Statute-Focused Presidential Administration

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Abstract

When the President directs agency action, this is known as "presidential administration." Without fail, presidential administration furthers the President's own policy aims. 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 legislative directives. Furthermore, the President has a constitutional duty to execute statutes per their own aims. And yet, no one has questioned the pervasive assumption that presidential administration should be exercised for the President's purposes alone. Furthermore, neither Justice 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, a contribution to the Annual Review of Administrative Law, fills that gap in the scholarship.

First, this Article illustrates 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 and continues today. 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, and the Biden Administration appears to be no exception.

Second, this Article argues that the motivation that underlies presidential administration—namely, the executive desire to further the President's own policy goals—should be redirected toward an interest in accomplishing the aims of the statutory scheme that the administrative agency is purporting to enforce. This Article's appeal for statute-focused presidentialism is motivated by an interest in infusing separation of powers considerations into the mix of values that drive presidential administration, which is currently overwhelmed

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by the immediate pull of political and partisan interests. Notably, however, statute-focused presidentialism would neither require curbing the scope of the President's power nor preclude presidentially directed policymaking, and may very well be consistent with a unitary executive.

But how can presidential administration be released from the clutches of the President's own policy agenda? Third, this Article proposes a blueprint to shift the incentives that underlie agency action resulting from presidential administration. More specifically, 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 the goals and thrust of legislation.

Ultimately, this Article makes three contributions. One, this Article is the first to contribute to the literature and conversation the insight that the problems of presidentialism as they relate to the lawfulness of agency action stem from the overwhelming focus of presidential administration on the President's own policy goals. Two, while most substantive or functionalist arguments in favor of checking presidential power do not gain traction with presidentialists or unitary executive theorists, this Article offers a proposal that should. After all, this Article's argument is not concerned with the scope or allocation of presidential power, but rather, with the incentives that drive presidential administration. Three, this Article offers a number of novel technical administrative interventions constructed to facilitate modest change in an era during which significant legislative action or judicial constraint of presidentialism on its face is unlikely.

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INTRODUCTION

During the Trump Administration, which had a particular interest in weakening environmental protection regulation,[1] the Environmental Protection Agency ("EPA") repealed a policy issued by the agency under President Obama; last year, the D.C. Circuit decided[2] that this constituted an unlawful *underregulation* of power plant emissions under the Clean Air Act.[3] This year, the Supreme Court reversed the D.C. Circuit.[4] Based on its evaluation of legislative intent, the Court decided that the environmental protection policy directed by President Obama—whose repeal by the Trump-era EPA the D.C. Circuit had rebuked in the decision below—constituted an unlawful *expansion* of the EPA's statutory authority.[5]

That either President Obama or President Trump seems to have directed the agency to enforce the law incorrectly might appear to be an example of President Obama's purported practice of "unilaterally implementing his legislative prerogatives by executive fiat"[6] or of the Trump Administration's "major deregulatory ambitions,"[7] depending

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1 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 the Clean Power Plan*, YALE CLIMATE CONNECTIONS (June 21, 2019), https://yaleclimateconnections.org/2019/06/the-trump-epa-strategy-to-undo-the-clean-power-plan/ [https://perma.cc/62HV-JCAB]; John Walke, *Trump's "Affordable Clean Energy" Rule: A Dirty Lie*, NAT'L RES. DEF. COUNCIL (Jan. 28. 2019), https://www.nrdc.org/experts/john-walke/trumps-affordable-clean-energy-rule-dirty-lie [https://perma.cc/M99U-TB2P]. And as the D.C. Circuit notes, "in 2019 *President Trump's* EPA repealed the 2015 Rule and issued the Affordable Clean Energy Rule." Am. Lung Ass'n v. EPA, 985 F.3d 914, 999 (D.C. Cir. 2021) (emphasis added).

2 *Am. Lung Ass'n*, 985 F.3d.

3 *Id.* at 951–57 (interpreting the Clean Air Act, 42 U.S.C. §§ 7401–7675); *see also infra* notes 101–07 and accompanying text.

4 West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

5 *Id*. at 2610 (dismissing the EPA's view that it had the statutory authority to implement the Obama-era Clear Air Act policy by stating that the "EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'") (citation omitted); *see also infra* notes 101–07 and accompanying text.

6 Robert Law, *Obama's 'Pen and Phone' Have Been Trumped When It Comes to DACA*, THE HILL (Sept. 1, 2017, 1:40 PM), https://thehill.com/blogs/pundits-blog/immigration/348871-obamas-pen-and-phone-have-been-trumped-when-it-comes-to-daca [https://perma.cc/8V8P-UECB].

7 Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 366, 369–70 (2021) (noting that "President Trump was criti-

on one's perspective on how best to interpret the Clean Air Act. However, these dynamics are neither new nor particular to certain Administrations. Rather, presidents have tried to alter the scope of legislation by narrowing or expanding the boundaries of an agency's statutorily delegated authority in pursuit of specific policy outcomes for the past thirty years.

Since the early 1990s, presidents have directed agencies to under- or overregulate in the areas of food and drug safety, healthcare, environmental protection, and immigration reform, among others.[8] Indeed, this Trump Administration episode is only one of a number of instances of presidential administration dating back to the Clinton presidency and exemplifies a dynamic that has existed since the Reagan era: presidentialism that is at odds with legislation.

Furthermore, this tension remains present under President Biden. On the one hand, the Biden Administration has said that it plans to reevaluate the lawfulness of agency actions in some contexts, albeit perhaps only in regard to the regulatory policies adopted under President Trump.[9] On the other hand, President Biden also "aims to go further" than previous presidents have to pursue his own regulatory goals.[10] Arguably, "he already has, simply by announcing a wider, bolder set of values to govern regulatory review."[11]

For this reason, Biden's presidentialism has come under fire in the courts. For instance, in April 2022, a federal district court struck down the Centers for Disease Control and Prevention ("CDC") mask mandate for airplanes and other public transportation,[12] implemented under President Biden to limit the spread of COVID-19, in part because "the Mask Mandate exceeds the CDC's authority under the Public Health Service Act";[13] in her decision, Judge Mizelle cites the

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cized for seeking to 'deconstruct' the administrative state through nonlegislative actions" and for "efforts to 'deliberately . . . undermine' the goals at the root of statutory legislation") (citations omitted); *see also Tracking Deregulation in The Trump Era*, BROOKINGS (Feb. 1, 2020), https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ [https://perma.cc/GXX4-FZZX].

8 *See infra* Part I.

9 *See, e.g.*, *infra* notes 447–63 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).

10 Lisa Schultz Bressman, *Flipping the Mission of Regulatory Review*, REGUL. REV. (Feb. 18, 2021), https://www.theregreview.org/2021/02/18/bressman-flipping-mission-regulatory-review/ [https://perma.cc/6YN6-C9KJ].

11 *Id.*

12 Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025 (Feb. 3, 2021).

13 42 U.S.C. §§ 201–300.

Supreme Court's understanding that "[b]ecause '[a]dministrative agencies are creatures of statute,' they 'possess only the authority that Congress has provided.'"[14] Likewise, in June 2021, the CDC issued an extension of its nationwide moratorium on evictions for qualified tenants in areas impacted by COVID-19, as directed by President Biden.[15] However, the Supreme Court blocked this agency action because the "statute on which the CDC relies does not grant it the authority it claims."[16] Another example involves President Biden's climate change directives;[17] in June 2021, a federal court granted a preliminary injunction against these directives, asserting that they violate statutory law.[18] And yet another is the Biden Administration's reprisal of Obama-era policies dictating immigration enforcement priorities[19] that a federal court struck down in July 2021.[20]

The conventional debate concerning presidential administration is whether the President's involvement in administration is constitutionally defensible as part of her authority to direct her branch.[21] Those who support presidential administration argue that because the Constitution vests in the President the executive power, executive agencies exist primarily in service of the President's agenda.[22] 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.[23] Those who take a more moderate view of presidential power argue that agencies are beholden to legislative authority as well, and

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14 Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-cv-1693 (M.D. Fla. Apr. 18, 2022), at *9 (per curiam) (citing Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S., slip op. at 5 (Jan. 13, 2022)).

15 *See infra* notes 172–88 and accompanying text.

16 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2485 (2021) (per curiam).

17 *See infra* notes 189–97 and accompanying text.

18 Louisiana v. Biden, 543 F. Supp. 3d 388, 419 (W.D. La. 2021).

19 *See infra* notes 133–46 and accompanying text.

20 Texas v. United States, No. 18-CV-00068, 2021 WL 3022434 (S.D. Tex. July 16, 2021); *see also infra* notes 135–43 and accompanying text.

21 *See* Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN L. REV. 43, 44–45 (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.").

22 *See infra* note 352 and accompanying text.

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

that the enforcement of statutory law benefits, in some cases, when agencies are insulated from the President.[24]

However, even among critics of presidential administration, few have questioned the legitimacy of presidential administration's *focus* on the President's priorities. Certainly, the partisanship and power-gathering nature of presidentialism has garnered deep criticism for decades,[25] including critiques of presidential aggrandizement from both ends of the ideological spectrum.[26] There are also plenty of commentators appraising the wisdom of policies that result from presidential administration—for instance, whether they are laudable as a concep-

24 *See infra* note 353 and accompanying text.

25 *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 22 (2010) ("Broadly speaking, presidents since Roosevelt have followed this last pattern. They have governed as partisans, attempting to persuade centrist voters to move left or right, as the case may be."); 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, 572 (2010) (criticizing the attempt to "extend the politicized presidency" from the Reagan through the George W. Bush Administration). Bruce Ackerman predicted, during the early years of the Obama Administration, "the election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs of the left or the right." ACKERMAN, *supra*, at 9; *see also* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 3–4 (Ctr. for the Study of the Admin. State, Working Paper No. 21-42, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788215&dgcid=EJournal_htmlemail_u.s.:administrative:law:ejournal_abstractlink [https://perma.cc/G8HG-992G] (arguing that agencies, controlled by the President, make "extreme policies"); 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").

26 *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 and prevent the sidelining of Congress), *with* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (arguing for a multi-pronged administrative approach, including an emphasis on expertise, to constrain presidential aggrandizement).

tual or substantive matter,[27] or approved by the public[28]—as well the capacity of presidentialism to accomplish those policies.[29]

Only very recently have scholars turned to a discussion of the norms and customs surrounding presidentialism,[30] or begun to consider the repercussions of the presidential administration of agency behavior for the enforcement of statutory law.[31] 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 principal bailiwick,"[32] which indicates that the President's primary motivation for

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27 *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).

28 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) (finding that "there are simply no guarantees that particular presidential regulatory policies will be more closely correlated with public opinion than policies developed through ordinary agency rulemaking proceedings").

29 *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 23, at 2284–303 (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").

30 *See, e.g.*, PRAKASH, *supra* note 26, 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 Leigh 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 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) (discussing 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).

31 *See, e.g.*, Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 586 (arguing that presidential administration undermines an "agency's ability to execute its statutory mandate" by "leaving agencies understaffed . . . ; marginalizing agency expertise; reallocating agency resources; occupying an agency with busywork; and damaging an agency's reputation."); David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (arguing that presidents sabotage the programs that agencies administer by choosing agency heads that attack their own agencies).

32 PRAKASH, *supra* note 26, 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.") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)); *see also* PRAKASH, *supra* note 26, at 41 ("[T]he [P]resident's express duty to faithfully execute the

engaging in administration should be to hold agencies accountable to the law as envisioned by Congress.[33]

This Article, a contribution to the *Annual Review of Administrative Law*, offers a comprehensive discussion of the parameters of presidentialism as they relate to the implementation of legislation. Presidential administration exists, theoretically, on a spectrum. On one end is presidentialism deployed wholly in pursuit of the President's own policy aims. On the other end, the President's own policy interests are fully subjugated to the goal of agency conformity with statutory requirements. Currently, presidential administration exists far on the former end of the continuum. 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 in some cases interfered with administrative fidelity to statutory law. Taking this state of affairs into consideration, this Article advocates for presidential administration that is somewhere in the middle

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laws, coupled with a narrow role in making federal statutes, strongly implies that the president has no unilateral lawmaking authority."); Julian Davis 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, Ethan J. Leib & Jed Handelsman Shugerman, *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").

33 *See* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 247–48 (2014) (positing that 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"); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1834, 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"); Ryan J. Barilleaux & Christopher S. Kelley, *What Is the Unitary Executive?*, *in* THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY 4 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010) (arguing that the Take Care "Clause insures that the [P]resident will not only execute the law personally, but also . . . oversee the executive branch agencies to insure that they are faithfully executing the laws") (quoting Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 Cardozo L. Rev. 219, 252–53 (1993)). Arguably, statute-focused presidentialism would better uphold the antifascist intentions of the original proponents of presidential administration, who advocated for strong presidentialism that was tempered by a formal separation of powers. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 38–40 (2022) (noting that the New Deal-era President's Committee on Administrative Management sought to "bring the government into compliance" with various constitutional mandates, including the Take Care Clause).

of the spectrum—that is, for a somewhat humbler form of presidentialism in service of statute.

This Article does not make a sweeping statement claiming that the presidential exercises of discretion push agencies to contravene statutes extensively,[34] nor does it make the (easy) argument that agencies should not behave unlawfully. But it also rejects the conventional argument that as long as agencies are behaving lawfully, per the barest understanding of lawfulness, they should be free to engage the President's agenda to the fullest extent possible. Rather, it asserts that agencies under political pressure sometimes "reject the sense of Congress" by failing to adequately implement legislative requirements.[35] In light of these circumstances, this Article contends that presidents and agencies should exercise discretion within boundaries set by the aims or thrust of statutory law, as discerned with the statute's own terms and intentions.

To make this argument, this Article contributes an analysis of the extent to which presidential administration results in agency actions that are at odds with statute. More specifically, it illustrates that agencies, under the influence of the President, engage in myopic statutory implementation that deprioritizes or ignores the goals of the statutory scheme at issue in favor of the President's policy interests. This analysis is based in judicial decisions that have arisen under previous presidents and the current one,[36] as well as accounts in secondary sources, including the media, and as gleaned from presidents' own missives.

Furthermore, this Article argues 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 and on its own terms. In making this argument, this Article raises the difficult question of what it means for the executive branch to execute the

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34 *See* PRAKASH, *supra* note 26, at 221. ("While presidents (and their administrations) faithfully execute most laws, that is not the uniform practice across all laws.").

35 *Id.* at 219–20 (quoting William Symmes, Jr., an opponent of the original ratification of the Constitution who believed that the Take Care Clause would be misread to allot the President far too much discretion).

36 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 United States" and the court most expert in administrative law matters. Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 4, 2015), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/ [https://perma.cc/C625-VEAL]. 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.

aims of legislation in an administrative state that is rife with discretion and presidential efforts to engage that discretion to further their own aims. And in doing so, it asserts that administrative discretion may only be exercised within boundaries set by legislation, however these boundaries are ascertained. However, it also affirms the possibility of an executive branch that is centralized or led by a strong President yet simultaneously oriented toward the aims of statutory law.

Notably, this Article does not make a formalist argument incorporating a full-fledged analysis of the executive branch's constitutional duty to faithfully execute the law, which has been accomplished elsewhere.[37] Rather, it builds a functional argument on the assertion that "[i]t is a derogation of duty not to pursue with diligence what Congress wants executed,"[38] and grapples with how to manifest the understanding 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 authorizing instrument or entity."[39]

Even under this rubric, there may very well be situations in which a close administrative reading of statute may lead the executive branch to conclude that the policy should be directed by the President. This may be because the statute is vague, inconsistent, or not up to confronting new challenges.[40] Or it may be that Congress itself intended there to be a strong political role in the development of policy. There may also be tools of statutory implementation—such as prosecutorial discretion—that lead to intense presidential administration that is consistent with the President's constitutional duty to enforce the law. But in these situations, the decision to engage in directive presidentialism should happen only after careful engagement with statute, and not only to fulfil the President's policy goals.

More specifically, this Article makes a functionalist appeal for reincorporating separation of powers principles into the balance of incentives driving presidentialism, which builds on Lisa Bressman's insight that "the [Supreme] Court may be understood as mediating between two different sorts of politics, congressional and presidential,

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37 *See, e.g.*, Goldsmith & Manning, *supra* note 33; Kent et al., *supra* note 32.

38 Kent et al., *supra* note 32, at 2191.

39 *Id.* at 2190.

40 *See* Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC (July 26, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ [https://perma.cc/ZHS5-RXQQ] (advocating for "[b]road statutory language, written with the aim of empowering an agency to take on new problems in new ways" and lamenting its potential demise as a result of *West Virginia v. EPA*).

rather than as vacillating between politics and procedures."[41] Currently, the merits and pull of politics and political accountability are overrepresented among the values that underlie presidentialism. And the virtues of good governance and ambitions for optimal policy outcomes, while important, are not enough to overcome the President's obligation to maintain a healthy separation of powers between the political branches. This perspective binds the legitimacy of presidential administration to the obligations of statutory execution. The goal of this Article is not to advocate for the extreme of a ministerial presidency, but rather, to urge a normative shift toward the demands of statutory law in response to the zeitgeist prioritizing presidential political accountability and responsiveness in administration above all.

That having been said, this Article's exposition might convince formalists that presidential administration in its current form may be unconstitutional in some cases, to the extent it involves an executive failure to engage in faithful execution or executive infringement on Congress's power to legislate. To be clear, this Article does not engage in the usual unitary executive debate regarding whether the President has only oversight authority, or whether she also has directive authority or can even "step into the shoes" of agency heads. In other words, this Article neither argues for limits to the scope or allocation of executive power nor advocates against centralization. Rather, the concern is with the motivations or incentives that drive presidential administration. For this reason, while most substantive or functionalist arguments in favor of constraining presidential power do not gain traction with presidentialists or unitary executive theorists, this proposal should. In fact, one could imagine a unitary executive theory that emphasizes strong, directive, and expansive presidential control over agencies wielded *in order to pursue the execution of the law for the law's own aims, demands and purposes*, as opposed to the President's policy aims alone.

Notably, the "aims," "demands," "purpose," and thrust of a statute, and the set of goals it was passed to accomplish, are determined with relation to the particular legislation and subject matter at issue. Furthermore, the aims of a statutory scheme are not necessarily best identified or furthered by purposivism. On the one hand, without taking a stand on how purposivism should be applied in regard to any particular case or issue, this Article accepts the reasonableness of

41 Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007).

purposivism[42] and of Kevin Stack's argument that regulatory statutes may oblige agencies to implement the statutes they administer in a purposivist manner.[43] And in a few notable cases—including *West Virginia v. EPA*,[44] decided this year and *FDA v. Brown & Williamson Tobacco Corp.*,[45] decided over twenty years ago—the judiciary has condemned the results of presidential administration after engaging in a purposivist interpretation of statute.[46]

On the other hand, this Article also allows for the possibility of textualist interpretations that incorporate new meaning in a manner that engages the broader aims of a statute[47]—for instance, the possibility of pro-environmental protection policies that the Clean Air Act did not explicitly anticipate but that uphold its core intent,[48] or the potential application of the Public Health Service Act to novel challenges concerning communicable diseases.[49] Of course, no mode of statutory interpretation can adequately justify an agency action that ignores statutory evaluation altogether in favor of dogged pursuit of the President's interests, be they focused on deregulation, implementing enforcement priorities, expanding regulatory mechanisms, or accomplishing some other presidential priority.

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42 *See* 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).

43 Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 871 (2015) ("To comply with [their] duty [to implement a 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.").

44 142 S. Ct. 2587 (2022).

45 529 U.S. 120, 158 (2000).

46 *See infra* notes 149–53, 232–41 and accompanying text.

47 *See, e.g.*, Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022) (arguing that textualism can be tethered to contemporary public meaning); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353 (2022) (arguing for the progressive possibilities of textualism); Benjamin Eidelson, *Dimensional Disparate Treatment* 95 S. CALIF. L. REV. (forthcoming 2022) (arguing that the textualism employed by a recent Supreme Court decision justifies the outcome protecting gay and transgender workers).

48 *See, e.g.*, *infra* notes 106–13 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).

49 *See infra* notes 319–29 and accompanying text (arguing that both a plain language interpretation of the Public Health Service Act and one focused on legislative history substantiates the CDC's authority to issue a COVID-related eviction moratorium); *see also infra* notes 173–88.

Note, as well, that references to presidential "interests" or "aims" in this Article concern the President's policy priorities in service of the public interest, as she conceives of it. These do not include, for purposes of this discussion, entirely self-interested goals[50] like reelection[51] or full-throated "constitutional arrogance."[52] This is, of course, notwithstanding the personal benefits to the President that attach to actions that are responsive to her political base or to the public interest as she sees it.

Finally, to change the framework of little "e" and big "E" executive power over time, 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 shirks its duties, it becomes the burden of the other two branches, to some extent, to guide 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, some of the responsibility to limit executive aggrandizement must fall to the President and agencies themselves, and the executive branch itself should therefore encourage a presidential turn toward a sincere interest in law execution that focuses on statutory—as opposed to Executive—goals.

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 based on their own interests, despite

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50 *See* PRAKASH, *supra* note 26, at 64 (cautioning against making too much of "the powers and influence" that presidents "*personally* wield").

51 *See* Kevin M. Stack, Widener L. Commonwealth L. Sch., 14th Gedid Lecture: The President and the Rise of Partisan Administration of the Law (Oct. 1, 2020), https://www.youtube.com/watch?v-QPLHetMET38 [https://perma.cc/J7K4-B8KT] (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").

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

the pressures of the President's policymaking agenda or perhaps even as part of that agenda.

This Article proceeds in three Parts. Part I illustrates how presidential intervention has thus far negatively impacted the administrative implementation of statutory law. Presidentialism has been, at least since the 1980s through today, in tension with the aims of legislation. Section I.A considers presidential administration that has, according to courts, led to the underenforcement of statutes. Section I.B analyzes presidential efforts that courts have condemned as expansions of the scope of agencies' regulatory authority. Overall, this Part shows that 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 argues for presidentialism that is essentially in service of the legislature's mandates, regardless of the breadth of the executive branch's discretionary authority to implement the law. In doing so, Part II advocates for a new model of presidential administration that focuses on the aims of statutory schemes above and beyond the urgencies of politics and political accountability, while also asserting that presidentialism may be both statute-focused *and* commanding. Much of this Part suggests that statute-focused presidentialism could involve a directive Executive—albeit one who pressures agencies to engage in statutory implementation that is more attentive to the nuances of statute, as opposed to the President's own goals. Section II.A suggests that a careful reading of statutory text and purpose could lead to policymaking that, in fact, is highly influenced by the President as a substantive matter. Section II.B suggests that, as a constitutional matter, the President may be empowered to apply the law selectively under certain circumstances. And Section II.C suggests that statute-focused presidentialism is even consistent with unitary executive theory.

