



THE C. BOYDEN GRAY

Center *for the* Study
of the Administrative State

ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

Judicial Administration

Bijal Shah

CSAS Working Paper 20-06

*Bureaucracy and Presidential Administration: Expertise and Accountability
in Constitutional Government, February 6, 2020*



ANTONIN SCALIA
LAW SCHOOL

JUDICIAL ADMINISTRATION
U.C. IRVINE LAW REVIEW (forthcoming)

Bijal Shah*

“Presidential administration” has been discussed for the last twenty years. However, scholars have not considered whether courts are doing the same thing. Like presidents, courts may oversee the quality of administrative action under authority granted by the Constitution and legislation. And also like presidents, courts make policy decisions in lieu of the agency which has been delegated policymaking power.

This Article draws on case law and legal scholarship, as well as work from public administration and political science, to construct a paradigm of “judicial administration.” More specifically, it offers a history of and traces the tension between the “overseer” and “decider” approaches to judicial administration, and explains the implications of these approaches for the constitutionality and efficacy of judicial review today.

First, this Article considers judicial administration as accomplished through the re-enforcement of administrative procedure. These efforts were criticized as judicial policymaking by formalists. However, as this Article notes, these decisions focus on reconciling administrative action with constitutional, technical and rule-of-law norms, and are thus rooted in overseer impulses. In other words, the “decider” dimensions of even the most intrusive judicial review of agency process have been overstated.

Second, and in contrast, this Article notes that the recent call to overturn Chevron constitutes uncritical advocacy for the “decider” approach to the judicial administration of statutory directives. In the past, courts have limited their role in the administration of legislation to that of overseer. However, today’s formalists seek to implement de novo review wholesale. This effort is, at its core, a push for courts to decide policy in lieu of the agencies to which Congress has delegated policymaking power, or to which policymaking power belongs as a matter of executive authority.

This may not trouble functionalists much. But it should trouble the very formalists who denounce Chevron. First, this evinces an inconsistency in their position, given

* Associate Professor of Law, Arizona State University (ASU), Sandra Day O’Connor College of Law. I am grateful for thoughtful feedback from Miriam Baer, Kent Barnett, Hal Bruff, Andy Coen, Blake Emerson, Bill Eskridge, Kati Kovacs, Hal Krent, Ron Levin, Chip Murphy, Justin Pidot, Joe Postell, Shalev Roisman, Dan Rodriguez, Jarrod Shobe, Glen Staszewski, David Super, Justin Weinstein-Tull and Judge Stephen F. Williams. This project benefited greatly from conversations at the University of Arizona College of Law and Brooklyn Law School faculty colloquia, George Mason Gray Center for the Study of the Administrative State “Bureaucracy and Political Leadership” roundtable, the George Washington University Law School Regulatory Studies Center roundtable, the AALS New Voices in Administrative Law & Legislation and New Voices on Legal Interpretation programs, and—of course— with my thoughtful and generous colleagues at ASU. Many thanks as well to Brenda Coufal, Abby Dockum and Alec Tyra for their helpful research assistance. All errors are my own.

that many have condemned what they identify as judicial policymaking in the realms of administrative process. More broadly, as in presidential administration, the “decider” approach to judicial administration runs the risk of treading on the legislature’s authority to make the law. To the extent this is the case, calls to dismantle the administrative state and instate the judiciary in its place are focused on reimbursing the wrong branch of government.

For those interested in judicial intervention as a means of regulating the administrative state, including the exercise of presidential power, the “overseer” model of judicial administration is less likely to offend a formal conception of the separation of powers. Furthermore, longstanding paradigms of judiciary as overseer confront the pressing issues—namely, the denigration of administrative due process and corrosion of expertise in service of the President’s agenda—resulting from today’s unsupervised executive branch.

INTRODUCTION	2
I. JUDICIAL ADMINISTRATION OF PROCEDURAL REQUIREMENTS	13
<i>A. Agency Constitutionalism</i>	16
1. Overseeing Administrative Due Process	17
2. Policymaking via Structural Injunction.....	20
<i>B. Augmenting Informal Rulemaking Requirements</i>	24
<i>C. “Hard Look” Review</i>	27
1. Overseeing Political Influence in Expertise	31
2. Supervising the Development of Expertise	34
II. JUDICIAL ADMINISTRATION OF STATUTORY DIRECTIVES.....	38
<i>A. Customary Judicial Reluctance to Make Policy</i>	43
<i>B. Chevron: The Illusion of Judicial Restraint</i>	46
1. Step Zero: A Tool of Judicial Policymaking.....	47
2. Step One: A Turn Toward the “Decider” Approach	50
III. IMPLICATIONS FOR THE ADMINISTRATIVE STATE.....	56
<i>A. The Constitutionality of Judicial Administration</i>	57
<i>B. Judicial vis-à-vis Presidential Administration</i>	59
CONCLUSION	62

INTRODUCTION

The judiciary influences the administration of law. Courts have the power to shape or even direct administrative activity, or to stop it in its tracks. Indeed, there has been ample evidence of this lately.

One way courts do this is by reviewing agency decisionmaking. This can include interrogating the quality of agency decisions, or evaluating the processes, like rulemaking and adjudication, by which agencies come to their policy decisions. For instance, in 2019, the Supreme Court denied the Department of Commerce’s effort to put a question about citizenship on the U.S. Cen-

sus.¹ The agency made this effort to further President Trump’s goals for immigration policy. In this case, the Court began its analysis consistent with the application of the Administrative Procedure Act (APA) arbitrary and capricious standard under hard look review, which considers the quality of administrative decisionmaking.² Consistent with hard look doctrine,³ the Court sought to consider “what role political judgments can and should play” in the administration of the Census.⁴ Ultimately, the Court held the action was illegitimate because the justification for it was based in pretext.⁵ As a result, the Trump Administration was forced to end its pursuit of this policy just one week later,⁶ despite the President’s continued interest in pursuing this policy.⁷

In response to an Executive Order issued by President Trump,⁸ the Environmental Protection Agency recently rescinded the Clean Power Plan (CPP) rules that the agency issued under the Obama Administration.⁹ Like the case that initiated hard look, *State Farm*,¹⁰ “[t]he Trump Administration’s proposal to repeal the Obama Administration’s CPP rules presents a similar situation—a new administration that campaigned on a deregulatory platform is seeking to rescind one of its predecessor’s major regulatory initiatives.”¹¹ It remains to be seen, however, whether the Court will apply hard look to this deregulation, as it did in *State Farm*,¹² or take a lenient approach under the APA’s arbitrary and capricious standard. In any case, the Court has the power to decide whether this regulation lives or dies.

The Court has ended other agency attempts to administer the law, through judicial review of agency action—notably, by determining that certain administrative policies are illegitimate because they are not the result of adequate rulemaking processes. In 2019, the Court held that because the Department of Health and Human Services neglected its statutory notice-and-comment obligations when it revealed a new policy that dramatically and retroactively reduced Medicare

¹ See generally *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) (holding that the agency’s action was illegitimate because it “rested on a pretextual basis”).

² See *infra* Part I.C (discussing the basis for hard look review).

³ See *infra* Part I.C.1 (arguing that courts oversee the influence of politics on agency action via hard look review).

⁴ *Department of Commerce v. New York*, 133 HARV. L. REV. 372, 372 (2019).

⁵ *Id.*

⁶ Michael Wines, *2020 Census Won’t Have Citizenship Question as Trump Administration Drops Effort*, NY TIMES (July 2, 2019) (“The Trump administration, in a dramatic about-face, abandoned its quest on Tuesday to add a citizenship question to the 2020 census, a week after being blocked by the Supreme Court.”).

⁷ Jacqueline Thomsen, *DOJ reverses, says it’s trying to find ways to include citizenship question on 2020 census*, THE HILL (July 3, 2019) (describing Judge Hazel’s conundrum). Indeed, the President’s interference with the judicial ruling was so strong that one district court judge (Judge Hazel) sought to determine whether “there could be a mechanism by which I order—and, again, I’m not saying I’m inclined to do this—the Census Bureau or the Department of Commerce to take whatever steps are necessary to counteract [the President’s tweets], which [I admit] is an odd place for the judiciary to be.” *La Union Del Pueblo Entero v. Ross* (No. 8:18-cv-01570-GJH) (June 26, 2019) (ordering the federal government to cease pursuit of the citizenship question in light of the Supreme Court’s decision in *Department of Commerce*).

⁸ *Presidential Executive Order on Promoting Energy Independence and Economic Growth*, Exec. Order No. 13,783 (March 28, 2017).

⁹ *Affordable Clean Energy Rule*, 40 C.F.R. Part 60 (finalized June 19, 2019).

¹⁰ See *infra* note 202.

¹¹ Jack Beermann, *The Deregulatory Moment and the Clean Power Plan Repeal*, HAR. L. REV. BLOG (Nov. 30, 2017).

¹² See *infra* note 205.

payments to hospitals serving low-income patients, its policy must be vacated.¹³ In 2017, the Court stopped the Deferred Action for Parents of Americans and Lawful Permanent Residents program (“DAPA”), implemented by the Department of Homeland Security as part of the Obama Administration’s immigration agenda, because it had not gone through the notice-and-comment process (and because it was arbitrary and capricious).¹⁴ However, in a throwback to *Vermont Yankee*,¹⁵ the Court also reasserted, in 2015, the view that the judicial augmentation of rulemaking requirements “imposes on agencies an obligation beyond the [APA]’s maximum procedural requirements.”¹⁶ Therefore, while courts can ensure that agencies engage in the bare minimum of APA rulemaking requirements, they may not add steps to the regulatory process.

Judicial efforts to square administrative statutory interpretation with legislative intent also alter how agencies implement the law. In 2019, the Court interpreted the Alaska National Interest Lands Conservation Act in a manner that stripped away the National Park Service’s jurisdiction over navigable waters.¹⁷ In 2009, during the early Obama years, the Court interpreted the Indian Reorganization Act in a manner that invalidated the Department of Interior’s longstanding policy of taking land belonging to certain Indian tribes into a trust on their behalf.¹⁸

Furthermore, efforts to squaring agency actions with the Constitution may also lead to judicial intervention in administration. For instance, in 2019, the Court held that the Lanham Act prohibition on registration “immoral” or “scandalous” trademarks violates the First Amendment; in doing so, it took away the government’s ability to limit viewpoint-based discrimination itself.¹⁹

As illustrated above, courts impact agencies’ administration of the law. This Article refers to this paradigm as “judicial administration.” Almost twenty years ago, then-professor Kagan introduced the concept of “presidential administration,” whereby the President is involved in agencies’ administration of the law.²⁰ Since then, the scholarly treatment of presidential admin-

¹³ *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019).

¹⁴ *United States v. Texas*, 136 S. Ct. 2271 (2016). More specifically, “an equally-divided Supreme Court affirmed the Fifth Circuit’s invalidation of the initiative because it was not promulgated as a rule, by means of a sharply-defined notice-and-comment process.” Bijal Shah, *Putting Public Administration Back into Administrative Law*, JOTWELL (June 12, 2018) (reviewing Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017)), <https://adlaw.jotwell.com/putting-public-administration-back-into-administrative-law/>.

¹⁵ See *infra* Part I.B.

¹⁶ *Perez v. Mortgage Bankers Association*, SCOTUSblog (“[T]he D.C. Circuit’s Paralyzed Veterans doctrine, which requires agencies to use the notice-and-comment process before it can significantly revise an interpretive rule, is contrary to the clear text of the Administrative Procedure Act’s rulemaking provisions and improperly imposes on agencies an obligation beyond the Act’s maximum procedural requirements.”), <https://www.scotusblog.com/cases/files/cases/perez-v-mortgage-bankers-association/>; *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92 (2015).

¹⁷ *Sturgeon v. Frost II*, 139 S. Ct. 1066 (2019).

¹⁸ *Carcieri v. Salazar*, 555 U.S. 379 (2009).

¹⁹ *Iancu v. Brunetti*, 588 U.S. 2294 (2019); *Iancu v. Brunetti*, 133 HARV. L. REV. 292 (2019) (“As the government explained at oral argument, striking down the ‘immoral or scandalous’ bar of the Lanham Act leaves the government without the opportunity to ‘restrict trademarks on the ground that they’re obscene.’”).

²⁰ See generally Elena Kagan, *Presidential Administration*, 114 HARV L. REV. 2245 (2001) (introducing the theory of “presidential administration”); see also Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. (forthcoming), at 11 n.43, available at <https://www.ssrn.com/abstract=3353418> (noting constitutional arguments both for and against presidential administration by scholars such as Steven Calabresi, Elena Kagan, Jerry Mashaw, Peter Shane, and others). Kagan argued that the President has authority to direct agency action. See *id.* at 2250 & 2331. Others have suggested that “presidential administration” is better understood as presidential “efforts to control bu-

istration,²¹ and to some extent, the “congressional administration” of agencies,²² has been thorough. For instance, scholars have considered the mechanisms of presidential administration,²³ whether presidential administration overwhelms or is at odds with the congressional priorities that govern agencies²⁴ and whether presidential administration violates the constitutional separation of powers by infringing on the legislature’s authority to empower the administrative state.²⁵ This Article brings to the fore the mechanisms of *judicial* administration, confronts its constitutional implications and considers its relevance today.

Although judicial administration has been on full display lately, by no means is it a recent development. Courts have influenced how agencies act for some time.²⁶ By many accounts,

reaucratic discretion from outside of agencies.” Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 577-78 (2011) (arguing that the “administrative presidency” has played a role in deteriorating agencies). While Kagan’s work made a lightning rod of the topic, a body of thoughtful literature on presidential control of agencies existed prior to 2001. *See, e.g.*, FRANCIS TROWBRIDGE VOM BAUR, *FEDERAL ADMINISTRATIVE LAW* 94 (1942) (noting that agencies, “acting as the administrative arm of the legislature [are] necessarily free from executive interference”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Alfred C. Aman, Jr., *Administrative Law in A Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101 (1988) (discussing the rise of presidential control over the “regulatory matrix”); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) (hereinafter Bruff, *Presidential Management of Rulemaking*); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979) (hereinafter Bruff, *Presidential Power and Rulemaking*).

²¹ *See, e.g.*, Shah, *supra* note 20 (discussing how Presidents control independent agencies by litigating against them); Harold J. Krent, *Presidential Control of Adjudication within the Executive Branch*, 65 CASE W. RES. L. REV. 1083 (2015); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953 (2015); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015); Daniel B. Rodriguez & Barry R. Weingast, *The “Reformation of Administrative Law” Revisited*, 31 J. L. ECON. & ORG., 782, 783 (2015) (arguing for “the critical role of Congress and the President in the reformation of both the American regulatory state and administrative law”); Daniel P. Rathbun, *Irrelevant Oversight: Presidential Administration from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643 (2009); Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2007); Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King*, 115 YALE L.J. 2611 (2006). The list goes on.

²² *See, e.g.*, Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. (forthcoming); Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 1961 (2019) (considering dynamics of congressional administration—in particular, how the legislature controls agencies through statutes requiring administrative coordination); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

²³ *See* Kagan, *supra* note 21, at 2247 (discussing the different approaches to presidential administration taken by Presidents Reagan, H.W. Bush, and Clinton).

²⁴ *See, e.g.*, Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397, 425 (2018); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 745 (2016).

²⁵ *See* Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006). (“It is that open question—that is, the authority of the President to direct the discretionary powers delegated to officials—the contemporary debate pursues.”). Even Kagan herself, enthusiastic as she was about presidential administration, noted that it proceeds without statutory authorization. Kagan, *supra* note 21, at 2319-20 (“In directing agency officials as to the use of their delegated discretion, the President engages in such [lawmaking] functions, but without the requisite congressional authority.”).

²⁶ LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 119 (1965) (noting that courts hold a sort of amorphous responsibility to enforce “the enforcement of “rights and duties and under broad grants of statutory and ‘common law’ jurisdiction”). “Modern administrative law relies heavily on the premise that federal agencies are responsive to judicial review.” Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory*

courts have played a strong role in shaping administrative power since the advent of the modern administrative state,²⁷ and the term “administrative responsibility” has long been used to describe the organization and operation of both agencies and the courts.²⁸ Today, courts continue to influence agencies to engage in certain conduct or adopt a particular approach to implementing the law. In other words, via judicial review, courts have long affected and effected government policies on a regular basis, and continue to do so.

But what does this Article mean by judicial “administration,” precisely? This phrasing does not refer to the tradition notion of the “administration of justice,” which includes the frameworks of criminal and civil law implemented within Article III courts.²⁹ “Administration” encompasses, in a loose sense, all that governmental agencies do to implement the law.³⁰ When either the President or courts engage in “administration,” they are participating, in some sense, in agency action. This Article includes judicial administration of rulemaking, adjudication and policy-making that stems from administrative statutory interpretation, which cover a significant portion of what agencies do.³¹

Certainly, the levers of judicial administration differ from those of presidential administration. Presidential administration tends to involve the constitutional power to appoint (and remove) agency heads and informal mechanisms of oversight, as well as political pressure, orders, directives, holding out (to the public) an agency’s policies as one’s own, and other forms of pres-

Slop and Strategy, 68 DUKE L.J. 1651, 1652 (2019). “Judicial review of the basis for administrative decisionmaking is...robust, rooted both in core administrative statutes and in constitutionally informed administrative law doctrines.” Gillian Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1933 (2013).

²⁷ WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 16 (1975) (noting that in the mid-1700s, “courts had vast coercive power of a criminal, administrative and civil nature”); *id.* (“In the absence of a bureaucracy, [political] authorities often possessed little coercive power of their own and often had to turn to courts.”); JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO THE CONSTITUTIONAL GOVERNMENT* 16 (2017) (“Administrative law did not start with judicial review of administrative activity; the courts were the administrators themselves.”); *id.* at 71 (noting W.F. Willoughby’s point that courts act as “auxiliary agencies for securing the administration of public law”).

²⁸ WILLIAM F. WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 9 (1929).

²⁹ *Id.* at 3;

³⁰ “[T]he vast majority of federal activities involve administrative agencies and people when they are conceived and planned as well as when they are performed....Administration is why and where and when and what and how and by whom things are done.” RICHARD J. STILLMAN, ED., *THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY* vii (1989); *see also* 2 AM. JUR. 2D *ADMINISTRATIVE LAW* § 46 (“[A]dministration has to do with the carrying of laws into effect, that is, their practical application to current affairs that are...administrative in nature.”); The provision of a more precise definition of “administration,” and of clear distinctions between what agencies, courts, Congress and the President do, is far beyond the scope of this Article—it is (and has been) the work of several lifetimes, really.

³¹ CARY COGLIANESE, ED., *ACHIEVING REGULATORY EXCELLENCE* (2017) (describing administrators as rule “applicers” and “enforcers,” and as engaging in “a variety of other actions—from educating to subsidizing to adjudicating disputes, all in an effort to solve the problems they have a responsibility to address”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975) (“[T]he traditional model [of administrative law] affords judicial review in order to cabin administrative discretion within statutory bounds, and requires agencies to follow decisional procedures designed to promote the accuracy, rationality, and reviewability of agency application of legislative directives.”). It bears noting that this Article is suggestive, and does not claim to be exhaustive. In other words, it offers examples of cases and doctrines that are illustrative of judicial administration, but there are surely other doctrinal frameworks worth considering.

idential guidance and decisionmaking.³² Judicial administration is accomplished through judicial review of agency action.

Despite the differences between presidential administration and judicial administration, the former provides important context for the latter. A prevalent framing of presidential administration, by Peter Strauss and others, distinguishes between two forms of presidential administration. In the first, the President acts as “overseer” of agency action³³ in order to ensure that it is consistent with executive branch norms and the President’s agenda. In the second, the President acts as policy “decider” by exercising the authority of the agency officials to whom the power to administer the law has been delegated by Congress.³⁴ The former is, to many, a comfortably constitutional exercise of presidential power.³⁵ The latter is more controversial, in that it evinces the President exercising agency policymaking authority despite the delegation of that authority by Congress to agencies themselves.³⁶

Courts, too, administer the law as “overseers” and “deciders.”³⁷ As to the former, the judiciary oversees the extent to which agency action is consistent with constitutional norms and the legislature’s agenda. As to the latter, courts sometimes engage in policymaking themselves.

³² See Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEORGE WASH. L. REV. 696, 715-18 (2007) (discussing how the President may legitimately control agencies through appointments, removals, coordination and “political synergy,” by which the “President’s place as leader of his party and patron of appointees assures strong incentives to follow his wishes”); Shah, *supra* note 21, at 40-47 (describing appointments, removals and informal consultation such as “shaping the scope and substance of governmental litigation, issuing broad mandates via directed memoranda and executive orders, creating presidential councils, guiding agencies’ implementation of their statutory mandates” and efforts to coordinate as the main forms of presidential control over executive agencies) (citations omitted); Watts, *supra* note 24, at 685-86 (stating that presidential administration has taken the form of “covert command [and] overt command [such as] issuing written directives and publicly claiming ownership of regulatory policy [in order to] influence or outright control regulatory policy”).

³³ Strauss, *supra* note 32, at 696-97.

³⁴ Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1205 (2013) (describing this model as one in which the President “step[s] directly into the shoes of the relevant official”); Watts, *supra* note 24, at 729 (“Kagan has won. Presidential directive authority with respect to executive agencies is alive and well.”).

³⁵ See, e.g., Watts, *supra* note 24, at 730 (suggesting that there is the President may make “suggestions” that serve “as relevant decisional factors without violating Congress’s intent”); Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461 (2010) (suggesting that “basic supervisory relationships” between the President and agencies could foster more sound policy in a constitutional manner).

³⁶ See Vermeule, *supra* note 34, at 1205 (“On this view, grants of discretion to the heads of executive agencies are presumptively to be read as authorizing presidential direction as a formal legal matter.”); Strauss, *supra* note 32 (discussing and arguing against the “decider” model of presidential administration); Stack, *supra* note 25, at 263 (arguing “the President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name”); Merrill, *supra* note 21, at 1977 (suggesting the “decider” model of presidential administration relies on a “constitutional order in which the President exercises autonomous policymaking authority without the need for any delegation of power from Congress, at least for the duration of the presidential administration”); *but see* Strauss, *supra* note 32, at 757 (In “the connection of agency priorities as a general matter to the President’s program, and the ordinary opacity even of agency judgments about such matters...one might find considerably greater room for the presumption of directorial authority for which Dean Kagan and others argue.”).

³⁷ As Harold Bruff notes, there is a distinction between the judiciary determining “whether the action was selected by fair procedures within constitutional and statutory limits and whether the action was substantively reasonable,” and the possibility of courts “supplant[ing] administrative discretion over policy matters by substituting judicial judgment for that of an agency.” Bruff, *Presidential Power and Rulemaking*, *supra* note 20, at 459.

To be clear, the “decider” approach to judicial administration is not necessarily more interventionist. Indeed, judiciary may significantly influence what agencies do while it promotes administrative adherence to constitutional and rule-of-law norms. Thus, even the overseer model may have a great impact on administrative policy outcomes. The distinction between the two lies, as a theoretical matter, in judicial intent. In the overseer approach, the court seeks to uphold constitutional and other administrative law values. The court’s knowledge that this is may change the agency’s policy outcome is distinct from its goal, which is to ensure compliance with transcendent norms. In the decider approach, the court’s interest lies directly in shaping the substance of the precise policy at issue.

This distinction between the two models may be difficult to perceive. Just as Strauss has noted in regards to presidential administration,³⁸ the “overseer” model of judicial administration may bleed into the “decider” model. For instance, in some cases, strong judicial intervention under the overseer approach may appear to be purposivist, a consideration this Article grapples with throughout. Indeed, this tension in judicial administration is reflected by consistent disagreement as to the extent to which any form of judicial review is, in fact, an articulation of policymaking power otherwise assigned to agencies by the legislature or as inherent to agencies’ placement in the executive branch.

This Article considers the overseer and decider approaches as they have appeared along two vectors of judicial administration: judicial review that seeks accountability to “due process and rule-of-law values on the one hand” and judicial review that seeks “accountability [to legislative intent] on the other.”³⁹

The purpose of judicial review of agency procedure has included persuading agencies to adhere to administrative due process⁴⁰ and norms of fairness and accessibility in rulemaking,⁴¹ and to encouraging policymaking based in reasoned expertise.⁴² In this context, formalist commentators, including on the Supreme Court, have characterized and condemned judicial review as judicial policymaking—in other words, on the grounds that courts have engaged in the “decider” model of judicial administration.⁴³ This Article argues that, in contrast, these doctrines remain solidly rooted in the “overseer” model because they are motivated by courts’ constitutional duty to ensure fair and adequate process.

The “overseer” approach has also been the courts’ preferred model of reviewing agency statutory interpretation. In this form of judicial administration, courts oversee agency fidelity to legislative intent. And yet this modality, too, allows for the “decider” approach. Here, too, courts sometimes adopt the legislative or executive policymaking authority delegated to agencies.⁴⁴ In this way, courts make policy decisions themselves.

While the “decider” dimensions of the judicial review of agency procedures have been overstated, they are overlooked today in regard to the judicial control of administrative statutory in-

³⁸ Strauss, *supra* note 32, at 704 (“The difference between oversight and decision can be subtle...”).

³⁹ Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1750 (2007).

⁴⁰ See *infra* Part I.A.

⁴¹ See *infra* Part I.B.

⁴² See *infra* Part I.C.

⁴³ See generally *infra* Part I.

⁴⁴ See *infra* Part II.

terpretation. Today's formalists argue for the elimination of *Chevron*⁴⁵ and for courts to be installed as the sole arbiters of administrative statutory implementation. Advocacy for this approach signals an unexamined turn towards the "decider" model of judicial administration, as a systemic matter, but only within the context of statutory interpretation.

