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The Purpose of Presidential Administration

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THE PURPOSE OF PRESIDENTIAL ADMINISTRATION

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When the Executive directs agency action, this is known as “presidential administration.” Without fail, presidential administration furthers the President’s own policy aims. No one has questioned the deep assumption that presidential administration should be exercised for the President’s purposes alone. Accordingly, this dynamic has intensified greatly in recent years, which has rendered agencies highly responsive to the President’s interests.

However, agencies must be responsive also, if not primarily, to the legislature’s directives. Furthermore, the President has a constitutional duty to execute statutes per their own purposes. And yet, neither Elena Kagan’s seminal work on presidential administration nor the subsequent literature on this topic considers the legitimacy of presidential agenda-setting as a means for fulfilling the Executive’s fundamental responsibility to implement legislation. This Article fills that gap in the scholarship.

This Article argues that presidential influence on agency action has disrupted administrative fidelity to statutory law. Despite common views that the Trump presidency was exceptional, this dysfunction began long before. In order to pursue their own policy goals, presidents have neglected their duty to put the law above their own interests for the last thirty years, continuing into the Biden administration. In the process, the executive branch has abdicated the duties that maintain a healthy separation of powers.

But how can presidential administration be released from the clutches of the President’s own policy agenda? This Article proposes a new paradigm of presidential administration. It explains how even the broad exercise of executive discretion and strong presidential authority can be deployed to execute the law with a wholesale focus on statutory purpose. In addition, this Article proffers a framework of congressional, judicial, and even administrative oversight and intervention to encourage the President to align the administrative execution of law with legislative goals, regardless of the pull of immediate political and partisan interests.

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INTRODUCTION

Earlier this year, the D.C. Circuit decided¹ that attempts by the Environmental Protection Agency (EPA) to underregulate power plant emissions—instigated by the Trump Administration, which had a particular interest in diminishing environmental protection²—were unacceptable, given the purposes of the Clean Air Act.³ The fact that the President directed an agency to contravene the law might appear to be an example of the Trump Administration’s “major deregulatory ambitions.”⁴ However, this practice has continued into the current administration, and existed throughout several administrations before.

¹ American Lung Assoc. v. EPA, No. 19-1140 (Jan. 2021).

² Members of President Trump’s transition team and cabinet, including successive heads of the EPA, Scott Pruitt and Andrew Wheeler, were notoriously “industry-friendly” and “persistent opponents of climate change rule-making efforts.” Dana Nuccitelli, *The Trump EPA strategy to undo Clean Power Plan*, YALE CLIMATE CONNECTION (June 21, 2019), available at <https://yaleclimateconnections.org/2019/06/the-trump-epa-strategy-to-undo-the-clean-power-plan/>; John Walke, *Trump’s “Affordable Clean Energy” Rule: A Dirty Lie*, NRDC (Jan. 28, 2019), available at <https://www.nrdc.org/experts/john-walke/trumps-affordable-clean-energy-rule-dirty-lie>. And as the court itself notes, “[I]n 2019 President Trump’s EPA repealed the 2015 Rule and issued the Affordable Clean Energy Rule.” *American Lung Assoc.*, No. 19-1140 at *8 (emphasis added).

³ See *infra* notes 82-91 and accompanying text.

⁴ See *Tracking deregulation in the Trump era*, BROOKINGS (Feb. 1, 2020), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/>; see also Bethany A. Davis Noll, “Tired of Winning”: *Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 369-70 (2021) (noting that “President Trump was criticized for seeking to ‘deconstruct’ the administrative state through non-legislative actions” and for “efforts to ‘deliberately ... undermine’ the goals at the root of statutory legislation”) (citations omitted).

As to the current administration, the Biden Administration may break with this longstanding practice, in some contexts.⁵ However, President Biden also “aims to go further” than previous presidents have to pursue his regulatory goals and “in some sense, he already has, simply by announcing a wider, bolder set of values to govern regulatory review.”⁶ One example of this involves Biden climate change directives; this summer, a federal court granted a preliminary injunction against these directives based on its assertion that they violate statutory law.⁷ Another is the reprisal of Obama-era policies dictating immigration enforcement priorities that were struck down by a federal court just last month.⁸

As to previous presidencies, each of these case studies from the Biden and Trump administrations is but an episode of extraordinary instances of presidential administration dating back to the Clinton Administration,⁹ and each exemplifies a dynamic that has existed since the Reagan era: presidentialism that is at odds with legislation.¹⁰

The core of the debate concerning presidential administration is whether the President’s involvement in administration is constitutionally defensible as part of her authority to direct her branch.¹¹ Those who support presidential administration argue that because the Constitution vests in the President the executive power, this means that executive agencies exist to be primarily in service of the President’s agenda.¹² Put differently, this camp not only prizes a robust version of the President’s constitutional authority, but also assumes that presidential directives are the most important “law” that agencies are tasked with enforcing.

And yet, even among critics of presidential administration, few have questioned the legitimacy of presidentialism’s focus on the President’s priorities. Certainly, the partisanship and power-gathering nature of presidentialism has garnered deep criticism for decades,¹³ including critiques of presidential aggrandizement from both ends of the

⁵ See, e.g., *infra* notes 305-312 and accompanying text (discussing Biden directives that direct agencies to evaluate policies and rules to ensure compliance with Titles IX and X, the Fair Housing Act; the National Firearms Act; Medicaid and the Affordable Care Act).

⁶ Lisa Schultz Bressman, *Flipping the Mission of Regulatory Review*, PENN REG REVIEW (Feb. 18, 2021), <https://www.theregreview.org/2021/02/18/bressman-flipping-mission-regulatory-review/>.

⁷ See *infra* notes 104-111 and accompanying text.

⁸ See *infra* notes 120-137 and accompanying text.

⁹ See *infra* Part I.B.

¹⁰ See *infra* Part I.A.

¹¹ See Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN L. REV. 43, 44 (2017) (“The real debate over presidential directive authority concerns a president’s ability to compel the head of an agency to take action consistent with the President’s wishes.”).

¹² See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2327 (2001).

¹³ See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 22 (2010) (“Broadly speaking, presidents since Roosevelt have followed [the] pattern [of] revert[ing] to strong partisanship once they win the White House.”); Donald P. Moynihan & Alasdair S. Roberts, *The Triumph of Loyalty Over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency*, 70 PUB. ADMIN. REV. 572 (2010) (criticizing the “extension of the politicized presidency” from the Reagan through the George W. Bush Administration). Bruce Ackerman predicted, during the early years of the Obama Administration, that “the election of an increasing number of charismatic outsider types who gain office by

ideological spectrum.¹⁴ There are also plenty of commentators appraising the wisdom of policies that result from presidential administration—for instance, whether they are laudable as a substantive or ideological matter,¹⁵ or approved by the public¹⁶—as well as the capacity of presidentialism to accomplish those policies.¹⁷

But only very recently have scholars turned to a discussion of the norms and customs surrounding presidentialism¹⁸ or begun to consider the negative repercussions of presidential administration on agency behavior.¹⁹ And no one has articulated, let alone taken seriously, the idea of a presidential administration that exists *apart* from the President’s own goals. This is so, even though “[l]aw execution [i]s the president’s

mobilizing activist support for extremist programs of the left or the right...” ACKERMAN, *supra* at 9; John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, draft at 3-4 (work in progress) (arguing that agencies, controlled by the President, make “extreme” policies”) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788215&dgcid=ejournal_html_email_u.s.:administrative:law:ejournal_abstractlink; Jerry L. Mashaw & David Berke, *Presidential Administration in A Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551 (2018) (finding in both the Obama and Trump Administrations “bold attempts to accrete executive power; presidential administration insinuating itself more and more into areas where proponents of presidentialism have cautioned against aggressive use of presidential directive authority; and the rise of organizational techniques, like policy czars and ‘shadow cabinets,’ that institutionalize presidential control”).

¹⁴ Compare SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* (2020) (arguing that originalism can constrain an increasingly self-aggrandizing executive that sidelines Congress) to PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2016) (arguing for a multipronged administrative approach, including an emphasis on expertise, in order to constrain presidential aggrandizement).

¹⁵ See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (arguing that the President favors business interests).

¹⁶ Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 870 (2012) (arguing that presidents “encourage agencies to cater to narrow special interests and...that the attentive public who does learn about such decisions will not have sufficient political influence to do very much about it”); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 447-48 (2010).

¹⁷ See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 877 (2003); Kagan, *supra* note 12 (focusing on the levers—and their effectiveness for presidential purposes—of presidents’ involvement in administrative process); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 3 (1994) (discussing how presidential micromanagement of agency policies is “ineffective and even counterproductive”).

¹⁸ See, e.g., PRAKASH, *supra* note 14, at 64 (observing of the Trump Administration that “in an environment where the executive [is not bound by custom], presidents will tend to break the law in order to advance their own policies and interests”); Tara L. Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877 (2020) (offering a theory for the interpretation of executive orders); Lisa Marshall Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743 (2019) (offering a legal framework to guide judicial review of presidential orders); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) (discuss how norms of presidentialism are changing); Alan Morrison, *Presidential Actions Should Be Subject to Administrative Procedure Act Review*, in *RETHINKING ADMIN LAW: FROM APA TO Z* (2019) (arguing that the President should be constrained by the Administrative Procedure Act).

¹⁹ See, e.g., Sharon Jacobs & Jody Freeman, *Structural Deregulation*, HARV. L. REV. (forthcoming) (arguing that “presidential administration undermines an agency’s ability to execute its statutory mandate” by “leaving agencies understaffed; marginalizing agency expertise; weakening independent agency oversight; reallocating agency resources; occupying an agency with busywork; and damaging an agency’s reputation”); David L. Noll, *Administrative Sabotage*, MICH. L. REV. (forthcoming) (arguing that presidents sabotage the programs that agencies administer by choosing agency heads that attack their own agencies).

principal bailiwick.”²⁰ Accordingly, the President’s primary motivation for engaging in administration should be to hold agencies accountable to the law as envisioned by Congress.²¹

This Article offers a comprehensive discussion of the parameters of presidentialism as they relate to the implementation of legislation. In doing so, it binds the legitimacy of presidential administration to the obligations of statutory execution and urges a normative shift toward the demands of statutory law in response to the general zeitgeist prioritizing the President in administration.

Notably, this Article does not engage in a full-fledged analysis of the executive branch’s constitutional duty to faithfully execute the law, which has been accomplished elsewhere.²² Rather, this Article contends that “[i]t is a derogation of duty not to pursue with diligence what Congress wants executed.”²³ Moreover, it grapples with the idea that the President’s duty “requires affirmative effort on the part of the President to pursue diligently and in good faith the interests of the...*purpose* specified by the authorizing instrument or entity.”²⁴

To be clear, the “purpose” of a statutory scheme—that is, the general thrust and set of goals the statute was passed to accomplish—is determined with relation to the particular legislation and subject matter at issue.²⁵ Note, as well, that presidential “purposes” refers to the President’s own policy priorities in service of the public interest, as she conceives of it. involve policymaking goals. These do not include, for purposes of

²⁰ PRAKASH, *supra* note 14, at 20 (noting Justice Hugo Black’s statement from the famous 1952 *Youngstown* case “that the President’s duty to faithfully execute the law refutes that he is a lawmaker.”); *see also id.* at 41 (“[T]he president’s express duty to faithfully execute the laws, coupled with a narrow role in making federal statutes, strongly implies that the President has no unilateral lawmaking authority.”); Julian D. Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1270 (2020) (“It wasn’t just that the use of executive power was subject to legislative influence in a crude political sense; rather, the power was conceptually an empty vessel until there were laws or instructions that needed executing.”); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2191 (2019) (suggesting that “the President as the head of the executive branch needs to follow the commands of Congress”).

²¹ The Take Care Clause extends “not only to the duties that fall upon [the President] personally in his official capacity, but also impose on him a duty of oversight to see that all lesser officials within the executive branch respect the same set of fiduciary duties that are imposed on the president.” RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 247-48 (2014); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) (noting that the Take Care Clause “seems to impose upon the President some sort of duty to exercise unspecified means to get those who execute the law, whoever they may be, to act with some sort of fidelity that the clause does not define”); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 250, 252-53 (1993) (arguing that the Take Care “clause ensures that presidents will not only execute the law personally but also monitor the executive branch agencies to ensure that the laws, as understood by the president, are faithfully executed”).

²² *See, e.g.*, Goldsmith & Manning, *supra* note 21; Kent et al., *supra* note 20.

²³ *See* Kent et al., *supra* note 20, at 2191.

²⁴ *Id.* (emphasis added).

²⁵ In addition, the term statutory “purpose” is not intended to be a term of art. More to the point, statutory “purpose” does not refer to “purposivist” statutory interpretation, although the latter may assist in identifying the former. *See supra* notes 71-75 and accompanying text.

this Article, entirely self-interested goals²⁶ like reelection²⁷ or full-throated “constitutional arrogance.”²⁸ (This is, of course, notwithstanding the personal benefits to the President that attaches to actions that are responsive to her political base.) This Article asserts that presidential administration must be decoupled from its conventional pursuit of the President’s policy interests and redirected toward fulfilling the executive branch’s fundamental duty to implement legislation per its own purposes.

First, this Article argues that presidents’ unflinching focus on their own policy goals, and the prevalence of presidential administration directing agencies to pursue those goals, has interfered with administrative fidelity to statutory law. In doing so, this Article contributes an analysis of the extent to which presidential administration results in agency actions that are at odds with statute. This Article does not make a sweeping statement claiming that the presidential exercises of discretion push agencies to contravene statute extensively.²⁹ Rather, it asserts that agencies under political pressure “reject [the] sense of Congress”³⁰ by failing to adequately implement legislative requirements.

More specifically, this Article uncovers the extent to which agencies, under the influence of the President, engage in myopic statutory implementation that deprioritizes or ignore the purposes of the statutory scheme at issue in favor of the President’s policy interests. To accomplish this task, this Article presents qualitative data which includes judicial decisions that have arisen under previous and the current President,³¹ as well as accounts in secondary sources, including the media, and as gleaned from presidents’ own missives.

Presidentialism has long been at odds with legislation.³² Furthermore, the information gathered for this Article reveals that presidents have altered the scope of regulation by narrowing or expanding the boundaries of an agency’s delegated authority

²⁶ See PRAKASH, *supra* note 14, at 64 (cautioning against making too much of “the powers and influences” that presidents “*personally* wield”).

²⁷ Kevin M. Stack, 14th Gedid Lecture: The President and the Rise of Partisan Administration of the Law (Oct. 1, 2020) (arguing that “partisan administration” is a form of presidential administration in which the President uses “the resources and actions of the federal government to benefit the incumbent’s own party’s election prospects (or to harm opponents) independent from the policy merits”) (recording available at <https://www.youtube.com/watch?v=QpLHetMET38>)

²⁸ Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA L. REV. 1649, 1651 (2016) (suggesting that residents engage in “constitutional arrogance” when they use “their unilateral powers to break boundaries and displace other constitutional authorities”).

²⁹ “While presidents (and their administrations) faithfully execute most laws, that is not the uniform practice across all laws.” PRAKASH, *supra* note 14, at 221.

³⁰ PRAKASH, *supra* note 14, at 219-20 (quoting William Symmes, Jr., an opponent of the original ratification of the Constitution who was believed that the Take Care Clause would be misread to allot the President far too much discretion).

³¹ This includes primarily Supreme Court and Circuit Court decisions; the latter set of cases are focused on, but not exclusive to, the D.C. Circuit, which is known as the “second most important court in the land” and the court most expert in administrative law matters. Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?*, YALE JREG NOTICE & COMMENT (Sept. 4, 2015). Sometimes, presidential intervention may be identified by courts from the ground up in the D.C. or other district courts; therefore, some cases from these jurisdictions are included as well.

in pursuit of specific policy outcomes. Since the early 1990s, presidents have directed agencies to under- or over-regulate in the areas of food and drug, healthcare, environmental protection, and immigration reform, among others.³³

Second, this Article advocates for presidentialism that is in service of the legislature's mandates, regardless of the breadth of the executive branch's discretionary authority to implement the law. This argument raises the difficult question of what it means for the executive branch to execute the purposes of legislation in an administrative state that is rife with administrative discretion and presidents' efforts to engage that discretion to further their own aims. But in doing so, it also affirms the possibility of an executive branch that centralized or led by a strong President, and yet simultaneously oriented toward the purposes of statutory law.

To bring this vision to life, this Article proposes inter- and intra-branch checks on the Executive's incentives for wielding control, as opposed to the substance, scope or even the allocation of presidential power. Like in any number of instances where one branch of government is shirking its duties, it becomes the burden of the other two branches to check the wayward branch. To restore legislative primacy in policymaking, and to engender transparency in the executive branch, both the legislature and the judiciary must become more aware of the potential complications and consequences of presidentialism. In addition, this Article suggests, the legislature, courts and even agencies themselves should encourage a presidential turn toward a sincere interest in law execution that focuses on statutory, as opposed to Executive, purpose.

Congress and courts may be either proactive or reactive, as it suits each branch, when it comes to obliging presidentialism to better enable agencies to maintain fidelity to legislative requirements and norms. Such checks could include congressional specification of the President's administrative role, oversight, and course correction. Both Congress and courts can play a role in reconciling disputes between presidential and other sources of law. Finally, the judiciary and even agencies could harness standards of review to assist the executive branch in implementing statutes, despite the pressures of or perhaps even as part of the President's policymaking agenda.

This Article proceeds in two Parts. Part I illustrates how presidential intervention had thus far negatively impacted the administrative implementation of statutory law. First, it notes that strong presidentialism has been, at least since the 1980s through today, in tension with the aims of legislation. Second, it discusses how presidents have interfered with administrative fidelity to the scope and requirements of several statutory mandates to such an extent that the Supreme Court and the D.C. Circuit, among other federal courts, have been forced to constrain their actions for the past three decades.

Part II advocates for a new model of presidential administration that focuses on the purposes of statutory schemes above and beyond the President's policy goals. It begins

³² See *infra* Part I.A.

by elucidating the parameters of executive discretion in the execution of law and explaining how even broad exercises of presidential and administrative discretion might be driven by a focus on statutory, as opposed to presidential, purposes. In doing so, this Part asserts that presidential administration that is focused on statutory purposes may be consistent with a centralized or even unitary executive branch.

To bring this paradigm into being, this Part advocates more specifically for a concerted, inter-branch effort to shape presidential discretion so that it is more squarely oriented toward the purposes of legislation. First, the legislature should emphasize its own purposes at the outset by establishing clear administrative roles for presidents in the execution of law. Second, agencies themselves should execute the law by parsing the extent to which the President's influence over statutory enforcement warps the purpose of legislation. Courts can encourage this. Not only should courts continue to constrain agencies' efforts to alter the scope of their own jurisdiction, but moreover, they should begin to evaluate the legitimacy of agency action by determining whether agencies' pursuit of the President's policy goals comes at the expense of the statutory aims. Third, agencies must also engage in statutory interpretation that engages statutory purposes. To support this endeavor, courts could apply *Chevron* to evaluate the President's influence on administrative statutory interpretation more closely and apply the major questions doctrine to reserve for themselves administrative statutory interpretation that has been warped by the President. Finally, courts might utilize hard look review to hold agency efforts to implement the law accountable in the wake of presidential administration.

PART I—CONVENTIONAL PRESIDENTIALISM

The President's use of her constitutional power and execution of her constitutional responsibilities are at battle, and this conflict has been projected through the administrative agencies. The conflict manifests as follows: in the modern era, the President enters office with the support of a coalition that seeks to implement its policy goals, which may include sweeping deregulation,³⁴ as myopically as possible.³⁵ As a result, the President wields heavy control over agencies' priorities and actions in pursuit of partisan policy aims.

This prevailing, narrow focus of modern presidents on their own policy interests alone has diluted the execution of law. As Bruce Ackerman notes, "Modern presidents regularly use their authority to advance their [own] policies at the expense of the legislative policies of Congress,"³⁶ and they are at an institutional advantage to do so.³⁷

³³ See *infra* Part I.B.

³⁴ See Jody Freeman & David B. Spence *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (arguing that one of the two major parties has grown hostile to the mission of the administrative state, but lacks the power to amend the legislation that has defined that mission).

³⁵ See ACKERMAN, *supra* note 13, at 9 ("I predict that [presidents] will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy even when they conflict with congressional mandates....").

³⁶ PRAKASH, *supra* note 14, at 216.

And as Woodrow Wilson predicted, “There are illegitimate means by which the President may influence the action of Congress....He may even substitute his own orders for acts of Congress which he wants but cannot get.”³⁸

This Part brings to light a disconnect between presidents’ conventional use of administrative discretion for their own policymaking purposes and the demands of statutory law that transcends the idiosyncratic policy interests of presidents. This Part illustrates when and articulates how presidential administration has altered agencies’ enforcement of legislative mandates in favor of the President’s purposes. To do so, it considers how presidents influence agencies and the impact of this influence on agencies’ execution of the law, as framed by the inadequacies of that execution raised in court. In particular, it catalogues examples of presidential intervention in agency action and evaluates whether and to what extent agency actions furthered in the wake of presidentialism did not adhere to judicial understandings of statutory purpose.

Note that, for some time, the term “presidential administration” has been used to refer to various mechanisms by which the President may lead or direct her agencies. These include “issuing broad mandates via directed memoranda and executive orders, creating presidential councils, and guiding agencies’ implementation of their statutory mandates.”³⁹ The President also has agents who engage in administrative intervention on her behalf,⁴⁰ sometimes through well-known and other times through underappreciated channels. “To fully exercise their constitutional and statutory duties, modern presidents rely on...aides—from cabinet secretaries to the lowest political appointees—[that] act in many ways like the president’s extra appendages.”⁴¹

Beyond the President herself, potential political agents include the Vice President; the offices and agencies of the White House, including the Office of Management and Budget (OMB) and its subcomponent, the Office of Information and Regulatory Affairs (OIRA).⁴² The Executive also employs presidential and White House councils, committees, subcommittees, and task forces.⁴³ which are particularly adept at weakening the legislature’s influence.⁴⁴

³⁷ See ACKERMAN, *supra* note 13, at 15 (noting that “[t]he Founders thought that Congress would be most dangerous” branch, and that they thus took care to dilute its power vis-à-vis that of the President); McGinnis & Rappaport, *supra* note 13 (arguing that legislative political polarization has enabled the President to adopt changes to the law unilaterally) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788215&dgcid=ejournal_html_email_u.s.:administrative:law:ejournal_abstractlink

³⁸ WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 71 (1908); see also PRAKASH, *supra* note 14, at 20 (“Modern presidents are lawmakers.”).

