
EMBRACING ADMINISTRATIVE CONSTITUTIONALISM

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Administrative agencies engage in constitutionalism. They resolve questions of statutory meaning and scope that implicate constitutional questions. Even when agencies do not consciously set out to weigh in on constitutional questions, by interpreting and applying statutes that rest on constitutional values, agencies elaborate constitutional meaning.

Should courts and theorists embrace or resist administrative constitutionalism? For those who believe that the courts are the exclusive and final interpreters of the Constitution, it seems natural to oppose it. Thus, over the past forty years, the Supreme Court has resisted administrative constitutionalism. When agencies elaborate constitutional meaning in their interpretation of statutes, the Court has denied them the deference ordinarily required by administrative law doctrine.

In this Article, I argue that administrative constitutionalism should be embraced. The Constitution's vague text must be adapted to changing societal contexts if it is to remain viable. Judicial constitutionalism has adapted the meaning of the Constitution to new societal contexts by adjusting constitutional principles derived from text. This form of constitutionalism, however, is limited in its capacity to update constitutional meaning. Justices are more than ever detached from the changing societal context, and the People lack the opportunity to engage in informed deliberation about the application of constitutional principles in these new contexts.

Administrative constitutionalism offers a critical supplement to judicial constitutionalism in adapting the Constitution to changing societal contexts. When judicial and agency applications of constitutional principles coexist, a process that I call "constitutional experimentation" takes place. Experimentation advances constitutional adaptation by allowing the operative effects of various constitutional applications to be tested. The People can then pressure courts and agencies to adopt constitutional applications that best advance constitutional principles in particular societal contexts.

INTRODUCTION

In the 2005 case of *Smith v. City of Jackson*,¹ uber-conservative Justice Antonin Scalia found himself in the strange position of advocating a liberal Equal Employment Opportunity Commission ("EEOC") interpretation of a civil rights statute.² The EEOC had interpreted the Age Discrimination in Employment Act ("ADEA")³ to prohibit employment actions that disproportionately injured older workers, even if they were not intentionally discriminatory.⁴ As Justice Scalia pointed out, under the prevailing doctrinal

¹ 544 U.S. 228 (2005).

² *See id.* at 243-47 (Scalia, J., concurring).

³ 29 U.S.C. §§ 621-634 (2012).

⁴ The EEOC regulation states:

standard, the Court should have deferred to the agency's interpretation of the ambiguous statute.⁵ Yet no other Justice joined Scalia's opinion. The other conservative Justices and the four more liberal Justices independently examined the text, purpose, legislative history, and the Court's own precedent to arrive at opposite conclusions about the meaning of the statute.⁶ The one

Any employment practice that adversely affects individuals within the protected age group on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." . . . Whenever the "reasonable factors other than age" defense is raised, the employer bears the burden of production and persuasion to demonstrate the defense.

29 C.F.R. § 1625.7(c)-(d) (2014). *See also* Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47724, 47725 (Sept. 29, 1981) ("Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity.").

⁵ *Smith*, 544 U.S. at 243 (Scalia, J., concurring) (explaining in light of the *Chevron* doctrine, "[t]his is an absolutely classic case for deference to agency interpretation"). The prohibitory text of the ADEA refers to those employer actions that "adversely affect [a person's] status as an employee." 29 U.S.C. § 623(a)(2) (2012). But the very next clause seemingly limits unlawful employer actions to those pursued "because of" an individual's age, a phrase often associated with a motive requirement. *See id.* The congressional statement of purpose provides little additional guidance as it describes in broad terms the ADEA's goal of "promot[ing] employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b) (2012). The legislative history, comprised mostly of a report from the Secretary of Labor, is not any clearer as it emphasizes a concern with "arbitrary" age discrimination without ever differentiating between that which is intentional and that which is effects-based. *See, e.g.*, U.S. DEP'T OF LABOR, *THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT* 58 (1965) (explaining "[t]o the extent that arbitrary discrimination occurs, it can and should be stopped").

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court established that when an agency interpretation has the force of law, the heightened deference framework established in *Chevron* applies. *Id.* at 226-27. This framework requires judicial deference when the statute is ambiguous and the agency's interpretation is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Agency interpretations have the "force of law" and thus are entitled to *Chevron* deference when they are the product of an explicit delegation of congressional authority issued through notice-and-comment rulemaking. *Mead*, 533 U.S. at 227. The EEOC's regulation met this standard. *See* Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. at 47724 (describing the source of the EEOC's regulatory authority and the notice-and-comment rulemaking process for adoption of the regulation).

⁶ *See Smith*, 544 U.S. at 233-41 (plurality opinion) (relying on text, legislative history and precedent to support a narrower disparate impact standard than that established in the EEOC regulation); *id.* at 248-62 (O'Connor, J., concurring) (relying on the "text, legislative history and purposes" to support the argument that the ADEA requires proof of discriminatory intent).

thing on which the seven Justices, besides Justice Scalia, agreed was that the EEOC's interpretation did not merit deference.⁷

The Court's failure to defer in *Smith* was not unique. In fact, the Court has frequently deviated from its own deference doctrine to deny deference to agencies' substantive interpretations of civil rights statutes implicating similar questions. The Court has refused to give any special weight to agencies' statutory interpretations on such issues as the meaning of discrimination, the evidentiary requirements under the disparate impact standard, and the classes of persons entitled to special legal protection as members of discrete and insular groups, apparently because these issues are related to longstanding constitutional controversies.⁸

This pattern represents the Court's resistance to administrative constitutionalism. When agencies resolve questions of statutory meaning that implicate deeper constitutional questions, they are engaged in "administrative constitutionalism"—an administrative process that results in the elaboration of constitutional meaning.⁹ Even if the agencies do not consciously set out to weigh in on constitutional questions, by fleshing out and applying statutes that rest on constitutional values, the agencies are undertaking a form of constitutionalism. The agencies' constitution-based value judgments are not necessarily incorporated into the Constitution itself, but they do become part of our broader constitutional framework and value system advanced by statutes.

As demonstrated in *Smith* and prior cases, the Court has consistently resisted administrative constitutionalism. This resistance does not necessarily arise out

⁷ Justice Rehnquist did not take part in the opinion. Justice Stevens, writing for the plurality, did not even consider the applicability of *Chevron* deference. Justice O'Connor, writing in concurrence, suggested that *Chevron* deference did not apply because the regulation "does not purport to interpret the language of [the relevant statutory provision, section 4(a) of the ADEA]." *Id.* at 264-65. This reasoning is puzzling because as Justice Scalia explained, the EEOC regulation clearly "prohibits employer practices that have a disparate impact on the aged," and the regulation, though directly interpreting section 4(f)(1), clearly references the relevant statutory provision, section 4(a) of the ADEA." *Id.* at 245-46 (Scalia, J., concurring); *see also* 29 C.F.R. § 1625.7.

⁸ *See infra* Part I.B.

⁹ WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 26-27 (2010) (describing administrative constitutionalism as the process by which agencies "consider and interpret the . . . Constitution"); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace*, 96 VA. L. REV. 799, 801 (2010) (defining administrative constitutionalism as "regulatory agencies' interpretation and implementation of constitutional law"); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013) (describing administrative constitutionalism as "encompass[ing] the elaboration of new constitutional understandings by administrative actors"); *see also* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2033 (2011) (arguing that excessive deference "to agencies in individual rights cases" amounts, effectively, to the judiciary's surrender of its "prerogative of declaring constitutional meaning").

of a concern that the agency interpretations of statutes are themselves unconstitutional. In fact, Congress on a few occasions has amended civil rights statutes to restore the agency's interpretation, and the Court has not declared these revised statutes unconstitutional.¹⁰ Rather, such resistance appears to be driven by the Court's view that agencies' elaboration of constitutional meaning is illegitimate.

In this Article, I argue against the judicial stance of resistance, offering a normative case for embracing administrative constitutionalism.¹¹ This case is premised on the need for constitutional adaptation to changing societal contexts—changes in the economy, social structures, technology, and most importantly, public values. Constitutional adaptation, I argue, requires a role for administrative constitutionalism and a process of constitutional experimentation to supplement other forms of adaptation that primarily occur in courts. Judicial constitutional adaptation is limited in ways that make this agency role in constitutionalism critical.

A principal objective of constitutionalism—which I define as the process of elaborating constitutional meaning—is to adapt the Constitution to an evolving society.¹² The Framers of the Constitution recognized the importance of constitutional adaptation when they established a process for amending the Constitution and adopted vague constitutional provisions whose meaning could “be adapted to the various *crises* of human affairs.”¹³ In the absence of viable

¹⁰ See *infra* note 68.

¹¹ Despite the burgeoning literature on administrative constitutionalism, no one has yet offered a comprehensive normative account of this practice. See, e.g., ESKRIDGE & FEREJOHN, *supra* note 9; Lee, *supra* note 9, at 803-05 (focusing on “the history of equal employment rule-making to . . . document and analyze administrators’ constitutional practices”); Metzger, *supra* note 9; Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. CHI. LEGAL F. 223, 227-29 (examining “the Court’s pattern of deference toward . . . agencies’ interpretations of civil rights statutes” vis-à-vis the extent to which such interpretations “implicate active constitutional controversies”); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 3-4 (2000) (examining the relationship between modern free speech libertarianism and courts’ changing beliefs concerning legislators’ and administrators’ capacity to regulate speech); Karen M. Tani, *Administrative Equal Protection: Cooperative Federalism in the Shadow of the Fourteenth Amendment*, 100 CORNELL L. REV. (forthcoming 2015) (analyzing the Social Security Board’s interpretations of the Equal Protection Clause in the mid-twentieth century); *infra* Part I.A. Gillian Metzger identifies some normative challenges and virtues of administrative constitutionalism without taking a firm position on the practice. Metzger, *supra* note 9, at 1916-29. Bill Eskridge and John Ferejohn identify administrative constitutionalism as a tool for entrenching small “c” constitutional norms contained in super-statutes. ESKRIDGE & FEREJOHN, *supra* note 9, at 27-29. Neither account provides a normative defense of administrative constitutionalism as a practice of constitutional meaning elaboration.

¹² See *infra* Part II.A (explaining the critical need for constitutional adaptation).

¹³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819); see U.S. CONST. art. V

opportunities for constitutional amendment, constitutional adaptation has occurred primarily through the elaboration of constitutional meaning to suit new settings.¹⁴

The process of updating constitutional meaning occurs through three distinct modes of constitutional analysis: the interpretation of constitutional text, the derivation of constitutional principles, and the application of constitutional text and principles to specific disputes.¹⁵ Interpretation is the process of discovering the meaning of ambiguous text when the text has a limited number of possible meanings.¹⁶ For example, the text of the Second Amendment is ambiguous in that it could refer either to an individual or collective right to bear arms.¹⁷ Courts can select between alternative readings of ambiguous text by looking to the surrounding textual context, contemporaneous usage of the text, and legislators' statements of intent.¹⁸

Some text, however, is not susceptible to interpretation because it is so vague and open-ended that it has a great number of potential readings.¹⁹ In the case of vague and under-determined text, ordinary tools of interpretation cannot provide a determinate answer about constitutional meaning. Instead, courts derive principles that animate the text from sources as diverse as the Framers' statements of purpose, social movements' expressions of constitutional objectives, and Americans' generalized sense of justice.²⁰ For

(establishing the amendment process); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 120 (2013) (suggesting that the drafters of the Constitution chose vague terms because they "realize[d] that the resolution of a future problem will depend on specific factual circumstances that cannot be specified in advance and therefore must be decided by others"); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 3 (2001) ("[W]e should regard the Constitution's abstract provisions not as coded messages from the past which deprive Americans of the power to govern themselves, but as invitations which call upon Americans to exercise their own best judgment about moral and political principles.").

¹⁴ See *infra* Part II.A-D.

¹⁵ This three-part framework of constitutionalism is an amalgamation of the many two-part frameworks of constitutionalism. See *infra* Part II.B.

¹⁶ KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT & JUDICIAL REVIEW* 5 (1999); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95, 100-02 (2010).

¹⁷ The Second Amendment states: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. CONST. amend. II.

¹⁸ In *District of Columbia v. Heller*, both Justice Scalia writing for the majority and Justice Stevens writing for the dissent used these sources to assess the meaning of the Second Amendment. 554 U.S. 570, 576-605, 640-62 (2008).

¹⁹ See Solum, *supra* note 16, at 98 ("[V]agueness refers to the existence of borderline cases: a term is vague if there are cases where the term might or might not apply."); Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL'Y* 599, 611-12 (2004).

²⁰ See *infra* Part II.C (providing examples of constitutional principles and their sources).

example, the Equal Protection Clause's text is vague, and courts have derived various principles from the text, such as the prohibition on caste legislation, the protection of discrete and insular minorities against discrimination, and the proscription on racial classifications.²¹

Finally, both text and principles must be applied. Constitutional applications are the standards, rules, and evidentiary requirements used to resolve specific constitutional disputes. For example, the Court has used the tiers of scrutiny framework to apply the constitutional equal protection principle prohibiting discrimination against discrete and insular minorities.²²

Different institutions have different capacities to use the modes of constitutional analysis to adapt constitutional meaning. Judicial constitutionalism has frequently adapted the Constitution to changing societal contexts by adjusting constitutional principles. Courts adjust constitutional principles by broadening or narrowing them, or shifting them entirely to accord with different points on the textual interpretive spectrum. But there are limits to this court-centered form of adaptation. The combination of the limited political backgrounds of justices, their long tenures on the bench, and partisan judicial entrenchment results in justices who are often considerably removed from changes in societal contexts.²³ In addition, broader public dialogue about constitutional principles in changing societal contexts usually does not engage important questions about the constitutional applications that often shape the principles.²⁴ This can produce constitutional principles that bear little resemblance to that which the People initially agreed upon and continue to promote.

In contrast to courts, agencies update constitutional meaning primarily by shifting their applications of constitutional principles. Agencies are able to update constitutional applications more speedily than courts, and they are more connected to public sentiment and evolving societal settings. Often, agencies' constitutional applications diverge from the Court's. When these two sets of constitutional applications co-exist, a process of constitutional experimentation can occur. The People can compare the operative effects of the different constitutional applications and evaluate them against the relevant constitutional principle. Constitutional adaptation can then occur through the combination of popular engagement and informed dialogue about what applications best advance constitutional principles in a particular societal context, followed by popular pressure on courts and agencies to adopt these applications.

²¹ See *infra* Part II.C.

²² See Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 306-07 (1997) (tracing the origins of the tiers of scrutiny framework to footnote four of *Carolene Products*); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 500 (2004) (linking the tiers of scrutiny with "the invocation of the concern expressed in *Carolene Products* for 'discrete and insular' minorit[ies]").

²³ See *infra* Part II.D.

²⁴ See *infra* Part II.D.

Despite its potential for fostering experimentation and dialogue, some might oppose administrative constitutionalism. In particular, constitutional theory might seem to indicate that agencies are not legitimate constitutional interpreters because they are subject to majoritarian pressures and special interest capture. Others might be concerned that the co-existence of multiple constitutional applications would lead to chaos and confusion about constitutional meaning. I argue that the intuition underlying this resistance is wrong. An important form of agency decision-making, notice-and-comment rulemaking, is deliberative in ways that ameliorate concerns about an agency role in constitutionalism. In addition, when administrative constitutionalism occurs via agencies indirectly applying the Constitution through statutory interpretation and implementation, there is little cause for concern about constitutional chaos and confusion. Courts retain direct control over constitutional meaning, even as agencies flesh out the underlying constitutional values.²⁵

This Article makes the case for embracing administrative constitutionalism in five parts. In Part I, I define administrative constitutionalism and describe the current state of resistance to it. In Part II, I argue that constitutional adaptation is crucial to the viability of the Constitution, and that judicial constitutionalism is limited in its capacity to respond to evolving societal contexts. In Part III, I make the affirmative case for embracing administrative constitutionalism, arguing that it allows for constitutional experimentation and fosters democratic dialogue about constitutional meaning. In Part IV, I address normative objections to administrative constitutionalism. Finally, in Part V, I conclude with a straightforward doctrinal prescription required for a judicial embrace of administrative constitutionalism.

I. RESISTING ADMINISTRATIVE CONSTITUTIONALISM

Constitutional meaning elaboration occurs in administrative agencies. This is one of the central insights from the burgeoning scholarship on administrative constitutionalism.²⁶ While this scholarly insight is new, the practice is not. At least since the beginning of the twentieth century, agencies have been engaging in constitutionalism through the implementation and interpretation of statutes raising constitutional issues.

The judicial response to administrative constitutionalism has evolved. Historical studies show that until the 1950s, the Supreme Court tended to treat agency interpretations of statutes implicating the Constitution the same way it did other agency interpretations. Presuming agency expertise, the Court deferred to administrative elaboration of constitutional meaning through statutory interpretation so long as the agency acted within the bounds of authority delegated to it by Congress. But in the late 1950s, this began to

²⁵ See *infra* Part IV (addressing these two bases for resistance to administrative constitutionalism).

²⁶ See sources cited *supra* note 11.

change. Judicial faith in administrative expertise declined at the same time as the Court increasingly asserted supreme authority over the meaning of the Constitution. These two developments corresponded with a shift from judicial deference to resistance to administrative constitutionalism. In this era of resistance, the Court refused to apply heightened deference frameworks to agency interpretations implicating the Constitution even when the prevailing doctrine suggested that it should. Instead, the Court consistently exercised independent judgment about the meaning of statutes. By resisting administrative constitutionalism, the Court has thus preserved its supreme authority over the Constitution.²⁷

In this Part, I elaborate on these points. First, I define administrative constitutionalism, identify the process by which agencies engage in the practice, and provide empirical examples from the literature. Second, I examine the shifting judicial response to administrative constitutionalism from initial deference to subsequent resistance.

A. *What Is Administrative Constitutionalism?*

Over the past century, administrative agencies have emerged as the key actors responsible for implementing congressional commands contained in statutes.²⁸ Since statutes are often ambiguous due to lack of congressional foresight or unwillingness to address politically delicate issues, agencies implementing statutes often have to interpret them.²⁹ According to our constitutional framework, which grants limited powers to the federal government, Congress can only pass statutes pursuant to authority contained in the Constitution.³⁰ Some bases of authority, such as those contained in the

²⁷ See *infra* Part I.B.

²⁸ See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985) (“[I]t is a defining characteristic of the administrative state that most statutes . . . are delegations to administrative agencies to issue and enforce [congressional] commands.”); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 964 (2001) (“The enactment of numerous federal regulatory statutes . . . has placed enormous authority in the hands of administrative agencies charged by law with responsibility for translating statutory directives into regulatory standards.”).

²⁹ See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987) (explaining that “gaps and ambiguities exist in all statutes” due to lack of legislative deliberation on the matter and changes in the society to which the statute applies); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1730 (2010) (“[S]tatutory interpretation has long been dominated by agencies.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (identifying the two sources of statutory ambiguity: Congress’s lack of clarity about the result it intended and Congress’s decision to leave certain issues to agency resolution).