Overall, this Article offers a comprehensive framework of judicial administration, and explore how this framework bears on the importance of judicial review to the legitimacy of the administrative state. Throughout, it threads its account with a discussion of the legal paradigms—including administrative adjudication, rulemaking, hard look review, the nondelegation doctrine, and *Chevron*—which are focal points of Kagan's seminal *Presidential Administration*,⁴⁶ among many other articles on the topic. These paradigms have given rise to and continue to shape not only presidential administration, but also, as this Article will illustrate, judicial administration. However, this Article does not evaluate whether the cases it discusses were decided correctly or not. By furthering certain administrative outcomes, judicial administration might hinder the machinery of the administrative state—or improve it, as the case may be. Accordingly, its use of the term "overseer" or "decider" for a particular approach to judicial administration is not meant to be complimentary or derogatory,⁴⁷ but rather, descriptive.

However, this Article does note that frameworks of judicial administration have normative implications for the ongoing discussion regarding the constitutionality of the administrative state. Some formalists⁴⁸ apply the "externalist" account of the administrative state⁴⁹ to argue that agencies are illegitimate. More specifically, they contend that agencies are unconstitutional because they exercise discretion in the implementation of law.⁵⁰ Furthermore, they often suggest that this discretion should be shifted into the hands of courts to remedy the constitutional transgression.⁵¹

⁴⁵ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

⁴⁶ See Kagan, *supra* note 21, at 2263-83.

⁴⁷ Cf. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 375 (1983) (using the term "managerial judges" critically). For instance, this Article does not assert that judicial administration is necessarily shaped by underlying political or constitutional ideologies held by the courts, even though it may be. An example of this normative approach is the assertion that anti-administrativists are interested in increasing judicial oversight precisely because it would curb agency action, but not agency inaction. See, e.g., Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, MICH. L. REV. (forthcoming); Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805 (2019). Another example involves claims of judicial "activism," a label denouncing judicial review as motivated by goals inapposite to nonpartisan judicial review. See Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441 (2004) (defining judicial activism as "judicial legislation").

⁴⁸ "Those adhering to a formalist approach...argue that the key to separation of powers disputes lies in determining whether the challenged action should be characterized as lawmaking, in which case the power is to remain in the province of the legislature; as enforcing the law, in which case it is to remain the prerogative of the executive branch; or as interpreting the law, in which case it falls within the domain of the judiciary." Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1254 (1988).

⁴⁹ Per this view, the expansion of agencies as a result of the New Deal was the result of a political loss for the courts. See Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State, Part I: Political Accommodation and Legal Strategy in the New Deal Era* (work-in-progress 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335114.

⁵⁰ "This judicial skepticism of administrative government, which [Gillan Metzger has] labeled anti-administrativism, is heavily constitutional, marked by a formalist and originalist approach to the separation of powers [and] a deep distrust of bureaucracy...." Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2020 SUP. CT. REV. (forthcoming), available at https://scholarship.law.columbia.edu/faculty_scholarship/2602/ (hereinafter Metzger,

Functionalists⁵² are less troubled by administrative power. These scholars admit that agencies wield a fair amount of clout⁵³ and that Congress could do more to articulate clear directives for agencies.⁵⁴ Nonetheless, they accept that, by now, the U.S. and most working governments have conceded to some form of an administrative state to accomplish its goals.⁵⁵ This view cares, primarily, that agencies exercise their discretion effectively with the aid of judicial oversight, and that the judiciary not interfere with the workings of agencies as a functional matter.⁵⁶

The debate is focused primarily on seeking appropriate boundaries to agency autonomy. However, it neglects to consider whether there are formal limits to the *judiciary's* power over the

The Roberts Court). Critics of the administrative state “paint the administrative state as fundamentally at odds with the Constitution’s separation of powers system, combining together in agencies the legislative, executive, and judicial authorities that the Constitution vests in different branches and producing unaccountable and aggrandized power in the process.” Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (hereinafter Metzger, *1930s Redux*); *id.* at 34 (noting that anti-administrativists have “a rhetorical and almost visceral resistance to an administrative government perceived to be running amok...and a heavy constitutional overlay, wherein the contemporary administrative state is portrayed as at odds with the basic constitutional structure and the original understanding of separation of powers”); *see, e.g.* Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 2-4 (2014) (introducing his argument that agencies are unconstitutional); Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 205, 206-08 (2016) (arguing that administrative agencies exercise “absolute power” unconstitutionally).

⁵¹ “Anti-administrativists” are defined by “themes [including] a strong turn to the courts as the means to curb administrative power.” Metzger, *1930s Redux*, *supra* note 50, at 34.

⁵² “[T]hose adhering to a functionalist view of separation of powers...argue that, given the rise of the administrative state, it is impossible to distinguish the branches based on the type of acts they perform. Each branch acts in a variety of ways—making rules, interpreting and applying them in cases properly brought before the courts.” Krent, *supra* note 48, at 1255.

⁵³ *See, e.g.*, Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190 (2011) (“Agencies (and here I include virtually all civil executive branch agencies, bureaus, and departments) typically possess great power.”); Steven Reed Armstrong, *The Argument for Agency Self-Enforcement of Discovery Orders*, 83 COLUM. L. REV. 215, 222–23 (1983) (“For instance, agencies promulgate rules, grant and terminate a variety of government benefits, fix rates, grant and deny professional licenses, impose penalties, and terminate employment without prior federal court approval.”).

⁵⁴ *See* Gillian Metzger, Panelist, 2019 ABA Administrative Law Conference, “The Nondelegation Doctrine After *Gundy*: Is the ‘Intelligible Principle’ Standard an Intelligible Principle?” (Nov. 14, 2019) (conceding that Congress could be more specific in its delegations, while also noting that there are other tools, like appropriations, investigations and the like, that Congress can use to exercise administrative oversight); *but see* Ernst Freund, *The Substitution of Rule for Discretion in Public Law*, 9 AMER. POLI. SCI. REV. 666, 669 (1915) (arguing that some legislation is quite specific, and that agencies are, in any case, better suited to plan regulatory programs”).

⁵⁵ Ernst Freund, *The Law of Administration in America*, 9 POLI. SCI. QUARTERLY 403, 424 (1814) (“[T]he strength of the government must grow with the expansion of its functions.”); Roscoe Pound, *Executive Justice*, in AMERICAN LAW REGISTER 146 (1907) (“Legislatures are pouring out an ever-increasing volume of laws. The old judicial machinery has been found inadequate to enforce them. If we are to be spared a return to oriental justice...the profession and the courts must take up vigorously and fearlessly the problem of to-day-how to administer the law to meet the demands of the world that is.”).

⁵⁶ For instance, scholars argue that judicial review may cause ossification in agencies. *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1425-28 (2012) (discussing various functionalist scholars’ views on judicial ossification); *see, e.g.* Richard J. Pierce Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992). Many also critique courts institutional competency vis-à-vis agencies in matters of expertise. *Infra* note 245.

administrative state, given that agencies are conduits for the legislative and the executive branches. As an initial matter, both sides assume that courts act only “judicially,” as a descriptive matter, no matter the breadth or tenor of their control over agency policymaking. In addition, both take for granted that the Constitution allows for the increase of judicial review *ad infinitum* to strengthen limits to what agencies can do (even though functionalists disagree as to whether this is advisable as a functional matter⁵⁷).

In contrast to this focus on the limits of administrative activity, this Article contributes a framework for evaluating the contours of and potential limits to the *judicial review* of administrative activity. In many ways, this Article reaffirms the “internalist” account of administrative law,⁵⁸ by arguing that there is legitimacy to agency autonomy vis-à-vis the courts. More specifically, it introduces the idea that—just like the President⁵⁹—courts could overstep their role as a formal matter when behaving as policymaking “deciders.” In addition, it suggests that the Supreme Court has abdicated its role as overseer of encourage constitutional norms, particularly in acquiescence to presidential administration.

This Article proceeds in three Parts. Part I offers an account of the judicial administration of agency processes, whereby courts impose procedural requirements to improve compliance with constitutional or other rule-of-law norms. The concerns confronted by this Part include due process in agency adjudication and as sustained by fair and publicly-accessible rulemaking, and the quality of agency expertise. Commentators, including the Supreme Court itself, have suggested that judicial review of these matters is a vehicle for judicial usurpation of legislative or executive policymaking. This Part argues that, as powerful as judicial intervention in these cases may be, it is rooted in the oversight model of judicial administration, as opposed to a judicial fixation on policy outcomes.

Part II explores the judicial administration of statutory directives. This role has roots in the “overseer” approach too, in that courts have maintained distance from agency policymaking. However, this Part argues, recent efforts to alter the application of or eliminate *Chevron* constitute a sharp turn towards the “decider” model of judicial administration. This Part defends its claim on three fronts: first, by suggesting that judicial restraint has historical underpinnings; second, by recounting how *Chevron*, which made explicit the custom of judicial restraint, nonetheless provides ample opportunity for courts to maintain ownership of statutory interpretation; and third, by illustrating, in great depth, how the “decider” approach to judicial review of the implementation of statutes has come to fruition under an evolving application of *Chevron*.

⁵⁷ See generally, *id.*

⁵⁸ This position suggests asserts that the current administrative state developed as a result of incremental doctrinal change, as opposed to merely shifting political winds. For a comprehensive treatment of this view, see Rodriguez & Weingast, *supra* note 49. Note the authors make a cogent argument that neither the externalist nor the internalist view tells the whole story, but rather, that “the modern administrative state [was both] “engineered [by] political accommodation [and shaped by] legal constraints.” *Id.*

⁵⁹ See Strauss, *supra* note 32, at 704-705 (“As in earlier scholarship, my own conclusion is that in ordinary administrative law contexts, where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President’s role—like that of the Congress and the courts—is that of overseer and not decider.”). “Perhaps a stronger case for the President as ‘the decider’ in ordinary administration arises in contexts where we do not expect judicial review, a developed record for administrative action, relatively formal administrative process, or [Freedom of Information Act] transparency.” *Id.* at 757-59 (discussing topics under the heading “The President as Decider on Issues of Priority”).

Part III concludes the Article with some thoughts on the importance of judicial administration to the current debate on the constitutionality of agencies. Just as the “decider” model of presidential administration does for the President, the “decider” model of judicial administration allows courts to act in the place of agency administrators. This cautions against uncritical advocacy for the “decider” model of judicial administration, particularly for those concerned with the legitimacy of the administrative state under a formal separation of powers paradigm. After all, from a formalist perspective, courts engaging in the “decider” model of judicial statutory interpretation are *impermissibly* exercising the policymaking power that has been delegated to agencies by the legislature or that exists as part of agencies’ role in the executive branch. For those interested in judicial intervention as a means of regulating a powerful executive branch,⁶⁰ reinforcement of the “overseer” model of judicial administration would limit potential separation-of-powers repercussions and allow courts to contend with the most pressing problems caused by today’s administrative state.

Before moving forward, it is worth noting a few forms of judge-led governmental administration that this Article will not confront (but remain ripe for consideration). For instance, the judiciary may appoint special masters or other administrative figures to the federal executive branch⁶¹ or at the level of federal courts, to engage in administrative tasks,⁶² serve an investigative or prosecutorial function, or ensure that agencies comply with a court’s decisions.⁶³ While these dynamics also have implications for the formal separation of powers, particularly concerning the boundary between judicial and executive power,⁶⁴ this Article excludes them in order to limit its scope and because the court is generally one step removed from a person specifically appointed to direct the agency action, rather than acting as an administrator itself.

Judges themselves might also be appointed by the President to directly serve an executive agency⁶⁵; unlike members of Congress, there is no clear proscription against the appointment of

⁶⁰ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from within*, 115 YALE L.J. 2314, 2317 (2006) (referring to the executive branch as “the most dangerous branch”).

⁶¹ See *Ex parte Siebold*, 100 U.S. 371 (1879) (holding that court appointment of federal marshals, who are executive officers, is constitutional under the Appointments Clause); *Morrison v. Olsen*, 487 U.S. 654, 676 (1988) (comparing the Court’s interbranch appointment of independent counsel to the “appointment of federal marshals, who are executive officers”).

⁶² For example, the Chief Justice has broad authority to appoint administrative support in the judiciary. 28 U.S.C. § 621(a)(1) (2006); *id.* at § 624; James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125, 1132 (2013) (citing the same statutes in support of the Chief Justice’s appointment power).

⁶³ See *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (upholding the appointment of private attorneys to act as prosecutors in judicial contempt trials); Nicholas R. Parillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685 (2018) (noting that judges often seek to compel agencies to comply with judicial decisions by issuing contempt filings, among other tools).

⁶⁴ See Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 673 (1978) (arguing that courts violate the separation of powers by “appointing executive and quasi-executive officers responsible to the judiciary and by determining administrative processes in elaborating detailed decrees”).

⁶⁵ See, e.g., *Mistretta v. U.S.*, 488 U.S. 361 (1989) (discussing appointment of judges to the U.S. Sentencing Commission).

judges into nonjudicial offices (although commentators have likewise raised separation of powers concerns about the practice⁶⁶ and the Supreme Court has suggested that judicial participation in policymaking is more acceptable if the policy concerns a uniquely judicial subject⁶⁷). These cases are excluded because they involve judges administering the law not as judges, but rather as agency officials bringing to bear their judicial expertise.

I. JUDICIAL ADMINISTRATION OF PROCEDURAL REQUIREMENTS

The President exercises control over processes of administration, both as “overseer”⁶⁸ and as “decider.”⁶⁹ This Part discusses cases in which the judiciary administers agency process, and characterizes these as doctrines of oversight. In the process, this Part both marks and refutes a prevalent formalist characterization of these decisions as infringing on the legislature’s or agencies’ own policymaking domain. None of these are easy decisions to parse, and there are thoughtful arguments suggesting that courts have engaged in policymaking within this paradigm. But the essential judicial motivation underlying these decisions—to oversee the constitutionality and quality of procedure, as opposed to engage in policymaking directly—suggest they are rooted in the “overseer” approach.

Throughout the modern era, commentators have “switched positions on judicial review, judicial restraint, and the role of the federal courts” in regards to the review of administrative procedures.⁷⁰ The timeframe prior to the passage of the APA was marked by the judiciary’s turn towards a public choice conception of agencies, which intense judicial review.⁷¹ Once the APA had passed and for decades after, courts were more likely to “look benignly on agency authority and autonomy.”⁷² To some extent, “this expansion of the administrative state was largely a self-conscious repudiation of legalism”⁷³ For instance, during this time, the Supreme Court applied the “arbitrary and capricious” standard of review in a highly deferential way.⁷⁴

⁶⁶ See, e.g., WILLOUGHBY, *supra* note 29, at 220-21; Earl C. Dudley, Jr., *Morrison v. Olson: A Modest Assessment*, 38 AM. U. L. REV. 255, 273 (1989) (arguing that the *Mistretta* decision went beyond the permissible role of the judiciary).

⁶⁷ See *Mistretta v. U.S.*, 488 U.S. at 361.

⁶⁸ See Krent, *supra* note 21 (discussing presidential “management” of administrative adjudication); Bruff, *Presidential Power and Rulemaking*, *supra* note 20 (examining “presidential oversight” of rulemaking by the Reagan administration).

⁶⁹ See Bruff, *Presidential Management of Rulemaking*, *supra* note 20, at 507 (suggesting that the President “retain[s] the opportunity to resolve ultimate value choices within the alternatives left open by statute”); *but see* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967 & 984 (arguing that the “delegations of authority that permit rulemaking are ordinarily made to others, not [the President]—to agency heads whose limited field of action and embeddedness in a multi-voiced framework of legislature, President, and court are the very tokens of their acceptability in a culture of law”).

⁷⁰ Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEXAS L. REV. 215, 215-216 (2019).

⁷¹ Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL’Y 219, 229-30 (1997).

⁷² Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1064-65 (1992).

⁷³ “On this view, the appropriate response of the legal system to the rise of administration is one of retreat.” Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2072 (1990) (“New Deal reformers

But as fits the cyclical nature of judicial review, there began once again a period of heightened judicial interest in ensuring that agencies acted in accordance with procedural and constitutional norms.⁷⁵ As Richard Stewart notes, “[t]wo fundamental criticisms” undergirded this rise in judicial involvement in administrative procedure.⁷⁶ First, critics of administrative agencies argued that “the limitation of the traditional [judicial review] protections to recognized liberty and property interests is no longer appropriate in view of the seemingly inexorable expansion of governmental power over private welfare.”⁷⁷ Second, there was a perception that “agencies have failed to discharge their respective mandates to protect the interests of the public in their given fields of administration.”⁷⁸ The judicial corrective to both of these problems required, broadly speaking, a demand that agencies adhere better to constitutional expectations of due process and fairness.

First, a period of expansion “took place in the 1960's and early 1970's as a result of the consumer, health and safety, and environmental movements,” which meant that more new agencies were created and regulatory activity accelerated.⁷⁹ In response, a “populist mistrust of agencies” caused an “upsurge” in judicial intervention in a variety of agency processes.⁸⁰ Then, in the 1980s, the beginning of “hard look” review, which was both based in and transformed the APA’s arbitrary and capricious standard, saw Court involvement in the minutiae of administrative expertise.

Accordingly, since the mid-twentieth century, courts have invalidated agency policies and otherwise ordered agencies to conduct its actions again with an eye towards shoring up its procedure. Commentator suggest that judicial mandates to agencies to improve process or evaluate information differently has led to judicial policymaking—in other words, that the judiciary has behaved as a “decider” for much of this case history.

This Part argues, in contrast, that these actions do not (for the most part) stray beyond the formal bounds of judicial authority, and are therefore moored in the oversight model. Overall, the overseer model has been the approach of choice for even the most intrusive judicial intervention into agency procedure from the 1960s through today.

believed that modern problems required institutions having flexibility, expertise, managerial capacity, political accountability, and powers of initiative far beyond those of the courts.”)

⁷⁴ See, e.g., *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935); *American Trucking Assns. v. U.S.*, 344 U.S. 298, 314-15 (1953); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143 (1967).

⁷⁵ “[T]he view that law and administration are incompatible has enjoyed a revival—ironically, mostly at the hands of people with little sympathy for regulation in general or the New Deal reformation in particular.” Sunstein, *supra* note 73, at 2073-74. As the court and populace once again became cynical of agencies’ motives, they drew on mechanisms of judicial review to take a more directive role vis-à-vis agencies in order “to ‘perfect’ administrative agencies” so that the various “pathologies” associated with agencies’ public choice motivation could be overcome. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997); see also Stewart, *supra* note 31, at 1670 (describing the new emphasis of the judiciary on ensuring “the fair representation of a wide range of affected interests in the process of administrative decision”). These pathologies included agency capture. Rodriguez & Weingast, *supra* note 21, at 783; Merrill, *id.* at 1047 & 1064-65.

⁷⁶ Stewart, *supra* note 31, at 1670.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Center for Effective Government, *A Brief History of Administrative Government*, <https://www.foreffectivegov.org/node/3461> (last visited July 31, 2019).

⁸⁰ Merrill, *supra* note 75, at 1064.

This argument is based in a recognition of the judiciary's role in ensuring the constitutionality and quality of administrative process. As Felix Frankfurter once noted, "our administrative law is inextricably bound up with constitutional law."⁸¹ Agencies "undertake, without prior federal court approval, a number of actions that affect the rights and privileges of individuals"⁸²— matters that, as Gillian Metzger notes, go to the heart of constitutional values the judiciary is empowered to protect.⁸³ Accordingly, a longstanding premise is "that courts play[] a primary role in constitutional interpretation, including determining the constitutionality of agency action."⁸⁴

Furthermore, the Court's constitutional mandate also includes the enforcement of rule-of-law norms.⁸⁵ As Robert Fuchs argued more broadly, functions of agencies include "achieving justice in ordinary human relations [and] adjusting...maladjustment between the scope of the problems to be met and the competence of the agencies relied upon for dealing with them."⁸⁶ The judiciary is both uniquely equipped and required to take a substantive approach to reviewing whether agencies are justly and expertly implementing the law.

First, this Part suggests that judicial oversight of due process and the agency adjudication of equal protection matters belongs in the overseer category, despite formalist critiques, because it is concerned with ensuring agency adjudication complies constitutional norms, as opposed to effecting a particular outcome. An exception that is perhaps more akin to legislative policymaking is the judicial issuance of *structural* injunctions in response to a finding that an agency violated equal protection law. And yet, despite the strong mooring of judicial oversight for constitutional purposes, the Supreme Court has, as of late, been reluctant to curb executive policymaking on constitutional grounds.

Second, this Part considers both the mid-twentieth century practice in which courts added to APA § 553 rulemaking requirements, as well as the enduring of oversight of the notice-and-comment process. Judicial augmentation of rulemaking has been rebuked as legislative policymaking under a formalist model, and thereby invalidated, by the Supreme Court itself. Nonetheless, both these decisions and the Court's more tepid, but nonetheless flourishing, practice of invalidating regulations due to inadequate notice-and-comment, are motivated by the constitutional impulse to ensure fairness in public processes, and therefore exemplify the overseer model.

⁸¹ Felix Frankfurter, *Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927).

⁸² Armstrong, *supra* note 53, at 222-23.

⁸³ See generally Metzger, *supra* note 26, at 1897-1900 (discussing actions by federal administrative agencies to interpret and implement the Constitution, including agency elaboration of constitutional principles and the constitutional structure of the administrative state more generally).

⁸⁴ Sophia Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1703 (2019) (disputing this view).

⁸⁵ Daniel Rodriguez and Barry Weingast note that "the Court's protection of the rule of law is related to a sense of institutional responsibility to protect rule of law values, a view that perhaps predates the Constitution, but is certainly embedded in our conception of judicial power...." Rodriguez & Weingast, *supra* note 49; see also Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L. J. 1538, 1538 (2018) (arguing that the agencies were created to improve the petition process); *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J.) ("The history of American freedom is, in no small measure, the history of procedure.").

⁸⁶ Ralph F. Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory*, 47 YALE L.J. 538, 539 (1938).

Third, this Part examines ongoing doctrine in which the Supreme Court and D.C. Circuit has applied the APA arbitrary and capricious standard to take a “hard look” at agency policymaking. Although the arbitrary and capricious standard is generally deferential, courts typically demand meaty administrative records under hard look review. Many commentators, formalist and functionalist, have argued that hard look review is outcome-oriented, and thus is a vehicle for courts to make policy in lieu of agencies. This Part suggests that under hard look review, courts are focused on parsing the influence of politics and interrogating the development of expertise in agency policymaking. More recently, hard look has been deployed to ensure that the agency merely acted ethically. Therefore, hard look review, too, is arguably a doctrine of oversight, rather than judicial policymaking.

A. Agency Constitutionalism

Like presidential administration, judicial administration of due process and other constitutional norms influence agency actions and outcomes. As in other areas of presidential administration,⁸⁷ the President controls the form and substance of administrative adjudication through appointment, removal and other forms of intra-branch “management.”⁸⁸ At times, norms of decisional independence⁸⁹ render the President less influential.⁹⁰ Nonetheless, administrative law judges have only partial decisional independence,⁹¹ and recent Supreme Court decisions allowing for more political control over administrative adjudicators have begun to deteriorate their insulation further.⁹² Accordingly, trends in administrative adjudication may reflect the President’s agenda now more than before.⁹³

⁸⁷ See *supra* note 32.

⁸⁸ Krent, *supra* note, at 1101.

⁸⁹ See Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 856 (2015) (suggesting that administrative law judges have significant decisional independence); *Ass’n of Administrative Law Judges v. Heckler* 594 F. Supp. 1132, 1141 (D.D.C. 1984) (“While the position of an ALJ is not ‘constitutionally protected,’ in many respects, it is ‘functionally comparable’ to that of a federal judge.”) (citations omitted).

⁹⁰ “[P]residential direction of administrative adjudication would be seen as an unprecedented exertion of power, violating longstanding unwritten traditions, and would for that reason provoke a storm of protest.... Anticipating the risk of this sort of reaction, Presidents will shy away from testing the outer limits of directive authority.” Vermeule, *supra* note 34, at 1213. “The only mode of administrative action from which... Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers that a department head possesses over an agency’s on-the-record determinations.” See Kagan, *supra* note, at 2306.

⁹¹ See *Ass’n of Administrative Law Judges v. Heckler* 594 F. Supp. at 1140-41 (noting that while “[t]he APA contains a number of provisions designed to safeguard the decisional independence of [administrative law judges],” and listing these provisions, that “[o]n matters of law and policy, however, ALJs are entirely subject to the agency”) (citations omitted); Antonin J. Scalia, *The ALJ Fiasco — A Reprise*, 47 U. CHI. L. REV. 57, 62 (1980) (noting that ALJs have less decisional independence than Article III judges).

⁹² See, e.g., *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018) (holding that holding that administrative law judges of the Securities and Exchange Commission are subject to the Appointments Clause); see also Metzger, *supra* note 50, at 21 (“Whether or not [*Lucia*] ultimately proves successful in court, the mere fact that such a long-established feature of the national administrative state is under question is striking.”)

