

ADMINISTRATIVE STATES:  
BEYOND PRESIDENTIAL ADMINISTRATION

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*Presidential administration is more entrenched and expansive than ever. Most significant policymaking comes from agency action rather than legislation. Courts endorse “the presence of Presidential power” in agency decisionmaking. Scholars give up on external checks and balances and take presidential direction as a starting point. Yet presidential administration is also quite fragile. Even as the Court embraces presidential control, it has been limiting the administrative domain over which the President presides. And when Presidents drive agency action in a polarized age, their policies are not only immediately contested but also readily reversed by their successors.*

*States complicate each piece of this story. In critical respects, federalism further strengthens presidential administration. Waivers, grants, nonpreemption of state law, and other intergovernmental techniques enable Presidents to effectuate policy agendas when federal agencies lack sufficient authority. States also furnish durability because their policies may outlast a President’s tenure when federal policies do not. At the same time, federalism diversifies administration and broadens its representative base. Defenses of presidential power as “accountable” and “effective” sound increasingly empty, if not dangerously autocratic. Yet it is easier to condemn presidential administration than to locate alternatives that connect the administrative state to electoral politics and representative institutions as well as to expertise and deliberation. Because state legislators and governors may furnish these connections, plural administrative states offer the most promising path forward for the contemporary administrative state.*

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## INTRODUCTION

Although the reach of federal agencies has never been greater, nearly every significant administrative action finds itself vulnerable to legal challenge, political reversal, or both. The Environmental Protection Agency’s Clean Power Plan,<sup>1</sup> the Department of Homeland Security’s Deferred Action for

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<sup>1</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015); *see* Press Release, White House Office of the Press Sec’y, Remarks by the President in Announcing the Clean Power Plan (Aug. 3, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan>.

Childhood Arrivals (DACA)<sup>2</sup> and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) initiatives,<sup>3</sup> and the Federal Communications Commission's net neutrality rules<sup>4</sup> involved distinct subjects; they involved distinct agencies, from a multi-member New Deal commission to the newest Cabinet agency; and they involved distinct forms of agency action, from notice-and-comment rulemaking to guidance. But all seem to have met the same unhappy fate.

Even before President Obama left office, these agency actions had been challenged in court,<sup>5</sup> and the Trump Administration has now withdrawn or

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<sup>2</sup> Memorandum from Janet Napolitano, Sec'y, U.S. Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012) [hereinafter DACA Memo], <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; see Press Release, White House Office of the Press Sec'y, Remarks by the President on Immigration (June 15, 2012), <http://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

<sup>3</sup> Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r of U.S. Customs & Border Prot. 4 (Nov. 20, 2014) [hereinafter DAPA Memo], [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); see Press Release, White House Office of the Press Sec'y, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>4</sup> Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,742 (Apr. 13, 2015); see *In re Protecting and Promoting the Open Internet*, 30 F.C.C. Rcd. 5601 (2015); *Net Neutrality: President Obama's Plan for a Free and Open Internet*, WHITE HOUSE, <https://www.whitehouse.gov/net-neutrality>.

<sup>5</sup> Plaintiffs argued that the Clean Power Plan exceeded the EPA's statutory authority and did not merit *Chevron* deference. Opening Brief of Petitioners on Core legal Issues, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb 19, 2016); see *West Virginia v. EPA*, 136 S. Ct. 999 (Mem) (Feb. 9, 2016) (staying Clean Power Plan pending review in the D.C. Circuit).

Plaintiffs argued that DACA and DAPA ran afoul of procedural requirements and usurped Congress's power. See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (enjoining DAPA and expansion of DACA); see also *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015) (dismissing challenge to DACA for lack of standing).