³⁹ Bijal Shah, *Executive (Agency) Administration*, 72 *STAN. L. REV.* 641, 687 (2020).

⁴⁰ “The modern presidency is an institution, not only a person.” ACKERMAN, *supra* note 13, at 7.

⁴¹ PRAKASH, *supra* note 14, at 65.

⁴² See generally, Nina A. Mendelson, *Disclosing ‘Political’ Oversight of Agency Decision Making*, 108 *MICH. L. REV.* 1127 (2010).

⁴³ Some have argued that presidential councils constitute “an illegal shadow government.” Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 *CARDOZO L. REV.* 219, 226 (1993) (noting this critique by a Congressperson against Vice President Dan Quayle’s Council on Competitiveness, as well

One of this Part's contributions is to highlight incentives that have united presidents' drive to influence agency action, and the extent to which these create administrative tension with legislation. Another is to show how presidentialism's disruptive influence transcends presidencies. A third is to highlight that although both the executive and legislative branches have constitutional claim to administrative control, the former has interfered with the latter's authority to animate agencies.⁴⁵

Part I.A offers a brief overview of how presidentialism has served as a tool of policymaking that is outside the bounds of statute. Part I.B outlines bold presidential attempts to expand or contract the scope of authority delegated to agencies by statute, and the ways in which courts have constrained these efforts when they result in administrative contravention of statute. Ultimately, this Part contends that Presidents seeking to exercise their power for their own purposes have done so at the expense of the executive responsibility to enforce the law, which implicates the separation of powers between the political branches.⁴⁶

A. Tension between Presidentialism and Legislation

In the mid-twentieth century, the Supreme Court affirmed the bedrock constitutional principle that the Executive cannot act in contravention of federal statutes.⁴⁷ About a decade later, the Court made explicit the idea that agencies may pursue presidential directives⁴⁸ as long as there is "there is no statutory limitation" that prohibits the agency from following the President's command.⁴⁹ Since then, the D.C. Circuit has approved agency actions directed by the President, as long as the agency follows the President's order only "to the extent permitted by law."⁵⁰

as the legislative view that a presidential council might problematically block an agency from adhering to its statutory duties). However, the D.C. Circuit has rejected challenges to them. *See Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (rejecting a challenge to President Reagan's Task Force on Regulatory Relief); *New York v. Reilly*, 969 F.2d 1147, 1152 (D.C. Cir. 1992) (rejecting a challenge to agency rule that relied on the opinion of Quayle's Council on Competitiveness, finding instead that the agency "exercised its expertise").

⁴⁴ *See* Joshua D. Clinton et al., *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 Am. J. Poli. Sci. 387 (2013).

⁴⁵ "Even if we assume (counterfactually) that Congress somehow can perfectly control both bureaucratic drift and legislative drift, the presence of the executive, like the presence of the independent judiciary, impedes Congress's ability to control agencies." Jonathan R. Macey, *Separate Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 697 (1992).

⁴⁶ *See* Goldsmith & Manning, *supra* note 21, at 1838 (arguing that "the [Supreme] Court uses the Take Care Clause as a placeholder for more abstract and generalized reasoning about the appropriate role of the President in a system of separation of powers").

⁴⁷ *Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *see also supra* note 20 and accompanying text (discussing this perspective).

⁴⁸ *Udall v. Tallman*, 380 U.S. 1, 23 (1965) (holding that the agency reasonably interpreted both the executive order and the statute at issue).

⁴⁹ *Id.* at 17.

⁵⁰ *See Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (suggesting that if an executive agency is unable to lawfully implement the President's order, then it must follow the law); *id.* (citing *The Federalist* No. 72, at 463 **187 *785) (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

Furthermore, the D.C. Circuit has established that the presidential “law” may not alter an agency’s responsibilities under statute. For instance, the court has declared that a ratified treaty signed by a President is not “law” that alters an agency’s responsibilities under statute.⁵¹ In addition, an agency’s obligations under statute may not be altered by presidential memorandum either.⁵² Furthermore, the court has blocked agency policies resulting from task forces if those policies do not comply with statutory requirements.⁵³

These cases support an enduring intuition underlying the paradigm of presidential administration: that agencies directed by the President act only within the constraints of statutory law.⁵⁴ As a result, so this view goes, while the fruits of presidentialism may attract criticism for its partisanship, substance, or wisdom, or calls for a more active Congress to render it unlawful, the likelihood of conflict between a presidential directive and existing legislation is minimal.

And yet, the ideal that agencies directed by the President act only within the constraints of statute is unsteady. Furthermore, presidential efforts to administer the law to achieve their own policy goals—and resulting tension with the law, at times—are not new, by any means. “For decades, U.S. Presidents have sought to exert greater control over the apparatus of the administrative state, through strategies of centralizing power.”⁵⁵

Presidents’ highly centralized efforts prioritizing their own policy aims began in the Reagan Administration.⁵⁶ The call for deregulation and a revamping of administrative oversight was championed by President Reagan, who famously initiated a wide array of deregulation efforts coordinated through the new OMB and its subcomponent, OIRA.⁵⁷ Indeed, the Reagan Administration had an “anti-government, deregulatory agenda [that]

⁵¹ Nat. Res. Def. Council v. Envtl. Prot. Agency, 464 F.3d 1, 3 (D.C. Cir. 2006); *id.* at 11 (“Because the post-ratification agreements of the parties are not ‘law,’ EPA’s rule—even if inconsistent with those agreements—is not in violation of any domestic law within the meaning of the Clean Air Act.”).

⁵² See Nat’l Fed’n of Fed. Emp., Local 1622 v. Brown, 645 F.2d 1017, 1025 (D.C. Cir. 1981) (holding that the Department of Defense acted impermissibly in capping the wages of non-appropriated fund workers solely on the basis of President Carter’s anti-inflation program, issued via a memorandum to the heads of all executive departments and agencies); *id.* at 1022 (reiterating that an agency may act as the President’s subordinate only “[w]ithin the range of choice allowed by statute”).

⁵³ See *New York v. United States EPA*, 413 F.3d 3 (D.C. Cir. 2005) (striking down EPA safe harbor rules loosening Clean Air Act standards that were directed by Vice President Dick Cheney’s Energy Task Force, as a violation of the statute).

⁵⁴ See *The Federalist No. 72* (Alexander Hamilton) (Benjamin F. Wright ed., 1961)).

⁵⁵ Jud Mathews, *Trump as Administrator in Chief: A Retrospective*, in *THE AMERICAN PRESIDENCY UNDER TRUMP* (forthcoming).

⁵⁶ See Kagan, *supra* note 12, at 2277 (noting that the “sea change” towards presidential administration “began with Ronald Reagan’s inauguration”). “The Reagan Justice Department...was unusually creative, if not unusually successful, in invoking separation of powers rhetoric to defend unilateral presidential initiatives and to challenge those practices it disfavored of the other branches.” Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 596 (1989).

⁵⁷ Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 689 (2016).

could not be accomplished through legislative means and that increased reliance on an aggressive administrative strategy was essential to securing its ideological goals.”⁵⁸

Whereas Presidents Reagan sought to control the administrative state largely through OIRA review, President Clinton asserted himself into the regulatory process on a more individualized basis to accomplish policy goals that were at odds with legislative intent.⁵⁹ One way that Clinton accomplished this is by issuing presidential directives.⁶⁰

President Obama’s consolidated administrative power as well. Like Clinton, Obama announced ownership over agency-led policies, sometimes to the detriment of administrative legitimacy.⁶¹ In addition, Obama’s crisis management strategy, based on the use of domestic, subject-matter “czars,” advanced policies contrary to those supported by a combative Congress.⁶²

Like his predecessors, President Trump’s preferred approaches to presidential administration included claiming ownership of and exercising centralized control over agency actions. For instance, Trump sought to force policy change through a flurry of written orders.⁶³ Soon after entering the Oval Office, Biden suggested that OIRA, “a predominantly reactive agency within OMB, should have responsibility to develop regulations that advance the Administration’s values.”⁶⁴ As noted in the Introduction⁶⁵ and will be discussed in the next Section, President Biden’s pursuit of his policymaking agenda has already begun impact agencies’ capacity to pursue their statutory mandates.

B. Disruptive Presidential Administration

Since before the turn of the twenty-first century, Presidents have consistently pressured agencies to act outside the constraints of statutory authority. Indeed, “presidents deprioritize, evade or void some subset of federal law when they believe policy or necessity demands it [and] may shrink or expand laws in order to accomplish

⁵⁸ Morton Rosenberg, *Congress’s Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628 (1989).

⁵⁹ See Kagan, *supra* note 12; Watts, *supra* note 57, at 690.

⁶⁰ “Presidential directives had been around before the Clinton Administration, but President Clinton made more regular use of them. In contrast, President Ronald Reagan issued nine directives; President George H.W. Bush issued four; and President Clinton issued 107.” Bressman, *supra* note 6.

⁶¹ Watts, *supra* note 57, at 710-711.

⁶² Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2584 (2011).

⁶³ Manheim & Watts, *supra* note 18, at 1744.

⁶⁴ “Faced with a number of major, continuous, and complex national crises, President Biden is looking to OIRA to promote his goals.” Bressman, *supra* note 6; see, e.g., Memorandum on Modernizing Regulatory Review (January 20, 2021) (directing OMB to produce recommendations that “provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations”), available at <https://www.federalregister.gov/documents/2021/01/26/2021-01866/modernizing-regulatory-review>

⁶⁵ See *supra* notes 5-8 and accompanying text.

their policies.”⁶⁶ More specifically, Presidents have directed agencies either to shirk their delegated responsibilities or to act beyond the limits of their statutory jurisdiction, in order to achieve particular regulatory or deregulatory outcomes, to further a policy scheme or to appease a stakeholder that dislikes the requirements of statute. As to the latter, scholars on the right⁶⁷ and the left⁶⁸ have argued that Presidents will choose to undercut the law in order to respond to voters’ demands.

Unfortunately, “presidents deprioritize, evade or void some subset of federal law when they believe policy or necessity demands it [and] may shrink or expand laws in order to accomplish their policies.”⁶⁹ Some presidential attempts to alter agencies’ delegated jurisdiction have been so egregious that the judiciary itself has seen fit to rebuff them.⁷⁰ Both the Supreme Court and the D.C. Circuit have been skeptical of continuing Executive efforts to alter agencies’ power to regulate, including those of Presidents Trump, Obama, W. Bush, Clinton and H.W. Bush. However, the D.C. Circuit has relented to the agency in some instances, and certain efforts by the Trump and Biden administrations are still percolating in the courts.

The first part of this Section considers presidential administration that has led to underenforcement of statute. The second part of this Section analyses presidential efforts to expand the scope of agencies’ regulatory authority. Note that agencies sometimes engage in textualism and other times outright ignore statutory evaluation at all in favor of other mechanisms—for instance, the implementation of enforcement priorities or the expansion of regulatory mechanisms—in order to pursue the President’s policy goals.

The judicial analysis varies as well. In a few, notable cases that bookend the period of self-regarding presidential administration—namely *American Lung Assoc. v. EPA*,⁷¹ decided this year and *FDA v. Brown & Williamson Tobacco Corp.*,⁷² decided thirty years ago—the judiciary has condemned presidential administration explicitly on the basis of a purposivist interpretation of statute.⁷³

⁶⁶ PRAKASH, *supra* note 14, at 221 (noting that “presidents deprioritize, evade or void some subset of federal law when they believe policy or necessity demands it [and] may shrink or expand laws in order to accomplish their policies”).

⁶⁷ PRAKASH, *supra* note 14, at 64 (“[I]n a context where citizens demand policy innovation from their presidents, these presidents are more apt to gratify such demands even at the expense of the law.”).

⁶⁸ ACKERMAN, *supra* note 13, at 9 (predicting that presidents will “assert ‘mandates from the People’ to evade or ignore congressional statutes when public opinion polls support decisive action”).

⁶⁹ PRAKASH, *supra* note 14, at 221 (noting that “presidents deprioritize, evade or void some subset of federal law when they believe policy or necessity demands it [and] may shrink or expand laws in order to accomplish their policies”).

⁷⁰ *See* Shah, *supra* note 39, at 683-84 (noting the “judiciary’s interest in limiting agencies’ opportunity to infringe on Congress’s right to determine administrative jurisdiction”).

⁷¹ *American Lung Assoc. v. EPA*, No. 19-1140 (Jan. 2021)/

⁷² *Food and Drug Administration (FDA) v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 158 (2000).

⁷³ *See infra* notes 89-91 & 167-176 and accompanying text.

On the one hand, this Article accepts the reasonableness of purposivism⁷⁴ without taking a stand on how it should be applied in regard to any particular case or issue, and aligns itself with Kevin Stack's argument that regulatory statutes oblige agencies to implement the statutes they administer in a purposivist manner.⁷⁵ On the other hand, it also allows for the possibility of textualist interpretations that engage the broader purpose of a statute—for instance, the possibility of pro-environmental protection policies that the Clean Air Act did not anticipate but that uphold its core intent.⁷⁶

Before proceeding, it is worth noting that in some instances, it is difficult to isolate the precise chain of events leading from the President's interests to an agency's changed actions. This difficulty exists in large part because the internal communications by which the President impresses her preferences upon agencies are generally unavailable to outsiders, which poses a significant challenge to scholars of executive norms and presidential power as a general matter.

Furthermore, relying on caselaw to any extent to unearth intra-executive dynamics may result in a selection bias. This problem is faced by scholars of presidentialism more generally, tasked as they are with capturing the specifics of internal branch dynamics that often transpire with little documentation and compromised transparency.⁷⁷ Then again, case law as a source has benefits, too.⁷⁸ In any case, by mining examples from a variety of sources,⁷⁹ this Part illustrates that presidential influence over and intervention in agency action exists and that it may inhibit agencies from adhering to statutory requirements.

⁷⁴ “Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 17 (1998) (In defining purposivism, one might begin with the credo of the legal process school: that, regardless of the actual workings of the legislature, it should be presumed to comprise ‘reasonable persons pursuing reasonable purposes reasonably.’ The purposivist judge aims to infer these purposes and apply them. Beyond this goal, purposivism is somewhat more difficult to define....”) (citations omitted).

⁷⁵ “To comply with their duty [to implement statute], agencies must develop a conception of the purposes that the statute requires them to pursue and select a course of action that best carries forward those purposes within the means permitted by the statute; in short, agencies must take a purposivist approach.” Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NORTHWESTERN UNIV. L. REV. 871, 871 (2015).

⁷⁶ See, e.g., *infra* notes 94-95 and accompanying text (arguing that textualism may allow for the regulation of greenhouse gasses under the Clean Air Act, even though Congress did not consider these at the time of enactment, because the purpose of the statute is to allow the EPA to regulate *any* air pollutants, which are defined broadly in the text).

⁷⁷ For instance, it is possible that case law highlights the most egregiously harmful examples of presidential influence, because it focuses on those instances of presidentialism that have led to litigation. Accordingly, it may be that situations in which the President encourages redemptive, deliberative administrative behavior take place in private, for instance, among the President's own counsel, although scholars have suggested otherwise. See ACKERMAN, *supra* note 13, at 99-101 (arguing that the Office of Legal Counsel and White House counsels in general face institutional challenges to providing nonpartisan guidance to the President and are “the last place to look for a systematic legal check on overweening presidential ambition”).

⁷⁸ For one, this body of research lends itself to more systematic review than intra-executive branch information gathered ad hoc. In addition, disapproving courts offer keen analyses that bolster this Section's argument that presidentialism is a problem. In any case, the bias toward justiciability exists in much of the administrative law scholarship, as well as among agencies themselves, who are primed to avoid litigation.

⁷⁹ See *supra* note 31 and accompanying text (discussing the details of this Article's data set).

1. Underenforcement of Statute

As both progressive and conservative scholars have noted, recent presidents have sought to underenforce legislation.⁸⁰ In some cases, the D.C. Circuit and Supreme Court have rebuked these as inconsistent with the statutory purposes, while other instances—namely those having to do with President Biden’s interest in limiting the enforcement of certain statutes—have only just begun to make their way to the courts.

As to cases that have been resolved to some degree by either the Supreme Court or the D.C. Circuit, the past three presidencies each offer at least one vivid example. In a case highlighted in the Introduction,⁸¹ President Trump directed the EPA to hold the position that the Clean Air Act did not permit the agency to implement the Clean Power Plan, an Obama-era policy that “sets flexible and achievable standards that give each state the opportunity to design its own most cost-effective path toward cleaner energy sources.”⁸²

More specifically, the agency issued the Affordable Clean Energy (ACE) rule, which repealed the Clean Power Plan and, in its stead, requires fewer emissions reductions and offers regulated entities little flexibility in compliance options.⁸³ This chain of events led to *American Lung Assoc. v. EPA*, in which the D.C. Circuit decided that the EPA’s limiting characterization of its authority under statute was inconsistent with the act.⁸⁴

In this case, the D.C. Circuit determined that the purpose of statute is to permit a wider array of activities than asserted by the EPA. As the court noted, the EPA “explained that it felt itself statutorily compelled to do [repeal the Clean Power Plan] because, in its view, ‘the plain meaning’ of Section [111(d)] of the Clean Air Act, the statute under which the EPA may regulate] ‘unambiguously’ limits the best system of emission reduction to only those measures ‘that can be put into operation at a building, structure, facility, or installation.’”⁸⁵

“Considering its authority under Section [111] to be confined to physical changes to the power plants themselves, the EPA’s ACE Rule determined a new best system of

⁸⁰ See Peter Shane, *Faithful Nonexecution*, 29 CORNELL J. OF L. & PUB. POL. 405, 405 (2019) (arguing that presidential undermining of the executive branch’s enforcement of the law may be understood as a “contraven[tion of] the President’s faithful execution duty”); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

⁸¹ See *supra* notes 1-4 and accompanying text.

⁸² *What is the Clean Power Plan?*, NRDC (Sept. 29, 2017), available at https://www.nrdc.org/stories/how-clean-power-plan-works-and-why-it-matters?gclid=CjwKCAiAjeSABhAPEiwAqfxURenhx61T6PA9RfhagGloi6C6qUIPHiHumdH22aneIoDMOM411R-K_xoC9BsQAvD_BwE.

⁸³ Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (Sept. 6, 2019), available at <https://www.federalregister.gov/documents/2019/07/08/2019-13507/repeal-of-the-clean-power-plan-emission-guidelines-for-greenhouse-gas-emissions-from-existing>

⁸⁴ *American Lung Assoc. v. EPA*, No. 19-1140 (Jan. 2021).

⁸⁵ *Id.* at *32-33.

emission reduction for coal-fired power plants only. The EPA left unaddressed in this rulemaking (or elsewhere) greenhouse gas emissions from other types of fossil-fuel-fired power plants, such as those fired by natural gas or oil.”⁸⁶ In other words, the agency took a textualist approach to statutory interpretation to justify the Trump Administration’s goal of underenforcing the Clean Air Act.⁸⁷

The court evaluated the EPA’s reading of the Clean Air Act⁸⁸ and declared that it fell short.⁸⁹ Indeed, the majority went beyond the agency’s narrow analysis to consider deeply—in a 147-page decision, no less—the requirements and expectations encompassed by the Clean Air Act. In addition, it independently determined that the statute is consistent with the EPA’s statutory authority to regulate.⁹⁰ Ultimately, it concluded, “[b]ecause promulgation of the ACE Rule and its embedded repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act, we vacate the ACE Rule and remand to the Agency.”⁹¹

The EPA’s position in *American Lung* is similar to the agency’s argument in *Massachusetts v. EPA*, in which the Supreme Court held invalid the EPA’s position, directed by President George W. Bush, that it was not authorized to regulate carbon dioxide and other greenhouse gases as pollutants under the Clean Air Act.⁹² In *Mass. v. EPA*, the Court noted that “the EPA impermissibly based its decision not to regulate greenhouse gases on political preferences rather than reasons grounded in the agency’s evaluation of the relevant science.”⁹³ Moreover, the Clean Air Act constitutes “capacious agency authorization” that “empower[s] the EPA Administrator to set emission standards for ‘any air pollutant’,”⁹⁴ defined as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.”⁹⁵ Abbe Gluck and Lisa Bressman note that this decision is one in which the Court relied on legislative history as well.⁹⁶

⁸⁶ *Id.*

⁸⁷ Jonathan Masur and Eric Posner argue that the agency took this approach because their cost/benefit analysis revealed significant benefits to the Clean Power Plan that revealed the ACE to be bad policy. Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L. J. 1109 (2021).

⁸⁸ “Even looking beyond the text does nothing to substantiate the EPA’s proposed reading of Section 7411.” *Id.* at *59-70 (proffering analysis under the heading “Statutory History, Structure, and Purpose”).

⁸⁹ *Id.* at *56-59 (proffering analysis under the heading “EPA’s Reading Itself Falls Short”).

⁹⁰ *Id.* at *29-32; *see also id.* at *132 (“Section [111(d)] allows the EPA to regulate carbon dioxide emissions from [a variety of] power plants.”).

⁹¹ *Id.* at *147.

⁹² 127 S. Ct. 1438 (2007) (holding that the EPA contravened the Clean Air Act when it refused to regulate vehicular emissions of greenhouses gases).

⁹³ *See* Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 511 (2019).

⁹⁴ Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 62 (2010).

⁹⁵ *Id.* at 63 (citing the Clean Air Act, 42 U.S.C. §§ 7521(a)(1), 7602(g) (2000)).

⁹⁶ *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside-an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 976 n.258 (2013).