⁹³ For example, commentators have noticed the prevalence of presidential administration in immigration. See, e.g., Bijal Shah, *Civil Servant Alarm*, 94 CHICAGO-KENT L. REV. 101, 117-18 & 118 n.101 (2019) (discussing the furtherance of the Trump Administration’s goals through policies affecting administrative immigration adjudication); Jerry L. Mashaw & David Berker, *Presidential Administration in a Regime of Separated Powers: An Analysis of*

Courts, too, influence administrative adjudication, and without the barrier of agency insulation.⁹⁴ However, their focus is on the quality of procedure, unlike that of presidents, who seek to adherence to a substantive agenda. Agencies have, in many ways, been “the primary interpreters and implementers of the federal Constitution throughout the history of the United States.”⁹⁵ Accordingly, “over the twentieth century...courts have cast an increasingly long shadow over the administered Constitution.”⁹⁶

In particular, the mid-twentieth century was a period of heightened judicial interest in ensuring that agencies acted in accordance with procedural and constitutional norms. During this apex of constitutional oversight, the Court pushed agencies to alter their adjudication processes to better comply with due process and a growing equal protection doctrine. These cases have been criticized judicial engagement in policymaking, sometimes referred to as “judicial activism.”⁹⁷

Judicial decisions demanding alternate or additional process in administrative adjudication have no doubt influenced policymaking outcomes. Nonetheless, this Section suggests that these constitutional decisions are interested, primarily, in values that are both judicial and constitutional,⁹⁸ as opposed to in directing policymaking outcomes. One potentially strong exception to this, is which the “decider” model is arguably prevalent, are cases in which judges have issued *structural* injunctions (remedies) against agencies as a result of finding a constitutional violation—for instance, of equal protection law. In any case, the Court’s interest in overseeing administrative constitutionalism has waned since then.

1. Overseeing Administrative Due Process

Recent American Experience, 35 YALE J. ON REG. 549, 579-87 (2018) (discussing presidentialism in immigration under the Obama and Trump administrations); Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 48 (2018) (noting the significant political influence on immigration judges ability to, among other things “carefully consider and deliberate on cases.”); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. 129, 152-53 (2017) (considering examples of the political disruption of immigration adjudication from the W. Bush and Obama administrations).

⁹⁴ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574 (1984) (noting that agency adjudication is beholden Article II courts).

⁹⁵ Lee, *supra* note 84, at 1706.

⁹⁶ *Id.* (“In part, this is because of the well-known expansion of judicial review during this period.”).

⁹⁷ See Kmiec, *supra* note 47, at 1447 (noting that the term “judicial activism” originated from perspective of scholars that “are more skeptical of individual judges’ notions of justice”); Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N. Y. L. SCH. L. REV. 925, 926 (1996). (“[A]n activist federal judiciary is inconsistent with the intent of the Constitution and is inherently undemocratic.”); Clint Bolick, *The Proper Role of "Judicial Activism,"* 42 HARV. J.L. & PUB. POL'Y 1, 2 (2019) (defining “judicial activism as any instance in which the courts strike down a law that violates individual rights or transgresses the constitutional boundaries of the other branches of government”); *but see id.* (“[T]he problem with judicial activism is not that there is far too much, but that there has been far too little.”).

⁹⁸ The development and application of constitutional due process law falls within the judiciary’s mandate more so than any other branch. Indeed, “[t]he President...has limited tools for applying the Constitution[, which means that] courts can maintain control over legislative and executive branch constitutional applications. Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 560–61 (2015).

Presidential administration may violate due process.⁹⁹ Judicial administration has sought, in contrast, to strengthen this constitutional norm, sometimes to the detriment of other administrative values. In the 1960s and 70s, the Supreme Court made efforts to ensure that members of the public whose rights were adjudicated by agencies were allotted adequate due process. These cases were denounced by critics—including the judicial dissent, in some cases—as judicial policymaking that overwhelmed the bureaucracy’s own priorities. Nonetheless, this Section labels these instances of judicial administration—in which courts sought to protect constitutional values or confronting constitutional violations, however intrusively—as the part of the “overseer” model, because they focus on ensuring fairness in adjudicative processes. Note that this argument is distinct from, but related, to the more common framing of judicial intervention during this time period as responsive, primarily, to judicial and popular distrust of agencies.¹⁰⁰

The era marked by *Goldberg v. Kelly* is viewed by critics as a period in which due process jurisprudence began to treat “privileges” as open to enforcement by judicial process¹⁰¹ when before, they had not been.¹⁰² As a result, this judicial engagement was viewed by many as impermissibly legislative and administrative.

In the well-known *Goldberg* case, the Court held that the government’s termination of public assistance payments without an evidentiary hearing prior to the termination of those benefits violated the Due Process Clause of the Fourteenth Amendment. The Court came to this conclusion by framing the government’s main interest as “the provision of welfare, counsel [and] its uninterrupted provision”¹⁰³ and deprioritizing the government’s desire to “conserve[] fiscal and administrative resources.”¹⁰⁴ By emphasizing a constitutional value over the government’s preferred cost/benefit analysis, the Court effectively determined a policy outcome that differed from the agency’s preference. Commentators—including the dissent itself—decried the Court’s decision as legislative policymaking:

[W]hen federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people. That is precisely what I believe the Court is doing in this case. Hence, my dissent.¹⁰⁵

⁹⁹ See Shah, *supra* note 93, at 117-18 (noting the critique that presidential directives may “infringe on [agency adjudicators’] core responsibility to issue decisions that are unbiased, impartial, expert and well-positioned to withstand judicial review.”); Mashaw & Berke, *supra* note 93, at 576 (noting that the President’s “enforcement ramp-up” could infringe on “due process or statutory procedural rights”).

¹⁰⁰ See text accompanying *supra* notes 75-78.

¹⁰¹ RONALD CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 584 (2016) (arguing that “the ‘right-privilege’ distinction began to erode as courts found creative ways to afford procedural protection to untraditional interests”).

¹⁰² Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1736 (2007); see also Hearings on H.R. 4236, H.R. 6198, and H.R. 6324, before Subcommittee No. 4 of the House Judiciary Committee, *supra* note 57, at 73-74; see also *id.* at 83-84 (suggesting a presumption against such this “assumption”).

¹⁰³ 397 U.S. 254, 265 (1970).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 274 (Black, J., dissenting).

In the *Department of Agriculture v. Murry*, another case from that timeframe, the Court once more imposed requirements of administrative due process that led to changes in the agency's substantive policy. Here, the Court mandated that due process required an administrative policy in which adults, claimed as dependents by individuals not eligible for food stamps, might themselves qualify for food stamps under the Food Stamp Act.¹⁰⁶ In doing so, the Court redirected the agency's initial decision that, as a matter of policy, people supported by non-indigent family members should not receive this type of public assistance.

As in *Goldberg*, the *Murry* decision deprioritized certain bureaucratic interests to uphold constitutional values, which some characterized as policymaking. For instance, Jerry Mashaw argues that *Murry* "illustrates the...Court's failure to recognize that different administrative schemes may be based on different models of justice."¹⁰⁷ Instead of allowing the agency to follow a feasible model of "bureaucracy administration," he asserts, the Court in this case dictated it follow a "moral-judgment model of justice" that led to a different policymaking outcome.¹⁰⁸ This view is reflected in the dissent in this case as well, in which four justices "accused the majority of engaging in *Lochner*-esque substantive due process review."¹⁰⁹ Mashaw concludes that had the Court recognized the...appropriateness of the bureaucratic-rationality model...it could have analyzed the *Murry* claim in a more sensible fashion."¹¹⁰

During this period of judicial activism, the judicial enforcement of due process was consistently critiqued as administrative and legislative policymaking. Justice Black's *Goldberg* dissent characterizes judicial intervention in due process as policymaking precisely because its focus is on what is fair and humane, which he implies is a concern best suited to the legislature.¹¹¹

And yet, assessments of fairness are key to the judicial enforcement of due process, and to the extent agencies are tasked with humanely and justly enforcing the law,¹¹² it is within the judicial role to ensure they accomplish this mission.¹¹³ In seeking or purporting to be more efficient, agencies may forgo adequate due process. Because of this potential consequence, courts are required to maintain oversight of administrative due process.

Nonetheless, the Court's approach today is far from the interventionist days of *Goldberg*. On the one hand, the Court is open to limiting agency policies in order to protect First Amendment rights, including in last year's case condemning the prohibition of "immoral" or "scandalous" trademarks¹¹⁴ and in a recent case protecting corporate speech,¹¹⁵ among others.¹¹⁶ On the

¹⁰⁶ 413 U.S. 508 (1973).

¹⁰⁷ Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 209-10 (1981).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *Goldberg v. Kelly*, 397 U. S. at 276 (Black, J., dissenting) ("[I]t is obvious that today's result does not depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.").

¹¹² See generally Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L. J. 1538, 1538 (2018) (arguing that the agencies were created to improve the petition process).

¹¹³ See text at *supra* notes 81-84.

¹¹⁴ See text accompanying *supra* note 19 (discussing *Iancu v. Brunetti*, 588 U.S. 2294 (2019)).

¹¹⁵ See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited).

other hand, the current standard for due process, as delineated by *Mathews v. Eldridge*, prioritizes the government's interests in efficiency and resource conservation.¹¹⁷

For instance, the Court has hesitated to curtail executive policymaking power, to the detriment of due process and other constitutional values, particularly in the immigration context. For instance, in *Kerry v. Din*, the Court refused to limit the State Department's discretion to deny a visa even to the spouse of a U.S. citizen, which had implications for both due process and the constitutional interest in liberty, once the agency claimed a potential threat to national security.¹¹⁸ And in *Trump v. Hawaii* and *Trump v. Sierra Club*—cases concerning the Muslim travel ban and border wall cases, respectively—the Court has likewise been reluctant to constrain the President's plenary power in immigration, choosing instead to bend the norms of constitutional law in order to keep from making policy decisions it considers to be in the President's domain.¹¹⁹

2. Policymaking via Structural Injunction

Presidents occasionally reorganize agencies when attempting to deal with a problem or crisis. Examples include the creation of the Environmental Protection Agency, created by President Nixon,¹²⁰ and the Department of Homeland Security, created by the second President Bush.¹²¹ Since determining the structure of agencies is a legislative power,¹²² agency reorganization initiated by the President tends to be often reinforced by legislation.¹²³ Courts also “effectuate the reorganization of an ongoing social institution” by issuing “structural injunctions.”¹²⁴ In particular, agency violations of constitutional law may lead to forward-looking, court-issued structural rem-

¹¹⁶ See e.g., *United States v. United Foods, Inc.*, 533 US 405 (2001) (holding that mandatory advertising assessments imposed on mushroom producers and handlers under the Mushroom Promotion, Research, and Consumer Information Act violate the First Amendment); *Rubin v. Coors Brewing Company*, 514 US 476 (1995) (holding that a ban on displaying alcohol content on beer labels violates the First Amendment); *Federal Communications Commission v. League of Women Voters of California*, 468 US 364 (1984) (holding that a ban on editorializing violates the First Amendment).

¹¹⁷ Paradoxically, the *Mathews* factors both overemphasize efficiency and manage to be indeterminate. See, e.g., Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *Yale L.J.* 455, 457-68 (1986); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 *U. CHI. L. REV.* 28 (1976). In addition, some argue that *Mathews v. Eldridge* “disregard[s] ‘process values’ and focus[es] on ‘subsidiary issues rather than the essence of the due process guarantee.’” Jason Parkin, *Adaptable Due Process*, 160 *U. PA. L. REV.* 1309, 1334 (2012) (citing Jerry Mashaw and Edward Rubin).

¹¹⁸ *Kerry v. Din*, 135 S. Ct. 2128 (2015); Adam Liptak, *Justices Weigh Denial of Visa to Husband of U.S. Citizen*, *NY TIMES* (Feb. 23, 2015).

¹¹⁹ See text accompanying *infra* notes 461-463.

¹²⁰ Reorganization Plan No. 3 was prepared by President Nixon and approved by Congress. 35 *Fed. Reg.* 15623 (Oct. 6, 1970).

¹²¹ Jonathan Thessin, *Department of Homeland Security*, 40 *HARV. J. ON LEGIS.* 513, 524-25 (2003) (“President Bush proposed, and Congress created a department charged with both preventing and responding to terrorist attacks.”).

¹²² See Shah, *supra* note 22, at 1963-64 (“Congress designs the structure of every agency and administrative sub-component (although its role in this regard is not exclusive).”) (citations omitted).

¹²³ See, e.g., *supra* notes 120 & 121.

¹²⁴ OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7 (1978).

edies.¹²⁵ Unlike the presidential reorganizations, however, structural injunctions change how agencies operate without legislative approval. In this way, structural injunctions are arguably legislative in nature, and thus perhaps illustrative of the “decider” model of judicial administration. It bears noting that their focus, however, is on enforcing constitutional values, as opposed to dictating the substance of administrative policies.

As an initial matter, the judiciary may invalidate administrative policies on a case-by-case basis in order to protect liberty and equal protection.¹²⁶ For example, in *Kent v. Dulles*, the Court ruled that while the Passport Director’s Office may regulate the travel practices of citizens by requiring them to obtain valid passports, it may not condition the fulfillment of such requirements with the imposition of rules that abridge basic constitutional notions of liberty, assembly, association, and personal autonomy.¹²⁷ Here, the Court created limitations on the agency’s right to restrict travel, although it soon backed away from this decision.¹²⁸

A few years later, the Court invalidated cost-saving administrative policies in order to improve gender equality.¹²⁹ For instance, in *Frontiero v. Richardson*, the controversy involved a Department of Defense requirement that a servicewoman show that her husband is dependent on her for purposes of allowance and benefits, even though the wives of male service members were automatically recognized as dependents.¹³⁰ This matter resulted in the Court invalidating the agency’s policy because it violated the Due Process Clause of the Fifth Amendment.¹³¹ This case that are may be contrasted to cases that were substantive similar to *Frontiero*, but concerned the constitutionality of statutes, as opposed to an administrative policy.¹³²

As in *Goldberg*,¹³³ the *Frontiero* decision deemphasized the government’s bureaucratic interests to contend with constitutional concerns. For instance, the Court stated that “although efficacious administration of governmental programs is not without some importance, ‘the Con-

¹²⁵ See Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1993) (The structural injunction is “the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution....”).

¹²⁶ “The Supreme Court has frequently construed statutes strictly in order to limit the arbitrary power which would otherwise be vested in administrative officials.” *Twice in Jeopardy*, 75 YALE L.J. 262, 321 n.271 (1965) (citing *Kent v. Dulles*); see also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 992 (1988) (“Courts have often read statutes narrowly ‘as a means of restraining the range of agency choice when fundamental individual liberties were at risk.’”) (citing *Kent v. Dulles*).

¹²⁷ 357 U.S. 116, 129 (1958) (“Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it.”); Peter H. Aranson et. al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 12 (1982) (noting that, in *Kent*, the agency abridged a constitutional right); see also *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (ruling similarly that the State Department may not violate the Fifth Amendment right to travel based on a finding that a passport applicant is a Communist).

¹²⁸ *Zemel v. Rusk*, 381 U.S. 1 (1965) (holding that the Passport Act allows the Secretary of State to forbid travel to Cuba by imposing general area restrictions on the issuance of passports); Aranson, *supra* note 127, at 67.

¹²⁹ See, e.g. *Reed v. Reed*, 404 U.S. 71 (1971) (ruling that the administrators of estates cannot be named in a way that discriminates between sexes); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹³⁰ 411 U.S. 677 (1973).

¹³¹ *Id.*

¹³² See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); see also Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1322 (2015) (noting the similarities of *Weinberger v. Wiesenfeld* and *Jimenez* to *Frontiero*).

¹³³ See *supra* notes 103-105 and accompanying text.

stitution recognizes higher values than speed and efficiency’.”¹³⁴ It also stated that “‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”¹³⁵ In *Frontiero*, like in *Murry*,¹³⁶ the Court dictated—for a particular controversy—a model of administration that complied better with the requirements of the Constitution than the agency’s chosen policy.

Around the same time, the Court permitted a structural injunction to correct racial discrimination perpetuated by an agency. In the early 1970s, both the Chicago Housing Authority and Department of Housing and Urban Development (HUD) were found liable for violating the Constitution by selecting public housing sites and assigning tenants based on race.¹³⁷ Initially, the District Court limited the remedy to within Chicago’s city limits.¹³⁸ In doing so, the court denied the plaintiff’s request for metropolitan area relief that would extend efforts to alleviate segregation practices to the suburbs as well.¹³⁹

In *Hills v. Gautreaux*, the question before the Supreme Court was whether a court could order a general metropolitan area remedy against HUD.¹⁴⁰ The Supreme Court did not, itself, direct HUD to implement a metropolitan area remedy in response to the class action decision, but it did find that the lower court had the authority to issue such an order.¹⁴¹ It characterized this approach as allowing “a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without overstepping the limits of judicial power...”¹⁴² This case can be contrasted to *Milliken v. Bradley*, in which the Court determined that a district court’s remedy ordering the desegregation of several school districts in Detroit was “wholly impermissible.”¹⁴³ However, in *Gautreaux*, Court said *Milliken* remedy was impermissible “not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred, but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.”¹⁴⁴

On the one hand, structural administrative remedies are generally created by agencies themselves.¹⁴⁵ The Court itself has noted that it did not wish “to prescribe the order which [an agency] should enter,” because “the fashioning of the remedy is a matter entrusted to the [agency], which has wide latitude for judgment.”¹⁴⁶ Justice Scalia argues that “by ‘turning judges into

¹³⁴ *Frontiero*, 411 U.S. at 690-91.

¹³⁵ *Id.* According to the plurality’s “administrative savings does not provide a sufficiently good reason for not treating men and women identically.” William R. Engles, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 160 (1985).

¹³⁶ See *supra* notes 106-108 and accompanying text.

¹³⁷ *Gautreaux v. Chi. Hous. Auth.*, 384 F. Supp. 37 (N.D. Ill. 1974).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 425 U.S. 284 (1976).

¹⁴¹ *Id.*

¹⁴² *Id.* at 301.

¹⁴³ 418 U.S. 717 (1974).

¹⁴⁴ Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 469-70 (1988).

¹⁴⁵ Louis L. Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720, 745 n. 69 (1946) (emphasis added) (noting the “general doctrine of the administrative power to determine the remedy”); *Id.* at 755 (remark- ing that Learned Hand “believed...that the courts are forbidden ‘to disturb the measure of relief which [administrative agencies] think necessary’”).

¹⁴⁶ *Fed. Trade Comm'n v. A. P. W. Paper Co.*, 328 U.S. 193, 203-204 (1946).

long-term administrators of complex social institutions,' structural reform remedies 'require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials.'"¹⁴⁷

Furthermore, "[t]he structural injunction frequently is viewed as an illegitimate judicial foray into both executive [and] legislative terrain."¹⁴⁸ As to the latter, there has developed a literature criticizing structural injunctions on the basis of both formalist¹⁴⁹ and functionalist¹⁵⁰ criteria. Even commentators with an expansive conception of the judiciary's formal power have suggested that courts do not have an "unregulable power to issue structural injunctions."¹⁵¹

On the other hand, the Court has the authority to foster administrative adherence to constitutional values like equal protection. As an initial matter, the Court may legitimately empower an agency to enforce a particularized remedy to a violation of statutory civil rights law.¹⁵² More to the point, the judiciary's primary goal in issuing structural injunctions is to halt unconstitutional administration, not to engage in the substance of future policymaking. Indeed, the structural injunction was considered a defensible, if not necessary, remedy for furthering the constitutional values inherent in school desegregation.¹⁵³ Courts can also choose to promulgate structural remedies with deference to the other branches,¹⁵⁴ to reduce offense to the separation of powers. Finally, as a practical matter, the structural injunction is as a remedy of "last resort,"¹⁵⁵ and "necessarily require government officials to take affirmative steps."¹⁵⁶ Therefore, "they can be

¹⁴⁷ James D. Ridgway, *Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies*, 64 ADMIN. L. REV. 57, 110 (2012) (citing *Brown v. Plata*, 131 S. Ct. 1910 (2011)).

¹⁴⁸ Janet Koven Levit, *Rewriting Beginnings: The Lessons of Gautreaux*, 28 J. MARSHALL L. REV. 57, 61-62 (1994) (discussing *Gautreaux*); see also Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1289 ("In the shaping of new rules to govern a variety of institutional settings, courts have been engaged in legislation without the benefit of a legislative process.").

¹⁴⁹ See Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 663 (1978) (characterizing a Supreme Court case, *In re Debs*, in which the federal judiciary issued and enforced a structural injunction, as the Court "assum[ing] for itself the authority to share Congress' plenary power to regulate interstate commerce." *Id.* "*In re Debs* represents judicial approval of an unusually dangerous combination of functions in the federal courts." *Id.* at 681).

¹⁵⁰ A fair portion of this critique is focused on the inability of judges to manage complex institutional reform. See, e.g., E. Garrett West, *A Youngstown for the Administrative State*, 70 ADMIN. L. REV. 629, 653 (2018); Robert E. Easton, Note, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983 (1990); Robert A. Katzmann, Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980); see also DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* 48 (1977).

¹⁵¹ See Calabresi & Prakash, *supra* note 20, at 665 n.142 ("Lessig and Sunstein assert that our construction of the Executive Power Clause leads to the conclusion 'that the judicial branch has a wide range of inherent and (legislatively) unregulable judicial authority beyond that enumerated and granted by Congress'....We disagree. Our theory does not inexorably lead to the conclusion that broad and unregulable "inherent" judicial powers must exist, such as, for example, an unregulable power to issue structural injunctions.").

¹⁵² See, e.g., *West v. Gibson*, 527 U.S. 212 (1999) (holding that the Equal Employment Opportunity Commission has authority to award compensatory damages against another agency that violated the Civil Rights Act).

¹⁵³ See Peter Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1108 (1984). There is a significant body of literature on this topic that is beyond the scope of this Article.

¹⁵⁴ See Nagel, *supra* note 149, at 719-21.

¹⁵⁵ PETER H. SCHUCK, *SUING GOVERNMENT* 189 (1983).

¹⁵⁶ Karla Grossenbacher, *Implementing Structural Injunctions: Getting A Remedy When Local Officials Resist*, 80 GEO. L.J. 2227, 2229 (1992).

extremely difficult to implement when those officials are unwilling to cooperate,”¹⁵⁷ which may render courts overseers, as a matter of fact, rather than deciders.

B. Augmenting Informal Rulemaking Requirements

The President influences the regulatory process,¹⁵⁸ generally through a centralized review process.¹⁵⁹ The White House Office of Management and Budget (OMB), “which reviews executive agencies’ proposed and final regulations as well as their regulatory plans, [allows the President to] exert[] significant control over the regulatory state.”¹⁶⁰ A central tension in this context is the need for the President to exercise control over her branch while simultaneously allowing agencies to engage in rulemaking that reflects legislative intent.¹⁶¹ Accordingly, Harold Bruff advises a case-by-case approach to identifying whether presidential involvement in rulemaking intrudes legislative turf.¹⁶²

Courts, too, administer rulemaking. In the mid-twentieth century, courts began in force to require agencies to add procedural mechanisms to rulemaking, such as oral argument or an *ex parte* communication bar, in order to put “meat” on the bare bones of the APA.¹⁶³ This Section considers both former judicial augmentation of the regulatory process and the more hands-off—but nonetheless, impactful—judicial administration of the notice-and-comment process that occurs today.

Many formalist critics, including the concurrent Supreme Court, characterized the former practice as both legislative and an intrusion into agency policymaking—in other words, as indicative of the “decider” approach to judicial administration—and thus beyond the scope of judicial power. However, this Section argues that these decisions were based in the judicial impulse to ensure fairness and public accessibility, and are therefore exemplary of the “overseer” model. Today, courts are restrained to a determination of whether agencies have complied with minimal rulemaking requirements, as opposed to obliging more. Although the current doctrine of judicial administration of rulemaking fits safely into the overseer model, it has nonetheless invalidated significant administrative policies.

¹⁵⁷ *Id.*

¹⁵⁸ “Rulemaking...is not immune to outside intervention and instead is open to the influence of persons outside the agency [] including the President.” Bruff, *Presidential Power and Rulemaking*, *supra* note 20, at 454.

¹⁵⁹ “White House review of agency rules is the mechanism that *presidents* have developed to exert control over the rulemaking apparatus.” Watts, *supra* note 24, at 689 (emphasis in original). While regulatory oversight has existed since the Carter administration, President Reagan was the first to authorize the Office of Management and Budget to oversee agencies’ rulemaking processes. *Id.* at 690-91. Indeed, Elena Kagan’s classic example of presidential administration involves President Clinton taking the reins from the Food and Drug Administration to initiate a rulemaking on tobacco regulation. Kagan, *supra* note 20, at 2282-83.

¹⁶⁰ *Id.* at 685.

¹⁶¹ “The President needs enough power to execute the laws effectively; yet he must not destroy the essential balance of power among the branches of the government.” Bruff, *Presidential Power and Rulemaking*, *supra* note 20, at 452.

¹⁶² See, e.g., *id.* at 495 (arguing that “[t]he President should have his broadest authority over rulemaking in the military and foreign affairs areas [and that e]mergencies should also justify relatively drastic presidential action”).

¹⁶³ See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1439 (2004) (noting that “in the mid-1960s and 1970s, courts reshaped the requirements that an agency had to satisfy if it relied on notice-and-comment rulemaking”).