Plaintiffs argued that the net neutrality orders of 2010 and 2015 exceeded the FCC's statutory authority. See *U.S. Telecom. Assoc. et al. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (rejecting challenge to FCC's 2015 Open Internet Order); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (vacating anti-discrimination and anti-blocking requirements of FCC's 2010 Open Internet Order).

begun the process of withdrawing each of the policies.<sup>6</sup> The same is true of numerous other Obama-era policies, from the Department of Housing and Urban Development's Affirmatively Furthering Fair Housing regulation,<sup>7</sup> to the Department of Education's guidance regarding transgender students,<sup>8</sup> to the Department of Labor's fiduciary duty rule,<sup>9</sup> and more. The most straightforward, and commonly offered, answer to the question of where these administrative decisions stand is that they have been "gutted or [are] on the road to being gutted."<sup>10</sup>

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<sup>6</sup> See Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 84 Fed. Reg. 32,520 (July 8, 2019) (repealing the Clean Power Plan and promulgating a different rule for electric utilities); Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (revoking net neutrality rules); Memorandum from John F. Kelly, Sec'y, Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Commiss., USCIBP, et al. (June 15, 2016) <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf> (rescinding the DAPA Memo); Memorandum from Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec., to James W. McCament, Acting Dir., USCIS, et al. (Sept. 5, 2017) <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> (rescinding the DACA Memo).

Several of these Trump Administration actions are now, in turn, being challenged in court. See, e.g., Dep't of Homeland Security v. Regents of the University of California, 2019 WL 2649834 (U.S. June 28, 2019) (granting certiorari to consider legality of DACA rescission); Mozilla Corp v. FCC, No. 18-1051 (D.C. Cir.) (oral argument Feb. 1, 2019) (considering challenge to Restoring Internet Freedom Order); see also Statement by Attorney General James on Trump EPA's "Dirty Power" Rule, New York Attorney General's Office, <https://ag.ny.gov/press-release/statement-attorney-general-james-trump-epas-dirty-power-rule> (June 19, 2019) (announcing intention to challenge EPA rule repealing Clean Power Plan).

<sup>7</sup> E.g., Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713 (proposed Aug 16, 2018) (publishing advance notice of proposed rulemaking, and stating that the Affirmatively Furthering Fair Housing rule promulgated in 2015 is "ineffective" and "highly prescriptive").

<sup>8</sup> Dear Colleague Letter on Transgender Students (Feb. 22, 2017), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> (rescinding Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice 3 (May 13, 2016)).

<sup>9</sup> See, e.g., Presidential Memorandum on Fiduciary Duty Rule (Feb. 3, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-fiduciary-duty-rule/> (directing the Secretary of Labor to review the Fiduciary Duty Rule with an eye to rescinding or revising it); Chamber of Commerce v. Dep't of Labor, 885 F.3d 360 (5th Cir. 2018) (vacating the Fiduciary Duty Rule).

<sup>10</sup> Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated*

That is not, however, a complete answer. When the EPA announced the Clean Power Plan's repeal, half of the states were already meeting its targets,<sup>11</sup> and many are now taking additional steps to advance the Plan's commitment to renewable energy.<sup>12</sup> Numerous sanctuary states and cities are refusing to cooperate with federal immigration enforcement that would target DACA- and DAPA-eligible immigrants,<sup>13</sup> and some have passed legislation maintaining particular protections for DACA recipients.<sup>14</sup> States have

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*Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 607 (2018); see also, e.g., K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1700 (2018) (book review) ("The incoming Trump Administration quickly reversed each of these [Obama Administration] regulatory initiatives.").

<sup>11</sup> E.g., Brad Plumer & Nadia Popovich, *How Will the Clean Power Plan Repeal Change Carbon Emissions for Your State?*, N.Y. TIMES, Oct. 10, 2017, <https://www.nytimes.com/interactive/2017/10/10/climate/clean-power-plan-emissions-your-state.html>.

<sup>12</sup> E.g., The 100 Percent Clean Energy Act of 2018, S.B. 100 (codified at CAL. PUB. UTIL. CODE §§ 399.11, 399.15, 399.30, & 454.53 (West 2018)); Climate Action Plan to Reduce Pollution, H.B. 19-1261 (codified at COLO. REV. STAT. § 25-7-102—105 (2018)); An Act to Reform Maine's Renewable Portfolio Standard, S.P. 457 (to be codified at ME. REV. STAT. ANN. tit. 35-A, § 3210); An Act Relating to Greenhouse Gas Emissions, S.B. 254 (Nev. 2019) (to be codified at NEV. REV. STAT. ch. 323); Climate Leadership and Community Protection Act, S. 6599 (N.Y. 2019); Renewable Energy Bill, A-3723 (N.J. 2018); Energy Transition Act, S.B. 489 (N.M. 2019); An Act Relating to Supporting Washington's Clean Energy Economy, S.B. 5116 (Wash. 2019) (to be codified at WASH. REV. CODE tits. 19, 43, 80, & 82). See generally *United States Climate Alliance*, <https://www.usclimatealliance.org/> (describing alliance of 25 governors who have committed to implementing "policies that advance the goals of the Paris Agreement"); *States & Tribes, WE ARE STILL IN*, <https://www.wearestillin.com/states-tribes> ("States are . . . taking up the mantle of climate leadership.").