In addition, it is noteworthy that the D.C. Circuit has allowed at least one occasion in which the President pushed an agency engage to alter its statutory enforcement in pursuit of a broader policy agency. More specifically, the Federal Communication Commission (FCC), under the direction of President Obama, passed an order reclassifying the internet under Title II of the Telecommunications Act.⁹⁷ This pursuit of “net neutrality,” which mandated equal access to the internet for all, was deemed a means toward “innovation, competition, free expression,” and “infrastructure development.”⁹⁸ In order to accomplish this policy, “the Obama-era FCC found it necessary to refrain from enforcing over ‘30 statutory provisions’ and to render ‘over 700 codified rules inapplicable.’”⁹⁹

Ultimately, the Obama Administration’s efforts to pressure the FCC to regulate the internet were approved by the court as consistent with the agency’s statutory authority to regulate.¹⁰⁰ And yet, while the D.C. Circuit denied rehearing of this case en banc because of the uncertainty regarding the future of the Title II Order under the Trump Administration,¹⁰¹ the court remained aware of the tension between the President’s policy interests and the requirements of the statute. More specifically, the dissent bristled that the net neutrality rule resulted from Obama pressuring the FCC “into rejecting this decades-long, light-touch consensus in favor of regulating the Internet like a public utility,” thus “[a]bandoning Congress’s clear, deregulatory policy.”¹⁰²

As to cases that remain in transition, some of President Biden’s new policies are already facing claims that they violate the law. These include agency efforts to “pause” new oil and natural gas leases on public lands or in offshore waters,¹⁰³ per a Biden executive order.¹⁰⁴ As instructed by the President:

⁹⁷ Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5618 (Feb. 26, 2015) (reclassifying the internet from an “information service” to a “telecommunications service”).

⁹⁸ *Id.* at 5625.

⁹⁹ Jay S. Kaplan, *Finding the Middle Ground: A Proposed Solution to the Net Neutrality Debate*, 26 GEO. MASON L. REV. 230, 237 (2018) (citing the 2015 FCC net neutrality order).

¹⁰⁰ U.S. Telecom Ass’n v. Fed. Comm’n Comm’n (FCC), 825 F.3d 674 (D.C. Cir. 2016).

¹⁰¹ U.S. Telecom Ass’n v. FCC, 855 F.3d 381 (D.C. Cir. 2017) (denying review of previous decision upholding the Obama FCC’s Open Internet Order in light of the Trump FCC’s notice of proposed rulemaking that would “dismantle or reduce the Open Internet Order rules”).

¹⁰² *Compare id.* at 394 (Brown, J., dissenting) (“When the FCC followed the Verizon ‘roadmap’ to implement ‘net neutrality’ principles without heavy-handed regulation of Internet access, the Obama Administration intervened. Through covert and overt measures, FCC was pressured into rejecting this decades-long, light-touch consensus in favor of regulating the Internet like a public utility,” this “[a]bandoning Congress’s clear, deregulatory policy...”) to *id.* at 382 (contending, in response to Judge Brown, that presidential pressure to increase statutory enforcement did not contravene the agency’s statutory authority).

¹⁰³ *Fourteen U.S. states sue Biden administration over oil and gas leasing pause*, REUTERS (March 24, 2021).

¹⁰⁴ Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 13993, 86 Fed. Reg. 7619 (Jan. 27, 2021); see also Hannah Pugh, *Calling It Quits on Oil and Gas Leases*, PENN REG REVIEW (Mar. 25, 2021) (“During President Joseph R. Biden’s first week in office, he signed an executive order directing the U.S. Department of the Interior to ‘pause new oil and natural gas leases on public lands’ and to conduct ‘a comprehensive review and reconsideration of federal oil and gas permitting and leasing practices.’”), <https://www.theregreview.org/2021/05/25/pugh-calling-quits-on-oil-gas-leases/>

To the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices *in light of the Secretary of the Interior's broad stewardship responsibilities* over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.¹⁰⁵

As of now, one district court has granted a preliminary injunction against this policy.¹⁰⁶ Despite the White House caveat that the Department of Interior should only exercise broad discretion in pursuit of the President's policy goals "to the extent consistent with applicable law,"¹⁰⁷ the court declares that the legislation at issue, which includes the Outer Continental Shelf Lands Act (OCSLA) and the Mineral Leasing Act (MLA), grants neither the President¹⁰⁸ nor the agency¹⁰⁹ the authority to "pause" new oil and natural gas leases.

The court asserts that "since OCSLA does not grant specific authority to a President to 'Pause' offshore oil and gas leases, the power to 'Pause' lies solely with Congress."¹¹⁰ Furthermore, the court states that agencies cannot "cancel or suspend a lease sale...for no reason other than to do a comprehensive review pursuant to Executive Order 14008. Although there is certainly nothing wrong with performing a comprehensive review, there is a problem in ignoring acts of Congress while the review is being completed."¹¹¹

In the immigration context, courts have been split on whether presidential administration is consistent with the law. One set of cases involves an executive order from President Biden, issued on the first day of his presidency.¹¹² In this order, Biden requested the immigration agencies engage in efforts "to protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety."¹¹³ In response to the executive order, the Secretary of the Department of Homeland Security (DHS) issued a memo to agency directors with three specific directives, which include an immediate 100-day pause on deportations to enable

¹⁰⁵ *Executive Order on Tackling the Climate Crisis at Home and Abroad*, Sec. 208 (Jan. 27, 2021) (emphasis added), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>; see also Dept. of Interior, Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy Future, (Jan. 27, 2021) (including a section entitled "HITTING PAUSE ON NEW OIL AND GAS LEASING"), available at <https://www.doi.gov/pressreleases/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands>.

¹⁰⁶ *Louisiana v. Biden*, 2021 WL 2446010 (W.D. La. June 15, 2021); Joshua Partlow & Juliet Eilperin, *Louisiana judge blocks Biden administration's oil and gas leasing pause*, WASH. POST (June 15, 2021) ("Although there is certainly nothing wrong with performing a comprehensive review, there is a problem in ignoring acts of Congress while the review is being completed," [Judge] Doughty wrote in his ruling.").

¹⁰⁷ See *Executive Order on Tackling the Climate Crisis at Home and Abroad*, *supra* note 105.

¹⁰⁸ *Louisiana v. Biden*, 2021 WL 2446010, at *3.

¹⁰⁹ *Id.* at *18.

¹¹⁰ *Id.* at *3.

¹¹¹ *Id.* at *14.

¹¹² Revisions of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

¹¹³ *Id.*

the Department of Homeland Security to coordinate a department-wide review of policies and practices concerning immigration enforcement and to develop guidelines on matters of national, border and public security.

On the one hand, one federal district court in Florida denied the motion for a preliminary injunction against this policy.¹¹⁴ Per this court, “Notwithstanding the listing of priorities, the memo states that ‘nothing in [the] memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities.’”¹¹⁵ In other words, the court determined that these enforcement priorities are not in contravention of the law.

On the other hand, another federal district court, this time in Texas, granted a preliminary injunction against this policy based on its view that the 100-day moratorium on some deportations is not consistent with the statutory language.¹¹⁶ As this court notes, the 100-day pause furthers “President Biden’s Executive Order stating that the new administration will ‘reset the policies and practices for enforcing civil immigration laws to align enforcement’ with the ‘values and priorities’ the new Executive deems important.”¹¹⁷ Nonetheless, and despite “all the[] detailed explanation of the Executive’s seemingly unending discretion,” the court declares, “the Defendants substantially undervalue the People’s grant of ‘legislative Powers’ to Congress.”¹¹⁸ While the lawsuit against this policy has been dropped because “the policy expired and the Biden administration said it had no plans to extend or reinstate it, according to a court filing,”¹¹⁹ this episode nonetheless exemplifies the tension between the convention pursuit of presidential administration and consistency with legislative ends.

Moreover, the same Texas court very recently condemned President Obama’s immigration directive instructing the immigration agencies to defer the deportation of various noncitizens,¹²⁰ a policy known as Deferred Action for Childhood Arrivals (DACA).¹²¹ DACA was considered by critics¹²²—and framed by the President

¹¹⁴ Florida v. U.S., No. 8:21-CV-541-CEH-SPF (M.D. Fla. May 18, 2021).

¹¹⁵ Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 13993, 86 Fed. Reg. 7619 (Jan. 27, 2021).

¹¹⁶ Texas v. United States, No. 6:21-CV-00003 (S.D. Tex. Feb. 23, 2021)

¹¹⁷ *Id.* at *40.

¹¹⁸ *Id.* at *37 (“Here, the Government has changed ‘shall remove’ to ‘may remove’ when [the statute] unambiguously means must remove. Accordingly, the 100-day pause is not an action committed to agency discretion.”).

¹¹⁹ Daniel Wiessner, *Texas Drops Challenge to Biden Administration’s Deportation Moratorium*, REUTERS (May 21, 2021) <https://www.reuters.com/business/legal/texas-drops-challenge-biden-admins-deportation-moratorium-2021-05-21/>.

¹²⁰ Texas v. U.S., No. 1-18-CV-00068 (S.D. Tex. Jul. 16, 2021).

¹²¹ Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. Adopted by the Department of Homeland Security under President Obama, “the DACA Memorandum established a process and agency-wide criteria for granting ‘deferred action’ to certain childhood-arrivals who lack a lawful immigration status.” Benjamin Eidelson, *Unbundling DACA and Unpacking Regents: What Chief Justice Roberts Got Right*, BALKINIZATION (June 25, 2020), <https://balkin.blogspot.com/2020/06/unbundling-daca-and-unpacking-regents.html>.

himself¹²³—as an attempt to underenforce statute in lieu of changing it through the appropriate mechanism for altering legislation. Notably, in a related case, the Supreme Court considered—and ultimately rejected—President Obama’s assertion that his immigration policy was just narrow enough that it did not “entail ‘ignoring the law.’”¹²⁴ Until very recently, however, DACA remained in place due to a Supreme Court ruling that held illegitimate the Trump administration’s attempt to rescind the policy,¹²⁵ while also establishing that the policy itself is subject to judicial review.¹²⁶ Since then, Biden had directed the immigration agencies to “preserve and fortify DACA,¹²⁷ and the agencies had begun to comply.¹²⁸

But just last month, a district court concluded that the DACA program is “illegal” because it falls outside immigration statutory schemes and congressional intent.¹²⁹ More specifically, the court determined that “Congress has not granted [the agency] the statutory authority to adopt DACA”;¹³⁰ that DACA contravenes statutory schemes addressing deportation,¹³¹ work permits,¹³² and humanitarian pathways to citizenship,¹³³ and that “DACA is not supported by historical precedent,” per the court’s analysis of regulatory and statutory schemes.¹³⁴

In response to this decision, President Biden has implored Congress to pass improved immigration legislation, while continuing to pledge that his Administration will

¹²² See, e.g., PRAKASH, *supra* note 14, at 41 (“President Obama adopted...a unilateral ‘pen-and-phone’ strategy [and] wielded it to remake the immigration landscape, bypassing and sidelining Congress.”); Delahunty & Yoo, *supra* note 80 at 784 (arguing that President Obama’s efforts to engage in prosecutorial discretion violated the Take Care Clause, which the authors declare “imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases”) (emphasis in original).

¹²³ Robert Law, *Obama's 'pen and phone' have been trumped when it comes to DACA*, THE HILL (Sept. 1, 2017), available at <https://thehill.com/blogs/pundits-blog/immigration/348871-obamas-pen-and-phone-have-been-trumped-when-it-comes-to-daca>; “[E]ven though [the new program Deferred Action for Parents of Americans and Lawful Permanent Residents] was formally put into place via an agency memo signed by [the Secretary of the Department of Homeland Security], rather than via a presidential order, DAPA had the President’s fingerprints all over it.” Manheim & Watts, *supra* note 18, at 1757.

¹²⁴ Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 122 (2017) (discussing *U.S. v. Texas*, 136 S. Ct. 2271 (2016)).

¹²⁵ *Department of Homeland Security (DHS) v. Regents of the University of California*, 140 Sup. Ct. ___ (June 18, 2020); see also *infra* notes 386-391 and accompanying text (discussing the reasoning behind *Regents*).

¹²⁶ *DHS v. Regents*, 140 Sup. Ct. at 1906.

¹²⁷ Memorandum: Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053, 7053 (Jan 20, 2021) (“The Secretary of Homeland Security, in consultation with the Attorney General, shall take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA.”).

¹²⁸ Statement by Homeland Security Secretary Mayorkas on DACA (Mar. 26, 2021) (noting that the agency was “taking action to preserve and fortify DACA. This is in keeping with the President’s memorandum.”), available at <https://www.dhs.gov/news/2021/03/26/statement-homeland-security-secretary-mayorkas-daca>; Genevieve Douglas, *New Measures to Preserve DACA Coming Soon*, USCIS Official Says, BLOOMBERG LAW (May 17, 2021).

¹²⁹ *Texas v. U.S.*, No. 1-18-CV-00068 (S.D. Tex. Jul. 16, 2021).

¹³⁰ *Id.* at *37.

¹³¹ *Id.* at *40.

¹³² *Id.* at *47.

¹³³ *Id.* at *53.

¹³⁴ *Id.* at *68.

pursue the DACA policy.¹³⁵ On the one hand, he states, “only Congress can ensure a permanent solution by granting a path to citizenship for Dreamers that will provide the certainty and stability that these young people need and deserve.”¹³⁶ On the other hand, he asserts that the “Department of Justice intends to appeal this decision in order to preserve and fortify DACA. And, as the court recognized, the Department of Homeland Security plans to issue a proposed rule concerning DACA in the near future.”¹³⁷

2. Expanding Enforcement Power

Reaching back from today to the Clinton presidency, both Democratic and Republican administrations have sought to expand agencies’ authority to regulate. For instance, President Biden has a sweeping set of goals for anti-trust regulation,¹³⁸ and has begun to engage agencies to pursue measures that might be in contravention of statutes governing the Federal Trade Commission (FTC).¹³⁹ These potentially problematic measures include “rescinding the bipartisan statement of policy that the FTC adopted in 2015 to interpret the FTC Act of 1914 in a manner consistent with antitrust law,” and planning to “abandon completely the rule of reason that the Supreme Court has been applying in antitrust law for over a century.”¹⁴⁰

In addition, both Presidents Biden and Trump appear to have directed agencies to pursue healthcare policies outside the scope of the jurisdiction granted to them under existing legislation. These include an executive order claiming to preserve healthcare for those with preexisting conditions¹⁴¹ and other executive orders pledging to bring down prescription drug prices,¹⁴² as well as a related Trump-era “Blueprint to Lower

¹³⁵ *Statement by President Joe Biden on DACA and Legislation for Dreamers* (July 17, 2021) (emphasis added), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Executive Order on Promoting Competition in the Working Economy* (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>; *FACT SHEET: Executive Order on Promoting Competition in the Working Economy* (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> (noting that President Biden describes his anti-trust initiative “as an overarching, ‘whole-of-government’ effort”).

¹³⁹ See Richard J. Pierce, *President Biden’s Anti-Trust Agenda*, YALE JREG NOTICE & COMMENT (July 12, 2021) (suggesting that some of President Biden’s anti-trust goals could be at odds with the Sherman Act); Richard J. Pierce, Jr, *Fasten Your Seatbelts, The FTC Is About to Take Us on a Rollercoaster Ride*, YALE JREG NOTICE & COMMENT (July 1, 2021) (arguing that the FTC Chair recently took measures that “dramatically expand the power of the FTC and of its Chair”).

¹⁴⁰ *Id.*

¹⁴¹ President Trump, *An America First Healthcare Plan*, Exec. Order No. 13, 951, 85 Fed. Reg. 62179 (Sept. 24, 2020).

¹⁴² President Biden, *Promoting Competition in the American Economy*, Exec. Order No. 14, 039, 86 Fed. Reg. 36987, 36988 (Sept. 13, 2020) (noting that “Americans are paying too much for prescription drugs and healthcare services—far more than the prices paid in other countries” and pledging to draw on antitrust law to reduce drug prices); President Trump, *Lowering Drug Prices by Putting America First*, Exec. Order No. 13, 948, 85 Fed. Reg. 59649 (Sept. 13, 2020); see also Fraiser Kansteiner, *With sweeping executive order, Biden puts drug pricing, anti-competitive strategies in the crosshairs*, FIERCE PHARMA (July 12, 2021) (noting that Biden is “advancing a Trump-era policy”), <https://www.fiercepharma.com/pharma/biden->

Prescription Drug Prices.”¹⁴³ Regarding these drug initiatives, the Trump Administration itself noted that agency measures pursuant to these directives are likely to be challenged as outside the scope of the agency’s jurisdiction under statute.¹⁴⁴

In addition, Trump issued a proposal that recategorizes bureaucrats as “Schedule F,” would render all bureaucrats (except administrative adjudicators, in some cases) subject to at-will removal.¹⁴⁵ Note that while the Biden Administration subsequently wrote an executive order revoking this proposal,¹⁴⁶ “it still bears attention,”¹⁴⁷ and holds the potential for reinvigoration under future administrations. Notably, “[t]he notion that professional civil servants—who perform policy roles—can be removed from office is destructive of objective and competent government.”¹⁴⁸ Moreover, for the purposes of

order-puts-drug-pricing-anti-competitive-pharma-practices-crosshairs; Tamara Keith, *Trump Signs New Executive Order On Prescription Drug Prices*, NPR (Sept. 13, 2020), <https://www.npr.org/2020/09/13/912545090/trump-signs-new-executive-order-on-prescription-drug-prices>.

¹⁴³ President Donald J. Trump’s Blueprint To Lower Drug Prices (May 11, 2018), available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-blueprint-lower-drug-prices/>; see also Sheryl Gay Stolberg & Margot Sanger-Katz, *Trump Keeps Promoting a Drug Order That No One Has Seen*, NY TIMES (Oct. 20, 2020); Thomas Waldrop & Nicole Rapfogel, *Too Little, Too Late: Trump’s Prescription Drug Executive Order Does Not Help Patients*, CENTER FOR AM. PROG. (Oct. 15, 2020), <https://www.americanprogress.org/issues/healthcare/news/2020/10/15/491425/little-late-trumps-prescription-drug-executive-order-not-help-patients/>; *Trump’s Executive Order on Preexisting Conditions Lacks Teeth, Experts Say*, KAISER HEALTH NETWORK (Sept. 28, 2020), <https://khn.org/news/trumps-executive-order-on-preexisting-conditions-lacks-teeth-experts-say/>.

¹⁴⁴ “Health and Human Services (HHS) Secretary Alex Azur told the Senate Health, Education, Labor, and Pensions (HELP) Committee on June 26, six weeks after the Blueprint was released, that, for example, he believes his department, through the Food and Drug Administration, has the authority to force drug companies to disclose list prices in television advertisements. But he added that he would welcome legislation to ‘shore up’ that authority because manufacturers will ‘certainly challenge’ any new requirement in court.” Stephen Barlas, *Views Conflict on Trump’s Drug-Pricing Blueprint Most Actions Face Political, Legal, and Technical Roadblocks*, 43 PHARM. & THERAPEUTICS 10 (Oct. 2018), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6152698/>

¹⁴⁵ *Executive Order on Creating Schedule F In The Excepted Service* (October 21, 2020) (allowing for a new “Schedule F” category that resurrects the patronage system, which would reclassify many civil servants as employees removable at will—including for purely political reasons), available at <https://www.whitehouse.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/>. The argument here is that anyone involved in policymaking can be swept into this new classification, and once they [a]re, they [a]re subject to political review and dismissal for any reason.” Erich Wagner, *‘Stunning’ Executive Order Would Politicize Civil Service*, GOV’T EXEC. (Oct. 22, 2020).

¹⁴⁶ *Executive Order on Protecting the Federal Workforce* (January 22, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/22/executive-order-protecting-the-federal-workforce/>

¹⁴⁷ Paul R. Verkuil, *Putting the Fizz Back Into Bureaucratic Justice*, PENN. REG. REV. (Feb. 8, 2021).

¹⁴⁸ *Id.* (discussing President Trump’s “executive order on ‘Creating Schedule F in the Excepted Service’”); see also Wagner, *supra* note 145 (noting that scientists, data collectors, attorneys, and other low-profile, expert bureaucrats could be removed from the government under the new Executive Order unless they “pledge their unwavering loyalty to” the President, as opposed to serving the nation); Lisa Rein et al., *Trump’s historic assault on the civil service was four years in the making*, WASH. POST (Oct. 23, 2020) (providing a history of the new Executive Order that illustrates that it is aimed at “allowing [the Trump] administration to weed out career federal employees viewed as disloyal in a second term”). “Critics argued that the order is a blatant attempt to get rid of those [bureaucratic] experts, further blurring the line between the political leadership and the civil service....” Kelsey Brugger, *Trump order looks to dismantle the ‘deep state’*, GREENWIRE (Oct. 22, 2020) (quoting former agency head) (noting comment by another former agency head that the order would diminish transparency in hiring and would prioritize people whose primary qualification is political loyalty).

this Article's discussion, this policy is likely to undercut the Pendleton Civil Service Reform Act.¹⁴⁹

Under President Obama, a federal court invalidated a Bureau of Land Management rule promulgated on the basis of “A Climate Action Plan” and related directives from President Obama.¹⁵⁰ More specifically, “[t]he court held that the Bureau of Land Management exceeded its authority under the Mineral Leasing Act, which permits the agency to limit natural gas waste, but not to regulate air quality standards.”¹⁵¹ Notably, the court stated repeatedly that “an administrative agency may not exercise its authority ‘in a manner that is inconsistent with administrative structure that Congress enacted into law.’”¹⁵² While the extent to which the Department of Interior (via the Bureau of Land Management) was behaving outside its mandate is up for debate,¹⁵³ the court found that the agency, acting per Obama instructions, went beyond the bounds of its delegated authority.¹⁵⁴

Conversely, also during this time, the D.C. Circuit approved of efforts by the executive branch to coordinate in the absence of delegated authority to do so. In a decision by then-Judge Kavanaugh, the court declared that the President has independent authority coordinate her branch, regardless of whether she is so authorized by the legislature to execute the law in that manner,¹⁵⁵ notwithstanding that in this case, President Obama had little to do with the coordination plan at issue in the case.¹⁵⁶

¹⁴⁹ As one scholar has noted, this Executive Order seeks “to undo what the Pendleton Act and subsequent civil service laws tried to accomplish, which was to create a career civil service with expertise that is both accountable to elected officials but also a repository of expertise in government.” Wagner, *supra* note 145 (quoting a professor at the University of Texas School of Public Affairs).