“Beginning in the late 1960s...judges on the Court of Appeals for the District of Columbia Circuit—with considerable support from the surrounding political and academic communities—decided that the procedures for informal rulemaking provided by the APA were inadequate” to stem agency capture.¹⁶⁴ Likewise, the early 70s saw a spat of cases requiring added procedures designed to improve the quality of rulemaking.¹⁶⁵ For instance, in *Portland Cement*, decided in 1973, the D.C. Circuit struck down proposed rules based on the agency’s failure to disclose the scientific data on which the rules were based.¹⁶⁶ Moving forward, courts began to expect agencies to “expose[] to the view of interested parties for their for comment” any “scientific material which is believed to support the rule,” particularly if a scientific decision is the basis for the proposed rule.¹⁶⁷ In addition, the *Home Box Office (HBO)* case, decided in 1977, was the apex of a judicial requirement prohibiting *ex parte* communication in informal rulemaking.¹⁶⁸ Overall, requirements of the time included “notices of proposed rulemaking that disclose[d] to the public all relevant evidence possessed by the agency; the use of oral proceedings, cross-examination, and discovery when deemed appropriate by the court; comprehensive statements of basis and purpose that respond in technical detail to all important points raised by outside parties during the rulemaking; and prohibitions on *ex parte* agency contacts with outside parties, agency pre-termination of important issues, and substantial deviations between the proposed and final rules.”¹⁶⁹

Some debate the common law implications of this time frame.¹⁷⁰ Others have discussed whether the judicial augmentation of rulemaking procedures contradicts the APA¹⁷¹ and noted its functional implications.¹⁷²

Still others contend that courts behaved, in these cases, in a legislative or administrative capacity. Indeed, the Supreme Court itself characterized the augmentation of administrative procedure as both “legislative”¹⁷³ and “administrative” in the famous *Vermont Yankee* case¹⁷⁴—that

¹⁶⁴ Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 857 (2007).

¹⁶⁵ Beermann & Lawson, *supra* note 164, at 857; *see also* John E. III FitzGerald, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 ADMIN. L. REV. 287, 289 (1974) (noting, in the mid-1970s, that “[f]lexibility in fitting administrative procedures to particular functions [was] crucially important in evaluating the Administrative Procedure Act”).

¹⁶⁶ *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); *see also* U.S. v. Nova Scotia Food Products Corp., 568 F.2d 240 (1977) (making a similar decision as *Portland Cement* in the Second Circuit).

¹⁶⁷ *Nova Scotia*, 568 F.2d at 252; *see also* Kathryn E. Kovacs, *Rules about Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 537-39 (2018) (arguing that this practice contradicted the text of the APA).

¹⁶⁸ *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9 (1977) (cert. denied).

¹⁶⁹ Beermann & Lawson, *supra* note 164, at 857.

¹⁷⁰ *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 181-89 (1998).

¹⁷¹ *See, e.g.*, Kovacs, *supra* note 167, at 537-39 & 530-44 (arguing, among other things, that requiring agencies to show scientific evidence contradicted the text of the APA); Beermann & Lawson, *supra* note 164, at 857 (contending that, at the time, “the lower federal courts essentially rewrote the APA’s notice-and-comment rulemaking provisions”).

¹⁷² *See, e.g.*, Kovacs *supra* note 167, at 544-65.

¹⁷³ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 525 (1978); *see also* Beermann & Lawson, *supra* note 164, at 858; *id.* at 901 (“*Vermont Yankee* violations...have an important feature in common: they all apply a judicial model to what Congress conceived of as a legislative process.”).

¹⁷⁴ The Court asserts not only that that “[a]gencies are free to grant additional procedural rights in the exercise of their discretion,” and that “administrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” *Vermont Yankee*,

is, as a “decider” approach to judicial administration. Put another way, according to *Vermont Yankee*, courts were hiding the exercise of administrative common law behind the veil of judicial statutory interpretation, in particular, of the APA 553 notice-and-comment-requirements.

Furthermore, it adopted a formalist view by deciding that it exceeds the limits of judicial power to require agencies to implement rulemaking procedures beyond those made explicit by Congress or that agencies have decided to implement themselves.¹⁷⁵ “The *Vermont Yankee* decision reasserted a conception of the APA as an ordinary statute which does not allow for the exercise of such authority.”¹⁷⁶ In doing so, the Court declared that courts cannot “impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”¹⁷⁷

Notably, the Supreme Court might not have had such a restrictive approach to presidential administration of rulemaking. Bruff argues that “[h]ad the *Vermont Yankee* Court considered presidential review of agency rulemaking...it might have articulated a relatively broad scope of executive supervision of regulatory practices.”¹⁷⁸ He suggests, further, that “to the extent that *Vermont Yankee* restricts the oversight function of the federal courts on the grounds that they lack the authority to affect policy decisions, one of the political branches may appropriately assume the initiative, thereby reducing pressure on the courts to step beyond the limits of traditional judicial review.”¹⁷⁹

As a general matter, there is merit to the idea that the political branches, particularly the legislature, should guide rulemaking. Not only do regulations exist to implement legislation with some precision, but rulemaking processes mimic legislative decisionmaking, which suggests that the legislature should play a pivotal role in structuring them.

That having been said, *Vermont Yankee* somewhat obscures the constitutional reasoning behind the judicial decisions it rebuked. Fairness though ample notice, the right to participate in public processes, procedural regulatory and procedural transparency are due process values,¹⁸⁰

435 U.S. at 525 & 543 (citations omitted); see also Bruff, *Presidential Power and Rulemaking*, *supra* note 20, at 460 (noting that the Court was concerned that “without the restriction on the judiciary” articulated by *Vermont Yankee*, “unwarranted judicial intrusion into agency decisionmaking could usurp the political authority of the agencies to set policy”). The Court also had functional concerns about the practice. *Id.* (noting that “the Court worried that enlarged judicial supervision of challenged agency actions would unduly restrict all agency choice of rulemaking procedures [and that] retroactive judicial imposition of special procedures in some cases could force agencies to act defensively by adopting maximum procedures in every case”).

¹⁷⁵ *Vermont Yankee*, 435 U.S. at 525 (declaring that APA § 553 “established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.”). The Court asserts, in addition, that “the court improperly intruded into the agency’s decisionmaking process” and “[n]either the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency.” *Vermont Yankee*, 435 U.S. at 525 & 555 (citations omitted).

¹⁷⁶ Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 184 (1983)

¹⁷⁷ *Vermont Yankee*, 435 U.S. at 549.

¹⁷⁸ *Id.* at 460-61.

¹⁷⁹ *Id.* at 461.

¹⁸⁰ See Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 693 (2007) (highlighting constitutional values of “public administration [including] fairness to affected interests through advance notice [and] broad rights of participation

which suggests that the augmentation of rulemaking requirements is a valid exercise of the judiciary's responsibility to uphold the Constitution. Even in *Vermont Yankee*, which advocated deeply for administrative autonomy, the Court nonetheless declared that "agencies should be able to create their own 'rules of procedure'" *only* "[a]bsent constitutional constraints...."¹⁸¹

There is evidence that this was the case here. In the D.C. Circuit decision overturned by *Vermont Yankee*, the lower court notes that the "primary argument advanced by the public interest intervenors is that the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process."¹⁸² Therefore, as Cass Sunstein has suggested, "the controversial decision of the D.C. Circuit in the *Vermont Yankee* case amounted to an insistence on procedural safeguards[, and thus] ought not to be understood as a usurpation of legislative or executive prerogatives."¹⁸³ Like the discussion enforcement of due process in administration adjudication discussed earlier in this Part, judicial review that bolsters due process in rulemaking has some basis in the overseer model of judicial administration. Since that time, as reaffirmed by *Perez v. Mortgage Bankers*,¹⁸⁴ the Court has restrained the judiciary from augmenting rulemaking requirements.

Nonetheless, it has continued to administer rulemaking via review of the notice-and-comment processes across administrations. In these cases, despite remaining squarely in the role of overseer, the Court has invalidated policies created by agencies at the behest of both Presidents Obama¹⁸⁵ and Trump.¹⁸⁶ The decisions in these cases did *not* hinge on whether the President's exercise of power was excessive, but rather, on a determination that the policies, while spearheaded by the President, lacked the notice-and-comment process required by everyday regulation. It is remarkable that, despite the very limited role of judicial engagement in rulemaking post-*Vermont Yankee*, the Court has invalidated policies with significant presidential imprimatur by deciding that they violate the minimal expectations of the APA. This set of cases exemplifies how interventionist the "overseer" approach to judicial administration can be.

C. "Hard Look" Review

in the rulemaking process"); *id.* (noting additional constitutional constraints associated with the "regularity of process and transparency...and enforcement and management norms").

¹⁸¹ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978).

¹⁸² *NRDC v. NRC*, 547 F.2d 633 (D.C. Cir. 1976).

¹⁸³ Cass R. Sunstein, *In Defense of the Hard Look: Judicial Activism and Administrative Law*, 7 HARV. J. L. & PUB. POL'Y 51, 52-53 (1984).

¹⁸⁴ See text accompanying *supra* note 16. See *Perez v. Mortgage Bankers Association*, 575 U.S. 92 (2015) (rejecting nearly twenty years of D.C. Circuit precedent, encapsulated by *Paralyzed Veterans of Am.*, to hold that notice and comment is not required when an agency alters an interpretive rule with a new interpretive rule); *Paralyzed Veterans of Am. v. D.C. Arena, LP*, 117 F.3d 579 (D.C. Cir. 1997); see also Beermann & Lawson, *supra* note 164, at 860 (arguing that *Vermont Yankee* can be read, today, to "forbid imposition of any administrative procedures not firmly grounded in some source of positive statutory, regulatory, or constitutional law").

¹⁸⁵ See text accompanying *supra* note 14 (discussing the DAPA case, *U.S. v. Texas*, 136 S. Ct. 2271 (2016)).

¹⁸⁶ See text accompanying *supra* note 13 (discussing *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019)).

Presidents may choose to influence agency expertise¹⁸⁷ or to defer to it.¹⁸⁸ Perhaps unsurprisingly, Kagan has argued that when the President has taken an active role in administrative decision, courts should reduce their intensity of review under hard look doctrine.¹⁸⁹ Some scholars suggest that presidential involvement can improve agency expertise by making it more accountable to public values,¹⁹⁰ and that insulation more generally interferes with the President's constitutional authority to exert control over his branch.¹⁹¹ Others argue that presidential influence can deteriorate the neutrality of agency expertise,¹⁹² for instance, by swaying it towards political interests; accordingly, this view suggests that deference to agency expertise can "ameliorat[e] potential problems with presidential administration."¹⁹³ Still others recommend a middle ground.¹⁹⁴ In this vein, some suggest that presidents should be able to foster agency independence if it serves them.¹⁹⁵ Others contend that while agencies may legitimately be swayed by politics, courts should not privilege presidential administration of expertise in arbitrary and capricious review.¹⁹⁶

Likewise, courts, too, administer expertise—in particular, through the doctrine of "hard look." Hard look review is based in Louis Jaffe's exhortation that courts take on a more signifi-

¹⁸⁷ "The Bush administration, for example, demonstrated a behind-the-scenes willingness to influence agencies' scientific findings." Watts, *supra* note 24, at 685.

¹⁸⁸ Daniel A. Farber, *Presidential Administration: Then and Now*, 43 ADMIN. & REG. L. NEWS 4, 4 (2017) (pointing out that Kagan noted in her article that President Clinton "defer[red] to agency staff on scientific matters").

¹⁸⁹ Kagan, *supra* note 21, at 2372; *id.* at 2280-83.

¹⁹⁰ See generally Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733 (2018) (arguing for the improvement of executive oversight of independent agency policymaking).

¹⁹¹ See generally Calabresi & Prakash, *supra* note 20 (arguing that any agency insulation interferes with the President's constitutional power).

¹⁹² See Bressman & Thompson, *supra* note 195, at 612 ("Independence was traditionally justified, particularly during the New Deal era, as promoting expertise.").

¹⁹³ Farber, *supra* note 188, at 4 ("Kagan viewed President Clinton's deference to agency staff on scientific matters as a significant factor in ameliorating potential problems with presidential administration."); see also STEPHEN BREYER, *BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION* 55-63 (1993) (arguing for a "depoliticized regulatory process," that experts should play a large role in policymaking and that there are "inherent" benefits to expertise and insulation from politics); Bruff, *supra* note 35, at 489 (suggesting that the President should exercise his appointments power "to select regulatory officers who understand and appreciate the boundary between expertise and policy," allow "experts who are not in political positions to communicate their views on science and policy to Congress and the public, [and] limit the number of prompting directives").

¹⁹⁴ For instance, Cass Sunstein has suggested that "presidential supervision is likely to be an important supplement to judicial review, serving some of the functions of the hard look doctrine without being subject to its risks," Sunstein, *supra* note 200, at 487.

¹⁹⁵ See Metzger, *supra* note 26, at 1992 (suggesting that agency independence may in some cases even benefit a president's agenda); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 631 (2010) (suggesting that "the President may seek a degree of independence to make credible a commitment to address a long-term problem"); *c.f.* Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 2008-13 (2019) (arguing that Congress may foster agency independence to improve fidelity to legislative directives).

¹⁹⁶ Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811 (2012); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U.L. REV. 141 (2012).

cant role in reviewing administrative agency action.¹⁹⁷ Soon after *Vermont Yankee* was decided,¹⁹⁸ the doctrine of hard look arose. From the 1980s until today, courts have engaged in “hard look” review, by which they interrogate agencies’ development and application of expertise. Hard look review, “subjects agency reasoning processes that underlie significant policy decisions to a heightened form of rationality review”¹⁹⁹ under APA § 706(2)(A) arbitrary and capricious review, which is otherwise a deferential standard.²⁰⁰ Hard look doctrine has evolved the arbitrary and capricious standard into a strong review of the agency’s record, and may entail judicial involvement in the minutia of administrative policymaking. Cass Sunstein characterizes hard look doctrine as the “most prominent recent manifestation” of ‘judicial control’ over the administrative bureaucracy.²⁰¹

State Farm is widely understood as establishing hard look review.²⁰² After administrative and legislative proceedings, the National Highway Traffic Safety Administration (NHTSA) issued Motor Vehicle Safety Standard 208 in 1977, which mandated the phasing in of passive restraints on vehicles—either automatic seatbelts or airbags. The automobile industry geared up to comply. Then, in 1981, after President Reagan entered the White House, the new Secretary of NHTSA reopened the rulemaking, received written comments, held public hearings, and ultimately rescinded the passive restraint requirement.

In *State Farm*, the Court evaluated whether the agency’s rescission of the seatbelt requirement was based in expertise. The Court declares that its scope of review under the arbitrary and capricious standard is “narrow and a court is not to substitute its judgment for that of the agency.”²⁰³ Furthermore, the Court notes that field studies regarding auto safety are “precisely the type of issue” that is primarily within agency expertise and “upon which a reviewing court must be hesitant to intrude.”²⁰⁴ Nonetheless, the Court picks apart the agency’s decision²⁰⁵ and ultimately decides that the agency’s rescission of the rule was arbitrary and capricious.

¹⁹⁷ See generally JAFFE, *supra* note 26; see also Daniel B. Rodriguez, *Jaffe's Law: An ESSAY ON THE INTELLECTUAL UNDERPINNINGS OF MODERN ADMINISTRATIVE LAW THEORY*, 72 CHI.-Kent L. Rev. 1159, 1160 (1997) (characterizing Jaffe as “the intellectual architect of hard look review”).

¹⁹⁸ See *supra* Part I.A.

¹⁹⁹ Richard W. Murphy, *The Limits of Legislative Control over the “Hard-Look,”* 56 ADMIN. L. REV. 1125, 1126 (2004).

²⁰⁰ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 463-65 (1987) (noting that hard look is a deferential standard that considers whether agencies have used illegitimate or irrational factors while developing policies); see also *supra* note 74 (listing examples of cases in which courts have applied the arbitrary and capricious standard in a deferential manner).

²⁰¹ *Id.* at 463.

²⁰² *Motor Vehicle Mfrs. Ass'n, v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (“An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis....”); see also Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 210 (1983) (“The State Farm decision expressly endorses the primary elements, both substantive and procedural, of the hard-look doctrine”); Peter L. Strauss, *Considering Political Alternatives to Hard Look Review*, 1989 DUKE L.J. 538, 539 (1989) ([I]n *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*...the Court essentially endorsed “hard look” review.”).

²⁰³ Sunstein, *supra* note 176, at 196.

²⁰⁴ *State Farm*, 463 U.S. at 53.

²⁰⁵ For instance, the Court suggested that even if seatbelts were wanting, NHTSA completely failed to consider an alternative of airbags; determined that the agency is too quick to dismiss the benefits of detachable seatbelts (and therefore, that the agency does not adequately consider consumer inertia); and declared that the agency did not artic-

For better or for worse, hard look review “continues to this day unabated.”²⁰⁶ Indeed, hard look has been criticized from a functionalist perspective as a mechanism for the Court to substitute its own, inferior judgment for that of the agency,²⁰⁷ as well as one that allows the Court to make policy decisions on the agency’s behalf.²⁰⁸ In addition, the formalist view that hard look review allows the judiciary to engage in legislative policymaking drives Paul Verkuil’s suggestion that there be a “*Vermont Yankee II*” to curb this doctrine.²⁰⁹

Requiring agencies to bulk up rulemaking records to justify decisions based in administrative expertise, could, in fact, be a reflection of the court’s policymaking interests. Alternatively, hard look doctrine entails judicial involvement in the minutia of administrative policymaking; in this way, it certainly *serves* administrative policymaking. Admittedly, it is difficult to distinguish between judicial purposivism and judicial oversight in this doctrine. This close supervision of the development of expertise may both appear indistinguishable from the exercise of policymaking power, and have a significant impact on policy outcomes.²¹⁰

This Section asserts, however, that hard look doctrine fits into the overseer model of judicial administration, at least as a theoretical matter. First, it argues that hard look doctrine focuses on the influence of politics on policymaking, as opposed to the substance of policymaking outcomes. Ultimately, by allowing courts to monitor the influence of politics on agency decisionmaking, hard look review allows judicial oversight of administrative constitutionality,²¹¹ even if it curtails presidential administration as a result.²¹²

ulate a basis for not requiring non-detachable, “spool out” seatbelts. *Id.* at 48 (At very least, “this alternative way of achieving the objectives of the Act should have been addressed and reasons given for its abandonment...”); *id.* at 52 (claiming “there is no direct evidence” supporting the agency’s finding that automatic seatbelts will not improve safety due); *id.* at 55 (arguing that the emergency release on spooling seatbelts seems as successful as those on detachable belts); *see also* Sunstein, *supra* note 176, at 197.

²⁰⁶ Beermann & Lawson, *supra* note 164, at 859 (noting this with disapproval).

²⁰⁷ *See e.g.* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983) (“Courts cannot take a hard look at materials they cannot understand nor be partners to technocrats in a realm in which only technocrats speak the language.”).

²⁰⁸ *See e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 558 (1985) (using *State Farm* as an example of when “hard look review [has] permit[ted] a court to substitute its judgment for the agency’s on the pretext of determining whether a policy outcome is ‘reasonable.’”); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 549 (1997) (“To advocate hard look review in the context of the courts’ prescriptive substantive review function is really to advocate greater discretion on the part of judges to substitute their views of appropriate statutory policies and analytical methodologies for those of the agency.”).

²⁰⁹ Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418, 418-19, 423-24 (1981); *see also* Beermann & Lawson, *supra* note 164, at 859 (noting that Verkuil drew on “*Vermont Yankee* as a broad symbol—a metaphor of sorts—for Supreme Court intervention to rein in undue lower-court interference with agency discretion and autonomy”). For a discussion of *Vermont Yankee*, *see* Part I.B.

²¹⁰ Sunstein, *supra* note 200, at 471 (describing hard look at the revitalization of “[a]n aggressive judicial role”); Rodriguez & Weingast, *supra* note 21, at 783 (“Without doubt, judicial intervention through the ‘hard look’ doctrine made an enormous impact on administrative policymaking, an impact depicted in a large contemporary literature on administrative law.”).

²¹¹ Sunstein, *supra* note 176, at 198 (arguing that hard look review is “a judicial check,” which “ensur[es] that agencies stay within the bounds set by Congress and guard[s] against arbitrariness[, is] an important, if imperfect, means of fulfilling some of the purposes underlying the original constitutional structure”); Sunstein, *supra* note 183, at 53 (“[A]ggressive posture of courts reviewing administrative action ought not to be understood as a usurpation of legis-

Second, this Section contends, hard look is rooted in supervision of agency expertise, which is distinct from policymaking as a matter of custom. This Section makes this claim on the basis of public administration scholarship that describes the development of expertise as belonging to neither political branch, not even the legislature. This suggests that while the development of expertise bears on policymaking, the two are distinguishable. In keeping with this idea, hard look review does not generally, as an empirical matter, lead to an agency changing its policy.²¹³ One reason for this may be that, despite the specter of the court's disapproval, the final decision-making authority generally rests with the agency.²¹⁴

1. Overseeing Political Influence in Expertise

The Court has long wrestled with whether presidential and political influence on agency expertise is justifiable. A key goal furthered by hard look review is identification of the appropriate level of agency responsiveness to the President's agenda. In other words, courts have focused, in hard look doctrine, on whether policymaking outcomes have been unduly influenced by political interests, as opposed to on encouraging any particular outcome. In this way, the judiciary has acted as overseer, seeking to ensure that there is a balance of political and technocratic factors shaping administrative policymaking.

Despite the outstanding view of *State Farm*²¹⁵ as purposivist,²¹⁶ its most substantive contribution was the idea that "agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms."²¹⁷ Similarly, Ronald Cass suggests that the Court's views on the causes and importance of climate change²¹⁸ impacted its decision in *Massa-*

lative or executive prerogatives, but as a way for the courts to reclaim some of their prior decision making authority, and at the same time to promote, rather than impair, the original purposes of the separation of powers.").

²¹² See *id.* (suggesting further that "the concern about judicial usurpation of executive authority, albeit legitimate, is insufficient to justify rejecting the current form of hard look").

²¹³ William S. Jordan III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals through Informal Rulemaking*, 94 NW. U. L. REV. 393, 396 (2000) ("[J]udicial review in the D.C. Circuit under the hard look version of the arbitrary and capricious standard generally did not significantly impede agencies in the pursuit of their policy goals during the decade under review. In many cases, regulatory programs continued despite successful hard look challenges to particular agency rules.").

²¹⁴ "*State Farm*...require[d] only reconsideration by the agency and d[id] not order the passive restraints rule into effect." Sunstein, *supra* note 176, at 210-11 (noting that, because it may not change outcomes, hard look is "peculiarly vulnerable to the conventional challenge that it will serve only to produce needless formality").

²¹⁵ See *Motor Vehicle Mfrs. Ass'n, v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983); *supra* notes 202-205 and accompanying text.

²¹⁶ See *supra* note 208-209 and accompanying text.

²¹⁷ Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2, 2 (2010); see also Sunstein, *supra* note 200, at 470-71 ("The disagreement [in *State Farm*] stemmed from contrasting views about the proper role of politics in the regulatory process).

²¹⁸ Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. ONLINE 75, 75 (2007) ("In their eagerness to promote government action to address global warming, the Justices stretch, twist, and torture administrative law doctrines to avoid the inconvenient truth that this is not a matter on which judges have any real role to play."); but see Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens's Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1061-62 (2010) (arguing that the Court's purposivism constituted adherence to legislative intent).

*Massachusetts v. EPA*²¹⁹ to require the Environmental Protection Agency to regulate carbon dioxide and other greenhouse gases as pollutants.²²⁰ In contrast, Harold Bruff argues that the “Court’s unusually aggressive supervision of EPA in *Massachusetts* seems to be due to the majority’s belief that the agency was ignoring its own scientific record, which pointed strongly in favor of regulation, in favor of presidential policies that did not directly answer the statutory command.”²²¹

Some approve of the judiciary acting as arbiter of political influence on agency policies,²²² and others disapprove.²²³ In the former group are some that are concerned that the Court has chosen *not* to apply hard look when the agency has acted in response to political pressure.²²⁴ These scholars suggest that even policy changes in response to political influence remain beholden to the expectations of hard look review.²²⁵

Of those who decry hard look limitations on political factors, some argue suggested that presidential influence on agency policies should encourage deference to agencies.²²⁶ While acquiescence to the President may be the Court’s general inclination today,²²⁷ it has placed some limits on administrative capriciousness resulting from presidential administration.

²¹⁹ See generally 127 S. Ct. 1438 (2007) (holding that the agency’s action was arbitrary and capricious because it had offered no reasoned explanation for its refusal to decide whether greenhouse gases caused or contributed to climate change).

²²⁰ *Id.* at 1446 (noting the “enormous potential consequences” of the EPA’s actions to stem global warming, that a “reduction in domestic emissions would slow the pace of global emissions increases, no matter,” and that the “Court attaches considerable significance to EPA’s espoused belief that global climate change must be addressed”).

²²¹ Bruff, *supra* note 35, at 462.

²²² Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 492 (2019) (“Contrary to what some scholars have argued, when an agency is acting pursuant to a presidential directive, its decisions require more, not less, scrutiny.”); Sunstein, *supra* note 176, at 196. (“The technocratic rationality required by *State Farm* and similar decisions should be understood as a device, admittedly highly imperfect, for reducing the risk that agency decisions will result from ‘political’ considerations that are sometimes illegitimate and that at any rate ought not to be concealed.”).

²²³ See generally Watts, *supra* note 69 (arguing that arbitrary and capricious review should privilege certain forms of political influence on agency decisionmaking); *c.f.* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1324 (1992) (arguing that allowing judges to “interfere with particular outcomes in the absence of constitutional or like instructions, simply on the grounds that political processes may have been inadequate, is inviting the whirlwind”).

²²⁴ For instance, in *FCC v. Fox*, 556 U.S. 502, 515 (2009), the Court’s view that politics should be allowed to influence agency policies may have buoyed its decision to allow the agency to abandon a rule without an explanation for the change. See William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1399 (2018); Short, *supra* note 196, at 1811; Watts, *supra* note 69, at 2009 (“In upholding the FCC’s orders, Justice Scalia’s opinion...seems to make it easier for agencies to change their policies due to changes in the political landscape.”).