<sup>13</sup> E.g., California Values Act S.B. 54 (codified at CAL. GOV'T CODE §§ 7282-7282.5, 7284-7284.12 (West 2018)); Protect Colorado Residents from Federal Government Overreach, H.B. 19-1124 (to be codified at COLO. REV. STAT. § 76.6); An Act Concerning the Trust Act, Pub. Act No. 19-20 (to be codified at CONN. GEN. STAT. §54-192h); Illinois TRUST Act, Ill. Pub. Act No. 100-463 (codified at 5 ILL. COMP. STAT. ANN. § 805 (West 2018)); An Act Relating to the Involvement of Public Bodies in Immigration Enforcement, H.B. 3464 (to be codified at OR. REV. STAT. ANN. ch. 724); An Act Relating to Establishing a Statewide Policy Supporting Washington State's Economy and Immigrants' Role in the Workplace, S.B. 5497 (to be codified at WASH. REV. CODE tits. 10 & 43); see also *Lunn v. Commonwealth*, 477 Mass. 517, 537 (2017) ("Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer . . .").

<sup>14</sup> E.g., An Act Relating to State Benefits for Undocumented Individuals, S.B. 1563 (to be codified at OR. REV. STAT. § 352.287) (exempting certain undocumented students from

responded to the FCC's actions by "restoring" net neutrality as a matter of state law.<sup>15</sup> They have likewise assumed custody of Obama-era housing, labor, education, and other policies.<sup>16</sup>

This Article seeks to make sense of this broader landscape and to probe its possibilities. Nearly two decades after then-Professor Elena Kagan announced that we were living "in an era of presidential administration"<sup>17</sup>—and some

paying nonresident tuition at public universities); An Act Relating to Motor and Other Vehicles, H. 7982 Sub. B (codified at R.I. GEN. LAWS § 31-10-26 (2018) ("The division of motor vehicles shall issue an operator's or chauffeur's license . . . to every qualifying applicant, including, but not limited to, any current or past recipient of a grant of deferred action under the Deferred Action for Childhood Arrivals (DACA) program."); see Press Release, Oregon Governor's Office, Governor Brown Signs DACA Legislation at May Day Celebration (May 1, 2018), <https://www.oregon.gov/newsroom/pages/NewsDetail.aspx?newsid=2697>; Press Release, Gina M. Raimondo, Governor of Rhode Island, Raimondo Signs Legislation Protecting Dreamers (June 18, 2018), <https://www.ri.gov/press/view/33496>.

<sup>15</sup> See, e.g., California Internet Consumer Protection and Net Neutrality Act of 2018, S.B. 822 (codified at CAL. CIV. CODE § 3100 et seq. (West 2018)); An Act Relating to Internet Service Providers, H.B. 4155 (to be codified at OR. REV. STAT. § 646.608); An Act Relating to Protecting Consumers and Promoting an Open Internet in Vermont, Act 169 (to be codified at VT. STAT. ANN. tit. 9, § 61A); An Act Relating to Protecting an Open Internet in Washington State, H.B. 2282 (to be codified at WASH. REV. CODE tit. 19). See generally *Net Neutrality 2019 Legislation*, NAT'L CONF. STATE LEG., <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-2019-legislation.aspx> (May 6, 2019) (compiling adopted and introduced net neutrality legislation from 29 states); Alex Johnson, *California Enacts Net Neutrality Bill, DOJ Counters with Lawsuit*, NBC NEWS, Sept. 30, 2018, <https://www.nbcnews.com/tech/internet/gov-jerry-brown-signs-bill-restore-net-neutrality-california-n915221> (describing the California law as "restor[ing] net neutrality protections that President Donald Trump's Federal Communications Commission killed late last year").