³⁰ See *United States v. Comstock*, 560 U.S. 126, 133 (2010) (“[T]he Federal

Article I Commerce and Taxing and Spending Clauses, are vague and the Supreme Court has left their meaning very much under-determined.³¹ Under the Commerce Clause, so long as there is some under-determined relationship between the activity regulated by the statute and interstate commerce, the statute is a valid exercise of congressional authority.³² Similarly, under the Spending Clause, so long as statutory conditions on the receipt of federal funds do not cross some under-determined line to coercion, the statute is a valid exercise of congressional authority.³³ When agencies interpret and implement these congressional exercises of authority, there is little in the way of constitutional doctrinal limits on their interpretations of statutes. This is not to say that there are no limits. The Court has pushed back on a few agency interpretations seen as infringing on state authority.³⁴ But typically, the Court is less likely to perceive agency interpretations of statutes governing such issues as health, safety, and the environment as forms of constitutionalism.

But when it comes to congressional enforcement of constitutional rights provisions, such as those contained in the Thirteenth, Fourteenth, and Fifteenth Amendments, a different story emerges. These amendments also tend to be vague; however, courts have developed robust doctrines determining their meanings.³⁵ The judicial requirements established for these amendments lie in

‘[G]overnment is acknowledged by all to be one of enumerated powers,’ which means that ‘[e]very law enacted by Congress must be based on one or more of’ those powers.’ (citation omitted)).

³¹ See U.S. CONST. art. I § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”); U.S. CONST. art. I § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

³² See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (explaining that Congress has the authority to “regulate the channels of interstate commerce . . . the instrumentalities of interstate commerce, and persons or things in interstate commerce [and] activities that substantially affect interstate commerce” (citations omitted)).

³³ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (“The legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))).

³⁴ For example, in two separate cases, the Court declined to defer to the United States Army Corps of Engineers’ interpretation of the Clean Water Act because it infringed on state authority. See *Rapanos v. United States*, 547 U.S. 715, 731-38 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001).

³⁵ This is particularly true of the Fourteenth Amendment, where the Court has extensively and frequently elaborated upon the meaning of the Equal Protection and Due Process Clauses. See, e.g., *Bertrall L. Ross II, Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1582-89, 1592-1608, 1616-33 (2013) (describing the Court’s extensive equal protection jurisprudence over the past half century).

the background when Congress enacts statutes enforcing them. And when agencies interpret ambiguous statutes passed pursuant to congressional enforcement authority under these amendments, they inevitably must make judgments about statutory meaning that are directly relevant to judicial controversies about the meaning of the Constitution. Agencies' constitutional value judgments, made in the process of interpreting statutes, are what I define as "administrative constitutionalism."

When agencies engage in constitutionalism, they often draw explicitly on judicially constructed constitutional doctrine.³⁶ For example, Sophie Lee has shown in her examination of the Federal Communication Commission's ("FCC") administrative constitutionalism in the mid- to late-twentieth century that the agency in defining the reach of statutory non-discrimination requirements drew on doctrine from the Court's constitutional jurisprudence. Specifically, the agency determined that the state action requirement found in the Court's Fourteenth Amendment jurisprudence, which limits the prohibitory reach of the amendment to state actors, also applied to the communications statute's non-discrimination mandate.³⁷ Similarly, Karen Tani has demonstrated in her study of the Social Security Board's administrative constitutionalism in the early- to mid-twentieth century, that when the agency brought federal statutory challenges against restrictive state welfare laws, it employed rational basis scrutiny—the form of scrutiny that the Court applied in its constitutional review of other welfare legislation.³⁸

At times agencies do not explicitly draw on constitutional doctrine either because none exists to address the specific matter or because the agency chooses to ignore what does exist. Even then the agency's statutory interpretation is still informed by broader doctrinal trends. For example, when the EEOC decided whether pregnancy discrimination was a form of sex discrimination under Title VII of the Civil Rights Act, its interpretation was made against the backdrop of the Court's evolving constitutional jurisprudence addressing sex discrimination.³⁹

³⁶ See Metzger, *supra* note 9, at 1897-98 (describing three recent instances of administrative constitutionalism that "involve[d] well-established constitutional requirements" and express agency "engage[ment] with these requirements, relying heavily on Supreme Court constitutional jurisprudence in doing so").

³⁷ See Lee, *supra* note 9, at 814-15 (explaining how FCC attorneys reasoned from Supreme Court state action doctrine cases in their application of the doctrine to broadcasters).

³⁸ See Tani, *supra* note 11, at 18-23, 46-49 (describing the Social Security Board's assertive scrutiny of state welfare laws initially under the Constitution and later through the vehicle of statutory interpretation).

³⁹ See Ross, *supra* note 11, at 259-61 (describing the Court's review of the EEOC interpretive guideline in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), made against the backdrop of an analogous equal protection case decided two years earlier, *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

While agencies tend to draw on judicial doctrine when engaging in administrative constitutionalism, they do not merely mimic judicial constitutionalism. Agencies often creatively interpret judicial doctrine both expansively and narrowly.⁴⁰ Lee shows that the FCC interpreted the Supreme Court's constitutional state action requirement expansively to reach many more actors than the Court would have reached.⁴¹ As a consequence, the FCC imposed statutory equal employment opportunity requirements on a broader set of communications companies than suggested by a less generous reading of judicial state action doctrine. Similarly, Tani reveals that the Social Security Board applied a rational basis standard that was much more rigorous than that of the Court.⁴² As a result, the agency invalidated state welfare laws pursuant to the federal Social Security Act that would likely have been valid under the Court's equal protection standard. Sometimes agencies interpret the Constitution more narrowly than the Court. Reuel Schiller demonstrates how federal and state administrators in the first half of the twentieth century engaged in content-based censorship of broadcast regulations, customs, and the mails on the basis of a narrow construction of the First Amendment right to freedom of speech.⁴³ Similarly, Lee shows how in the 1960s and 1970s, the now-defunct Federal Powers Commission narrowly interpreted the state action doctrine to avoid requiring that utility companies provide equal employment opportunities to racial minorities.⁴⁴

Administrative constitutionalism has thus been a part of the constitutional landscape for many years. Over time, the judicial response to agency elaborations of constitutional meaning has shifted from deference to resistance. In the next section, I describe this evolving judicial response to administrative constitutionalism and identify potential sources of the shift.

B. *From Deference to Resistance: The Judicial Response to Administrative Constitutionalism*

Courts in the early part of the twentieth century tended to defer to agencies implementing and interpreting statutes. This deference arose from a general belief about the separation of the administration of law from politics, reinforced by the image of unelected and expert bureaucrats controlling agency actions.⁴⁵ Courts even deferred to agencies' interpretations of statutes that

⁴⁰ See Lee, *supra* note 9, at 801 ("For the most part, administrative constitutionalism involves . . . *creative interpretation*. Administrators creatively extended or narrowed court doctrine in the absence of clear, judicially defined rules."); Metzger, *supra* note 9, at 1906 (explaining that administrative constitutionalism "often involve[s] administrative officials offering creative interpretations of existing constitutional law").

⁴¹ Lee, *supra* note 9, at 811-16.

⁴² Tani, *supra* note 11, at 20-21.

⁴³ Schiller, *supra* note 11, at 21-51.

⁴⁴ Lee, *supra* note 9, at 844-52.

⁴⁵ See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative*

directly involved the Constitution. Schiller found that courts deferred when federal and state administrative regulations of movies, customs, and the mails clearly implicated the First Amendment right to freedom of speech.⁴⁶ As Schiller explains, courts, “[s]haped by faith in expertise,” trusted administrators “to weigh the constitutional considerations at issue with other public policy concerns.”⁴⁷ So long as the agency acted within the authority delegated to it by Congress, the Court deferred irrespective of the relationship between the agency action and the Constitution.⁴⁸

In the period after the Second World War, courts’ and theorists’ faith in agency expertise declined as they began to realize the increasing influence interest groups exerted upon agency decision-making.⁴⁹ As agencies turned more to notice-and-comment rulemaking as a regulatory tool in the late 1960s—a tool that provided members of the public with greater opportunities to participate in the development of regulations—an interest group representation model supplanted the previously dominant expertise model of administrative law.⁵⁰ Then, once President Ronald Reagan initiated the process of regulatory review of rulemaking in the 1980s, a presidential control model of administrative law in which agency actions were understood to be directed by, or at least accountable to, the President supplemented and partially replaced the interest group representation model.⁵¹ With these shifts, the Court continued to rely on expertise as a justification for deference to agencies⁵² but

State: A Critical Look at the Practice of Presidential Control, 105 MICH. L. REV. 47, 53 (2006) (identifying the early twentieth century dominance of the “expertise” model of administrative law in which agencies through their expertise were considered “better positioned to produce sound regulation and good government than elected officials”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1518-20 (1992) (describing the New Deal era expertise-based justification for agency decisionmaking).

⁴⁶ Schiller, *supra* note 11, at 14-51.

⁴⁷ *Id.* at 21.

⁴⁸ *Id.* at 22 (“[C]onstitutional protection of freedom of expression was subsumed under administrative law. Courts would correct administrators who violated administrative law standards, but the fact that these administrators were regulating speech, as opposed to any other activity, was irrelevant.”).

⁴⁹ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1682-84 (1975).

⁵⁰ See Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 179 (1997) (describing the interest group representation model that dominated in the 1960s and 1970s as one that “conceives of the ideal administrative process as a perfected legislative process, in which all affected interests will be heard by the agency and reasonably accommodated”).

⁵¹ See Bressman & Vandenberg, *supra* note 45, at 53-54 (describing the shift to the presidential control model); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272-2303 (2001) (describing the major features of the presidential control model).

⁵² See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)

appeared less willing to presume that all agency actions arose from expert judgments that exceeded its own. At the same time, the Court, in its decision to grant heightened deference to agency actions, placed greater emphasis on agency accountability to the President.⁵³

The Court's declining emphasis on agency expertise and its growing willingness to see the administration of law in political terms occurred at a time of increasingly forceful judicial assertions of supreme authority to determine the meaning of the Constitution's rights and liberty provisions. This began with the announcement in the famous footnote four of *United States v. Carolene Products Co.*⁵⁴ In that case, a plurality of the Court explained that there would be a narrow presumption of constitutionality when legislation appeared to be within "a specific prohibition . . . of the first ten amendments."⁵⁵ The Court further asserted that it would subject "to more exacting judicial scrutiny" statutes that discriminate against "discrete and insular minorities" or "seriously . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁵⁶

From this assertion of special judicial authority to enforce the Constitution's rights and liberty provisions, the Court went further in the late 1950s when it claimed the supreme status of its constitutional interpretations. In the face of state and local obstruction of its prior equal protection holdings prohibiting school segregation, the Court held in *Cooper v. Aaron*⁵⁷ that its interpretations of the Constitution were like the Constitution itself, "the supreme law of the land."⁵⁸ In the mid-1990s, the Court relied on this assertion of the supreme status of its interpretations of the Constitution to limit congressional authority to give substantive meaning to the Constitution. In its invalidation of statutes providing more expansive equal protection rights to the disabled and the aged than available under judicial doctrine, the Court held, "Congress cannot 'decree the *substance* of the Fourteenth Amendment's restrictions' . . . [because] [t]he ultimate interpretation and determination of the Fourteenth

(justifying heightened judicial deference in part on the basis of the agencies' comparatively greater expertise).

⁵³ See *id.* (justifying heightened judicial deference in part on the basis of the agencies' accountability to the President).

⁵⁴ 304 U.S. 144, 152 n.4 (1938).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 358 U.S. 1 (1958).

⁵⁸ *Id.* at 18 ("Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' . . . Chief Justice Marshall . . . declared in the notable case of *Marbury v. Madison* . . . that 'It is emphatically the province and duty of the judicial department to say what the law is.' . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States." (internal citations omitted)).

Amendment's substantive meaning remains the province of the Judicial Branch."⁵⁹

This assertion of judicial supremacy did not only serve to limit legislative authority to determine the substantive meaning of the Constitution. Combined with the declining judicial faith in agency expertise as a basis for agency action, it also contributed to a shift from judicial deference to resistance to administrative constitutionalism. Schiller's study of the shifting judicial response to administrative censorship shows, consistent with the *Carolene Products* footnote, that the Court in the 1940s began to "strip[] local administrators of their traditional power . . . to exclude speakers from public fora based on the content of their speech" and more closely scrutinize administrative restrictions on speech.⁶⁰ Judicially constructed First Amendment doctrine emerged as a barrier to administrative discretion to suppress speech through censorship in the mid-twentieth century.⁶¹ Similarly, Tani and Lee describe the judicial pushback to the Social Security Board's more rigorous rational basis review of welfare legislation in the 1970s and the FCC's selective interpretation of judicial affirmative action doctrine in the 1990s and 2000s.⁶²

Resistance to administrative constitutionalism has been perhaps most apparent in the Supreme Court's response to agency interpretations of civil rights statutes. When interpreting Titles VI and VII of the Civil Rights Act, the Voting Rights Act, the Age Discrimination in Employment Act, and the American with Disabilities Act, agencies have resolved questions about the meaning of discrimination, the baseline from which to assess discriminatory purpose and effect, and who should be included within the class of "discrete

⁵⁹ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *see also United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("It is thus a 'permanent and indispensable feature of our constitutional system' that 'the federal judiciary is supreme in the exposition of the law of the Constitution.'" (quoting *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995))); *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997) (limiting congressional enforcement power to remedying constitutional violations and not defining the substance of the Constitution). Several cases have applied the *Boerne* standard. *See Tennessee v. Lane*, 541 U.S. 509, 520 (2004); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1, 2 (2003) (describing these decisions as "express[ing] with . . . clarity the Court's claim to an exclusive authority to interpret the Constitution").

⁶⁰ Schiller, *supra* note 11, at 59-66.

⁶¹ *Id.* at 59-70 ("[B]y 1940, the Court had begun to take free speech jurisprudence out from under administrative law.").

⁶² Lee, *supra* note 9, at 875-80; Tani, *supra* note 11 (manuscript at 58) (on file with author) ("Confronted squarely with an equal protection question, the Court rejected the notion that state-level welfare classifications merited anything more than rational basis review under the Fourteenth Amendment.").

and insular” minorities protected by the statutes.⁶³ These agency interpretive judgments were at the core of constitutional controversies about the meaning of equal protection under the Fourteenth Amendment and prohibitions on the denial or abridgement of the right to vote under the Fifteenth Amendment.⁶⁴ To the extent that agencies resolved these questions, they engaged in administrative constitutionalism.

Rather than defer to the expert capacity of agencies to weigh constitutional considerations against other public policy concerns in their interpretation of statutes, as it had done before, the Court resisted administrative constitutionalism. To do so, the Court manipulated deference doctrine. Specifically, the Court consistently deviated from its own doctrinal standards when reviewing agency interpretations at the core of ongoing controversies.⁶⁵ Instead of applying a heightened standard that required deference so long as the agency interpretations were reasonable, the Court applied standards of minimal or no deference that allowed it to independently determine the meaning of the statutes.⁶⁶ When making these independent judgments about statutory meaning, the Court often chose interpretations most consistent with those contained in its own constitutional jurisprudence.⁶⁷

This judicial resistance to administrative constitutionalism cannot be justified on the basis that the agencies’ interpretations were unconstitutional. On the few occasions in which Congress overrode the Court’s rejection of the agency interpretation by enacting legislation adopting the rejected interpretation, the Court did not respond with an invalidation of the statute.⁶⁸ Instead, judicial resistance to administrative constitutionalism is better understood as arising from the combination of the Court’s declining judicial

⁶³ See Ross, *supra* note 11, at 259-82.

⁶⁴ See *id.* (identifying the relationship of these agency determinations to the Court’s concurrent constitutional jurisprudence).

⁶⁵ See *id.* (examining this Supreme Court resistance to administrative constitutionalism from the mid-1970s to the present).

⁶⁶ See *id.* at 235-37, 240-41, 256-59 (contrasting the two heightened deference models that the Court applied to agency interpretations since the 1960s with the Court’s application of minimal or no deference to civil rights agencies’ substantive interpretations of civil rights statutes even in cases in which the heightened deference framework ordinarily applied).

⁶⁷ See *id.* at 259-68 (identifying cases in which the Court rejected the agency interpretation of a civil rights statute in favor of one more consistent with its constitutional jurisprudence).

⁶⁸ See, e.g., Pregnancy Discrimination Act (PDA) of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)) (amending Title VII to restore an EEOC interpretation that the Court rejected in *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976)); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA) of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577, 578 (amending Section 5 of the Voting Rights Act to restore the United States Attorney General’s interpretations that the Court rejected in *Reno v. Bossier Parish School Board (Bossier Parrish II)*, 528 U.S. 320, 324, 341 (2000)).

faith in agency expertise and increasing assertions of judicial supremacy over the Constitution. The Court, in cases in which it resists administrative constitutionalism, does not give much weight to the comparative expertise of agencies. Instead, the Court appears to see itself as the superior interpreter because of the constitutional nature of the statutory question. And while the Court does not explicitly assert its supreme judicial authority over the Constitution in these cases, the Court never contemplates agencies as partners in elaborating constitutional meaning. Instead the Court, through its anchoring of statutory meaning to its interpretation of the Constitution in the face of contrary agency constructions, clearly sees itself as the exclusive elaborator of constitutional meaning.

By resisting administrative constitutionalism, and limiting legislative constitutionalism, the Supreme Court has centralized constitutional meaning elaboration in courts. Such centralization has major costs in terms of one of the principle objectives of constitutionalism—constitutional adaptation to an evolving society. In the next two Parts, I describe these costs and make the affirmative case for a judicial embrace of administrative constitutionalism.

II. CONSTITUTIONAL ADAPTATION AND THE LIMITS OF JUDICIAL CONSTITUTIONALISM

If the Constitution is to remain relevant as a governing legal instrument, it must adapt to changing societal contexts. Courts have been the central institution responsible for adapting constitutional meaning to changes in society. But there are important limits to judicial constitutional adaptation. In this Part, I start by describing the critical need for constitutional adaptation and how judicial elaboration of constitutional meaning is the central tool for such adaptation. I then develop a framework of constitutionalist adaptation and explore how courts engage in the process. I conclude by identifying the limits on judicial constitutional adaptation.

A. *The Critical Need for Constitutional Adaptation*

The Constitution, as Chief Justice John Marshall famously explained in *McCulloch v. Maryland*,⁶⁹ is “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”⁷⁰ The

⁶⁹ 17 U.S. (4 Wheat.) 316 (1819).

⁷⁰ *Id.* at 415. In addition to Justice Marshall, prominent Supreme Court Justices and constitutional theorists have recognized the need for constitutional adaptation to changing societal contexts. *See, e.g.,* *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.) (“[W]e must realize that [the words of the Constitution] have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”); Edward S. Corwin, *Constitution v. Constitutional Theory: The Question of the States v. the Nation*, 19 AM. J. POL. SCI. 290 (1925), *reprinted in* AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD S. CORWIN 99, 108 (Alpheus T. Mason & Gerald Garvey eds., 1970) (“The proper point of view from which to approach the task of

Constitution was written over two hundred years ago to govern a society much different than the one that exists now. A local agrarian economy has been transformed into a national and global industrial-service-technology economy. Trains, planes, and automobiles have replaced the horse and buggy. Mobile phones, e-mails, and tweets have surpassed postal mail and telegraphs as the principal means of communication. Most relevant here, a society that once not only tolerated, but in some contexts embraced, the enslavement of an entire race, the subjugation of women, the vilification of gays and lesbians, and the complete marginalization of other groups has evolved into one that, for the most part, aspires to the equal treatment of all individuals.