²²⁵ See *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quoting *State Farm*); see also Buzbee, *supra* note 224, at 1400-1401 (detailing how *Encino Motorcars* reinforced the requirements of hard look for policy changes).

²²⁶ Watts, *supra* note 69 (arguing that courts should allow agency policies that are responsiveness to “public values” espoused by the President to pass arbitrary and capricious review); Kagan, *supra* note 20, at 2380 (arguing for an approach that “relax[es] the rigors of hard look review when demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question”).

²²⁷ See *infra* notes 461-471 and accompanying text.

In *Department of Commerce v. New York*, the Court recently engaged in hard look review, initially to determine whether the President's influence on the agency's decision was permissible.²²⁸ However, the Court ultimately upheld a lower court case setting aside the Commerce Secretary's decision to add a citizenship question on the 2020 Census because the Secretary's expressed justification was pretextual²²⁹ and thus unavailable for "meaningful judicial review."²³⁰

While much of Chief Justice Roberts's majority opinion treated the Commerce Secretary's decision "as a perfectly reasonable and historically-grounded policy choice,"²³¹ the decision ultimately found that the Secretary "had lied."²³² This meant he put forth "'contrived reasons [that] defeat the purpose' of courts requiring agencies to provide reasoned explanations for their actions."²³³ As the Chief Justice explained, "[i]f judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."²³⁴

Despite this clear reprobation of the agency's record, the Court did not determine that the decision failed arbitrary and capricious review, although Justice Breyer notes in his concurrence that he and three other Justices would have held this as well.²³⁵ Rather, it remanded the matter to the agency.

The Court's decision in this case was focused, distinctly, on the agency's integrity, which is usually not the explicit concern of the arbitrary and capricious standard.²³⁶ However, as Gillian Metzger argues, arbitrary and capricious review "serves to identify pretextual decisionmaking"—for instance, in the seminal *State Farm* decision. *State Farm* "did not put its holding in terms of pretext, instead concluding that the agency was not acting reasonably to achieve its safety goals. However, an implicit corollary of concluding that an agency's policy undercuts its stated goals is that those goals probably weren't really motivating the agency in the first place."²³⁷

²²⁸ See text accompanying *supra* notes 1-5 (discussing *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019)).

²²⁹ *Dep't of Commerce v. New York*, 139 S. Ct. at ___ (concluding that "the decision to reinstate a citizenship question cannot be adequately explained in terms of agency's request for improved citizenship data to better enforce the [Voting Right Act]," and thus that the agency's explanation "is incongruent with what the record reveals about the agency's priorities and decisionmaking process.")

²³⁰ *Id.* at ___.

²³¹ Metzger, *The Roberts Court*, *supra* note 50.

²³² *Id.*

²³³ *Id.*

²³⁴ *Dep't of Commerce v. New York*, 139 S. Ct. at 2576.

²³⁵ *Id.* at 2585 (Breyer, J., concurring) ("I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire [but] write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA).")

²³⁶ Metzger, *The Roberts Court*, *supra* note 50 ("It's true that arbitrary and capriciousness review does not usually speak in terms of pretext and the Supreme Court had not previously held agency action arbitrary and capricious on pretext grounds."); *but see id.* (noting that in *Texas v United States*, 809 F3d 134, 171–76 (5th Cir 2015), the court of appeals applied the arbitrary and capricious standard to uphold "the district court's determination that the justification given for Department of Homeland Security's [DAPA] program was 'pretext'").

²³⁷ *Id.*

Arguably, in both *State Farm* and *Dep't of Commerce*, then, the Court engaged in the oversight model of administration, by seeking to ensure merely that the policy was supported by the agency's purported goals, as opposed to responsive only to shifting political winds. That having been said, *Dep't of Commerce* effectively quashed the government's decision to add a citizenship question to the Census, in part because any subsequent justification would be equally *post hoc*.²³⁸ Here we see the potential for the Court to engage significantly in administration without making policy itself, in order to arbitrate the proper influence of politics on agency decisionmaking.

2. Supervising the Development of Expertise

Hard look review is, fundamentally, the oversight of agency expertise.²³⁹ Despite the consideration of political factors in *State Farm*, this and other cases serve as examples of hard look reviewing emphasizing the importance of expertise.²⁴⁰ Many claim that hard look allows courts to substitute their own judgment, and impose their own policymaking preferences, on agencies.²⁴¹ This Section argues that expertise-building is distinct from legislative policymaking as a matter of custom. More specifically, progressive scholarship from political science and public administration suggests that the development, substantiation and application of expertise is not ascribed to either political branch of the government, not even the legislature. Certainly, figures like Frank Goodnow and Woodrow Wilson acknowledged that agencies settle value questions and engage in political issues. But they nonetheless distinguished between administration and policymaking, despite the endless interaction between the two.²⁴²

The legitimacy of agencies derives, in part, from the extent to which they are differentiated from political actors and have developed unique expertise.²⁴³ Both the "science" of administration, including matters of internal agency organization and management, and substantive scientific and technocratic knowledge may be characterized as expertise. Since the New Deal, agencies have been responsible for the development and implementation of expertise while ad-

²³⁸ See *supra* notes 6-7 and accompanying text.

²³⁹ "One fundamental doctrine of judicial review, hard look review, both privileges expertise and has been found to improve the quality of administrative adjudication, in part because of its emphasis on the evaluation of agency process." Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279, 347-48 (2017).

²⁴⁰ *Id.* at 347 n. 330 (listing *State Farm*, *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986) and *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 105-06 (1983) as examples of hard look focused on expertise); see also Sunstein, *supra* note 200, at 470-71 (The majority [in *State Farm*] treated the issue [of politics] as if it were simply one of the application of expertise to the problem."); Sunstein, *supra* note 176, at 196.

²⁴¹ See *supra* notes 207-209 and accompanying text.

²⁴² "[T]he responsibility of administrative agencies to popular control was a value taken-for-granted; the responsiveness of administrators and bureaucrats was not seen as a problem because everyone then understood that politics and policy were separate from administration, which was concerned exclusively with the execution of assignments handed down from the realm of politics." Wallace S. Sayre, *Premises of Public Administration: Past and Emerging*, 18 PUB. ADMIN. REV. 102, 103 (1958).

²⁴³ DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES* 14-15 (2001); see also DAVID H. ROSENBLUM, *PUBLIC ADMINISTRATION AND LAW: BENCH V. BUREAU IN THE UNITED STATES* 18 (1983) (characterizing expertise as an "independent" power of agencies for the formulation and implementation of public policy).

ministering the law,²⁴⁴ and favored for this purpose over judges as a functional matter.²⁴⁵ That having been said, agencies' responsibility to expertise does not stem from the legislative delegation of policymaking power.

In the late 1800s, around the time the first modern agency was created, commentators asserted that administration and politics—that is, the workings of bureaucracy and of the legislature—are in fact wholly separate, and that the former is located only in agencies,²⁴⁶ as opposed to Congress. One expectation of the modern agency was that it engaged in the work of “administration,” separate from what politicians do. In 1887, Woodrow Wilson noted about the “province of administration” that “[m]ost important to be observed is the truth...insisted upon by our civil service reformers; namely, that administration lies outside the proper sphere of *politics*.”²⁴⁷ Wilson note further that “[a]dministrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.”²⁴⁸

At the turn of the twentieth century, scholars “contended that there were ‘two distinct functions of government’²⁴⁹: As Frank Goodnow put it, “[p]olitics [which] ‘has to do with policies or expressions of the state will,’ [and] administration [which] ‘has to do with the execution of these policies.’”²⁵⁰ Nicholas Henry suggests this view was based in the view that “the legislative branch, aided by the interpretive abilities of the judicial branch, expressed the will of the state and formed policy, while the executive branch administered those policies impartially and apolitically.”²⁵¹ Similarly, public administration was associated with unique scientific principles that

²⁴⁴ See James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN L. REV. 363, 364 (1976) (“Those who rationalized the New Deal’s regulatory initiatives regarded expertise and specialization as the particular strengths of the administrative process.”).

²⁴⁵ See JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1933) (noting that agencies, unlike judges, develop expertise “from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem”); *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 632-33 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966) (in which Judge Leventhal rejects a challenge to an agency policy in part because it concerns “the kind of issue where a month of [agency] experience will be worth a year of [judicial] hearings”); Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1721 (2015) (arguing generalist courts cannot effectively review scientific determinations from expert agencies.) Critiques that courts lack the expertise to oversee agencies date back to before the APA. See, e.g., Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 (Walter-Logan Bill), before Subcommittee No. 4 of the House Judiciary Committee, 76th CONG. 1, 74 (1939) (arguing that courts have less expertise than agencies); Hearings on S. 674, S. 675, and S. 918 Part 1, before a Subcommittee of the Senate Judiciary Committee, 77th CONG., AT 173 (1941) (arguing that increased judicial review would allow the judiciary to “substitute[e] its own judgment in legislative and executive matters for the qualified opinion of an expert body set up by Congress”); Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L.J. 577, 596-98 (1938) (arguing that courts, like Congress, does not have the expertise or competence to administer the law).

²⁴⁶ See, e.g., FRANK GOODNOW, POLITICS AND ADMINISTRATION 10-11 (1900); see generally Leonard D. White, *Public Administration*, in RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT’S RESEARCH COMMITTEE ON SOCIAL TRENDS (1934) (discussing increased centralization, efficiency and expertise in the administrative state). Ernst Freund, who favored a “centralized, bureaucratic method of organizing administration,” looked to Europe as a model. POSTELL, *supra* note 27, at 181-82.

²⁴⁷ Woodrow Wilson, *The Study of Administration*, 2 POLI. SCI. QUARTERLY 197, 210 (1887) (emphasis in original).

²⁴⁸ *Id.*

²⁴⁹ Nicholas Henry, *Paradigms of Public Administration*, 35 PUB. ADMIN. REV. 378, 378 (1975).

²⁵⁰ *Id.*

²⁵¹ *Id.* (“Separation of powers provided the basis of the distinction.”).

both centered “in the government’s bureaucracy”²⁵² and had no particular locus in any constitutional branch, including the political branches.²⁵³ Accordingly, “[c]ourts in the early part of the twentieth century tended to defer to agencies implementing and interpreting statute.”²⁵⁴ For today’s purposes, this suggests that when an agency engages in legislative policymaking, this constitutes a separate function from the development of expertise.

Complementarily, scholars also noted a lack of constitutional constraints to the development administrative expertise. Ernst Freund distinguished the work of administration from that of the legislature and the judiciary on constitutional terms,²⁵⁵ while Wilson claimed that “the field of administration...at most points stands apart even from the debatable ground of constitutional study.”²⁵⁶ Goodnow also interrogated the assumption that public administration necessarily had “constitutional moorings,”²⁵⁷ Thinkers such as like these categorized the administration of expertise as “extra-constitutional.”²⁵⁸

As is well know, there soon arose a tension between the concept of administration as a purely focused on science and information gleaned through expertise, and its potential to be political;

²⁵² The emphasis of this paradigm was on locus—“where public administration should be.” *Id.* “[I]n the view of Goodnow and his fellow public administrationists, public administration should center in the government’s bureaucracy.” *Id.*

²⁵³ See generally, F. W. WILLOUGHBY, *PRINCIPLES OF PUBLIC ADMINISTRATION* (1927); see also Foote, *supra* note 180, at 693 (noting that fundamental precepts of public administration include “the use of expertise to run programs [and] the development of a full administrative record to ensure reasonable decision-making; and enforcement and management norms”); see also Wilson, *supra* note 247, at 211 (“A great deal of administration goes about *incognito* to most of the world, being confounded now with political ‘management,’ and again with constitutional principle.”) (emphasis in original); *id.* at 212 (noting that statutory law and the Constitution, which properly concern themselves with the development of “general law,” are not administrative and that only “the detailed execution of such plans is administrative”).

²⁵⁴ Ross, *supra* note 98, at 530–31 (noting this happened due to “a general belief about the separation of the administration of law from politics, reinforced by the image of...expert bureaucrats controlling agency actions”); *id.* at 531 n.45 (citing work by Lisa Bressman and Mark Seidenfeld that identifies “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’”); see also Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1286 (2014) (“As for history, the sort of judicial review that the presumption favors—appellate-style arbitrariness review—was not only unheard of prior to the twentieth century, but was commonly thought to be unconstitutional.”).

²⁵⁵ Freund, *supra* note 255, at 404 (noting that administrative law “regulates and limits governmental action without involving constitutional questions. Its subject matter being the administration of public affairs, as distinguished from legislation on the one side and from the jurisdiction of the courts on the other, it has been aptly called administrative law.”).

²⁵⁶ Wilson, *supra* note 247, at 210.

²⁵⁷ See Ralph Clark Chandler, *Dual Sources of American Administrative Legitimacy*, 7 DIALOGUE 1, 7 (1984). This is not to say that there are no valid constitutional concerns associated with agencies’ pursuit of information. See, e.g., Kenneth Culp Davis, *The Investigative Power of Administrative Agencies*, 56 YALE L.J. 1111, 1114 (1947) (arguing that agencies’ investigatory powers may harm “constitutional principles concerning privacy, searches and seizures, self-incrimination, and freedom from bureaucratic snooping”).

²⁵⁸ GUSTAVUS A. WEBER, *ORGANIZED EFFORTS FOR THE IMPROVEMENT OF METHODS OF ADMINISTRATION IN THE UNITED STATES* 3-5 (1919) (noting a shift in political science literature, towards the recognition of the need for technical, “extra-constitutional agencies” to further the tasks of government “efficient[ly] and economical[ly].”) (emphasis added); Wilson, *supra* note 247, at 211 (“There is [a] distinction between constitutional and administrative questions....”).

indeed, the APA was passed as a symbol of the growing mistrust of administrative power.²⁵⁹ Accordingly, some social scientists progressed to the belief that public administration, on second thought, cannot be divorced from politics.²⁶⁰

Nonetheless, some of the same scholar suggested that, as a theoretical matter, agencies act outside the scope of politics, despite their adjacency to the political branches.²⁶¹ Likewise, government agencies themselves argue, perhaps unsurprisingly, against the judicial supervision of expert tribunals.²⁶² Overall, this suggests that, to the extent the development of expertise lies outside of the sphere of politics, the judiciary may feasibly engage with this set of administrative responsibilities, as it has under the doctrine of hard look review, without acting as a policymaking “decider.”

On the one hand, there are functional reasons to allow agencies to maintain primary control over the development and evaluation of information.²⁶³ On the other hand, for those concerned with the technical failings of agencies,²⁶⁴ there is impetus to give power to courts in this domain.²⁶⁵ A growing, functional distrust of agencies could be alleviated by a greater emphasis on hard look. More intense judicial involvement in the development of agency expertise could strengthen push agencies to maintain the quality of expertise despite pressure from the President.

²⁵⁹ See *infra* text accompanying notes 332 & 334.

²⁶⁰ See generally John Merriman Gaus, *Trends in the Theory of Public Administration*, 10 PUB. ADMIN. REV., 161 (1950); see also *id.* at 168 (“A theory of public administration means in our time a theory of politics also.”); Sayre, *supra* note 242, at 103 (expressing skepticism of agencies as a result of the perceived involvement of administrators in politics); *id.* at 105 (“Public administration is one of the major political processes.”).

²⁶¹ See, e.g., Sayre, *supra* note 242, at 102-103 (arguing that administration is concerned primarily with “[o]rganization theory [that is, challenges associated with] the necessities of hierarchy, the uses of staff agencies, a limited span of control, [and the] subdivision of work by such ‘scientific’ principles as purpose, process, place, or clientele”); see also Herbert A. Simon, *A Comment on ‘The Science of Public Administration,’* 7 PUB. ADMIN. REV. 200 (1947) (suggesting that public administration remained separate from politics and comprised expertise—in particular, two types: a “pure” science of administration and the prescriptive decision-making required to issue public policy).

²⁶² See Hearings on H.R. 4236, H.R. 6198, and H.R. 6324, before Subcommittee No. 4 of the House Judiciary Committee, *supra* note 57, at 74 (noting that in the debates leading to the APA, the Department of War argued that “courts are in no position to supervise the exercise of discretionary authority by these specialized tribunals except in those cases where there is a clear abuse of power or authority”).

²⁶³ Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 734 (2011) (arguing “that courts ought to be at their ‘most deferential’ when reviewing an agency’s scientific determinations’ [as] supported by basic notions of institutional competence and...a natural judicial tendency to avoid any deep confrontations with science”); see also *supra* note 57 and accompanying text. Judicial restraint may allow an agency the autonomy to maximize its own, targeted resources and permit a fuller expression of the policy, while minimizing the burden on courts, which are tasked with a more generalized mandate. Furthermore, it may be misguided to draw on ever-increasing procedure, and in particular judicial review, as the basis for administrative legitimacy and accountability. See generally Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

²⁶⁴ See, e.g., MARVER BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955) (arguing that agencies atrophy and become subject to capture); THEODORE LOWI, *THE END OF LIBERALISM* (1969); Mark Green & Ralph Nader, *Economic Regulation v. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973) (arguing that Congress fails to give agencies enough guidance in the development of expertise).

²⁶⁵ Indeed, despite Judge Leventhal’s earlier enthusiasm for agency expertise, *supra* note 245, he eventually became convinced that courts should be part of the administrative, record-building process. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

For instance, in regards to the Affordable Clean Energy Rule,²⁶⁶ some have called the new policy “alarming,”²⁶⁷ and others suggest that it evinces poor or obscure scientific reasoning on the part of the Environmental Protection Agency.²⁶⁸ Accordingly, the Court should scrutinize the agency’s development and application of expertise under hard look. Furthermore, to maintain consistency with *Mass. v. EPA*,²⁶⁹ the Court would be advised to push back against the agency’s similar reasoning here—that rescission of the previous rule is required because otherwise, the agency would exceed the its jurisdiction under the Clean Air Act.²⁷⁰

II. JUDICIAL ADMINISTRATION OF STATUTORY DIRECTIVES

The President’s involvement in administrative statutory interpretation is controversial.²⁷¹ This is because the President rarely, delegated direct power to implement statute; this is generally a role allotted to the agency (head). Accordingly, Kevin Stack argues that the President should not be allowed to exercise the discretion to interpret statutes that has been delegated to an agency, as opposed to the President herself.²⁷²

Courts, too, influence the outcomes of policymaking by taking control of administrative statutory interpretation. Unlike the President, however, the judiciary has a privileged role in administrative statutory interpretation. Furthermore, also unlike the President,²⁷³ courts have uncontested power to issue directives that legally bind agencies.

Part I noted underlying characterization of the judicial review of agency processes as part of the “decider” model of judicial administration, argued that overseer dimensions have been overlooked. The instant Part argues that the opposite is true in regards to the judicial administration of statutes. Just as *Chevron*²⁷⁴ is a doctrine of judicial restraint, the current trend towards rebuking of *Chevron* is a turn towards the “decider” model of judicial administration, in which judges

²⁶⁶ See text accompanying *supra* notes 9-12 (discussing the Affordable Clean Energy Rule, 40 C.F.R. Part 60 (finalized June 19, 2019)).

²⁶⁷ Lincoln L. Davies, et al., *Trump, Energy Policy, and Hard Look Review*, Proceedings of the 64th Annual Rocky Mountain Mineral Law Institute, 21-2 (2018).

²⁶⁸ See Jessica Wentz, *Four Important Points about Epa’s Affordable Clean Energy Rule*, COLUMBIA L. SCHOOL CLIMATE LAW BLOG (June 20, 2019) (suggesting that the “EPA revised its methodology to downplay the public health impacts and costs of replacing the CPP with the [Affordable Clean Energy] Rule”); Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, NY TIMES (May 20, 2019).

²⁶⁹ *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (holding invalid the agency’s argument that it was not authorized to regulate carbon dioxide and other greenhouse gases as pollutants under the Environmental Protection Act).

²⁷⁰ Wentz, *supra* note 268, (noting that the “EPA asserts the [Clean Air Act] does not grant [authority for the CPP] on the basis of the plain meaning, structure, and legislative history of the [Act, and that n]otably, EPA has tried this very move before—and lost before the Supreme Court. In *Massachusetts v. EPA* (2007).”).

²⁷¹ “American public law has no answer to the question of how a court should evaluate the president’s assertion of statutory authority.” Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 539 (2005).

²⁷² See generally *id.*

²⁷³ See generally Strauss, *supra* note 32 (discussing and contesting the President’s authority to issue binding directives on—that is, to make decisions on behalf of—agencies).

²⁷⁴ See generally *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984)

“step into the shoes” of the agency head²⁷⁵ and exercise policymaking power delegated to agencies.

Certainly, courts have a mandate to ensure that agencies’ interpretation of statutes comply with constitutional expectations and legislative intent. Courts’ power to review agency actions arise from the conference of “original jurisdiction of all civil actions under the Constitution,”²⁷⁶ and from organic statutes with explicit provisions for judicial review, including the APA.

To the extent agencies “apply the Constitution through statutory interpretation,”²⁷⁷ courts have the power to attend to constitutional matters implicated by these interpretations.²⁷⁸ Courts are particularly justified in maintaining control over administrative statutory interpretation when doing so is necessarily to manage a constitutional matter, such as preservation of the First Amendment²⁷⁹ or application of the Supremacy Clause,²⁸⁰ although constitutional implications may obscure the fact that the Supreme Court ultimately engaged in more pedestrian statutory interpretation.²⁸¹ Administrative law is centered as well on judicial “interpretations of the statutes establishing the agencies,”²⁸² although its role in this regard was not inevitable.²⁸³ Shaping administrative policy through the interpretation and distillation of legislation is generally accepted as an exercise of judicial power which Cynthia Farina refers to as the ““independent judgment model” of statutory interpretation.”²⁸⁴

²⁷⁵ See Vermeule, *supra* note 34, at 1205 (discussing Kagan’s model as that of the President “step[ping] directly into the shoes of the relevant official”).

²⁷⁶ 28 U.S.C. § 1331. Administrative statutory interpretation is particularly judicial when it involves interpreting a statute in a way that prevents its enforcement by the agency from being unconstitutional. See, e.g., *TC v. American Tobacco Co.*, 264 U.S. 298 (1924) (refuting the Federal Trade Commission’s interpretation of the Federal Trade Act because the agency interpretation was in violation of the Fourth Amendment).

²⁷⁷ Ross, *supra* note 98, at 561.

²⁷⁸ See Cass R. Sunstein, *Chevron As Law*, 107 GEO. L.J. 1613, 1674 (2019) (suggesting that the canon of constitutional avoidance limits *Chevron* deference to agencies).

²⁷⁹ See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (creating a more expansive First Amendment prohibition against the application of anti-discrimination law to religious employers); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (eradicating National Labor Board jurisdiction over parochial schools); see also Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1374 (1981). For more recent examples, see *supra* notes 114-116.

²⁸⁰ See, e.g., *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733 (2008) (applying the Supremacy Clause to limit the authority of the Federal Energy Regulatory Commission under the *Mobile-Sierra* presumption when state law has deregulated its energy markets).

²⁸¹ For instance, in *NLRB v Catholic Bishop*, discussed in *supra* note 279, the “Supreme Court affirmed the Seventh Circuit [in this case], but [only] on statutory grounds.” Laycock, *supra* note 279, at 1374 (emphasis added); see also Robert J. Pushaw, Jr., *Labor Relations Board Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, 97 YALE L.J. 135, 155 n.2 (1987) (noting a case in which the Supreme Court evaded the constitutional questions raised by the Free Exercise and Establishment Clauses on which the Court of Appeals based its decision).

²⁸² Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1637 (2011).

²⁸³ *Cf.* LANDIS, *supra* note 245 (critiquing the court-centric view of administration and arguing that it need not have been this way). For instance, Nicholas Bagley points out that there is a “puzzling presumption” in favor of judicial review, even in instances when Congress has expressly legislated against it. See generally Bagley, *supra* note 254.

²⁸⁴ Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453-54 (1989) (“In [this] model, the interpretive authority rests principally with the court. Using traditional techniques of statutory construction, the court exercises its own judgment to determine de novo what the stat-

However, statutory interpretation is also tool of administration.²⁸⁵ As matter of positive law, agencies are delegated policymaking authority in order to implement legislation.²⁸⁶ As a descriptive matter, Bill Eskridge notes that in cases since *Chevron* “the primary engine of statutory dynamism is and long has been agencies, with courts as second-level interpreters (if that) in most instances.”²⁸⁷ Accordingly, the “deferential model” of statutory interpretation suggests that “principal interpretive responsibility rests with the agency [and that t]he court must accept any reasonable construction offered by the agency, so long as the statutory language or, possibly, the legislative history is not patently inconsistent.”²⁸⁸ Per this account, “the agency’s function is to give meaning to the statute: the court determines only whether the interpretation the agency has chosen is a ‘rational’ reading, not whether it is the ‘right’ reading.”²⁸⁹

(It is worth noting, briefly, that, the deferential model does not hinge on whether agencies exercise legislative²⁹⁰ or executive²⁹¹ power while engaging in administrative statutory interpretation. Of course, the tension between executive and legislative power is fraught and whether

ute means.”); see also Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 412 (1949); Clyde W. Summers, *Frankfurter, Labor Law and the Judge’s Function*, 67 YALE L.J. 266, 303 (1957).

²⁸⁵ Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 25 (1940) (“To administer a statutory rule, the administrative officer or agency must first interpret it and determine the facts to which it applies. This is especially so where the statutory rule is expressed by Congress in general terms as is usual.”); Wilson, *supra* note 247, at 212 (“Every particular application of general law is an act of administration.”); Foote, *supra* note 180, at 693 (“[T]he specific procedures that agencies must use to formulate substantive rules...advance the values of *public administration*.”) (emphasis in original).