<sup>16</sup> See, e.g., An Act Concerning Affirmatively Furthering Fair Housing, A.B. 686 (codified at CAL. GOV'T CODE §§ 8899.50, 65583, 65583.2 (West 2018)) (introducing an affirmatively furthering fair housing obligation into state law following the Trump Administration's decision not to implement the federal affirmatively furthering fair housing regulation); An Act Relating to Financial Planners, S.B. 383 (to be codified at NEV. REV. STAT. §§ 628A.010, 628A.040, 688C.212) (restoring the Department of Labor's Obama-era fiduciary rule as a matter of state law); Letter from N.Y. State Attorney Gen. & N.Y. Comm'r of Educ., <http://www.nysed.gov/common/nysed/files/nysed-oag-joint-guidance-letter-2-28-18.pdf> (Feb 28, 2018) (informing "school districts across New York State that – irrespective of the federal government's recent announcement [that it would no longer investigate civil rights complaints from transgender students denied bathroom access] – they have independent duties to protect transgender students from discrimination and harassment in their schools and at all school functions").

<sup>17</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001)

eight decades after President Franklin Delano Roosevelt established the basic architecture for a far-reaching, presidentially superintended administrative state—presidential administration is stronger than ever. Presidents rely on federal agencies to further their agendas; most significant policymaking comes from agency action rather than legislation.<sup>18</sup> Courts limit agency officials' insulation from presidential appointment and removal and bless "the presence of Presidential power" in agency policymaking.<sup>19</sup> Scholars who defend the administrative state take presidential direction as their starting point. Largely giving up on external checks and balances, they propose tempering presidential control through bureaucracy and administrative procedure.<sup>20</sup>

As the Obama-Trump transition illustrates, however, presidential administration is also quite fragile. When Presidents drive administrative decisionmaking in a polarized age, their policy choices are immediately contested and readily subject to reversal.<sup>21</sup> The very political dynamics that yield more aggressive presidential administration also jeopardize its outputs. With a new election, presidential administration may cannibalize itself.

Even as the Supreme Court has increasingly embraced presidential control, moreover, it has been limiting the domain of agency decisionmaking. Presidential power, as it has appeared in recent cases, is part of the latest attack

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(announcing and defending "an era of presidential administration," defined by the President's "primacy in setting the direction and influencing the outcome of administrative process").

<sup>18</sup> See, e.g., Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1968 (2015) ("By the end of the twentieth century and accelerating at the beginning of the twenty-first, the President and the vastly expanded executive branch have become the most powerful engine of government."); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 698 (2016) ("Obama has elevated White House control over agencies' regulatory activity to its highest level ever."); Daniel A. Farber, *Presidential Administration Under Trump*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591), at 4 (Aug. 2017) ("Although borrowing governance methods from his predecessors, [Trump] may be going to greater extremes in the frequency and degree of his reliance on those methods, so that what was previously exceptional seems now to be a more central part of governance.").

<sup>19</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981)); see also, e.g., *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

<sup>20</sup> See, e.g., Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); *infra* Section II.B.

<sup>21</sup> See, e.g., Mashaw & Berke, *supra* note 10; Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. (forthcoming 2019) (describing Trump's particularly aggressive rollbacks of Obama-era regulations).

on today's administrative state, not an aspect of its defense.<sup>22</sup> If this doctrinal development persists, presidential administration will not plausibly be associated with a "pro-regulatory governing agenda"<sup>23</sup>: courts may well accept presidential control over agency decisions, but they are likely to deem "pro-regulatory" decisions themselves beyond agencies' authority.

To better understand today's potent-yet-fragile presidential administration, we need to bring the states into view. The President's effectuation of a domestic policy agenda through administrative means<sup>24</sup> is, in fact, still-more powerful than a review of federal agency decisions alone suggests. States critically supplement federal agency policymaking and may succeed where federal agencies ultimately fail; the legacy of Obama's initiatives rests almost entirely in state hands.