The Constitution, according to the language in *McCulloch*, is intended to adapt to the evolving societal context that it governs, including changes to the economy, social structures, technology, and the values of the People. Justice Marshall seemed to recognize early that if the Constitution failed to adapt, its dictates would be subject to public backlash, resistance, and possibly irrelevance.⁷¹

Chief Justice Marshall was not alone in having this foresight. Those who wrote and ratified the original Constitution anticipated that society would change and that the Constitution would need to adapt to respond to such changes. The clearest evidence of the Framers' recognition of the need for constitutional adaptation is their adoption of a process for amending the Constitution.⁷² After the Civil War, those who wrote and ratified the Reconstruction Amendments embraced a second tool of constitutional adaptation when they extended constitutional decision-making authority to Congress. Specifically, Congress was given the power to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments through authorizing legislation.⁷³ While the extent of this authority continues to be disputed, it is clear that the legislature, the institution most responsive to changes in societal context, has the authority to remedy constitutional violations.⁷⁴ Presumably, the shape and scope of such constitutional remedies would evolve with the societal context.

interpreting the [C]onstitution is that of regarding it as a living statute, palpitating with the purpose of the hour, reënacted with every waking breath of the American people . . .").

⁷¹ As one scholar has suggested, "[t]he democratic authority of the Constitution . . . depends upon its *openness* to the constitutional convictions of current generations, and not merely its closure to them." Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1348 (2006).

⁷² Under Article V of the Constitution, the People, through their representatives in Congress or in the state legislature, can propose and secure changes to the Constitution with the acquiescence of a super-majority of the states. U.S. CONST. art. V.

⁷³ See U.S. CONST. amend. XIII, § 2; *id.* at amend. XIV, § 5; *id.* at amend. XV, § 2.

⁷⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 518-20 (1997) (acknowledging congressional authority to remedy constitutional violations).

Finally, and most importantly, those who authored and ratified the Constitution also developed a less explicit tool for constitutional adaptation. They adopted vague language for certain provisions of the Constitution such as “[c]ommerce,”⁷⁵ “[p]rivileges and [i]mmunities,”⁷⁶ “freedom of speech,”⁷⁷ and “cruel and unusual punishment”⁷⁸ in the original Constitution and “due process”⁷⁹ and “equal protection of the laws”⁸⁰ in the Fourteenth Amendment. This choice of vague language was no accident. It was in part a conscious choice to delegate the resolution of the details of constitutional provisions to future generations who would encounter societal contexts that could not be entirely foreseen or anticipated.⁸¹ Soon after the ratification of the Reconstruction Amendments, the Court claimed the authority to resolve constitutional vagueness and judicial constitutionalism emerged as an important tool for constitutional adaptation.⁸²

These three tools of constitutional adaptation—constitutional amendment, congressional constitutional lawmaking, and judicial constitutionalism—differ in their capacities to maintain a Constitution responsive to changing societal contexts. Adaptation through the Article V amendment process has been exceedingly rare. As a consequence of the challenge of obtaining the required super-majority support for passage of an amendment in a heterogeneous and diverse nation, only twenty-seven of them have been adopted since the ratification of the Constitution in the late eighteenth century. The Article V amendment process thus describes a small range of the constitutional adaptation that has occurred over time.⁸³

Constitutional lawmaking in Congress has only served as a partial supplement to the amendment process. Whether characterized as constitutional moments⁸⁴ or super-statutes,⁸⁵ important constitutional adaptations in Congress

⁷⁵ U.S. CONST. art. I, § 8, cl. 3.

⁷⁶ *Id.* at art. IV, § 2, cl. 1.

⁷⁷ *Id.* at amend. I.

⁷⁸ *Id.* at amend. VIII.

⁷⁹ *Id.* at amend. XIV, § 1.

⁸⁰ *Id.*

⁸¹ See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 19 (2011) (“The Fourteenth Amendment’s legislative history in Congress and the ratifying state legislatures confirms that the inclusion of language at a high level of generality was purposeful and was understood to be addressed to a broad problem.”).

⁸² See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75-83 (1872) (resolving the meaning of the Fourteenth Amendment equal protection and privileges and immunities clause claiming “it is not difficult to give a meaning to this clause.”).

⁸³ See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 668 (2009) (“Not only is Article V exclusivity an unattractive conception of constitutional change, but it does not now nor has it ever described our actual constitutional practice.”).

⁸⁴ 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 409 (1998) (describing what constitutes a “constitutional moment”); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1761-88 (2007) (describing the civil rights revolution of the 1950s and

have been limited for two reasons. First, like the constitutional amendment process, congressional constitutional lawmaking is rarely successful because of the difficulty of garnering the necessary level of public support for far-reaching laws in contexts of societal disagreement.⁸⁶ To secure the necessary political support, Congress usually relies on vague and ambiguous language that must later be interpreted.⁸⁷ This leads to a second limit on constitutional adaptation through lawmaking. The Supreme Court has claimed primary statutory interpretive responsibility over vague and ambiguous statutes that implicate constitutional meaning.⁸⁸ When the Court interprets vague and ambiguous constitutional laws, it often chooses interpretations most consistent with values already established in its constitutional jurisprudence.⁸⁹ As a result, through statutory interpretation, many congressional constitutional adaptations have come to resemble judicial constitutional adaptations.

These limits to the Article V amendment process and congressional constitutional lawmaking have left judicial elaboration of vague constitutional language as the primary means of constitutional adaptation.⁹⁰ In the next section, I offer a framework of constitutionalism that provides a basis for

1960s as a constitutional moment).

⁸⁵ William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (defining a “super-statute” as “a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law” including the Constitution itself).

⁸⁶ See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379-80 (2007) (discussing the difficulty of constitutional lawmaking).

⁸⁷ See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421-22 (1989) (offering examples of major acts that Congress left ambiguous and arguing that such ambiguity represents a delegation of lawmaking authority to other institutions responsible for interpreting the statutes).

⁸⁸ The Court has claimed primary statutory interpretive authority over statutes that implicate the Constitution through constitutional avoidance canons, clear statement rules, the constitutional mainstreaming of statutes, and resistance to administrative constitutionalism. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598-610 (1992) (providing a catalogue of clear statement rules and avoidance doctrines used by the courts); Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1219-26 (2011) (describing the process by which the Court chooses interpretations of statutes more consistent with the values that it prioritizes in its constitutional jurisprudence); *supra* Part I.B.

⁸⁹ Ross, *supra* note 88.

⁹⁰ See, e.g., ESKRIDGE & FEREJOHN, *supra* note 9, at 4 (explaining that because the Constitution “is too old to answer most of the looming social, political, and moral questions . . . [and the amendment process] is simply too arduous for any but the most process-oriented changes to the Constitution . . . Constitutional updating, if any, has fallen to the Court”).

understanding the limits on judicial adaptation of constitutional meaning, and the rationale for allowing agencies to supplement courts' role in the process of adaptation.

B. *A Framework of Constitutionalist Adaptation: Text-Principle-Application*

Recent advances in constitutional theory have suggested dividing constitutional meaning elaboration into two parts. Keith Whittington and Lawrence Solum distinguish between interpretation and construction.⁹¹ Richard Fallon separates out interpretation from implementation.⁹² Mitchell Berman favors a distinction between constitutional operative propositions and decision rules.⁹³ And finally, Jack Balkin divides constitutionalism into the categories of text and principle.⁹⁴

Building from these accounts, I argue constitutional meaning elaboration is best understood as being comprised of three components—text, principle, and application. When the text of the Constitution is ambiguous in that it has a limited number of potential meanings, most of the work of constitutional meaning elaboration is at the level of textual interpretation. Interpretation involves an examination of the context and contemporaneous usage of text, textual canons of construction, and statements of intent in the legislative history. For example, the Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁹⁵ The question raised in *District of Columbia v. Heller*⁹⁶ was whether the Amendment protected an individual right to possess a gun or only the rights of person as part of a militia.⁹⁷ The Court spent a considerable amount of time sorting the meaning of ambiguous terms, such as “the people,” the right “to keep and bear arms,” as well as the

⁹¹ WHITTINGTON, *supra* note 16, at 5-12 (describing the distinction between interpretation and construction); Solum, *supra* note 16, at 100-08 (same).

⁹² See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 61-67 (1997) (elaborating upon the distinction between interpreting and implementing the Constitution, finding that “[f]requently, a perfect correspondence could not . . . exist between the meaning of constitutional norms and the doctrinal tests by which those norms are implemented . . . some constitutional norms may be too vague to serve directly as effective rules of law”).

⁹³ Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (defining “constitutional operative propositions” as the “judiciary’s understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision” and “constitutional decision rules” as “doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied”).

⁹⁴ JACK M. BALKIN, *LIVING ORIGINALISM* 14-15 (2011) (explaining the distinct functions of text and principle in the articulation of constitutional meaning).

⁹⁵ U.S. CONST. amend. II.

⁹⁶ 554 U.S. 570 (2008).

⁹⁷ *Id.* at 577 (describing the two competing interpretations of the Second Amendment).

relationship between the prefatory clause and the operative clause.⁹⁸ Justice Scalia, writing for the majority, looked to textualist sources of interpretation to determine what “the people” and “keep and bear arms” referred to in the Amendment.⁹⁹ He also looked to the drafting history to determine the relationship of the prefatory to the operative clauses of the Amendment.¹⁰⁰ The Court ultimately concluded from its interpretation of the text that the Second Amendment protected an individual right to bear arms.¹⁰¹

When the text is under-determined or vague in that there are substantial uncertainties about its meaning, most of the work of constitutional meaning elaboration involves deriving constitutional principles. The Fourteenth Amendment prohibition on the denial “to any person . . . the equal protection of the laws” is a classic example of vague and under-determined constitutional text.¹⁰² The terms “equal” and “protection” and the phrase “equal protection” are open-ended and can be interpreted in an almost unlimited number of ways.¹⁰³ Neither the context of the text, legislative statements of intent, or broader public discussions of the meaning of the Amendment’s terms and phrase provide sufficient insight about the provision’s meaning.¹⁰⁴ As a result, elaboration of the Amendment’s meaning requires the intermediate step of principle derivation.

Constitutional principles can be understood as the general sense of obligation of the constitutional text. They are derived from sources as wide ranging as contemporaneous statements of purpose, contemporary social movement expressions of values, and Americans’ generalized sense of justice.¹⁰⁵ In deriving principles underlying the Equal Protection Clause, courts and scholars have turned to historical sources such as Framers’ statements of

⁹⁸ *Id.* at 579-600.

⁹⁹ *Id.* at 579-84 (relying on other constitutional references to “the people” as well as contemporaneous dictionaries and treatises).

¹⁰⁰ *Id.* at 598-600 (assessing the reason for inclusion of the prefatory provision to the Second Amendment by studying the 1788 ratification debates).

¹⁰¹ *Id.* at 570 (“The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”).

¹⁰² U.S. CONST. amend. XIV, § 1.

¹⁰³ See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1 (1979) (commenting on how the vague provisions of the Constitution are “capable of a great number of different meanings [that] often conflict”); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer’s Social Statics*, 88 MICH. L. REV. 1366, 1367-68 (1990) (arguing that because “the equal protection clause represents a reservoir of [principles] . . . conflicts among competing [principles] may be inevitable”).

¹⁰⁴ See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 9 (1988) (“With . . . few exceptions . . . supporters of the Fourteenth Amendment spent little time elaborating how it would apply to specific issues they faced.”).

¹⁰⁵ See BALKIN, *supra* note 94.

purpose and contemporaneous judicial applications of the clause. In some cases, courts and scholars have supplemented these historical sources with more contemporary sources of meaning arising from social movements and broader societal senses of justice. For example, one of the principles widely accepted as animating the Equal Protection Clause is that it prohibits caste legislation.¹⁰⁶ Over time, this principled prohibition on caste legislation has been supplemented by more specific explanatory principles. In the famous 1938 case of *United States v. Carolene Products Co.*, the Court viewed caste legislation as that which discriminated against “discrete and insular minorities” marginalized from the political process.¹⁰⁷ This explanatory principle, which was both more consistent with and specific than the prohibition on caste legislation, was derived from an evolving societal context in which racial, religious, and other minorities were broadly subjected to discriminatory state actions.

In most cases, neither the text nor the principles derived from the text are specific enough to resolve actual disputes. Instead, both must be applied.¹⁰⁸ Constitutional applications comprise the rules, standards, and evidentiary requirements employed to resolve specific constitutional disputes. When applying more determined text, the Court often employs categorical rules. For example, after the Court in *Heller* found that the Second Amendment protected an individual right to bear arms it proceeded to apply a categorical prohibition on gun restrictions with some narrow exceptions.¹⁰⁹ When applying constitutional principles, the Court tends to use balancing tests and evidentiary rules.¹¹⁰ For example, the Court has applied the prohibition on discrimination

¹⁰⁶ This principle was derived from a statement of the sponsor of the Amendment, Senator Jacob Howard, who explained that the Amendment was intended to “abolish all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.” CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866); see also William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 2, 7-8 (1999) (“Since the late 1960s and early ’70s, leading liberal constitutional law scholars have held that the Fourteenth Amendment embodies an anticaste or equal citizenship principle . . .”).

¹⁰⁷ 304 U.S. 144, 152 n.4 (1938).

¹⁰⁸ See Berman, *supra* note 93, at 10 (explaining that “[a] court cannot implement [an] operative proposition without some sort of procedure . . . for determining whether to *adjudge* the operative proposition satisfied when, as will always be the case, the court lacks unmediated access to the true fact of the matter”).

¹⁰⁹ *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008) (sustaining “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms”).

¹¹⁰ See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 398-428 (2009) (contrasting the Supreme Court’s establishment of a categorical test for the ambiguous Second Amendment with the Court’s creation of balancing tests for the more vague First Amendment freedom of speech but

against discrete and insular minorities through the well-known tiers of scrutiny analysis to determine whether an individual has been the object of constitutionally impermissible or justified discrimination.¹¹¹

At times it is hard to distinguish these three modes of analysis—text, principle, and application.¹¹² While there are no bright lines dividing them, it is nonetheless valuable from the perspective of considering the role of different institutions in constitutional adaptation to think of them separately.¹¹³ In the next section, I describe the major theories of constitutional adaptation, which place courts at the center. I then examine how courts engage in constitutional adaptation through the lens of the text-principle-application framework, before discussing the limits of judicial constitutional adaptation.

C. *Judicial Constitutional Adaptation*

Courts have led the way in adapting the Constitution to changing societal contexts. Two sets of constitutional theorists provide normative support for this judicial role. The first set of theorists—a group I refer to as “court-centered judicial constitutionalists”—focus on judges as the principal agents of constitutional adaptation, particularly with respect to elaborating the meaning of individual rights provisions in evolving societal contexts. The second set of theorists—a group I refer to as “dialogic judicial constitutionalists”—emphasize the role of dialogue between courts and the People in the adaptation of constitutional meaning to new societal contexts.

1. Theories

Court-Centered Judicial Constitutionalism. The court-centered judicial constitutionalists include a range of theorists that span the ideological spectrum. Scholarly defenders of the Warren Court’s activist progressive constitutionalism, such as Ronald Dworkin, Owen Fiss, and Christopher

suggesting that Second Amendment doctrine will likely develop balancing tests).

¹¹¹ See, e.g., Goldberg, *supra* note 22, at 485-91 (describing the Supreme Court’s tiers of scrutiny under the Equal Protection Clause).

¹¹² See Berman, *supra* note 93, at 79 (conceding that “[t]here is no algorithm or litmus-paper test for correctly sorting existing doctrine into operative proposition and decision rule components”) (emphasis omitted). Pragmatist scholars suggest that rights (principles) are inextricably intertwined with remedies (applications) and thus cannot be neatly separated. See Roderick M. Hills, Jr., *The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) (“To talk of some ‘pure’ constitutional principle independent of how some institution . . . implements that value is to talk in empty, metaphysical abstractions.”); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 870-73 (1999) (rejecting a rights essentialist account in which rights and remedies are separate in favor of a rights equilibration account in which rights and remedies are inextricably intertwined).

¹¹³ See, e.g., Berman, *supra* note 93, at 16-17 (suggesting that the division of constitutional doctrine into separate components “is a first step toward identifying the full latitude that Congress should rightly enjoy in the shaping of in-court doctrine”).

Eisgruber, emphasize the function of courts as the American “forum of principle”¹¹⁴ and adjudication as the process by which judges “giv[e] meaning to our public values.”¹¹⁵ According to these theoretical accounts, judges “interpret and apply [the Constitution’s] abstract clauses on the understanding that they invoke moral principles about political decency and justice.”¹¹⁶ Judges do not act on the basis of their own moral principles, but rather on those that “are plausibly attributable to the American people as a whole.”¹¹⁷ While Dworkin, Fiss, and Eisgruber are less explicit about how the Constitution adapts to changing societal contexts, the logical conclusion from their theories of constitutionalism is that as the moral judgments of the American people evolve, the judges’ interpretations of the Constitution evolve in response.

Generally found on the more conservative end of the ideological spectrum, the new originalist approach to constitutional meaning elaboration separates interpretation from construction.¹¹⁸ Judges should interpret ambiguous yet determined text according to the meaning of the text at the time of ratification.¹¹⁹ But when text is vague and under-determined, judges engaging in the interpretive process are limited to offering a broad categorization of prohibited actions.¹²⁰ Judges must therefore supplement constitutional

¹¹⁴ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 516-18 (1981).

¹¹⁵ Fiss, *supra* note 103, at 14 (describing the function of adjudication); *see also* RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 8-11 (1996) (defending the moral reading of the Constitution); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 111-26 (2001) (describing the judicial method in the interpretation of vague constitutional provisions as incorporating the people’s moral views and conceptions of justice).

¹¹⁶ DWORIN, *supra* note 115, at 2; *see also* EISGRUBER, *supra* note 115 at 3 (“[T]he Supreme Court should be understood as a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle.”).

¹¹⁷ EISGRUBER, *supra* note 115, at 126.

¹¹⁸ The new originalists arose in part in response to criticisms about old originalists’ inability to justify widely accepted judicial adaptations of the Constitution. The old originalists argued that courts should interpret the Constitution according to how the Framers expected the Constitution to apply. *See, e.g.*, Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) (advocating an originalist approach that focuses on how the Framers’ intended for the Constitution to apply). But a rigorous application of this approach could not reconcile foundational judicial constructions, such as the Court’s prohibition on race-based school segregation under the Fourteenth Amendment Equal Protection Clause in *Brown v. Board of Education*. *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58-59 (1955) (finding that the Framers of the Fourteenth Amendment did not intend for it to prohibit racial segregation).

¹¹⁹ Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999) (describing original meaning as focused on ascertaining the meaning “that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment”).

¹²⁰ *See* BALKIN, *supra* note 94, at 22 (explaining that vague constitutional text provides a

interpretation with constitutional construction in which they draw from considerations external to the text such as evolving social realities, political principles, and even partisanship.¹²¹ These considerations, the new originalists argue, provide courts with a basis for adapting vague and underdetermined constitutional text to new societal contexts.¹²²

These two approaches are court-centered accounts of constitutional adaptation because they emphasize the role of courts in gauging changes in societal context without any clear channels of public input. In fact, a point of emphasis for these accounts is that judges are uniquely positioned to engage in constitutionalism because of their independence and insulation from the public. As Eisgruber explains, judges “do not have to worry about losing their jobs, and they do not have to struggle to get better jobs.”¹²³ This independence and insulation provides opportunities for judges to engage in principled deliberation in their identification of overlapping consensus about changing social realities and evolving public values and to adapt the meaning of the Constitution accordingly.¹²⁴

Dialogic Judicial Constitutionalist. The dialogic judicial constitutionalists tend to be critical of the court-centered constitutionalist account of constitutional adaptation. These scholars argue that constitutional adaptation occurs through dialogue between the People and the Court about the changing societal context. The dialogic judicial constitutionalists emphasize different forms of dialogue ranging from indirect means of public input via changes in court membership to more direct means of public input through litigation.