²⁸⁶ Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1447 (2017) (“Many statutes contain specific statutory delegations of authority...to accomplish a particular, congressionally identified goal, and resolving such matters obviously is not a matter of interpretation but of pure, naked policymaking.”); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1883–84 (2015) (arguing that agency implementation of statute is not “statutory interpretation,” but rather policymaking).

²⁸⁷ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1196 (2008).

²⁸⁸ Farina, *supra* note 284, at 454.

²⁸⁹ *Id.*

²⁹⁰ While formalists and functionalists on the farthest ends of the spectrum disagree as to whether agencies *should* exercise administrative power, they both take for granted that, for better or for worse, agencies *do* exercise legislative power. On the one hand, some formalists/originalists are dismayed that “in the modern state, and for quite some time, Congress has delegated authority to write rules and regulations with the status of laws to administrative agencies situated within the executive branch.” Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law* 133 HARV. L. REV. 164, 164 (2019) (declaring that “Congress is supposed to write laws.”). On the other hand, some functionalists concede that administrative policymaking power stems from a delegation of legislative power from Congress, but are not concerned about this. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 488-90 (2001) (Stevens, J., concurring) (arguing that delegations of legislative power to agencies are acceptable as long as the delegation offers an “intelligible principle”).

²⁹¹ Some argue that agencies’ policymaking authority is executive in nature—that is, associated with their duty to enforce the law. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873, n. 4 (2013) (“Agencies make rules...and conduct adjudications...and have done so since the beginning of the Republic. These activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the ‘executive Power.’”); see also WILLOUGHBY, *supra* note 29, at 8-9 (noting that primary responsibility for executing the law lies with the President and agencies); Lee, *supra* note 285, at 1 (arguing that the power of administrative agencies to prescribe interpretive regulations is inherent to their placement within the executive branch, and therefore need not be delegated by Congress); Adrian Vermeule, *No*, 93 TEXAS L. REV. 1547, 1557-60 (2013) (suggesting this is the most agreed-upon theory of the origins of agencies’ policymaking power).

power is exercised in one domain or the other may be difficult to parse,²⁹² and may even be moot.²⁹³)

In many ways, *Chevron* strikes a balance between the independent judgment and the deferential models of statutory interpretation, in that it limits (albeit imperfectly) the judiciary to the role of overseer, by focusing judicial review on the reconciliation of agency action with legislative intent, as opposed to on policymaking outcomes.²⁹⁴ Indeed, *Chevron* was once “embraced by the right as an effort to cabin the illegitimate exercise of policymaking authority of unelected judges...and to insist instead on the primacy of officials within the Executive Branch.”²⁹⁵

Nonetheless, calls for the demise of *Chevron* are reaching a fever pitch and the doctrine is weaker than before, due primarily to growing “judicial skepticism of administrative government.”²⁹⁶ In particular, the views of Justices Kavanaugh and Gorsuch are a rallying cry for those seeking to eliminate judicial deference to agency statutory interpretation.²⁹⁷ For instance, Kavanaugh has argued that judges *alone* “should strive to find the best reading of the statute [and] should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous.”²⁹⁸ Justice Gorsuch, too, “displays a viewpoint that, in historical terms, is relatively new at the Supreme Court level: full-scale, heated opposition to the very existence of

²⁹² See Kenneth Culp Davis, *Administrative Rules-Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919 (1948) (differentiating between “quasi-legislative” administrative rule-making and a seemingly distinct interpretive rule-making, which traditionally falls under the “executive” administrative powers, and noting they are difficult to distinguish in practice).

²⁹³ Lee, *supra* note 285, at 25 (suggesting that the distinction between agency exercise of legislative and executive power is academic because “in most of its regulatory Acts Congress includes an authorization to ‘make such regulations as are necessary to carry out the provisions of this Act,’ or similar language”).

²⁹⁴ See generally Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 132 HARV. L. REV. 852 (2020).

²⁹⁵ Sunstein, *supra* note 278, at 1618; see also Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2 (2007) (noting over a decade ago, a trend by which scholars sought to cabin judicial statutory interpretation through formalism, even as they embraced judicial discretion in constitutional theory).

²⁹⁶ Metzger, *The Roberts Court*, *supra* note 50 (suggesting that “the clearest example” of this skepticism is the mounting political pressure to eliminate *Chevron*); see also Cass R. Sunstein, *Chevron Without Chevron*, 2018 SUP. CT. REV. 59, 59 (2018) (noting that *Chevron* is “under serious pressure, fueled by some serious questions about the legitimacy of the regulatory state in general”).

²⁹⁷ See Metzger, *supra* note 50, at 4 (noting, for instance, that “anti-administrative views quickly became a centerpiece of Gorsuch’s Senate confirmation hearings—surely never before have so many senators spoken at such length about the *Chevron* doctrine of judicial deference to administrative statutory interpretations.”); *id.* at 24 (“So far, only two Justices have concluded that *Chevron* deference to agency statutory interpretations is unconstitutional, though several more are willing to limit *Chevron*’s scope.”) (citations omitted); Bednar & Hickman, *supra* note 286, at 1451 (noting the recent conversation between now-Justice Kavanaugh and Judge Katzmann “reflect[ing] disagreement over *Chevron*’s approach to statutory ambiguity as well) (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2153-54 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) and Robert A. Katzmann, *Response to Judge Kavanaugh’s Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 398 (2016)); see also *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (“*Chevron* deference raises serious separation-of-powers questions.”).

²⁹⁸ Kavanaugh, *supra* note 297; see also Scalia, *supra* note 343, at 521 (arguing that textualists like him—and presumably, Justice Kavanaugh—are less likely to find statutory ambiguity than those who give credence to legislative history while ascertaining a statutory interpretation).

judicial deference.”²⁹⁹ Echoing the *Vermont Yankee* prohibition on the judicial augmentation of the APA,³⁰⁰ Gorsuch has declared that the *Auer* doctrine (per which agencies are entitled to deference for their interpretation of their own regulations) constitutes an impermissible interpretation of the APA.³⁰¹ In contrast to *Vermont Yankee*, however, Gorsuch argues that it is not the courts, but agencies, that are over-empowered by this misinterpretation, and therefore it is agencies, as opposed to courts, that should be constrained.³⁰²

From these Justices’ perspective, eliminating deference to agencies’ statutory interpretation would rightfully re-establish power in the judiciary. However, this Part argues, the true result of this effort to curb administrative power is that judicial administration of statutory implementation has begun to engage more directly in policymaking—in other words, that courts have turned toward the “decider” model in this context.

This Part approaches this argument from three angles. First, it argues that courts have long deferred to the legislature, and to agencies themselves, the policymaking functions of administrative statutory interpretation. In other words, claims that eliminating *Chevron* deference would transfer power from agencies “back” to courts³⁰³ are overstated.

Second, this Part notes that while *Chevron* concretizes the intuition that judicial review of agency statutory implementation is separate from policymaking, it also provides adequate opportunity for courts to disengage from deference in order to uphold congressional intent on their own. In other words, *Chevron* allows courts much flexibility to exercise their powers of statutory interpretation.

Third, this Part, illustrates that the “decider” approach to judicial review of statutory interpretation has come to the fore under a changing application of *Chevron*. To do so, it offers examples of one particular model of the “decider” approach. In this model, the Supreme Court has asserted control over the interpretation of a statute by making a questionable determination that the statute is unambiguous. In doing so, the Court appears to assume the policymaking function otherwise consigned to agencies. This continued approach suggests that, whether or not *Chevron* is overturned, courts may begin to dictate administrative policymaking outcomes at a greater pace.

²⁹⁹ Ronald Levin, *Auer deference — Supreme Court chooses evolution, not revolution*, SCOTUSBLOG (June 27, 2019), <https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/>.

³⁰⁰ See *supra* Part I.B.

³⁰¹ “When this Court speaks about the rules governing judicial review of federal agency action, we are not (or shouldn’t be) writing on a blank slate or exercising some common-law-making power. We are supposed to be applying the Administrative Procedure Act. ... Yet, remarkably, until today this Court has never made any serious effort to square the *Auer* doctrine with the APA.” *Kisor v. Wilkie* 588 U.S. 2400, 2431-33 (2019) (Gorsuch, J., dissenting) (going on to explain how *Auer* is a misconstruction of the APA).

³⁰² See *id.*

³⁰³ See “Anti-administrativists” advocate for “a strong turn to the courts to protect individuals against administrative excess and restore the original constitutional order.” Metzger, *The Roberts Court*, *supra* note 50; Lee, *supra* note 84, at 1702-03 (“At a general level, critics who argue for a return to nineteenth-century administrative law emphasize several features said to characterize the period [including that] courts, not agencies, [were tasked] with enforcement of the most coercive policies...”).

A. Customary Judicial Reluctance to Make Policy

Critics of the administrative state argue that there was a golden age in which courts had significant, discretionary power. However, they overlook the extent to which the judiciary has been deferential in matters of statutory interpretation that bear on policymaking. This Section suggests that courts often retreated from the “decider” model of the judicial administration of statutory interpretation.

“The legislature [has long been] the central administrative authority of the state.”³⁰⁴ Accordingly, many who “have long defended judicial power over statutory interpretation based on the assumption that judges serve as ‘faithful agents’ for Congress.”³⁰⁵ That having been said, administrative agencies owe their existence to Congress and play their own role as “faithful agents.”³⁰⁶ Furthermore, Jerry Mashaw notes that the prevalent notion that “administrative officers adjudicating cases and making rules appeared only in the late-nineteenth and early-twentieth centuries with the creation of so-called ‘independent’ agencies” is a “misrepresentation.”³⁰⁷

As early as the 17th century, philosophers warned against the exercise of lawmaking power by the judiciary:

“There is no liberty,” says Montesquieu, “if the power of judging is not separated from the legislative power and from the executive power. If it were joined to the legislative power, the power over the life and the liberty of citizens would be arbitrary; for the judge would be legislator. If it were joined to the executive power, the judge might have the force of an oppressor.”³⁰⁸

Accordingly, as early as the mid-1700s, there was widespread distrust of judicial power,³⁰⁹ including skepticism of the judicial exercise of discretion, which led, in part, to the development of *stare decisis*.³¹⁰ William Nelson outlines how “judges of the eighteenth century...inherited a legal system that gave them little law-making power.”³¹¹

³⁰⁴ Freund, *supra* note 255, at 413 (making this observation reluctantly).

³⁰⁵ Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1245 (2002).

³⁰⁶ Metzger, *supra* note 26, at 1901; POSTELL, *supra* note 27, at 73 (noting that even in antebellum America, a time of noteworthy judicial power of the administrative state, there arose the understanding that “administrators” or “legislators,” and not the judiciary, “should be responsible for administrative decisions). As Ernst Freund noted long ago, in some governmental systems in Europe, agencies can exercise power even “independent of statute.” Freund, *supra* note 255, at 410-11.

³⁰⁷ JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 4 (2012) (“It is but a short step from [this misrepresentation] to deep concerns about the legitimacy of the modern administrative state.”).

³⁰⁸ Pound, *supra* note 55, at 137 (1907); *see also* Kagan, *supra* note 21, at 2270 (criticizing the courts for “suppress[ing] political control of administration by the legislature”).

³⁰⁹ *See* NELSON, *supra* note 27, at 18 (“Given the vast powers of the courts, it is not surprising that men kept close watch over them. Colonials perceived that “an impartial administration of justice” was of “great moment to the people”).

³¹⁰ *Id.* at 18-20.

³¹¹ NELSON, *supra* note 27, at 33.

In “the late-eighteenth and nineteenth centuries...matters of administrative structure and technique, and how they were shaped by legislation and administrative action, were necessarily at the heart of the legal enterprise.”³¹² During that time, courts themselves explicitly acknowledged the primacy of the legislature in creating the law, and even in determining constitutionality, noting that statutory law has “its own force.”³¹³ Complementarily, the nineteenth century attitude towards courts was that they should be relatively hands-off agency action too.³¹⁴ One commentator suggests that, since this time, agencies have retained a “specification” or “completion” power to fill in statutory gaps.³¹⁵

In the mid-nineteenth century, the judiciary had the power to issue writs of mandamus, including to government officials ordering them to properly fulfill their official duties or correct an abuse of discretion.³¹⁶ However, a court would compel only what it considered to be a “plain official duty, requiring *no* exercise of discretion,” which rendered the mandamus akin to an injunction enforcing the law.³¹⁷ And in most other circumstances, “there was no judicial review at all, with aggrieved claimants relegated either to filing internal complaints with the agency or petitioning Congress for relief.”³¹⁸

Contemporaneously, “Congress had initiated programs that we would now characterize as welfare state activity: veterans’ disability pensions, the establishment and operation of seaman’s hospitals, and the provision of relief to persons suffering from disasters brought about through no fault of their own.”³¹⁹ Although these operations weren’t large, “each required the development of administrative techniques that would generate both a capacity for implementation and sources of control and accountability.”³²⁰

Once Congress began to lack the “time, resources, foresight, and flexibility to attend to even-ry conceivable detail of regulatory policy,” agencies were created to assist in these matters.³²¹

³¹² MASHAW, *supra* note 307, at 10.

³¹³ NELSON, *supra* note 27, at 109.

³¹⁴ MASHAW, *supra* note 307, at 10; Bagley, *supra* note 254, at 1286 (“[A]ppellate-style arbitrariness review [of agencies] was not only unheard of prior to the twentieth century, but was commonly thought to be unconstitutional.”).

³¹⁵ Ian Wurman, *The Specification Power*, 168 PA. L. REV. (forthcoming).

³¹⁶ See, e.g., *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 611 (1838) (distinguishing between “political duties imposed upon many officers in the executive department” and duties that “grow out of and are subject to the control of law”); see also *Garfield v. U.S. ex rel. Goldsby*, 211 U.S. 249, 261 (1908) (“It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law.”).

³¹⁷ *Garfield*, 211 U.S. at 261-62 (emphasis added) (citations omitted); see also 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.3, pp. 162–63 (5th ed. 2010) (noting that courts would grant writs of mandamus only for ministerial, not discretionary, matters).

³¹⁸ See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 942 (2011).

³¹⁹ Mashaw, *supra* note 322, at 1338.

³²⁰ *Id.*

³²¹ Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 364 (2010) (noting that “various characteristics of agency decisionmaking and institutional structure [made] agencies tolerable (and perhaps even superior) substitutes for congressional lawmaking”) (citations omitted); see also McKinley, McKinley, *supra* note 112, at 1538 (“Much of what we now call the modern “administrative state” grew out of the petition process in Congress.”); Hearings on H.R. 4236, H.R. 6198, and H.R. 6324, before Subcommittee No. 4 of the House Judiciary Committee, *supra* note 57, at 69 & 107 (implying

Then, the task of implementing various programs began to be delegated to agencies via statute; those responsibilities often involved policymaking.³²² Some suggest that agencies fulfill only a managerial function as an extension of Congress,³²³ while others argue that officials who oversee administration are far from limited.³²⁴

It need not have been this way. Indeed, the legislature might have assigned functions in support of itself to courts,³²⁵ notwithstanding potential constitutional repercussions of this approach.³²⁶ This implies that the designation of agencies—as opposed to courts—as the conduit for legislative policymaking is purposeful.³²⁷ In any case, agencies were designated as an extension of the political branches of government³²⁸ the way an assistant acts as the hands and labor of a visionary.

By the twentieth century, “[t]he Supreme Court recognized the limitations of its role in reviewing agency exercises of specific authority grants.”³²⁹ Accordingly, “[c]ourts in the early part of the twentieth century tended to defer to agencies implementing and interpreting statutes.”³³⁰ Only around the first period of administrative growth, just prior to the passage of the

that agencies are better suited to administer the law than the legislature); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 442 (1998) (“Congress cannot supervise all of the details of agency action....”); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 951 (2000) (noting that “the constitutionally created branches needed agents to perform the vast amount of detail work required to govern a modern society”).

³²² Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1268 (2006) (“Early Congresses delegated broad policymaking powers [which] combined policymaking, enforcement, and adjudication in the same administrative hands, created administrative bodies outside of executive departments...”).

³²³ See generally Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004) (suggesting that institutional realities, render agency policymaking limited).

³²⁴ See, e.g., Mashaw, *supra* note 322, at 1339; Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. 89, 90 (1996) (“Congress delegates development of substantive policies to administrative agencies under broad and general guidelines when it is impracticable or impolitic for it to make such decisions.”).

³²⁵ JAFFE, *supra* note 26 (“As we have seen, many functions can be assigned either to an agency or court or both.”); Lemos, *supra* note 321, at 365 (arguing that “we lack an account of the value—if any—of delegations to courts”).

³²⁶ JAFFE, *supra* note 26, at 103 (noting constitutional concerns when courts engage in “functions” which may be “characterize[d] as ‘administrative’ and as such are not ‘judicial’”); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CA. L. REV. 405, 405 (2008) (arguing that courts as well as agencies are constrained by the nondelegation doctrine); Freund, *supra* note 54, at 668 (“The real significance of administrative ruling authority then does not lie in any diversion of genuine judicial power, but in relieving the judiciary from functions in their nature more or less legislative.”; *but see* JAFFE, *supra* note 26, at 274-76 (“The mere fact that a question can be made the subject of administrative action does not mean that it is for that reason incapable of judicial enforcement, nor does it mean that the legislature intended it to be exclusively administrative.”)

³²⁷ “To be sure, the failure of the legislature to grant the power in question [to the judiciary] may indicate an intention to withhold it.” See Freund, *supra* note 55, at 403

³²⁸ Sayre, *supra* note 242, at 105.

³²⁹ Bednar & Hickman, *supra* note 286, at 1447 (discussing this as evident in a case decided in 1936); *see also* CASS ET AL., *supra* note 101, at 245 (noting that “whether a court has jurisdiction over a petition for judicial review is a different question from whether a challenged agency action is reviewable”).

³³⁰ Ross, *supra* note 98, at 530-31 (“Courts even deferred to agencies’ interpretations of statutes that directly involved the Constitution.”); *see also* Lee, *supra* note 84, at 1703-06 (arguing that it was in fact “agencies, not the courts, [that] took the lead in interpreting the Constitution” per nineteenth century historians’ case studies of administrative constitutionalism”).

APA, did scholars begin conceiving of agency power as unconstitutional,³³¹ rather than legitimate administrative support for the political branches.³³² And yet, worries associated with efforts to “judicialize administrative procedure” animated full-throated disapproval of the Walter-Logan bill, the precursor to the APA.³³³

Eventually, the “view that legal checks, in their traditional form, are an indispensable constraint on regulatory administration”³³⁴ drove the enactment of the APA in 1946, but this perspective remained unpopular.³³⁵ Furthermore, as Cass Sunstein has recently argued, legislative history and other considerations suggest that the APA’s judicial review provisions did *not* require *de novo* judicial review of agency statutory interpretation.³³⁶ A half-century later, the *Chevron* opinion concretized the longstanding intuition that *de novo* review should be limited, by distinguishing between judicial statutory interpretation for purposes of upholding legislative intent, and agency statutory interpretation for policymaking purposes.³³⁷ Arguably, then, the popularity of *de novo* review is a relatively new development.

B. *Chevron*: The Illusion of Judicial Restraint

Chevron is simply a doctrine of moderate (at best) judicial restraint.³³⁸ The decision made explicit the longstanding intuition that questions of policy and law are distinct, and that Congress’s authority to allot the former to agencies should be guarded.³³⁹ In other words, it is a doctrine advising courts to adhere to an overseer model of judicial administration. (Note, too, that presidential administration may impact judicial deferential to agency statutory interpretation.

³³¹ “The exercise of discretionary authority by administrative agencies has probably been subjected to more criticism than any other task of governmental administration.... All too frequently the exercise of discretion is loosely characterized by reference to some such vague symbolism as ‘tyranny,’ ‘despotism,’ or ‘bureaucracy.’” Cooper, *supra* note 57, at 577.

³³² “A critical attitude reveals what appears to be a total misconception of the character of administrative discretion and the unavoidable necessity for its use in the execution of governmental policies.” *Id.* at 577-78. “This blind hostility and suspicion toward a legitimate administrative function is largely the result of a misunderstanding as to the basic problems of government which manifests itself in several different ways.” *Id.*

³³³ Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 277 (1978).

³³⁴ Sunstein, *supra* note 73, at 2072; see also ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, S. DOC. NO. 248 (1945) (noting in the foreword that the APA “embarks upon a new field of legislation of broad application in the “administrative” area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other”).

³³⁵ Verkuil, *supra* note 333, at 276-77 (noting that interest in an administrative code like the APA was a “minority position” in contrast to many that advocated for administrative autonomy).

³³⁶ See Sunstein, *supra* note 278, at 1652-57.

³³⁷ William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 138 (1991) (noting that a “line of precedents culminating with *Chevron*...conceded to agencies the power to fill statutory ‘gaps, both large and small’”).

³³⁸ See Bednar & Hickman, *supra* note 286, at 1444 (“With all of the debates and complaints about *Chevron* deference, it is easy to lose sight of the fact that *Chevron* is, primarily, just a standard of review rather than a rule of decision”).

³³⁹ See Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303-304 (1988) (arguing that a “strong reading of *Chevron*” is proper because “agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power”).

Indeed, scholars have disagreed for some time as to whether agencies should merit more or less *Chevron* deference if the interpretation is accountable to the President.³⁴⁰ And yet, this Section notes, *Chevron* also allows courts ample opportunity to exercise substantial control over administrative statutory interpretation, including in furtherance of policymaking. In other words, even a strict application of *Chevron*, as modified by more recent cases, allows courts to engage in *de novo* review at their will.

Per *Chevron*, statutory ambiguity is a signal that that Congress intended additional policy-making by agencies, not courts. As *Chevron* articulates, “The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”³⁴¹ Furthermore, the Court declares, “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.”³⁴² As Justice Scalia declared once *Chevron* was decided, “Congress now knows that the ambiguities it creates...will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency.”³⁴³ In this way, “*Chevron*...restrict[s] Article III courts to their appropriate institutional roles.”³⁴⁴

1. Step Zero: A Tool of Judicial Policymaking

Even under the deferential model of statutory interpretation, however, courts are explicitly empowered to interpret certain ambiguous statutes.³⁴⁵ Principles introduced by the *Mead* case,

³⁴⁰ Compare Kagan, *supra* note 20, at 2376 (“*Chevron*’s primary rationale suggests [an] approach...link[ing] deference in some way to presidential involvement.”); Mathew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U. PA. L. REV. 759, 875-76 (1997) to Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 680 (2014) (arguing against the view that “presidential involvement in an agency’s decision making should intensify its entitlement to *Chevron* deference”); Stack, *supra* note 25, at 267 (arguing that “the President’s constructions of delegated authority should be eligible for *Chevron* deference, but only when they follow from statutes that expressly grant power to the President”); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463-64, 503-15 (2003) (arguing that political accountability cannot justify *Chevron* deference is an agency’s interpretation is irrational or adopted without the force of law); Farina, *supra* note 284, at 512 (arguing that “presidential control over domestic regulatory policy cannot cure the legitimacy problems posed by delegation” of legislative power to agencies under *Chevron*); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 312 (1986). See also Kent Barnett et. al., *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1479-80 (2018) (interpreting *Chevron* to suggest that it “considered political accountability comparatively between the courts and executive agencies,” and not that presidential administration merits greater deference).

³⁴¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (citations omitted).

³⁴² *Id.* at 866.

³⁴³ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

³⁴⁴ West, *supra* note 150, at 629 (arguing that “*Chevron* [is] an analogue to *Youngstown* and to other doctrines of judicial deference that restrict Article III courts to their appropriate institutional roles”); see also *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984) (noting that “[j]udges are not part of either political branch of the Government. Courts must, in some cases,” and suggesting “[i]n contrast, an agency to which Congress has delegated policymaking responsibilities may” is better situated to make a policy judgment).

³⁴⁵ See Sunstein, *supra* note 278, at 1676-78.

sometimes referred to as *Chevron* Step Zero, allow courts to rely on signals that suggest Congress did not intend for an agency's interpretation of statute to have authority. *Mead* declared that *Chevron* applies only if Congress delegated authority to an agency to make rules carrying the "force of law," as shown by an agency's power to engage in adjudication, notice-and-comment rulemaking or by "some other indication of a comparable congressional intent," and the agency uses this "force of law" authority to render the interpretation at issue.³⁴⁶

Moreover, the *FDA v. Brown & Williamson*,³⁴⁷ *Mass v. EPA*³⁴⁸ and *Gonzales v. Oregon*³⁴⁹ cases elaborated on *Mead* to suggest that, under certain extraordinary circumstances³⁵⁰ or in regards to "major questions"³⁵¹ often concerning matters of national import³⁵² or the determination of agencies' jurisdictions,³⁵³ courts can declare that Congress did not intend for agencies to interpret statute, even if the statute is ambiguous.

The *Chevron* Step Zero doctrine is far from uncontroversial.³⁵⁴ While some (including the *Mead* majority) argue that *Chevron* Step Zero allows courts to bring forth a legitimate expression of legislative intent to exclude agencies from policymaking, others argue that it allows courts to commandeer policymaking.³⁵⁵ (Notably, Justice Scalia's dissent in *Mead* suggests that *Chevron*

³⁴⁶ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law . . .")

³⁴⁷ 529 U.S. 120 (2000).

³⁴⁸ 549 U.S. 497 (2007).

³⁴⁹ 546 U.S. 243 (2006).

³⁵⁰ Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 763-64 (2007) (noting that in *Gonzales v. Oregon*, "the Court refused to presume that Congress would have implicitly authorized the Attorney General to reach an issue as 'extraordinary' as the restriction of physician-assisted suicide").