Although twenty-first century political polarization throws this state role into sharp relief, federalism has always been a part of presidential administration. Kagan's own principal examples involved state implementation of policies federal agencies lacked sufficient authority to carry out.<sup>25</sup> And the basic "infrastructure"<sup>26</sup> for presidential administration emerged alongside New Deal cooperative federalism. Roosevelt's Brownlow Committee appreciated that even a robust federal administration would have to collaborate with state and local governments to achieve certain policy ends. It further recognized that federalism both bolstered and tempered the argument for presidential power: intergovernmental coordination demanded greater presidential control over federal administration, the Brownlow report insisted, but geographical decentralization, in turn, meant that concentrating power in the presidency need not amount to "overcentralization."<sup>27</sup> State, local, and regional

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<sup>22</sup> See *infra* Section II.A.

<sup>23</sup> Kagan, *supra* note 17, at 2249.

<sup>24</sup> Kagan's definition of the phenomenon was somewhat narrower, focused on the President's "comparative primacy [relative to Congress, the judiciary, external constituencies, and agency staff] in setting the direction and influencing the outcome of administrative process," *id.* at 2246, although she gestured to this broader understanding as well, *see, e.g., id.* at 2248 ("Faced for most of his time in office with a hostile Congress but eager to show progress on domestic issues, Clinton and his White House staff turned to the bureaucracy to achieve, to the extent it could, the full panoply of his domestic policy goals."). For discussion of the broadening of the understanding, see *infra* Section I.B.

<sup>25</sup> See *infra* notes 168-173 and accompanying text.

<sup>26</sup> Kagan, *supra* note 17, at 2275.

<sup>27</sup> PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 26 (1937) [hereinafter BROWNLOW REPORT].

implementation of presidential policies could bring an executive-centric administrative state “nearer to the people themselves.”<sup>28</sup>

Presidential administration has changed substantially since the 1930s, but this foundational sketch continues to shed light on contemporary practices. In particular, if states extend the reach of presidential administration, so too can they render it more palatable. Defenses of executive power as “accountable” and “effective” increasingly seem not only empty but dangerously autocratic.<sup>29</sup> Yet it is easier to condemn presidential administration than to find plausible alternatives, modes of governance that connect the administrative state to representative democracy and politics as well as to deliberation and expertise. States diversify presidential policymaking, both amplifying and limiting any particular President’s agenda. They also furnish multiple tethers to electoral politics and the broader public. In a political era defined by a wide-ranging federal executive branch, limited congressional capacity, and fractious partisanship, shifting our focus from a unitary administrative state to multiple administrative states offers a better way to think about presidential administration and American government more generally.

## I. THE RISE AND RISE OF PRESIDENTIAL ADMINISTRATION

Although “presidential administration” has come to denote a wide range of practices, the version Kagan described in 2001 was relatively narrow in its conception of both “presidential” and “administration.” The President superintended decisions Congress had delegated to federal agencies through mechanisms of centralization, including regulatory review and directives. In the first decades of the twenty-first century, presidential administration has grown more capacious as it has incorporated strategies of politicization as well as centralization. The rise of an executive-centered party system means that “presidential” need not require activity by the President herself but encompasses a partisan platform carried out by political officials across federal

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<sup>28</sup> *Id.* at 30 (“A general principle that may be laid down is that the decentralization should be geographical and that more and more of the administrative work of the Executive Branch be carried on in the field in regional units set up to cover all parts of the United States. In this way the Government will be brought nearer to the people themselves and by this regional organization the Federal Government may the better cooperate with State and local governments in the conduct of its affairs.”); *see infra* Part III.

<sup>29</sup> *Cf.* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY 171 (2018) (“[P]residentialism’ has the vices of its virtues. . . . ‘Democracy’ should mean more than that we elect our dictators.”).

agencies.<sup>30</sup> “Administration” has also grown both more substantial and more autonomous: confronting partisan polarization, legislative gridlock, and aging statutes, Presidents have relied heavily on agencies to set domestic policy, and commentators have defended presidentially directed policymaking more and more attenuated from legislative authorization.