To bring a paradigm of statute-focused presidentialism into being, Part III outlines a concerted, inter-branch approach to shaping presidential discretion so that it is more squarely oriented toward the aims of legislation. Section III.A argues that the legislature should emphasize its own goals at the outset by establishing clear administrative roles for presidents in the execution of law. Section III.B asserts that agencies themselves should execute the law by parsing the extent to which the President's influence over statutory enforcement warps the

goals of legislation. Courts can encourage this. Not only should courts continue to constrain agencies' efforts to alter their own jurisdictions, 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 statutory aims. Per Section III.C, agencies must also engage in statutory interpretation that engages statutory schemes. To support this endeavor, courts could apply *Chevron*[53] to evaluate the President's influence on administrative statutory interpretation more closely and apply the major questions doctrine to reserve for themselves some administrative statutory interpretation that has been warped by the President. Finally, Part III.D advises that courts utilize hard look review under the arbitrary and capricious standard—a standard whose very purpose is to ensure that the agency has not relied on factors which Congress did not intend it to consider, and that the Supreme Court has recently been willing to deploy against problematic agency action—to hold administrative efforts to implement the law to standards of rationality, or even accountability, in the wake of presidential administration.

I. Conventional, Disruptive Presidentialism

In the mid-twentieth century, the Supreme Court affirmed the bedrock constitutional principle that the Executive cannot act in contravention of federal statutes.[54] About a decade later, the Court made explicit the idea that agencies may pursue presidential directives[55] as long as there is "there is no statutory limitation" that prohibits the agency from following the President's command.[56] 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 allowed by the law."[57]

The D.C. Circuit has consistently held that presidential directives may not alter an agency's duties under its governing statutory scheme.

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53 Chevron, U.S.A., Inc. v. Nat.'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

54 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (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 32 and accompanying text.

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

56 *Id.* at 17.

57 *See* Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28, 32 (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) (citing The Federalist No. 72, at 463 (Alexander Hamilton) (Benjamin F. Wright ed., 1961)).

For instance, the court has declared that a ratified treaty signed by a President is not "law" that changes an agency's statutory responsibilities.[58] In addition, an agency's obligations under statute may not be altered by presidential memorandum.[59] Furthermore, the court has blocked agency policies resulting from task forces if those policies do not comply with statutory requirements.[60]

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. 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 has been unsteady for some time.

"For decades, U.S. Presidents have sought to exert greater control over the apparatus of the administrative state, through strategies of centralizing power,"[61] as well as by exerting direct control over administrative initiatives. Note that the term "presidential administration" refers to the latter—that is, 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,"[62] as well as various situations involving political influence over administrative adjudication.[63]

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58 Nat. Res. Def. Council v. EPA, 464 F.3d 1, 3, 11 (D.C. Cir. 2006) ("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.").

59 *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").

60 *See* New York v. EPA, 413 F.3d 3, 40–41 (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).

61 Jud Mathews, *Trump as Administrator in Chief: A Retrospective*, in THE AMERICAN PRESIDENCY UNDER TRUMP 1, 2 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747046 [https://perma.cc/GN7G-K7TV].

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

63 *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 858–59 (2015).

As a result, the President's use of her constitutional power and execution of her constitutional responsibilities have come into conflict in a manner that is 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 myopically to implement its policy goals,[64] which may include sweeping deregulation.[65] As a result, the President wields heavy control over agencies' priorities and actions in pursuit of partisan policy aims, which may be in tension with the statutory aims agencies could be expected to pursue.

The President also has agents who engage in administrative intervention on her behalf,[66] 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—[who] act in many ways like the president's extra eyes, ears, mouth, arms, and legs."[67] These players include the Vice President and 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").[68] The Executive also employs presidential and White House councils, committees, subcommittees,

64 *See* ACKERMAN, *supra* note 25, 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 . . . .").

65 *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).

66 ACKERMAN, *supra* note 25, at 7 ("The modern presidency is an institution, not only a person.").

67 PRAKASH, *supra* note 26, at 65.

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

and task forces,[69] which may be particularly adept at weakening the legislature's influence.[70]

The intensity of presidential control over agencies, coupled with the prevailing, narrow focus of modern presidents on their own policy interests, has diluted the execution of law. As Saikrishna Bangalore Prakash notes, "Modern presidents regularly use their authority to advance their [own] policy agendas at the expense of the legislative policies of Congress,"[71] and they are at an institutional advantage to do so.[72] As Woodrow Wilson predicted, the President may "substitute his own orders for acts of Congress which he wants but cannot get."[73]

Presidents' highly centralized efforts to prioritize their own policy aims, which push against the boundaries set by Congress, began in the Reagan Administration.[74] President Reagan called for deregulation and a revamping of administrative oversight, and famously initiated a wide array of deregulation efforts coordinated through the new OMB and its subcomponent, OIRA.[75] Indeed, the Reagan Administration had an "anti- government, deregulatory agenda [that] could not be accomplished through legislative means" and that depended "on an

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69 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) (citation omitted) (noting this critique by a Congressperson against Vice President Dan Quayle's Council on Competitiveness, as well 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 presidential councils. *See, e.g.*, 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").

70 *See* Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 Am. J. Poli. Sci. 387 (2013).

71 PRAKASH, *supra* note 26, at 216.

72 *See* ACKERMAN, *supra* note 25, at 15 (noting that "[t]he Founders thought that Congress would be [the] most dangerous" branch, and that they thus took care to dilute its power vis-à-vis that of the President); McGinnis & Rappaport, *supra* note 25 (arguing that legislative political polarization has enabled the President to adopt changes to the law unilaterally).

73 WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 71 (1908); *see also* PRAKASH, *supra* note 26, at 20 ("Modern presidents are lawmakers.").

74 Kagan, *supra* note 23, at 2277 (noting that the "sea change" towards presidential administration "began with Ronald Reagan's inauguration"); *see also* Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 596 (1989) ("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.").

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

aggressive administrative strategy . . . to secur[e] its ideological goals."[76]

Whereas President Reagan sought to control the administrative state largely through OIRA review, President George W. Bush's White House inserted itself into administrative decisionmaking and rulemaking processes.[77] President Clinton likewise asserted himself in the regulatory process on a more individualized basis—via presidential directives[78]—to accomplish policy goals that were at odds with legislative intent.[79] During his terms in office, President Obama borrowed from the playbooks of these prior administrations to influence the administrative state. Like President Reagan, President Obama's centralized crisis management strategy, based on the use of domestic, subject-matter "czars," advanced policies contrary to those supported by a combative Congress.[80] And like President Clinton, President Obama announced ownership over agency-led policies, sometimes to the detriment of administrative legitimacy.[81]

Also like his predecessors, President Trump's preferred approaches to presidential administration included exercising centralized control over and claiming ownership of agency actions, in part by "forc[ing] policy change through a flurry of written orders."[82] Echoing President Reagan, President Biden suggested early in his term that OIRA, which is "a predominantly reactive agency within OMB, should have responsibility to develop regulations that advance the Administration's values."[83]

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76 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).

77 *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 423–24 (2009).

78 *See* Bressman, *supra* note 10 ("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.").

79 *See* Kagan, *supra* note 23, at 2333; Watts, *supra* note 75, at 690–91.

80 Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2586 (2011).

81 *See* Watts, *supra* note 75, at 710–11, 714–15.

82 Manheim & Watts, *supra* note 30, at 1744.

83 Bressman, *supra* note 10 ("Faced with a number of major, continuous, and complex national crises, President Biden is looking to OIRA to promote his goals."); *see, e.g.*, Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 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").

This Part argues that via these well-known mechanisms of presidential centralization and control, presidents have pressured agencies to act outside of the boundaries or contrary to the requirements established by statutory authority. Scholars on the right[84] and the left[85] 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."[86] Some presidential attempts to alter agencies' delegated jurisdiction have been so egregious that the judiciary itself has seen fit to rebuff them.[87]

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. That having been said, both the Supreme Court and the D.C. Circuit have been reluctant to bless Executive efforts to alter agencies' power to regulate, including those of Presidents Trump, Obama, W. Bush, Clinton and H.W. Bush.[88] Notably, the D.C. Circuit has relented to the agency in some instances,[89] but efforts by the Trump and Biden administrations are currently facing reprobation in the courts.[90]

Furthermore, relying to any extent on case law 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

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84 *See* PRAKASH, *supra* note 26, 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.").

85 ACKERMAN, *supra* note 25, at 9 (predicting that presidents will "assert 'mandates from the People' to evade or ignore congressional statutes when public opinion polls support decisive action").

86 PRAKASH, *supra* note 26, at 221.

87 *See* Shah, *supra* note 62, at 683–84 (noting the "judiciary's interest in limiting agencies' opportunity to infringe on Congress's right to determine administrative jurisdiction").

88 *See id.* at 729–47 (collecting cases where the D.C. Circuit has rebuffed administrative actions directed by presidential administrations).

89 *See, e.g.*, *infra* notes 210–14 and accompanying text.

90 *See, e.g.*, *infra* notes 97–107 and accompanying text; *infra* notes 146–97 and accompanying text.

transpire with little documentation and limited transparency.[91] Then again, judicial decisions offer the most detailed description and analyses of the lawfulness of agency action.

Case law as a source of data has other benefits, too. For one, a body of research built on case law lends itself to more systematic review than intra-executive branch information gathered ad hoc. In addition, disapproving courts offer keen analyses that bolster this Part's argument that presidentialism is a problem. In any case, the bias toward justiciability exists not only in administrative law scholarship, but also among agencies themselves, who are primed to avoid litigation.

By mining examples from case law and other sources,[92] this Part illustrates that presidential influence over and intervention in agency action exists and that it may hinder agencies' adherence to statutory requirements. 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 shortcomings 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 adhered to judicial understandings of statutory schemes.

More specifically, this Part shows, Presidents have directed agencies either to shirk their delegated responsibilities (Part I.A) or act beyond the limits of their statutory jurisdiction (Part I.B) to achieve particular regulatory or deregulatory outcomes, further a policy scheme, or appease a stakeholder that dislikes the requirements of statute. It is not necessarily the case that an agency's reconceptualization of the scope of its authority is inconsistent with the responsibilities it shoulders or the authority it has been granted by statute, but the following cases highlight a tension between agencies' claimed scope of

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91 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, such as among the President's own counsel, although scholars have suggested otherwise. *See* ACKERMAN, *supra* note 25, 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") (emphasis omitted). That having been said, the fact that the President sometimes acts positively as a lawful leader does not bear on the assertion that *some* presidential interventions result in unlawful agency action.

92 *See supra* note 36 and accompanying text (discussing the sources of this Article's data set).

authority and courts' understanding of it. In exploring this tension, 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 transcend the particularized policy interests of presidents. In addition, it illustrates when and articulates how presidential administration has altered agencies' enforcement of legislative mandates in favor of the President's policy aims.

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 incentives create administrative tension with legislation. Another is to show how presidentialism's disruptive influence transcends presidencies and political factions. A third is to illustrate that although both the executive and legislative branches have constitutional claims to administrative control, the former branch has interfered with the latter branch's authority to animate agencies.[93] 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.[94]

A. Underenforcement of Statutes

As both progressive and conservative scholars have noted, recent presidents have sought to underenforce legislation.[95] In some cases, the D.C. Circuit and Supreme Court have engaged with the issue of whether the resulting agency action is inconsistent with statutory aims, 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 for cases that have been resolved to some degree by the Supreme Court, each of the presidencies from George W. Bush through

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93 "[E]ven 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, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 697 (1992).

94 *See* Goldsmith & Manning, *supra* note 33, 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").

95 *See* Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL'Y 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).

today offer at least one vivid example. In a case highlighted in the Introduction,[96] 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."[97] Specifically, the agency issued the Affordable Clean Energy ("ACE") rule, which repealed the Clean Power Plan and, in its stead, required fewer emissions reductions.[98] This chain of events led to *American Lung Ass'n*, in which the D.C. Circuit decided that the EPA's limiting characterization of its authority under statute was inconsistent with the Act.[99]

The agency took a textualist approach to statutory interpretation to justify the Trump Administration's goal of underenforcing the Clean Air Act.[100] More specifically, as the court noted, "[t]he EPA explained that it felt itself statutorily compelled to [repeal the Clean Power Plan] because, in its view, 'the plain meaning' of Section 7411(d) [otherwise known as 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.'"[101] Furthermore,

> [c]onsidering its authority under Section 7411 to be confined to physical changes to the power plants themselves, the EPA's ACE Rule determined a new best system of emission reduction for coal-fired power plants only. The EPA left unaddressed in this rulemaking (or elsewhere) greenhouse

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96 *See supra* notes 2–7 and accompanying text.

97 *What is the Clean Power Plan?*, NRDC (Sept. 29, 2017), https://www.nrdc.org/stories/how-clean-power-plan-works-and-why-it-matters? [https://perma.cc/V3C2-9CPY].

98 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), (to be codified at 40 C.F.R. 60).

99 985 F.3d 914, 995 (D.C. Cir. 2021).

100 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. *See* Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L. J. 1109, 1109 (2021).

101 *Am. Lung Ass'n*, 985 F.3d at 938 (emphasis omitted) (quoting 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. at 32,523–24).

> gas emissions from other types of fossil-fuel-fired power plants, such as those fired by natural gas or oil.[102]

In response, the D.C. Circuit evaluated the EPA's reading of the Clean Air Act[103] and declared that it fell short.[104] The court confirmed that the purpose of the statute is to permit a wider array of activities than asserted by the EPA.[105] 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 authorizes the EPA to regulate extensively.[106] 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."[107]

In *West Virginia v. EPA*, the Supreme Court reversed the D.C. Circuit.[108] Importantly, scholars have argued that the Court's affirmation of the Trump EPA's interpretation of the Clean Air Act is a problematic reading of the statute.[109] However, it is possible that rather than illustrating illegitimate Trump-era underregulation of the Clean Air Act, this set of cases concern an unlawful effort by the Obama-era EPA to expand the scope of its jurisdiction.[110]

The Trump EPA's position in *West Virginia v. EPA* was similar to the agency's argument in *Massachusetts v. EPA*,[111] in which the Supreme Court held invalid the EPA's position—as directed by President W. Bush—that it was not authorized to regulate carbon dioxide and other greenhouse gases as pollutants under the Clean Air Act.[112] In *Massachusetts v. EPA*, the Court applied a textualist approach to statutory interpretation to find that the Clean Air Act "empower[s]

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102 *Am. Lung Ass'n*, 985 F.3d at 938.

103 "Even looking beyond the text does nothing to substantiate the EPA's proposed reading of Section 7411." *Id*. at 951 (proffering analysis under the heading "Statutory History, Structure, and Purpose").

104 *Id*. at 950–51 (proffering analysis under the heading "EPA's Reading Itself Falls Short").

105 *Id.* at 956–57.

106 *Id.* at 930–32; *see also id.* at 988 ("Section 7411(d) allows the EPA to regulate carbon dioxide emissions from [a variety of] power plants.").

107 *Id*. at 995.

108 West Virginia v. EPA, 142 S. Ct. 2587 (2022).

109 *See infra* notes 277–79 and accompanying text.

110 *See infra* notes 112–15 and accompanying text.

111 549 U.S. 497 (2007).

112 *Id.* (holding that the EPA contravened the Clean Air Act when it refused to regulate vehicular emissions of greenhouse gases).

the EPA Administrator to set emission standards for '*any* air pollutant,'" 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."[113] By focusing on the language of the statute, the Court embraced textualism in order to find "capacious agency authorization" under the statute.[114] Abbe R. Gluck and Lisa Schultz Bressman note that this decision is one in which the Court relied on legislative history as well.[115]

In the immigration context, courts have split on whether presidential administration is consistent with statutory law. One set of cases involves an executive order from President Biden, issued on the first day of his presidency.[116] In this order, President Biden requested that 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."[117] In response to the executive order, the Secretary of the Department of Homeland Security ("DHS") issued a memorandum to agency directors with three specific directives, which included an immediate 100-day pause on deportations.[118] This pause would have enabled DHS 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.[119]

On the one hand, one federal district court in Florida denied a motion for a preliminary injunction against this policy.[120] The court noted that, "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

113 Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 62–63 (citing 42 U.S.C. §§ 7521(a)(1), 7602(g)).

114 *See id*. at 63.

115 *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).

116 Revisions of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

117 *Id.* at 7051.

118 Memorandum from David Pekoske, Acting Sec'y, DHS, to Troy Miller, Senior Off. Performing the Duties of the Comm'r, et al. (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/C2PA-RF7P].

119 *See id*.

120 Florida v. United States, 540 F. Supp. 3d 1144, 1144 (M.D. Fla. 2021).

identified as priorities.'"[121] In other words, the court determined that these enforcement priorities are not in contravention of the statutory law governing DHS.

On the other hand, a federal district court 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.[122] As that 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."[123]

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."[124] 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,"[125] this episode nonetheless exemplifies the tension between the conventional pursuit of presidential administration and consistency with legislative ends.

Moreover, the same Texas court recently condemned President Obama's immigration directive instructing the immigration agencies to defer the deportation of various noncitizens,[126] a policy known as Deferred Action for Childhood Arrivals ("DACA").[127] DACA was considered by critics[128]—and framed by the President himself[129]—as

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121 *Id.* at 1149.

122 Texas v. United States, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021).

123 *Id*. at 653.

124 *Id*. at 651 ("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.").

125 Daniel Wiessner, *Texas Drops Challenge to Biden Admin.'s Deportation Moratorium*, REUTERS (May 21, 2021, 2:53 PM), https://www.reuters.com/business/legal/texas-drops-challenge-biden-admins-deportation-moratorium-2021-05-21/ [https://perma.cc/GF28-M5M7].

126 Texas v. United States., No. 1:18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. Jul. 16, 2021).

127 Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/5Q7D-QJ2Q]. Adopted by DHS 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*, JACK M. BALKIN: BALKINIZATION (June 25, 2020), https://balkin.blogspot.com/2020/06/unbundling-daca-and-unpacking-regents.html [https://perma.cc/XP4B-NXB8].

128 *See, e.g.*, PRAKASH, *supra* note 26, at 51 ("President Obama adopted . . . a unilateral

an attempt to underenforce a 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.'"[130] Until recently, however, DACA remained in place due to a Supreme Court ruling that the Trump Administration's attempt to rescind the policy was illegitimate,[131] while also establishing that the DACA policy itself is subject to judicial review.[132] Since then, President Biden has directed the immigration agencies to "preserve and fortify DACA,"[133] and the agencies have begun to comply.[134]

Nonetheless, in July 2021, a district court permanently enjoined DHS from "administering the DACA program and from reimplementing DACA without compliance with" the Administrative Procedure Act ("APA").[135] Moreover, it characterized the DACA program as "illegal" because it falls outside immigration statutory schemes and congressional intent.[136] More specifically, the court determined that

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'pen-and-phone' strategy [and] . . . wielded it to remake the immigration landscape, bypassing and sidelining Congress."); Delahunty & Yoo, *supra* note 95, 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").

129 *See* Remarks on Immigration Reform and an Exchange with Reporters, 1 PUB. PAPERS 800–01 (June 15, 2012) (transcribing Rose Garden speech by President Obama declaring that under DACA, DHS will have "discretion about whom to prosecute" while still recognizing that "[DACA] is temporary, Congress needs to act."); Law, *supra* note 6 (asserting that "Obama commanded the Department of Homeland Security to announce that it was unilaterally implementing their version of the DREAM Act").

130 Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 122 (2017) (emphasis omitted) (discussing United States v. Texas, 579 U.S. 547 (2016)).

131 DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020); *see also infra* notes 571–74 and accompanying text (discussing the reasoning behind this decision).

132 *Regents*, 140 S. Ct. at 1906.

133 Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7,053, (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.").

134 Press Release, DHS, Statement by Homeland Security Secretary Mayorkas on DACA (Mar. 26, 2021), https://www.dhs.gov/news/2021/03/26/statement-homeland-security-secretary-mayorkas-daca [https://perma.cc/6PVB-8RS9] (noting that the agency was "taking action to preserve and fortify DACA . . . in keeping with the President's memorandum"); *see also* Genevieve Douglas, *New Measures to Preserve DACA Coming Soon, USCIS Official Says*, BLOOMBERG L. (May 17, 2021, 3:28 PM), https://news.bloomberglaw.com/daily-labor-report/new-measures-to-preserve-daca-coming-soon-uscis-official-says [https://perma.cc/BX35-ARPR].

135 Texas v. United States, No. 1:18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. July 16, 2021); 5 U.S.C. §§ 551–559.

136 Texas v. United States, 549 F. Supp. 3d 572, 604–14 (S.D. Tex. 2021).

"Congress has not granted [the agency] the statutory authority to adopt DACA";[137] that DACA contravenes statutory schemes addressing deportation,[138] work permits,[139] and humanitarian pathways to citizenship;[140] and that "DACA is not supported by historical precedent," per the court's analysis of regulatory and statutory schemes.[141] Since then, the Supreme Court has granted cert on this case, but denied a motion to stay this district court order.[142]

In response to the district court decision, President Biden has implored Congress to pass improved immigration legislation, while continuing to pledge that his Administration will pursue the DACA policy.[143] 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."[144] 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,"[145] which it did in September 2021.[146] In this single statement, President Biden lays out the tension between statutory requirements and his own policy goals and articulates an intention to draw on agency rulemaking to change the contours of how immigration legislation is applied.

B. Expanding Enforcement Jurisdiction

Reaching back from today to the Clinton presidency, both Democratic and Republican administrations have sought to expand agencies' authority to regulate, and the Biden Administration is no exception. Some of President Biden's new policies are already facing claims that they violate the law. For instance, as noted in the previous

137 *Id.* at 604.