³⁵¹ Cass Sunstein suggests that the "major questions" doctrine is a nondelegation canon that should be deployed to limit *Chevron* deference to agencies. Sunstein, *supra* note 278, at 1674-78 (arguing that as a general matter that nondelegation canons should cabin *Chevron* deference to agencies); see also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2022 (2018) "[I]n a series of cases in the past three decades, the Supreme Court has held that where a statutory ambiguity raises a question of great 'economic and political significance,' it will presume that Congress did not intend the agency to resolve the issue" (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)).

³⁵² See Bressman, *supra* note 350, at 763 (noting that in *Brown & Williamson*, "[t]he Court refused to presume that Congress would have delegated 'a decision of such economic and political significance'").

³⁵³ Bressman, *supra* note 350, at 799-800 (noting that in *Brown & Williamson* and *Gonzales v. Oregon*, agencies sought to claim jurisdiction, whereas in *Mass v. EPA*, the agency "declined to assert jurisdiction under a statute that arguably encompassed the regulatory subject") (emphasis in original).

³⁵⁴ Cary Coglianese, *Chevron's Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1343 (2017) (noting that it is difficult to determine "To what extent has the statute delegated implementing authority, including a kind of interpretive authority, to the agency?").

³⁵⁵ See Emerson, *supra* note 351, at 2023-24 (arguing that *Mead* "licenses judicial intervention in intensely political disputes"). To this point, the extraordinary circumstances and major questions doctrines tend to be exercised by the Supreme Court more so than lower courts, suggesting that courts are generally loathe to undercut agency policymaking, provided it carries the "force of law." See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 799-800 (2017) (suggesting that the Major Questions Doctrine should be exclusively applied by the Supreme Court, noting that "lower courts lack the institutional features necessary to further the benefits of the [Major Questions Doctrine], and any lower court involvement in the exception's implementation will inflict unnecessary costs on litigants, agencies, and the courts themselves.").

Step Zero aggrandizes judicial power at the expense of the President.³⁵⁶ In any case, the pany of cases that make up the *Chevron* doctrine allow the judiciary ample opportunity to take a primary role in administrative statutory interpretation.

In a recent case entitled *PDR Network*, Justice Breyer remanded a case to the Court of Appeals to make an assessment under *Chevron* Step Zero. In particular, he asked the court below to determine whether an agency's statutory interpretation was "legislative"—in other words, made with the force of law (and therefore deserving of the possibility of *Chevron* deference).³⁵⁷ However, Justice Kavanaugh's concurrence emphasized that in his view the case concerned a major question/issue of great importance, and that he would not defer to the agency's interpretation even if the policy were may be described as legislative.³⁵⁸

In *King v. Burwell*, the Court declined outright to defer to an Internal Revenue Service regulation extending the tax credits the Affordable Care Act authorized to federal exchanges as well as those created by the states.³⁵⁹ In doing so, it cited *FDA v. Brown & Williamson* to suggest that this was an "extraordinary case" in which Congress did not intend an implicit delegation of policymaking authority to the agency.³⁶⁰ Nonetheless, six Justices (in a Court made up of fewer anti-administrativists than today) ultimately came to its own independent judgment that the relevant section of the statute should be interpreted just as the agency had in it regulation.³⁶¹ Both of these case showcase a tension between functionalist Justices' discomfort with engaging in policymaking, and formalist (as well as functionalist) Justices' openness to doing so all the same.

Finally, it bears noting that the Court sometimes eschews the entire *Chevron* framework altogether. For example, in 2015, the Court determined that the Whistleblower Protection Act bars the Transportation Security Administration from taking enforcement action against an employee who intentionally discloses sensitive security information.³⁶² This decision was based on the Court's assessment that the phrase "prohibited by law" means prohibited by statute only, and excludes prohibitions made by regulation.³⁶³ While the agency's regulation prohibiting the disclosure in question was effectively invalidated, the Court did not apply *Chevron* in order to do so. Instead, the Court interpreted a section of the statute that the agency simply failed to consider.

Likewise, during the George W. Bush Administration, the Court interpreted the Immigration Reform and Control Act of 1986 in a manner that invalidated a National Labor Relations Board policy awarding back pay to undocumented immigrant employees in some instances, despite

³⁵⁶ See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) (noting that Justice Scalia's dissent in the *Mead* case and his general support for eliminating *Mead* (and *Skidmore*, for that matter) would "remove[] from judicial control and remit[] to presidential control [the determination of] authoritative agency interpretations") (emphasis added).

³⁵⁷ *PDR Network, LLC v. Carlton Harris Chiropractic, Inc.*, No. 17-1705, at *7 (Jun. 20, 2019).

³⁵⁸ *Id.* at *10, *21 (declaring that the question of interpretation "raises significant questions under the Due Process Clause[,] a serious constitutional issue," and that Congress could not have intended the agency's interpretation in this case).

³⁵⁹ *King v. Burwell*, 135 S. Ct. 2480 (2015).

³⁶⁰ *Id.* at 2489.

³⁶¹ *Id.* at 2489 (citing *Marbury*, no less, to hold that its reading of the legislation is "fair").

³⁶² *Department of Homeland Security v. MacLean*, 574 U.S. 383 (2015).

³⁶³ See generally, *id.*

previous judicial interpretation to the contrary.³⁶⁴ Again, in this case, “the Court simply resolved the statutory question without relying on any of *Mead*, *Chevron* or *Skidmore*, notwithstanding party briefs or concurring or dissenting opinions discussing those cases.”³⁶⁵

2. Step One: A Turn Toward the “Decider” Approach

When the court engages in *de novo* interpretation of an ambiguous statute, after erroneously deeming that statute unambiguous, this also implies judicial engagement in policymaking. As noted earlier, prominent formalist Justice Kavanaugh has argued that it is precisely because statutory ambiguity can be found in any statute that judges should be the only arbiters of statutory meaning in every instance.³⁶⁶ By arguing that courts should ignore ambiguity and interpret all statutes as they wish, Kavanaugh is not advocating for the reinforcement of judicial power, but rather, for increasing the judiciary’s opportunity to make policy decisions in lieu of agencies. Moreover, the Supreme Court has recently begun to rely on this pathway to policymaking.

“Even when judges employ pure *de novo* review using traditional tools of statutory construction with no layer of deference intruding, they often disagree over what statutes mean,”³⁶⁷ which suggests that the interpretation is a policy decision, not a clear expression of legislative intent. And as Merrick Garland notes, the risk that a court may “substitute its judgment for the agency’s...inhere[s] in a court’s determination of which of several statutory purposes the legislature considered most important.”³⁶⁸ Therefore, while interpreting ambiguous legislation, “the court may be tempted to substitute its own hierarchy of values for that of Congress.”³⁶⁹ The rest of this Part hypothesizes, on the basis of examples, that weak determinations of unambiguity at *Chevron* Step One has already moved the judicial administration of statutory implementation towards the “decider” approach.

Statutory ambiguity signals that Congress has delegated to the agency the power to “fill statutory gaps” via policy.³⁷⁰ Therefore, once the court has dispensed with *Mead*,³⁷¹ its first step under *Chevron* is to determine whether the statute at issue is ambiguous. As Kristin Hickman

³⁶⁴ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 US 137 (2002).

³⁶⁵ See generally, *id.*; see also Hickman, *supra* note 390, at 549.

³⁶⁶ See text accompanying *supra* note 297.

³⁶⁷ Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1446-47 (2017) (noting further that “even if one pursues a robust, *de novo*-like analysis of statutory text, history, and purpose, some statutory questions simply do not have answers that can be derived through traditional common law reasoning”); see also Kristin Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALABAMA L. REV. 733, 746 (2019) (illustrating that even “traditional tools of statutory interpretation are not especially helpful in narrowing statutory meaning to the point of practical application”); Sunstein, *supra* note 183, at 61 (noting that both “textualism and purposivism sometimes fail to give concrete answers to difficult statutory questions” under *Chevron*); Stewart, *supra* note 31, at 1785 (observing that “‘considerable judicial reconstruction’ of a statute may be required in order to assign paramount weight to one particular purpose”).

³⁶⁸ Garland, *supra* note 208, at 558.

³⁶⁹ *Id.* Accordingly, there is an “overlooked cost of eliminating or narrowing *Chevron* deference: such reform could result in partisanship playing a larger role in judicial review of agency statutory interpretations.” Barnett et. al., *supra* note 340, at 1464.

³⁷⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 870-72 (2001); Scalia, *supra* note 343, at 516-17.

³⁷¹ See text accompanying *supra* notes 346-353.

argues, “*Chevron* step one, properly understood, already strongly resembles *de novo* review”³⁷²—and in this way, allows the court to forgo deference if it determines that Congress did not intend the agency to exercise policymaking power.

When a statute delegates policymaking power to an agency via ambiguity,³⁷³ “the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—*i.e.*, whether its resolution of the ambiguity is reasonable.”³⁷⁴ Conversely, without ambiguity, an agency official has no discretion; “clear legislative meaning will always make unlawful any agency action that conflicts with that meaning.”³⁷⁵ Therefore, if a court’s claim that a statute is unambiguous is feeble, the court may, in fact, be engaging in undercover policymaking.

It is important to note that this Section assumes that there are tools for determining whether statutory ambiguity exists. The determination of ambiguity is difficult, to say the least.³⁷⁶ There is a robust literature debating the legitimacy of various canons of statutory interpretation as they relate to the determination of ambiguity at *Chevron* Step One.³⁷⁷ The debate as to whether textualism, purposivism or any other canon of statutory interpretation—including the seemingly new “canon” of cost/benefit analysis³⁷⁸—should be deployed is both highly relevant to the determination of statutory ambiguity at Step One and, regrettably, beyond the scope of this Section to arbitrate.

Rather than engaging in deliberation about how to determine whether a statute is ambiguous, this Section assumes that a statute may, theoretically, be identified as ambiguous by a court.³⁷⁹ More specifically, this Section relies on the views of distinguished commentators—including courts of appeals decisions and dissenting Supreme Court Justices—that characterize a Court decision as having wrongfully characterized a statute as unambiguous.

Sturgeon v. Frost II,³⁸⁰ decided last year, illustrates not only the strong inclinations of several Justices who favor *de novo* review, but also a seeming indifference in the rest towards the potential for courts to be policymakers as a result. In this case, the entire Supreme Court interpreted the statutory language “public lands” in the Alaska National Interest Lands Conservation Act to exclude navigable waters.³⁸¹ In doing so, the Court invalidating National Park Ser-

³⁷² Hickman, *supra* note 390, at 587.

³⁷³ Whether this refers to ambiguity as a general matter, or ambiguity as to whether Congress authorized the agency to make policy under the law, while highly contested by those who read *Chevron*, does not matter much in the doctrine’s practical application; in either case, agencies have some claim to policymaking power. *See, e.g.*, Merrill & Hickman, *supra* note 370, at 833.

³⁷⁴ *Chevron*, 467 U.S. at 833. This is known as *Chevron* Step Two.

³⁷⁵ Coglianese, *supra* note 354, at 1344.

³⁷⁶ As Scalia once declared in regards to Step One, “How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.” Scalia, *supra* note 343, at 520-21.

³⁷⁷ *See, e.g.*, Sunstein, *supra* note 183, at 72 (noting that “it is not easy to identify a canon of construction to settle the question how to interpret the word ‘[statutory] source,’” the terminology at issue in *Chevron*); Sunstein, *supra* note 278 (arguing that textualism is the correct approach to determining ambiguity at *Chevron* Step One); Linda Jellum, *Chevron’s Demise: a Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (noting that the Supreme Court has moved to a textualist approach at *Chevron* Step One).

³⁷⁸ *See* Sunstein, *supra* note 183, at 73 (discussing this new “canon” of statutory interpretation deployed by courts).

³⁷⁹ If Cass Sunstein may make this assumption, I, too, am so emboldened. *See* Sunstein, *supra* note 278, at 1613.

³⁸⁰ *Supra* note 17 (discussing *Sturgeon v. Frost II*, 139 S. Ct. 1066 (2019)).

³⁸¹ *Id.*

vice's national regulations concerning these waters. However, the divergent justifications of the majority and the concurrence are telling.

In the majority opinion, Justice Elena Kagan declined to defer to the agency's interpretation of "public land" as inclusive of navigable waters because this language *unambiguously* excludes navigable waters.³⁸² However, the Ninth Circuit, in the decision below, relied extensively on precedent interpreting this statute to conclude that the navigable water in question was indeed "public land."³⁸³ The disagreement between the Ninth Circuit and Supreme Court as to the meaning of "public land" suggests that the term is ambiguous.

In addition, the concurrence, written by Justice Sotomayor and joined by Justice Ginsburg, notes as well that the language is ambiguous.³⁸⁴ Nonetheless, they agree join the majority because its reading of the statutory language is "cogent," and because of "the important regulatory pathways that the Court's decision leaves open for future exploration."³⁸⁵ That the Court engaged in policymaking does not mean that the decision was wrong.³⁸⁶ It means, simply, that since the language at issue is ambiguous, the Supreme Court's interpretation was constituted policymaking, rather than an expression of unambiguous legislative intent.

Likewise, in *Carcieri v. Salazar*, the Court held in 2009 that the Indian Reorganization Act of 1934 did not apply to tribes not recognized at the time of the statute's creation, which meant that it invalidated the Department of the Interior's longstanding policy of taking land into trust for Indian tribes recognized after that time.³⁸⁷ The matter in dispute concerned the term "now."³⁸⁸ The statute allows the Department of the Interior to take land into trust for "include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction."³⁸⁹ "[A] majority of the Court found the meaning of the statute clear."³⁹⁰

More specifically, Justice Thomas draws on a textualist/originalist approach to decide that "'now under Federal jurisdiction' refers to a tribe that was under federal jurisdiction at the time of the statute's enactment."³⁹¹ However, the "concurrence found the statute ambiguous."³⁹² Justice Breyer notes in concurrence that "'now under Federal jurisdiction" could also "refer to the time the Secretary of the Interior exercises his authority to take land 'for Indians'."³⁹³ (Likewise,

³⁸² "Because we see, for the reasons given below, no ambiguity as to Section 103(c)'s meaning, we cannot give deference to the Park Service's contrary construction." *Sturgeon*, 139 S. Ct. at __ n.3.

³⁸³ *Sturgeon v. Frost*, 872 F.3d 927 (9th Cir. 2017).

³⁸⁴ See *Sturgeon v. Frost*, 139 S. Ct. 1066, 1087-88 (2019) (Sotomayor, J., concurring) (drawing on H.L.A. Hart's "vehicles in the park" exercise to suggest that statutory language at issue is ambiguous).

³⁸⁵ *Id.* at 1088 (Sotomayor, J., concurring).

³⁸⁶ Arguably, the fact that all nine Justices ultimately signed on to the policy outcome (albeit for different reasons), the outcome is correct as a normative matter. See generally *id.*

³⁸⁷ *Supra* note 18 (discussing *Carcieri v. Salazar*, 555 U.S. 379 (2009)) (emphasis added).

³⁸⁸ *Carcieri v. Salazar*, 555 U.S. 379 (2009).

³⁸⁹ Indian Reorganization Act of 1934, 25 U.S.C. ch. 14, subch. V § 461 (1934).

³⁹⁰ Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 542 (2014).

³⁹¹ *Carcieri*, 555 U.S. at 382; see also *id.* at 388 (examining the meaning of the term "now" as defined by Webster's New International Dictionary and Black's Law Dictionary in 1934 and 1933, respectively).

³⁹² Hickman, *supra* note 390, at 542.

³⁹³ *Id.* at 396 (Breyer, J., concurring).

those in dissent both agreed with this latter construction and also argued that this language is tangential to the crux of the matter.³⁹⁴)

The disagreement between the majority and the concurrence as to the meaning of the term “now” reveals the ambiguity of this term. Despite this apparent ambiguity, however, the majority, declines to defer to the agency’s interpretation of the term “now.” Instead, it engages in an independent interpretation of the language, in other words, in its own administrative policymaking, which invalidates the Department of Interior’s own policy. The concurrence also refuses to defer the agency by arguing, under *Mead* that Congress did not give the agency the authority to interpret the term “now.”³⁹⁵ This analysis, too, suffers from indeterminacy that offers a pathway to judicial policymaking.³⁹⁶ *Sturgeon II* and *Carcieri* cases suggest that as the result of a loosen application of *Chevron* Step One, the judiciary has engaged in policymaking recently, for better or for worse.³⁹⁷

This route to judicial policymaking is not new. In 1994, in *Brown v. Gardner*, the Court unanimously invalidated a Department of Veterans Affairs regulation based on its own statutory interpretation.³⁹⁸ Despite the longevity of the regulation³⁹⁹ and legislative silence on whether it comports with a statute passed in 1934,⁴⁰⁰ the Court declared that the regulation misread ambiguity into the statute,⁴⁰¹ thus reversing a 60-year-old policy. Some suggest that the Court did so in order to enshrine a more “veteran-friendly” approach to government policies—in particular, one

³⁹⁴ See *id.* at 402 (Stevens, J., dissenting) (“Yet to my mind, whether ‘now’ means 1934 (as the Court holds) or the present time (as respondents would have it) sheds no light on the question whether the Secretary’s actions on behalf of the Narragansett were permitted under the statute.”); *id.* at ___ (Souter, J., concurring in part and dissenting in part) (“Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content.”).

³⁹⁵ *Id.* at 396-97 (Breyer, J., concurring) (“These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity. See *United States v. Mead Corp.*”); see also Hickman, *supra* note 390, at 542 (noting that while Justice Breyer conceded the term “now” is ambiguous, he nonetheless declined to defer to the agency under *Chevron*)

³⁹⁶ See text accompanying *supra* notes 354-356.

³⁹⁷ Matthew Sanders, *Sizing up Sturgeon v. Frost*, ABA TRENDS (May 10, 2019), at https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/may-june-2019/sizing-up-sturgeon/ (noting that *Sturgeon II* eliminates the National Park Service’s ability to regulate hovercrafts on certain waters); Jennifer L. Turner & Bethany Sullivan, *Enough Is Enough: Ten Years of Carcieri v. Salazar*, 40 PUB. LAND & RES. L. REV. 1 (2019) (arguing that “*Carcieri* has been weaponized by states, local governments, citizens’ groups, individuals, corporations, and even other tribes, to challenge the exercise of tribal sovereignty”).

³⁹⁸ 513 U.S. 115 (1994).

³⁹⁹ *Id.* at 122 (“[W]e dispose of the Government’s argument that the [agency’s] regulatory interpretation...deserves judicial deference due to its undisturbed endurance for 60 years.”).

⁴⁰⁰ *Id.* at 120-121 (“The Government contends that...Congress’s legislative silence as to the [agency’s] regulatory practice over the last 60 years serves as an implicit endorsement of its fault-based policy.”).

⁴⁰¹ *Id.* at 117-118 (“Ambiguity is a creature not of definitional possibilities but of statutory context, and this context negates a fault reading [that is, the agency’s interpretation of the statute].”) (citations omitted); see also *National Labor Relations Act-Agency Jurisdiction*, 124 HARV. L. REV. 380, 388 n. 79 (2010) (characterizing the decision in *Gardner* as “based on a narrow textual reading”).

that allows a veteran-friendly interpretation to prevail over the agency's interpretation when a statute is ambiguous.⁴⁰²

In 1990, in *Dole v. United Steelworkers*, the Court denied deference to the Office of Management and Budget's longstanding policy allowing it to review and countermand agency regulations mandating disclosure by regulated entities directly to third parties.⁴⁰³ More specifically, the Court decided that the Paperwork Reduction Act is "clear and unambiguous on the question of whether it applies to agency directives to private parties to collect specified information and disseminate or make it available to third parties." In response, the dissent called this determination of unambiguity "questionable,"⁴⁰⁴ argued that the agency's interpretation merits deference⁴⁰⁵ and declared further that "[i]f *Chevron* is to have meaning, it must apply when a statute is as ambiguous on the issue at hand as the [Paperwork Reduction Act] is on the subject of disclosure requirements."⁴⁰⁶ Some characterize this case as illustrative of the Court's reluctance to allow an agency to determine the scope of its own jurisdiction.⁴⁰⁷ Others argue, however, that the Court's initiated this policy to curb the Office of Management and Budget,⁴⁰⁸ a powerful White House agency that furthers presidential administration.

Also in 1990, in *Sullivan v. Zebley*,⁴⁰⁹ the Court required the Secretary of the Social Security Administration to revise and create several regulations in response to the Court's new reading of the relevant statute.⁴¹⁰ The *Zebley* majority accepts the lower court's determination that the stat-

⁴⁰² See James D. Ridgway, *Toward A Less Adversarial Relationship Between Chevron and Gardner*, 9 U. MASS. L. REV. 388, 391 (2014); Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has It Mastered Chevron's Step Zero?*, 3 VETERANS L. REV. 67, 70 (2011) (describing *Gardner* as a doctrine advising that "interpretive doubt should be resolved in the veteran's favor"); Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59, 59 (2011) (noting that the conflict between *Chevron* and "*Gardner's* Presumption" has led to the quandary of "[w]hich interpretation controls when a statute is ambiguous--the agency's reasonable interpretation or the veteran's interpretation?").

⁴⁰³ 494 U.S. 26 (1990).

⁴⁰⁴ *Id.* at 43 (White, J., dissenting) (noting skeptically that the Court required "more than ten pages, including a review of numerous statutory provisions and legislative history," to come to this conclusion); see also Merrill, *supra* note 318, at 1000 n.129 (noting that in *Dole v. United Steelworkers*, the Court rejected the "Office of Management and Budget's construction of the Paperwork Reduction Act largely on the basis of structural arguments and canons of construction"). see also Jellum, *supra* note 377, at 756 (characterizing the Court's statutory interpretation as "intentionalist"). "Given his general textualist approach, it is indeed odd that Justice Scalia signed onto this opinion, which represented everything about statutory interpretation with which he disagreed.") *Id.*

⁴⁰⁵ "Since the statute itself is not clear and unambiguous, the legislative history is muddy at best, and [since the Office of Management and Budget] has given the statute what I believe is a permissible construction, I cannot agree with the outcome the Court reaches." *Gardner*, 494 U.S. at 53 (White, J., dissenting).

⁴⁰⁶ *Gardner*, 494 U.S. at 53 (White, J., dissenting).

⁴⁰⁷ See, e.g., Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 749 n.139 (2014); Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1934 (2012).

⁴⁰⁸ See, e.g., Pamela M. Foster, *A Limit to OMB's Authority Under the Paperwork Reduction Act in Dole v. United Steelworkers of America: A Step in the Right Direction*, 6 ADMIN. L.J. 153 (1992).

⁴⁰⁹ *Sullivan v. Zebley*, 493 U.S. 521 (1990).

⁴¹⁰ See generally Amber R. Anderson, *Disabled Without Benefits: The Impacts of Recent Social Security Reforms on Disabled Children*, 41 B.C. L. REV. 125, 130 (1999) (discussing the new multi-step regulatory process that resulted from the *Zebley* decision).

ute at issue is unambiguous.⁴¹¹ In response, the dissent in this case implores the majority to reconsider its assumption that legislative intent is clear in this case and argues, as have other commentators, that it is not and therefore the agency's reasonable interpretation should stand.⁴¹² As a result of "*Zebley*, the [Social Security Administration] revised the rules used to evaluate childhood disability claims, promulgating several new regulations."⁴¹³ Here, there is a lack of clarity as to whether the Court is rejecting the agency's interpretation at *Chevron* Step One or Step Two.⁴¹⁴ To the extent it is the latter, the Court's decision is that much more surprising, given the courts tend to defer to agencies at Step Two.⁴¹⁵

Again, this analysis offers no value judgment as to whether the Court's decision was correct based on public welfare or other values. Perhaps the Court stepped in righteously to fill a gap in the statute that was unanticipated by the enacting Congress—the coverage of disabled children for the relevant social security benefits when only adults were considered in the text. Rather, this framing suggests that the Court's reinterpretation of statute and refutation of the Secretary's regulations does not reflect clear legislative intent, but rather, was an act of policymaking.

Addled by the Court's policymaking, agencies have gone to Congress to demand a clarification. For instance, in *Dunn v. Consumer Financial Protection Bureau*, the Supreme Court applied an ordinary meaning analysis to hold that the Treasury Amendment to the Commodity Exchange Act exempts off-exchange trading in foreign currency options from Commodity Futures Trading Commission regulation.⁴¹⁶ In part because this ruling "served to encourage the continuation of widespread fraud in retail [over-the-counter] futures and options on currencies," which cuts against the legislative purpose driving the Commodity Futures Trading Commission, the agency beseeched Congress "to regulate dealers selling retail foreign exchange futures or options."⁴¹⁷ Eventually, Congress passed this law.⁴¹⁸ On the one hand, it may have done so because the language of the Treasury Amendment indeed lent itself to only the Court's interpretation proffered in *Dunn*. On the other hand, this chain of events offers the possibility that

⁴¹¹ See *Zebley*, 493 U.S. at 527 ("Although the Court of Appeals recognized that the Secretary's interpretation of the statute is entitled to deference, it rejected the regulations as contrary to clear congressional intent.").

⁴¹² *Id.* at 542 (White, J., dissenting) ("We [must] first ask whether Congress has expressed a clear intent on the question at issue here; if so, we should enforce that intent. If not, as I think is the case, we should defer to the agency's interpretation as long as it is permissible."); see also Merrill, *supra* note 318, at 991 (citing *Zebley* to support the argument that the *Chevron* "'plain meaning' inquiry has tended in practice to devolve into an inquiry about whether the statute as a whole generates a clearly preferred meaning").

⁴¹³ Anderson, *supra* note 410, at 131.