#### A. *Delegation and Deference*

In the late twentieth century, presidential administration consisted principally of tools and strategies to control rulemaking, which had recently become the most significant form of administrative action.<sup>31</sup> Building on his predecessors’ innovations, President Ronald Reagan established regulatory review by the Office of Management and Budget (OMB) as a central part of the rulemaking process.<sup>32</sup> President Bill Clinton slightly modified but maintained such regulatory review<sup>33</sup> and also sought to spur and take ownership of administrative action through directives to agencies and personal appropriation of their actions.<sup>34</sup>

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<sup>30</sup> See Sidney M. Milkis & Nicholas Jacobs, “I Alone Can Fix It”: Donald Trump, the Administrative Presidency, and Hazards of Executive-Centered Partisanship, 15 THE FORUM 583 (2017); cf. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 82 (2016) (“The ultimate holders of power in American democracy are not government institutions [including Congress and the President] but democratic interests: the coalitions of policy-seeking political actors—voters, parties, officials, interest groups—that compete for control of these institutions and direct their decisionmaking. Locating policymaking power therefore requires . . . ‘passing through’ the power of each institution to the underlying interests that control its decisionmaking.”).

<sup>31</sup> See generally HAROLD SEIDMAN, POLITICS, POSITION & POWER 103 (5th ed. 1998) (“In the past the contest between the president and the Congress for power to direct executive policies and actions focused mainly on issues related to executive branch structure. The contest has now shifted new a new arena with jurisdiction over the review and control of regulations providing the major source of conflict.”).

<sup>32</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1982); see Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986).

<sup>33</sup> Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 app. at 76 (1994); see Kagan, *supra* note 17. Subsequent Presidents have also maintained regulatory review. See Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (President George W. Bush); Exec. Order No. 13,563, 3 C.F.R. 215 (2011) (President Barack Obama); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (2017) (President Donald Trump); Watts, *supra* note 18.

<sup>34</sup> See Kagan, *supra* note 17, at 2281-2319 (describing presidential administration under Clinton).

This wave of presidential administration thus focused on centralization, that is, on White House control over agency actions.<sup>35</sup> As compared to its subsequent development, such presidential administration was relatively modest. For one thing, the very idea of centralization posited agencies as critically distinct from the President: the President could seek to drive or constrain agency action, but it was not to be assumed that agencies would act consistently with presidential preferences; they had to be closely monitored and subject to controls. For another, this version of presidential administration did not displace Congress as lawmaker: it asserted the President's power over administrative agencies but emphasized that these agencies were only making policy pursuant to power delegated by Congress in the first instance.

Both of these limits were apparent in the period's leading doctrinal and theoretical accounts. Although courts had deferred to agency decisions long before 1984, *Chevron* newly proposed that deference was warranted because of agencies' connection to the President:

[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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.<sup>36</sup>

For the Court, delegation and deference worked hand-in-hand. The primary contrast the opinion drew was between the constituency-less judiciary and the other two "political branches." The Court appreciated that Congress would confer substantial policymaking authority on the executive branch. It did not

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<sup>35</sup> See generally Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235 (John E. Chubb & Paul E. Peterson eds., 1985) (describing techniques of centralization and politicization). There has long been debate about whether OMB and within it OIRA, the agency responsible for regulatory review, can fairly be equated with the President. Compare, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1307 (2006) ("OIRA is not the President"), and Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1342 (2013) ("OIRA review will rarely result in greater presidential oversight"), with Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEGAL STUD. 95, 131 (2014) ("In our view, centralized regulatory review is fundamentally about presidential control over the administrative state."). This and other limits of centralization have placed more pressure on strategies of politicization in recent years. See *infra* Section I.B.

<sup>36</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

seek to revive a strong nondelegation doctrine, nor did it suggest that agencies were “transmission belts” merely carrying out congressional instruction or technocrats merely applying expertise to apolitical problems.<sup>37</sup> Instead of cleaving bureaucracy from politics, the Court recognized the President as supplying the necessary democratic connection. Moving away from the interest-representation model that had sought to legitimize agency decisionmaking with reference to a diverse public,<sup>38</sup> the Court turned to the President as a single individual who could represent the people.<sup>39</sup>

The notion of accountability also underlay the most prominent defense of presidential administration. Before Kagan’s *Presidential Administration*, a number of scholars had noted the trend toward presidential centralization,<sup>40</sup> and some had insisted on the constitutional imperative of a unitary executive.<sup>41</sup> But these accounts generally focused on disciplining the administrative state. On the heels of Clinton’s presidency, Kagan offered a more robust, pro-regulatory account of presidential control.<sup>42</sup> For her, the question was one of statutory

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<sup>37</sup> See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675-78 (1975) (describing transmission belt and expertise models of administrative legitimacy).