138 *See id.* at 622.

139 *Id.* at 610.

140 *Id.* at 613-14.

141 *Id.* at 617.

142 United States v. Texas, 22-58 (22A17), 597 US at *1 (July 21, 2022), *cert. granted*, (setting the argument for this case in December 2022), *available at* https://www.supremecourt.gov/orders/courtorders/072122zr_7k47.pdf [https://perma.cc/D295-PUPX].

143 Presidential Statement on Deferred Action for Childhood Arrivals and Immigration Reform Legislation, 2021 DAILY COMP. PRES. DOC. 1 (July 17, 2021).

144 *Id.*

145 *Id.*

146 Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

Section,[147] the Supreme Court very recently validated the Trump EPA's repeal of an environmental protection policy directed by President Obama by finding that Obama-era policy itself to be unlawful.[148] Indeed, the Court determined that the EPA had overstepped its statutory jurisdiction because it did not have "clear congressional authorization" under the Clean Air Act to establish President Obama's Clean Power Plan.[149]

While the Supreme Court reversed the D.C. Circuit, it did so by employing a purposivist analysis like the D.C. Circuit did in the decision below.[150] More specifically, the Court likewise rejected what it perceived to be textualism employed by the Obama EPA[151] and instead applied the major questions doctrine[152] based on "both separation of powers principles and [the Court's] practical understanding of legislative intent."[153] Under its own analysis, the Court determined that "Congress did not grant EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan."[154] (Note that "generation-shifting" refers to the agency's efforts to regulate shifts in electricity production (for instance "from existing coal-fired power plants, which would make less power, to natural-gas-fired plants, which would make more") as a form of emissions control.[155])

Simply put, the Court characterizes the Obama EPA's efforts to generation shift as outside the lawful scope of the Clean Air Act because the relevant language of the Clean Air Act was "vague" and "long-extant,"[156] and lacked a "clear statement" granting the EPA the requisite authority,[157] and in doing so, authenticates President Trump's deregulatory efforts. Notably, this is in direct opposition to the D.C. Circuit's assertion that the Trump EPA's failure to require a shift to

147 *See supra* notes 108–09 and accompanying text.

148 West Virginia v. EPA, 142 S. Ct. 2587 (2022).

149 *See id*. at 2609 (citation omitted).

150 *See supra* notes 100–07 and accompanying text (rejecting the Trump EPA's textualist analysis in favor of a deep and nuanced reading of the Clean Air Act).

151 *See West Virginia v. EPA*, 142 S. Ct. at 2609 (We are "'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary.") (citation omitted).

152 For an explanation of the major questions doctrine, see *infra* notes 499–502 and accompanying text.

153 *West Virginia v. EPA*, 142 S. Ct. at 2609 (citation omitted).

154 *Id*. at 2595 (citation omitted).

155 *Id*. at 2593.

156 *Id*. at 2610.

157 *Id*. at 2614.

non-coal forms of energy production (such as gas or oil) as a means to reduce emissions[158] constituted an underenforcement of the Clean Air Act by the EPA.[159]

Another high-profile example of a Biden policy that led an agency to exercise authority beyond the scope of its statutory jurisdiction is a CDC mandate requiring masks on public transportation.[160] This mandate, which was part of a coalition of efforts by the Biden Administration to prevent the spread of COVID-19,[161] was initially implemented in February 2021.[162] The CDC was set to extend the mandate before it expired on April 18, 2022.[163] However, a district court judge struck the mandate down before the CDC could do so.[164]

To come to this decision, the judge evaluated the Public Health Service Act,[165] which states in relevant part:

> The Surgeon General, with the approval of the Secretary [of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . . For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."[166]

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158 American Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021).

159 *See supra* notes 102–04 and accompanying text.

160 *See supra* notes 12–13 and accompanying text.

161 *See, e.g.*, Exec. Order No. 13,991, 86 Fed. Reg. 7045 (Jan. 20, 2021); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917–18, 1926, 1928); *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S., slip op. at 2 (Jan. 13, 2022) (per curiam). (ruling on a vaccine mandate that required a vaccinate-or-test regime for the majority of the U.S. workforce).

162 Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025 (Feb. 3, 2021).

163 Associated Press, *Biden Administration Extends Public Transport Mask Mandate by Two Weeks*, THE GUARDIAN (Apr. 13, 2022, 12:33 AM), https://www.theguardian.com/us-news/2022/apr/13/biden-administration-extends-public-transport-mask-mandate-cdc [https://perma.cc/PHC2-N4Y3].

164 *See* Health Freedom Def. Fund v. Biden, No. 8:21-cv-1693-KKM-AEP, 2022 WL 1134138, at *1 (M.D. Fla. Apr. 18, 2022).

165 *Id.* at *9 (identifying 42 U.S.C. § 264(a) as the purported source of the CDC's authority to issue the rule requiring masks on public transportation).

166 42 U.S.C. § 264(a); *see also* 42 C.F.R. § 70.2 (delegating this authority to the CDC).

The judge applied textualism to determine that the CDC's mask mandate is not "necessary to prevent . . . communicable diseases."[167] Drawing on "corpus linguistics" to find the ordinary meaning of the term at the time the statute was written, as well as on the view that the term "sanitation" has to be narrowly defined to avoid bringing "[e]very act necessary to prevent disease spread would be possible" under its umbrella, the judge declared that the term "'sanitation" in the statute refers to measures that clean something, but not to measures that keep something clean.[168] Because the mandate to wear masks falls into the latter meaning of "sanitation," the judge concluded, it is outside the authority granted to the CDC by the statute.[169] The Biden Administration is no longer enforcing the mandate,[170] although it does appear to be appealing the decision,[171] if only to further its own interest in asserting the scope of the CDC's statutory authority.[172]

Another such policy is a CDC order extending the federal eviction moratorium in order to prevent the spread of COVID-19, which the Supreme Court has blocked.[173] The CDC issued its first eviction moratorium incident to COVID-19 relief legislation passed by Congress in March 2020.[174] "Among other relief programs, the Act im-

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167 *Health Freedom Def. Fund*, 2022 WL 1134138, at *17–20.

168 *Id.* at *17–18.

169 *Id.* at *19.

170 David Shepardson, Rajesh Kumar Singh & Jeff Mason., *U.S. Will No Longer Enforce Mask Mandate on Airplanes, Trains After Court Ruling*, REUTERS (Apr. 19, 2022, 5:22 AM), https://www.reuters.com/legal/government/us-judge-rules-mask-mandate-transport-unlawful-overturning-biden-effort-2022-04-18/ [https://perma.cc/8W92-569H].

171 Sheryl Gay Stolberg, *Justice Dept. Appeals to Reinstate Transportation Mask Mandate*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/us/politics/cdc-transportation-mask-mandate.html [https://perma.cc/4XHV-R8C3].

172 *See* Charlie Savage & Sharon LaFraniere, *Analysis: The U.S. Appealed to Reinstate Masks. But Is It Seeking to Win?*, N.Y. TIMES (Apr. 22, 2022), https://www.nytimes.com/2022/04/22/us/politics/biden-legal-strategy-mask-mandate.html [https://perma.cc/UP8D-K5AU] ("Legal specialists raised another possibility: The administration may instead be buying time and thinking about trying to erase the ruling — a move that would allow it to protect the powers of the Centers for Disease Control and Prevention to respond to a future crisis — but without reviving a mask mandate.").

173 *See supra* text accompanying note 16. Notably, the Court has since suggested that CDC's scope of authority is as contentious as the EPA's. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2613 (2022) ("The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly 'raise[s] an eyebrow.'") (citation omitted).

174 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, 134 Stat. 281 (passed in March 2020 to alleviate burdens caused by the burgeoning COVID–19 pandemic).

posed a 120-day eviction moratorium for properties that participated in federal assistance programs or were subject to federally-backed loans."[175] However, "[w]hen the eviction moratorium expired in July [2020], Congress did not renew it."[176] Nonetheless, the CDC decided to extend the moratorium without congressional authorization through December 2020.[177] Furthermore, this extension "went further than its statutory predecessor, covering all residential properties nationwide and imposing criminal penalties on violators."[178]

While Congress eventually decided to extend the CDC's second moratorium through January 2021 as part of a second COVID-19 relief bill,[179] the CDC then issued a third moratorium extending relief through June 2021, months after the legislative renewal of the second moratorium ended.[180] The CDC issued this extension notwithstanding both a D.C. Circuit ruling that the agency was unlikely to overcome a challenge to the second extension,[181] and the President's own concerns about a lack of congressional authorization and constitutional authority to issue another extension.[182] Notably, however, the third morato-

175 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam) (citing Pub. L. 116–136, § 4024, 134 Stat. 281).

176 *Id.* Despite congressional efforts, a vote to renew the moratorium failed. Barbara Sprunt, *The Biden Administration Issues a New Eviction Moratorium After a Federal Ban Lapsed*, NPR (Aug. 3, 2021, 7:07 PM), https://www.npr.org/2021/08/03/1024345276/the-biden-administration-plans-a-new-eviction-moratorium-after-a-federal-ban-lap [https://perma.cc/8X4T-9QTJ].

177 *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486 (citing Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020)).

178 *Id*.

179 Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, § 502, 134 Stat. 2078, 2078–79 (2021).

180 *See id.* (citing Temporary Halt in Residential Evictions, 85 Fed. Reg. at 55,292).

181 Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 20-cv-03377-DLF, 2021 U.S. App. WL 2221646, at *1 (D.C. Cir. June 2, 2021).

182 *See* Krishnadev Calamur, *The Supreme Court Will Allow Evictions to Resume. It Could Affect Millions of Tenants*, NPR (Aug. 26, 2021, 10:29 PM), https://www.npr.org/2021/08/26/1024668578/court-blocks-biden-cdc-evictions-moratorium [https://perma.cc/W2W3-DYKU] ("Gene Sperling, who oversees the White House's rollout of the COVID relief, said Biden 'has double, triple, quadruple checked' on whether he could unilaterally extend the eviction moratorium, but determined it was not possible . . . [because] the Supreme Court made it clear that 'congressional authorization' was needed on the matter."); *see also* Peter M. Shane, *No, the CDC Eviction Moratorium Does Not Raise Constitutional Issues*, WASH. MONTHLY (Aug. 10, 2021), https://washingtonmonthly.com/2021/08/10/no-the-cdc-eviction-moratorium-does-not-raise-constitutional-issues/ [https://perma.cc/L6V8-Q7CB] (arguing that "Biden added to confusion about the [moratorium] when he cast his deliberations as a matter of consultation with 'constitutional lawyers' and said, 'the bulk of the constitutional scholarship says that [a moratorium] is not likely to pass constitutional muster.'"); Jack Goldsmith, *The Anatomy of a Screw Up: The Biden Eviction Moratorium Saga*, LAWFARE (Aug. 9, 2021, 9:43 AM) https://www.lawfareblog.com/anatomy-screw-biden-eviction-moratorium-saga [https://perma.cc/U8TL-W47K] (arguing that

rium was narrower than the previous extension; the previous extension applied nationwide, while the third moratorium did not apply to counties that "no longer experience substantial or high levels of community transmission."[183]

Nonetheless, the Supreme Court suggested: "It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute . . . ."[184] The "decades-old" statute "to which the Court refers is, as in the previous example, . . . the Public Health Service Act."[185]

In its brief evaluation of this legislation, the Court states that "[r]eading both sentences together, rather than the first in isolation, it is a stretch to maintain that [the statute] gives the CDC the authority to impose this eviction moratorium."[186] As a result, the Court blocked the newest extension, declaring that "careful [statutory] review . . . makes clear that the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority."[187] The Court concludes: "It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts."[188]

Another Biden policy facing judicial reproach involves agency efforts to "pause" new oil and natural gas leases on public lands or in offshore waters,[189] per an executive order.[190] At first blush, "pausing" a lease may appear to be underenforcement of the law, in that it would disrupt a lease made pursuant to statute. However, this Part characterizes this directive as potentially expanding administrative jurisdiction because it reads into the statute additional agency authority to suspend an existing contract. As instructed by the President:

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the Biden Administration overreacted to the Supreme Court order halting the moratorium by assuming "the Supreme Court ha[d] made clear that" the option for the CDC to issue another moratorium was "no longer available.").

183 Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,250 (Aug. 6, 2021).

184 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam).

185 *See supra* notes 164–66 and accompanying text.

186 *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488.

187 *Id.* at 2486.

188 *Id.*

189 *Fourteen U.S. States Sue Biden Administration Over Oil and Gas Leasing Pause*, REUTERS (Mar. 24, 2021), https://www.reuters.com/article/us-usa-biden-wyoming/fourteen-u-s-states-sue-biden-administration-over-oil-and-gas-leasing-pause-idUSKBN2BG2KG [https://perma.cc/6RAV-NLFV].

190 Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

> 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.[191]

As of the date of writing, one district court has granted a preliminary injunction against this policy.[192] 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" and "in light of the Secretary of the Interior's broad stewardship responsibilities,"[193] the court declared that the legislation at issue, which includes the Outer Continental Shelf Lands Act ("OCSLA") and the Mineral Leasing Act ("MLA"), grants neither the President nor the agency the authority to "pause" new oil and natural gas leases.[194]

The court asserted 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."[195] 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."[196] "Although there is certainly nothing wrong with performing a comprehensive review," the court remarks, "there is a problem in ignoring acts of Congress while the review is being completed."[197]

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191 *Id.*; *see also* Press Release, Dep't. 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, (Feb. 11, 2021) (including a section entitled "Hitting Pause on New Oil and Gas Leasing"), https://www.doi.gov/pressreleases/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands [https://perma.cc/2C64-UVVZ] (including a section entitled "Hitting Pause on New Oil and Gas Leasing").

192 Louisiana v. Biden, 543 F. Supp. 3d 388, 388 (W.D. La. 2021); Joshua Partlow & Juliet Eilperin, *Louisiana Judge Blocks Biden Administration's Oil and Gas Leasing Pause*, WASH. POST (June 15, 2021, 9:47 PM), https://www.washingtonpost.com/climate-environment/2021/06/15/louisiana-judge-blocks-biden-administrations-oil-gas-leasing-pause/ [https://perma.cc/Q75K-N2E9].

193 *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

194 Louisiana v. Biden, 543 F. Supp. 3d at 398, 413.

195 *Id.* at 398.

196 *Id.* at 410.

197 *Id.*

Another set of policies that may soon face litigation involve President Biden's issuance of a sweeping set of goals for anti-trust regulation,[198] which directs the Federal Trade Commission ("FTC") to pursue measures that might be in contravention of statutes governing the agency.[199] These allegedly 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 "abandon[ing] completely the rule of reason that the Supreme Court has been applying in antitrust law for over a century."[200]

In addition, President Trump—despite his alleged pursuit of deregulation—appears 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 provide healthcare coverage for those with preexisting conditions and other executive orders pledging to bring down prescription drug prices.[201] Notably, President Biden has also sought to advance the latter policy.[202] Regarding these drug initiatives, the Trump Administration noted that agency measures pursuant to these directives are likely

198 *See* Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021); Press Release, The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/J27C-49HX] (noting that President Biden describes his anti-trust initiative as a "whole-of-government effort").

199 *See* Richard J. Pierce, Jr., *President Biden's Antitrust Agenda*, YALE J. ON REGUL.: NOTICE & COMMENT (July 12, 2021), https://www.yalejreg.com/nc/president-bidens-antitrust-agenda-by-richard-j-pierce-jr/ [https://perma.cc/L9SD-9V2W] (suggesting that at least one of President Biden's antitrust goals could be at odds with the Sherman Act).

200 Richard J. Pierce, Jr., *Fasten Your Seatbelts, the FTC Is About to Take Us on a Rollercoaster Ride*, YALE J. ON REGUL.: NOTICE & COMMENT (July 1, 2021), https://www.yalejreg.com/nc/fasten-your-seatbelts-the-ftc-is-about-to-take-us-on-a-rollercoaster-ride-by-richard-j-pierce-jr/ [https://perma.cc/Q9UB-Q54S].

201 *See* Exec. Order No. 13,948, 85 Fed. Reg. 59,649 (Sept. 13, 2020); Press Release, The White House, President Donald J. Trump's Blueprint To Lower Drug Prices (May 11, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-blueprint-lower-drug-prices/?utm_source=Twitter&utm_medium=social&utm_campaign=wh [https://perma.cc/WHU8-HHMT].

202 Exec. Order No. 14,036, 86 Fed. Reg. 36,987, (July 9, 2021) (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)*; see also* Fraiser Kansteiner, *With Sweeping Executive Order, Biden Puts Drug Pricing, Anti-Competitive Strategies in the Crosshairs*, FIERCE PHARMA (July 12, 2021, 11:28 AM), https://www.fiercepharma.com/pharma/biden-order-puts-drug-pricing-anti-competitive-pharma-practices-crosshairs [https://perma.cc/D966-TE48] (noting that President Biden is "advancing a Trump-era policy" in an attempt to combat high prescription drug prices).

to be challenged as outside the scope of the agency's jurisdiction under statute.[203]

In addition, Trump issued an executive order, in pursuit of a unitary executive, that recategorized civil servants (with the exception of certain administrative adjudicators) as "Schedule F," thus rendering all of them subject to at-will removal.[204] While the Biden Administration subsequently revoked this proposal,[205] "it still bears attention,"[206] and could be reinvigorated by 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

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203 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 [executive order] 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 (2018).

204 *See* Exec Order No. 13,957, 85 Fed. Reg. 67,631(Oct. 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); Erich Wagner, *'Stunning' Executive Order Would Politicize Civil Service*, GOV'T EXEC. (Oct. 22, 2020), https://www.govexec.com/management/2020/10/stunning-executive-order-would-politicize-civil-service/169479/ [https://perma.cc/3JZC-ZVCG] ("The argument here is that anyone involved in policymaking can be swept into this new classification, and once they [a]re in they [a]re subject to political review and dismissal for any reason.").

205 Exec. Order 14,003, 86 Fed. Reg. 7,231 (January 22, 2021).

206 Paul R. Verkuil, *Putting the Fizz Back into Bureaucratic Justice*, REGUL. REV. (Feb. 8, 2021) https://www.theregreview.org/2021/02/08/verkuil-putting-fizz-bureaucratic-justice/ [https://perma.cc/TV9K-ZTAB].

government."[207] Moreover, this policy is likely to undercut the Pendleton Act[208] and the Civil Service Reform Act.[209]

It is noteworthy that the D.C. Circuit has allowed the President to push an agency to alter its statutory enforcement in pursuit of a broader policy on at least one occasion. 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.[210] This pursuit of "net neutrality," which mandated equal access to the internet for all by subjecting internet providers to heavier regulation, was deemed a means toward "[i]nnovation, [c]ompetition, [f]ree [e]xpression, and [i]nfrastructure [d]eployment."[211]

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.[212] 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,[213] the judges remained aware of a possible tension be-

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207 *Id.* (emphasis omitted) (discussing President Trump's "executive order on 'Creating Schedule F in the Excepted Service'"); *see also* Wagner, *supra* note 204 (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, Josh Dawsey & Toluse Olorunnipa, *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 A]dministration to weed out career federal employees viewed as disloyal in a second term"); Kelsey Brugger, *Trump Order Looks to Dismantle the 'Deep State'*, GREENWIRE (Oct. 22, 2020) (noting that "[c]ritics 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," and sharing a comment by a former agency head that the order would diminish transparency in hiring and would prioritize people whose primary qualification was political loyalty).

208 Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883) (codified as amended in scattered sections of 5 U.S.C.).

209 Civil Service Reform Act ("CSRA"), Pub. L. No. 95–454, 92 Stat. 1111 (1978). As one scholar has noted, Trump's executive order sought "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 204 (quoting a professor at the University of Texas School of Public Affairs).

210 Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5618 (2015) (reclassifying the internet from an "information service" to a "telecommunications service").

211 *Id.* at 5625.

212 *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 730 (D.C. Cir. 2016).

213 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 382 (D.C. Cir. 2017) (Srinivasan, J., concurring) (per curiam) (noting that en banc review of a previous decision upholding the Obama

tween the President's policy interests and the requirements of the statute. More specifically, the dissent bristled that the net neutrality rule resulted from President 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."[214]

Also 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 the President.[215] 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."[216] Notably, the court stated that "an administrative agency may not exercise its authority 'in a manner that is inconsistent with administrative structure that Congress enacted into law.'"[217] While the extent to which the Department of Interior (via the Bureau of Land Management) was behaving outside its mandate is up for debate,[218]

FCC's Open Internet Order is "particularly unwarranted" in light of the Trump FCC's notice of proposed rulemaking that would "replace the existing rule with a markedly different one").

214 *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," thus "[a]bandoning Congress's clear, deregulatory policy. . . ."). *But see id.* at 382 (Srinivasan, J., concurring) (contending, in response to Judge Brown, that presidential pressure to increase statutory enforcement did not contravene the agency's statutory authority).

215 *See* Wyoming v. Dep't. of Interior, 493 F. Supp. 3d 1046, 1067 n.20, 1070 n.23, 1073 n.26 (D. Wyo. 2020).

216 Max Masuda-Farkas, Alana Sheppard & Megan Russo, *Week in Review*, REGUL. 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. *See* Wyoming v. Dep't. of Interior, No. 16-cv-00285, 2017 WL 161428, at *20–21 (D. Wyo. 2017).

217 Wyoming v. Dep't of Interior, 493 F. Supp. at 1064 (quoting Food & Drug Admin. v. & Williamson Tobacco Corp, 529 U.S. 120, 125 (2000)).

218 *See, e.g.*, Press Release, Peter Zalzal, Lead Attorney, Environmental Defense Fund, Wyoming Federal Court Overturns Common Sense Protections Against Wasting Natural Gas on Public and Tribal Lands (Oct. 8, 2020), https://www.edf.org/media/wyoming-federal-court-overturns-common-sense-protections-against-wasting-natural-gas-public [https://perma.cc/FK7W-6YWQ] ("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.").

the court found that the agency, acting pursuant to President Obama's instructions, went beyond the bounds of its delegated authority.[219]

Conversely, in a separate case heard around the same time, the D.C. Circuit approved 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 to coordinate her branch, regardless of whether she is so authorized by the legislature to execute the law in that manner,[220] notwithstanding that in this case, President Obama had little to do with the coordination plan at issue.[221]

Commentators argue that the President's power to coordinate her branch is beneficial to her branch, and therefore justified even without express legislative approval.[222] It is also possible to argue that the Constitution authorizes coordination[223] as "necessary to protect the operations of the federal government, even in cases in which no statute provides explicit authority to do so."[224]

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219 Wyoming v. Dep't. of Interior, 493 F. Supp. at 1052 (holding that the agency "exceeded its statutory authority . . . in promulgating the new regulations.").