¹⁵⁰ *Wyoming v. Dept. of Interior*, No. 2:16-CV-0280-SWS at *31 n.23 & *26 n.20, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20201008_docket-216-cv-00285_order-1.pdf#page=2.

¹⁵¹ Max Masuda-Farkas et al., *Week in Review*, PENN. REG. REV. (Oct. 16, 2020). In this way, the Bureau of Land Management was found to have infringed on the authority of the Environmental Protection Bureau as well, which is charged by the Clean Air Act with the regulation of air quality. *Wyoming v. Dept. of Interior*, at *20-21.

¹⁵² *Id.* at *17, 21 & 37 (citing *Brown & Williamson Tobacco Corp.*).

¹⁵³ “The court recognized the Department of the Interior’s clear authority to prevent harmful natural gas waste and that the measures the department adopted in 2016 would indeed cut waste. Nonetheless, it found the Waste Prevention Rule was unlawful based on its *additional* air quality benefits for tribal and Western communities.” *Wyoming Federal Court Overturms Common Sense Protections against Wasting Natural Gas on Public and Tribal Lands*, STATEMENT OF [ENVIRONMENTAL DEFENSE FUND] LEAD ATTORNEY PETER ZALZAL (Oct. 8, 2020) (emphasis in original), <https://www.edf.org/media/wyoming-federal-court-overturms-common-sense-protections-against-wasting-natural-gas-public>.

¹⁵⁴ *Id.* at *2 (holding that the agency “exceeded its statutory authority...in promulgating the new regulations.”).

¹⁵⁵ Kavanaugh declares, “Under Article II of the Constitution, departments and agencies in the Executive Branch are subordinate to one President and may consult and coordinate to implement the laws passed by Congress [and i]n a ‘single Executive Branch headed by one President,’ we do not lightly impose a rule that would deter one executive agency from consulting another about matters of shared concern.” *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 249 (D.C. Cir. 2014).

¹⁵⁶ *See id.* at 246 (noting that two agencies adopted the coordination plan, and failing to mention any presidential involvement at all).

Commentators argue that the President's power to coordinate her branch is beneficial to her branch, and therefore justified even without express legislative approval of it.¹⁵⁷ It is also possible to argue that the Take Care Clause authorizes coordination¹⁵⁸ as "necessary to protect the operations of the federal government, even in cases in which no statute provides explicit authority to do so."¹⁵⁹ Nonetheless, improvements to administrative communication and efficiency do not negate the possibility the Congress may have intended, in some cases, for the bulk of legal implementation to be accomplished by a particular agency with concentrated regulatory expertise. In other words, the D.C. Circuit's decision ignored the extent to which presidential or agencies' own efforts to coordinate may, in some cases, interfere with the execution of law.

In Elena Kagan's best-known example of presidential administration,¹⁶⁰ *FDA v. Brown & Williamson Tobacco Corp.*,¹⁶¹ President Clinton directed the Food and Drug Administration (FDA) to expand the scope of its statutory authority. In condemnation of Clinton's efforts, the Supreme Court found that the agency overstepped its statutory authority when it promulgated rules to this end.¹⁶² The matter at issue was whether the legislature intended the FDA to regulate tobacco, per the goals of President Clinton.¹⁶³ In making its decision, the majority focused on the legislature as the primary source of agency authority,¹⁶⁴ in contrast to the dissent's implication that the President may confer

¹⁵⁷ Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 1964 (2019) (noting that "the relevant literature has focused only on the ways in which interagency coordination has served as an executive tool for regulatory reform, to improve administrative adjudication, or to reconcile shared jurisdiction among agencies"); *Nat'l Min. Ass'n*, 758 F.3d at 249 (arguing that "our 'form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.'") (citations omitted); Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RES. L. REV. 1083, 1101-02 (2015) (discussing *National Mining Association v. McCarthy*) ("Congressional delegation to specific executive branch officials has not precluded Presidents from exercising managerial oversight in addition to the controls of appointment and removal. Without such oversight, there would be little coordination among agencies, resulting in duplication and waste.").

¹⁵⁸ *Nat'l Min. Ass'n*, 758 F.3d at 249 ("Indeed, one of the main goals of any President, and his or her White House staff, is to ensure that such consultation and coordination occurs in the many disparate and far-flung parts of the Executive behemoth....[W]e will not read into that statutory silence an implicit ban on inter-agency consultation and coordination[, since] restricting such consultation and coordination would raise significant constitutional concerns.")

¹⁵⁹ *C.f.* Goldsmith & Manning, *supra* note 21, at 1837-38 (citing a case in which the Supreme Court recognized "the President's inherent authority to provide a bodyguard to protect a federal judge despite the lack of any explicit statutory authority").

¹⁶⁰ See Kagan, *supra* note 12.

¹⁶¹ *Food and Drug Administration (FDA) v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 158 (2000).

¹⁶² *Brown & Williamson*, 529 U.S. at 125-26.

¹⁶³ The President's News Conference (Aug. 10, 1995), available at <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-1076>.

¹⁶⁴ *Brown & Williamson*, 529 U.S. at 132-33 (suggesting that a "coherent and regulatory" framework of legislation, including and beyond the agency's enabling statute, defines and limits the breadth of valid agency action).

authority onto an agency,¹⁶⁵ and determined that “an FDA ban [on tobacco] would plainly contradict congressional intent.”¹⁶⁶

To justify its purposivist approach, the Court noted the FDA’s longstanding practice of refraining from tobacco regulation, and Congress’s acquiescence to this practice, as evidenced by its choice not to legislate a change to the practice.¹⁶⁷ The Court also identified a succession of statutes in which Congress relied on the agency’s own characterization of its limited jurisdiction in repeated statements before Congress,¹⁶⁸ as well as other legislation regulating tobacco that indicate the legislature’s expectation that the FDA did not have authority to regulate tobacco under its enabling statute, the Food, Drug, and Cosmetic Act.¹⁶⁹

The Court also said that, on several occasions, Congress considered and rejected legislative proposals to amend the Act to give the agency the authority to regulate tobacco products,¹⁷⁰ and that the structure of the Act precluded the agency from regulating tobacco products without banning them,¹⁷¹ an outcome that would not be acceptable given the fact that Congress has shown clear intent that cigarettes and tobacco not be banned.¹⁷² Given the economic importance of the tobacco industry, the Court concludes, Congress would not have subjected tobacco to regulation under the FDCA without saying so explicitly. Ultimately, President Clinton’s forceful assertion of agency jurisdiction was not enough to overcome this requirement.

It is notable that the decision in this case was made by a narrow margin, a 5-4 majority, and the dissent takes a purposivist approach to statutory interpretation that ultimately supports the agency’s position.¹⁷³ Indeed, both the majority and the dissent likewise sees fit to engage in an analysis that forefronts the legislature’s policy aims, although it also argues separately that the President should be able to direct policy.¹⁷⁴ Notably, in the wake of *Brown & Williamson*, Congress gave the agency the authority to regulate tobacco after all,¹⁷⁵ which suggests that the dissent’s views of the intentions of the statutory scheme may have been accurate.¹⁷⁶

¹⁶⁵ *Id.* at 189-90 (Breyer, J., dissenting).

¹⁶⁶ *Id.* at 122.

¹⁶⁷ *Id.* at 152.

¹⁶⁸ *Id.* at 190.

¹⁶⁹ *Id.* at 122.

¹⁷⁰ *Id.* at 126-27.

¹⁷¹ *Id.* at 174.

¹⁷² *Id.* at 121.

¹⁷³ *Id.* at 163 (Breyers, J., dissenting) (“I believe that the most important indicia of statutory meaning—language and purpose—along with the FDCA’s legislative history (described briefly in Part I) are sufficient to establish that the FDA has authority to regulate tobacco.”).

¹⁷⁴ *Id.* at 189-90 (Breyers, J., dissenting).

¹⁷⁵ See Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

¹⁷⁶ See Christine Kexel Chabot, *Selling Chevron*, 67 ADMIN. L. REV. 481, 537 (2015) (noting that “the majority in *Brown & Williamson* was worried about erroneously affirming tobacco regulations to which Congress had not agreed” but may have failed “to recognize health protection Congress *did* delegate”) (emphasis in original).

Finally, the idiosyncratic example of the “Bush-Wilson Agreement” between President George H.W. Bush and former Archivist Don W. Wilson¹⁷⁷ bears noting. This agreement, signed on President Bush’s last day in office, purported to give President Bush exclusive control over electronic records of the Executive Office of the President created during his term in office.¹⁷⁸ Unfortunately for the former president, the district court for the District of Columbia found that this agreement violated the Presidential Records Act, and issued an injunction prohibiting the Acting Archivist from implementing the agreement.¹⁷⁹

PART II—A NEW PRESIDENTIAL ADMINISTRATION

Part I illustrated not only that presidents in the modern era are directive and agenda-focused, but also that presidential administration is at odds with statutory law. Part II touts a new conception of presidential administration, as opposed to simply denouncing it wholesale as do others who seek to reinvigorate the bureaucracy.¹⁸⁰ In doing so, it advocates for a paradigm of presidential administration that prioritizes fidelity to legislative mandates and norms over the President’s own interests. It imagines a model in which the President exercises control over agencies to support and amplify their capacity to implement legislation. In this alternate world, the President acknowledges legislative supremacy in the creation of law. This vision has room, even, for a unitary executive, but one in which the President assumes strict control over agencies to ensure their accountability to norms espoused by Congress.

First, this Part explores how various dimensions of execution discretion can be applied toward the dutiful execution of law, and explains how even broad delegations of administrative power and a powerful president may be consistent with a renewed Executive focus on the heart of legislation. Indeed, the focus of this Part is not on limiting the force or the scope of presidential control, but rather on shifting President’s the *motivation* for wielding control. First of all, there is no guarantee that targeting executive centralization serves to constrain presidential administration in the first place.¹⁸¹ Moreover, a centralized or unitary executive branch could exist in harmony with and even encourage the execution of law that prioritizes statutory purposes over those of the President. In any case, law-focused execution should become a primary incentive driving presidents’ efforts to control their agents, however loose or firm that control may be.

¹⁷⁷ American Historical Ass’n v. Peterson, 876 F.Supp. 1300, 1303 (D.D.C., Feb. 27, 1995).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1303-1304.

¹⁸⁰ See, e.g. Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISCOURSE 418 (2021) (stating that the authors are “down on presidential administration” and arguing in favor of “tossing out the presidential administration playbook”).

¹⁸¹ Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms about Executive Power*, 164 U. PA. L. REV. 1869, 1873 (2016) (arguing that the prevalent debate seeking to “distinguish[] between presidential oversight and decisionmaking...is unlikely to do much, if anything, to constrain Presidents from effectively controlling administrative agencies”).

Second, this Part offers a blueprint for coaxing the Executive and her branch into deliberative policymaking that emphasizes legislative considerations. In pursuit of their policy aims, presidents have neglected their duty to lead, organize and shape agencies in any number of ways that benefit a searching administrative inquiry into legislative purpose and careful implementation of the law on its own terms. As of now, the management of presidential administration has consisted of judicial efforts to deal with conflicts between presidentialism and legislation long after they have arisen. Instead, even before such conflicts arise in the courts, Congress, the judiciary and even agencies themselves should encourage and preserve presidential efforts to direct agencies to execute the law in accordance with statutory purposes.

A. A Paradigm of Legislation-Focused Presidentialism

The executive branch's authority to exercise discretion, however broad, is not a license to engage in single-minded pursuit of the President's own policy purposes. Indeed, the Faithful Execution Clauses have a particular "historical purpose: to limit the discretion of public officials."¹⁸² On the one hand, the requirement of faithful execution "was imposed because of a concern that officers might act *ultra vires*."¹⁸³ On the other hand, as Andrew Kent, Ethan Leib and Jed Shugerman argue, "[f]aithful execution requires not only the absence of bad faith."¹⁸⁴ Rather, the President is beholden to "not only proscriptive dimensions of the duty of faithful execution but prescriptive ones as well."¹⁸⁵ As Bruce Ackerman has said:

Before a president can even begin executing the law, he must first figure out what the law requires him to do. It is not enough for him to suppose that "the law" means whatever he wants it to mean....The present institutional setup fails this test.¹⁸⁶

Complementarily, administrative agencies are fundamentally stewards of statutory law as well, pursuant not only to the legislative delegations of power enjoyed by department heads, but also to agencies' role as agents of the Executive.¹⁸⁷ As Richard Epstein notes, the duties of faithful execution extend "not only to the duties that fall upon [the President] personally in his official capacity, but also impose on him a duty of oversight to see that all lesser officials within the executive branch respect" the law.¹⁸⁸ In

¹⁸² Kent et al., *supra* note 20, at 2117.

¹⁸³ See Kent et al., *supra* note 20, at 2118 ("[T]he duty of faithful execution helped the officeholder internalize the obligation to obey the law, instrument, instruction, charter, or authorization that created the officer's power.").

¹⁸⁴ Kent et al., *supra* note 20, at 2190.

¹⁸⁵ *Id.*

¹⁸⁶ ACKERMAN, *supra* note 13, at 148.

¹⁸⁷ "[A]gencies' policymaking authority is executive in nature—that is, associated with their duty to enforce the law." Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1168 n.320 (2021) (citations omitted); 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).

¹⁸⁸ EPSTEIN, *supra* note 21, at 247-48; see also RYAN J. BARILLEAUX & CHRISTOPHER S. KELLEY, *THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY* 97 (2010) ("Presidents must 'take Care that the Laws be faithfully executed,' but this requires the assistance of others—others in the executive branch who are responsible to the president."); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA.

this vein, the requirements of statutory enforcement apply not only to the President, but also to others in the executive branch.¹⁸⁹ It is for these reasons that agency actions are evaluated by the courts per the mandates of law passed by Congress.

Still, as Jack Goldsmith and John Manning note, there is “no principled metric for identifying when a valid exercise of prosecutorial discretion shades into an impermissible exercise of dispensation or suspension power.”¹⁹⁰ “Virtually all laws require some degree of discretion and intelligence in their execution, especially if they are to be faithfully executed.”¹⁹¹ So, how can the executive branch’s exercise of vast discretion be squared with its duty to engage in a statute-focused execution of the law?

As an initial matter, administrative pursuit of the President’s policy agenda does not necessarily result in poor outcomes as a substantive matter. Moreover, presidential administration can lead to thoughtful or beneficial policymaking. Kathryn Watts notes that “not all forms of presidential control are equal.”¹⁹² Some forms of presidential control “taint agency science, prompts agencies to ignore the law, and undermine transparency,” she explains, while others “promote positive values like political accountability and regulatory coherence.”¹⁹³ Some scholars level functionalist criticism at executive policymaking,¹⁹⁴ and such critiques about the substance and partisanship of executive policymaking has been aimed at presidents from Roosevelt to Trump.¹⁹⁵ But others hold the view that “[a] strongly unitary executive can promote important values of accountability, coordination, and uniformity in the execution of the laws.”¹⁹⁶

L. REV. 1753, 1757 (2016) (noting that the Take Care “clause demands that the President ensure that his subordinates act in good faith in enforcing the law”); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 250, 252-53 (1993) (arguing that the “Take Care” “clause ensures that presidents will not only execute the law personally but also monitor the executive branch agencies to ensure that the laws, as understood by the president, are faithfully executed”).

¹⁸⁹ “As legal executive, his constitutional aspect, the President cannot be thought of alone.” WILSON, *supra* note 38, at 66; *see also* Kent et al., *supra* note 20, at 2118 (“Yet one of our most interesting findings here is that commands of faithful execution with duties that parallel Article II applied not only to senior government officials who might have been plausible models for the presidency in Article II, but also to a vast number of less significant officers.”); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875-78 (2015) (noting that the passive voice of the Take Care Clause necessarily implies law administration by someone other than the President).

¹⁹⁰ Goldsmith & Manning, *supra* note 21, at 1863-64.

¹⁹¹ EPSTEIN, *supra* note 21, at 267.

¹⁹² Watts, *supra* note 57, at 706.

¹⁹³ *Id.*

¹⁹⁴ *See, e.g.*, Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1748-50 (2009) (noting criticisms of the idea that unitary executive theory furthers accountability); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U.L. REV. 1031, 1031 (2013) (arguing that “presidential involvement in agency enforcement, though extensive, has been ad hoc, crisis-driven, and frequently opaque”); Mendelson, *supra* note 42 (advocating for greater transparency in OIRA oversight).

¹⁹⁵ *See supra* note 13 (listing such critiques).

¹⁹⁶ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); *see also* Michael A. Fitts, *Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 829 (1996) (noting that arguments in favor of a centralized executive branch cite the reduction of collective action problems).

Indeed, presidents may seek to foster good governance,¹⁹⁷ coordination¹⁹⁸ or even to insulate agency decisionmakers¹⁹⁹ in pursuit of better administration. Presidents have long had engaged in cost/benefit analysis²⁰⁰ (notwithstanding situations in which the Executive leverages such an analysis to fundamentally unjustifiable effect²⁰¹), which could lead to transparency, accountability or higher-quality policies.²⁰² Moreover, the President may be better positioned to prioritize values that would not be executed well by technocrats, enforcement officials or others at the front lines of the bureaucracy. Truly, good policy can come from the presidential reshaping of statutory mandates, be it thirty years ago²⁰³ or more recently.²⁰⁴

To put it succinctly, presidential policies are not suspicious on their face. Rather, the concern is with inter-branch balance rather than the wisdom of presidential administration on its own terms, notwithstanding that a healthy separation of powers may also foster higher-quality presidentialism. Even when acting to further values of good governance or other administrative norms, however, there is generally no clear evidence to suggest that Presidents seek these outcomes as a result of a careful evaluation of statutory purpose. For instance, cost/benefit analysis may not square with certain regulatory purposes²⁰⁵ or even with a statutory emphasis on maximizing benefits alone. Even when the outcomes of presidentialism lead to good policy, the President is usually motivated by her own goals, as opposed to a keen interest in dutiful execution.

¹⁹⁷ See *Executive Order on Governance and Integration of Federal Mission Resilience*, Exec. Order 10,355 (Dec. 7, 2020).

¹⁹⁸ See *supra* note 157 (discussing how and why presidents foster coordination).

¹⁹⁹ See Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 26 CONST. COMMENTARY 583 (2010). Apparently, in Executive Order 13,924, President Trump directed agency heads to ‘consider the principles of fairness in administrative enforcement and adjudication.’ Verkuil, *supra* note 147; see also Regulatory Relief To Support Economic Recovery, Exec. Order No. 13924, 85 Fed. Reg. 31353 (May 22, 2020). That having been said, President Trump’s ‘focus on regulatory fairness, although presented in a neutral fashion, was directed at slowing down and even obstructing the enforcement process itself.’ *Id.*

²⁰⁰ See BARILLEAUX & KELLEY, *supra* note 188, at 7 (suggesting that President George W. Bush was interested in ‘ensuring that all regulations were vetted through a cost-benefit prism’); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L. J. 2280, 2295-96 (2006) (discussing ‘Reagan and Clinton Executive Orders[, which] impose a cost-benefit analysis on all executive agencies when the organic statutes in question do not preclude it’); Mashaw & Berke, *supra* note 13, at 555, 580 & 590 (noting that Presidents Obama, Clinton, and Reagan all mandated cost-benefit analysis); see, e.g., *Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process*, 40 CFR 83 (Dec. 8, 2020).

²⁰¹ *A Debate Over President Trump's "One-In-Two-Out" Executive Order*, PENN. REG REVIEW (June 26, 2017) (showcasing several scholars debating the constitutionality and lawfulness of Executive Order 13,771), <https://www.theregreview.org/2017/06/26/debate-one-in-two-out-executive-order/>

²⁰² See Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L. J. 1593 (2019); Jonathan Masur, *Will Cost-Benefit Analysis Become the Law of the EPA?*, YALE JREG NOTICE & COMMENT (July 11, 2018) (arguing a Clear Air Act rule issued under the Trump Administration provides a good opportunity for the Environmental Protection Agency ‘to instantiate cost/benefit analysis as the law of that agency’).

²⁰³ See *infra* notes 160-176 and accompanying text (discussing President Clinton and FDA joint efforts in the 1990s to regulate the use of tobacco).

²⁰⁴ See *infra* notes 97-102 and accompanying text (discussing President Obama and FCC joint efforts in 2017 to promote net neutrality).

²⁰⁵ See Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335 (2011).

Furthermore, advocating for legislation-focused presidentialism does not require taking a stake in the debate regarding whether the President has the power to direct²⁰⁶ the exercise of authority granted to an agency by statute, or merely to oversee it.²⁰⁷ Perhaps counterintuitively, the assertion that presidential administration must promote statutory interests does not undermine the position of unitary executive theorists that the President is rightfully a strong principal as a constitutional matter.²⁰⁸

At the very least, focusing presidentialism on statutory purposes does not require the President to play merely a ministerial role. After all, the longstanding practice of broad delegation effectively recognizes executive authority to adapt laws over time to evolving circumstances in a way that defies a simple principal-agent understanding of faithful execution. For this reason, presidential or attendant political influence is not mechanical, nor does it impact administrative efficacy alone. To the contrary, there are, in fact, deep value choices inherent to the implementation of law.²⁰⁹

And yet, even a very directive president may engage in legislation-focused presidentialism. There is great potential for a powerful presidential role in ensuring obedience to the goals embodied by statutory law. Indeed, a unitary executive branch need not be considered a co-principal of Congress,²¹⁰ but instead could rest on a system

²⁰⁶ Unitary executive theorists hold an expansive view of the President's constitutional power that asserts she has the constitutional power not only to direct agency actions, but also to "step in the shoes" of administrators and act in their place. Adrian Vermeule, *Conventions of Agency Independence*, 13 COLUM. L. REV. 1163, 1205 (2013); see, e.g., Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993) (arguing that historical evidence favors the "Chief Administrator theory," which holds that the President has the power to substitute his judgment for that of an agency head); Kagan, *supra* note 12, at 2327 (arguing that the President has control over delegations of authority to executive agencies: "When Congress delegates discretionary authority to an agency official, because that official is a subordinate of the President, it is so granting discretionary authority [unless otherwise specified] to the President.").