The dialogic method with perhaps the deepest historical roots focuses on the role of the people’s representatives in securing a Supreme Court responsive to evolving societal contexts. The so-called replacement theory of constitutional change advanced by political scientist Robert Dahl suggests that the power of the President to appoint and the Senate to confirm judges ensures that judicial decisions are never too far detached from the public’s values.¹²⁵ Judges who

broad framework that “will not be sufficient to decide a wide range of [more specific] controversies”).

¹²¹ KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 209 (1999).

¹²² See Solum, *supra* note 16, at 116-17 (describing constitutional construction as a means for the constitutional meaning to adapt to new societal contexts).

¹²³ EISGRUBER, *supra* note 115, at 4.

¹²⁴ See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 25 (Yale Univ. Press 1986) (1962) (suggesting “courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess”); EISGRUBER, *supra* note 115, at 58 (explaining that, because of life tenure, “[e]ven if politicians and judges are equally moral and equally insightful, it is easier for judges to act on their moral convictions.”).

¹²⁵ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957), reprinted in Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 563, 569-70 (2001); see also Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional*

hail from, and owe their jobs to, the political coalition that appointed them will ordinarily interpret the Constitution in ways responsive to the values of the prevailing political coalition and the people they represent.¹²⁶ When a new political coalition emerges, the Court's constitutional interpretations will eventually evolve in response as new judges are appointed.¹²⁷

Other dialogic constitutionalists focus on the role of more direct forms of dialogue in constitutionalist adaptation. Robert Post and Reva Siegel offer accounts of the role of constitutional culture in the Court's adaptation of constitutional meaning to new societal contexts.¹²⁸ This constitutional culture "rang[es] from the convictions of ordinary citizens about the meaning of their Constitution to the considered constitutional interpretations of those authorized to make law based upon these interpretations."¹²⁹ The Court, in order to avoid backlash and resistance to its judgments, gives weight to constitutional culture in its interpretation of the Constitution.¹³⁰ As constitutional culture evolves or becomes the object of contestation, the Court responds and resolves conflict through constitutional adjudication.¹³¹ In an analogous vein of scholarship, Reva Siegel, Jack Balkin, and Bill Eskridge emphasize the role of social movements in constitutional meaning elaboration.¹³² These social movements

Interpretation, 51 DUKE L.J. 307, 322 (2001) ("The most obvious starting point for thinking about the causes of [changes to constitutional doctrine] is the shifting composition of the Court.").

¹²⁶ See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2609 (2003) (describing the view that "the process of periodic appointments to the judiciary, and particularly to the Supreme Court, ensures some congruity between popular opinion and judicial output").

¹²⁷ See Dahl, *supra* note 125, at 569 (calculating the number of appointments each president could expect given the average length of tenure of Supreme Court justices in the 1950s and observing that these appointments would likely be sufficient to "tip the balance on a normally divided Court").

¹²⁸ See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 83 (2003) ("It is precisely because constitutional law is not autonomous from culture that constitutional law properly evolves as culture evolves."); Siegel, *supra* note 71, at 1350-66 (describing the relationship between constitutional culture and social movement conflict in producing constitutional change).

¹²⁹ Post, *supra* note 128, at 41; see also Siegel, *supra* note 71, at 1325 (defining constitutional culture as "the understandings of role and practices of argument that guide interactions among citizens and officials in matters concerning the Constitution's meaning").

¹³⁰ See Post & Siegel, *supra* note 86, at 374 ("If courts interpret the Constitution in terms that diverge from deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments.").

¹³¹ Post, *supra* note 128, at 54-77.

¹³² See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005) ("Jacksonianism, abolitionism, the labor movement, the second wave of American feminism, the Civil Rights movement, the gay rights movement, and the New Right, to

comprised of a mobilized citizenry shape both how the people understand and how the courts interpret the Constitution.¹³³

Litigation functions as the principal vehicle for transmitting constitutional culture and social movement values to the Court.¹³⁴ By bringing cases, advancing new legal arguments in briefs, and drawing public attention to both the case and the underlying legal arguments, litigants pressure the Court to respond to changes in societal contexts.¹³⁵ And the Court adapts the meaning

name only a few examples, have profoundly shaped judicial interpretations of the American Constitution.”); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946-50 (2006) (focusing on social movements as constitutional disruptors); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 491-508 (2001) [hereinafter Eskridge, *Channeling*] (arguing that identity-based social movements have transformed anti-discrimination law); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002) [hereinafter Eskridge, *Effects*] (arguing “most twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements . . . of the twentieth century”); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 318-26 (2001) (describing how social movements influence constitutional meaning elaboration); Siegel, *supra* note 71, at 1323 (“Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding . . .”).

¹³³ According to Balkin and Siegel,

social movements have the power to change the meaning of law and to alter the normative climate in which laws are interpreted and understood. They can undermine or support the legitimacy of existing practices, dislodge long agreed-upon principles, and nourish new constitutional norms. . . . The push and pull of mobilization and countermobilization produces a new balance of understandings about which practices are socially licit and illicit, and about which exercises of public power are constitutionally legitimate and illegitimate.

Balkin & Siegel, *supra* note 132, at 949.

¹³⁴ See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 242-44 (2008) (describing how the gun rights movement’s claims on the Court shaped a litigation strategy supporting the individual right to bear arms); Siegel, *supra* note 71 at 1366-89 (describing the use of litigation to achieve constitutional change in response to the second wave feminist movement in the 1970s). Dialogic constitutionalists also focus on another way by which social movements influence constitutional meaning: through pressure on the President in the judicial appointment process. See Balkin, *supra* note 132, at 30 (“Through their influence on everyday politics, social movements can influence Presidential appointments to the judiciary, which at the margin, increase the chances that the movement’s constitutional claims will receive a sympathetic ear.”).

¹³⁵ See Eskridge, *Channeling*, *supra* note 132, at 499 (“Social movements can affect constitutional law by generating new kinds of cases and challenging judges to apply or expand existing constitutional rules and precedents to grant relief in those cases.”).

of the Constitution on the basis of the influence of constitutional culture and social movements.¹³⁶

Both the court-centered judicial constitutionalists and the dialogic judicial constitutionalists provide important accounts of constitutional adaptation. Under both accounts, courts are the central actors in adapting constitutional meaning.¹³⁷ Courts are institutionally positioned to engage in principled deliberation about the meaning of the Constitution while accounting for changes in constitutional culture and social movement pressure.¹³⁸

As evidenced in past changes to constitutional doctrine, the Court has adapted the meaning of the Constitution. In the next section, I describe how courts adapt constitutional meaning according to these theories of judicial constitutionalism through the lens of text-principle-application framework.

2. Approach: The Adjustment of Principles

Judicial constitutionalist theories of constitutional adaptation focus on court elaboration of the meaning of vague constitutional text.¹³⁹ But they fail to explicitly recognize that courts primarily update meaning by adopting new constitutional principles, and that judicial applications of principles tend to be especially sticky. In fact, these theories either ignore constitutional applications or fail to differentiate between constitutional principles and applications. For example, the moral constitutionalists ignore constitutional applications focusing on the Court's role in identifying the moral principles of the People and importing these judgments into the meaning of vague phrases like equal protection and due process.¹⁴⁰ The new originalists and the dialogic constitutionalists tend to treat principles and applications as essentially indistinguishable with both sets of theorists focusing more on principles than applications.¹⁴¹

¹³⁶ See, e.g., Siegel, *supra* note 71, at 1403-14 (describing how struggles over the Equal Rights Amendment influenced Supreme Court equal protection gender doctrine).

¹³⁷ See, e.g., Post & Siegel, *supra* note 86, at 379 (“[D]emocratic constitutionalism does not seek to take the Constitution away from courts. Democratic constitutionalism recognizes the essential role of judicially enforced constitutional rights in the American polity.”).

¹³⁸ See *id.* (“[A]djudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning.”).

¹³⁹ See, e.g., Eskridge, *Channeling*, *supra* note 132, at 499-500 (“The post-Reconstruction Constitution is filled with grand phrases—equal protection, due process, freedom of speech—that can be applied in a variety of ways, depending on the case’s context, the legal precedents, and the sympathies of the judge.”).

¹⁴⁰ See DWORKIN, *supra* note 115, at 10-12 (emphasizing the role of judges in constructing moral principles from vague constitutional language); EISGRUBER, *supra* note 115, at 3 (“[W]e should regard the Constitution’s abstract provisions . . . as invitations which call upon Americans to exercise their own best judgment about moral and political principles.”).

¹⁴¹ See BALKIN, *supra* note 94, at 15-16 (acknowledging constitutional applications, but making constitutional principles central to his “text and principles” approach to

Constitutional adaptation, according to the judicial constitutionalist theories, therefore occurs primarily through the adjustment of constitutional principles derived from text. There are often many possible principles that can be derived from vague constitutional text, as constitutional principles tend to be layered from the more general to the more specific.¹⁴² For the more general principles, there are often several possible specific explanatory principles. And for these more specific explanatory principles, there are often even several more possible explanatory principles. And so on. The judicial constitutionalist adjustment in constitutional principles tends to come in the form of the judicial construction of more specific principles, the rejection of specific principle in favor of the broader principle, or a shift to a different principle altogether that is consistent with the text or the more general principle.

The judicial adjustment of constitutional principles under the Fourteenth Amendment offers an example. As described above, the Framers of the Fourteenth Amendment frequently described its purpose as prohibiting caste legislation.¹⁴³ This purpose can be understood as the general principle underlying the text. But in the *Slaughterhouse Cases*,¹⁴⁴ decided four years after the ratification of the Fourteenth Amendment, the Court offered a narrower explanatory principle, describing the Fourteenth Amendment as focused on the “freedom of the African Race . . . from the oppressions of the white men”¹⁴⁵ This explanatory principle was consistent with the text and the general principle but did not extend as far as the general prohibition on caste legislation. In the late nineteenth century, the Court adjusted the principle through a rejection of the narrower explanatory principle in favor of a broader one. In *Yick Wo v. Hopkins*,¹⁴⁶ the Court responded to a constitutional challenge to discriminatory state actions against persons of Chinese descent and held that the Equal Protection Clause encompassed the protection of any person from discrimination on the basis of race, color, or nationality.¹⁴⁷ This explanatory principle was also consistent with the text and general principle, but broader than the explanatory principle offered in the *Slaughterhouse Cases* as it included within the ambit of equal protection scrutiny all members of racial and national origin groups.

constitutionalism); Balkin & Siegel, *supra* note 132, at 946-50 (focusing on how social movements engage in the adaptation of constitutional principles).

¹⁴² See BALKIN, *supra* note 94, at 222 (identifying four different principles that animated the Fourteenth Amendment).

¹⁴³ See *supra* text accompanying note 106.

¹⁴⁴ 83 U.S. (16 Wall.) 36 (1872).

¹⁴⁵ *Id.* at 37.

¹⁴⁶ 118 U.S. 356 (1886).

¹⁴⁷ *Id.* at 369 (“[The Fourteenth Amendment’s] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality”).

Later, in the mid-twentieth century case of *United States v. Carolene Products Co.*, the Court both broadened and narrowed the equal protection explanatory principle established in *Yick Wo*. In response to concerns about discrimination directed at groups other than racial and national origin minorities, the Court extended equal protection scrutiny to other discrete and insular minority groups marginalized in the political process.¹⁴⁸ But it also narrowed somewhat the reach of equal protection by suggesting that it would mostly defer to state actions discriminating against other groups not considered politically marginalized.¹⁴⁹ Finally, in the latter part of the twentieth century, the Court in a series of cases established an anti-classification principle for the Equal Protection Clause that rejects some of the narrower aspects of the *Carolene Products* principle. Rather than limiting equal protection scrutiny to certain marginalized groups, the anti-classification principle extends such scrutiny to any state classification on the basis of race or gender irrespective of whether it harms or benefits the marginalized group.¹⁵⁰

This judicial adjustment of constitutional principle that occurs with respect to many of the vague provisions of the Constitution describes a wide range of constitutional adaptation. But there are important limits to court-centered methods of judicial constitutional adaptation. In the next section, I describe some limits on judicial constitutionalism as a vehicle of constitutional adaptation.

D. *Limits on Judicial Constitutional Adaptation*

1. Limits on Courts

A major assumption underlying court-centered judicial constitutionalism is that members of the Supreme Court are able to account for changes in societal contexts because they are a part of the People themselves. In one respect, this is perhaps more true than ever before. Because of changes in the demographics of the Court, Justices are increasingly able to draw on their experiences as racial, gender, and religious minorities in their constitutional adjudication.¹⁵¹ But in other respects, this is less true than ever before as the Justices hail from an increasingly smaller subset of society. Justices have always been drawn

¹⁴⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁴⁹ *Id.* at 152 (establishing deferential rational basis review as the form of scrutiny relevant to other regulatory legislation).

¹⁵⁰ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (establishing strict scrutiny as the relevant standard of review for all racial classifications); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (declaring intermediate scrutiny as the standard appropriate for all gender classifications).

¹⁵¹ See SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010, at 6-11 (describing the increasing racial, gender, and religious diversity of the Court).

from the more elite classes.¹⁵² Now, however, Justices are being drawn from elite classes with more limited connection to the views and values of the people than they were in the past. Over the last forty years, Elena Kagan is the only Supreme Court Justice who did not serve as a judge prior to her appointment.¹⁵³ The emergence of a *de facto* prerequisite of prior judicial experience has resulted in Justices who are more disconnected from evolving public values since judging demands a certain degree of distance from politics.¹⁵⁴ Concomitantly, there has been a striking decline in the number of Justices who had prior legislative and executive experience—positions of responsibility that tend to require a degree of responsiveness to changing societal contexts.¹⁵⁵ Whereas it was very much the norm prior to the 1950s for presidents to appoint members of Congress, state or local legislators, governors, lieutenant governors, and mayors to the Supreme Court, no member of the current Supreme Court has served in any of these elected positions.¹⁵⁶

The Court's detachment from changing societal contexts is further exacerbated by the Justices' isolation from politics after they are appointed to the Court. "The Justices live and work in relative isolation from major currents of American political, technological, and social life. Their principal sounding

¹⁵² See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 *Nw. U. L. REV.* 145, 189 (1998) ("Justices of the United States Supreme Court . . . are overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities."); see also Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *GEO. L.J.* 1515, 1537 (2010) (observing that once selected, "all Supreme Court Justices—irrespective of their family background—are themselves part of the elite of American society and spend a high proportion of their time with other members of the elite.").

¹⁵³ Peter Baker & Jeff Zeleny, *Obama Said to Pick Solicitor General for Court*, *N.Y. TIMES*, May 10, 2010, at A1.

¹⁵⁴ See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 170 (1999) (arguing that since the Eisenhower Administration, "federal circuit court judges have become the 'darlings' of the selection process"); Lee Epstein et al., *The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the U.S. Supreme Court*, 91 *CALIF. L. REV.* 903, 909-17, 933, 936 (2003) (finding empirically that a norm of prior judicial experience in the Supreme Court selection process emerged in the mid-twentieth century and that the mean number of years of prior judicial service was 9.2 years in 2001).

¹⁵⁵ SMELCER, *supra* note 151, at 22-25 (describing the decline in legislative and executive experience of Supreme Court appointees); see also Epstein et al., *supra* note 154, at 933 ("Between 1789 and 1952, the mean percentage of justices with some political background, either in legislative or executive politics, hovered around 65%. Since 1952, that figure has dropped to 34%.").

¹⁵⁶ Since 1953, only Justices Earl Warren, Lewis Powell, Potter Stewart, and Sandra Day O'Connor served in one of these positions prior to their appointments to the Supreme Court. SMELCER, *supra* note 151, at 22-25; see also Epstein et al., *supra* note 154, at 930-31 (showing the change from 1789-1901 in the percentage of Justices holding elected and non-legal executive or legislative positions before being appointed to the Court).

boards, their law clerks, do little to broaden the Justices' skills or perspectives: clerks have almost no practical experience as lawyers, much less as policymakers, and are drawn from the same legal culture as the Justices themselves."¹⁵⁷ The Justices stay on the Court for an increasingly long time, as Presidents appoint increasingly younger Justices and life tenure obstructs opportunities for the influx of new judicial blood with stronger connections to the evolving society and its values.¹⁵⁸ Given these trends, judges are constrained in their capacity to adapt constitutional meaning to evolving societal contexts.

2. Limits on Dialogue

In addition to institutional limits on courts in the process of adaptation, public dialogue about constitutional meaning is also limited when constitutional adaptation is exclusively in the hands of courts. Both indirect dialogue through the replacement of justices and more direct dialogue through litigation are inadequate in securing judicial constitutional adaptation to changing societal context.

The replacement theories of constitutional adaptation assume that the judicial appointments process will produce a Court more or less responsive to the values of new political coalitions and their constituents.¹⁵⁹ Even if we assume that politicians are able to identify judicial appointees with values that align with theirs, any responsiveness to the values of the national political coalition will occur with a lag, at best.¹⁶⁰ It simply takes time for a new political coalition to secure enough appointments to the Court to change its value orientation. At worst, because of what Jack Balkin and Sanford Levinson term "partisan entrenchment"—"the temporal extension of partisan representation" on the Court beyond the appointing president¹⁶¹—certain national governing coalitions may never be able to appoint enough justices to secure a majority. Long judicial tenures and the choice of justices to

¹⁵⁷ Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 8 (1998) (footnote omitted).

¹⁵⁸ Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 140-41 (showing that the average Supreme Court Justice's tenure has increased from 12.2 years between 1941 and 1970 to 26.1 years from 1971 to 2000).

¹⁵⁹ See *supra* text accompanying notes 125-127.

¹⁶⁰ See Dahl, *supra* note 125, at 580 (acknowledging transitional periods "when the old alliance is disintegrating and the new one is struggling to take control of political institutions" as a source of lags); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 805-07 (1975) (finding a lag period of five years on the basis of an empirical study).

¹⁶¹ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001).

strategically retire when their party is in power have contributed to this problem of partisan entrenchment.¹⁶²

For example, President Richard Nixon's appointment of four Justices in the early 1970s to secure conservative Republican control of the Supreme Court has been temporally extended to the present by long judicial tenures and the strategic retirement of Justices.¹⁶³ Since 1972, Democrat-appointed Justices have not once held a majority of the seats on the Court. This is the longest period in U.S. history in which the appointees of one political party have held a majority of the seats on the Court.¹⁶⁴ This temporal extension of Republican control is particularly troubling for any theory relying on the replacement of Justices for constitutional adaptation when you consider that by the end of President Barack Obama's second term, Democratic presidents will have occupied the White House for sixteen of the last twenty-four years.

In addition to the limits on judicial replacements to secure constitutional adaptation, theories relying on direct dialogue are also constrained. The theories of constitutional adaptation through direct dialogue assume that the public is informed enough to have convictions and to mobilize to influence constitutional meaning through litigation. This assumption is probably more accurate in describing the elite public. But for ordinary members of the public, to the extent that they have convictions or mobilize to influence constitutional meaning, the meaning that they seek to influence is usually at a high level of abstraction.