220 Nat'l Min. Ass'n v. McCarthy, 758 F.3d 243, 249 (D.C. Cir. 2014) ("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 . . . . In 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.'" (quoting Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep't of the Treasury, 638 F.3d 794, 803 (D.C. Cir. 2011))).

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

222 *See, e.g.*, 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"); *McCarthy*, 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 *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.").

223 *See McCarthy*, 758 F.3d at 249 ("[W]e will not read into that statutory silence an implicit ban on inter-agency consultation and coordination . . . [because] restricting such consultation and coordination would raise significant constitutional concerns . . . . 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.").

224 Goldsmith & Manning, *supra* note 33, at 1837–38, 1838 n.17 (noting that 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" (citing Cunningham v. Neagle, 135 US 1, 67–68 (1890))).

Nonetheless, improvements to administrative communication and efficiency do not negate the possibility the Congress may have intended, in some cases, to privilege values that are at odds with coordination or to concentrate the bulk of statutory authority in a particular agency (for instance, one with the most relevant regulatory expertise). Furthermore, "[t]o the extent that coordination lowers the level of service legislators could provide to their constituents, these members are likely to use their oversight jurisdiction to impede coordination."[225] For instance, scholars have argued that the congressional reorganization of bureaucracy to create the new DHS was structured to allow different components of the agency to respond to different priorities.[226] In other words, Judge Kavanaugh's D.C. Circuit decision ignored the extent to which presidential or agency efforts to coordinate interfere with the execution of law as intended by the legislature.

In Justice Elena Kagan's best-known example of presidential administration,[227] *FDA v. Brown & Williamson Tobacco Corp*,[228] President Clinton directed the Food and Drug Administration ("FDA") to regulate beyond the scope of its authority.[229] In condemnation of President Clinton's efforts, the Supreme Court found that the agency overstepped its statutory authority when it promulgated rules meant to regulate the tobacco industry.[230] At the time, President Clinton had made clear his goal of increasing government oversight of the tobacco market and tobacco products.[231] In striking down the FDA's new policy, the majority focused on the legislature as the primary source of agency authority[232]—in contrast to the dissent's implication that the

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225 Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 719–20 (2006).

226 More specifically, "[a]llowing the two separate legislative subcommittees with different goals to retain jurisdiction over the different pieces of the now reorganized bureau" may have purposefully "impede[d] coordination" in order to allow "different interests on the two subcommittees to continue to pull the two portions of the reorganized bureau in different directions." *Id*. at 706.

227 *See* Kagan, *supra* note 23.

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

229 *See id.*

230 *Id.* at 125–26.

231 The President's News Conference, 2 PUB. PAPERS 1237 (Aug. 10, 1995), *available at* https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-1076 [https://perma.cc/49EC-F3EQ].

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

President may confer authority onto an agency[233]—and determined that "an FDA ban [on tobacco] would plainly contradict congressional intent."[234]

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.[235] 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,[236] as well as other legislation regulating tobacco that indicated the legislature's expectation that the FDA did not have authority to regulate tobacco under its enabling statute, the Food, Drug, and Cosmetic Act ("FDCA").[237]

The Court also said that, on several occasions, Congress considered and rejected proposed amendments to the FDCA giving the agency authority to regulate tobacco products,[238] and that the structure of the Act precluded the agency from regulating tobacco products without banning them,[239] an outcome that would not be acceptable given the fact that Congress has shown clear intent that cigarettes and tobacco not be banned.[240] Given the economic importance of the tobacco industry, the Court concluded, Congress would not have subjected tobacco to regulation under the FDCA without saying so explicitly.[241] Ultimately, President Clinton's forceful assertion of agency jurisdiction was not enough to overcome this requirement.[242]

It is notable that the decision in this case was decided on a narrow 5-4 vote, and the dissent took a purposivist approach to statutory interpretation that ultimately supports the agency's position.[243] Indeed, both the majority and the dissent saw fit to engage in an analysis that

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233 *Id.* at 189–90 (Breyer, J., dissenting).

234 *Id.* at 122. Note that the FDA did not actually propose a wholesale ban on tobacco, but the Court found that, because the agency is required to ban drugs which "cannot be used safely for any therapeutic purpose," allowing their jurisdiction to include tobacco would compel a complete ban on tobacco products. *Id.* at 142.

235 *Id.* at 152.

236 *Id.* at 153.

237 21 U.S.C. §§ 301–399; *see Brown & Williamson*, 529 U.S. at 122.

238 *Brown & Williamson*, 529 U.S. at 147–48.

239 *Id.* at 142.

240 *Id.* at 121.

241 *Id.* at 147.

242 *Id.*

243 *See id.* at 161, 163 (Breyer, J., dissenting) ("I believe that the most important indicia of statutory meaning—language and purpose—along with the FDCA's legislative history . . . are sufficient to establish that the FDA has authority to regulate tobacco.").

emphasizes the legislature's policy aims, although the dissent separately argues that the President should be able to direct policy.[244] Notably, in the wake of *Brown & Williamson*, Congress gave the agency authority to regulate tobacco after all,[245] which suggests that the dissent's views of the intentions of the statutory scheme may have been accurate.[246]

Finally, the idiosyncratic example of the "Bush-Wilson Agreement" between President George H.W. Bush and former Archivist Don W. Wilson bears noting.[247] This agreement, signed on President Bush's last day in office, "purport[ed] to give . . . President Bush exclusive control over electronic records of the Executive Office of the President created during [his] term in office."[248] The D.C. district court found that this agreement violated the Presidential Records Act,[249] and issued an injunction prohibiting the Acting Archivist from implementing the agreement.[250]

Ultimately, this Part has illustrated that presidential administration goes beyond centralizing executive action in order to further the President's policy agenda or even directing agencies to formulate and implement controversial policies. Indeed, the Executive may pressure agencies to behave in ways that run counter to statutory requirements or expectations. More specifically, the President sometimes directs agencies to under- or overenforce the law. As to underenforcement, cases from the past three administrations offer examples. As to efforts to expand the scope of an agency's enforcement power, relevant cases span from the Biden Administration all the way back to the Clinton presidency. These cases all suggest that by influencing what agencies do for her own purposes, the President may push agencies to contravene statutory purpose or requirements.

So, what might we take away from all of this? Arguably, presidential administration is not only at odds with particular statutes, but also with the separation of powers. While both the executive and legis-

244 *See id.* at 190–91 (Breyer, J., dissenting).

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

246 *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").

247 *See* Am. Hist. Ass'n v. Peterson, 876 F. Supp. 1300, 1303 (D.D.C. 1995).

248 *Id.*

249 44 U.S.C. §§ 2201–2209.

250 *Peterson*, 876 F. Supp. at 1303–04.

lative branches have constitutional claims to administrative control, the Executive has failed, to some extent, to acquiesce to legislative primacy in lawmaking. This is evidenced by Presidents' neglect of their duty to influence agencies in ways that benefit a searching administrative inquiry into legislative meaning. In other words, the prevailing, narrow focus of modern Presidents on their own policy interests alone—and the acquiescence of scholars to a self-centered version of Executive unilateralism—has rendered presidential administration deficient.

If one is a formalist, presidential administration in its current form may be unconstitutional in some cases. Presidentialism may lead to a failure by the executive branch to engage in faithful execution or to allow Congress to legislate. Furthermore, from a functionalist perspective, even if conventional presidential administration fosters political accountability, good governance or beneficial policies, it nonetheless encompasses an incomplete set of virtues. Instead, rather than being driven overwhelmingly by partisanship or politics, the executive branch has a responsibility to engage in bounded discretion exercised to fulfil statutory aims and to implement a balanced separation of powers that limits executive aggrandizement.

II. Expansive Presidential Administration Within Boundaries

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. Part I illustrated not only that presidents in the modern era are directive- and agenda-focused, but also that presidential administration is sometimes at odds with statutory law. Part II touts a new conception of presidential administration, as opposed to simply denouncing it wholesale like others who seek to reinvigorate the bureaucracy.[251] In doing so, it advocates for a paradigm of presidential administration that prioritizes fidelity to legislative mandates and norms over the President's own policy and political interests and in addition to other goals, such as political accountability, high-quality coordination, uniformity in execution, and beneficial policy, that may otherwise be supported by presidentialism. Overall, this Part

251 *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. 418, 423 (2021) (stating that the authors are "down on presidential administration" and arguing in favor of "[t]ossing [o]ut the [p]residential [a]dministration [p]laybook").

argues that even if conventional presidential administration results in good governance and outcomes, presidentialism is nonetheless built on an incomplete set of values if it is not adequately statute-focused; it explains how even broad exercises of presidential and administrative discretion might be driven by a focus on statutory execution, as opposed to presidential aims; and it asserts that presidential administration that is focused on statutory aims may be consistent with a centralized or even unitary executive branch.

Scholars have advocated for presidentialism on the basis that it furthers good governance and preferable policy outcomes. This Part's argument for statute-focused presidential administration concedes that it is not necessarily consistent with an emphasis on public care, consultation with experts in all situations, or socially beneficial policymaking.

Some scholars level functionalist criticism against executive policymaking,[252] and critiques about the substance and partisanship of executive policymaking have been aimed at presidents from Roosevelt to Trump.[253] 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."[254] Truly, what many might consider to be "good" or beneficial policy can come from the presidential reshaping of statutory mandates, be it thirty years ago[255] or more recently.[256]

Furthermore, presidential administration on its own terms may seek to foster good governance[257] or coordination,[258] or even to insu-

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252 *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 68 (advocating for greater transparency in OIRA oversight).

253 *See supra* note 25 (listing such critiques).

254 Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); *see also* Michael A. Fitts, *The 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).

255 *See supra* notes 228–41 and accompanying text (discussing President Clinton's and the FDA's joint efforts in the 1990s to regulate the use of tobacco).

256 *See supra* notes 210–14 and accompanying text (discussing President Obama's and the FCC's joint efforts in 2017 to promote net neutrality).

257 *See, e.g.*, Exec. Order No. 10,355, 85 Fed. Reg. 79,379 (Dec. 7, 2020) (concerning the integration of agency "preparedness programs").

258 *See supra* note 222 (discussing how and why Presidents foster coordination).

late agency decisionmakers[259] in pursuit of better policy or decisional outcomes. Presidents have long engaged in cost/benefit analysis[260] (notwithstanding situations in which the Executive applies this analysis to fundamentally unjustifiable effect)[261], which can lead to transparency, accountability, or higher-quality policies,[262] notwithstanding the drawbacks of this approach.[263] Then again, cost-benefit analysis may not square with certain regulatory aims,[264] let alone with a statutory emphasis on maximizing benefits alone.

As to expertise in administration, Kathryn A. Watts notes that "not all forms of presidential control are equal."[265] Some forms of presidential control "taint agency science, prompt agencies to ignore

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259 *See* Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 26 CONST. COMMENT. 583 (2010). Note that in Executive Order 13,924, President Trump directed agency heads to "consider the principles of fairness in administrative enforcement and adjudication." 85 Fed. Reg. 31,353 (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." Verkuil, *supra* note 206.

260 *See* Barilleaux & Kelley, *supra* note 33, 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 [e]xecutive [o]rders [that] . . . impose[d] a cost-benefit analysis on all executive agencies when the organic statutes in question d[id] not preclude it"); Mashaw & Berke, *supra* note 25, 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 C.F.R § 83 (2020).

261 *See, e.g.*, *A Debate Over President Trump's "One-In-Two-Out" Executive Order*, REGUL. REVIEW (June 26, 2017), https://www.theregreview.org/2017/06/26/debate-one-in-two-out-executive-order/ [https://perma.cc/N2DR-J2LY] (showcasing several scholars debating the constitutionality and lawfulness of Executive Order 13,771).

262 *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 J. ON REGUL.: NOTICE & COMMENT (July 11, 2018), https://www.yalejreg.com/nc/will-cost-benefit-analysis-become-the-law-of-the-epa-by-jonathan-masur/ [https://perma.cc/8LY2-TKFV] (arguing a Clear Air Act rule issued under the Trump Administration provided a good opportunity for the EPA "to instantiate [cost-benefit analysis] as the law of that agency").

263 *See* Matthew D. Adler & Eric Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999) (noting that while the "popularity [of cost-benefit analysis] among agencies in the United States government has never been greater[, m]any law professors, economists, and philosophers believe that [cost-benefit analysis] does not produce morally relevant information and should not be used in project evaluation"); *A Debate Over the Use of Cost-Benefit Analysis*, REGUL. REV. (Sept. 26, 2016), https://www.theregreview.org/2016/09/26/debate-cost-benefit-analysis/ [https://perma.cc/RFZ3-RRLC] (noting that opponents of cost-benefit analysis argue that it "can mislead decision-makers [and] object to putting into dollar terms certain benefits—such as reductions in premature mortality or improvements in health—that they believe either cannot or should not be monetized").

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

265 Watts, *supra* note 75, at 706.

the law, and undermine transparency," she explains, while others "promote positive values like political accountability and regulatory coherence."[266] 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.

To put it succinctly, policies in forceful pursuit of the President's agenda are not suspicious on their face. However, even when the President acts to further social or optimal outcomes, good governance, or administrative norms, there is no clear evidence to suggest that Presidents generally pursue these values as a result of a careful evaluation of statutory aims. Even when presidentialism leads to virtuous policies, the President is usually motivated by her own goals, as opposed to a keen interest in dutiful statutory execution. Accordingly, this Part argues for the inclusion of an interest in functional interbranch balance in the set of incentives driving presidential administration, notwithstanding that a healthy separation of powers may also foster higher-quality presidentialism.

Notably, the focus of this Part is not on limiting the force or the scope of presidential control, but rather on shifting the President's *motivation* for wielding control. Accordingly, this Part 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 functionally acknowledges legislative supremacy in the creation of law, thus rendering an approach to administration that incorporates a more robust set of separation of powers values and limits to executive aggrandizement into the mix of incentives that currently drive presidentialism—incentives that include, predominantly, political accountability and self-interest, in addition to efficiency, good governance, and an interest in principled outcomes.

The remainder of this Part explores how various dimensions of execution discretion can be applied toward the legitimate 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 law execution. In many situations, strong and expansive presidentialism dovetails with an invigorated administrative focus on statutory scheme. A vision of bounded presidentialism has room, even, for a unitary executive, but one in which the President assumes strict

266 *Id.*

control over agencies to ensure their accountability to norms and requirements espoused by Congress.

A. Legislative Authorization of or Acquiescence to Presidentialism

Statute-focused administration may be consistent with presidentialism.[267] Indeed, it may be that in some cases, Congress may have wished to have little or no say in the matter of law execution. At the very least, the legislating Congress may have supported the exercise of presidential discretion or at least expected the President to wield some control over the administration of statute.

First, 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,[268] based on reasonable analysis suggesting that statutory values are vague, indeterminate, or conflicting; hold no clear objective; or are orthogonal to new regulatory challenges.[269]

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, or to manage new challenges that implicate the legislative scheme at issue. After all,

> [a] key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise."[270]

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267 *See*, *e.g.*, Guedes v. ATF, No. 21-5045, 2022 WL 3205889, at *2–3 (D.C. Cir. Aug. 9, 2022) (stating that the ATF's interpretation of the National Firearms Act, "urged" by "then-President Trump and Congress," was "the best construction of the statute").

268 *See* Kent et al., *supra* note 32, at 2191 (suggesting that an 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 POL. SCI. Q. 843, 872 (1994–95) ("[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.").

269 *See generally* Freeman & Spence, *supra* note 65 (discussing the problems of applying old statutes to new regulatory challenges).

270 West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) (discussing, in particular, Section 111 of the Clean Air Act).

This understanding applies in regulatory contexts as distinct as environmental protection[271] and national security.[272]

These types of situations differ, however, from those in which agencies exercise their discretion to pursue the President's goals in a vacuum. Take, for instance, the Trump Administration's contention,[273] and likewise, the argument furthered by the George W. Bush Administration,[274] that the EPA is not authorized under the Clean Air Act to regulate greenhouses gases—either those that emanate from certain sources, as was the EPA's argument under the Trump Administration,[275] or at all, as asserted by the Bush EPA.[276] In both of these cases, courts found against the agency after ascertaining the thrust of the statute at issue.

In *American Lung Ass'n*, the D.C. Circuit drew on purposivism to declare that the agency reached the "incorrect conclusion that the plain statutory text [of the Clean Air Act] clearly foreclosed the Clean Power Plan, so that complete repeal was 'the only permissible interpretation of the scope of the EPA's authority.'"[277] While this decision was reversed by the Supreme Court in *West Virginia v. EPA*, which found the Clean Power Plan to be unlawful, the Court's decision arguably allows a Trump-era policy deregulating environmental protection[278] to stand in contravention of both statutory text and intent.[279]

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271 *See*, *e.g.*, *id.* ("The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. [I]n enacting Section 111 [Congress made a broad delegation.] The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.").

272 *See*, *e.g.*, Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. *1-2 (forthcoming 2023) (arguing that an "expansive and free-form" major questions doctrine "raises serious problems for foreign affairs and national security" because it threatens the executive branch's ability to apply broadly-written statutes such as the Emergency Economic Powers Act, the Trade Expansion Act of 1962, the Trade Act of 1974, and the Defense Production Act to engage in "economic warfare" in order "to fight modern conflicts"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181908 [https://perma.cc/D69Q-KLJF].

273 *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 938 (D.C. Cir. 2021).

274 *See* Massachusetts v. EPA, 549 U.S. 497, 511–13 (2007).

275 *See supra* notes 97–107 and accompanying text.

276 *See supra* notes 112–15 and accompanying text.

277 *Am. Lung Ass'n*, 985 F.3d at 995.

278 *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, VA. L. REV. at *1 n.1 (forthcoming) (characterizing *West Virginia v. EPA* as "invoking major questions doctrine to invalidate EPA regulation designed to curb emissions from greenhouse gasses"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724 [https://perma.cc/RJL4-FVZ8]; *id.* at *1–2 (arguing, among other things, that the major questions doctrine as deployed in *West Virginia v. EPA* "operates as a powerful deregulatory tool that limits or substantially

Thomas McGarity and Wendy Wagner assert that the "Court reached its result by applying the 'major questions' doctrine to avoid a deep analysis of the text and legislative history on Section 111" of the Clean Air Act.[280]

Accordingly, scholars have argued that the Court's affirmation of the Trump EPA's interpretation of the Clean Air Act was enabled by a controversial application of the major questions doctrine,[281] "which replaces normal text-in-context statutory interpretation."[282] Elena Kagan suggests that the major questions doctrine applies, for instance, when an agency tries to "decide significant issues on which they have no particular expertise"[283]—that is, "when there is a mismatch between the agency's usual portfolio and a given assertion of power."[284] "But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly . . . with all the Clean Air Act's provisions."[285]

Likewise, in the Bush-era *Massachusetts v. EPA*, the Supreme Court drew on a textual analysis to assert that the Clean Air Act constitutes "capacious agency authorization" that "empower[s] the EPA Administrator to set emission standards for '*any* air pollutant.'"[286] In both cases, it seems, the statute—which was passed to wage a "war on

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nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective").

279 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

> [Congress] broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute.

Id.

280 Thomas O. McGarity & Wendy E. Wagner, *Do Not Blame Us*, REGUL. REV. (July 25, 2022), https://www.theregreview.org/2022/07/25/mcgarity-wagner-do-not-blame-us/ [https://perma.cc/Z35P-ZRXD].

281 *See West Virginia v. EPA*, 132 S. Ct. at 2641 (Kagan, J., dissenting) (noting that the major questions doctrine could be described by a "get-out-of-text-free card").

282 *Id.* at 2634 (Kagan, J., dissenting) (suggesting that the majority's formulation of the major questions doctrine "replaces normal text-in-context statutory interpretation").

283 *Id.* at 2633 (Kagan, J., dissenting).

284 *Id.*

285 *Id.*

286 Loshin & Nielson, *supra* note 113 at 62-63 (emphasis added) (discussing *Massachusetts v. EPA*).

air pollution"[287] —authorized the agency to exercise broad discretion to determine how best to reduce air pollution. Regardless of the canon of statutory interpretation the EPA decides to use to enforce the Clean Air Act, both the D.C. Circuit and the Supreme Court have said that the EPA cannot, with sincerity, assert that the legislation allows the agency to underregulate in the face of new challenges to the environment, such as those posed by greenhouse gases.

Even if delegations of discretion are generous or abstract, this does not necessarily mean that they should be at the mercy of politicos. A broad delegation might instead be the result of collective action problems or a lack of expertise in the legislature. 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 aims. In other words, administrative actors may have discretion, but only within boundaries.[288] 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, statute-focused execution might require devolving power downwards from the President and political appointees towards civil servants—a move from presidential administration to "civic administration."[289] 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 her policy interests. In this regard, Kevin M. 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."[290] When broad delegation results from indeterminacy, its enforcement may require, primarily, administrative engagement in expert, technocratic, or other nuanced determinations.

One example of broad delegation that requires a technical analysis hails from forty years ago and led to the well-known *Benzene* case,[291] which concerned the Department of Labor's authority to "pro-

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287 INDUR M. GOKLANY, CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION (1999).

288 *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 into some doubt the seemingly absolute discretion the executive branch has until now been thought to possess").

289 Emerson & Michaels, *supra* note 251, at 422.

290 Stack, *supra* note 43, at 871.

291 Indus. Union Dep't v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607 (1980).

vide safe and healthful employment."[292] In this case, the Supreme Court decided that the Secretary of Labor exceeded his statutory authority by failing to make a threshold finding that "a significant risk of material health impairment" existed to justify the standard he set in enforcing this law.[293] 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.[294]

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,"[295] which suggests he may be open to allowing agency experts to assess how best to enforce a statute.[296] More generally, no delegation of discretionary authority—old, broad, abstract, or otherwise—should be exercised on the basis of political interests alone without contextual statutory analysis.