<sup>38</sup> For instance, courts in the 1970s had opened notice-and-comment rulemaking to public participation on the front end and to public challenge on the back end. See, e.g., *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-55 (1970) (standing); *McKart v. United States*, 395 U.S. 185, 197-99 (1969) (exhaustion); *Abbott Labs. v. Gardner*, 387 U.S. 136, 139-41 (1967) (pre-enforcement review); *Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977) (notice and comment); *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-37 (D.C. Cir. 1976) (en banc) (notice and comment).

<sup>39</sup> See, e.g., Cynthia R. Farina, *The “Chief Executive” and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 183 (1997) (“The *Chevron* mystique flows from this promise that the ordinary act of statutory interpretation can advance the larger process of reconciling agencies with constitutional democracy.”). See generally Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 490 (2003) (“The presidential control model seeks to ensure that administrative policy decisions reflect the preferences of the one person who speaks for the entire nation. In this way, it attempts to legitimate administrative policy decisions, through presidential politics, on the ground that they are responsive to public preferences.”).

<sup>40</sup> See, e.g., Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219 (1993); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

<sup>41</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541 (1994).

<sup>42</sup> See generally Kagan, *supra* note 17, at 2249 (“Where once presidential supervision had worked to dilute or delay regulatory initiatives, it served in the Clinton years as part of a

interpretation, not Article II command.<sup>43</sup> Despite this constitutional modesty, however, her account was normatively emphatic: presidential control rendered administration democratically responsible. Democratic accountability was in part retrospective<sup>44</sup> but largely prospective and procedural, grounded in the President's consideration of national preferences and the public's monitoring of transparent presidential choices.<sup>45</sup>

Although the idea that “We, the People’ control the bureaucracy” through the President was subject to forceful criticism from the start,<sup>46</sup> developments in national politics and administrative practice were underway that soon yielded more aggressive exercises and defenses of presidential administration.

### B. *Politicization and Polarization*

The seeds of a stronger presidential administration were present in Kagan's account. She noted that the reemergence of divided government made legislating difficult, so President Clinton turned to the bureaucracy to advance his domestic policy agenda.<sup>47</sup> Since she wrote, political polarization has increased, and presidential administration has become a matter not only of

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distinctly activist and pro-regulatory governing agenda.”).

<sup>43</sup> *Id.* at 2364.

<sup>44</sup> *E.g., id.* at 2334 (noting that the President is the only official “elected by a national constituency in votes focused on general, rather than local, policy issues”).

<sup>45</sup> *E.g., id.* at 2335 (“[B]ecause the President has a national constituency, he is likely to consider . . . the preferences of the general public”); *id.* at 2384 (“Presidential administration . . . advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion”); *see also* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985) (arguing that presidential control increases “the responsiveness of government to the desires of the electorate”); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193-96 (1994) (arguing that the President is politically accountable to a broader, less organized constituency, which helps him withstand the pressures that interest groups exert on members of Congress); *infra* Section V.A (considering the accountability argument).

<sup>46</sup> Farina, *supra* note 39, at 182; *see, e.g.,* Bressman, *supra* note 39; 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 (1996); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994).

<sup>47</sup> Kagan, *supra* note 17, at 2248, 2250, 2311.

shaping agencies' exercise of congressionally conferred power but also of making policy without Congress. As the practice has expanded, so too have commentators defended more sweeping presidential policymaking.