²⁰⁷ Those who take a moderate view of Executive power argue that the President may oversee what agencies do, but that she may not, as a constitutional matter, seize the authority delegated to administrators by legislation and make decisions in their stead. See, e.g., Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) ("[I]n the ordinary world of domestic administration, where Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure. [However, o]versight, and not decision, is his responsibility."); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) ("[A]s a matter of statutory construction, the President has directive authority—that is, the power to act directly under the statute or to bind the discretion of lower level officials—only when the statute expressly grants power to the President in name."); see also Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869 (2016) (offering an analysis of possible constitutional constraints on the President's ability to direct the actions those officials take and suggesting one possible constraint would permit Presidents to oversee agencies but not to make decisions for them.").

²⁰⁸ According to this view, "under our constitutional system, the President must have the authority to control all government officials who implement the laws." Lessig & Sunstein, *supra* note 196, at 2.

²⁰⁹ See Tim Brennan, *To End Science Denial, Admit That Policymaking Is Not All Science*, PENN REG REVIEW (June 14, 2021) ("Policy discussions belong in the realm of values."), <https://www.theregreview.org/2021/06/14/brennan-end-science-denial-admit-policymaking-is-not-all-science/>.

²¹⁰ See CRISTINA M. RODRÍGUEZ & ADAM B. COX, *THE PRESIDENT AND IMMIGRATION LAW* (2020) (arguing for a co-principal model of presidentialism in the immigration context); but see Bijal Shah, *Investigating a Unitary Executive Model of Immigration*, BALKINIZATION (Dec. 4, 2020) (criticizing the unitary

of presidential control that ensures agencies engage in more exacting adherence to legislative goals and expectations. Conversely, presidentialism that prioritizes statutory purpose can encourage a strong executive hierarchy and reinforce the President's role as head of the executive branch.

In some cases, the legislating Congress may have wished to have no say in the matter of law execution and may have supported the potential for the President to wield control over the administration of statute. Perhaps, Congress intended for policies to be formulated based on high-level or political considerations. Here, there may be a significant expanse of discretion delegated to the administrative state and the agency may exercise it to follow the President to the ends of the earth.

Complementarily, the President could legitimately act as a tiebreaker,²¹¹ based on reasonable analysis suggesting that statutory values are indeterminate, conflicting, hold no clear objective or orthogonal to new regulatory challenges.²¹² There may also be situations in which old or broad delegations of statute necessitate presidential or political control as the intended or only recourse for statutory reconciliation. These situations differ, however, from those in which agencies exercise their discretion to pursue the President's goals in a vacuum..

Moreover, even if delegations of discretion are generous or abstract, this does not necessarily mean that they should be at the mercy of politicians. A broad delegation might instead be the result of collective action problems or a lack of expertise in the legislature. In such cases, the President might direct an agency to consider more closely the requirements of statutes, instead of compelling it to bend statutory requirements to their her policy interests.

In such instances, Congress might have expected agencies to exercise discretion that is limited by or that ensures a particular allegiance to the legislation's purposes—in other words, agencies have discretion within boundaries.²¹³ This may mean, as a concrete matter, that there are limits to an agency's freedom to bend to the President's preferences. In such instances, faithful execution might require devolving power downwards from the president and political appointees towards career staff and other

executive overtones of Cox & Rodríguez's book), <https://balkin.blogspot.com/2020/12/investigating-unitary-executive-model.html>.

²¹¹ See Kent et al., *supra* note 20, at 2191 (suggesting that a textual reading of the Take Care Clause includes a "limited affirmative prescription [that] gives the President authority to fill in incomplete legislative schemes to promote the best interests of the people...whose interests are usually mediated through their representatives"); Cornell W. Clayton, *Separate Branches—Separate Politics: Judicial Enforcement of Congressional Intent*, 109 POLI SCI QUARTERLY 843, 872 (1994) ("[H]olding the executive branch responsible to the law does not rob the presidency of the energy that the Framers intended or that contemporary circumstances require.").

²¹² See generally, Freeman & Spence, *supra* note 34 (discussing the problems of applying old statutes to new regulatory challenges).

²¹³ See Cary Coglianese & Christopher S. Yoo, *Introduction: The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1591 (2016) (introducing a symposium that "cast[s] into some doubt the seemingly absolute discretion the executive branch has until now been thought to possess").

responsible actors—a move from presidential administration to “civic administration.”²¹⁴ In this regard, Kevin Stack argues that “agencies’ institutional capacities—a familiar constellation of expertise, indirect political accountability, and ability to vet proposals before adopting them—make them ideally suited to carry out the task of purposive interpretation.”²¹⁵ When broad delegation results from indeterminacy, it may also require administrative engagement in expert, technocratic or other nuanced determinations.

One example of a broad delegation that requires a technical analysis hails from forty years ago and led to the well-known *Benzene* case, which concerned the Department of Labor’s authority to “provide for safe and healthful employment.”²¹⁶ In this case, the Supreme Court decided that the Secretary of Labor exceeded his statutory authority by failing to make a threshold finding to justify the standard he set to enforce this law.²¹⁷ In other words, the broad delegation in this case did not require a high-level judgment call, but rather, a technical and expert determination concerning the allowable amounts of exposure to a particular chemical.²¹⁸

Today, President Biden seeks to “ensure that the review process promotes policies that reflect new developments in scientific and economic understanding, fully accounts for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects,”²¹⁹ which suggests he may be open to allowing agency experts to assess how best to enforce a statute.²²⁰ More generally, no delegation of discretionary authority, old, broad, abstract or otherwise, should be exercised on the basis of political interests alone without contextual analysis.

B. Obliging a Focus on Statutory Purposes

As is often so when the Executive has failed to fulfill her duties, the separation of powers dictates that other branches of government step in to offer encouragement or constraint. This Section recruits the legislature and courts to evolve presidential administration into a more effective tool of statutory enforcement. In doing so, this Section takes seriously Eric Posner’s suggestion that “scholars address directly whether bureaucratic innovation is likely to improve policy outcomes”²²¹ and draws on the view

²¹⁴ Emerson & Michaels, *supra* note 180.

²¹⁵ Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 871 (2015).

²¹⁶ *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (holding that a rule regulating benzene in small doses was not supported by substantial evidence).

²¹⁷ *Id.*

²¹⁸ *See id.*

²¹⁹ *See* Memo on Modernizing Regulatory Review, *supra* note 64.

²²⁰ *See id.*; *see also* Susan Dudley, *Regulatory Reset*, PENN. REG. REV. (Feb. 19, 2021) (arguing that Biden’s Memo on Modernizing Regulatory Reform, which draws on “longstanding, bipartisan principles [that] call for agencies to analyze the effects of alternative regulatory approaches before they issue rules,” displays “regulatory humility”), <https://www.theregreview.org/2021/02/19/dudley-regulatory-reset/>

²²¹ Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive Underenforcement*, 164 U. PA. L. REV. 1677, 1677 (2016).

of Jerry Mashaw and David Berke that the “separation of powers has retained functional importance” to the management of presidentialism.²²²

As of now, the results of presidential administration, alone, have been recognized as illegitimate—and that too, only in instances where they contravene the law. But this is not enough. Confronting only the most egregious examples of agency action resulting from presidential maladministration does not suffice to ensure that the execution of law adheres to legislative principles and purposes. Rather, the President must be persuaded to consider seriously the legislature's aims when intervening in agency action,²²³ and to make those considerations plain,²²⁴ before a controversy arises in the courts.

As Posner has noted, there is difficulty, while comparing the political branches, in “defining and measuring power, let alone determining whether the power of different branches ‘balance’.”²²⁵ Accordingly, this Section does not offer a blunt, cross-cutting benchmark, bright line, or clear standard that allows courts to assess whether presidents are impeding administrative compliance to the law across areas of regulation. Rather, it presents options for Congress and the judiciary to manage both the exercise and the fallout of presidential administration that pursues the President’s own policymaking purposes alone.

More specifically, this Section encourages presidential and agency prioritization of and engagement with statutory purpose at successive stages of statutory implementation. First, this Section advocates for Congress to make clear its purpose with regard to presidential administration. In order to accomplish, Legislation could define the president’s role in statutory execution. Otherwise, it could be more precise about how agencies should weigh the mandates of legislation against presidential influence. Second, this Section argues that agencies spend more time divining how to trade off between presidential and statutory purposes. To create an incentive for agencies to do this, the judiciary might maintain and intensify its restriction of executive attempts to redefine the scope of their statutory delegations at the behest of the President. Moreover, courts could evaluate more explicitly and consistently the extent to which Congress intends for presidents’ own policy priorities to shape statutory implementation. Third, this Section considers purpose in administrative statutory interpretation by noting that courts might also apply *Chevron* and major questions doctrine to more explicitly confront, analyze and excise presidentialism that cuts against the legislature’s intentions for significant policy decisions. Finally, it emphasizes agencies’ responsibility to demonstrate their faithfulness to statutory mandates by suggesting that courts deploy the arbitrary and capricious standard. Courts could determine whether presidential administration has improved or

²²² Mashaw & Berke, *supra* note 13, at 551.

²²³ Watts, *supra* note 57, at 734 (noting briefly that in “statutory interpretation, the key question [is] whether the substance of the presidential suggestion was tethered to or divorced from the relevant statutory inquiry”)

²²⁴ As Woodrow Wilson declared, our government “must be made to disclose to us its operative coordination as a whole: its places of leadership, its method of action, how it operates, what checks it, what gives it energy and effect.” WILSON, *supra* note 38, at 59.

harm the agency's capacity to make policy that reflects legislative preferences, which would engage the accountability-forcing dimensions of arbitrary and capricious review.

1. Legislative Specification of the President's Role in Execution

In *Louisiana v. Biden*,²²⁶ the federal court spoke to the President's authority to direct the agencies to "pause" certain statutory requirements, stating that he was not authorized to do so per the relevant statutes and that only Congress could have authorized such a pause.²²⁷ The confusion regarding the scope of the president's power to exercise administrative discretion in this context could have been avoided, however, if Congress had spoken directly to the issue.

To clarify the limits of presidentialism vis-à-vis legislation, this Section suggests, Congress specify requirements for, and limits to, presidential action that would better ensure the execution of the purpose of the law. As Kathryn Watts has noted, "there is a lack of clarity concerning...when statutes delegating discretionary powers to agencies allow agencies to act pursuant to presidential directions."²²⁸ Congress itself could make explicit the scope and intensity of presidential administration it is willing to allow, instead of leaving the question open to judicial or scholarly interpretation.²²⁹

Presidential role specification would allow Congress to harmonize presidential directives and the requirements of legislation. It could also be used to augment the President's power under statute or, in contrast, to decentralize the executive branch as necessary, to bring to a statutory scheme to life. First, Congress could better ensure that the President keeps her interests subordinate to those of the legislature in the execution of statutory law by assigning the President clear and fixed administrative roles. This suggestion complements the argument that Congress "take back power" from the President by issuing narrower delegations to agencies.²³⁰ Second, the legislature could specify lawful options for the President to influence the execution of law, and in doing so, communicate explicitly whether the President is included in or excluded from administrative policymaking.

Note that this Section excludes discussion of legislative control through the appropriations process and of formal and informal legislative oversight. This is in part because these dynamics have received thorough treatment in the literature²³¹ and because they have only a limited impact on the influence of presidentialism on policymaking. In addition, political theorists have discussed how Congress organizes

²²⁵ *Id.* at 1680.

²²⁶ *Louisiana v. Biden*, 2021 WL 2446010 (W.D. La. June 15, 2021).

²²⁷ See *supra* notes 104-111 and accompanying text.

²²⁸ Watts, *supra* note 57, at 727.

²²⁹ See, e.g., Kagan, *supra* note 12, at 2247 (asserting that unless Congress made an agency independent, it expects that Presidents will exercise heavily directive authority).

²³⁰ See McGinnis & Rappaport, *supra* note 13, draft at 23.

²³¹ See, e.g., Matthew B. Lawrence, Disappropriation, 120 COLUM. L. REV. 1 (2020); Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187 (2018).

itself internally to fight bureaucratic drift,²³² and this Section will not rehash that material here. Rather, this Section contributes a discussion of presidential role specification to the set of existing options for legislative control, assuming that legislators are interested in guiding the executive branch in this way and able to overcome collective action problems to do so.

This suggestion is buoyed by the fact that courts already look to legislation to determine the scope of the President's jurisdiction to direct the law or provide agencies cover from judicial review. For instance, the Supreme Court has justified an agency's decision not to engage in an environmental impact assessment under The National Environmental Policy Act (NEPA) "rule of reason" because, according to the Court, this provision shields the agency from accountability to NEPA when the President has directed the agency and the agency has no discretion to refuse the President's directive.²³³

In addition, the D.C. Circuit²³⁴ has "read the Procurement Act as giving the President direct and broad-ranging authority to achieve a sophisticated management system capable of pursuing the 'not narrow' goals of 'economy and efficiency'."²³⁵ In this case, the court looked to the President himself to determine the scope of her power under statute;²³⁶ perhaps the court would have looked to statute had the legislature itself specified this matter. In addition, other federal courts of appeals have viewed agencies' actions as the manifestation of high-level presidential power, particular in matters of national security and foreign affairs, and therefore deemed those actions unreviewable.²³⁷

²³² See Macey, *supra* note 45, at 671-74 (describing this work). Well-known examples include the work of McNollgast. See, e.g., Matthew D. McCubbins, et al, Structure and Process, Politics and Policy: *Administrative Arrangements and the Political Control of*

Agencies, 75 VA. L. REV. 431 (1989); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

²³³ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769, 124 S. Ct. 2204, 2216 (2004); see also Adam J. White, *Executive Orders As Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1593-94 (2018) (noting that in *Dep't of Transp. v. Pub. Citizen*, the Supreme Court held "that when an agency implements a policy decision made by the President, it is not required to analyze the environmental impacts of the President's decision, because it has no control over the President").

²³⁴ *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) cert. denied at 443 U.S. 915 (1979).

²³⁵ J. Frederick Clarke, *AFL-CIO v. Kahn Exaggerates Presidential Power under the Procurement Act*, 68 CALIF. L. REV. 1044, 1045-46 (1980).

²³⁶ "The court found support for its broad reading of the President's procurement authority in the history of the *Executive's* interpretation of the Act." *Id.* at 1046 (emphasis added).

²³⁷ See e.g., *Epsilon Elecs., Inc. v. United States Dep't of the Treasury*, 857 F.3d 913, 916 (2017) (noting that the International Emergency Economic Powers Act authorizes the President to declare a national emergency when "he identifies an 'unusual and extraordinary threat' to the American economy, national security, or foreign policy that originates from abroad, and [to] address the threat by regulating foreign commerce," and that the actions and findings of the President under the review process "shall not be subject to judicial review"); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 241 & 281 (D.C. Cir. 1989) (declaring that President Reagan's abortion policy limitations were authorized by 22 U.S.C. § 2151b(b), which granted him discretion "to furnish [foreign] assistance, on such terms and conditions as he may determine, for voluntary population planning," and were therefore not subject to judicial review); *Midwestern Gas Transmission Co. v. F.E.R.C.*, 589 F.2d 603 (D.C. Cir. 1978) (finding that the agency acted pursuant to the Alaska Natural Gas Transportation Act of 1976, which lays out a five-part procedural framework that requires unreviewable participation of the President).

As an initial matter, Congress could pass statutes to solve the tensions between presidential and statutory aims identified earlier in this article. This could include allotting a role for treaty-based law, executive order, or presidential task forces to shape how agencies enforce the law,²³⁸ installing the President or a proxy as the clear leader of multi-agency efforts,²³⁹ and specifying a role for the President in policymaking and other tools of administrative statutory interpretation such that *Chevron* is no longer the primary mechanism by which an incoming president may assert her preferred interpretation of statute.²⁴⁰

Also, Congress could employ presidential role specification to centralize the executive branch, either for ideological reasons or to improve the efficiency and efficacy of administration. While the soundness of doing so is up for debate, the amplification of Executive power by an intentionally acquiescent Congress is perhaps more politically accountable than allowing the judiciary—the least politically accountable branch of government—to continue to be the primary force in amplifying Executive power. This approach is perhaps also more defensible than the unitary executive theory, per which the President has absolute authority, which rests on an indeterminate understanding of Article II.²⁴¹

Possibilities for role specification that creates a more unitary executive abound. As an initial matter, Congress has done this before. Sometimes, “Congress, in the passage of legislation, quite explicitly delegates power to the president for making future decisions that are better made quickly in light of circumstances that cannot be known at the time of the initial delegation.”²⁴² In addition, Congress has sought to regularize the policymaking function of the President, at least as it relates to rulemaking and *ex parte* communication, by passing overarching legislation dedicated to this matter.²⁴³ In this context, statutory language was drafted, or at least construed, for the purpose of bolstering the President’s ability to engage in administrative policymaking and shield agencies from judicial review. In at least one case, the agency’s regulations, promulgated to implement an executive order, were deemed valid precisely because the President

²³⁸ See *supra* notes 51-53 and accompanying text.

²³⁹ See *supra* notes 155-159 and accompanying text.

²⁴⁰ See *infra* Part II.C.

²⁴¹ See *supra* notes 206-207 (discussing this assumption and counterarguments).

²⁴² EPSTEIN, *supra* note 21, at 267; see, e.g., *Karpova v. Snow*, 497 F.3d 262 (2d Cir. 2007) (finding that executive orders were issued validly under the authority granted to the President by both the International Emergency Economic Powers Act and the United Nations Participation Act); *Flynn v. Shultz*, 748 F.2d 1186 (7th Cir. 1984) (noting that statute authorizes the President to make determination as to whether a person was “unjustly deprived” under the Hostage Act in order to compel the State Department to act).

²⁴³ Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 982 (1980) (referencing the following proposed legislation: ABA Commission on Law and the Economy, *Federal Regulation: Roads to Reform*, ch. 5 (1979); S. 1545, *Accountability in Regulatory Rulemaking Act of 1979*, 96th Cong., 1st Sess. (1979); S. 2147, *The Regulatory Flexibility and Administrative Reform Act of 1979*, 96th Cong., 1st Sess. (1979), reprinted in 125 Cong. Rec. S. 19040 (daily ed. Dec. 18, 1979); and S. 1291, *The Administrative Practice and Regulatory Control Act of 1979*, 96th Cong., 1st Sess. (1979)).

issued the executive order pursuant to powers granted by statute.²⁴⁴ Moreover, Congress could also ensure that the President's role is unreviewable, just as it has in the past.²⁴⁵

Conversely, Congress could deploy presidential role specification to decentralize the executive branch, particularly if Congress disapproves of presidential administration that leads agencies to warp their adherence to affirmative mandates²⁴⁶ or contravene the justificatory and procedural requirements of superstatutes.²⁴⁷ As Paul Verkuil has noted, "the statutory grant of clear power to determine policy in the President and his staff [could] limit that power in a substantively restrictive and procedurally burdensome manner."²⁴⁸

In this way, Congress could use presidential role specification to reinforce structural separation. The legislature should proceed carefully, depending on the role it wishes the President/political leadership to take on. For instance, it could require a President to serve only a consultative, as opposed to a directive, role in administration, as a way to counteract the Supreme Court's measures chipping away at for-cause removal protections.²⁴⁹ Congress might also temper presidential intervention in policymaking by requiring that it occur only in consultation with agency officials. Furthermore, the legislature could limit political interference in adjudication just as easily as it delegated to Presidents the authority to engage in *ex parte* influence in the past.²⁵⁰

2. Judicial and Agency Arbitration of Administrative Discretion

To evaluate and ameliorate the negative impact of presidentialism on the administrative execution of statute, this Section advises that the judiciary not only limit administrative efforts to alter or expand their statutory jurisdiction resulting from political pressure, as it has done in the past,²⁵¹ but also evaluate closely the impact of presidentialism on the exercise of administrative authority.

As an initial matter, if courts are interested in walking back, calibrating or even simply rationalizing the President's reach, they might engage in comparisons of constitutional power. For instance, courts could choose, as a matter of practice, to

²⁴⁴ *Karpova*, 497 F.3d at 270. In this case, "[t]reasury regulations [were] put into place to implement an executive order that imposed economic sanctions on Iraq; the executive orders were themselves authorized by the Iraqi Sanctions Act of 1990." Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1122 (2009) (analyzing *Karpova*).

²⁴⁵ See *supra* note 237 and accompanying text.

²⁴⁶ See *supra* Part I.A.

²⁴⁷ See *supra* Part I.B.

²⁴⁸ *Id.* at 984 (arguing further that Congress could "offer the President less power over executive agencies than he currently enjoys under article II").

²⁴⁹ Bijal Shah, *The President's Fourth Branch*, GEO. WASH. L. REV. (forthcoming); Bijal Shah, *Expanding Presidential Influence on Agency Adjudication*, PENN REG REVIEW (July 23, 2021) (discussing the Supreme Court's efforts to chip away at for-cause removal protections, particularly those that impact administrative adjudicators).

²⁵⁰ See Verkuil, *supra* note 243, at 982 (listing legislation that has increased the opportunity for Presidents to intervene in formal agency processes).

²⁵¹ See *supra* Part II.B.

acquiesce to presidential administration only after explicit consideration of how the President's constitutional power and responsibilities square with the legislature's constitutional authority.