For example, many of the people and their representatives who mobilized around the feminist movement held a generalized level of hostility toward gender classifications.¹⁶⁵ This translated into a public demand for equal rights for women reflected in the push for an Equal Rights Amendment.¹⁶⁶ This social movement certainly seemed to influence the Court's adaptation of the

¹⁶² See James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1101 (2004) (identifying the problem of strategic retirements in which Justices "time[] their retirements based on which president would nominate their successors").

¹⁶³ See Balkin & Levinson, *supra* note 161, at 1071-72.

¹⁶⁴ See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 41-45 (5th ed. 2008) (providing the party of appointment and tenure of every Justice of the Court through 2007).

¹⁶⁵ See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1687-88 (2005) (describing the shift in social attitudes inspired by the feminist movement from viewing discrimination against women as "natural to invidious").

¹⁶⁶ The Equal Rights Amendment that Congress passed stated: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong., 117 CONG. REC. 35,326 (1971); see also Siegel, *supra* note 71, at 1377-89 (describing the feminist movement triumph with the Equal Rights Amendment in Congress).

Equal Protection Clause in the 1970s, as it brought gender classifications within the ambit of scrutiny under the Equal Protection Clause.¹⁶⁷ But the dialogue between the People and the Court broke down at the level of specific application of the equal protection principle. The People lacked a deep understanding of the options available and their impacts on ameliorating the pernicious effects of certain gender classifications. The more elite lawyers advocated for the application of a higher level of scrutiny to gender classifications as a remedy.¹⁶⁸ But they too lacked information on how effective the application of these higher levels of scrutiny would be in implementing the prohibition on sex classifications or its costs and benefits as compared to alternatives. And ultimately, when the Court chose to apply an intermediate level of scrutiny, the People, their elite advocates, and the Court itself were in the dark about how well the application would protect the constitutional principle.¹⁶⁹ The absence of an informed public limits the capacity for dialogue between the People and the Court to secure a Constitution adapted to changing societal contexts. And as will be discussed further in the next Part, once the Court chooses a particular remedial application, it has been difficult to adjust it through litigation even when the application only weakly advances the constitutional principle.

In sum, constitutional adaptation through judicial constitutionalism leaves important gaps. Members of the Court lack exposure to changing societal contexts, while judicial replacement and litigation are limited as tools for constitutional adaptation. These gaps imply the need for alternative means to sustain the Constitution as an organic governing document. In the next Part, I argue that we should embrace administrative constitutionalism as a supplement to judicial constitutionalism in adapting the Constitution to changing societal contexts.

III. CONSTITUTIONAL EXPERIMENTATION: THE BENEFITS OF EMBRACING ADMINISTRATIVE CONSTITUTIONALISM

Constitutional adaptation can occur not only through the adjustment of constitutional principles, but also through the adjustment in the applications of principles. A certain constitutional application may not be the best way to

¹⁶⁷ See Siegel, *supra* note 71, at 1378 (describing how feminist arguments “helped shape a movement’s transformative understanding of equal citizenship into terms that courts could enforce and the public would recognize as the Constitution”).

¹⁶⁸ See *id.* at 1371 (describing Ruth Bader Ginsburg’s appellate brief in the case of *Reed v. Reed*, 404 U.S. 71 (1971), that made an analogy between race and sex in arguing that heightened scrutiny should be applied to gender classifications).

¹⁶⁹ See, e.g., *Craig v. Boren*, 429 U.S. 190, 220-21 (1976) (Rehnquist, J., dissenting) (complaining that the intermediate scrutiny standard “apparently [came] out of thin air” and that the Court “had enough difficulty with the two standards of review [(rational basis and strict scrutiny)] so as to counsel weightily against the insertion of still another ‘standard’ between those two”).

advance a constitutional principle in a particular societal context. But for reasons related to the rule of law, courts have not shown the same willingness or capacity to adjust constitutional applications. As a result, judicial constitutional applications tend to be sticky; often they persist irrespective of changes to the societal context. In this Part, I argue that agencies can play an important role in adjusting constitutional applications by aiding a process I call “constitutional experimentation.” I start by describing the stickiness of judicial constitutional applications and the costs of such stickiness in terms of constitutional adaptation. I then argue that embracing administrative constitutionalism, which primarily comes in the form of constitutional applications, permits constitutional adaptation through experimentation with different constitutional applications. I conclude this Part by showing how adaptation through constitutional experimentation can overcome some of the limits of court-centered constitutional adaptation.

A. *The Stickiness of Judicial Constitutional Applications*

Constitutional applications are the implementing standards, rules, and evidentiary requirements used to resolve particular constitutional disputes. Often, even at their narrowest level of specificity, constitutional principles can be applied in multiple ways.¹⁷⁰ The choice of constitutional application is a discretionary policy determination about how to implement the constitutional principle. When the Court makes these policy determinations, it not only assesses the effectiveness of constitutional applications in advancing the principle, but also accounts for institutional limits in the use of certain applications.¹⁷¹

For example, in *Washington v. Davis*,¹⁷² the Court considered two potential constitutional applications of the equal protection prohibition on caste legislation: an evidentiary requirement that challengers prove the state action was motivated by a discriminatory purpose or one that required a showing that the state action had a discriminatory impact and could not be adequately justified.¹⁷³ In choosing the discriminatory purpose standard, the Court

¹⁷⁰ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (suggesting that even when we agree on principles (concepts), there can still be disagreement over what applications (conceptions) “ought to be adopted to realize that [principle]”).

¹⁷¹ See Berman, *supra* note 93, at 92-95 (describing the institutional considerations that go into the construction of what he refers to as “decision rules” and what I refer to as constitutional applications); Fallon, *supra* note 92, at 66 (explaining that in the implementation of doctrinal tests, the Court must address institutionalist considerations about the choice of tests).

¹⁷² 426 U.S. 229 (1976).

¹⁷³ See *id.* at 238-39 (deriving the disparate impact standard from doctrine under Title VII of the Civil Rights Act).

suggested that precedent supported its approach.¹⁷⁴ But the Court appeared to be primarily motivated by a concern about its institutional capacity and legitimacy to adopt a disparate impact standard.¹⁷⁵

To the extent that the choice of constitutional application arises from concerns about institutional constraints, other institutions not similarly situated may be able to establish and enforce applications that better implement the constitutional principle.¹⁷⁶ Judicial constitutional applications might need to be adjusted for other reasons as well. The Court, lacking information about the costs and benefits of novel constitutional applications, may simply err in choosing an application that only minimally advances the constitutional principle. Alternatively, a constitutional application that in a past societal context effectively advanced the constitutional principle might not be the most effective in a new societal context.¹⁷⁷

Despite the need for the adjustment of constitutional applications, courts often do not have the willingness to update them in the same way that they adjust constitutional principles. This judicial reluctance arises from differences in the rule of law concerns that arise from adjusting principles as opposed to applications. Constitutional principles, on the one hand, often have only an indirect effect on a particular judgment. Principles usually do not require a specific adjudicatory outcome. For example, the anti-classification principle does not require a specific judgment on a case addressing the constitutionality of a race neutral law that has a discriminatory impact. Within the reasoning of most cases, constitutional principles are appropriately considered dicta. As a result, when the Court adjusts principles, it usually does not disrupt settled expectations or undermine the rule of law.

Constitutional applications, on the other hand, are usually part of the holding of the case that people rely on to guide their future actions. For example, the judicial choice of a discriminatory purpose over a discriminatory impact standard is part of the holding of a decision that directly implicates future state decisions on whether to take certain actions. The Court can, and has, adjusted constitutional applications, but such changes pose a greater threat to its institutional legitimacy as an actor that purportedly merely discovers and

¹⁷⁴ *Id.* at 239-41.

¹⁷⁵ The Court explained that a disparate impact rule “would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.” *Id.* at 248; *see also* Sager, *supra* note 170, at 1218 (arguing that “[i]nstitutional rather than analytical reasons appear to have prompted [the Court’s] broad exclusion of state tax and regulatory measures from the reach of the equal protection construct fashioned by the federal judiciary”).

¹⁷⁶ *See* Fallon, *supra* note 92, at 66 (“The Court can share responsibility for implementing the Constitution with other institutions.”).

¹⁷⁷ *See* Roosevelt, *supra* note 165, at 1692-93 (“Decision rules [(applications)] may lose fit over time if facts or background understandings change.”).

applies the law.¹⁷⁸ These applications are therefore treated as precedent that carry with them *stare decisis* effect on future cases.¹⁷⁹ Constitutional applications are thus resistant to future adjustments unless the constitutional principle itself is changed. This stickiness of judicial constitutional applications ultimately limits constitutional adaptation to new societal contexts.

Fortunately, there is another means by which applications can be adjusted to fit new societal contexts. In the next section, I develop a theory of constitutional adaptation through experimentation with constitutional applications. Under this theory, agencies play a critical role in the process of constitutional adaptation.

B. *Constitutional Adaptation Through Court-Agency Experimentation with Applications*

Theorists of constitutional adaptation have largely overlooked the role of agencies in ensuring that the Constitution is responsive to evolving societal contexts. In this section, I argue that agencies' role in constitutionalism should be embraced because of the opportunities that they create for experimentation with constitutional applications. Agencies often provide alternatives to the courts' constitutional applications. Through the co-existence of agency and court applications of constitutional principles in different legal domains, different applications can be tested in particular legal disputes. Such experimentation provides the People with the chance to learn how well different applications advance the relevant constitutional principles, to engage in informed dialogue about the applications, and to pressure courts and agencies to adopt applications best suited for particular societal contexts.

On its face, the idea of experimenting with the meaning of constitutional rights seems jarring. For some, our constitutional rights have almost a mythical quality to them. But even for those who believe this, it is important to recognize that the choice of constitutional application is a policy determination mostly divorced from the Constitution rather than directly derived from it.

¹⁷⁸ Carolyn Shapiro, *Claiming Neutrality and Confessing Subjectivity in Supreme Court Confirmation Hearings*, 88 CHI.-KENT L. REV. 455, 456 (2013) (describing judicial appointees' claims of judicial objectivity and neutrality in Senate confirmation hearings in which appointees describe judging as merely applying law to facts).

¹⁷⁹ A function of *stare decisis* is to sustain the legitimacy of the Court in the eyes of the public. See *Planned Parenthood v. Casey*, 505 U.S. 833, 866-67 (1992) (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation. The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case.”); Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1118-20 (1995) (describing the “growing disposition among judges to understand the *stare decisis* doctrine as grounded in part in the importance of maintaining the Court’s image and to treat this rationale as a reason for decision”).

There is nothing in the vague provisions of the Constitution or in its many principles that requires a particular constitutional application. Certain constitutional applications can be rejected. But none are required.

Given that constitutional applications are policy choices, the literature on optimal policy choices is relevant to choices among constitutional applications. The theory of democratic experimentalism suggests that policy experimentation is central to optimal policy choices.¹⁸⁰ Policy experimentation requires two things. First, there must be a baseline objective in the form of a goal sought to be achieved by a policy.¹⁸¹ The goal can be in the form of concrete measurements such as the reduction of car emissions, the elevation of school reading standards, or the reduction in income inequality to certain levels. Alternatively, it can be in the form of more abstract goals such as the creation of a more livable city or a fairer judicial system. Without a baseline, there is no clear basis for measuring a policy's success. Second, there must be decentralization of control over policy choices. In order for any policy experimentation to occur, multiple institutions must have the autonomy to pursue different policies.¹⁸² The existence of different policies provides a basis for comparison between approaches toward achieving a particular objective.¹⁸³

¹⁸⁰ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314 (1998) (discussing “these [pragmatist] disciplines’ potential to create a form of collective problem solving suited to the local diversity and volatility of problems that confound modern democracies, while maintaining the accountability of public officials and government essential to the very idea of constitutional order”); Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 130 (2014) (“The benefits of experimentation could be realized in the governmental policy-making sphere . . . particularly in situations where the payoffs from a given policy are extremely uncertain.”); Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 483 (2008) (“When learning is possible, innovative high-risk policies with lower average outcomes but the potential for greater outcomes become preferable.” (footnote omitted)); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55 (2011) (“[Democratic experimentalism’s] governing norm in institutional design is reliability—the capacity for learning and adaptation.”).

¹⁸¹ See Dorf & Sabel, *supra* note 180, at 286-87 (describing objectives in terms of benchmarks, in which each locale compares their systems and processes to those other superior systems and processes used in other locales); Sabel & Simon, *supra* note 180, at 79 (describing as the first step in experimentation the establishment of “framework goals . . . and provisional measures for gauging their achievement”).

¹⁸² See Dorf & Sabel, *supra* note 180, at 287-88 (emphasizing the importance of policy variation amongst different localities); Sabel & Simon, *supra* note 180, at 79.

¹⁸³ See Dorf & Sabel, *supra* note 180, at 288 (describing a deliberative process arising from policy experimentation in which local residents can debate “the advantages and disadvantages of current choices, given possibilities demonstrated elsewhere”); Sabel & Simon, *supra* note 180, at 79 (describing as the third step of experimentation the requirement that “local units . . . report regularly on their performance and participate in a peer review in which their results are compared with those units employing other means to

Policy experimentation is familiar in American constitutional law as a concept justifying a robust federalist system of government. As expressed in the oft-repeated metaphor of states as laboratories of experimentation, one rationale for limiting federal authority over state policy choices is that it provides states with the opportunity to innovate with different policies.¹⁸⁴ State policy innovation on matters such as climate change, public education, and minimum wage laws can provide information to people and elected officials in other states about the costs and benefits of different types of laws in achieving particular objectives. Other states can then choose to replicate a particular state's policy or choose to pursue a different policy depending on what best advances each state's objectives. This federalist experimentation sometimes leads to convergence around a particular policy.¹⁸⁵ But on many occasions, experimentation continues indefinitely as variations in the policy objectives and preferences of the people in different states lead to the pursuit of diverging policies.

Even in the instances of ongoing disagreement, experimentation does often lead to some convergence around a narrower set of policy choices based on what clearly works and what does not in achieving the objectives. The federal government often learns from these experiments in establishing its own policies, which are then sometimes applied to the states as minimum standards that states must follow. For example, the federal government, in part on the basis of information derived from policy experimentations in states, has set standards on the environment, welfare, and health insurance.¹⁸⁶

The concept of deriving optimal policy choices from policy experimentation underpins an analogous process I call "constitutional experimentation." In this process, the goal is to develop optimal applications of constitutional principles. The pursuit of constitutional principles such as eliminating caste legislation under the Equal Protection Clause can be analogized to the policy objectives of ameliorating global warming, attaining higher education standards, or reducing income inequality. Constitutional principles function as the necessary baseline objective for measuring policy experiments. If we assume that constitutional principles do not require a specific constitutional application, then those

the same general ends").

¹⁸⁴ Justice Louis Brandeis famously articulated this metaphor of states as laboratories for experimentation in an otherwise unremarkable case. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

¹⁸⁵ *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 399 (1997) (offering examples of such state convergence that led to the federal adoption of policies like social security and welfare reform).

¹⁸⁶ *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 55 (2004) (describing examples of state experimentation that led to federal policy reform).

applications function as the policies that different institutions can experiment with to determine how best to advance the objective.

While the idea of experimenting with constitutional applications may sound foreign, it already occurs before disputes reach the Supreme Court. The Supreme Court in certain cases establishes baseline objectives in the form of constitutional principles without developing all the potential applications needed to implement the principle. For example, the Court in establishing the constitutional principle prohibiting discrimination against discrete and insular minorities constructed an application in the form of the tiers of scrutiny framework for facially discriminatory laws. The Court, however, failed to establish the constitutional application relevant to laws that did not discriminate on their face but disproportionately harmed members of one group. Lower federal courts and state courts had an opportunity to experiment with different constitutional applications to advance the principle.¹⁸⁷ The lower courts experimented with an evidentiary standard that merely required the challenger to prove that the state action had a disparate racial impact. The burden then shifted to the state to justify the state action. When the Supreme Court decided to adopt the discriminatory purpose standard in *Washington v. Davis*, it made the choice against the background of judicial applications of disparate impact standards.¹⁸⁸ This background provided the Court with information about the alternative constitutional applications' effectiveness in advancing the constitutional principle and its responsiveness to the societal context. It is not clear how much the Court relied on this background in choosing the discriminatory purpose standard, but it clearly drew on considerations regarding the consequences of applying the discriminatory impact standard that reflected its awareness of how it operated in practice.¹⁸⁹ Lower court experimentation therefore informed the Supreme Court's choice of application.

The problem with limiting the process of constitutional experimentation to lower courts is that once the Court chooses a particular constitutional application, experimentation must end. The judicial system is structured hierarchically such that lower courts must follow the determinations of higher courts.¹⁹⁰ So when the Supreme Court decided that an equal protection claim required proof that a facially neutral state action was motivated by a

¹⁸⁷ See *Washington v. Davis*, 426 U.S. 229, 244-45 (1976).

¹⁸⁸ *Id.* at 244 & n.12 (1976) (acknowledging that "various Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause" and citing the cases).

¹⁸⁹ See *id.* at 248 (suggesting that judicial application of a disparate impact standard is too intrusive on democratic policy-making).

¹⁹⁰ See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824 (1994).

discriminatory purpose, lower courts followed precedent and stopped experimenting with evidentiary standards that did not require some form of proof of discriminatory purpose. As a result, since the *Washington v. Davis* decision in 1976, the Supreme Court along with lower federal and state courts applying the Constitution have consistently adhered to the discriminatory purpose standard when addressing equal protection challenges.¹⁹¹

The discriminatory purpose standard is in no sense unique. Examining equal protection standards more generally, since at least the 1960s, courts at all levels have consistently adhered to Supreme Court determinations about who belongs to a discrete and insular class and the tiers of scrutiny applied to the different classes of individuals. It may be the case that these applications best advanced the constitutional principle when they were established and continue to do so now nearly fifty years later, but experimentation in courts is not going to provide any definitive answers to those questions in the present. We can safely assume that at least in some cases, constitutional applications will require some adjustments to new societal contexts. Such adjustments in constitutional applications will require continued experimentation even after Supreme Court pronouncements.

For robust constitutional experimentation to occur, another institution has to step in to advance constitutional applications that diverge from those of the Court. And just as importantly, the Court has to embrace that institution's role. Even though the development of constitutional applications is very much a policy determination, Congress and the President infrequently engage in it. These political branches' incentives for developing constitutional applications are limited and their tools are not particularly suited for the task. Congress's role in the development of constitutional applications has been limited by legislators' unwillingness to address difficult and controversial issues that expose them to potential electoral vulnerability.¹⁹² The result has been statutes that often offer only vague and ambiguous elaborations of constitutional meaning, which courts subsequently claim primary responsibility for interpreting. The President also has limited tools for applying the Constitution. The executive's primary tool consists of enforcing the Constitution through civil and criminal actions. Enforcement, however, is ultimately guided by the

¹⁹¹ See, e.g., *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”); *Hayden v. Patterson*, 594 F.3d 150, 162-64 (2d Cir. 2010) (discussing whether the challenged New York statute had discriminatory purpose); *Porter v. U.S. Capitol Police Bd.*, 816 F. Supp. 2d 1, 6 (D.D.C. 2011) (“[A] plaintiff must show *purposeful* discrimination to prevail on an equal-protection claim.”).