⁴¹⁴ See Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 131–32 (1993) (citing *Zebley* to support the contention that "the Court has been quite willing to reject agency interpretations, and the Court is often reluctant to 'defer' in the sense of accepting a reasonable agency interpretation when it prefers an alternative interpretation.").

⁴¹⁵ Shah, *supra* note 20, at 38 n.149 ("Step Two of the *Chevron* analysis, at which point the court decides whether an agency's interpretation of ambiguous statute is reasonable, tends to be permissive; generally, the agency's interpretation stands at that level.") (citations omitted).

⁴¹⁶ 517 U.S. 1219 (1996); see also Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701, 786 (1999); Thomas A. Tormey, *A Derivatives Dilemma: The Treasury Amendment Controversy and the Regulatory Status of Foreign Currency Options*, 65 FORDHAM L. REV. 2313, 2320 (1997).

⁴¹⁷ Jerry Markham, *Regulating the Moneychangers*, 18 U. PA. J. BUS. L. 789, 841 (2016).

⁴¹⁸ *Id.* (noting that "Congress included such authority in the Commodity Futures Modernization Act of 2000").

Supreme Court's interpretation of the Treasury Amendment was an iteration of legislative policymaking that Congress eventually thwarted.

Finally, it is worth noting that the Court can limit agencies' policymaking authority by rebuking agencies' efforts as infringing on the legislature, while also limiting the scope of its *own* legislative policymaking. For example, in *Dimension Financial Corp.*, the Court rejected the agency's interpretation at Step One of the *Chevron* inquiry.⁴¹⁹ More specifically, the Court disputed the Federal Reserve Board's interpretation of the term "banks" in legislation designed to regulate financial institutions.⁴²⁰ More specifically, the Board states that "banks" includes financial institutions that are "functionally equivalent" to banks, while the Court disagrees.⁴²¹

The Court goes on to declare that "[r]ather than defining 'bank' as an institution that offers the functional equivalent of banking services, however, Congress *defined with specificity* certain transactions that constitute banking subject to regulation"—in other words, that Congress intended the plain meaning of banks, and not its extension to non-bank institutions.⁴²² "The statute may be imperfect," the Court goes on to say, but the "Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."⁴²³ Furthermore "[t]he Court [also] found itself constrained by the Act's language, stating, 'If the Bank Holding Company [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.'⁴²⁴ In this case, the Court sought to constrain administrative policymaking power while also maintaining its own formal boundaries. The policies in question may have suffered, but the Court remained in its role the role of "overseer," as opposed to acting as a "decider."

III. IMPLICATIONS FOR THE ADMINISTRATIVE STATE

This Article's primary contribution thus far has been positive. This Part earmarks some the potential ramifications of courts administering the law. Like Kagan herself admitted of presidential administration, judicial administration might "push past the edges of legality."⁴²⁵ Critics of

⁴¹⁹ Merrill, *supra* note 318, at 1034 (characterizing *Dimension Financial Corp.* explicitly as a Step One inquiry); Jonathon Bloomberg, *The Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion*, 73 CORNELL L. REV. 113, 132 n.75 (1987) (noting that in *Dimension Financial Corp.*, "the Court overruled agency action as violating clear congressional intent in a classic application of the first tier of the review framework") (citations omitted); *see also id.* at 122 n.75 (listing *Dimension Financial Corp.* as evidence that *Chevron* has taken hold of cases on financial regulation).

⁴²⁰ Bd. of Governors of Fed. Reserve Sys. v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

⁴²¹ "The Federal Reserve Board had expanded its regulations to encompass institutions which offered bank-like services [by reinterpreting] the definition of 'bank' found in section 2(c) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841(c) (1982). The Court ruled that the statutory definition of 'bank' clearly precluded the Board's action." Bloomberg, *supra* note 281, at 132 n.75.

⁴²² *Dimension Financial Corp.*, 474 U.S. at 374 (emphasis added); *see also* Keith R. Fisher, *Federalism Contra Federal Reservism: Bank Holding Companies and State Bank Powers*, 23 U.S.F. L. REV. 317, 377 n.9 (1989) (noting that the Court in this case viewed the agency's statutory interpretation as "at odds with the plain meaning of the statute").

⁴²³ *Dimension Financial Corp.*, 474 U.S. 361, at 374,

⁴²⁴ Bloomberg, *supra* note 281, at 132 n.75 (citations omitted).

⁴²⁵ Farber, *supra* note 188, at 4.

administrative agencies must grapple with the separation-of-powers implications of an uncritical view of judicial oversight, particularly of the “decider” approach to administrative statutory interpretation.

And yet, despite the potential constitutional consequences of judicial administration, it is uniquely suited to “combat...the transgressions of presidential administration.”⁴²⁶ By maintaining or increasing the judiciary’s power to “oversee” agency adherence to due process and rule-of-law values, courts may better constrain concerning exercises of presidential power.

A. *The Constitutionality of Judicial Administration*

As noted in the Introduction, there are fervent arguments among academics and in popular discourse surrounding the constitutional legitimacy of the administrative state. Formalists, in particular, argue for an increase of judicial power over agency action because they believe that agencies exercise unconstitutional power.⁴²⁷ More specifically, many decrying agency power today focus on enhancing judicial control of administrative statutory interpretation.⁴²⁸

However, the constitutional legitimacy of judicial administration is debatable, too. Indeed, judicial administration has the potential to violate the constitutional separation of powers particularly if one abides by a formal paradigm.

By condemning the judicial augmentation of informal rulemaking procedures, *Vermont Yankee* articulated a formalist rebuke of judicial policymaking—that is, of the “decider” model of judicial administration in this context.⁴²⁹ Likewise, the *Chevron* doctrine, which guides the judiciary to defer to policies based in agencies’ interpretations of statute, restrains judicial policymaking somewhat.⁴³⁰ And yet, many formalists call for the dilution or elimination of *Chevron* deference, thus advocating for the “decider” model of judicial administration—that is, for a stronger norm of judicial policymaking. Although *Chevron* still stands, its dilution by *Mead*⁴³¹ and at Step One,⁴³² has led to an increase in judicial policymaking. If agencies indeed exercise constitutional power (be it legislative⁴³³ or executive⁴³⁴), as formalists assert, then the “decider” model of judicial administration is outside the scope of the judiciary’s constitutional jurisdiction, and an infringement on the legislative⁴³⁵ or executive branches,⁴³⁶ including the context of statutory interpretation/implementation.

To the extent judicial review of constitutional due process is based in the “overseer” model, as argued earlier,⁴³⁷ it, like presidential administration,⁴³⁸ is less objectionable under a formal

⁴²⁶ See *id.*

⁴²⁷ See *supra* notes 48-51 and accompanying text.

⁴²⁸ See *supra* notes 296 and accompanying text.

⁴²⁹ See *supra* Part I.B.

⁴³⁰ See *supra* Part II.B.

⁴³¹ See *supra* Part II.B.1.

⁴³² See *supra* Part II.B.2.

⁴³³ See *supra* note 290.

⁴³⁴ See *supra* note 291.

⁴³⁵ Lemos, *supra* note 326, at 405 (noting that “just as agencies exercise a lawmaking function when they fill in the gaps left by broad statutory delegations of power, so too do courts”).

⁴³⁶ Cooper, *supra* note 57, at 596-98.

⁴³⁷ See *supra* Part I.

separation of powers framework. It is further inconsistent to the formalist position, then, that many have advocated for limits to judicial oversight of administrative due process and individual rights,⁴³⁹ even as they advocate deeply for enhancing courts' ability to act make policy decisions via statutory interpretation.⁴⁴⁰

Instead of this paradoxical approach to judicial review, formalists might make the linchpin of their advocacy the idea that the legislature [re]claim certain responsibilities.⁴⁴¹ But this approach, too, has its problems. As Bednar and Hickman suggest:

[U]nless Congress chooses to assume substantially more responsibility for making policy choices itself or the courts decide to seriously reinvigorate the nondelegation doctrine—neither of which seems remotely likely—at least some variant of *Chevron* deference will be essential to guide and assist courts from intruding too deeply into a policy sphere....⁴⁴²

To formalists' dismay, courts may continue to “defer” to agencies' interpretations of statute as a functional matter even in the event that *Chevron* falls, in order to limit judicial involvement in legislative policymaking⁴⁴³ in a world where the nondelegation doctrine remains permissive.⁴⁴⁴ Courts may continue to maintain “the line between law and policy in administrative law” and to limit intervention to problems associated with the former, as Jeffrey Pojanowski advises they do.⁴⁴⁵ A better approach to limiting *Chevron* might be to bolster doctrines of judicial oversight that are in tension with it, such as hard look review.⁴⁴⁶

⁴³⁸ See text accompanying *supra* notes 35-36.

⁴³⁹ See generally *supra* Part I.

⁴⁴⁰ See generally *supra* Part II.

⁴⁴¹ See Bednar & Hickman, *supra* note 286, at 1461 (“To the extent that courts and commentators want to curtail the administrative state, they should focus their efforts on rolling back congressional delegations of policymaking discretion to agency officials rather than overturning *Chevron*.”); Aaron L. Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. FORUM 1, 4-5 (2017) (arguing that some anti-administrativists are already looking to Congress to curb agency power).

⁴⁴² Bednar & Hickman, *supra* note 286, at 1398; see also Metzger, *The Roberts Court*, *supra* note 50 (noting that “bold assertions of administrative authority stem in part from Congress’s inability to address pressing problems, with political polarization, intense partisanship, and near parity between the main parties often leading to legislative gridlock”).

⁴⁴³ See Kristin E. Hickman, *SOPRA? So What? Chevron Reform Misses the Target Entirely*, 14 U. ST. THOMAS L. J. 580, 590 (2018) (arguing that even if *Chevron* is overturned, “once a statutory question crosses into the policymaking sphere, many if not most judges and justices are uncomfortable with making what they recognize as fundamentally policy-based decisions rather than traditional interpretive ones. In such cases, their inclination will be to defer to the agency”); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1076 (2016) (arguing that, even if *Chevron* did not exist, courts would continue to distinguish between legal interpretation and policymaking); Sunstein, *supra* note 183, at 79 (“[A]fter a lengthy and difficult cleanup operation, and after adoption of novel formulations, the framework that would ultimately replace *Chevron* would be likely to operate, in practice, a fair bit like that in *Chevron* itself.”).

⁴⁴⁴ See generally Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331 (2003).

⁴⁴⁵ Pojanowski, *supra* note 294, at 884 (advocating for a theory of law which would “increase[e] judicial responsibility on questions of law while decreasing it on matters involving policymaking discretion”).

⁴⁴⁶ For example, in *Encino Motorcar*, the Court declined to apply *Chevron* to a statutory interpretation where the agency failed hard look. See *supra* note 225; Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis*

All of this having been said, judicial administration—even the “decider” model—does not constitute an infringement on the legislature if one takes a more functional view of the separation of powers.⁴⁴⁷ Functionalists do not have cause to be overly troubled by judicial administration, except to the extent that it creates functional problems⁴⁴⁸ or leads to partisan outcomes.⁴⁴⁹ Functionalists might cheer enhanced judicial administration if it leads to greater fairness in administrative process or more expert and uniform policies, as the next Section suggests it could. Formalists, too, might focus their advocacy on the “overseer” model, to curb the administrative state while reducing potential separation of powers problems.

B. Judicial vis-à-vis Presidential Administration

This Article concludes with thoughts on the potential interaction between judicial and presidential administration. Broadly, conflicts between judicial and administrative policymaking represent a clash of judicial and executive power. On the one hand, Kagan has argued that “courts should attempt, through their articulation of administrative law, to recognize and promote” presidential administration.⁴⁵⁰ For instance, courts should accede to the President in the view of those that support the political accountability theories of hard look⁴⁵¹ or *Chevron*⁴⁵² or that advocate more generally for a unitary executive (often formalists themselves).⁴⁵³

In addition, presidential administration may shape or constrain judicial administration. Indeed, the President’s control of agencies has intensified. Increased presidential power over agencies, beginning with the conferral of agency reorganization power on the President⁴⁵⁴ and including a growth in political staff⁴⁵⁵ and more aggressive presidential leadership,⁴⁵⁶ has ren-

for the Administrative State, 69 ALA. L. REV. 1, 31 n.188 (2017). Conversely, the *Chevron* may moderate hard look review. Paul R. Verkuil, *The Wait Is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 929 (2007).

⁴⁴⁷ See text accompanying *supra* notes 52-56.

⁴⁴⁸ See *supra* note 56 (discussing functionalist concerns with judicial review of agencies such as ossification and inferior judicial expertise). More broadly, courts’ own interest in administering the law may vary across agencies; indeed, some agencies are known for garnering far less judicial oversight than others. John C. Kilwein & Richard A. Brisbin Jr., *Supreme Court Review of Federal Administrative Agencies*, 80 JUDICATURE 130, 132 (1996) (outlining which agencies appear before the court the most and their relative success).

⁴⁴⁹ See Shah, *supra* note 21, at 61 (offering analysis of decisions written by Justices Gorsuch and Kavanaugh that suggest the Supreme Court is susceptible to political capture) (citations omitted).

⁴⁵⁰ See Kagan, *supra* note 21, at 2363 (arguing that “courts should attempt, through their articulation of administrative law, to recognize and promote” presidential administration).

⁴⁵¹

⁴⁵² See *supra* note 340.

⁴⁵³ See Kagan, *supra* note 21, at 2271-72 (articulating ways in which unitary executive theorists argue that courts should accord legislative and administrative power to the President). For an oft-cited treatise espousing unitary executive theory, see Calabresi & Prakash, *supra* note 20.

⁴⁵⁴ Herbert Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AMER. POLI. SCI. REV. 1057, 1066 (1956).

⁴⁵⁵ *Id.*; See Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L. J. 1002, 1037 (2017) (“There is [empirical] evidence that presidents seek to increase the number or proportion of political appointees in agencies that would otherwise be ideologically opposed to them.”); White, *supra* note 246, at 1403.

⁴⁵⁶ See generally *Administrative Management in the Government of the United States*, PRES. COMM. ON ADMIN. MANAGEMENT 29, 29-30 & 36 (1937) (discussing President Roosevelt’s contention that agencies should be wholly

dered administrative agencies more “executive” in nature, for better or for worse. This may limit or interfere with the judiciary’s role in guiding agencies’ implementation of the law.

On the other hand, where presidential administration fails in terms of consistency or ethical leadership, or otherwise in the view of those less amenable to a unitary executive,⁴⁵⁷ judicial administration may encourage more equitable administrative processes, stable precedent and adherence to the rule of law in agency decisionmaking. Increasing judicial oversight could stem the use (or misuse) of process to justify and obscure an increase in executive power, by holding agencies accountable to constitutional norms and the expectations of positive law. For instance, greater judicial control over the development and application of agency processes and expertise could improve the administration of law particularly if agencies’ rush to further the President’s agenda⁴⁵⁸ results in sloppy administrative action.⁴⁵⁹

The promise judicial administration holds for curbing the excesses of presidential administration are as of yet unrealized. The Court has, in some cases, curtailed executive branch policies, both presidential and administrative, via oversight of agency adherence to the requirements of constitutional due process and of the APA—but only when the breach has been egregious.⁴⁶⁰ In a number of recent cases, however, the Court has declined to intervene in policymaking resulting from presidential administration.

In regards to President Trump’s immigration ban on the residents of several countries violated the Constitution, the Court subjugated the Establishment Clause to the President’s plenary power under immigration law, instead of engaging with the potential constitutional violation associated with suspension of the entry of Muslims into the United States.⁴⁶¹ Likewise, the Court let stand President Trump’s diversion of funds towards the construction of a border wall, in the wake of his declaration of a national emergency. Instead of contending with the potential statutory and constitutional implications of these actions, the Court dismissed the application for

under control of the President); Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RESOURCES ENERGY & ENVTL. L. REV. 287 (2019) (discussing President Trump’s executive order on regulatory review and his broad control over certain agencies, namely the Environmental Protection Agency).

⁴⁵⁷ See, e.g., Cynthia R. Farina, *Undoing the New Deal through the New Presidentialism*, 22 HARV. J. L. & PUB. POL’Y 227, 227-28 (1998) (discussing the dangers of the unitary executive thesis).

⁴⁵⁸ Katyal, *supra* note 60, at 2317 (“[T]he risks of unchecked executive power have grown to the point where dispatch has become a worn-out excuse for capricious activity.”).

⁴⁵⁹ Buzbee, *supra* note 224, at 1360 (“Changes [in regulation] cannot be unjustified, purely political, or unacknowledged.”); see also *id.* at 1381-1417 (discussing various forms of sloppy policymaking happening at the whims of President Trump); Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273 (1993) (arguing that allowing the President to manage agencies interferes with the administrative value determination); *c.f.* Sunstein, *supra* note 200, at 463-65 (discussing how “the federal courts have also acted as an important check on administrative agencies,” primarily through the “hard-look” doctrine); Farber, *supra* note 188, at 4 (noting that Kagan predicted a growing “disregard for expertise” as a result of presidential administration).

⁴⁶⁰ See, e.g., *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019) (holding that an agency’s action is illegitimate under the APA because it was based on pretext); *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (holding that neither national security nor separation of powers principles allows the executive branch to violate the Fifth Amendment due process of an American citizen by holding detaining him indefinitely); see also *supra* notes 1-7; 228-235 and accompanying text. See also Sunstein, *supra* note 200, at 486 (noting that judicial control is at best a partial safeguard against administrative malfeasance).

⁴⁶¹ See generally *Trump v. Hawaii*, 585 US 2392 (2018).

a stay on the grounds that plaintiff had no cause of action,⁴⁶² thereby effectively acquiescing to the President.⁴⁶³

Some cases remain open, but it appears unlikely that the Court will interfere with agencies' pursuit of the President's agenda. For instance, fueled by a desire to express disapproval of a lower court's use of a nationwide injunction,⁴⁶⁴ the Court declined recently to stay a controversial Department of Homeland Security regulation⁴⁶⁵ that furthers President Trump's restrictionist immigration goals.⁴⁶⁶ The Court chose to sustain this policy, before a final evaluation of its legitimacy, despite the fact that it both dramatically alters the meaning of longstanding immigration legislation and, by some accounts, infringes on constitutional norms.⁴⁶⁷ This suggests the Court does not take these concerns seriously. In addition, it appears unlikely that the Court will delegitimize the Environmental Protection Agency's recent rescission of the Clean Power Plan rules issued at the behest of President Trump, despite concerns that it might be arbitrary and capricious,⁴⁶⁸ given that the rule was issued two years after the notice of proposed rulemaking without any pushback from the Court in the interim.⁴⁶⁹ In all of these cases, the administrative

⁴⁶² See generally *Trump v. Sierra Club*, 588 U. S. 1 (2019).

⁴⁶³ See Steve Vladeck, Academic highlight: The quiet doctrinal shift (likely) behind the border-wall stay, SCOTUSblog (July 27, 2019) (“[T]he decision is part of a larger, emerging trend...one in which the solicitor general has been unusually aggressive in seeking emergency or extraordinary relief from the justices, and the court, or at least a majority thereof, has largely acquiesced.”), <https://www.scotusblog.com/2019/07/academic-highlight-the-quiet-doctrinal-shift-likely-behind-the-border-wall-stay/>.

⁴⁶⁴ *Department of Homeland Security v. New York*, 589 U. S. ___, at *2 (2020) (referring derogatorily to the nationwide injunction against the Department of Homeland Security issued by a district court in the Second Circuit).

⁴⁶⁵ See generally *Inadmissibility on Public Charge Grounds*, 8 C.F.R. 103, 212-214, 245, 248, 84 Fed. Reg. 41292 (Aug. 14, 2019).

⁴⁶⁶ Michael D. Shear & Emily Baumgaertner, *Trump Administration Aims to Sharply Restrict New Green Cards for Those on Public Aid*, NY TIMES (Sept. 22, 2018) (noting the new rule is the “latest in a series of aggressive crack-downs by President Trump and his hard-line aides on legal and illegal immigration”); Ed Kilgore, *Trump Moves Ahead With Ban on Public Assistance for Legal Immigrants*, NY Mag (Aug. 12, 2019) (noting that the new rule is “central to the administration’s strategy of reducing legal as well as illegal immigration”).

⁴⁶⁷ See Kilgore, *supra* note 466 (suggesting that the new rule “impacts citizens [and] has had a “chilling effect” on participation in public assistance”); see also Camilo Montoya-Galvez, *New Trump administration rule cracks down on welfare benefits use by legal immigrants*, CBS NEWS (Aug. 12, 2019), available at <https://www.cbsnews.com/news/what-is-a-public-charge-new-trump-administration-rule-cracks-down-on-welfare-use-by-legal-immigrants/> (noting that of the over 26,000 comments submitted within a 60-day public comment window, “nearly all [were] critical of” the regulation).

⁴⁶⁸ See *supra* notes 9-12 and accompanying text.

⁴⁶⁹ The rule was finalized in 2019, *supra* note 9, while the notice was issued in 2017. Notice of Proposed Rulemaking, 40 C.F.R. Part 52, 82. Fed. Reg. 48035 (Oct. 17, 2017).

policies encouraged by the President remain in place,⁴⁷⁰ and in the case of the travel ban, have become more severe.⁴⁷¹

The timidity of the Court in these cases suggests that those who view judicial intervention as an antidote to unabashed growth in agency or presidential power should focus on the bolstering judicial administration of agency processes.⁴⁷² Those concerned with growing executive power might remind the Court of role in ensuring constitutional due process.⁴⁷³ The Court appears willing to consider concerns about the notice-and-comment process⁴⁷⁴; anti-administrativists might pursue such claims with more vigor. More drastically, reversing or pulling back on *Vermont Yankee* could allow the judiciary to require more robust rulemaking processes that better constrain the whims of presidential administration. For instance, the *HBO* case,⁴⁷⁵ if expanded properly, could improve public awareness of “ex parte communications from the White House during the rulemaking period.”⁴⁷⁶ Reinvigoration of hard look doctrine⁴⁷⁷ could encourage agencies to conform policies, such as the regulation of safety and greenhouse gases, to good science, instead of presidential interests. In addition, as is illustrated by the Census case,⁴⁷⁸ judicial oversight may begin to serve the important function of ensuring that agencies behaving ethically, regardless of whether they are influenced by the President’s agenda.⁴⁷⁹

CONCLUSION

Scholars, as led by now-Justice Kagan, have written about presidential administration in depth. The instant Article argues that the judiciary, too, administers the law. More specifically, it brings to the fore a comprehensive framework of “judicial administration.” In doing so, it sheds light on how courts sometimes administer in the role of custodian, or “overseer,” of agency compliance with law, while at other times, they assume administrative policymaking authority as “deciders.” Neither approach is inherent to any particular doctrine. Rather, both may be present

⁴⁷⁰ See *Understanding the Muslim Ban and How We’ll Keep Fighting It*, NAT’L IMM. L. CENTER (June 2019) (“Unfortunately, the Supreme Court turned a blind eye to the Trump administration’s blatant bigotry when it allowed Muslim Ban 3.0 to go into full effect on June 26, 2018.”); Adam Liptak, *Justices Weigh Denial of Visa to Husband of U.S. Citizen*, NY TIMES (Feb. 23, 2015) (discussing *Kerry v. Din*); Linda Greenhouse, *On the Border Wall, the Supreme Court Caves to Trump*, NY TIMES (Aug. 1, 2019) (noting that Trump compared the ruling to the Muslim ban cases, saying that in regards to the former, just as in the latter, the Court is likely to acquiesce to his policy); Dana Nuccitelli, *The Trump EPA strategy to undo Clean Power Plan*, YALE CLIMATE CONNECTIONS (June 21, 2019) (noting also that the new regulation will fail to reduce carbon emissions).

⁴⁷¹ See Zolan Kanno-Youngs, *Trump Administration Adds Six Countries to Travel Ban*, NY TIMES (Jan. 31, 2020).

⁴⁷² See Molot, *supra* note 305, at 1246 (arguing that “as the lone constitutional actor with no formal role in legislation or law execution, the judiciary is the only entity available to place needed limits on government administration”).

⁴⁷³ See *supra* Part I.A.

⁴⁷⁴ See text accompanying *supra* notes 13-14 & 185-186.

⁴⁷⁵ *Supra* note 168 and accompanying text.

⁴⁷⁶ Bruff, *Presidential Power and Rulemaking*, *supra* note 20, at 503-504.

⁴⁷⁷ See *supra* Part II.B.; *supra* notes 213-214 (noting that hard look does not tend to change policy outcomes).

⁴⁷⁸ See text accompanying *supra* notes 228-235 (discussing the Court’s focus on the agency’s lack of integrity in *Department of Commerce v. New York*).

⁴⁷⁹ See *supra* Part II.B.1.

in any administrative law context, and this Article's foremost contribution is highlighting a longstanding tension between the two.

In addition, this Article contributes some thoughts on if and when judicial administration constitutes overreach. Anti-administrativists should be leery of the judiciary's potential imposition on the other constitutional branches. Despite some formalists' energetic interest in increasing judicial control over the administrative state, formal separation of powers principles caution against the exuberant transfer of policymaking power from agencies to courts.

To avoid a violation of a formal model of the separation of powers, even anti-administrativist Justices should calibrate judicial review of statutory interpretation to ensure that the judiciary requires agencies to follow Congress's broad directions without implementing a new order in which courts make policy decisions primarily on their own. That having been said, reaffirmation of judicial oversight could help curtail the most pressing problems caused by and facing the executive branch, without offending the constitutional separation of powers. This approach might include enhancing the judicial role in ensuring executive compliance with constitutional norms, ethical agency conduct, and policymaking based in defensible administrative expertise.