More specifically, courts could more consider more explicitly whether Congress intended to allow the President to direct the agency to shift the areas of regulation determined by the agency's enabling act. In some cases, such an approach might yield a standard for determining the legitimacy of presidentialism. As of now, it may be so that courts determine the legitimacy of agency action resulting from presidential administration based on the composition of judges or their support for particular policy outcomes. For instance, Michael Herz argues, in regard to *FDA v. Brown & Williamson*, that "the result was driven by the individual Justices' sympathy, or lack thereof, toward the FDA's undertaking."²⁵² To the extent this is a problem²⁵³ for any case discussed in Part I.B, mechanizing the judicial balancing of presidentialism against statutory purpose could reduce ex post policymaking by courts.²⁵⁴ Furthermore, if Congress becomes aware that courts are interested in this matter in any capacity, they might begin to legislate more precisely, as suggest in the previous Section.

Previous cases come close, but not close enough, to the type of evaluation courts might undertake. For instance, in *Brown & Williamson Tobacco Corp.*,²⁵⁵ both the majority and the dissent fail to consider whether Congress intended to allow the President to direct the FDA's regulatory jurisdiction. And while the *Brown & Williamson* majority does a deep dive into the details of legislative intent, it does not forefront a consideration of the legitimacy of presidentialism within the statutory scheme at issue.

Likewise, in *American Lung*, the majority does not assess the President's role in the agency's policymaking. It makes an oblique reference to presidentialism by declaring that "[t]he EPA here 'failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law'."²⁵⁶ However, its analysis would have benefitted from more explicit recognition of the President's aims and an effort to evaluate whether presidentialism is consistent with it the requirements of legislation.

²⁵² Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 346 (2004).

²⁵³ Thomas W. Merrill, *Legitimate Interpretation—or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1400 (2020) ("The best way to preserve the legitimacy of courts and other adjudicators, this Article contends, is to assess the performance of these institutions in terms of norms of legitimate dispute resolution, not legitimate law declaration.").

²⁵⁴ See generally Shah, *supra* note 187 (discussing ways in which courts engage in agency action).

²⁵⁵ See notes 160-176 and accompanying text (discussing the purposivist approach of this decision)

²⁵⁶ *Id.* at *46 (citation omitted). After all, "Trump's [own] administration concluded that 'Earth's climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities.'" *Id.* at *27 (citing U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME II: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES (REPORT-IN-BRIEF) 24 (2018).) Further cementing the need for climate change regulation, "[t]he administration added that 'the evidence of human-caused climate change is overwhelming and continues to strengthen,'" and "the impacts of climate change are intensifying across the country [and that c]limate-related changes in weather patterns and associated changes in air, water, food, and the environment are affecting the health and well-being of the American people, causing injuries, illnesses, and death.'" *Id.*

The closest this decision comes to balancing these sets of interests is in Judge Walker's concurrence. First, Judge Walker exhorts the political accountability and majoritarianism that hews to the legislative process,²⁵⁷ and advocates for legislative supremacy in policymaking.²⁵⁸ Moving on, he declares: "In its clearest provisions, the Clean Air Act evinces a political consensus."²⁵⁹ And like the majority, he gestures to the corrupting influence of presidentialism: "if ever there was an era when an agency's good sense was alone enough to make its rules good law, that era is over."²⁶⁰

In this way, he displays skepticism that agencies, under the corrupting influence of the President, have the capacity to engage in statutory interpretation that honors the hard-won results of the legislative process. A related implication of his statements is that Congress could not have intended for presidentialism to corrupt agencies' "good sense" application of statute.

More generally, courts might also constrain administrative efforts to pursue the President's promises when there is a clear lack of existing statutory law adequate to justify the agency's actions. One lightning rod of an example is the possibility that the FTC has begun to act and regulate beyond the scope of its authority;²⁶¹ if so, courts might rein in this agency. Other examples include both the Biden and Trump administrations' efforts to protect those with preexisting conditions²⁶² and lower the price of prescription drugs,²⁶³ both of which may require either changes to the Affordable Care Act or to Medicare provisions, or new legislation altogether that authorizes agencies to implement relevant measures in a comprehensive and meaningful way.²⁶⁴ In a related example, the Department of Health and Human Services, at the urging of the Trump Administration, has proposed a requirement that all regulations expire automatically unless agencies conducts a retrospective review of each regulation.²⁶⁵ While this proposal merits attention primarily for its potential violation of

²⁵⁷ "To guard against factions, legislation requires something approaching a national consensus [and] must survive bicameralism and presentment. Only through that process can ideologically aligned states use federal power to impose their will on the unwilling...In that process, each political institution probes legislative proposals from the perspective of different constituencies. The point is: It's difficult to pass laws — on purpose." *American Lung Assoc. v. EPA*, No. 19-1140 at **3 (Jan. 2021) (Walker, J., concurring/dissenting).

²⁵⁸ "Congress decides what major rules make good sense." *Id.* at **15. For a discussion of the implications of Judge Walker's statements for the major questions doctrine, see *infra* notes 342-344 and accompanying text.

²⁵⁹ *Id.* at **4.

²⁶⁰ *Id.* at **15.

²⁶¹ See *supra* notes 138-140 and accompanying text.

²⁶² See *supra* note 141 and accompanying text.

²⁶³ See *supra* notes 142-144 and accompanying text.

²⁶⁴ See Waldrop & Rapfogel, *supra* note 143 (suggesting that the recent executive order on lowering the costs of prescription drugs is a presidential effort to "circumvent Congress"); *c.f.* Amy Goldstein et al., *Trump pledges to send \$200 drug discount cards to Medicare recipients weeks before election; funding source unclear*, WASH. POST (Sept. 24, 2020) (suggesting that there is no legal funding source for a recent Trump Administration promise to "\$200 discount cards to 33 million older Americans to help them defray the cost of prescription drugs").

²⁶⁵ *Securing Updated and Necessary Statutory Evaluations Timely (SUNSET)*, 21 CFR 6 (Jan. 19, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00597.pdf>. "The Trump

the APA's arbitrary and capricious standard,²⁶⁶ courts should also evaluate whether there is adequate legislative authority for this proposal.

In one more example, President Trump has issued an Executive Order that renders civil servants subject to at-will removal,²⁶⁷ which he declares to be a "faithful execution of the law."²⁶⁸ This order undercuts the Pendleton Civil Service Reform Act.²⁶⁹ Accordingly, the judiciary should also be careful not to approve of a new category of unprotected bureaucrat if this category is not in keeping with the Pendleton Act's limitation of the patronage system.²⁷⁰

This is not to say that Presidents cannot or should not direct the scope of policy, only that presidentialism must occur within the constraints of statute and, ideally, include a genuine effort to uphold the legislature's preferences. For instance, if a rule is interpretative, it may be directed by the President without undercutting the underlying statute.²⁷¹ In addition, "[w]here the President has discretion not to enforce...he can announce rules to be used in the exercise of that discretion."²⁷²

More specifically, Presidents may specify how to prioritize the enforcement of a statutory mandate, given the realities of a limited pool of resources.²⁷³ Consider Obama's Deferred Action for Childhood Arrivals (DACA) policy.²⁷⁴ On the one hand, as noted earlier, it was initiated after the President Obama trumpeted an intention to work around

administration has drafted a proposal that would make many government regulations automatically expire after 10 years unless government agencies undertook a formal process to renew them." Steve Usdin, *Trump administration considering 10-year sunset for all rules*, BIOCENTURY (Oct. 23, 2020), available at <https://www.biocentury.com/article/631364>; see also Mia Cabello, *The Midnight Regulation to End Regulations*, PENN. REG. REV. (Dec. 21, 2020), <https://www.theregreview.org/2020/12/21/cabello-midnight-regulation-end-regulations/>.

²⁶⁶ See text accompanying *supra* notes 405-408.

²⁶⁷ See *supra* note 145 and accompanying text.

²⁶⁸ "Faithful execution of the law requires that the President have appropriate management oversight regarding this select cadre of professionals..." *Executive Order on Creating Schedule F In The Excepted Service* (October 21, 2020) (emphasis added), available at <https://www.whitehouse.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/>.

²⁶⁹ See *supra* note 149 and accompanying text.

²⁷⁰ Rebecca Beitsch, *Trump sued over 'partisan' order stripping some civil service protections*, THE HILL (Oct. 27, 2020) ("The suit asks courts to block the executive order, arguing that Trump is bypassing a congressional role.").

²⁷¹ In *Alina Health Services*, the Court resolved a circuit court split in which more than one circuit suggested "that notice and comment wasn't needed in cases like this"—in other words, cases involving the interpretation of Medicare provisions. *Alina Health Servs.*, 139 S. Ct. 1804 at 1805 (citing *Christi Regional Medical Center, Inc. v. Leavitt*, 509 F.3d 1259, 1271, n. 11 (10th Cir. 2007) and *Baptist Health v. Thompson*, 458 F.3d 768, 776 n. 8 (8th Cir. 2006) as examples of cases mentioning this principle, albeit in passing).

²⁷² Prakash, *supra* note 80 at 116.

²⁷³ See *id.* at 240 (noting that the discretion "enjoyed by presidents" under the Constitution includes the power to "influence which laws will be enforced through the allocation of scarce funds"). "Put another way, by passing many laws and supplying insufficient funds to 'fully' enforce them against violators, actual and alleged, Congress implicitly delegates the setting of enforcement priorities to the executive." *Id.* at 240-41.

²⁷⁴ See Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. 115, 116 (2013) (arguing that the Obama Administration's setting of immigration enforcement policies did not suspend or dispense of any law).

legislation,²⁷⁵ and recently decried by a federal court as “illegal.”²⁷⁶ One the other hand, both the Obama- and Biden-era memos outlining and implementing immigration policies offer justifications such as the need to prioritize enforcement resources.²⁷⁷ As Goldsmith and Manning note regarding the execution of law, “[s]ome prosecutorial discretion is inevitable; if the executive cannot plausibly enforce the law against all who violate it, then enforcement agencies must set prosecution priorities.”²⁷⁸ According, it has been widely argued that, rather than subverting legislation, the DACA policy was “grounded [in the] constitutionally rooted prosecutorial power of the president.”²⁷⁹

As the recent DACA case continues through the appeals process, courts could use this case as vehicle to consider whether presidentialism serve agencies’ fulsome execution of the law, or whether it constitutes, in fact, an effort to pervert agencies’ legal authority. The judiciary could be convinced that that the DACA policy “advance[s] a series of purposes consistent with Congress’s broad public policy objectives.”²⁸⁰ If Biden is able to cast DACA—or future policies that involve enforcement discretion, as in the recent 100-day moratorium on certain deportations²⁸¹—“not as in conflict with Congress, but as fulfilling the purposes of existing law in a manner consistent with the principal-agent model,”²⁸² it could succeed in showing the courts that these enforcement priorities are consistent with statute and evince a faithful execution of the law.

The Biden policy “pausing” new gas and oil leases²⁸³ offers another, albeit more difficult, case study for the exercise of administrative discretion. Unlike DACA, the argument that this new fossil fuels policy is consistent with the purpose of law does not rest on the inevitability of prosecutorial discretion. Rather, the agency argues that the authority to pause is “‘committed to agency discretion by law’ under OCSLA and under MLA,” as part of the agency’s discretion to government contracts and everyday

²⁷⁵ See *supra* notes 121-126 and accompanying text.

²⁷⁶ *Texas v. U.S.*, No. 1-18-CV-00068 (S.D. Tex. Jul. 16, 2021); see *supra* notes 129-136 and accompanying text.

²⁷⁷ Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) (framing the policy as “measures” that are “necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities”), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>

²⁷⁸ Goldsmith & Manning, *supra* note 21, at 1863-64 (identifying the DACA policy as an acceptable exercise of prosecutorial discretion under the Take Care clause).

²⁷⁹ Peter M. Shane, *Administrative Law To The Rescue?*, BALKINIZATION (Dec. 8, 2020), at <https://balkin.blogspot.com/2020/12/administrative-law-to-rescue.html>. “The Take Care Clause empowers the President “to engage in prosecutorial discretion—a power that, as recent events have shown us, may give the President room to reshape the effective reach of laws enacted by Congress.”

²⁸⁰ See Shane, *supra* note 279 (arguing that the Obama-era DACA policy “could also have been shown to advance a series of purposes consistent with Congress’s broad public policy objectives”).

²⁸¹ See *supra* notes 112-119 and accompanying text.

²⁸² Shane, *supra* note 279 (noting that the Obama “[a]dministration could have cast both DACA and DAPA not as in conflict with Congress, but as fulfilling the purposes of existing law in a manner consistent with the principal-agent model.”).

²⁸³ See *supra* notes 103-111 and accompanying text.

operations.²⁸⁴ Eric Biber and Jordan Diamond suggest that this could mean that the agency’s discretionary authority logically and lawfully extends to managing—and even canceling—fossil fuel leases and contracts.²⁸⁵ However, they also “emphasize that this argument is not a slam-dunk—there are strong counterarguments in the legislative history, the caselaw, and the structure of the MLA.”²⁸⁶ In other words, this Biden oil and gas “pause” policy does not appear to further the purpose of the statute that the agency claims gives it the authority to engage in the policy in the first place.

A more successful argument for a policy that allows such pauses for the express purpose of preventing fossil fuel development on public lands would be one that finds purchase in the purpose of a legislative scheme. In this vein, the agency could argue that it has discretion to engage in this policy under the Endangered Species Act, which might require the agency to go even further to prohibit environmental damage caused by fossil fuels,²⁸⁷ or in the Federal Land Policy and Management Act, which requires the agency to “prevent unnecessary or undue degradation” of public lands. As to the latter statute, the agency could conclude that the greenhouse gas emissions from fossil fuels implicate this legislation “by contributing to climate change.”²⁸⁸ If so, the statute would “trigger a nondiscretionary duty to stop that degradation by canceling the leases” that produce greenhouse gas emissions.²⁸⁹

In addition, agencies have long been the entities that mediate between the President’s broad agenda and the requirements and intentions of the law they are tasked with executing, but these efforts to mediate are subjugated by political interests. In this vein, an agency might *itself* consider whether a presidential request or even directive is something the agency has the authority to implement pursuant to legislation.²⁹⁰ And if not, the agency could decline to implement the President’s initiative in order to remain lawful. In doing so, the agency would offer an incentive to the President to identify existing legislation or initiate new legislation to support her preferred regulatory outcomes.

For example, under the Trump administration, an agency may have resisted implementing an unlawful policy despite political pressure, although it ultimately succumbed to some degree. In pursuit of President Trump’s “Blueprint to Lower Prescription Drug Prices,”²⁹¹ the Department of Health and Human Services initiated a rulemaking docket titled “HHS Blueprint to Lower Drug Prices and Reduce Out-of-

²⁸⁴ *Louisiana v. Biden*, 2021 WL 2446010, at *11 (W.D. La. June 15, 2021).

²⁸⁵ Eric Biber & Jordan Diamond, *Keeping It All In the Ground?*, 63 ARIZ. ST. L. REV. 279, 298 (2021).

²⁸⁶ *Id.* at 303.

²⁸⁷ *See id.* at 307.

²⁸⁸ *Id.* at 308.

²⁸⁹ *Id.*

²⁹⁰ *C.f.* Jennifer Nou, *Agency Self-Insulation under Presidential Review*, 126 HARV. L. REV. 1755 (2013) (discussing how agencies self-insulate from presidential review to avoid various drawbacks, including the possibility of policy reversals); Shah, *supra* note 301 (discussing bureaucratic resistance that allowed agencies to refrain from unlawful behavior, despite the presidential pressure).

²⁹¹ *See supra* note 143.

Pocket Costs”²⁹² that requested information only²⁹³ and did not lead to any concrete policies, despite the fact that over 3,000 comments were received on that notice.²⁹⁴ On the one hand, the agency published a related document on its website²⁹⁵ and another, narrow rule on the matter.²⁹⁶ On the other hand, the agency initially declined to implement an expansive rule,²⁹⁷ perhaps because it could not find a legal pathway to implement the President’s promises without the requisite changes to legislation,²⁹⁸ although the agency eventually regulated a modest reduction to certain Medicare premiums a few years later.²⁹⁹

In this case, it appears that the agency was not interested resisting the President’s initiative, even if it was outside the scope of what the agency can accomplish under current law.³⁰⁰ But it is possible that an agency might. Agency attempts to assert the requirements of lawful administrative action vis-à-vis the political pressure could be ineffective, at least in the short term, given the President’s power to fire agency heads who dare to resist unlawful directives.³⁰¹ In the long-term, however, with the help of courageous political appointees and civil servants, administrative resolve to faithfully execute the law could become customary.

Courts, in their own right, could reinforce agency heads’ efforts to resist political pressure in order to more faithfully execute the legislation in contention, by reconsidering whether the exercise of administrative discretion—particularly if it has a significant impact on the implementation of law—is unreviewable. On the one hand, the Supreme Court has declared that when the President is directing an agency in her own

²⁹² HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs, 83 Fed. Reg. 22,692 (May 16, 2018), *available at* <https://www.federalregister.gov/documents/2018/05/16/2018-10435/hhs-blueprint-to-lower-drug-prices-and-reduce-out-of-pocket-costs>

²⁹³ “Through this request for information, HHS seeks comment from interested parties to help shape future policy development and agency action.” *Id.*

²⁹⁴ Regulation to Require Drug Pricing Transparency CMS-4187-P, *available at* <https://beta.regulations.gov/docket/CMS-2018-0123/unified-agenda>

²⁹⁵ “Report on 100 Days of Action on the American Patient First Blueprint,” *available at* https://www.hhs.gov/sites/default/files/ReportOn100DaysofAction_AmericanPatientsFirstBlueprint.pdf

²⁹⁶ Medicare and Medicaid Programs; Regulation To Require Drug Pricing Transparency, 84 Fed. Reg. 20,732 (July 9, 2019), *available at* <https://www.federalregister.gov/documents/2019/05/10/2019-09655/medicare-and-medicaid-programs-regulation-to-require-drug-pricing-transparency> (requiring that the list price be mentioned on television advertisements for drugs); more information at <https://beta.regulations.gov/docket/HHS-OS-2018-0010>

²⁹⁷ “After touting the [Blueprint] policy for months, [Health and Human Services] eventually declined to issue regulations implementing it.” Waldrop & Rapfogel, *supra* note 143 (“The fact that drug companies are sitting on the edge of their seats waiting for the administration to put a plan in place doesn’t mean a plan will evolve quickly. It clearly won’t.”); *see also* Barlas, *supra* note 144.

²⁹⁸ *See supra* note 144 (discussing how the head of HHS conceded that the agency’s authority to pursue these measures would be better supported by additional legislation).

²⁹⁹ Modernizing Part D and Medicare Advantage To Lower Drug Prices and Reduce Out-of-Pocket Expenses, 84 Fed. Reg. 23,823 (Jan. 1, 2020).

³⁰⁰ Noting that the head of HHS would “welcome legislation eliminating the 100% cap on drug rebates imposed under the Patient Protection and Affordable Care Act, ‘which would create a significant disincentive for drug companies to raise list prices.’” Barlas, *supra* note 144.

³⁰¹ *See* Bijal Shah, *Civil Servant Alarm*, 94 CHICAGO-KENT L. REV. 627, 643-45 (2019) (noting the incident in which Attorney General Sally Yates was fired by the Trump administration for noting that an immigration directive might be unlawful).

capacity, her exercise of discretion is not reviewable under the agency's enabling statute.³⁰² On the other hand, the D.C. Circuit has noted that even if an agency is acting at the behest of the President, it acts under its own auspices—or rather, the requirements of legislation—and therefore, is still subject to judicial oversight.³⁰³ According to the D.C. Circuit, even if an agency head “were acting at the behest of the President, this ‘does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.’”³⁰⁴

Finally, when changes in administration occur, agencies should also revisit policies directed by the previous president to ensure they adequately fulfil statutory aims. Furthermore, the President herself might support or even lead administrative attempts to balance her demands against the requirements of statute. The Biden administration appears to have empowered agencies to engage in such efforts. On the one hand, directing agencies to reevaluate regulation may be driven by the ultimate goal of pursuing certain policy outcomes. On the other hand, these sorts of directives may reconcile presidentialism and legislation by allowing the President to pursue her partisan policy interests while also encouraging agencies to investigate the quality and legitimacy of the regulatory fulfillment of statutory purposes.

For instance, a recent Biden directive invites the agency to revisit its policies³⁰⁵ and rules to ensure that they adequately implement the Title X statute.³⁰⁶ In another directive, the Secretary of Housing and Urban Development (HUD) is directed to examine the effects of Trump-era regulations and HUD's policies more generally “on

³⁰² See, e.g., *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112-113 (1948) (holding that President's discretion under the Civil Aeronautics Act to approve certain decisions of the Civil Aeronautics Board is not subject to judicial review under statute because President's decision in this context “derives its vitality from the exercise of unreviewable Presidential discretion”).

³⁰³ See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

³⁰⁴ *Chamber of Commerce*, 74 F.3d at 1322. In *Chamber of Commerce v. Reich*, the D.C. Circuit condemned the President's directive on the ground that it was preempted by statutory authority—in this case, the National Labor Relations Act. *Id.* at 1399. There is disagreement as to whether such preemption is an improper restriction on presidential power or whether judicial review and the subsequent restriction of presidential power in this context is justified to ensure that the President does not push agencies to exceed their congressionally-delegated power. Compare Charles Thomas Kimmitt, *Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in Chamber of Commerce v. Reich*, 106 YALE L.J. 811, 832 (1996) to Gordon M. Clay, *Executive (Ab) Use of the Procurement Power: Chamber of Commerce v. Reich*, 84 GEO. L.J. 2573, 2574-75 (1996).

³⁰⁵ Memorandum on Protecting Women's Health at Home and Abroad, Daily Comp. Pres. Docs., 2009 DCPD no. 202100098 (January 28, 2021) (revoking “The Presidential Memorandum of January 23, 2017 (The Mexico City Policy)”). The Mexico City Policy, which limited the funding of nongovernmental organizations that provide abortion-related services or counsel, were initially announced by President Reagan in 1984, “rescinded by President Clinton in 1993, reinstated by President George W. Bush in 2001, and rescinded by President Obama in 2009” before President Trump reinstated them in 2017. *Id.*

³⁰⁶ See *id.* (directing the Secretary of Health and Human Services to review the “Title X Rule” promulgated by the Trump administration and any other regulations that might interfere with the proper implementation of Title X of the Public Health Services Act, 42 U.S.C. 300 to 300a-6, which “provides Federal funding for family planning services that primarily benefit low-income patients.”)