¹⁹² See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1078 (1986) (describing how Congress declares itself in favor of broad goals, but tends to avoid establishing concrete rules to meet those goals because of concern that such decisions “will be subject to a cascade of informal congressional criticism”).

courts' judgment about the meaning of statutes and the Constitution. Thus, through statutory interpretation and the adjudication of executive enforcement actions, courts can maintain control over legislative and executive branch constitutional applications.

Administrative agencies are the institutions best positioned to break this judicial monopoly and provide alternative applications of the Constitution. Agency administrators are political appointees and civil servants mostly immune from the electoral incentives that lead Congress to adopt vague and ambiguous statutes.¹⁹³ Agencies also have a wealth of tools to regulate with greater specificity. Agencies can adjudicate disputes about statutory meaning, issue more generalized regulations interpreting the statute through a notice-and-comment rulemaking process that requires public input, or issue interpretive guidelines or statements of policy.¹⁹⁴

To the extent that statutes implicate constitutional meaning, agencies employ these tools to indirectly apply the Constitution through statutory interpretation. In fact, much of administrative constitutionalism is in the form of constitutional applications. Agencies interpret vague and under-determined congressional statutory articulations of constitutional texts or principles and apply them to specific contexts through the development of implementing standards, rules, or evidentiary requirements. For example, as Sophie Lee showed in her study of administrative constitutionalism at the FCC, the FCC's broad interpretation of the Court's state action doctrine in its interpretation of communications statutes involved the application of a Fourteenth Amendment principle. The agency applied the constitutional principle by developing standards for determining who is a state actor in specific controversies.¹⁹⁵ Similarly, the Social Security Board's rigorous rational basis scrutiny of restrictive state welfare laws involved an application of an equal protection principle prohibiting arbitrary laws. The agency in these controversies developed a unique standard of scrutiny that it applied to state welfare laws.¹⁹⁶

The EEOC, in its implementation of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, has developed multiple applications of equal protection principles. When interpreting the Civil Rights Act to prohibit pregnancy discrimination as a form of sex discrimination under the Act, the agency applied a categorical rule

¹⁹³ See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 37 (2008) (“[I]ndividual regulators have greater individual incentives to develop sound regulatory policy, as their professional rewards are tied to successful regulatory decisions more closely than are legislators’.”).

¹⁹⁴ See 5 U.S.C. §§ 553-54 (establishing the procedures for adjudication, notice-and-comment rulemaking, and exceptions from notice-and-comment procedural requirements for interpretative rules and statements of policy).

¹⁹⁵ See *supra* note 37 and accompanying text.

¹⁹⁶ See *supra* note 38 and accompanying text.

implementing the equal protection prohibition on caste legislation.¹⁹⁷ When interpreting the Americans with Disabilities Act to extend the protections of the statute to persons with HIV and poor eyesight, the agency broadly applied a test for determining who belongs to a discrete and insular minority in its application of the equal protection principle protecting members of such groups.¹⁹⁸ Finally, when interpreting the Age Discrimination in Employment Act to prohibit employment actions that had a discriminatory impact on the aged, the agency applied an evidentiary rule to advance the equal protection prohibition on discrimination against discrete and insular minorities.¹⁹⁹

Each of these agency constitutional applications diverged from the Court's. The FCC's application of the state action doctrine was broader than the Court's.²⁰⁰ The Social Security Board's application of rational basis review was more rigorous than the Court's.²⁰¹ The EEOC's prohibition on pregnancy discrimination as a form of sex discrimination was inconsistent with the Court's prior determination that it was not.²⁰² The EEOC took a different approach from the Court in determining which groups belong to the discrete and insular class of minorities entitled to special legal protections.²⁰³ And finally, the EEOC's application of a discriminatory impact test was distinct from the Court's application of a discriminatory intent standard.²⁰⁴

What produces divergence in judicial and agency constitutional applications? The sources include institutional differences and variations in the two institutions' decision-making processes.²⁰⁵ Whatever the sources, the key

¹⁹⁷ See 29 CFR § 1604.10(b) (1975) ("Disabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."); *supra* note 39 and accompanying text.

¹⁹⁸ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479-82 (1999) (describing the EEOC's broad interpretive guidelines for applying the Americans with Disabilities Act); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (explaining the EEOC view that the ADA covers individuals with asymptomatic HIV); *supra* note 63 and accompanying text.

¹⁹⁹ See *supra* notes 2-7 and accompanying text.

²⁰⁰ See *supra* note 41 and accompanying text.

²⁰¹ See *supra* note 42 and accompanying text.

²⁰² See *supra* note 39 and accompanying text.

²⁰³ See *supra* note 63 and accompanying text.

²⁰⁴ See *supra* note 4 and accompanying text.

²⁰⁵ Important institutional differences include the fact that judges, through life tenure, have greater independence from Congress and the President than agency heads, who can be removed by the President. See *supra* Part IV.A. In addition, agencies tend to approach problems more as experts responsible for resolving specific types of disputes repeatedly and frequently, while judges approach problems more as generalists responsible for resolving many different types of disputes. See *infra* note 257 and accompanying text. In terms of variations in decision-making processes, agencies often develop constitutional applications

is that the co-existence of multiple applications results in constitutional experimentation. Observing distinct court and agency applications of constitutional principles allows the People to assess how effective the different applications are in advancing the constitutional principle. The People can then evaluate the substantive costs and benefits of different applications through a process of public dialogue. Such democratic engagement may at times lead to a public resolution in favor of a particular application. When a consensus or near consensus develops around a particular application, the people can mobilize for the general adoption of the application through litigation in courts or input into rulemaking in agencies. At other times, multiple constitutional applications will coexist while democratic contestation about how best to advance the relevant constitutional principle continues.

Such constitutional experimentation between court and agency constitutional applications is not merely a theoretical possibility. Prior to the rise of judicial resistance to administrative constitutionalism, agencies enforced constitutional applications that diverged from those of the courts.²⁰⁶ And even after the rise of judicial resistance to administrative constitutionalism, opportunities for experimentation have not been entirely foreclosed. A prominent example of ongoing experimentation with constitutional applications involves the evidentiary burden for advancing the equal protection prohibition on race-based caste legislation. Disputes on the proper evidentiary standard are focused on how best to identify and eliminate caste legislation. The EEOC, in its interpretation of the Civil Rights Act in the late 1960s, developed an evidentiary standard in the employment context prohibiting actions that had a disparate impact unless justified by business necessity.²⁰⁷ Without clearly crediting the agency, the Court in *Griggs v. Duke Power Co.*²⁰⁸ interpreted the Civil Rights Act as incorporating this disparate impact evidentiary standard.²⁰⁹ When the Court, in its direct interpretation of the Equal Protection Clause in *Washington v. Davis*, rejected the disparate impact standard, it did not foreclose all future applications of the standard.²¹⁰ Instead,

through notice-and-comment rulemaking while courts develop constitutional applications in adjudication. In the adjudicative process, fact-finding is limited to the particular dispute. The agency process of notice-and-comment rulemaking allows for fact-finding from a broader set of sources. Any member of the public can provide facts that the agency must consider in its decision to adopt constitutional applications in the form of regulations. *See infra* note 263 and accompanying text. This consideration of a broader set of facts can lead to divergences in choices about constitutional applications.

²⁰⁶ *See supra* Part I.B.

²⁰⁷ *See, e.g.*, 29 C.F.R. § 1605.3(b)(2) (2013).

²⁰⁸ 401 U.S. 424 (1971).

²⁰⁹ *Id.* at 431-32.

²¹⁰ 426 U.S. 229, 239 (1976) (“We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.”).

it allowed the EEOC to continue to apply the disparate impact standard to employment disputes governed by the Civil Rights Act.²¹¹

The coexistence of the disparate impact standard and the discriminatory purpose standard has allowed for ongoing dialogue about how to best advance the equal protection prohibition on caste legislation. This ongoing dialogue has engaged several questions about the different constitutional applications in changing societal contexts: Does the prohibition on discriminatory motivation best advance the equal protection principle of eliminating caste legislation? Or does it leave some caste systems un-redressed insofar as it permits state actions that reinforce structural inequality or are animated by implicit bias? Does a prohibition on state actions that have a disparate impact better serve the principle? Or does it re-create another form of caste system by giving state actors incentives to provide preferential treatment to minorities? As a result of the judicial embrace of administrative constitutionalism in this important, but narrow, context, this public dialogue and engagement has been informed by a comparison of the actual operative effect of the two standards in different contexts.

Administrative constitutionalism thus provides the only real opportunity for continued experimentation with constitutional applications after Supreme Court pronouncements. Unfortunately, because of judicial resistance to administrative constitutionalism, constitutional adaptation through constitutional experimentation has been discouraged. But if the Court were persuaded to embrace administrative constitutionalism, opportunities for experimentation with constitutional applications can overcome many of the limits on constitutional adaptation to changing societal contexts that arise when we leave such adaptation entirely in the Court's hands. In the next section, I show how supplementing judicial constitutionalism with constitutional experimentation between administrative and judicial constitutional applications can lead to adaptation that is more responsive to changing societal contexts.

C. *Constitutional Experimentation as a Redress to Limits on Court-Centered Constitutional Adaptation*

Judicial constitutionalism is a relatively inefficient way to update the Constitution due to (1) the growing detachment of the Justices from the people, (2) the increasing inefficacy of judicial replacement as a mechanism for ensuring responsiveness to changes in the national governing coalition and the people it represents, and (3) the ongoing lack of opportunities for *informed* dialogue between the People and the Court through litigation.

Supplementing judicial constitutionalism with administrative constitutionalism advances constitutional adaptation in ways responsive to

²¹¹ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009) (finding the *Griggs* disparate impact standard to be the relevant standard for claims of employment discrimination under the Civil Rights Act and the congressional codification of the standard in the 1991 Civil Rights Act).

these concerns. First, administrative constitutionalism can ameliorate the growing detachment of the Justices. Agencies are institutionally designed to have stronger links to elected officials. Agency heads do not have life tenure and therefore tend to act more like agents of the President that appoints them.²¹² Agency heads need to at least have the pulse of the political branches and the constituents that they represent.²¹³ This does not mean that agency heads and the agencies they lead entirely lack autonomy and independence. They retain a considerable degree of both. But they do have a stronger link to the political branches, which tend to tie agency actions to evolving societal contexts.

In addition, the relationship between the political branches and agencies differs from that which exists between the political branches and the courts. Whereas the judiciary is co-equal to the other branches of government, agencies are subject to both presidential and congressional supervision and control.²¹⁴ The President and Congress can therefore monitor and check agency actions in a way that they cannot judicial actions. As a consequence, the political branches can typically ensure a greater degree of agency responsiveness to their values in the agencies' construction and enforcement of constitutional applications than they can obtain from the Court.

Second, the authority of new presidents to replace agency heads after elections allows for a greater degree of agency responsiveness to changing societal contexts.²¹⁵ Unlike Justices, who can stay on the bench as long as they choose and entrench onto the Court the partisan values of their appointing president long beyond their expiration date, new presidents can impose their values and preferences onto agencies through their selection of agency heads.²¹⁶ This authority to control agencies through replacements is not unfettered, as civil servants committed to the agency mission typically stay on.²¹⁷ These civil servants can constrain political appointees from making

²¹² See B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) (finding changes in agency output after changes in agency leadership in five of the seven programs studied with four of these changes made at the beginning of new presidential administrations). "The direction and magnitude of these responses reflects the increased power of a chief executive in the period after a presidential election." *Id.*

²¹³ See *id.* at 821 ("[A]t certain times in the cycle of U.S. politics, responsiveness permeates the U.S. bureaucracy. As new democratic majorities sweep newly elected officials into office, nonelective bureaucracies transmit demands for change.").

²¹⁴ See *infra* note 236 and accompanying text (discussing the mechanisms of presidential and congressional supervision and control over agencies).

²¹⁵ See E. Mann & Zachary A. Smith, *The Selection of U.S. Cabinet Officers and Other Political Executives*, 2 INT'L POL. SCI. REV. 211, 213-20 (1981) (describing the presidential selection process for heads of major cabinet agencies).

²¹⁶ See *id.*

²¹⁷ See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 103 (1992).

certain types of policy changes or adopting certain types of policy determinations.²¹⁸ But the selection of agency heads can shift agency policy, including those involving constitutional applications, in a direction more responsive to the values of the president and the ruling national political coalition.

Finally, the coexistence of administrative and judicial constitutional applications allows public dialogue to be informed by the applications' operative effect. When social movements or even ordinary citizens seek constitutional adaptation through litigation, they will be armed with information about how well different applications advance the constitutional principle.

In sum, embracing administrative constitutionalism advances constitutional adaptation. But even so, some may still resist administrative constitutionalism. In the next section, I respond to two potential bases of continued resistance.

IV. OVERCOMING RESISTANCE

Despite its value in advancing the critical goal of constitutional adaptation to a changing society, some courts and scholars will resist administrative constitutionalism. Two sources of such resistance are likely. First, some may resist an agency role in constitutionalism, particularly in the elaboration of constitutional rights, because they view agencies as either too majoritarian or subject to minority interest group capture. Under either view, the concern is that agencies are insufficiently insulated from politics, and hence cannot serve as forums for principled, deliberative engagement on constitutional meaning—a function central to many theories of constitutionalism. Second, many might fear that the co-existence of multiple applications of the Constitution will lead to constitutional chaos and confusion about constitutional meaning. In the following, I address both concerns.

A. *Overcoming Resistance to Agencies' Role in Constitutionalism*

The dominant view in constitutional theory suggests that courts should have exclusive authority over the elaboration of constitutional meaning, and particularly the meaning of the rights provisions of the Constitution.²¹⁹ A principal reason why rights are protected under the Constitution is to insulate them from the demands of ordinary politics that might require their sacrifice for popularly preferred state actions.²²⁰ “Judicial supremacists” argue that

²¹⁸ See *infra* notes 257-258 and accompanying text (arguing that civil servants tend to be committed to the agency's mission).

²¹⁹ See Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 780 (2002) (describing the strong view of judicial supremacy as theorizing that “courts should take the lead in resolving constitutional disputes and need show little deference to the constitutional reasoning of other actors, even as those other actors should show strong deference to the judiciary”).

²²⁰ Post, *supra* note 128, at 48 (“[T]he very purpose of constitutional rights is to defend

courts are uniquely positioned to resist ordinary politics because judges are appointed and given life tenure.²²¹ Judges can enforce constitutional rights through a deliberative decision-making process guided by principle as opposed to politics.

There are two principal forms of ordinary politics that scholars theorize courts are uniquely positioned to resist in their protection of individual rights. The first is majoritarianism. As a form of ordinary politics premised on the aggregation of individual preferences, majoritarianism is generally theorized as a threat to the rights of the minority. This concern dates back to the Framers of the Constitution. James Madison famously argued that factions comprising a majority of the people would tyrannize the minority and violate their rights unless checked.²²² The second form of ordinary politics is minority capture. As articulated in public choice theory, this form of ordinary politics leads to the precise opposite concerns as majoritarianism. According to this account of politics, it is minorities that pose a threat to majorities despite their smaller numbers because of minorities' greater capacity to overcome collective action problems.²²³ Minorities secure favorable laws from politically accountable state actors through concerted political actions such as lobbying and contributing money to election campaigns at the expense of the more politically diffuse, weak, and generally uninformed majority.²²⁴ In some instances, such favoritism toward minorities can even undercut the rights of members of the majority.

These views of ordinary politics suggest that institutions directly accountable to the people cannot be trusted to protect individual rights. Members of Congress and the President who are subject to elections are unlikely to adopt elaborations of constitutional meaning that conflict with the demands of the public.²²⁵ Similarly, although agency heads and civil servants are not directly subject to elections, leading agency theorists suggest that they are also vulnerable to the same demands of ordinary politics channeled either through political branch control over agencies or direct special interest group

constitutional values against the depredations of popular sentiments that may inform constitutional culture.”).

²²¹ See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 131-34 (2004) (examining the origins of the concern about majority tyranny as a justification for judicial review and judicial supremacy).

²²² THE FEDERALIST No. 10 (James Madison).

²²³ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 10-36 (1965) (describing the comparative organizational advantage that small groups have over large groups through their greater capacity to police and sanction free riding).

²²⁴ See Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 228 (1967) (describing this action as rent-seeking).

²²⁵ See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 37-38 (1974) (hypothesizing that politicians' actions are motivated by their desire to be re-elected).

influence over agency actions.²²⁶ As a result, agencies lack the autonomy to resist the demands of ordinary politics that can undercut the constitutional rights of individuals.

These accounts are right in suggesting that agencies are less insulated from public input than courts. In fact, I argued above that a principal advantage to administrative constitutionalism is that the public can influence agency decision-making through the public comment process of rulemaking and the capacity of each new President to select new agency heads.²²⁷ But it is important to differentiate between two forms of public input. The first form of public input is through the ordinary politics of majoritarianism and special interest capture that I have just described. To the extent that agency elaborations of constitutional meaning are responsive to these demands of ordinary politics, judicial supremacists are properly suspicious and courts should resist administrative constitutionalism. But while there is a tremendous scholarly fixation on majoritarian influence on, and special interest capture of, agencies, it is not the only or even the dominant form of public input into agency decision-making. Instead, public input into one of the most important forms of agency decision-making—notice-and-comment rulemaking—is derived from a process that is more deliberative than majoritarian or special interest captured.

What distinguishes deliberative politics from the worrisome forms of majority or minority capture? A deliberative democratic process requires the equal consideration of input from individuals and interest groups in a decision.²²⁸ Neither the majority nor the most powerful special interest groups wins merely because of their support, status, or influence.²²⁹ Importantly, the public input in a deliberative process is not only an expression of preferences, as more aggregative models of decision-making emphasize.²³⁰ Instead, such

²²⁶ See *infra* note 234.

²²⁷ See *supra* Part III.B.

²²⁸ See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988) (describing as a principle commitment of liberal republicanism “the equality of political actors, embodied in a desire to eliminate sharp disparities in political participation or influence among individuals or social groups”).

²²⁹ See Seidenfeld, *supra* note 45, at 1534 (“[B]y insisting that government action reflect social consensus about the common good, civic republicanism facilitates the adoption of law that respects the interests of minorities and other groups historically excluded from political power and that simultaneously comports with the polity’s general sense of justice.”) (footnote omitted); Sunstein, *supra* note 228, at 1542-57 (contrasting the more aggregative, pluralist conception of politics from the deliberative conception of politics).

²³⁰ See, e.g., Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 886-87 (2012) (“[T]he key distinctions between majoritarian or pluralistic theories of democratic governance and more deliberative alternatives is that while the former theories focus on making decisions that accord with the prevailing distribution of political power, the latter theories emphasize the importance of having mutually respectful discussions of the merits of the issues and ensuring that

input includes information about the factual context of the decision, potential consequences of a particular choice, and alternative means to achieve the public good that can shape preferences and lead to consensus.²³¹ The institutional decision-maker in a deliberative process relies on the data gathered to choose a particular policy that it thinks will best advance the public good on the basis of its expertise.²³² As part of this decision-making process, the institutional decision-maker provides the reasons for the choice of policy and the rejection of alternatives from the perspective of the public good and not the demands of ordinary politics.²³³

Scholars have theorized that if the President or Congress controls agencies, then agency decisions are less likely to arise from a deliberative process. Instead, majoritarian and special interest influence is likely to be channeled through the mechanisms of political branch control.²³⁴ Assuming that this is true, I argue, contrary to some leading accounts,²³⁵ that agencies have the necessary independence and autonomy from the President and Congress to engage in deliberative decision-making processes. The President and Congress have the capacity to direct only a small number of agency actions. For other agency actions, the executive and legislative branches' mechanisms of political control only serve as a check on agencies from diverging too far from the elected branches' preferences.

everyone's interests and perspectives are taken into account in making decisions.”).