That having been said, the President may feasibly direct the scope of policy, even in the absence of a clear legislative imperative to do so, or even if there is no need for leadership to reconcile vague or inconsistent legislation. For instance, if a rule is interpretative, it could be directed by the President without undercutting the underlying statute.[297] However, presidentialism should occur within the constraints of statute and include a genuine effort to uphold the preferences of the Congress that passed the relevant legislation.

Moreover, there may be cases in which careful interpretation suggests that agencies can maintain fidelity to the aims of a statutory scheme by furthering the President's policy goals or interest in con-

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292 *Id.* at 607 (holding that a rule regulating benzene in small doses was not supported by substantial evidence).

293 *Id.* at 639.

294 *See id.*

295 Memorandum on Modernizing Regulatory Review, *supra* note 83.

296 *See id.*; *see also* Susan Dudley, *Regulatory Reset*, REGUL. REV. (Feb. 19, 2021), https://www.theregreview.org/2021/02/19/dudley-regulatory-reset/ [https://perma.cc/7HT8-3UKK] (arguing that Biden's Memorandum on Modernizing Regulatory Review, which drew on "longstanding, bipartisan principles [that] call for agencies to analyze the effects of alternative regulatory approaches before they issue rules," displayed "regulatory humility").

297 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" involving the interpretation of Medicare provisions. Azar v. Allina Health Servs., 139 S. Ct. 1804, 1810 (2019) (citing Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271, n.11 (10th Cir. 2007); Baptist Health v. Thompson, 458 F.3d 768, 776 n.8 (8th Cir. 2006) as examples of cases mentioning this principle).

tending with a new regulatory challenge. The CDC's recent issuance of both a mask mandate[298] and an eviction moratorium[299] pursuant to the Public Health Service Act offer case studies to exercise this approach. In both of these instances, the agency was arguably justified in pursuing the President's directive to manage the spread of COVID-19 because the statute fundamentally empowers the agency to confront public health crises through quarantine and other public health measures.[300] As these examples illustrate, the essential aspect of the legislation can be identified via textual and purposivist statutory interpretation.

In the case of the federal mask requirement, the legal analysis in the decision overturning the mandate has been widely criticized primarily for its idiosyncratic application of textualism.[301] One law professor observed that the court's "understanding of 'sanitation' [is] . . . not how the term is used in the public health field or understood by the [CDC], which issued the mandate."[302] As noted earlier, the judge's decision focused on the ordinary meaning of

> the word "sanitation" in the statute [based on her] consult[ation of] various contemporary dictionaries. [The judge] found a couple of definitions . . . [some of which the judge] acknowledge[s] "would appear to cover the Mask Mandate," [but f]or reasons that are hard to explain, she prefers [other] definitions. . . . None of this is entirely logical or even textually coherent . . . ."[303]

Some scholars of corpus linguistics have since asserted that "linguistic principles and data support the opposite conclusion about 'sanitation' and the statute's meaning" and that therefore, the "language

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298 *See supra* notes 162–72 and accompanying text.

299 *See supra* notes 175–88 and accompanying text.

300 *See History of Quarantine*, CDC, https://www.cdc.gov/quarantine/historyquarantine.html [https://perma.cc/KS88-N44L].

301 *See* John Kruzel, *Judge's 'Textualist' Ruling on Airline Mask Mandate Sparks Backlash*, THE HILL (Apr. 20, 2022, 5:16 AM), https://thehill.com/regulation/court-battles/3273602-judges-textualist-ruling-on-airline-mask-mandate-sparks-backlash/ [https://perma.cc/R3K9-E4JM] (noting that critics "derided" the ruling as "as overly formalistic and divorced from the health imperatives of a global pandemic").

302 Joe Hernandez & Selena Simmons-Duffin, *The Judge Who Tossed Mask Mandate Misunderstood Public Health Law, Legal Experts Say*, NPR (Apr. 19, 2022, 6:23 PM), https://www.npr.org/sections/health-shots/2022/04/19/1093641691/mask-mandate-judge-public-health-sanitation [https://perma.cc/NK2V-RBWJ] (quoting Erin Fuse Brown, professor at Georgia State University College of Law).

303 Amy Davidson Sorkin, *The Hazard-Filled Ruling on the Transportation Mask Mandate*, NEW YORKER (Apr. 22, 2022), https://www.newyorker.com/news/daily-comment/the-hazard-filled-ruling-on-the-transportation-mask-mandate [https://perma.cc/D8RD-DR8B].

of the Public Health Services Act authorizes the CDC's transit mask order."[304] In relevant part, they conclude that the judge "invented [two] senses of 'sanitation' which are divorced from the meanings described by the dictionaries" and which may also reflect a technical, not ordinary, meaning of the word.[305] In doing so, the judge artificially excluded from the meaning of the word measures related to preserving public health.[306] Furthermore, the court excluded mask mandates from the definition of "sanitation" of its choosing, despite the fact that even the definition it chose ("measures that clean something") could include such a mandate.[307]

More broadly, these scholars argue that "the district court's opinion is a representative example of modern textualism. This modern textualism," these authors continue, "has replaced faithful agency to Congress with populist appeals to 'democratic' interpretation of law's 'ordinary meaning . . . . '"[308] These commentators note as well the problems with textualism that "strip[s] single words from their context."[309] This analysis defends the view that textualism is more legitimate when anchored by the context provided by the legislation at issue.

Arguably, in this case, the judge's interpretation of statute both eschewed "faithful agency to Congress" and ran counter to an interpretation that is democratically accountable.[310] After all, the directive to implement the mask mandate came from the President, whose preferences are held out as representative of voters' interests. This understanding supports this Section's contention that presidentialism can be

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304 Stefan Th. Gries, Michael Kranzlein, Nathan Schneider, Brian Slocum & Kevin Tobia, *Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond*, 123 COLUM. L. REV. F. (manuscript at 1–4) (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4097679&dgcid=EJournal_htmlemail_law:society:legislation:ejournal_abstractlink [https://perma.cc/3B6D-Y9XT].

> From the Supreme Court to the Middle District of Florida, a slate of new textualist judges are poised to issue impactful holdings in the name of "ordinary" and "public" meaning. These opinions claim legitimacy from linguistics and empirical sciences. But the principles and data invoked are often invalid, unrobust, cherry-picked, or misleading. If textualists are to plausibly deny that their interpretations are motivated by normative commitments, their commitment to valid linguistic principles will have to be more convincing.

Id. (manuscript at 5).

305 *Id.* (manuscript at 15).

306 *See id.* (manuscript at 14).

307 *Id.* (manuscript at 13).

308 *Id.* (manuscript at 4–5).

309 *Id.* (manuscript at 5).

310 *Id.* (manuscript at 4).

deployed to direct agencies to enforce the law fruitfully with respect to its goals, for instance, in the face of a national health crisis.

In regard to the eviction moratorium, the controversy is not as easy to resolve as suggested by the recent Supreme Court order blocking the moratorium.[311] More specifically, neither the textualist nor purposivist aspects of the majority's reading of the relevant statutory authority render the only possible interpretation or, moreover, the interpretation that best furthers the aims of the statutory scheme at issue.

The majority in *Association of Realtors* read § 361(a) of the Public Health Service Act[312] to mean that the second sentence,[313] which lists specific tasks now assigned to the CDC such as "fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be so infected or contaminated,"[314] limits the CDC's authority in the first sentence of the paragraph to "make and enforce such regulations as . . . are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . ."[315] For better or for worse, after the Court blocked the moratorium, the Biden Administration and the CDC itself also adopted the position that there is no available authority to issue another moratorium.[316]

However, as Jack Goldsmith notes, the Supreme Court opinion is merely an order halting the moratorium, not a final determination on its merits.[317] Goldsmith remarks that "despite the diminished procedural context, and without any explanation from the Court, many in the administration and in the commentariat treated these signals as a conclusive prediction about how the Supreme Court viewed the legality

311 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488 (2021) (per curiam) ("The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing.").

312 42 U.S.C. § 264(a).

313 *See supra* notes 164–66 and accompanying text.

314 42 U.S.C. § 264(a); *see also* 42 C.F.R. § 70.2 (2020) (delegating this authority to the CDC).

315 42 U.S.C. § 264(a).

316 Among other White House officials, the White House coordinator repeated the following "talking point": "'Unfortunately, the Supreme Court declared on June 29 that the [CDC] could not grant such an extension without clear and specific congressional authorization.' Sperling added that, as of that date, 'the CDC director and her team have been unable to find legal authority' to extend the moratorium." Goldsmith, *supra* note 182; *see also* sources cited *supra* note 182.

317 Goldsmith, *supra* note 182 ("There was widespread agreement [that] the Supreme Court's action in June did not amount to a definitive and binding precedent [and that] for the moment, it would not be illegal for the government to issue another ban—especially one more narrowly focused on hard-hit counties.").

of the eviction moratorium."[318] This suggests that while the Biden Administration was right to reexamine whether the CDC's moratorium is consistent with the statute, its willingness to accept the Court's speculation as a foregone conclusion is not necessarily the only, let alone the correct, approach to statute-focused presidentialism in this situation. Assuming that the controversy remains open, there may be other ways to interpret the language that satisfy the Biden Administration's COVID relief goals, allow the executive branch to confront new challenges in disease management, benefit social outcomes more generally and, most importantly, further the thrust of the Public Health Service Act.

Those on the Court dissenting from the order offer such an approach.[319] First, they suggest, "it is far from 'demonstrably' clear that the CDC lacks the power to issue its modified moratorium order."[320] In addition to engaging in a detailed balancing of the equities that weighs in favor of the moratorium,[321] unlike the more cursory calculus made by the majority,[322] the dissent also declares, "The statute's first sentence grants the CDC authority to design measures that, in the agency's judgment, are essential to contain disease outbreaks. The provision's plain meaning includes eviction moratoria necessary to stop the spread of diseases like COVID–19," while the second sentence "is naturally read to expand the agency's powers by providing congressional authorization to act on personal property when necessary."[323] Peter Shane notes that this was also the position generally held by defenders of the moratorium.[324] As for the argument that "the second sentence should instead be read to cabin the CDC's authority," the dissent goes on to suggest that "[n]ot only does that reading lack a clear statutory basis but the second sentence goes on to empower the CDC to take 'other measures, as in [its] judgment may be necessary.'"[325]

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318 *Id.*

319 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (Breyer, J., dissenting) (per curiam) (alteration in original).

320 *Id.*

321 *Id.* at 2492–94 (providing a detailed analysis of the harms of COVID-19 weighed against the limited—as opposed to nationwide—coverage of the most recent moratorium).

322 *See id.* at 2488 ("[T]he equities had shifted in the plaintiffs' favor: Vaccine and rental-assistance distribution had improved since the stay was entered, while the harm to landlords had continued to increase.").

323 *Id.* at 2491 (Breyer, J., dissenting).

324 *See* Shane, *supra* note 182.

325 *Ala. Ass'n of Realtors*, 141 S. Ct. at 2491 (Breyer, J., dissenting) (citing 42 U.S.C. § 264(a)).

"Furthermore," the dissent continues, "reading the provision's second sentence to narrow its first would undermine Congress' purpose," particularly as it pertains to eviction moratoria.[326] Indeed, "[w]hen Congress enacted § 361(a), public health agencies intervened in the housing market by regulation, including eviction moratoria, to contain infection by preventing the movement of people."[327] Accordingly, "[i]f Congress had meant to exclude these types of measures from its broad grant of authority, it likely would have said so."[328] In addition, a "key drafter" of the statutory text at issue "explained, '[t]he second sentence . . . was written not to limit the broad authority contained in the first sentence, but to 'expressly authorize . . . inspections and . . . other steps necessary in the enforcement of quarantine.'"[329]

Overall, this Section suggests that there may very well be situations in which a close administrative reading of statute leads the executive branch to conclude that the policy should be directed by the President, either because the statute is vague, inconsistent, or not up to confronting new challenges, or because Congress intended there to be a strong political role in the development of policy—for instance, in order to handle a pressing crisis.

B. The Legitimacy of Prosecutorial Discretion

The constitutional faithful execution requirement has a particular "historical purpose: to limit the discretion of public officials."[330] On the one hand, the requirement of faithful execution "was imposed because of a concern that officers might act ultra vires."[331] On the other hand, as Andrew Kent, Ethan Leib, and Jed Shugerman argue, "[f]aithful execution requires [more than] the absence of bad faith."[332] Rather, the President is beholden to "not only proscriptive dimensions of the duty of faithful execution but prescriptive ones as well."[333] As Bruce Ackerman says: "Before a [P]resident can even begin exe-

326 *Id.* at 2491–92.

327 *Id.* at 2491 (noting the use of similar moratoria in New York City in 1920 to prevent the eviction of tenants infected with influenza and pneumonia).

328 *Id.*

329 *Id.* at 2492 (citing *Hearings on H. R. 3379 Before the Subcomm. on Interstate & Foreign Com.*, 78th Cong., 139 (1944)).

330 Kent et al., *supra* note 32, at 2117.

331 *See id.* 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.").

332 *Id.* at 2190.

333 *Id.*

cuting 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."[334]

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.[335] 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.[336] In this vein, the requirements of statutory fidelity apply not only to the President, but also to others in the executive branch.[337] It is for these reasons that agency actions are evaluated by the courts per the mandates of law passed by Congress.

That having been said, the President's duty to enforce statutes is accompanied by various constitutional powers the President may exercise in service of this duty. As a result of this authority—in particular, to engage in prosecutorial discretion—a president may feasibly direct the selective application of legislation in a manner that nonetheless adheres to the statutory scheme at hand. Accordingly, strong

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334 ACKERMAN, *supra* note 25, at 148.

335 "[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 TEX. L. REV. 1547, 1557–60 (2013) (suggesting this is the most agreed-upon theory of the origins of agencies' policymaking power).

336 EPSTEIN, *supra* note 33, at 247–48; *see also* Melanie Marlowe, *The Unitary Executive and Review of Agency Rulemaking*, *in* THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010); Barilleaux & Kelley, *supra* note 260, at 97 ("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. 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"); Herz, *supra* note 69, at 252–53 (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).

337 *See* WILSON, *supra* note 73, at 66 ("As legal executive, his constitutional aspect, the President cannot be thought of alone."); *see also* Kent et al., *supra* note 32 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).

presidentialism and fidelity to statute may be consistent with one another when governed by the constitutional mandate that, "[w]here the President has discretion not to enforce . . . he can announce rules to be used in the exercise of that discretion."[338] 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."[339] This suggests that in service of their enforcement responsibility, Presidents may specify how to prioritize the enforcement of a statutory mandate, given the limited pool of resources available to them.[340] In addition, the Supreme Court has "determined that the administrative exercise of discretion as to whether to investigate or prosecute allegations of statutory violations is exempt from judicial review,"[341] which provides an avenue for presidential administration to influence administrative action that is purely executive in nature.

Consider President Obama's DACA policy.[342] On the one hand, as noted earlier, it was initiated after President Obama trumpeted an intention to work around legislation,[343] and recently decried by a federal court as an "illegally implemented program."[344] On the other hand, both the Obama- and Biden-era memoranda outlining and implementing immigration policies offer the need to prioritize enforcement resources as one of several justifications.[345] Accordingly, it has

338 Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. 115, 116 (2013).

339 Goldsmith & Manning, *supra* note 33, at 1863–64 (identifying the DACA policy as an acceptable exercise of prosecutorial discretion under the Take Care clause).

340 *See* PRAKASH, *supra* note 26, 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.

341 Bijal Shah, *Heckler v. Chaney in* LEADING CASES IN ADMINISTRATIVE LAW (ABA Section of Administrative Law and Regulatory Practice) (forthcoming) (discussing Heckler v. Chaney, 470 U.S. 821 (1985)).

342 *See generally* Prakash, *supra* note 338 (arguing that the Obama Administration's setting of immigration enforcement policies did not suspend or dispense of any law).

343 *See supra* notes 127–32 and accompanying text.

344 Texas v. United States., No. 18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. July 16, 2021); *see supra* notes 135–43 and accompanying text.

345 Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 127 (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 [https://perma.cc/5JAC-KCBE]; Memorandum: Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA),

been widely argued that, rather than subverting legislation, the DACA policy and similar immigration policies were "ground[ed] . . . in a constitutionally rooted prosecutorial power of the president."[346]

As the most recent DACA controversy continues through the appeals process, courts could use this case as a vehicle to consider whether presidentialism serves 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 the DACA policy "advance[s] a series of purposes consistent with Congress's broad public policy objectives."[347] If the Biden Administration is able to cast DACA,[348] recently issued enforcement priorities,[349] or policies such as the recent 100-day moratorium on certain deportations[350] "not as in conflict with Congress, but as fulfilling the purposes of existing law in a manner consistent with the principal-agent model,"[351] it could succeed in showing the courts that these enforcement priorities are consistent with statute and evince a faithful execution of the law.

Ultimately, this Section suggests at least one tool of statutory implementation that involves intense presidential administration—prosecutorial discretion—is consistent with the President's constitutional duty to enforce the law. However, the decision to engage in such directive presidentialism should happen only after careful engagement with statute, and not only in order to fulfil the President's policy goals or to be responsive to voters' interests.

C. Consistency with a Unitary Executive

Finally, advocating for legislation-focused presidentialism does not require staking out a position in the debate regarding whether the

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supra note 133 ("DACA reflects a judgment that these immigrants should not be a priority for removal . . . .").

346 *Cf.* Peter M. Shane, *Administrative Law To The Rescue?*, JACK M. BALKIN: BALKINIZATION (Dec. 8, 2020), https://balkin.blogspot.com/2020/12/administrative-law-to-rescue.html [https://perma.cc/7EM8-ZMYK] (referring to the Obama-era Deferred Action for Parents of Americans ("DAPA") policy, which, as Shane notes, was the twin policy to DACA, and also an example of executive action pursuing the president's vision of immigration enforcement).

347 *Id.* (suggesting that the Obama-era DAPA policy was consistent with legislative policy objectives like "strengthening local law enforcement, supporting the national economy, and preserving family unity").

348 *See supra* notes 134–46 and accompanying text.

349 *See* Memorandum from Alejandro N. Mayorkas, Sec'y, DHS, to Tae D. Johnson, Dir., U.S. Immigr. & Customs Enf't (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/QVL9-AYK5] (advocating for prosecutorial discretion and listing enforcement priorities).

350 *See supra* notes 116–25 and accompanying text.

351 Shane, *supra* note 346.

President has the power to direct[352] the exercise of authority granted to an agency by statute, or merely to oversee it.[353] 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 leader as a constitutional matter.[354]

Indeed, there is no guarantee that targeting executive centralization serves to constrain presidential administration in the first place.[355] Moreover, this Section asserts, a centralized or unitary executive branch could exist in harmony with and even encourage the execution of law that prioritizes statutory aims over those of the President. In any case, statute-focused execution should become a primary incentive driving presidents' efforts to control their agents, however loose or firm that control may be.

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352 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 directly into the shoes" of administrators and act in their place. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1205 (2013) (stating that unitary executive theorists hold an expansive view of the President's constitutional power—not only to direct agency actions, but also to "step directly into the shoes" of administrators and act in their place); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 992 (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 23, at 2327 (arguing that "when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President" because "that official is a subordinate of the President").

353 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, 759-60 (2007) ("In 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."); 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).

354 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 254, at 2.

355 Coglianese & Firth, *supra* note 353, at 1873 (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").

At the very least, focusing presidentialism on statutory aims 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 in the implementation of law.[356]

And yet, even an exceptionally directive president may engage in legislation-focused presidentialism. There is great potential for a powerful presidential role in ensuring fealty to the goals embodied by statutory law. Indeed, a unitary executive branch need not be considered a co-principal of Congress[357] but instead could rest on a system of presidential control that ensures agencies engage in more exacting adherence to legislative goals and expectations. Complementarily, presidentialism that prioritizes statutory goals can encourage a strong executive hierarchy and reinforce the President's role as head of the executive branch.

In the end, this Section does not engage in the usual unitary executive debate regarding whether the President has only oversight authority, or whether she also has directive authority, or can even "step into the shoes" of agency heads. In other words, it advocates neither for limits to the scope or allocation of executive power nor against centralization in the executive branch. Rather, this Section highlights this Article's concern with the motivations or incentives that drive presidential administration. For this reason, while most substantive or functionalist arguments in favor of constraining presidential power do not gain traction with unitary executive theorists, this Article's should. In fact, this Article supports a vision of unitary executive theory that emphasizes strong, directive, and expansive presidential control over agencies wielded, in the final analysis, in order to pursue the execution

356 *See* Tim Brennan, *To End Science Denial, Admit That Policymaking Is Not All Science*, REGUL. REV. (June 14, 2021), https://www.theregreview.org/2021/06/14/brennan-end-science-denial-admit-policymaking-is-not-all-science/ [https://perma.cc/94EV-R97X] ("Policy discussions belong in the realm of values.").

357 *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020) (arguing for co-principal model of presidentialism in immigration context). *But see* Bijal Shah, *Investigating a Unitary Executive Model of Immigration*, JACK M. BALKIN: BALKINIZATION (Dec. 4, 2020) (criticizing unitary executive overtones of Cox & Rodríguez's book), https://balkin.blogspot.com/2020/12/investigating-unitary-executive-model.html [https://perma.cc/LFU7-LAMG].

of the law for the law's own aims—as opposed to the President's policy goals alone.

III. Obliging an Executive Emphasis on Legislation

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. Still, as Jack Goldsmith and John F. Manning note, there is "no principled metric" for identifying when a valid exercise of presidential discretion "shades into an impermissible exercise of dispensation or suspension power."[358] "Virtually all laws require some degree of discretion and intelligence in their execution, especially if they are to be faithfully executed."[359] 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 is typical 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. Often, the argument of those seeking constraints to presidential power centers on the unrealistic assertion that Congress should simply legislate more.[360] This Part offers a complementary solution: that both the federal and internal (executive) separation of powers[361] frameworks be harnessed to infuse the executive branch with its own interest in limiting self-aggrandizement.