HUD's statutory duty to ensure compliance with the Fair Housing Act."³⁰⁷ In one more directive, the President seeks to clarify the "requirements of the National Firearms Act."³⁰⁸ An executive order directs the Department of Education to ensure compliance with Title IX as it relates to discrimination on the basis of sexual orientation and gender identity.³⁰⁹ And another executive order seeks to ensure regulatory consistency with Medicaid and the Affordable Care Act.³¹⁰

The Title X initiative is motivated by an interest in ensuring that low-income patients are not denied support in instance where they might be contemplating abortion or related matters,³¹¹ However, it also encourages the agency to reconsider its policies to ensure that they fit more squarely with the statutory requirements and intent of Title X. The Fair Housing directive makes clear that its intention is to ensure full administrative compliance with the intentions of the statute.³¹² The gun control initiative, while motivated by an interested in limiting gun use and violence, could facilitate the Bureau of Alcohol, Firearms, Tobacco and Explosives in better understanding its obligations under the National Firearms Act.³¹³ The executive order concerning anti-LGBT discrimination directs the Department of Education to review a rule promulgated under the Trump Administration³¹⁴ "and any other agency actions taken pursuant to that rule, for consistency with governing law, including Title IX,"³¹⁵ in particular, as it relates to a recent Supreme Court decision.³¹⁶ In addition, the Biden executive order on Medicaid

³⁰⁷ Memorandum on Redressing our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487 (January 29, 2021)

³⁰⁸ Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic (Apr. 7, 2021), *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/>

³⁰⁹ Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, Exec. Order No. 14, 021, 86 Fed. Reg. 13803 (March 8, 2021); Tovia Smith, *Biden Begins Process To Undo Trump Administration's Title IX Rules*, NPR (March 10, 2021), <https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules>.

³¹⁰ Strengthening Medicaid and the Affordable Care Act, Exec. Order No. 14, 009, 86 Fed. Reg. 7793 (8, 2021).

³¹¹ *See generally* Memo on Protecting Women's Health at Home and Abroad, *supra* note 305.

³¹² *See* Memo on Redressing our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, *supra* note 307 ("Based on that examination, the Secretary shall take any necessary steps, as appropriate and consistent with applicable law, to implement the Fair Housing Act's requirements that HUD administer its programs in a manner that affirmatively furthers fair housing and HUD's overall duty to administer the Act (42 U.S.C. 3608(a)) including by preventing practices with an unjustified discriminatory effect.").

³¹³ *See* Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic, *supra* note 308.

³¹⁴ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30026 (May 19, 2020).

³¹⁵ *See* Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, *supra* note 309 at 13803-4.

³¹⁶ Department of Education, Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021), ("Consistent with the Supreme Court's ruling and analysis in *Bostock*, the Department interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity.") (citing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)).

seeks “to review waivers issued under the prior administration that ‘may reduce coverage under or otherwise undermine Medicaid’ and the Affordable Care Act.”³¹⁷ For now, the Supreme Court has accepted the Biden Administration’s efforts to make its policy more consistent with these two legislative schemes.³¹⁸

3. Parsing Presidentialism via *Chevron* and the Major Questions Doctrine.

Continuing in the vein of evaluation and balance, this Section suggests that courts apply *Chevron* and the major questions doctrine to determine whether administrative submission to the President is consistent with the statutory preferences and to motivate agencies to prioritize the latter.

Notably, *Chevron* calls for deference to presidential preferences:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices...resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute...³¹⁹

Building on this further, Kagan argued that if administrative statutory interpretation has been influenced by the President, it is more deserving of *Chevron* deference than if the President were not involved.³²⁰ However, the Supreme Court has both affirmed³²¹ and expressed skepticism of³²² administrative statutory interpretation informed by the President.

³¹⁷ Jonathan Shin, *U.S. Supreme Court Removes Oral Arguments Over State Medicaid Work Requirements from Calendar*, JDSUPRA (March 18, 2021), <https://www.jdsupra.com/legalnews/u-s-supreme-court-removes-oral-9821606/>; see also *Strengthening Medicaid and the Affordable Care Act*, *supra* note 310.

³¹⁸ *Id.*

³¹⁹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 104 S. Ct. 2778, 2793 (1984).

³²⁰ See, e.g., Kagan, *supra* note 12, at 2372 (“A sounder version of [*Chevron*] would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.”)

³²¹ See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005) (accepting W. Bush Administration’s changed interpretation of the Telecommunications Act of 1934); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) (permitting the Clinton Administration’s new interpretation of the National Banking Act); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (1993) (upholding the Secretary of Health and Human Service’s interpretation, which reflected the interests of President George W. Bush, of Title XVIII of the Social Security Act); *Rust v. Sullivan*, 500 U.S. 173, 187-89 (1991) (finding that the changed interpretation of Title X by the Reagan and Bush Administrations withholding funding from providers who engage in abortion-related activities was “amply justified” with a “reasoned analysis”).

³²² See, e.g., *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2013) (affirming George W. Bush Administration’s, and not the Obama Administration’s, reading of the Alien Tort Statute); *Levin v. United States*, 568 U.S. 503 (2013) (disagreeing with “the freshly minted revision,” by the Obama Administration, of how to reconcile the Gonzales Act with the Federal Tort Claims Act); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 91-93 (2013); Transcript of Oral Argument at 32, *U.S. Airways*, 569 U.S. 88 (No. 11-1285) (displaying Justice Roberts’s disapproval of change in statutory interpretation based on a change in administration: “I think it would be more candid for your office to tell us when there is a change in position, that it’s not based on further reflection of the Secretary. It’s not that the Secretary is now of the

In addition, critics of *Chevron* have charged that it leads judges away from determining how agencies can best follow statutory text and congressional intent,³²³ and some have also taken the view that statutory interpretation influenced by the President is less likely to reflect the legislature's preferences. In 1981, Justice Powell suggested, in a Supreme Court decision, that if an agency changes its statutory interpretation in response to presidential influence, the new interpretation "is entitled to considerably less deference."³²⁴ Thirty years later, the Seventh Circuit decried shifting political influence on administrative statutory interpretation as "making a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them, since that principle is based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose."³²⁵ Before his confirmation, now-Justice Kavanaugh argued that "*Chevron* encourages the Executive Branch...to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."³²⁶ Peter Shane has likewise suggested that an interpretation of statute that "fluctuate[s] based on the preferences of a majority of the President's electoral supporters" cannot be squared with legislative intent.³²⁷

The judiciary remains split on the matter. On the one hand, the Ninth Circuit refused recently in *E. Bay Sanctuary Covenant* to give *Chevron* deference to an agency's interpretation of the Immigration and Naturalization Act directed by President Trump because the interpretation was in conflict with the Act.³²⁸ On the other hand, in *Little Sisters of the Poor*, the Supreme Court accepted an administrative interpretation of the Affordable Care Act directed by the same president.³²⁹ More specifically, the Supreme Court implies that the statute clearly allows for the agency's new policy, issued at President Trump's direction, allowing employers to opt out of providing no-cost contraceptive coverage under the Affordable Care Act,³³⁰ despite the fact that the Third

view—there has been a change") *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215 (1988) (refusing to abide by the Reagan Administration's recently switched position that underlying statute did not permit the promulgation of the retroactive Medicare cost-limiting rules); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (determining that conflicting interpretations of "well-founded fear" in asylum law from the Johnson to the Reagan Administrations were entitled to little deference).

³²³ See, e.g., Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. (forthcoming 2021) (arguing that *Chevron* should not be applied to the outcomes of immigration adjudications); Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397 (2018) (arguing against the idea that agencies deserve greater deference for statutory interpretation that has the President's fingerprints on it).

³²⁴ *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

³²⁵ *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590 (7th Cir. 2012).

³²⁶ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016).

³²⁷ Peter M. Shane, *Chevron Deference, The Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 698-99 (2014).

³²⁸ See *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (declaring that a new regulation, issued pursuant to a presidential proclamation, is in direct conflict with the Immigration and Naturalization Act and therefore not entitled to deference under *Chevron*).

³²⁹ *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ____ (2020).

³³⁰ See *id.* see also *id.* at 64 (Kagan, J., concurring) (arguing that both the majority and dissent are incorrect that the statute is clear).

Circuit affirmed a grant of preliminary injunction against the agency rule because it considered the interpretation to be at odds with the statute itself.³³¹

To be clear, the Supreme Court did not engage in a deference analysis, although the concurrence argued that it should have.³³² Superficially, the Supreme Court simply disagreed with the Third Circuit's interpretation of statute. But the Court's decision also indicates its tolerance for presidential control over administrative statutory interpretation, given President Trump's well-known interest in a policy exempting employers from contraceptive coverage,³³³ and his directive to expand the exemption to include not only religious, but also "moral" objectors.³³⁴

The judiciary might consider resolving this ambivalence regarding the wisdom of deferring to statutory interpretation influenced by political considerations. More specifically, courts could draw on *Chevron* to limit presidentialism particularly when it interferes with a purposes of the legal scheme at issue, just as the Third Circuit did in *Little Sisters*.³³⁵

Note that such an approach does not require a "best" reading of statute. Rather, it requires a nuanced reading, as opposed to reading with an eye toward interpreting statute in a manner that furthers the President's preferences. With this in mind, courts might evaluate both the leveraging of presidential pressure and application of expertise to determine which of the two, or which combination of the two, should be prioritized in the policymaking scheme at issue. Even more simply, courts might view with skepticism administrative policies that cut against the purposes of a statutory scheme, such as the limitation of access to reproductive care under a law that seeks to expand access to healthcare.

This combined approach could impact the application of *Chevron* Step One and Step Two. As to the former, if courts determine that legislation has an unequivocal set of substantive purposes, or otherwise intends an agency to act on the basis of expertise, and instead the agency followed the President's directives without regard for the orientation

³³¹ *Pennsylvania v. President of the United States*, 930 F.3d 543, 558 (3d Cir. 2019) (affirming the grant of preliminary injunction against agency rule allowing, at President Trump's direction, employers to opt out of providing no-cost contraceptive coverage under the Affordable Care Act). "Nowhere in the enabling statute did Congress grant the agency the authority to exempt entities from providing insurance coverage for such services...." *Id.*

³³² "Try as I might, I do not find...clarity in the statute....But *Chevron* deference was built for cases like these. *Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme." *Little Sisters of the Poor*, 591 U.S. ___ at 64 (Kagan, J., concurring) (citations omitted).

³³³ "Just four months after taking office, President Trump, speaking in the Rose Garden, congratulated the Little Sisters for having 'just won a lawsuit' and that their 'long ordeal w[ould] soon be over.'" Tanner J. Bean & Robin Fretwell Wilson, *The Administrative State as a New Front in the Culture War: Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, CATO SUP. CT REV. (2020).

³³⁴ "In one of its first actions, [the Trump] administration issued interim final rules, later finalized, that kept the coverage mandate, but exempted not only all religious objectors but also moral objectors." *Id.*

³³⁵ See *supra* note 331 and accompanying text.

of the statute, the administrative interpretation in question might fail the Step One requirement of statutory ambiguity. Likewise, in situations in which the legitimacy of a policy depends on technical analysis, if an agency acts with blind faith in the President, courts might choose to apply Step Two with more teeth than usual.³³⁶

Finally, it is worth considering a reformulation of the major questions doctrine that would allow courts to confront the deficiencies of administrative statutory interpretation shaped by the President.³³⁷ Per “major questions” (or “major rules”) doctrine, “an agency can issue a major rule—i.e., one of great economic and political significance—only if it has clear congressional authorization to do so.”³³⁸ In other words, by invoking major questions doctrine, courts may choose not to apply the *Chevron* framework in the first instance, based on the determination that the legislature could not have intended the agency to be the arbiter, under any circumstances, of a significant constitutional or policy question.³³⁹ As then-Judge Kavanaugh admitted in his *U.S. Telecom Ass'n v. FCC* dissent, “the conclusion that a rule is major ‘has a bit of a ‘know it when you see it’ quality,” which Blake Emerson argues constitutes “an open-ended judgment call that could doom agency action in the absence of a crystal-clear statutory mandate.”³⁴⁰ This suggests that all roads lead back to the suggestions in Part II.B.1 of the instant Article, which argues for more legislative specificity to resolve the legitimacy of presidentialism.

In the absence of this, on the one hand, major questions analysis could be applied feasibly to allow “courts to strike down regulations the Administration [does] not favor for policy-based reasons,”³⁴¹ instead of serving as a form of nonpartisan oversight over presidential administration. On the other hand, the major questions doctrine could be complementary to legislative specification, if courts apply the doctrine to preserving the primacy of legislative purpose (as opposed to judicial preference), particularly in instances where the policy at issue has been heavily influenced by the President.

In his recent concurrence/dissent in *American Lung Association*, Judge Walker evinces an interest in expanding the major questions doctrine to further limit agencies’ ability to engage in statutory interpretation.³⁴² While some of this interest rests on anti-

³³⁶ See Shah, *supra* note 39, at 671 n.140 (“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 is upheld at that level.”) (citations omitted).

³³⁷ *C.f.* McGinnis & Rappaport, *supra* note 13, draft at 26 (suggesting that if the Supreme “Court applies the major questions doctrine vigorously, it will also help reduce polarization”).

³³⁸ *United States Telecom Ass'n v. Fed. Comm'n's Comm'n*, 855 F.3d 381, 383 (D.C. Cir. 2017).

³³⁹ See Shah, *supra* note 187, at 53 (discussing the major questions doctrine and its implications for *Chevron*).

³⁴⁰ Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2041 (2018) (citing *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

³⁴¹ Natasha Brunstein & Richard L. Revesz, *The Trump Administration's Weaponization of the "Major Questions" Doctrine*, PENN. REG REVIEW (May 2021).

³⁴² Over time, the Supreme Court will further illuminate the nature of major questions and the limits of delegation.” *American Lung Assoc. v. EPA*, No. 19-1140 at **16 (Jan. 2021) (Walker, J., concurring/dissenting).

administrativism,³⁴³ Judge Walker also implies that there are limits to the benefits of presidential intervention in administrative statutory interpretation, particularly to the extent it cuts against the potential for agencies to apply “good sense” in policymaking.³⁴⁴ This opinion highlights the potential (albeit unrealized, in this case) usefulness of this doctrine for staving off dogmatic agency adherence to the President’s values.

Otherwise, an explicit consideration of statutory purpose could serve as a proxy for balancing presidentialism against legislation. A thread of cases including *U.S. Telecom Ass’n v. FCC*,³⁴⁵ *Massachusetts v. EPA*³⁴⁶ and *FDA v. Brown & Williamson*³⁴⁷ suggests that even, or perhaps especially, when the President or political figures have had a major role in shaping administrative statutory interpretation,³⁴⁸ the Supreme Court will look to legislative frameworks first to determine the legitimacy of the agency’s interpretation of the law at issue. By making a nuanced determination about whether the agency’s policy comports with what legislation not only allows, but explicitly authorizes, courts can sidestep the need to evaluate the legitimacy of presidentialism in that context.

In *U.S. Telecom Ass’n*, the D.C. Circuit debates whether the agency’s action is explicitly authorized by statute. The dissent, penned by then-Judge Kavanaugh, argues that the “FCC’s net neutrality rule is a major rule, but Congress has not clearly authorized the FCC to issue the rule. For that reason alone, the rule is unlawful.”³⁴⁹ In response, Judges Srinivasan and Tatel asserts in their concurrence:

Our colleague [Judge Kavanaugh] submits that Supreme Court decisions require clear congressional authorization for rules like the net neutrality rule, and the requisite clear statutory authority, he argues, is absent here....Assuming the existence of the [major questions doctrine] and assuming further that the rule in this case qualifies as a major one so as to bring the doctrine into play, the question posed by the doctrine is whether the FCC has clear congressional authorization to issue the rule. The answer is yes. Indeed, we know Congress vested the agency with authority to impose obligations

³⁴³ “Congress decides what major rules make good sense. The Constitution’s First Article begins, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”...Thus, whatever multi-billion-dollar regulatory power the federal government might enjoy, it’s found on the open floor of an accountable Congress, not in the impenetrable halls of an administrative agency — even if that agency is an overflowing font of good sense.” *Id.* at **15-16.

³⁴⁴ See *supra* note 260 and accompanying text.

³⁴⁵ *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017); see also *supra* notes 97-102 and accompanying text.

³⁴⁶ *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007).

³⁴⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 158 (2000).

³⁴⁸ See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 *YALE L.J.* 1748, 1812 & 1812 n.310 (2021) (noting in regard to *U.S. Telecom Ass’n v. FCC* and *Brown & Williamson* that “[c]ases involving ‘major’ questions are, almost by definition, the cases in which political accountability is a meaningful possibility”).

³⁴⁹ *U.S. Telecom Ass’n*, 855 F.3d at 418 (Kavanaugh, J., dissenting).

like the ones instituted by the [FCC] Order [“Protecting and Promoting the Open Internet”] because the Supreme Court has specifically told us so.”³⁵⁰

Reasonable minds may disagree as to whether the concurrence’s determination was correct. The point here is that the major question fight in this case focused on the right inquiry: the scope and intention of legislative authorization on its own terms, not as negotiable for presidential purposes.

Likewise, in both *Mass. v EPA* and *Brown & Williamson*, cases in which the President was heavily involved in the policymaking at issue, the Supreme Court rebuked the agency for acting outside the scope of its delegated jurisdiction.³⁵¹ In this way, the Court limited the impact of presidentialism, even though it did not express an intention to do so.

4. Hard Look Review to Encourage Statute-Focused Execution

“Administrative law now features two main tendencies: presidential control of administration and a demand for comprehensive rationalization of administrative decision making.”³⁵² As to the former, courts have “long wrestled with whether presidential and political influence on agency expertise is justifiable.”³⁵³ To do so, they have applied the “Administrative Procedure Act’s (APA) arbitrary-and-capricious standard under ‘hard look’ review, which considers the quality of administrative decision-making”³⁵⁴ and often involves “judicial involvement in the minutiae of administrative expertise.”³⁵⁵

One area in which this standard has been liberally applied involves cases in which agencies change their policies in response to a new president. Scholars have suggested that such policy changes may be legitimate in some situations,³⁵⁶ and even more, that a “sounder version” of hard look “review would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.”³⁵⁷ Furthermore, from the Reagan presidency

³⁵⁰ *Id.* at 383 (citing *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005)).

³⁵¹ Shah, *supra* note 187, at 52-35 (noting that “*FDA v. Brown & Williamson* [and] *Massachusetts v. EPA* suggest that, under certain extraordinary circumstances or in regards to “major questions” often concerning matters of national import or the determination of agencies’ jurisdictions, courts can declare that Congress did not intend for agencies to interpret statute, even if the statute is ambiguous”) (citations omitted).

³⁵² Jerry Mashaw, *Is Administrative Law at War with Itself?* (work in progress) (arguing that “[a] consistent general theory of administrative legitimacy still eludes us” because of this tension), available at https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3688558&dgcid=ejournal_htmlmail_u.s.:administrative:law:ejournal_abstractlink.

³⁵³ Shah, *supra* note 187, at 1156.

³⁵⁴ Shah, *supra* note 187, at 1123.

³⁵⁵ *Id.* at 1136.

³⁵⁶ See, e.g., Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before A New President Arrives*, 78 N.Y.U. L. REV. 557 (2003); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 470-71 (1987) (“The disagreement [in *State Farm*] stemmed from contrasting views about the proper role of politics in the regulatory process).

³⁵⁷ Kagan, *supra* note 12, at 2372.

through today, courts have evaluated policy changes instigated by a new president under the arbitrary and capricious standard/hard look review, accepting these changes in some cases,³⁵⁸ while rejecting them in others.³⁵⁹

And yet, if agencies have truly acquiesced to legislative purpose, administrative policies should remain consistent across administrations. Accordingly, one substantive contribution of the well-known *State Farm* case, which introduced the rule that a policy change resulting from the transition to a new presidency need not be arbitrary and capricious, is the idea that “agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms.”³⁶⁰ Otherwise, as Thomas McGarity has suggested, “[w]hen the President or his staff can secretly intervene into any stage of the regulatory process, accountability suffers. An agency can usually manipulate its analysis and explanations of the existing data to fit a presidentially required outcome.”³⁶¹

This Section argues that the executive branch must evaluate what a statute requires,³⁶² instead of administering legislation based on a plan to pursue the President’s policy interests and an assessment of the President’s authorities developed in isolation from statutory law. Complimentarily, as executive control over administration grows ever more centralized, the executive branch as a whole must be required to strike a balance between the President’s and the legislature’s goals, and to identify and articulate its reasons for the balance that has been struck.

³⁵⁸ See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (validating a policy change initiated by the Reagan Administration); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (deciding that a changed policy on expletives in response to a presidential directive was not arbitrary and capricious, so long as there was an articulated reason); *Wyoming v. USDA*, 661 F.3d 1209, 1265 (10th Cir. 2011) (declaring that an agency’s decision to reverse course under a longstanding, but interim, rule at the request of President Clinton was acceptable, since the agency “indeed took a ‘hard look’ at the environmental consequences of the [rule] and therefore did not act arbitrarily and capriciously...”); *International Union v. Chao*, 361 F.3d 249 (3rd Cir. 2004) (declaring that agency decision, in response to directives from the Bush II Administration, not to promulgate a rule prioritized by the Clinton Administration was not arbitrary or capricious); see also Kathryn Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 20 (2009) (discussing *Chao*).