²³¹ See Seidenfeld, *supra* note 45, at 1514 (“[G]overnment’s primary responsibility [under the deliberative model] is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good.”).

²³² See, e.g., Staszewski, *supra* note 230, at 857 (describing the deliberative model as one in which public officials are obliged “to engage in reasoned deliberation on which courses of action will promote the public good”).

²³³ See Sunstein, *supra* note 228, at 1544 (arguing that under the deliberative model, “[p]olitical actors must justify their choices by appealing to a broader public good”).

²³⁴ See Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 3 (1994) (suggesting strong presidential guidance of agencies “can exacerbate the problems of special interest influence over regulation”); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 771, 788 (1983) (identifying the mechanism for interest group influence on agency action through the channel of congressional control over agencies and finding evidence of such congressional control over the Federal Trade Commission). *But see* CROLEY, *supra* note 193, at 98 (suggesting “presidential influence may well empower agencies to advance diffuse interests”).

²³⁵ See, e.g., Kagan, *supra* note 51, at 2303-09 (describing the presidential control model in the Clinton Administration, in which President Clinton used devices of regulatory review to exercise considerable authority over executive agency actions); Terry M. Moe, *An Assessment of the Positive Theory of “Congressional Dominance,”* 12 LEGIS. STUD. Q. 475, 477-79 (1987) (describing the theory of congressional dominance, which suggests that Congress exercises considerable control over agency actions).

The primary mechanisms of political control include the President's and Congress's authority to review, oversee, and override agency decisions and the President's power to remove agency heads.²³⁶ These tools serve as an important check on some agency decisions, but they are rather limited in their capacity to control agency actions. The administrative state is enormous and the political branches are simply incapable of directing more than a very small number of agency decisions.²³⁷ Presidential regulatory review is limited to a small number of major rules measured primarily on the basis of their monetary impact.²³⁸ This excludes most agency rulemaking elaborating on the meaning of individual rights.²³⁹ Congressional committee oversight and control over agency budgets are too costly and undependable to function as a tool to direct many agency actions.²⁴⁰ And finally, the time and resources required for

²³⁶ See David S. Rubenstein, "Relative Checks": Towards Optimal Control of Administrative Power, 51 WM. & MARY L. REV. 2169, 2199-2201 (2010) (describing the tools of presidential control over agencies); Seidenfeld, *supra* note 234, at 9-10 (describing congressional mechanisms of agency control).

²³⁷ See Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 398-401 (2010) (describing the magnitude of the administrative state in terms of employees, institutional structures, decision-making processes, and agency actions); Farina, *supra* note 50, at 185 (describing the idea of comprehensive presidential supervision of the administrative state as "absurd"); David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 433 (1997) ("[T]he monitoring capacity of presidential and congressional staffs [is] overwhelmed by the number of agency policy-makers and the sheer volume of federal agency policy-making which occurs in Washington."); Seidenfeld, *supra* note 234, at 14 ("The President and his close personal aides cannot directly review all or even any significant portion of agency rulemaking decisions.").

²³⁸ See Exec. Order No. 12,291, 3 C.F.R. 128 (1981), *reprinted in* 5 U.S.C. § 601 (1982) (defining a major rule as one that has an "annual effect on the economy of \$100 million or more"); Exec. Order 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (1993) (employing the same definition of a major rule); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 870-71 (2003) (calculating the limited number of rules reviewed).

²³⁹ See Croley, *supra* note 238, at 856-57 (finding from a study of regulatory review from 1993-2000 that "the only agencies whose rules were the subject of at least 5 percent of all [regulatory review] meetings" were the Environmental Protection Agency (54%), Department of Labor (7%), Department of Transportation (8%), Department of Health and Human Services (9%), and the United States Department of Agriculture (6%)).

²⁴⁰ See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 94 (1992) (explaining "the standard monitoring solutions to the principal-agent problem, which include political oversight in the form of hearings and budget reviews, are a costly and hence imperfect solution to the politicians' agency cost problem"); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 249-50 (1987) (describing the costs of agency monitoring for the President and Congress); Moe, *supra* note

statutory overrides means that they are rarely passed even when the agency acts contrary to congressional and presidential preferences.²⁴¹

Even when the President and Congress attempt to exercise authority through these mechanisms of control, agencies retain considerable autonomy because of their capacity to play the competing demands of the branches of government against each other.²⁴² For example, agency actors can protect their policy choices against statutory overrides by marshalling the support of sympathetic Congress members and committees in back channel discussions or oversight hearings.²⁴³ Similarly, agencies can protect themselves from congressional budget cuts by turning to the more supportive president to negotiate a more favorable budget for the agency.²⁴⁴

Moreover, as evidenced by its infrequency, it is politically costly for the President to remove his own chosen agency head as that suggests discord within the administration.²⁴⁵ These costs of removal are exacerbated in

235, at 486-88 (explaining why the budget is not a dependable control mechanism).

²⁴¹ Moe, *supra* note 235, at 488 (explaining that while legislation, in theory, is a useful mechanism to control agency behavior, it simply “is not easy to pass new legislation,” especially legislation targeted at specific agency actions). Political scientists and some legal theorists focus on administrative procedures as mechanisms for control. *See, e.g.,* McCubbins et al., *supra* note 240, at 254-64. I do not dispute that some administrative procedures might facilitate enhanced political control. But I do argue, consistent with many legal theorists, that the procedural requirements for notice-and-comment rulemaking emphasized here can enhance agency autonomy and deliberative decision-making if rigorously enforced by the courts through hard look review. *See* CROLEY, *supra* note 193, at 143 (“Agencies’ procedural autonomy begets legal and political autonomy. . . . Congress does not dominate agencies through administrative procedure, but rather liberates them.”).

²⁴² *See* Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 163 (1996) (finding that the interaction between the president and Congress leads to great autonomy for some agencies and little autonomy for others). This competition often exists within the branches themselves, with congressional committees and subcommittees and different offices within the executive branch imposing competing demands on agencies. *See* Bressman & Vandenbergh, *supra* note 45, at 68 (surveying Environmental Protection Agency officials who describe the competing influences in the executive branch).

²⁴³ *See* Charles Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467, 471 (2004) (“[S]ince both houses would have to pass legislation in order for a law overriding the agency to be passed, the agency need only pay attention to one house. Once that house is satisfied by the agency’s action, the agency no longer needs to worry about override legislation being passed and it can disregard the preferences of the other chamber.”).

²⁴⁴ While Congress has constitutional authority over appropriations, the President often plays an agenda-setting role with respect to the annual budget. Hammond & Knott, *supra* note 242, at 124.

²⁴⁵ *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) (explaining that because “a discharge is highly visible and comes

contexts of divided government because of the need for senatorial confirmation of any new appointee.²⁴⁶ Inter-branch competition over agencies requires the President to either choose an agency head congenial to the Senate, who might have political preferences that diverge somewhat from the President, or leave the office vacant.²⁴⁷ Agency heads recognizing that removal poses a mostly empty threat are positioned to exercise decision-making autonomy within the boundary constraints of presidential and senatorial preferences.²⁴⁸

This is not to say that agencies are entirely autonomous from the political branches. The tools of political branch control, even when only infrequently used, constrain agency actions within certain political bounds. But these tools tend to operate more as checks on agency actions than means to dictate and control them.²⁴⁹

Agency autonomy from the demands of ordinary politics is also enabled by the limited capacity of the public to directly influence agency actions. Agency heads are appointed and other agency staffers are career civil servants. What agencies do is often invisible to the uninformed public and as a result agency actions are rarely the focal point of majoritarian pressures.²⁵⁰ Moreover, despite conventional wisdom, there is little to suggest that special interest groups have particular influence on agencies responsible for elaborating the meaning of constitutional rights.

Despite their lack of direct electoral accountability to the public, it is widely assumed that agencies are prone to capture by those they regulate. Similar to the capture theory of politics, small groups or specific industries are presumed to be capable of securing goods for themselves from agencies at the expense of the more diffuse public.²⁵¹ This theory has been applied to agencies despite the

with significant political costs; an agency head can be fired only rarely”).

²⁴⁶ See U.S. CONST. art. II, § 2.

²⁴⁷ See Percival, *supra* note 28, at 968 (“By requiring Senate confirmation of the president’s nominees to head cabinet agencies, the Constitution presumably envisions that these officers will have some degree of independence that makes it necessary for them to be acceptable not only to the president, but also to the Senate . . .”).

²⁴⁸ See Pildes and Sunstein, *supra* note 245, at 25 (suggesting that the threat of removal influences agency heads to “follow the President on matters of importance” but acknowledging that “there is a substantial difference between the power to fire and the power to make the ultimate decision in particular cases”).

²⁴⁹ See Croley, *supra* note 238, at 832 (“[S]ubstantial agency autonomy is a fact of regulatory life.”).

²⁵⁰ See DeMuth & Ginsburg, *supra* note 192, at 1081 (describing the rulemaking process as “operating in relative obscurity from public view”); Staszewski, *supra* note 230, at 869 (explaining “the vast majority of regulatory decision making flies beneath the general public’s radar and implicates established preferences of the electorate only at very high levels of abstraction” (quoting Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1271 (2009))).

²⁵¹ The theory of agency capture primarily associated with economist George Stigler was particularly prominent in the 1970s and 1980s. See Kenneth J. Meier & John P. Plumlee,

absence of any proven incentives that special interest groups can provide to agency actors in exchange for the regulatory goods. Whereas special interest groups are said to capture politics by providing politicians with the resources necessary to be reelected, such as campaign finance and votes, there is little that such groups can offer to agency personnel to directly influence their decisions.²⁵² Future employment opportunities, which is the primary incentive theorized,²⁵³ has not been empirically shown to be used or effective at securing more favorable agency decisions for special interest groups.²⁵⁴ This incentive is less likely to be provided to agencies responsible for the elaboration of the meaning of individual rights, as they tend to regulate a broad spectrum of state and private actors rather than distinct industries.²⁵⁵ For example, the EEOC in its enforcement of the ADEA regulates all state and private employers.²⁵⁶ These employers would need to overcome their own collective action problems in order to coordinate to provide future employment opportunities to agency

Regulatory Administration and Organizational Rigidity, 31 W. POL. Q. 80, 80-81 (1978) (“[T]he idea of regulatory capture has become conventional wisdom in political science, and has done so without any serious empirical examination.”); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Despite the lack of empirical support for the theory, it maintains a hold on the imagination of many scholars. See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 121-22 (2000) (“[A]gency capture is no longer regarded as a valid descriptive theory of bureaucratic behavior. No family of public choice models seems more irrelevant yet more widely cited than capture models.”).

²⁵² See, e.g., Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 891-95 (1987) (describing the major tenets of the public choice theory of legislation).

²⁵³ See William T. Gormley, Jr., *A Test of the Revolving Door Hypothesis at the FCC*, 23 AM. J. POL. SCI. 665, 666 (1979) (describing the “revolving door hypothesis” as predicting that those administrators who “have either served a regulated industry before joining the commission or expect to serve the regulated industry after leaving the commission” will act more favorably to the regulated industry).

²⁵⁴ See CROLEY, *supra* note 193, at 49-51 (questioning the revolving door thesis); Jeffrey E. Cohen, *The Dynamics of the “Revolving Door” on the FCC*, 30 AM. J. POL. SCI. 689, 693-95 (1986) (finding in a comprehensive study of the FCC a modest positive correlation between administrators’ pre-agency employment in the industry and support for industry, but a modest and *negative* correlation between administrators’ post-agency employment in industry and support for industry, suggesting that industry is more likely to hire its administrative enemies).

²⁵⁵ Jonathan Macey argues that “[w]here a regulatory agency represents a single ‘clientele,’ the rules it generates are far more likely to reflect the interests of that clientele than the rules of an agency that represents a number of clienteles with competing interests.” Macey, *supra* note 240, at 94.

²⁵⁶ See 42 U.S.C. § 2000e(b) (2012) (defining employer for purposes of Title VII of the Civil Rights Act to broadly include “a person engaged in an industry affecting commerce who has fifteen or more employees”).

actors in exchange for particular regulatory goods. This is certainly not impossible, but much more difficult than agency capture theory suggests.

Agency actors, particularly those agency actors responsible for elaborating the meaning of constitutional rights, are more likely to be motivated by their commitment to an agency's mission. Career civil servants committed to the agency mission do most of the heavy lifting in the agency policy-making process. These actors often choose to work for the agency and sustain a long career at the agency because of their desire to advance the agency's mission.²⁵⁷ To the extent that agency actions arising from the demands of ordinary politics conflict with the mission of the agency, these civil servants will often resist them in favor of actions that advance the agency's mission.²⁵⁸ Importantly, the missions of civil rights agencies are often defined in terms of the constitutional principles that congressional constitutional enforcement statutes charge them with advancing.²⁵⁹ In addition, even if agency heads are initially appointed to carry out the directives of the President or Congress, as they "acquire additional expertise in the relevant policy arena, they often adopt the preferences and perspectives of agency careerists on policy issues."²⁶⁰ In this role, they often join with career civil servants in resisting political branch and public pressure to act contrary to the mission of the agency.

Agencies therefore enjoy considerable autonomy from the demands of ordinary politics channeled through the political branches or arising from direct public pressure. This autonomy facilitates a more deliberative process of agency decision-making, principally in notice-and-comment rulemaking—an innovative process of decision-making established in the Administrative Procedure Act that the Court has actively supervised.²⁶¹ Notice-and-comment

²⁵⁷ See CROLEY, *supra* note 193, at 93 (arguing that civil servants self-select into agencies based on their "ideological commitment to a given agency's mission"); Macey, *supra* note 240, at 103 (explaining "[e]ven entry-level positions at agencies generally are staffed by recent graduates with a long-term interest in the industry being regulated").

²⁵⁸ See Hammond & Knott, *supra* note 242, at 120 (observing that "bureaucrats have goals of their own, and so may not wish to follow directives from either the president, Congress, or courts"); Spence, *supra* note 237, at 431 (observing that decentralized agencies have many centers of policy-making power, many of which are controlled by career civil servants, making it more difficult for the President or Congress to exert control on them).

²⁵⁹ Congress often articulates the constitutional principles animating the statute in the statement of purpose of the Act. See, e.g., Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) ("An Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability"); Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 ("An Act to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education . . . to prevent discrimination in federally assisted programs . . ."); *supra* note 5 (describing the purpose of the ADEA).

²⁶⁰ Spence, *supra* note 237, at 431.

²⁶¹ See 5 U.S.C. § 553 (2012) (establishing the procedures for notice-and-comment

rulemaking allows broad public input into agency decision-making by requiring that the public be provided with notice of proposed rules and the opportunity to comment on the rules.²⁶² Public input sometimes comes in the form of expressions of political preferences, but often the comments provide factual, contextual data in the form of the costs and benefits of the rule or suggest alternatives to the rule in a particular context.²⁶³

Judicial review of the notice-and-comment rulemaking reinforces the deliberative nature of the rulemaking process. The Court has interpreted the Administrative Procedure Act's "arbitrary and capricious" standard to require judicial hard look review of the rulemaking process.²⁶⁴ Under this hard-look review standard, agencies must "have taken a hard look at the range of evidence, arguments, and alternatives relevant to an issue, and have made . . . a reasoned policy choice based on these considerations."²⁶⁵ Hard-look review thus acts as a check on special interest deals or pure aggregative lawmaking in the rulemaking process.²⁶⁶ Agencies cannot merely count comments in favor and opposed and decide whether to issue a rule on that basis. Nor can the agency simply issue rules in favor of the comments of the most prominent and powerful interest groups. Instead, agencies must give fair consideration to all relevant public comments and justify rules as advancing the statutory objective in light of the available evidence.²⁶⁷

rulemaking); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to "examine the relevant data and articulate . . . a 'rational connection between the facts found and the choice made.'").

²⁶² See 5 U.S.C. § 553 (b)-(c) (2012) (establishing the requirements for the notice-and-comment rulemaking process).

²⁶³ See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 435-59 (2005) (describing the nature of public comments in three rulemaking settings).

²⁶⁴ See 5 U.S.C. § 706(2)(A) (2012) ("The reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law."); *State Farm*, 463 U.S. at 43 (requiring under the arbitrary and capricious standard that the "agency . . . examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

²⁶⁵ Kagan, *supra* note 51, at 2380.

²⁶⁶ Seidenfeld, *supra* note 234, at 23 ("[J]udicial review helps check against the government striking pure political deals aimed at generating monopoly rents."); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 287 (1986) (describing the goal of hard look review as "guard[ing] against the dangers of self-interested representation and of factional tyranny in the regulatory process").

²⁶⁷ See, e.g., Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 157 (2012) ("An agency acts at its own peril if it ignores comments that it finds unsophisticated or unpersuasive because it has no way of knowing whether the reviewing court will find those comments relevant to the agency determination."); see also CROLEY, *supra* note 193, at 135 (explaining that public interest participants in notice and comment rulemaking "serve as an antidote to special-interest

As enforced by the courts, notice-and-comment rulemaking is a deliberative democratic process in that it is broadly participatory, requires that the input from members of the public be given equal consideration, and demands reasoned explanations for agency choices. It is certainly important to acknowledge that interest groups with the knowledge and resources to participate may dominate the notice-and-comment process.²⁶⁸ But while there is the potential that the data provided in the notice-and-comment process is skewed toward that which knowledgeable and resourceful interest groups provide, hard-look review requires that all comments be fairly considered. Thus, hard-look review limits the capacity of these groups to capture the decision-making process.

Agencies acting through the notice-and-comment rulemaking process are therefore well positioned to engage in a deliberative process of constitutionalism resistant to the demands of ordinary politics. In this form of deliberative constitutionalism, the threats of majority tyranny of minority rights or minority tyranny of the rights of the majority are greatly diminished. Rather than advancing the preferences of majorities or special interest minorities, agencies can consider how well different applications advance

participation” by providing “alternative sources of analyses and information . . . monitoring as well as participating in agency decisionmaking, and by initiating litigation to challenge agency action that may undermine general interests”).

²⁶⁸ Wendy Wagner argues that informational capture, which she defines as “the excessive use of information and related information costs as a means of gaining control over regulatory decisionmaking in informal rulemakings,” results in agency decision-making biased toward those entities that it regulates. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010). But others suggest that the concern is over-stated. See CROLEY, *supra* note 193, at 50 (questioning the thesis of informational capture, explaining that “many of the specific decisionmaking procedures agencies commonly employ—like rulemaking and adjudication under the provisions of the Administrative Procedure Act—are designed to foster the neutral production, dissemination, and exchange of information”).

Empirical studies of the comment process are mixed, with some scholars showing that the regulated dominate some comment processes but not others. See Cuéllar, *supra* note 263, at 460 (finding in an empirical study of three regulatory domains that “comments from individual members of the public account for the vast majority of all the public input received”); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252-54 (1998) (finding that business commenters dominated in the rulemaking process of the Environmental Protection Agency and the National Highway Transportation Safety Agency, but “considerable participation by government agencies, public interest groups, and citizen advocacy groups” was evidenced in a Department of Housing and Urban Development rulemaking); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding that business interests submitted a majority of the comments to rules promulgated by the agencies included in their data set).

broad constitutional principles on the basis of factual context, consequences, and alternatives provided in public comments.