This Part recruits the legislature, courts, and internal executive branch actors—namely, administrative bureaucrats themselves—to evolve presidential administration into a more effective tool of statutory enforcement. In doing so, it draws on the view of Jerry L. Mashaw and David Berke that the "separation of powers has retained functional importance" to the management of presidentialism,[362] and

358 Goldsmith & Manning, *supra* note 33, at 1863–64.

359 Epstein, *supra* note 33, at 267.

360 *See, e.g.*, Morton H. Halperin, *Take Back: How Congress Can Reclaim Its Power*, Just Sec. (June 10, 2019), https://www.justsecurity.org/64451/take-back-how-congress-can-reclaim-its-power/ [https://perma.cc/3YQT-48FB].

361 *See* Bijal Shah, *Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. Rev. Online 1, 2 (2017) (citing Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. Rev. 227, 235 (2016) and Neal Kumar Katyal, *Internal Separations of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314 (2006)).

362 Mashaw & Berke, *supra* note 25, at 549.

implements Eric Posner's suggestion that "scholars . . . address directly whether bureaucratic innovation is likely to improve policy outcomes."[363]

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. Put another way, it is the results of presidential administration, alone, that have been recognized as illegitimate—and only in instances where those results contravene the law. This, however, is not enough. Something is lost when the only constraint on presidential administration is a judicial backstop. Judicial confrontation of 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 aims from the get-go. Forcing courts alone to manage presidential administration ex post not only puts undue pressure on the judiciary to identify legislative aims and preserve the separation of powers, but also results in a loss of the potential outcomes that could result from presidentialism in full-throated pursuit of legislative aims.

Rather, the President must be persuaded to consider seriously the legislature's aims when intervening in agency action,[364] and to make those considerations plain,[365] before a controversy arises in the courts. This Part offers a blueprint for coaxing the Executive and her branch into deliberative policymaking that emphasizes legislative considerations. Before 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 goals and, thereby, to maintain executive subordination to legislative primacy in lawmaking.

Notably, much of this Part advocates for judicial review, which may seem ill-advised given current trends in the Supreme Court and certain courts of appeal toward strengthening presidential power by animating appointments requirements for administrative adjudicators and reducing removal protections for independent agency heads. The Supreme Court and other courts, however, have also shown an inter-

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

364 *See* Watts, *supra* note 75, at 734 (noting 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").

365 *See* WILSON, *supra* note 73, at 54 ("[O]ur 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.").

est in constraining agencies—in part, as a result of explicitly anti-administrativist values, and also particularly through the use of the APA's arbitrary and capricious standard, discussed further in Part III.D. These frameworks of judicial review provide an opportunity for judicial oversight of the administrative state that serves, indirectly, as a check on the President as well.

As Posner has noted, there is difficulty in "defining and measuring power, let alone determining whether the power of different branches 'balances'" when comparing the political branches.[366] Accordingly, this Part does not offer a blunt, cross-cutting benchmark, bright line, or clear standard—nothing so satisfying, for instance, as a *Youngstown*-esque[367] framework delineating permissible and impermissible acts of presidentialism—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, on a case-by-case basis, both the exercise and the fallout of presidentialism in pursuit of the President's own policymaking goals alone.

More specifically, this Part encourages presidential and agency prioritization of, and engagement with, statutory aims at successive stages of statutory implementation. First, this Part advocates for Congress to make clear its goals regarding presidential administration. For instance, legislation could define the President's role in statutory execution. Or, it could be drafted to more precisely articulate how agencies should weigh the mandates of legislation against presidential influence. Second, this Part argues that agencies should spend more time divining how to balance presidential and statutory aims. To create an incentive for agencies to do this, the judiciary might intensify its restriction of agencies' 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 Part argues that courts might also apply *Chevron* and the major questions doctrine to more explicitly confront, analyze, and excise presidentialism that leads to conflict between an agency's statutory interpretation and the aims of legislation. Finally, this Part asserts that courts could determine whether presidential administration has improved or harmed the agency's capacity

366 Posner, *supra* note 363, at 1680.

367 *Compare supra* note 32, *with supra* note 54.

to make policy that reflects legislative preferences by engaging the accountability-forcing dimensions of arbitrary and capricious review.

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

In *Louisiana v. Biden*,[368] 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.[369] The confusion regarding the scope of the President's power to exercise administrative discretion in this context could have been avoided if Congress had spoken directly to the issue.

To clarify the limits of presidentialism vis-à-vis legislation, this Section suggests, Congress should specify requirements for, and limits to, presidential action that would better ensure the execution of the aims of the law. As Kathryn A. Watts has noted, "there is a lack of clarity concerning both . . . when statutes delegating discretionary powers to agencies allow agencies to act pursuant to presidential directions" and "when statutes delegating discretionary powers to agencies allow agencies to take presidential suggestions into account."[370] 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.[371] Notably, this complements other pathways by which the legislature might entrench its preferred statutory interpretations in the administrative state.[372]

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 when necessary to bring 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 is-

368 543 F. Supp. 3d 388 (W.D. La. 2021).

369 *See supra* notes 194–97 and accompanying text.

370 Watts, *supra* note 75, at 727 (emphasis omitted).

371 *See, e.g.*, Kagan, *supra* note 19, at 2247 (asserting that unless Congress made an agency independent, it expects that Presidents will exercise heavily directive authority).

372 *See* Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 281 (2022) (remarking on the "unrealized potential" of the Congressional Review Act, which "authorizes special fast-track procedures for Congress to pass a joint resolution disapproving an agency rule").

suing narrower delegations to agencies.[373] Second, the legislature could specify 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 literature and because they have only a limited impact on the influence of presidentialism on policymaking.[374] In addition, political theorists have discussed how Congress organizes itself internally to fight bureaucratic drift,[375] and this Section will not rehash that material. Rather, this Section contributes a discussion of presidential role specification to the set of existing options for legislative control, assuming circumstances in which legislators are interested in guiding the executive branch in this way and able to overcome collective action problems to do so.

The suggestion that Congress specify the President's role in executing the law 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")[376] "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.[377]

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373 *See* McGinnis & Rappaport, *supra* note 25, draft at 23–24.

374 *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).

375 *See* Macey, *supra* note 93, at 671–74 (describing this work). Well-known examples include the works of Mathew D. McCubbins, Roger Noll, and Barry Weingast, often referred to as "McNollgast." *See*, *e.g.*, Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

376 42 U.S.C. §§ 4321–4370.

377 *See* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767, 770 (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").

In addition, the D.C. Circuit[378] 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.'"[379] In this case, the court looked to the President himself to determine the scope of his power under statute;[380] Perhaps the court would have looked to the statute, had the legislature itself specified this matter. In addition, federal courts of appeals have viewed agencies' actions in some instances as the manifestation of the presidential plenary power—particularly in matters of national security and foreign affairs—and therefore deemed those actions unreviewable.[381]

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,[382] installing the President or a proxy as the clear leader of multi-agency efforts,[383] or specifying a role for the President in policymaking and in administrative statutory interpretation such that *Chevron* is no longer the primary mechanism by which an incoming president may assert her preferred interpretation of statute.[384]

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378 Am. Fed'n of Lab. & Cong. of Indus. Org. v. Kahn, 618 F.2d 784 (D.C. Cir. 1979).

379 J. Frederick Clarke, Jr., AFL-CIO v. Kahn *Exaggerates Presidential Power Under the Procurement Act*, 68 CALIF. L. REV. 1044, 1045–46 (1980) (quoting *Kahn*, 618 F.2d at 787–89); Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. §§ 471–514 (1976). .

380 *Id.* at 1046 ("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.") (emphasis added).

381 50 U.S.C § 1701. *See, e.g.*, Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury, 857 F.3d 913, 916 (D.C. Cir. 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"); DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 281–82 (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. Fed. Energy Regul. Comm'n, 589 F.2d 603, 627 (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).

382 *See supra* notes 57–59 and accompanying text (discussing how the law deems legislation supreme over these forms of presidential "law").

383 *See supra* notes 220–24 and accompanying text (discussing interagency coordination).

384 *See supra* Part II.C.

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.[385]

Possibilities for role specification that creates a more unitary executive abound. As an initial matter, Congress has done this before. In passing legislation, Congress sometimes "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."[386] 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.[387] 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 issued the executive order pursuant to powers granted by statute.[388] Moreover, Con-

385 *See supra* notes 352–53 (discussing this assumption and counterarguments).

386 *See* EPSTEIN, *supra* note 33, at 267; Karpova v. Snow, 497 F.3d 262, 270 (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, 1193 (7th Cir. 1984) (noting that the Hostage Act authorizes the President to makes determination as to whether a person was "unjustly deprived" in order to compel the State Department to act).

387 *See* 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 COMM. ON L. & ECON., FEDERAL REGULATION: ROADS TO REFORM, ch. 5 (1979); Accountability in Regulatory Rulemaking Act of 1979, S. 1545, 96th Cong., (1979); The Regulatory Flexibility and Administrative Reform Act of 1979, S. 2147, 96th Cong., (1979); and the Administrative Practice and Regulatory Control Act of 1979, S. 129, 196th Cong., (1979)).

388 *Karpova*, 497 F.3d at 270. In this case, "Treasury 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 *Karpov*a).

gress could also ensure that the President's role is unreviewable, just as it has in the past.[389]

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 mandates.[390] As Paul Verkuil notes, "a 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."[391]

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 and 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.[392] 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.[393]

B. Judicial and Agency Arbitration of Administrative Jurisdiction

This Section urges the judiciary not only to limit administrative efforts to alter or expand their jurisdiction, as it has done in the past,[394] but also evaluate closely the impact of political pressure on the scope of administrative authority. In doing so, the judiciary will be able to ameliorate the negative impact of presidentialism on the administrative execution of statutes. Agencies, too, must evaluate whether they have the requisite statutory authority to regulate, or

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389 *See supra* note 387 and accompanying text.

390 *See supra* Section I.A.

391 *See* Verkuil, *supra* note 387, at 984 (arguing further that Congress could "offer the President less power over executive agencies than he currently enjoys under article II").

392 *See* Bijal Shah, *The President's Fourth Branch?*, FORDHAM L. REV. (forthcoming); Bijal Shah, *Expanding Presidential Influence on Agency Adjudication*, REGUL. REV. (July 23, 2021), https://www.theregreview.org/2021/07/23/shah-agency-adjudication/ [https://perma.cc/4N45-H9VF] (discussing the Supreme Court's efforts to chip away at for-cause removal protections).

393 *See* Verkuil, *supra* note 387, at 982 (listing legislation that has increased the opportunity for Presidents to intervene in formal agency processes).

394 *See supra* Part I.

choose not to regulate, in accordance with presidential aims or directives.

As an initial matter, if courts are interested in walking back, calibrating, or 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 acquiesce to presidential administration only after explicit consideration of how the President's constitutional power and responsibilities square with the legislature' constitutional authority.

Moreover, courts might also constrain administrative efforts to pursue the President's promises when there is a lack of existing statutory law adequate to justify the agency's actions. One example involves recent priorities set by the FTC under a new Chair.[395] If the Supreme Court perceives the FTC as regulating beyond the scope of its authority either substantively or procedurally, the Court might rein in this agency.[396] Other examples include the Biden and Trump Administrations' efforts to protect those with preexisting conditions and lower the price of prescription drugs.[397] Both 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.[398]

In a related example, the Trump Administration proposed a requirement that all Department of Health and Human Services ("HHS") regulations expire automatically unless agencies conduct a retrospective review of each regulation.[399] "The proposed rule—which

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395 *See supra* notes 198–200 and accompanying text.

396 *See* Richard J. Pierce, Jr., *Unsolicited Advice for FTC Chair Khan*, YALE J. ON REGUL.: NOTICE & COMMENT (July 15, 2021).

397 *See supra* notes 201–03 and accompanying text.

398 *See* Thomas Waldrop & Nicole Rapfogel, *Too Little, Too Late: Trump's Prescription Drug Executive Order Does Not Help Patients*, CTR. FOR AM. PROGRESS (Oct. 15, 2020), https://www.americanprogress.org/issues/healthcare/news/2020/10/15/491425/little-late-trumps-prescription-drug-executive-order-not-help-patients/ [https://perma.cc/Q6MU-UGF7] (suggesting that the recent executive order on lowering the costs of prescription drugs is a presidential effort to "circumvent Congress"); *see also* Amy Goldstein, Yasmeen Abutaleb & Josh Dawsey, *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").

399 Securing Updated and Necessary Statutory Evaluations Timely ("SUNSET"), 86 Fed. Reg. 5694 (Jan. 19, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00597.pdf [https://perma.cc/3RPA-AGZ9]; *see also* Steve Usdin, *Trump Administration Considering 10-Year Sunset for All Rules*, BIOCENTURY (Oct. 23, 2020, 3:04 PM), https://www.biocentury.com/article/631364 [https://perma.cc/NV3J-NHP8] ("The Trump administration

would offer no explicit public health benefits—threatens the rescission of thousands of meaningful, science-based regulations, including those concerning food safety and transparency, consumer protections, pharmaceuticals, and health care programs."[400] Advocates of this policy argue that it is supported by the Regulatory Flexibility Act ("RFA")[401] because it forces the agencies to comply with the RFA's requirements for retrospective review.[402]

The RFA requires that an agency amend to repeal a rule only if the agency determines that a rule is not achieving its purpose or is unduly burdensome.[403] The RFA does not, however, authorize the automatic sunsetting mandated by the new rule.[404] Indeed, a complaint brought by a coalition of health groups argues, in part, that the rule sunsets regulations "without RFA review or considerations required under substantive statutes and the APA."[405]

As a result of this action, the Biden Administration is postponing implementation of this rule for one year; the Administration also appears to find merit in some of the plaintiffs' claims.[406] However, even though President Biden has pulled back from this policy, it might very well be resuscitated by a future President,[407] if not by the Biden White House itself. Accordingly, courts should take the opportunity now to evaluate whether there is adequate legislative authority for such a policy (in addition to considering whether the rule is in violation of the APA's arbitrary and capricious standard).[408]

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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.").

400 Mia Cabello, *The Midnight Regulation to End Regulations*, REGUL. REV. (Dec. 21, 2020), https://www.theregreview.org/2020/12/21/cabello-midnight-regulation-end-regulations/ [https://perma.cc/5C74-EMQG] ("It also risks diverting agency resources to the point that revising or creating new regulations to further public health would be extremely difficult.").

401 5 U.S.C. §§ 600–612.

402 Charles Yates & Adi Dynar, *The Biden Administration Should Not Sunset the Sunset Rule*, REGUL. REV. (Apr. 4, 2022), https://www.theregreview.org/2022/04/04/yates-dynar-biden-administration-should-not-sunset-the-sunset-rule/ [https://perma.cc/3GRQ-DA2J].

403 5 U.S.C. § 610.

404 *See id.*

405 Complaint at 24, Cnty. of Santa Clara v. HHS, No. 5:21-cv-01655 (N.D. Cal. Mar. 9, 2021).

406 *See* SUNSET, 86 Fed. Reg. 5694; SUNSET; Administrative Delay of Effective Date, 87 Fed. Reg. 12,399 (delaying the effective date) (Mar. 4, 2022).

407 *See* Martin Totaro & Connor Raso, *Agencies Should Plan Now for Future Efforts to Automatically Sunset Their Rules*, BROOKINGS INST. (Feb. 25, 2021), https://www.brookings.edu/research/agencies-should-plan-now-for-future-efforts-to-automatically-sunset-their-rules/ [https://perma.cc/J3VY-MUUT] (arguing that "a future administration might well try to adopt a similar action" as President Trump's sunset rule).

408 *See infra* notes 589–95 and accompanying text.

In one more example, President Trump issued an executive order that renders civil servants subject to at-will removal,[409] which he declared to be a "[f]aithful execution of the law."[410] This order, which remains a policy option for future presidents who seek to promote a more unitary executive,[411] undercuts the Pendleton Civil Service Reform Act.[412] Accordingly, the judiciary should also be careful not to approve of a new category of unprotected bureaucrat if the category is not in keeping with the Pendleton Act's limitation of the patronage system.[413] In other words, courts should recognize that an initiative like Schedule F falls outside the scope of administrative authority unless there is new legislation passed to authorize universal at-will removal of bureaucrats.

The Biden policy "pausing" new gas and oil leases[414] offers another, albeit more difficult, case study for reconciling presidentialism and statute. Here, the agency argued that the authority to pause oil and gas leases is "committed to agency discretion by law . . . under MLA or under OCSLA," as part of the agency's discretion in government contracts and everyday operations.[415] Eric Biber and Jordan Diamond suggest that this could mean the agency's discretionary authority logically and lawfully extends to managing—and even canceling—fossil fuel leases and contracts.[416] They also, however, "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."[417]

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 aims of a legislative scheme; such an argument may require consulting different statutory

409 *See supra* note 204 and accompanying text.

410 Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 26, 2020) ("*Faithful execution of the law* requires that the President have appropriate management oversight regarding this select cadre of professionals.") (emphasis added).

411 *See supra* notes 206–07 and accompanying text.

412 *See supra* note 209 and accompanying text.

413 *See* Rebecca Beitsch, *Trump Sued Over 'Partisan' Order Stripping Some Civil Service Protections*, THE HILL (Oct. 27, 2020, 4:37 PM), https://thehill.com/homenews/administration/523023-trump-sued-over-partisan-order-stripping-some-civil-service [https://perma.cc/C4D6-XF9S] ("The suit asks courts to block the executive order, arguing that Trump is bypassing a congressional role.").

414 *See supra* notes 190–97 and accompanying text.

415 Louisiana v. Biden, 543 F. Supp. 3d 388, 407, 409 (W.D. La. 2021).

416 Eric Biber & Jordan Diamond, *Keeping It* All *in the Ground*?, 63 ARIZ. STATE L. REV. 279, 298 (2021).

417 *Id.* at 303.

frameworks than the one on which the agency initially relied. In this vein, the EPA could argue that it has discretion to engage in this policy under the Endangered Species Act,[418] which might compel the agency to go even further to prohibit environmental damage caused by fossil fuels,[419] or in the Federal Land Policy and Management Act,[420] which requires the agency to "prevent unnecessary or undue degradation" of public lands.[421] 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."[422] If so, the statute would "trigger a nondiscretionary duty to stop that degradation by canceling the leases" that produce greenhouse gas emissions.[423]

In addition, agencies have long mediated 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 *itself* might consider whether a presidential request or even directive is something the agency has the authority to implement pursuant to legislation.[424] And if not, the agency could decline to implement the President's initiative in order to remain in compliance with its governing statutory scheme. 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, one 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,"[425] the HHS initiated a rulemaking docket titled "HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs."[426] The

418 16 U.S.C. §§ 1531–1544.

419 *See* Biber & Diamond, *supra* note 416, at 307.

420 43 U.S.C. §§ 1701–1787.

421 Biber & Diamond, *supra* note 416, at 302, 307-08 (quoting 43 U.S.C. § 1732(b)).

422 *Id.* at 308.

423 *Id.*

424 *Cf.* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1762-63 (2013) (discussing how agencies self-insulate from presidential review to avoid various drawbacks, including the possibility of policy reversals); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 649 (2019) (discussing bureaucratic resistance that allowed agencies to refrain from unlawful behavior, despite the presidential pressure).

425 *See supra* note 201.

426 83 Fed. Reg. 22,692 (May 16, 2018).

rulemaking docket requested information only,[427] and did not lead to any concrete policies despite the fact that over 3,000 comments were received on that notice.[428] On the one hand, the agency published a related document on its website[429] and another, narrow rule concerning prescription drug prices.[430] On the other hand, the agency initially declined to implement an expansive rule,[431] perhaps because it could not find a legal pathway to implement the President's promises without statutory changes.[432] The agency eventually regulated a modest reduction to certain Medicare premiums a few years later.[433]

In this case, it appears that the agency was not interested in resisting the President's initiative, even if it was outside the scope of what the agency could accomplish under current law.[434] But it is possible that an agency might resist presidential directives, subsequent to "'internal' . . . separation of powers" dynamics.[435] In the past, broad swaths of the immigration bureaucracy have resisted presidential initiatives, not only under the Trump administration,[436] but also in re-

427 *Id.* ("Through this request for information, HHS seeks comment from interested parties to help shape future policy development and agency action.").

428 Barlas, *supra* note 203, at 628.

429 DAN BEST, DEP'T OF HEALTH & HUM. SERVS., REPORT ON 100 DAYS OF ACTION ON THE AMERICAN PATIENT FIRST BLUEPRINT (2018), https://www.hhs.gov/sites/default/files/ReportOn100DaysofAction_AmericanPatientsFirstBlueprint.pdf [https://perma.cc/6NL3-FHFF].

430 *See* Medicare and Medicaid Programs; Regulation to Require Drug Pricing Transparency, 84 Fed. Reg. 20,732 (May 10, 2019) (requiring that the list price be mentioned on television advertisements for drugs).

431 *See* Waldrop & Rapfogel, *supra* note 398 ("[A]fter touting the [Blueprint] policy for months, [HHS] eventually declined to issue regulations implementing it."); *see also* Barlas, *supra* note 203, at 606 ("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.").

432 *See* Barlas, *supra* note 203, at 606 (discussing how HHS Secretary Alex Azur conceded that the agency's authority to pursue these measures would be better supported by additional legislation).

433 *See* Modernizing Part D and Medicare Advantage to Lower Drug Prices and Reduce Out-of-Pocket Expenses, 84 Fed. Reg 23,832 (May 23, 2019) (to be codified at 42 C.F.R. pts. 422, 423).

434 *See* Barlas, *supra* note 203 (noting that HHS Secretary Azur 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.'").

435 Shah, *supra* note 361, at 102–03, 102 n.4 (discussing the literature on an internal or administrative separation of powers, which suggests that "a balanced relationship among . . . intra-agency actors would improve administrative functionality").

436 *See* Shah, *supra* note 424, at 639–47 (illustrating that under President Trump, "civil servants from varied branches of the immigration bureaucracy, with divergent views on the proper balance between the humanitarian and exclusionary goals of the U.S. immigration law, have

sponse to policies from Presidents Obama,[437] George W. Bush,[438] and even Reagan,[439] and in some cases succeeded in changing the contours of presidential administration.[440] A healthy bureaucratic interest in maintaining the statutory or congressional mission of an agency could encourage administration that balances presidential aims and legislative directives. Agency head attempts to assert the requirements of lawful administrative action vis-à-vis 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.[441] In the long term, however, with the help of courageous civil servants, political appointees' resolve to pursue greater fidelity to the law could become customary.