³⁵⁹ See, e.g., *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007) (explaining in depth why an agency’s decision denying a petition to regulate greenhouse gas emissions from motor vehicles was arbitrary and capricious); *Epsilon Elecs., Inc. v. United States Dep’t of the Treasury*, 857 F.3d 913 (D.C. Cir. 2017), *supra* note 245 (finding that the agency, acting under direction from the President, nonetheless failed to adequately explain why it discounted certain evidence in its decision); *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956 (9th Cir. 2015) (deciding that the agency did not provide a reasoned explanation for a change in policy under a new administration); *Nat. Res. Def. Council, Inc. v. U. S. Nuclear Regulatory Comm’n*, 685 F.2d 459, 467 (D.C. Cir. 1982) (finding the agency’s rule arbitrary and capricious because it “fail[ed] to allow for proper consideration of the uncertainties [and failed] to allow for proper consideration of the health, socioeconomic and cumulative effects”); see *id.* (Edwards, J. concurring) (noting President Reagan’s role in the decision to pursue the policy).

³⁶⁰ Watts, *supra* note 358, at 2.

³⁶¹ Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 *AM. U. L. REV.* 443, 456 (1987).

³⁶² See Bellia, *supra* note 188, at 1757 (arguing that the Take Care “clause calls for the President not merely to ensure that the laws be executed, but that they be *faithfully* executed”) (emphasis in original).

Arbitrary and capricious review may assist in these tasks. To be clear, “hard look” need not require the creation of a standard of review for the President’s actions, as scholars have suggested recently.³⁶³ Rather, courts would deploy the existing hard look framework while reviewing *agency* action to suss out both a) the existence of presidential intervention, and b) the extent to which this intervention disrupted the agencies’ wholehearted execution of legislation.

This suggestion is not meant to imply that the doctrine should be applied such that a whiff of, or even significant, political involvement would trigger hard look review. For instance, recently, in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, the D.C. Circuit refused to find a bump-stock rule impermissible even though it was the product of “naked political desire,” promulgated at the direction of President Trump.³⁶⁴ Rather, the court decided that the agency had a satisfactory explanation for the rule regardless of presidential involvement—namely, that the Gun Control Act anticipated that the Attorney General would regulate to ban dangerous firearms such as those with a bump-stock device, which were used to perpetrate the “Las Vega massacre” in 2017.³⁶⁵

Courts should consider the extent of the President’s influence, whether it fits within legislative expectations and—importantly—whether this influence led the agency to neglect considerations important to the purpose of the legislative scheme. In doing so, courts might be persuaded that the legislature intended policymaking to be shaped by strong political leadership, as in *Guedes*.³⁶⁶ But courts might also find that agencies, having acquiesced to the President’s preferences, have ignored the law’s expectations that they act with expertise or with other, non-political considerations.³⁶⁷

For example, in *Grace v. Barr*, the D.C. Circuit held last year that a proposed Department of Justice policy raising the bar for “credible fear” determinations pertaining to non-governmental actors (like gangs and abusive domestic partners) was arbitrary and capricious because the agency failed to provide a reasoned explanation for the change.³⁶⁸ The new policy issued from a politically-charged adjudication by Attorney General Jeff

³⁶³ See Manheim & Watts, *supra* note 18 (advocating for a coherent legal framework to guide judicial review of presidential orders); Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 896-99 (2019) (suggesting process-based and hard look review of presidential, as opposed to administrative, fact-finding); Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1938 (2016) (arguing that the “best arrow” to curtail presidential inaction in statutory enforcement is judicial review, “which oscillates between extreme deference and ‘hard look’ review, depending on the circumstances”).

³⁶⁴ 920 F.3d 1, 34 (D.C. Cir.), cert. denied, 140 S. Ct. 789 (2020).

³⁶⁵ See *id.* at 7-8.

³⁶⁶ See *id.* at 7-9. “Presidential administrations are elected to make policy,” the court notes more generally, “[a]nd ‘as long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.’” *Id.* at 34 (quoting *State Farm*) (citations omitted).

³⁶⁷ See, e.g., BARILLEAUX & KELLEY, *supra* note 188, at 116 (suggesting under President Clinton that “[f]aithfully executing the [National Defense Authorization Act] would require appointing someone with an extensive background ‘in national organizational management in appropriate technical fields, and . . . well qualified to manage the nuclear weapons non-proliferation and materials disposition programs of the newly-created’ Act.)

³⁶⁸ *Grace v. Barr*, No. 19-5013 (D.C. Cir. 2020).

Sessions,³⁶⁹ resulting from his power to refer and review cases immigration cases himself.³⁷⁰ Despite the importance of this policy to President Trump's immigration agenda, Judge Tatel notes for the majority that the policy fails arbitrary and capricious review because it raises the bar far above what Congress intended for credible fear determinations.³⁷¹

In another immigration case, a federal court found arbitrary and capricious a Department of Homeland Securities decision to close a parole program, per a clear presidential directive.³⁷² The district court for the District of Columbia is also entertaining a case asserting that the Department of State's limitations on diversity visas are invalid because they apply a set of presidential proclamations that are arbitrary and capricious, which results in agency behavior that is also, in part arbitrary and capricious.³⁷³ In addition, a few decisions³⁷⁴ have suggested that the arbitrary and capricious standard could reign in agencies' recent and longstanding neglect of environmental impact statements at the behest of presidents.³⁷⁵ Notably, the Supreme Court granted cert on a case to determine whether a Trump-era regulation substantially expanding the "public charge" exception to noncitizen admissibility,³⁷⁶ but subsequently dismissed the case at the request of the Biden Administration.³⁷⁷

³⁶⁹ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

³⁷⁰ See generally Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA LAW REVIEW 129 (2017) (arguing that the Attorney General's referral and review mechanism has been used to contravene the law).

³⁷¹ See *id.* at 19-20.

³⁷² *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1084 (N.D. Cal., Dec. 10, 2018); *id.* at 1055 (finding arbitrary and capricious the termination of the Central American Minors program and rescission of conditional parole approval determinations, which followed an Executive Order directing the agency to reform the program in this manner); see also *Border Security and Immigration Enforcement Improvements*, Exec. Order No. 13,767, 83 F.R. 8793 (Jan. 30, 2017).

³⁷³ See *Gomez v. Biden*, 2021 U.S. Dist. LEXIS 53808 (D.D.C. Feb. 19, 2021); *Gomez v. Trump*, Case No. 20-cv-02128 (APM) (D.D.C. Sep. 30, 2020). Note that plaintiffs ask the court "to reject the government's argument that their case is moot since President Joe Biden rescinded orders restricting their entry, arguing that their "'injuries linger' because they haven't been allowed to immigrate." Dorothy Atkins, *Visa Winners Say 'Injuries Linger' Despite Biden Orders*, LAW 360 (March 30, 2021), <https://www.law360.com/articles/1370298>

³⁷⁴ See, e.g., *Backcountry Against Dumps v. U.S. Dept. of Energy*, 2017 U.S. Dist. LEXIS 114496 (S.D. Cal., Jan. 30, 2017) (finding agency issuance of a presidential permit to be arbitrary and capricious because the agency failed to issue an environmental impact statement); *Border Power Plant Working Group v. DOE*, 260 F.Supp. 2d 997, 1018 & 1033 (S.D. Ca., May 2, 2003) (involving similar issue as *Backcountry Against Dumps*). The court later dismissed the action against the agency after the agency revised its analysis. *Border Power Plant Working Group v. DOE*, 467 F.Supp. 2d 1040 (S.D. Cal., Nov. 30, 2006).

³⁷⁵ See Shah, *supra* note 249 (discussing in depth several administrations' efforts to sidestep the National Environmental Policy Act's environmental impact statement requirements).

³⁷⁶ *United States Citizenship and Immigration Services, Et Al., Petitioners v. City and County Of San Francisco, et al. Petition For A Writ Of Certiorari* (Jan. 21, 2021) (requesting cert on a regulation reinterpreting Immigration and Nationality Act, 8 U.S.C. 1182(a)(4)(A)).

³⁷⁷ Amy Howe, *Cases testing Trump's "public charge" immigration rule are dismissed*, SCOTUSBLOG (Mar. 9, 2021) (noting also that the Supreme Court "canceled oral arguments in two other immigration cases after policy changes by the Biden administration. One case involved funding for the wall along the U.S.-Mexico border; the other involved a Trump administration policy that required some asylum seekers to wait in Mexico before an asylum hearing."), <https://www.scotusblog.com/2021/03/cases-testing-trumps-public-charge-immigration-rule-are-dismissed/>

There are a number of considerations that flow from the proposal to apply the arbitrary and capricious standard in this manner. One issue that arises is how courts might adequately draw on an administrative record to evaluate presidential influence. As the D.C. Circuit has illustrated, it is difficult to identify and evaluate the President's influence on agency action.³⁷⁸ The President is not generally held accountable for an agency's decision, "nor is his reasoning process made available to the regulatees and the beneficiaries of regulation."³⁷⁹

On the one hand, the Supreme Court appears to limit the impact of such presidentialism on its own decisions. For instance, a speech by President Obama notably did not influence the Court's decision as to whether an agency had been delegated the authority to treat a penalty as a tax under the Affordable Care Act.³⁸⁰ And almost twenty years after the famous case involving Clinton's statements urging the FDA to regulate tobacco,³⁸¹ the Court again implied that public-facing presidential leadership cannot overcome the statutory requirements that govern policymaking when it rejected the Department of Commerce efforts to add a question about citizenship to the Census at the behest of President Trump.³⁸²

On the other hand, Part I.B of this Article has showcased how the President can influence an *agency's* action. Given this, perhaps all such statements should part of the legal domain, instead of only those that the President wishes to be on record. Making relatively transparent, public presidential statements reviewable could lead to an increase in opaque, internal forms of political pressure that remain out of judicial reach. Then again, there is value in ensuring that at least some forms of presidential administration are subject to review, particularly when they have the capacity to render administrative action insufficient under the law.

Moreover, the agency's reasoning is more readily available than the President's, which means that agencies may be held accountable when acting under the influence of the President regardless of whether the president's influence is captured on the record. "Insisting that agencies give reasons for the decisions [influenced by the President] and requiring them to expose the data underlying their decisions...may not result in the most efficient decisionmaking process, but it does hold them to public account."³⁸³ Furthermore, the Supreme Court may have an appetite for this approach, given that it

³⁷⁸ *Sierra Club v. Costle*, 657 F.2d 298, 406-407 (D.C. Cir. 1981) (allowing for "conversations between the President or his staff and other Executive Branch officers" in proceedings that are not adjudicatory or quasi-adjudicatory).

³⁷⁹ McGarity, *supra* note 361, at 457.

³⁸⁰ *Shaw*, *supra* note 124, at 101-103 (discussing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)). "It was striking, then, that despite the debates at oral argument about its significance and the extensive media coverage, no genuine reliance on the President's statement appeared" in the relevant cases on the topic of whether the penalty attached to the Affordable Care Act was a tax. *Id.* at 103; *see also* *Watts*, *supra* note 57, at 700-704 (discussing the same example).

³⁸¹ *See supra* notes 160-176 and accompanying text.

³⁸² *See Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___ (June 18, 2020).

³⁸³ *Sierra Club*, 657 F.2d at 407.

recently drew on the arbitrary and capricious standard to rebuke pretextual justifications for policies that further the President's goals.³⁸⁴

Another important question is, how should a judge measure the agency's justification for responsiveness to the President's interests? In some cases, the court may be able to determine that the agency meets the minimal arbitrary and capricious standard, despite problematic Presidential directives.³⁸⁵ In other situations, if it is the case that the only justification offered consists of the President's statements, courts might be reluctant to allow a policy to pass muster under arbitrary and capricious review,

In *DHS v. Regents* and *Dept. of Commerce v. NY*, the Supreme Court evolved the arbitrary and capricious standard into an accountability-forcing mechanism for censuring pretextual or otherwise unethical agency justifications for policies that further the President's interests. In *DHS v. Regents*,³⁸⁶ the Court invalidated the Trump-directed rescission³⁸⁷ of the DACA policy.³⁸⁸ According to the Court, the agency acted in an arbitrary and capricious manner because it did not adequately justify its action.³⁸⁹ Although the agency eventually supplemented its reasoning, the Court concluded that this supplement was made after the action was taken and therefore could not be relied upon to justify the prior action.³⁹⁰

As Ben Eidelson notes, the Court's refusal to accept a post hoc rationalization is a "turn to an 'accountability-forcing' form of arbitrariness review."³⁹¹ The argument that the DACA policy has led to reliance that in turn requires the continuation of this policy,³⁹² an argument that the judiciary has entertained,³⁹³ offers another manner by which courts could evaluate the legitimacy of presidential administration.

³⁸⁴ *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___ (June 18, 2020) (rejecting an agency's rescission of an Obama-era policy at the request of President Trump under the arbitrary and capricious standard because the agency did not articulate a substantial reason at the time of the rescission).

³⁸⁵ See *supra* notes 273-273 (explaining the legitimate basis for the DACA policy despite President Obama's statements suggesting that he sought to act in lieu of formal legal change).

³⁸⁶ *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___ (June 18, 2020).

³⁸⁷ Memorandum on Rescission Of Deferred Action For Childhood Arrivals (DACA) (Sept. 5, 2017), available at <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

³⁸⁸ Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

³⁸⁹ *DHS v. Regents*, 591 U.S. at *18-24 (noting that the Secretary of the Department of Homeland Security "failed to consider . . . important aspect[s] of the problem," per the requirements of *State Farm*).

³⁹⁰ *Id.* at *14-15.

³⁹¹ Eidelson, *supra* note 348, at 1750; but see Stephen Lee, *DACA and the Limits of Good Governance*, PENN. REG. REV. (July 29, 2020), <https://www.theregreview.org/2020/07/29/lee-daca-good-governance/> (arguing that the Regents decision is "narrow" and "illustrates the limits of the good governance rationale in the context of ongoing struggles...to expand immigrant rights").

³⁹² Bijal Shah *Reliance Interests & the DACA Rescission*, ACS (Apr. 27, 2018), <https://www.acslaw.org/expertforum/reliance-interests-the-daca-rescission/>.

³⁹³ See *NAACP v. Trump*, No. 8 1:17-cv-01907-JDB (D.D.C. Aug. 17, 2018) (deciding that the Trump DHS's "failure to give an adequate explanation of its legal judgment," which rendered the DACA rescission arbitrary and capricious, "was particularly egregious here in light of the reliance interests involved"); see also

Similarly,³⁹⁴ in *Department of Commerce v. New York*, the Court reinvigorated arbitrary and capricious review as a means for sniffing out pretextual justifications for policies developed at the President’s request.³⁹⁵ In this case, the Court rebuked an agency that implemented the President’s public promises on the basis of a pretextual justification.³⁹⁶ More specifically, the Court upheld a lower court case setting aside the Commerce Secretary’s decision to add a citizenship question to the 2020 Census because the Secretary’s expressed justification was pretextual³⁹⁷ and thus unavailable for “meaningful judicial review.”³⁹⁸ While much of Chief Justice Roberts’s majority opinion treated the Commerce Secretary’s decision “as a perfectly reasonable and historically-grounded policy choice,”³⁹⁹ the decision ultimately found that the Secretary “had lied.”⁴⁰⁰ 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.”⁴⁰¹

It bears noting, however, that *DHS v. Regents* and *Dept. of Commerce v. NY* turned on Justice Roberts’s vote. If new Justices favor a unitary executive at all costs, the Court may become less amenable to arbitrary and capricious review as a means to force accountability, or even simply to root out pretextual justifications, when agencies pursue the President’s aims. Note, too, that enforcement constitutes an additional stumbling

Encino Motor Cars v. Navarro, 579 US __ (2016) (instructing that “when an agency reverses a prior decision, it must provide a reasoned explanation for the change” that addresses the “facts and circumstances that underlay or were engendered by the prior policy,” including any “serious reliance interests”);

³⁹⁴ See Lee, *supra* note 391 (“In allowing for subterfuge and pretext, *Regents* resembles the census case from last term, *Department of Commerce v. New York*, which concerned the Secretary of Commerce’s attempt to include a question about citizenship on the 2020 census survey.”).

³⁹⁵ Shah, *supra* note 187 (discussing how “arbitrary and capricious review ‘serves to identify pretextual decisionmaking’—for instance, in the seminal *State Farm* decision”) (citations omitted).

³⁹⁶ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019) (“We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are ‘not required to exhibit a naiveté from which ordinary citizens are free.’”) (citations omitted).

³⁹⁷ *Dep’t of Commerce*, 139 S. Ct. 2551, at 2574-75 (2019) (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]”)

³⁹⁸ *Id.* at 2573.

³⁹⁹ Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2020 SUP. CT. REV. (forthcoming), draft at 9, available at https://scholarship.law.columbia.edu/faculty_scholarship/2602/ (hereinafter Metzger, *The Roberts Court*).

⁴⁰⁰ *Id.* This meant he put forth “‘contrived reasons [that] defeat the purpose’ of courts requiring agencies to provide reasoned explanations for their actions.” *Id.*; see also Eidelson, *supra* note 348, at 1788 (noting that when the Secretary “lied about his reasons for adding the citizenship question, [there was] damage in terms of *political* accountability” as well) (emphasis in original).

⁴⁰¹ *Dep’t of Commerce v. New York*, 139 S. Ct. at 2576.

block; after all, despite the outcome of *Dept. of Commerce*, President Trump refused⁴⁰² to follow court orders to restore the DACA program.⁴⁰³

Likewise, courts took agencies to task for implementing a new interpretation of the Temporary Protected Status (TPS) legislation—specifically, one that bars Haitians from TPS status, at the behest of President Trump—without adequate explanation, by deploying the arbitrary and capricious standard to censure a policy motivated by the President’s discriminatory impulses or racial animus.⁴⁰⁴ Courts should continue this practice.

Finally, consider the Trump Administration’s proposal that agencies implement an automatic sunset for all regulations⁴⁰⁵ serves as a case study. As of now, neither Congress nor the Biden Administration has revoked this rule or addressed its potential consequences, which includes the imminent invalidation of tens of thousands of agency regulations.⁴⁰⁶ Even if Biden pulls back from this policy, it is likely to be resuscitated by a future president,⁴⁰⁷ which suggests that it could be a test case.

Beyond the fact that the statutory authority for this effort is unspecified,⁴⁰⁸ any policy that automatically expires all regulations is most likely arbitrary and capricious. Moreover, for purposes of this Section, it seems fairly certain that the Administration did not propose this policy after a careful or nuanced analysis of the legislation that

⁴⁰² Memorandum on Department of Homeland Security Will Reject Initial Requests for DACA As It Weighs Future of the Program (July 28, 2020), *available at* <https://www.dhs.gov/news/2020/07/28/department-homeland-security-will-reject-initial-requests-daca-it-weighs-future>.

⁴⁰³ *CASA de Md. v. DHS*, Civil No. PWG-17-2942 (July 17, 2020) (compelling the Department of Homeland Security to comply with *Dept. of Commerce v. NY*), *available at* <https://www.courtlistener.com/recap/gov.uscourts.mdd.403497/gov.uscourts.mdd.403497.97.0.pdf>.

⁴⁰⁴ For instance, courts in the Second, Ninth, First and Fourth Circuits have come to this decision. *See, e.g., Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) (finding that the plaintiffs’ claims failed largely due to the lack of evidence tying the President’s alleged discriminatory intent to the specific TPS terminations at issue); *Saget v. Trump*, 375 F. Supp. 3d 280, 324 (E.D.N.Y. 2019) (indicating that the agency’s decision was arbitrary and capricious since it departed from past agency decisions without an explanation and was improperly influenced by the White House); *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1099 (N.D. Cal 2018) (noting that plaintiff allegations and a facial review of TPS termination notices support there being a plausible inference that the agency adopted a new policy or practice without an explicit explanation for the change); *Centro Presente v. United States Dep’t of Homeland Security*, 332 F. Supp. 3d 393 (D. Mass. 2018) (denying motion to dismiss because court ruled it is plausible that policy is arbitrary and capricious because of the potential for discriminatory reasons motivating the decision.); *CASA de Md., Inc v. Trump*, 355 F. Supp. 3d 307 (D. Md. 2018) (denying motion to dismiss because there was enough evidence to support plaintiff’s case of the decision being arbitrary and capricious and the decision being racially motivated).

⁴⁰⁵ *See supra* note 265 and accompanying text.

⁴⁰⁶ Jasmine Wang, *Health Regulation’s Ticking Time Bomb*, PENN. REG. REV. (Apr. 27, 2021) (noting that the SUNSET rule “could cause more than 18,000 regulations from the U.S. Department of Health & Human Services (HHS)” alone “to disappear”).

⁴⁰⁷ Martin Totaro & Connor Raso, *Agencies should plan now for future efforts to automatically sunset their rules*, BROOKINGS INSTITUTE (Feb. 25, 2021) (arguing that “a future administration might well try to adopt a similar action” as Trump’s sunset rule).

⁴⁰⁸ *See* text accompanying *supra* note 265-266.

governs all regulatory frameworks, which suggests that this policy would also fail the accountability-forcing component of arbitrary and capricious review as well.

CONCLUSION

According to the Constitution, Woodrow Wilson remarks, the President is “only the legal executive, the presiding and guiding authority in the application of law and the execution of policy.”⁴⁰⁹ Agencies, too, are charged with the enforcement of legislation in their capacity as part of the executive branch. Therefore, when the President directs administration, her priority should be ensuring that agencies are fully accountable to the purposes of law. And yet, as Wilson presciently noted, the President “has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action.”⁴¹⁰

This Article argues that modern presidents have brought their responsibility to execute the law into tension with their own policymaking purposes—a tension that has been manifested in the administrative state. To support this claim, it offers a nuanced evaluation of administrative outcomes that result from presidential intervention. Its contribution in this regard lies in demonstrating that presidents have disrupted execution by directing agencies to contravene statutory purposes. This state of affairs suggests that presidential administration conflicts with the obligations that animate and govern agencies.

In response to this quandary, this Article advocates for a new presidential administration—one that may involve expansive executive discretion and a directive president, but that is nonetheless directed at implementing the purposes of the law itself, as opposed to the President’s own policymaking aims alone. Furthermore, it provides a blueprint for what is required of the other branches to bring this vision into being. This multifaceted approach should include not only reprobation of the most egregious contraventions of law resulting from presidentialism, but rather, a restructuring of presidential administration from all sides.

⁴⁰⁹ WILSON, *supra* note 38, at 59.

⁴¹⁰ *Id.* at 60.