

ADMINISTRATIVIZING CONSTITUTIONAL LAW

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What if the answer to a foundational question in constitutional theory, one that everyone has been obsessing about for years now, is hiding in plain sight? This is exactly what this Article suggests. The question that it tackles is how courts ought to exercise their powers of constitutional review. And the answer that it provides is that courts rely on the same basic approach that they already use elsewhere in public law: in the sub-constitutional law of administrative law. In short, the Article argues that we should “administrativize” constitutional law.

*The Article advocates the “exportation” of three central tenets of administrative law adjudication into the constitutional law context to achieve the desired “administrativization.” The first is captured in the seminal *Chevron v. NRDC* case which instructed courts to defer to any reasonable interpretation of statutes by administrative agencies. The second is the requirement that actions by administrative agencies satisfy a standard of what courts came to call, especially since the Supreme Court case in *Motor Vehicles v. State Farm*, “reasoned decisionmaking.” And the final one is the “highly deferential” review of inactions by agencies that was suggested in *Massachusetts v. EPA* as well as the notion of “anti-abdication” that courts recognized in another related corner of administrative law.*

In combination, the Article argues that these three tenets are all that is needed to construct an extremely appealing approach to constitutional law adjudication. And while there are significant challenges in adapting these tenets to the constitutional law setting—which deals with different institutions, themes, and legal texts—the Article shows that they can all be satisfactorily met. Among the many advantages of an “administrativized” constitutional law are that it strikes an attractive balance between the respective roles of courts and political institutions in carrying forward the constitutional plan; that it has inherent flexibility which can accommodate people with radically different views; that it promotes a “culture of justification” that is appropriate (and may in fact be desperately needed) in a pluralist and highly distrustful polity like our own; and that it is only a default position which can expand and contract in appropriate circumstances.

While there is nothing internal to law that prevents its proposal, the Article is clear eyed that convincing courts to move in this direction is likely to prove hard. After all, under an “administrativized” constitutional law, the Constitution will be taken away from the courts to a substantial—though far from complete—degree. Recent discussions about the need for “court reform” suggest, however, that things might be changing. Assuming the continued political vitality of these conversations, the Article argues that both supporters and opponents of “court reform” should pay close attention to what an “administrativized” constitutional law has to offer. In one scenario, an “administrativized” constitutional law can help reformers achieve their desired result of democratizing the courts more effectively than focusing on institutional reform alone. In a different scenario, however, an “administrativized” constitutional law has consensus-building features that can make institutional reform ultimately redundant.