Courts could reinforce agency heads' efforts to resist political pressure in order to more faithfully execute the legislation in contention. To do this, courts may reconsider whether the exercise of administrative discretion—particularly if it has a significant impact on the implementation of law—is reviewable. On the one hand, the Supreme Court has declared that when the President is directing an agency in her own capacity, her exercise of discretion is not reviewable under the agency's enabling statute.[442] On the other hand, the D.C. Circuit has noted that even if an agency is acting at the behest of the Presi-

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voiced substantively similar opposition to the President's immigration agenda," albeit to limited effect).

437 Shah, *supra* note 378, at 637–39 (showing that under President Obama, policies that outlined new immigration enforcement priorities led to defiance from Immigration and Customs Enforcement ("ICE") officers that was in keeping with their usual interest in maximizing deportation, and that ICE officers succeeded in changing the President's policies).

438 Shah, *supra* note 378, at 636–37 (discussing how under President G.W. Bush, two sets of dissimilar civil servants that nonetheless worked together—DHS prosecutors and Department of Justice immigration judges—were united in the view that a new detention policy would negatively affect noncitizens and noting "that the program was short-lived due in part to this resistance, which suggests that upper-level officials were responsive to bottom-up concerns") (citation omitted).

439 Shah, *supra* note 378, at 335–36 (discussing how, under President Reagan, civil servants whose focus was on management challenged new detention policies due to concerns about their impact on the immigration system).

440 *See supra* notes 437–38.

441 *See* Shah, *supra* note 424, at 646 (noting the incident in which Attorney General Sally Yates was fired by the Trump Administration for noting that an immigration directive might be unlawful).

442 *See*, *e.g.*, Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 112–13 (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 the President's decision in this context "derives its vitality from the exercise of unreviewable Presidential discretion").

dent, it acts under its own auspices—or rather, the requirements of legislation—and therefore, is still subject to judicial oversight.[443] 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.'"[444]

When changes in administration occur, agencies should also revisit policies directed by the previous President—in addition to closely considering policy changes directed by new Presidents[445]—to ensure they adequately fulfil statutory aims. A new administration and its political leaders might be able to identify instances in which the previous administration acted counter to the aims of legislation. Furthermore, the President herself might support or even lead administrative attempts to balance her demands against the requirements of statute. On the one hand, directing agencies to reevaluate regulation may be driven by the ultimate goal of pursuing certain policy outcomes that are equally misaligned with statute as the policies of the outgoing President. 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.

The Biden Administration appears to have empowered agencies to engage in regulatory reevaluation.[446] For instance, a recent Biden

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443 Chamber of Com. v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

444 *Id.* (alteration in original) (quoting Soucie v. David, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)). In *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 Kimmett, *Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in* Chamber of Commerce v. Reich, 106 YALE L.J. 811, 832 (1996), *with* Gordon M. Clay, *Executive (Ab)use of the Procurement Power:* Chamber of Commerce v. Reich, 84 GEO. L.J. 2573, 2574–75 (1996).

445 *See infra* Section III.D.

446 *See, e.g.*, Memorandum on Protecting Women's Health at Home and Abroad, 2021 DAILY COMP. PRES. DOC. 1–2 (Jan. 28, 2021) ("The Secretary of Health and Human Services shall review the Title X Rule and any other regulations governing the Title X program . . . and shall consider, as soon as practicable, whether to suspend, revise, or rescind . . . those regulations, *consistent with applicable law*, including the Administrative Procedure Act.") (emphasis added).

directive invites the HHS to revisit its policies[447] and rules to ensure that they adequately implement the Title X statute.[448] 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 HUD's statutory duty to ensure compliance with the Fair Housing Act."[449] In one more directive, the President seeks to clarify the "requirements of the National Firearms Act."[450] Additionally, President Biden issued an executive order directing the Department of Education to ensure compliance with Title IX[451] as it relates to discrimination on the basis of sexual orientation and gender identity.[452] And another executive order seeks to ensure regulatory consistency with Medicaid[453] and the Affordable Care Act.[454]

The Title X initiative is motivated by an interest in ensuring that low-income patients are not denied support in instances where they might contemplate abortion or related health measures.[455] However, the initiative also encourages the agency to reconsider its policies to ensure that they fit more squarely with the statutory requirements and

447 *Id.* (revoking Memorandum on the Mexico City Policy, 2017 DAILY COMP. PRES. DOC. 1 (Jan. 23, 2017))("The Mexico City Policy"). The Mexico City Policy, which limited the funding of nongovernmental organizations that provide abortion-related services or counsel, was 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 reinstalled them in 2017. *Id.*

448 *Id.* (directing the Secretary of HHS 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 Service Act, 42 U.S.C. §§ 300–00a-6, which "provides Federal funding for family planning services that primarily benefit low-income patients").

449 Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 26, 2021) (referencing the Fair Housing Act, 42 U.S.C. §§ 3601–3631).

450 Press Release, The White House, Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic (Apr. 7, 2021), 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/ [https://perma.cc/MG5Z-B828] (referencing the National Firearms Act, I.R.C. §§ 5801–5872).

451 20 U.S.C. §§ 1681–1688.

452 Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021); *see also* Tovia Smith, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NPR (Mar. 10, 2021, 5:27 PM), https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules [https://perma.cc/9JHS-CRF9].

453 42 U.S.C. §§ 1396–1396w-6.

454 Exec. Order No. 14,009, 86 Fed. Reg. 7793 (Jan. 28, 2021); I.R.C. § 5000A.

455 *See generally* Memorandum on Protecting Women's Health at Home and Abroad, *supra* note 446.

intent of Title X.[456] The Fair Housing directive makes clear that it seeks to ensure full administrative compliance with the intentions of the statute.[457] The gun control initiative, while motivated by an interest in limiting gun use and violence, could encourage the Bureau of Alcohol, Tobacco, Firearms and Explosives to better understand its obligations under the National Firearms Act.[458] The executive order concerning anti-LGBT discrimination directs the Department of Education to review a rule promulgated under the Trump Administration[459] "and any other agency actions taken pursuant to that rule, for consistency with governing law, including Title IX,"[460] in particular, as it relates to a recent Supreme Court decision.[461] In addition, the Biden executive order on Medicaid seeks "to review waivers issued under the prior administration that 'may reduce coverage under or otherwise undermine Medicaid'" and the Affordable Care Act.[462] For now, the Supreme Court has accepted the Biden Administration's efforts to make its policy more consistent with these two legislative schemes.[463]

Finally, courts should consider more explicitly whether Congress intended to allow the President to direct the agency to shift areas of regulation, as determined by the agency's enabling act. This endeavor will be more successful in situations where Congress chose to legislate

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456 *Id.*

457 *See* Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, *supra* note 449 ("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.").

458 *See* Press Release, the White House, *supra* note 450.

459 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. 106).

460 Exec. Order No. 14,021, *supra* note 452, at 13,803–04.

461 *See* 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. 32,637 (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))).

462 Jonathan Shin, *U.S. Supreme Court Removes Oral Arguments Over State Medicaid Work Requirements from Calendar*, JD SUPRA (Mar. 18, 2021), https://www.jdsupra.com/legalnews/u-s-supreme-court-removes-oral-9821606/ [https://perma.cc/95Q9-XDRE]; *see also* Exec. Order No. 14,009, *supra* note 454.

463 *See* Shin, *supra* note 462.

the issue with greater specificity.[464] In some cases, this approach might yield a standard for determining the legitimacy of presidentialism.

Previous cases come close, but not close enough, to the type of evaluation courts might undertake. For instance, in *Brown & Williamson*, both the majority and the dissent failed to consider whether Congress intended to allow the President to direct the FDA's regulatory jurisdiction.[465] And although the *Brown & Williamson* majority dove into the details of legislative intent, it did not emphasize evaluating the legitimacy of presidentialism within the statutory scheme at issue.[466]

Likewise, in *West Virginia v. EPA*, the majority did not assess the President's role in the agency's policymaking. In *American Lung Ass'n*, the decision below, the majority 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.'"[467] However, both the Supreme Court and the D.C. Circuit's analyses would have benefitted from more explicit recognition of the President's aims and an effort to evaluate whether presidentialism is consistent with the requirements of legislation.

The closest this set of cases came to considering presidentialism in the implementing statute is in Judge Walker's concurrence in *American Lung Ass'n*. First, Judge Walker identifies the political accountability and majoritarianism inherent to the legislative process,[468] and

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464 *See infra* Part III.A (arguing that Congress should specify the President's role in statutory enforcement).

465 *See supra* notes 228–46 and accompanying text (discussing the purposivist approach of this decision).

466 *See id.*

467 *Am. Lung Ass'n*, 985 F.3d at 944 (citation omitted). After all, "President 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 935 (citing U.S. GLOB. CHANGE RSCH. PROGRAM, 2 FOURTH NATIONAL CLIMATE ASSESSMENT, 24 (David Reidmiller et al. eds., 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,' . . . 'the impacts of climate change are intensifying across the country[, and 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.*

468 *Id.* at 996–97. (Walker, J., concurring in part and dissenting in part). ("To guard against factions, legislation requires something approaching a national consensus . . . . [It] 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.") (citations omitted).

advocates for legislative supremacy in policymaking.[469] He then applies this lens to the matter at issue: "In its clearest provisions, the Clean Air Act evinces a political consensus."[470] And like the majority, he gestures to the corrupting influence of presidentialism: "[b]ut 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."[471]

Judge Walker appears skeptical 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.

Admittedly, it may be the case 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 *Brown & Williamson*[472] that "the result was driven by the individual Justices' sympathy, or lack thereof, toward the FDA's undertaking."[473] To the extent this is a problem[474] for any case discussed in Part I, mechanizing the judicial balancing of presidentialism against statutory aims could reduce ex post policymaking by courts.[475] Furthermore, if Congress becomes aware that courts are interested in this matter in any capacity, they might legislate more precisely, as suggested in Part III.A.

C. *Judicial Parsing of 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's

469 *Id.* at 1003 ("Congress decides what major rules make good sense."). For a discussion of the implications of Judge Walker's statements for the major questions doctrine, see *infra* notes 504–06 and accompanying text.

470 *Am. Lung Ass'n*, 985 F.3d at 997 (Walker, J., concurring in part and dissenting in part).

471 *Id.* at 1003.

472 529 U.S. 120.

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

474 *See* Thomas W. Merrill, *Legitimate Interpretation—or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1400 (2020) (arguing that "[t]he 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.").

475 *See* Shah, *supra* note 63, at 856–59; *see generally* Shah, *supra* note 335 (discussing ways in which courts engage in agency action).

policy goals is consistent with statutory preferences. In doing so, the judiciary could discourage agencies from furthering statutory interpretation that favors the President's policy interests in an outsized way.

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 . . . .[476]

Building on this further, Justice 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.[477] Then again, the Supreme Court has both affirmed[478]—and expressed skepticism of[479]—administrative statutory interpretation informed by the President. Conversely, the D.C. Circuit has, on at least

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476 Chevron, U.S.A., Inc. v. Nat.'l Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

477 *See* Kagan, *supra* note 23, 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.").

478 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) (accepting George W. Bush Administration's changed interpretation of the Telecommunications Act of 1934); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 747 (1996) (permitting the Clinton Administration's new interpretation of the National Banking Act); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 418–20 (1993) (upholding the Secretary of HHS'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").

479 *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (affirming the George W. Bush Administration's, and not the Obama Administration's, reading of the Alien Tort Statute; note that both—that is, opposing—arguments were presented to the Court by the same U.S. Solicitor General); Levin v. United States, 568 U.S. 503, 518 (2013) (disagreeing with Obama Administration's "freshly minted revision" of how to reconcile the Gonzalez Act with the Federal Tort Claims Act); Transcript of Oral Argument at 32, U.S. Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) (No. 11–1285) (demonstrating Justice Roberts's disapproval of change in statutory interpretation based on a change in administration: "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 view—there has been a change [in administration]"); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 215 (1988) (refusing to abide by the Reagan Administration's recently switched position that the underlying statute permitted the promulgation of retroactive Medicare cost-limiting rules); Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 447 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).

one recent occasion, supported the results of presidential administration even after dispensing with *Chevron*.[480]

Critics of *Chevron* have charged that it leads judges away from determining how agencies can best follow statutory text and congressional intent, and some have also taken the view that statutory interpretation influenced by the President is less likely to reflect the legislature's preferences.[481] In 1981, the Supreme Court suggested that if an agency changes its statutory interpretation in response to presidential influence, the new interpretation "is entitled to considerably less deference."[482] Thirty years later, the Seventh Circuit decried shifting political influence on administrative statutory interpretation as

> mak[ing] 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.[483]

Both conservative and progressive scholars have argued that deference to administrative statutory interpretation influenced by the President is problematic. As to the former end of the spectrum, 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."[484] As to commentary from a more progressive scholar, Peter M. Shane has likewise suggested that an interpretation of a statute that fluctuates based on the "preferences of a majority of the President's electoral supporters" cannot be squared with legislative intent.[485]

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480 Guedes v. ATF, No. 21-5045, 2022 WL 3205889, at *3 (D.C. Cir. Aug. 9, 2022) (affirming the bump-stock regulation despite its decision—at the request of both parties—to "dispense with the *Chevron* framework.").

481 *See, e.g.*, Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (Feb. 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).

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

483 Sandifer v. U.S. Steel Corp., 678 F.3d 590, 599 (7th Cir. 2012) (citations omitted).

484 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

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

Courts have split on the matter. On the one hand, the Ninth Circuit recently refused *E. Bay Sanctuary Covenant v. Trump* to give *Chevron* deference to an agency where President Trump directed its interpretation of the Immigration and Naturalization Act, because the interpretation was in conflict with the Act.[486] On the other hand, in *Little Sisters of the Poor v. Pennsylvania*,[487] the Supreme Court accepted an administrative interpretation of the Affordable Care Act directed by President Trump.[488] More specifically, the Court implied that the statute clearly allows for the agency's new policy allowing employers to opt out of providing no-cost contraceptive coverage under the Affordable Care Act.[489] This was despite the fact that the Third Circuit affirmed the granting of a preliminary injunction against the agency rule because it considered the interpretation to be at odds with the statute itself.[490]

To be clear, the Supreme Court did not engage in a deference analysis, although the concurrence argued that it should have.[491] 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,[492] and his directive

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486 *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, was in direct conflict with the Immigration and Naturalization Act and therefore not entitled to deference under *Chevron*).

487 Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S., slip op. (July 8, 2020).

488 *Id.* at 2.

489 *See id.* at 18. *But see id.* at 64 (Kagan, J., concurring) (arguing that both the majority and dissent incorrectly posited that the statute is clear).

490 *See* Pennsylvania v. President United States, 930 F.3d 543, 558 (3d Cir. 2019), *rev'd*, *Little Sisters of the Poor*, 591 U.S. slip op. at 26 (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.*

491 *Little Sisters of the Poor*, 591 U.S., slip op. at 2 (Kagan, J., concurring) ("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.") (citations omitted).

492 *See* Tanner J. Bean & Robin Fretwell Wilson, *The Administrative State as a New Front in the Culture War:* Little Sisters of the Poor v. Pennsylvania, 2019–2020 CATO SUP. CT REV. 229, 233 (2020) ("Just four months after taking office, President Donald 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.'") (alterations in original).

to expand the exemption to include not only religious, but also "moral" objectors.[493]

The judiciary might consider resolving this ambivalence regarding deference to statutory interpretation influenced by political considerations. More specifically, courts could limit the extent to which *Chevron* encourages presidentialism, particularly when it interferes with the goals of the legal scheme at issue, just as the Third Circuit did in *Little Sisters*.[494]

Note that such an approach does not require a "best" reading of statute, a view that reflects the concession discussed in Part II.A. Rather, it requires merely 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 goals 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. At Step One, the judiciary must determine whether legislation is ambiguous—and if it is not, "give effect to the unambiguously expressed intent of Congress."[495] If the relevant statutory provision is ambiguous, courts must defer to the agency's interpretation.[496] As to the former, if courts determine that legislation has an unequivocal set of substantive aims, 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 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.[497]

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

494 *See supra* note 490 and accompanying text.

495 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

496 *Id.* at 844.

497 *See* Shah, *supra* note 62, at 671 n.140 ("Step Two of the *Chevron* analysis, at which point

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.[498] Per the "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."[499] In other words, by invoking the major questions doctrine, courts may choose not to apply the *Chevron* framework at all in the first instance (or to find that the agency's interpretation fails at Step One, leading to the same result), 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.[500] As then-Judge Kavanaugh admitted in his *U.S. Telecom Ass'n v. FCC* dissent, "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality,"[501] which Blake Emerson argues constitutes "an open-ended judgment call that could doom agency action in the absence of a crystal-clear statutory mandate."[502] This suggests that all roads lead back to the suggestions in Part III.A of this Article, which argues for more legislative specificity to resolve the legitimacy of presidentialism.

In the absence of legislative specificity, on the one hand, major questions analysis could allow "courts to strike down regulations the Administration [does] not favor for policy-based reasons,"[503] instead of providing nonpartisan oversight of presidential administration. On

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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).

498 *C.f.* McGinnis & Rappaport, *supra* note 25, Working Paper at 27 (suggesting that if the Supreme "Court applies the major questions doctrine vigorously, it will also help reduce polarization").

499 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383 (D.C. Cir. 2017); *see also* Shah, *supra* note 335, at 1176–77 (noting that FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Massachusetts v. EPA, 549 U.S. 497 (2007); and Gonzales v. Oregon, 546 U.S. 243 (2006) establish that "under certain extraordinary circumstances or in regard 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 a statute, even if the statute is ambiguous") (citations omitted).

500 *See* Shah, *supra* note 335, at 1176–78 (discussing the major questions doctrine and its implications regarding *Chevron*).

501 855 F.3d at 423 (Kavanaugh, J., dissenting).

502 Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2041 (2018).

503 Natasha Brunstein & Richard L. Revesz, *The Trump Administration's Weaponization of the "Major Questions" Doctrine*, REGUL. REV. (May 2021), https://www.theregreview.org/2021/05/10/brunstein-revesz-trump-administrations-weaponization-major-questions-doctrine/ [https://perma.cc/QRT7-PPWF].

the other hand, the major questions doctrine could be complementary to legislative specification, if courts apply the doctrine to maintain the primacy of statutory aims (as opposed to judicial policy preference), particularly in instances where the policy at issue has been heavily influenced by the President.

In his concurring and dissenting opinion in *American Lung Ass'n,* Judge Walker evinced an interest in expanding the major questions doctrine to further limit agencies' ability to engage in statutory interpretation.[504] While some of this interest rests on anti-administrativism,[505] Judge Walker also implied that there are limits to the benefits of presidential intervention in administrative statutory interpretation, particularly to the extent that such intervention cuts against the potential for agencies to apply "good sense" in policymaking.[506] 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. In some ways, this concurrence foreshadowed the Supreme Court's final dispensation of this issue.

In *West Virginia v. EPA*, which reversed *American Lung Ass'n*, the Supreme Court refused to engage the *Chevron* framework by applying the major questions doctrine instead.[507] Scholars have argued that the Court's application of the major questions doctrine in this case is concerning.[508] Moreover, Leah Litman and Daniel Deacon argue that the major questions rule can now "effectively narrow the scope of agencies' authority outside the normal legislative process"[509] While Deacon and Litman note this possibility with disapproval, it could serve to constrain presidential administration that is inconsistent with statute.

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504 *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 1003 (D.C. Cir. 2021) (Walker, J., concurring in part and dissenting in part) ("Over time, the Supreme Court will further illuminate the nature of major questions and the limits of delegation.").

505 *Id.* ("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.").

506 *See id.*

507 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (stating that the major questions doctrine is applied "in certain extraordinary cases [in which] both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there") (citation omitted).

508 *See supra* notes 281–85 and accompanying text.

509 Deacon & Litman, *supra* note 278, at *6 ("This dynamic undermines the purported purpose of the [major questions] doctrine, which is to channel policy disputes into legislatures.").

Justice Gorsuch's concurrence, while deeply anti-administrativist,[510] hints at this potential. For instance, he suggests that the major questions doctrine upholds separation of powers principles,[511] without which "[l]egislation would risk becoming nothing more than the will of the current President."[512] Without the court policing potential executive branch overreach via major questions (and certain constitutional doctrines),[513] "[s]tability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power."[514] Gorsuch also cites *American Lung Ass'n* and *U.S. Telecom Ass'n v. FCC* to imply that the major questions doctrine could foil a president who attempts his "own regulatory solution" despite what Gorsuch perceives to be a lack of adequate statutory authority.[515]

However, if the major questions doctrine is more likely to rear its head in situations where political parties or movements have rendered certain policies controversial[516]—policies that presumably draw the ire of the Supreme Court as a result of controversy, leading the Court to set the *Chevron* framework aside—it is possible that a political actor like the President could take advantage of the major questions doctrine to dispense with the policy of her predecessor. Arguably, the Trump Administration ultimately accomplished as much vis-à-vis the Clean Power Plan in *West Virginia v. EPA*.[517]

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510 *See*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (disparaging "the will of unelected officials barely responsive to" the President); *id.* (evincing concern about a world in which "agencies could churn out new laws more or less at whim [and suggesting that administrative] [i]ntrusions on liberty would not be difficult and rare, but easy and profuse"); *id.* (worrying about "[p]owerful special interests, which are sometimes 'uniquely' able to influence the agendas of administrative agencies . . . flourish[ing] while others would be left to ever-shifting winds").

511 *Id.* at 2617 (Gorsuch, J., concurring) ("The major questions doctrine works . . . to protect the Constitution's separation of powers.").

512 *Id.* at 2618 (Gorsuch, J., concurring).

513 *Id.* at 2617 (Gorsuch, J., concurring) (discussing sovereign immunity and prohibitions against statutory retroactivity).

514 *Id.* at 2618 (Gorsuch, J., concurring).