B. *Overcoming Resistance to Constitutional Experimentation*

Aside from resisting an agency role in constitutionalism, others may resist constitutional experimentation, the idea that multiple institutions should autonomously develop their own distinct applications of the Constitution. Two leading opponents of extrajudicial constitutionalism, Larry Alexander and Frederick Schauer, argue, “a constitution exist[s] partly because of the value of uniform decisions on issues as to which people have divergent substantive views and personal agendas.”²⁶⁹ To the extent constitutional interpretive authority is shared between different institutions, they predict that interpretive anarchy will ensue, leading to public confusion over the meaning of the Constitution.²⁷⁰ In order to avoid such “anarchy”²⁷¹ and confusion, one institution’s interpretive authority has to be supreme. Alexander and Schauer argue that the interpretive authority of courts should be supreme because they are best positioned to entrench the Constitution as law “to achieve a degree of settlement and stability, and . . . remove a series of transcendent questions from short-term majoritarian control.”²⁷² Judicial supremacy over the elaboration of constitutional meaning thus “serve[s] the function of authoritatively settling what ought to be done [and] reducing the range of viable disagreement.”²⁷³

This so-called settlement function of judicial supremacy resonates with the intuition that somebody has to have the final say about the meaning of the Constitution. The implication is that direct judicial elaborations of constitutional meaning cannot coexist with other institutions’ direct elaborations of constitutional meaning. Chaos and anarchy will presumably result when two or more institutions say different things about what the Constitution requires, and the People and state actors have no way of determining which institutions’ elaborations of constitutional meaning control.²⁷⁴

²⁶⁹ Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376 (1997).

²⁷⁰ *Id.* at 1379 (“‘Protestantism’ in constitutional interpretation—interpretative anarchy—produces no settled meaning of the Constitution and thus no settlement of what is to be done with respect to our most important affairs.”).

²⁷¹ *Id.*

²⁷² *Id.* at 1380.

²⁷³ *Id.* at 1376.

²⁷⁴ *Id.* at 1380 (suggesting that the judicial exclusivity in the elaboration of constitutional meaning serves the value of stability in constitutional law). *But see* Neal Devins and Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 91 (1998) (rejecting judicial exclusivity and arguing that “stability can only be achieved through a give-and-take process involving all of government as well as the people”).

Even if we assume that multiple direct interpretations of the Constitution would produce chaos, it is not so clear that overlapping *direct* and *indirect* elaborations of constitutional meaning would have that result. Administrative constitutionalism is not usually in the form of direct assessments of constitutional meaning.²⁷⁵ Instead, agency elaborations of constitutional meaning are only indirect, in that they are derived from agency interpretations of statutes that enforce or implicate the Constitution.²⁷⁶ In other words, agencies are not purporting to decide what the text of the Constitution directly requires, or resolve disputes about constitutional meaning; they are simply using constitutional values as background guidance as they develop the meaning of statutes.

This distinction between direct and indirect interpretation of the Constitution ameliorates much of the potential for constitutional chaos and public confusion. When Congress enacts statutes pursuant to its authority to enforce the Constitution, it can impose remedial duties and obligations that diverge from those found under the Constitution so long as they do not re-define the substance of the Constitution.²⁷⁷ When the Court and Congress have offered divergent remedies, it has not resulted in constitutional chaos and public confusion. Within the domains that statutes govern, statutes are supreme unless the Court declares them constitutionally invalid.²⁷⁸ In domains where statutes do not govern, judicial constructions of the Constitution guide the conduct of the People and state actors. Constitutional chaos and confusion is avoided by this division of legal domains that provides the People and state actors with a clear sense of their legal duties on the basis of which domain—statutory or constitutional—governs.

There are many instances of the co-existence of statutes enforcing the Constitution that impose obligations that diverge from those the Court derives from the Constitution. For example, the Voting Rights Act prohibits states from maintaining voting qualifications or procedures that *result* in discrimination on account of race.²⁷⁹ This prohibition differs from that established in the Court's constitutional jurisprudence, which places greater emphasis on prohibiting states from acting with a discriminatory purpose.²⁸⁰

²⁷⁵ See *supra* Part I (defining administrative constitutionalism and providing examples in the form of agency interpretations of statutes).

²⁷⁶ See *supra* Introduction (explaining how indirect and indirect elaborations of constitutional meaning occur).

²⁷⁷ See *supra* text accompanying note 59.

²⁷⁸ U.S. CONST. art. VI, cl. 2.

²⁷⁹ 42 U.S.C. § 1973(a) (2012).

²⁸⁰ See *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (plurality opinion) (observing “the requirement that racially discriminatory purpose or intent be proved [in] voting cases”); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (requiring a showing under the Equal Protection Clause that a voting procedure “conceived or operated [a] purposeful devic[e] to further racial . . . discrimination”); Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 *FORDHAM L. REV.* 175,

The direct and indirect constructions of the Constitution have co-existed without any confusion; states understand that when they establish voting qualifications they must abide by the stricter obligations contained in the statute. But when the state engages in other types of actions, such as the establishment of welfare restrictions that have a disparate racial impact, they know that in the absence of statutes imposing alternative requirements, the Court's constitutional jurisprudence controls.

Statutes enforcing the Constitution do not produce confusion about constitutional meaning, so there is little reason to think agency constructions of statutes should either. Agency interpretations of statutes merely resolve ambiguities about the duties and obligations that a statute imposes and, until Congress overrides the agency interpretation or the Court declares it unconstitutional, they essentially substitute for the statute itself. For example, the Department of Justice's interpretation of the Voting Rights Act becomes a part of the Voting Rights Act until Congress overrides it or the Court declares it unconstitutional. Since the agency is not directly elaborating constitutional meaning in its construction of the Voting Rights Act, it does not lead to constitutional chaos. And because the People and state actors can differentiate between their statutory obligations determined through agency constructions of statutes and their constitutional obligations determined through direct judicial elaborations of constitutional meaning, public confusion is unlikely to result as well.

V. THE DOCTRINAL PATH FORWARD

What would it mean doctrinally for courts to embrace administrative constitutionalism? The case for embracing administrative constitutionalism that I have articulated above is premised on two comparative advantages that agencies have over courts. First, agencies, as institutions staffed and structured to regulate specific fields and actions, have a comparative advantage over more generalist courts. Agencies are staffed with people dedicated to addressing particular issues and hold tools such as the notice-and-comment process that allow them to more readily assess the effects of a particular standard or rule on institutional and individual behavior and actions. Second, agencies, which are subject to a degree of political control and public input that does not exist to the same degree for courts, are designed to be more responsive to shifts in societal values. The President, Congress, and the People can more readily communicate values and views to agencies than they can to courts.

The values from constitutional experimentation and innovation arise when agencies act on the basis of these comparative advantages that they have over courts. Any doctrinal approach to judicial review of administrative constitutionalism should therefore be focused on ensuring that agencies, in their elaboration of constitutional meaning, do in fact act on the basis of its

191-97 (2012) (analyzing the evidentiary standard in *City of Mobile v. Bolden* and *Rogers v. Lodge*).

comparative advantages. If agencies do not, then there is no real reason for courts to defer to their interpretations of statutes implicating constitutional values. In fact, given the institutional role of courts as defenders of the Constitution, it would be inappropriate for courts to delegate to agencies a role in constitutional meaning elaboration when the only relevant difference between the two institutions is simply who populates them.

Agencies must not only act on the basis of their comparative advantages of expertise and responsiveness in their elaboration of constitutional meaning, they should also give proper consideration to how their actions best advance constitutional principles established by the courts. In the process of constitutional experimentation, agencies, in their choice of constitutional applications, should consider the relationship between the constitutional applications that they adopt and the constitutional principles established in case law. If the agency does not consider this relationship, then courts will inevitably closely scrutinize the action according to whether it is consistent with the constitutional principles courts have developed. And once courts are in the position to closely scrutinize agency elaborations of constitutional meaning, it will be difficult for them to resist the urge to reject the agency interpretation of the statute in favor of one more consistent with its constitutional jurisprudence.²⁸¹ In order to advance opportunities for constitutional experimentation with different constitutional applications, courts should therefore develop a doctrine that requires agencies to consider the relationship between its constitutional application and the constitutional principles and provide reasons supporting the choice of constitutional application. If the agency satisfies these requirements in the notice-and-comment rulemaking process, courts should extend heightened deference to administrative interpretations of statutes that implicate constitutional values.

A doctrinal embrace of administrative constitutionalism requires only slight changes to existing administrative law standards. The critical doctrinal tool is the hard look review standard that courts use to assess whether an agency action is arbitrary and capricious.²⁸² As applied to judicial review of administrative constitutionalism, this hard look review standard should combine the approaches of the majority and dissenting opinions in *FCC v. Fox Television Stations, Inc.*,²⁸³ the most recent case to examine the standard in any detail.

In *Fox Television Stations, Inc.*, the Court reviewed the FCC's interpretation of the Federal Communication Act's prohibition on "utter[ing] any obscene, indecent, or profane language by means of radio communication" during certain hours.²⁸⁴ In the 1970s, the FCC defined indecent speech to include "language that describes, in terms patently offensive as measured by

²⁸¹ See Ross, *supra* note 88, at 1219-26.

²⁸² See *supra* notes 261 & 264 and accompanying text.

²⁸³ 556 U.S. 502 (2009).

²⁸⁴ *Id.* at 506 (quoting 18 U.S.C. § 1464 (2006)).

contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”²⁸⁵ Applying the standard, the FCC fined a radio station for its broadcast of George Carlin’s monologue that involved the repetitive use of expletives in a program “uniquely accessible to children.”²⁸⁶ Several years later, the FCC issued an order interpreting its prior standard explaining, “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”²⁸⁷

After a singer and a presenter at the 2002 and 2003 Billboard Music Awards uttered a single, fleeting expletive, the FCC issued an order holding Fox liable for violations of the Federal Communications Act.²⁸⁸ Fox Television challenged the FCC order arguing that the agency acted arbitrarily and capriciously when it defined as indecent the use of a fleeting expletive.²⁸⁹ Fox also challenged the constitutionality of the FCC regulation.²⁹⁰

In an opinion written by Justice Kennedy, the majority held that the FCC had not acted arbitrarily and capriciously. The majority explained, the FCC adopted the new policy on the basis of “the patent offensiveness of even isolated uses of sexual and excretory words.”²⁹¹ While the FCC could not quantify the harm without an ethically problematic controlled study of children exposed to indecent broadcasts, the FCC found that “[e]ven isolated utterances can be made in ‘pander[ing], . . . vulgar and shocking’ manners, and can constitute harmful ‘first blow[s]’ to children.”²⁹² For the majority, it was sufficient for the agency to observe that “children mimic the behavior they [see]—or at least the behavior that is presented to them as normal and appropriate.”²⁹³ Finally, the court found as further support for the agency’s more expansive interpretation of indecency its finding that technology had evolved to make “it easier for broadcasters to bleep out offending words.”²⁹⁴

The FCC’s explanation for its policy was certainly not a model of expertise-driven analysis as the agency was limited in the empirical data it could obtain

²⁸⁵ *Id.* at 506-07 (quoting *In re Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C. 2d. 94, 98 (1975)).

²⁸⁶ *Id.* at 507 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978)).

²⁸⁷ *Id.* (quoting *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4980 (2004)).

²⁸⁸ *Id.* at 510.

²⁸⁹ *See id.* at 513.

²⁹⁰ *Id.* at 510-11.

²⁹¹ *Id.* at 517.

²⁹² *Id.* at 518 (citation omitted) (quoting *In the Matter of Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 13299, 13324).

²⁹³ *Id.* at 519.

²⁹⁴ *Id.* at 518.

about the effects of fleeting expletives on children. Given this limitation, it was appropriate for the Court to find that the agency met the hard look review standard by examining the available data and providing an explanation for its action.²⁹⁵ In contexts where agencies are not similarly limited in the data that they are able to collect, the court should require consideration of the data available and explain why it rejected alternatives. If the agency fulfills this requirement, the court should find that the agency did not act arbitrarily and capriciously. Proper judicial respect for the agency's comparative advantage in exercising expert judgment opens the door to fruitful constitutional experimentation.

Justice Breyer, writing the leading dissent, did not disagree with the Court's assessment of how the arbitrary and capricious standard should apply in the ordinary case. The dissenters agreed that in the ordinary case, an agency should not be found to have acted arbitrarily and capriciously if it considered available data and explained its policy choice in light of alternatives.²⁹⁶ But for the dissent, this was not an ordinary case. Justice Breyer argued that the change in FCC policy from fining the broadcasting of programming with repeated expletives to ones with only fleeting expletives required justification for the change under the arbitrary and capricious standard. Specifically, when an agency changes its policy, it is not enough for it merely to consider data available for its original policy choice and provide reasoned explanation for it. Instead, "the agency must explain *why* it has come to the conclusion that it should now change direction."²⁹⁷ This includes addressing such questions as: "Why . . . it now reject[s] the considerations that led it to adopt the initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?"²⁹⁸

Justice Breyer concedes that sometimes it will be sufficient for the agency to simply explain that it has weighed the relevant considerations differently.²⁹⁹ But at other times, the "agency can and should say more."³⁰⁰ Breyer explained:

Where . . . the agency rested its previous policy on particular factual findings . . . or where an agency rested its prior policy on its view of the governing law . . . or where an agency rested its previous policy on, say, a special need to coordinate with another agency, one would normally expect the agency to focus upon those earlier views of fact, of law, or of

²⁹⁵ *Id.* at 513 (quoting *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (describing the governing arbitrary and capricious standard as a narrow one that requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action").

²⁹⁶ *Id.* at 549 (Breyer, J., dissenting) (articulating an arbitrary and capricious standard similar to the one that the majority employed).

²⁹⁷ *Id.* at 550.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

policy and explain why they are no longer controlling.³⁰¹

What the dissenters sought to ferret out with the application of this more rigorous hard look review was the political motivations for the changes in policy. The majority in *Fox Television* acknowledged that congressional pressure played a role in the FCC's decision to change policy.³⁰² The dissent found this troubling, arguing that it would be inconsistent with the APA for agencies "to change major policies on the basis of nothing more than political considerations or even personal whim."³⁰³

The dissenters stood on solid ground with their argument that agency policies should not be driven purely by political considerations. But their more rigorous hard look review standard tilts the balance too far in the direction of prohibiting any political considerations in the choice of agency policies. Whenever there is an absence of sufficiently probative new data about changes in the world to support a new policy, agencies will have a difficult time changing course. The result in some cases will be agency policies constrained from keeping up with changing values. Such constraints would undermine one of the principal comparative advantages that agencies have over courts in the elaboration of constitutional meaning—their ability to be responsive to evolving public values. If agencies are no better than courts in updating constitutional applications to evolving public values, then we are left with constitutional standards and rules that are poorly adapted to changing societal contexts.

In order to obtain the maximum benefit from constitutional experimentation and to best secure a Constitution that adapts to changes in society and its values, agencies should be given leeway to justify a change in policy on the basis of changes in how it weighs available data and considers alternatives. It is through these changes that evolving public values enter into the agency decision-making process and that constitutional adaptation to evolving societal contexts can occur.³⁰⁴

³⁰¹ *Id.* at 551-52.

³⁰² *Id.* at 523 n.4 (majority opinion).

³⁰³ *Id.* at 552 (Breyer, J., dissenting).

³⁰⁴ Scholars have offered various proposed doctrinal revisions that would allow agencies to bring political considerations into their decisions without being found to have acted arbitrarily and capriciously. See Kagan, *supra* note 51, at 2380 (suggesting an approach which "would relax the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by doing so has accepted responsibility for, the administrative decision in question."); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 45-52 (2009) (describing "the mechanics of how political influences could be embraced by arbitrary and capricious review"). But as Mark Seidenfeld argues, the current hard look review standard established in *Fox Television* allows for the influence of changing political values through the opportunity for agencies to "weigh the costs and benefits of a rule differently from a prior administration." Seidenfeld, *supra* note 267, at 149.

While courts should give agencies greater discretion to change policies than the dissent's rigorous hard look review provides, Justice Breyer was right to suggest that courts should closely scrutinize whether the agency considers the constitutional implications of their policy choices. While courts typically focus on the "arbitrary and capricious" language of the APA review standard, a provision in the same statute also prohibits agency actions "contrary to constitutional right, power, privilege, or immunity."³⁰⁵ This prohibition should be understood as requiring that agencies not only act consistent with constitutional principles established by courts, but also, that they explain how their action advances the relevant constitutional principle.

In *Fox Television*, the FCC failed to meet this standard. The FCC in a conclusory statement said that its "decision is not inconsistent with the Supreme Court ruling in *Pacifica*."³⁰⁶ In *Pacifica*, the Court articulated the First Amendment principle relevant to the censorship of obscene speech. The Court explained:

Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.³⁰⁷

The FCC had a statutory obligation under the APA to explain how the ban on fleeting expletives was consistent with the constitutional principle found in the Supreme Court's First Amendment jurisprudence. Such consideration might have led to exceptions for certain types of fleeting expletives like those made to express a political view. It also might have led to the establishment of an exception for certain broadcasters unable to police fleeting expletives with new technology. In the absence of such an exception, broadcasters might be deterred from speaking because of concern that what might be said in the broadcast would be punished. Since the FCC did not satisfy the requirement of evaluating the relationship between its rule and First Amendment principles, the Court should have remanded the case to the agency with instructions that it provide reasoned support for its administrative constitutionalist determination.

In sum, when agencies in a notice-and-comment rulemaking process elaborate constitutional meaning through the interpretation of statutes, courts should review the process according to an ordinary hard look review standard. In this review, courts should ensure that agencies acted on the basis of expertise by giving consideration to public comments and properly accounting

³⁰⁵ 5 U.S.C. § 706(2)(B) (2012).

³⁰⁶ *Fox Television*, 556 U.S. at 555 (Breyer, J., dissenting) (quoting *In re Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4982 (2004)).

³⁰⁷ *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (citation omitted).

for public inputs about factual contexts, costs and benefits of a policy, and alternatives. Agencies should, however, be given the authority to re-weigh facts on the basis of changes in public values represented by the election of a new President or changes in partisan control of Congress. Once the agency has considered facts relevant to the regulation, the agency should then explain how the regulation accords with constitutional principles. If the agency satisfies these requirements, courts should then apply the deference framework already in place for other agency construction of statutes made through the notice-and-comment rulemaking process.³⁰⁸ Thus, in cases like the one that introduced this Article, *Smith v. City of Jackson*, the Court should defer to the agency's indirect application of constitutional principles through rulemaking so long as the agency's construction of the statute is reasonable and not contrary to the clear intent of Congress.

CONCLUSION

If we want to advance a principal goal of the American constitutional project—the adaptation of the Constitution to evolving societal contexts—it is crucial that courts embrace administrative constitutionalism. Such an embrace will provide opportunities for constitutional experimentation with different applications of constitutional principles. By observing the outcomes of these experiments, the People will be equipped for an informed deliberation about which applications best advance the relevant constitutional principle in changing societal contexts. And through this process of continual, democratic updating, the Constitution may in fact “endure for ages to come” and “adapt[] to the various *crises* of human affairs.”³⁰⁹

³⁰⁸ See *supra* text accompanying note 5.

³⁰⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).