at 1042.

388 *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L. J. 534, 576–77 (2011); Metzger, *supra* note 371, at 579–80.

389 Vermeule, *supra* note 374, at 2274–75.

390 *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 41–45 (2009); DeShazo & Freeman, *supra* note 368, at 2235; Spence, *supra* note 153, at 415–19.

such internal experts or other agencies to less searching scrutiny.[391] Similarly, they might defer to substantive guidelines for certain types of administrative decisionmaking promulgated by the agencies with expertise in that area.[392] For example, they might consider an agency's cost-benefit analysis presumptively adequate if the agency followed the guidelines for cost-benefit analysis promulgated by the Office of Information and Regulatory Affairs, which reviews agency cost-benefit assessments as part of its review of agency rulemaking.[393] Alternatively, courts could use criticism or disapproval of an agency's determinations by another agency, or an agency's failure to adhere to internal recommendations and guidelines, as signals that perhaps more searching scrutiny is in order.

Harnessing administrative structure in this fashion could mitigate the criticisms that courts lack the substantive expertise to review agency determinations sensibly, that courts inject their own ideological and political preferences, and that fear of judicial reversal leads agencies to expend unnecessary time and resources producing extensive justifications for rules.[394] Doing so is not without risks, however. In particular, deferring to agency structure undermines the ability of courts to serve as checks against administrative excesses or regulatory failures. Joint agency decisions may reflect the combined expertise of administrative agencies, or collusive efforts by agencies to aggrandize their collective powers. Agency silence may reflect not acquiescence, but pressure to go along with a President's policy or a sister agency's determinations. Agencies might also seek to manipulate internal experts or other internal measures if these were given special weight in judicial analysis. Courts must also consider whether they are undermining the very structures on which they are relying—either by giving them more weight than Congress intended or by increasing the stakes that turn on such internal regulatory determinations.

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391 *See* DeShazo & Freeman, *supra* note 368, at 2288; Vermeule, *supra* note 374, at 2232; *see also* Freeman & Rossi, *supra* note 368, at 1204–05 (cautioning against affording greater deference simply because of agency consensus, but arguing that "strong agency coordination [will] . . . produce decisions that will tend to attract greater judicial deference").

392 This move is evident in the proposed Regulatory Accountability Act. *See supra* text accompanying note 172.

393 *See* OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-4, GUIDELINES FOR THE CONDUCT OF REGULATORY ANALYSIS (2003); Exec. Order No. 12,866, 3 C.F.R. 638 (1993) *reprinted as amended in* 5 U.S.C. § 601 (2006). For a recent example in which a court independently reviewed an agency's cost-benefit assessments and found them inadequate, see Business Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

394 *See supra* notes 140–41.

Hence, for courts to devise doctrines that derive the potential benefits of administrative structure without creating new liabilities, they will need to be aware of the pragmatic and normative concerns at issue as well as be attentive to statutory design. They will need to move incrementally and revise their emerging doctrines in light of experience and unforeseen consequences. They will need to engage in a dialogue with agencies and the political branches about which administrative arrangements are reliable surrogates for searching judicial review and which instead seem troubling.[395] In short, for courts to make beneficial use of administrative structure, they will need to be open about the fact that they are engaged in a process of developing administrative common law.

CONCLUSION

The goal of this Foreword has been to domesticate administrative common law. Administrative common law is ubiquitous and inevitable. The nature of our separation of powers system and the constitutional tensions raised by modern administrative government ensure that independent judicial development of administrative law doctrines will continue. Moreover, such judicial lawmaking is constitutionally legitimate, reflecting not only the uniquely federal interests at stake, but also the constitutional values that administrative common law advances.

That is not to say that administrative common law is without dangers. A real risk exists that courts will fashion doctrines that are based more on their own policy preferences than governing statutes and fit poorly with the realities of administrative regulation. The way to counter this danger, however, is not to deny courts the power to fashion administrative law—such a denial is often unfounded and likely only to force judicial lawmaking underground. Instead, we should embrace administrative common law and demand that courts be open about their common law efforts. Doing so will not only increase transparency of a core administrative law dynamic, it will allow courts to use their lawmaking powers to take advantage of features, such as administrative structure, that could improve judicial review of administrative action.

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395 Vermeule, *supra* note 374, at 2242 (stating that courts should require agencies departing from expert recommendations to provide justifications for why certain experts are not reliable).