515 *Id.* at 2622 (Gorsuch, J., concurring) (citing Am. Lung Ass'n, 985 F.3d 914, 998 n.20 (D.C. Cir. 2021) ("President stating that 'if Congress won't act soon . . . I will'"), and U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423–424 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("noting a 'President's intervention [may] underscor[e] the enormous significance' of a regulation")).

516 *See* Deacon & Litman, *supra* note 278, at *33.

517 *See supra* notes 148–59 and accompanying text.

Nonetheless, explicit judicial consideration of statutory goals could serve as a proxy for balancing presidentialism against legislation. A thread of major questions cases including *U.S. Telecom Ass'n v. FCC*,[518] *Massachusetts v. EPA*[519] and *FDA v. Brown & Williamson*[520] suggests that even—or perhaps especially—when the President or political figures have had a major role in shaping administrative statutory interpretation, the Supreme Court will look to legislative frameworks first to determine the legitimacy of the agency's interpretation of the law at issue.[521] By making a nuanced determination about whether the agency's policy comports with what legislation authorizes, courts can sidestep the need to evaluate the legitimacy of presidentialism in that context.

Indeed, in both *Massachusetts 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. In *Massachusetts v. EPA*, the Court said explicitly 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."[522] In *Brown & Williamson*, the Court took pains to highlight the importance of the legislature's preference for the agency, deemphasizing the role of the President in directing the agency (in contrast to the dissent).[523] In this way, the Court limited the impact of presidentialism, even though it did not express an intention to do so.

In *U.S. Telecom Ass'n*, the D.C. Circuit debated whether the agency's action was explicitly authorized by statute.[524] The dissent, penned by then-Judge Kavanaugh, argues that "[t]he 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."[525] In response, Judge Srinivasan asserted in a concurrence:

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518 855 F.3d 381 (D.C. Cir. 2017); *see also supra* notes 210–14 and accompanying text.

519 549 U.S. 497 (2007).

520 529 U.S. 120, 158 (2000).

521 *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* and *Brown & Williamson* that "[c]ases involving 'major' questions are, almost by definition, the cases in which political accountability is a meaningful possibility").

522 Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 511 (2019) (citing Massachusetts v, EPA, 549 U.S. at 533–34).

523 *See supra* text accompanying notes 228–47.

524 *See* 855 F.3d at 382.

525 *Id.* at 418 (Kavanaugh, J., dissenting).

> [O]ur 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 like the ones instituted by the [FCC] Order ["Protecting and Promoting the Open Internet"] because the Supreme Court has specifically told us so.[526]

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.

D. Hard Look Review to Encourage Statute-Focused Execution

Presidentialism and expertise are in conflict with one another in the administrative state.[527] Indeed, courts have "long wrestled with whether presidential and political influence on agency expertise is justifiable."[528] To do so, they have applied the APA's arbitrary and capricious standard, which is generally deferential,[529] to engage in "'hard look' review, which considers the quality of administrative decisionmaking" and often involves "judicial involvement in the minutiae of administrative expertise."[530]

One area where this standard has been 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,[531] and even more, that a "sounder version" of hard

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526 *Id.* at 382–83 (Srinivasan, J., concurring) (leading into a discussion of Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)).

527 *See* Jerry L. Mashaw, *Is Administrative Law at War with Itself?*, 29 N.Y.U. ENV'T J. 421, 421 (2021) (arguing that "a consistent general theory of administrative legitimacy still eludes us" because of the tension between "presidentialism" and "presidential administration").

528 Shah, *supra* note 335, at 1156.

529 *Id.* at 1137.

530 *Id.* at 1123, 1136.

531 *See, e.g.*, Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 593 (2003); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 470–71 (1987) ("The disagree-

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."[532] Still, from the Reagan presidency through today, courts have evaluated policy changes instigated by a new President under either the arbitrary and capricious standard or via hard look review—accepting the changes in some cases,[533] but rejecting them in others.[534]

And yet, if agencies have truly acquiesced to legislative aims, 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 is not per se arbitrary and capricious—is the idea that "agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms."[535] Then again, as Thomas McGarity has observed, "When the President or his staff can secretly intervene into any stage of the regulatory process, accountability suffers. An agency can usually manipu-

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ment . . . stemmed from contrasting views about the proper role of politics in the regulatory process.") (analyzing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.Ins. Co., 463 U.S. 29 (1983)).

532 Kagan, *supra* note 23, at 2372 (arguing that the presence of presidential involvement in agency action should be viewed as beneficial to meeting the arbitrary and capricious standard).

533 *See, e.g.*, *State Farm*, 463 U.S. at 29–31 (validating a policy change initiated by the Reagan Administration); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (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. U.S. Dep't of Agric., 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, because the agency "indeed took a 'hard look' at the environmental consequences of the . . . [r]ule and therefore did not act arbitrarily and capriciously . . . ."); Int'l Union v. Chao, 361 F.3d 249, 251–52 (3rd Cir. 2004) (declaring that the agency decision, in response to directives from the George W. Bush Administration, not to promulgate a rule prioritized by the Clinton Administration was not arbitrary or capricious); *see also* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 20 (2009) (discussing *Chao*).

534 *See, e.g.*, Massachusetts v. EPA, 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. U.S. Dep't of the Treasury, 857 F.3d 913 (D.C. Cir. 2017) (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 Regul. Comm'n, 685 F.2d 459, 460 (D.C. Cir. 1982) (per curiam) (finding that the agency's rule was arbitrary and capricious because it "fail[ed] to allow for proper consideration of the uncertainties . . . [and] fail[ed] to allow for proper consideration of the health, socioeconomic and cumulative effects"); *id.* at 509 (Edwards, J., concurring in part and dissenting in part) (noting President Reagan's role in the decision to pursue the policy).

535 Watts, *supra* note 534, at 5 (emphasis omitted).

late its analysis and explanations of the existing data to fit a presidentially required outcome."[536]

This Section argues that the executive branch must evaluate what a statute requires,[537] 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. Indeed, as presidential control over administration continues to increase, the executive branch must be required to strike a balance between the President's and the legislature's goals, and to identify and articulate its reasons in doing so. To encourage this shift, courts should probe administrative justifications, even those seemingly based in rationality, rather than taking at face value that agencies are not motivated primarily or solely by political aims.

Arbitrary and capricious review may assist in these tasks. As Kevin M. Stack notes, "one of the most fundamental elements of arbitrary and capricious review under [section] 706 of the APA is that the agency must make some demonstration of the connection between its decision and the statute's aims."[538] Notably, the formative *State Farm* decision states that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ."[539] Furthermore, "[t]he agency's duty to 'cogently explain why it has exercised its discretion in a given manner' thus includes a duty of connecting the agency's chosen course of action to the ends established by the act."[540] To be clear, "hard look" review need not require the creation of a standard of review for the President's actions, as scholars have recently suggested.[541] Rather, courts would deploy the existing "hard look" framework while review-

536 Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 456–57 (1987).

537 *See* Bellia, *supra* note 336, at 1757 (arguing that the Take Care "[C]lause calls for the President not merely to ensure that the laws be executed, but that they be '*faithfully*' executed").

538 Stack, *supra* note 43, at 899 (noting that "[t]he canonical application of arbitrary and capricious review in the *State Farm* decision illustrates this demand").

539 463 U.S. at 43.

540 Stack, *supra* note 43, at 900 (citing Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1312 (2012)).

541 *See* Manheim & Watts, *supra* note 30 (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").

ing *agency* action to suss out both the existence of presidential intervention and 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 result in overturning a policy as a result of the generally deferential standard of review under APA section 706(2)(a), or even as a result of hard look review. For instance, in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*[542] 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.[543] Rather, the court decided that the agency had a satisfactory explanation for the rule regardless of presidential involvement—namely, that the Gun Control Act[544] 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 Vegas massacre" in 2017.[545]

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 goals 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*.[546] But courts might also find that agencies, having acquiesced to the President's preferences, have ignored the law's expectations that they act mainly on the basis of expertise or other nonpolitical considerations.[547]

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542 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020); *see also* Guedes v. ATF, No. 21-5045, 2022 WL 3205889, at *2–3 (D.C. Cir. Aug. 9, 2022) (affirming *Guedes I* and *Guedes II* by finding the ATF's interpretation of the National Firearms Act, "urged" by "then-President Trump and Congress," was correct).

543 *Id.* at 34.

544 18 U.S.C. §§ 921–934.

545 *See Guedes*, 920 F.3d at 7–8. Notably, the court comes to an outcome affirming the regulation despite its decision—at the request of both parties—to "dispense with the *Chevron* framework." *Guedes*, 2022 WL 3205889, at *3.

546 *See id.* at 34 (noting that "[p]residential administrations are elected to make policy, . . . [a]nd '[a]s 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'") (alteration in original) (citations omitted).

547 *See, e.g.*, Christopher S. Kelley, *The Unitary Executive and the Clinton* Administration, *in* THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY 116-17 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010) (suggesting that President Clinton's "[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

For example, in *Grace v. Barr*,[548] the D.C. Circuit held that a proposed Department of Justice policy raising the bar for "credible fear" determinations pertaining to nongovernmental actors (like gangs and abusive domestic partners) was arbitrary and capricious because the agency failed to provide a reasoned explanation for the change.[549] The new policy issued from a politically-charged adjudication by Attorney General Jeff Sessions,[550] resulting from his power to refer and review immigration cases himself.[551] Despite the importance of this policy to President Trump's immigration agenda, Judge Tatel noted for the majority that the policy failed arbitrary and capricious review because it raised the bar far above what Congress intended for credible fear determinations.[552]

In another immigration case, *Gomez v. Biden*,[553] a federal court found a DHS decision to mass rescind a parole program, per a clear presidential directive, to be arbitrary and capricious.[554] The district court for the District of Columbia also entertained a case where the plaintiffs asserted 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.[555] While the district court's final decision ordered the State Department to process

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qualified to manage the nuclear weapons non-proliferation and materials disposition programs of the newly-created [National Nuclear Security Administration]'").

548 965 F.3d 883 (D.C. Cir. 2020).

549 *Id.* at 900.

550 A-B-, 27 I&N Dec. 316 (A.G. 2018), *vacated*, 28 I&N Dec. 307 (A.G. 2021) ("An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.").

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

552 *See id.* at 148.

553 No. 20-cv-01419, 2021 U.S. Dist. LEXIS 53808 (D.D.C. Feb. 19, 2021), *appeal docketed*, No. 21-5288 (D.C. Cir. Dec. 16, 2021).

554 *Id.*; Gomez v. Trump, 490 F. Supp. 3d 276 (D.D.C. Sept. 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 (Mar. 30, 2021), https://www.law360.com/articles/1370298 [https://perma.cc/2USH-D5BP].

555 S.A. v. Trump, 363 F. Supp. 3d 1048, 1055 (N.D. Cal. 2018) (finding arbitrary and capricious the recission of the Central American Minors program conditional parole approval determinations, which followed an executive order directing the agency to reform the program in this manner); *see also* Exec. Order No. 13,767, 83 Fed. Reg. 8793 (Jan. 30, 2017).

the visas reserved for members of the class of plaintiffs,[556] this decision was subsequently stayed until after the D.C. Circuit court issues its opinion on the Biden Administration's appeal of this case.[557]

Notably, the Supreme Court granted certiorari in another case to determine whether a Trump-era regulation substantially expanding the "public charge" exception to noncitizen admissibility was permissible, but subsequently dismissed the case at the request of the Biden Administration.[558] In addition, a few decisions have suggested that the arbitrary and capricious standard could reign in agencies' neglect of NEPA's environmental impact statement requirement at the behest of Presidents.[559]

A number of considerations flow from the proposal that courts apply the arbitrary and capricious standard to ensure that an agency in the pursuit of presidential interests demonstrates a connection between its decisions and statutory aims,[560] does not "rel[y] on factors which Congress has not intended it to consider,"[561] and connects its "chosen course of action to the ends established by the" relevant statute.[562] 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.[563] The President is not generally

556 *See* Gomez v. Biden, 1:20-cv-01419-APM (D.D.C. Aug. 17, 2021).

557 *See* Kin Shaun Goh v. Dep't of State, No. 21-cv-00999 (D.D.C. Sept. 30, 2021).

558 U.S. Citizenship and Immigr. Servs., v. San Francisco, 981 F.3d 742 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1292 (2021) (challenging a regulation reinterpreting the Immigration and Nationality Act, 8 U.S.C. 1182(a)(4)(A)); Amy Howe, *Cases Testing Trump's "Public Charge" Immigration Rule Are Dismissed*, SCOTUSBLOG (Mar. 9, 2021, 2:56 PM), https://www.scotusblog.com/2021/03/cases-testing-trumps-public-charge-immigration-rule-are-dismissed/ [https://perma.cc/NZH9-5AAK] (noting also that the Supreme Court "canceled oral arguments in two other immigration cases after policy changes by the Biden [A]dministration. 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.").

559 *See, e.g.*, Backcountry Against Dumps v. U.S. Dep't 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 Grp. v. Dep't of Energy, 260 F. Supp. 2d 997, 1018, 1033 (S.D. Cal. 2003) (involving a 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 Grp. v. Dep't of Energy, 467 F. Supp. 2d 1040 (S.D. Cal. 2006).

560 *See supra* note 538 and accompanying text.

561 *See supra* note 539 and accompanying text.

562 *See supra* note 540 and accompanying text.

563 *See* Sierra Club v. Costle, 657 F.2d 298, 406–07 (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).

held accountable for an agency's decision, "nor is his reasoning process made available to the regulatees and the beneficiaries of regulation."[564]

On the one hand, the Supreme Court appears to limit the impact of 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.[565] And almost twenty years after the famous case involving President Clinton's statements urging the FDA to regulate tobacco,[566] the Court again implied that public-facing presidential leadership cannot overcome the Court's own understanding of the statutory requirements that govern policymaking, when it rejected efforts by the Department of Commerce to add a question about citizenship to the census at President Trump's behest.[567]

On the other hand, Part I of this Article showcases how the President can influence an *agency's* action. Given this, perhaps all such statements should be part of the legal domain, rather than only those that the President wishes to be on record. It is possible that 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 their 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."[568] Furthermore, the Supreme

564 McGarity, *supra* note 536, at 457.

565 *See* Shaw, *supra* note 130, at 101–03 (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.); Watts, *supra* note 75, at 700–04 (discussing the same example).

566 *See supra* notes 227–41 and accompanying text.

567 *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019).

568 McGarity, *supra* note 536, at 456.

Court may have an appetite for this approach, given that it recently drew on the arbitrary and capricious standard to rebuke pretextual justifications for policies that further the President's goals.[569]

Another important question is, how should a judge evaluate 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.[570] In other situations, if the only justification offered consists of the President's statements, courts might be reluctant to uphold a policy under arbitrary and capricious review.

In *DHS v. Regents* and *Department 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*, the Court invalidated the Trump-directed rescission of the DACA policy.[571] According to the Court, the agency acted in an arbitrary and capricious manner because it did not adequately justify its action.[572] 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.[573] Benjamin Eidelson suggests that the Court's refusal to accept a post hoc rationalization is a turn to "the 'accountability-forcing' form of arbitrariness review."[574] The argument that the DACA policy has led to reliance that in turn requires the

569 *See* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (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).

570 *See supra* notes 342–51 (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).

571 Memorandum from Elaine C. Duke, Acting Sec'y, DHS, to James W. McCament, Acting Dir., Citizenship & Immigr. Servs., et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/6645-PEVU]; Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 127.

572 *DHS v. Regents*, 140 S. Ct. at 1909–15 (noting that the Secretary of the Department of Homeland Security "failed to consider . . . important aspects of the problem," per the requirements of *State Farm*) (alteration in original).

573 *Id.* at 1907–08.

574 Eidelson, *supra* note 521, at 1748. *But see* Stephen Lee, *DACA and the Limits of Good Governance*, REGUL. REV. (July 29, 2020), https://www.theregreview.org/2020/07/29/lee-daca-good-governance/ [https://perma.cc/QN26-JMPE] (arguing that the *DHS v. Regents* decision is "narrow" and "illustrates the limits of the good governance rationale in the context of ongoing struggles . . . to expand immigrant rights").

continuation of this policy,[575] an argument that the judiciary has entertained,[576] offers another manner by which courts could evaluate the legitimacy of presidential administration.

Similarly,[577] 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.[578] In this case, the Court rebuked an agency that implemented the President's public promises on the basis of a pretextual justification.[579] "Consistent with hard look doctrine, the Court sought to consider 'what role political judgments can and should play' in the administration of the Census."[580] Ultimately, 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 pretextual,[581] and thus unavailable for "meaningful judicial review."[582] While much of Chief Justice Roberts's majority opinion treated the Commerce Secretary's decision "as a per-

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575 *See* Bijal Shah, *Reliance Interests & the DACA Rescission*, Am. Const. Soc'y (Apr. 27, 2018), https://www.acslaw.org/expertforum/reliance-interests-the-daca-rescission/ [https://perma.cc/T2RV-UURL].

576 *See* NAACP v. Trump, 298 F. Supp. 3d 209, 240 (D.D.C. 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* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016) (instructing that "[a]gencies are free to change their existing policies as long as they 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") (citations omitted).

577 *See* Lee, *supra* note 574 ("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.").

578 Shah, *supra* note 335 (discussing how "arbitrary-and-capricious review 'serves to identify pretextual decisionmaking'—for instance, in the seminal *State Farm* decision") (citation omitted).

579 Dep't of Com. 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.'") (citation omitted).

580 *See* Shah, *supra* note 335, at 1123.

581 *Dep't of Com. v. New York*, 139 S. Ct. at 2574–75 (concluding that "the decision to reinstate a citizenship question cannot be adequately explained in terms of [the agency's] request for improved citizenship data to better enforce the [Voting Right Act]").

582 *Id.* at 2573.

fectly reasonable and historically grounded policy choice,"[583] the decision ultimately found that the Secretary "had lied."[584] As the Chief Justice explained: "If 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."[585]

It bears noting, however, that *Regents* and *Department of Commerce v. New York* both 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 block; after all, despite the outcome of *Regents*, President Trump refused[586] to follow court orders to restore the DACA program.[587]

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.[588] Courts

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583 Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 26 (2020).

584 *Id.* at 27. 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 521, at 1788 (noting that when the Secretary "lied about his reasons for adding the citizenship question, [there was] damage to *political* accountability" as well).

585 *Dep't of Com. v. New York*, 139 S. Ct. at 2576.

586 *Department of Homeland Security Will Reject Initial Requests for DACA as It Weighs Future of the Program*, DHS (July 28, 2020), https://www.dhs.gov/news/2020/07/28/department-homeland-security-will-reject-initial-requests-daca-it-weighs-future [https://perma.cc/Z5Q7-44FN].

587 *See, e.g.*, CASA de Md. v. DHS, No. 17-cv-02942-PWG (D. Md. July 17, 2020) (order compelling DHS to comply with *Dep't of Com. v. New York*).

588 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 because 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 plaintiffs' allegations and a facial review of TPS termination notices supported a plausible inference that the agency adopted a new policy or practice without an explicit explanation for the change); Centro Presente v. DHS, 332 F. Supp. 3d 393 (D. Mass. 2018) (denying motion to dismiss because it was plausible that policy is arbitrary and capricious due to the potential for discriminatory reasons motivating the decision.); CASA de Md., Inc. v. Trump, 355 F. Supp. 3d 307 (D. Md. 2018)

should continue this practice to ensure that agencies do not bend the enforcement of statute to a President's base instincts.

Finally, consider the Trump Administration's proposal that the HHS implement an automatic sunset for all regulations.[589] Until recently, neither Congress nor the Biden Administration had addressed its potential consequences, which includes the imminent invalidation of tens of thousands of agency regulations.[590] As a result, health organizations who are concerned about the fallout of the rule[591] have sued to invalidate the rule, in part, under the arbitrary and capricious standard[592] (in addition to arguing that the rule is unlawful).[593]

As noted earlier, the Biden Administration has postponed implementing this rule, but only temporarily.[594] For this reason, it would be prudent for the judiciary to apply the arbitrary and capricious standard in this case to determine whether a presidential directive to an agency to sunset its regulations is likely to be in violation of the APA. Beyond the fact that the statutory authority for this effort is unspecified,[595] any policy that automatically expires all regulations is most likely arbitrary and capricious. Moreover, the judiciary might consider whether the HHS, under the direction of the Trump Administration, in fact proposed this policy after a careful or nuanced analysis of the legislation that governs all regulatory frameworks. If not, this case could go the way of *Regents* and *Department of Commerce v. NY*, in which the Supreme Court applied the accountability-forcing component of arbitrary and capricious review to find that the agency had violated the APA.

(denying motion to dismiss because there was enough evidence to support plaintiff's contention that the decision was arbitrary and capricious and the decision racially motivated).

589 *See supra* note 399 and accompanying text; *see also* SUNSET, 86 Fed. Reg. 5964.

590 *See* Jasmine Wang, *Health Regulation's Ticking Time Bomb*, REGUL. REV. (Apr. 27, 2021), https://www.theregreview.org/2021/04/27/wang-health-regulations-ticking-time-bomb/ [https://perma.cc/Z67Y-8R2Q] (noting that the SUNSET rule "could cause more than 18,000 regulations from [HHS] to disappear").

591 *See supra* notes 400–02 and accompanying text.

592 Complaint, *supra* note 405, at 27 (arguing that the rule is "arbitrary and capricious because, among other reasons, it purports to 'incentivize' the Department to review regulations at an infeasible pace HHS has never achieved by eliminating regulations relied upon by the general public").

593 *See supra* notes 403–05 and accompanying text.

594 *See supra* notes 406–07 and accompanying text; *see also* SUNSET, 86 Fed. Reg. at 5964; Administrative Delay of Effective Date, 87 Fed. Reg. 12,399 (Mar. 4, 2022).

595 *See supra* text accompanying notes 399–400.

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."[596] 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 aims 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."[597]

This Article argues that modern Presidents have brought their responsibility to execute the law into tension with their own policy interests—a tension that has 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 aims. This state of affairs suggests that presidential administration conflicts with the obligations that animate and govern agencies, even if presidentialism furthers values of political accountability, good governance, or even subjective understandings of what makes for beneficial or optimal policy.

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 goals 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 also a restructuring of presidential administration itself from all sides, including from within.

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596 WILSON, *supra* note 73, at 59.

597 *Id.* at 60.