As an initial matter, partisan polarization has made it easier for Presidents to advance policy ends through agency action. The presidential administration of the Reagan and Clinton years was largely defined by attempts to control regulation from the White House, and often the person of the President himself.<sup>48</sup> Alongside regulatory review, directives, and other centralizing strategies, however, a more powerful tool of presidential administration was emerging: politicization of the bureaucracy.<sup>49</sup> The number of political appointees in agencies multiplied, and Presidents assumed the role of Congress and local party organizations in filling these positions.<sup>50</sup> With political appointees inside agencies, Presidents would have less need to superintend agency exercises of discretionary power through centralization: agency officials would choose to align their policymaking with presidential prerogatives in the first instance.<sup>51</sup>

While the number of political appointees grew throughout the latter half of the twentieth century,<sup>52</sup> the recent increase in political polarization has made politicization-through-appointment a more manageable strategy. As the parties have grown more nationally and presidentially oriented, as they have grown more coherent and programmatic, and as they have grown more distinct from

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<sup>48</sup> See *supra* notes 31-35 and accompanying text.

<sup>49</sup> See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS 2* (2008) (“People commonly refer to the act of increasing the number and penetration of appointees as ‘politicization.’ Politicized agencies, then, are those that have the largest percentage and deepest penetration of appointees.”); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *GEO. WASH. L. REV.* 1095 (2008) (describing a shift from centralization strategies to politicization strategies since the 1980s); Moe, *supra* note 35 (discussing politicization versus centralization); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, *LAW & CONTEMP. PROBS.*, Spring 1994, at 1, 17-19 (describing politicization in terms of presidential appointment of “loyal, ideologically compatible people in pivotal positions”).

<sup>50</sup> See LEWIS, *supra* note 49; Barron, *supra* note 49, at 1122-32.

<sup>51</sup> See Moe, *supra* note 35; see also Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 *YALE L.J.* 1002 (2017) (studying federal spending to show that the extent of high-level personnel politicization affects agencies' political responsiveness); George A. Krause & Anne Joseph O'Connell, *Experiential Learning and Presidential Management of the U.S. Federal Bureaucracy: Logic and Evidence from Agency Leadership Appointments*, 60 *AM. J. POL. SCI.* 914 (2015) (showing that Presidents increasingly privilege loyalty over competence in making appointments over the course of their tenure).

<sup>52</sup> See LEWIS, *supra* note 49; Barron, *supra* note 49, at 1122-28.

one another, partisan labels signal views on a host of domestic policy issues, and Presidents can rely on these labels to populate agencies well below the department head level.<sup>53</sup> The local party organization may have disappeared as a player in appointments, but national partisan networks have taken over.<sup>54</sup> This enables Presidents to appoint a thick layer of politically aligned agency officials, even when party organizations themselves are weak.

At the same time as Presidents Bush, Obama, and Trump have continued longstanding practices of centralization and adopted some new ones,<sup>55</sup> then, they have also influenced the administrative state considerably through appointments. The Clean Power Plan, DAPA and DACA, net neutrality – these and their respective repeals are as much agency officials’ policy as the President’s. The President’s directives and review of agency decisions have been less significant than his selection of agency appointees in the first instance.

As these examples further underscore, the political polarization that has made it easier for Presidents to “remake agencies in their own image”<sup>56</sup> has also underwritten bolder exercises of presidential policymaking. Especially under conditions of divided government, Congress struggles to legislate. With the public looking to the President, Presidents in turn rely on agency action.<sup>57</sup>

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<sup>53</sup> See Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALABAMA L. REV. 45, 62-80 (2015); see also Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008) (describing how party polarization enables Presidents to effectively control independent agencies by appointing a majority of commissioners).

<sup>54</sup> See generally DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS 2 (2009) (describing parties as “coalitions of groups with intense preferences on particular issues managed by politicians”); SETH E. MASKET, NO MIDDLE GROUND 41 (2009) (suggesting “a theory of parties that accounts for the coordination of various actors both inside and outside the government”); Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 571 (2012) (arguing that parties are “best understood as coalitions of interest groups and activists seeking to capture and use government for their particular goals”).

<sup>55</sup> See, e.g., Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577 (2011); Watts, *supra* note 18, at 693-706; see *infra* notes 184-190 (providing a catalog of recognized techniques of presidential administration); see also Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 243-55 (2015) (describing “pooling” of resources dispersed among various agencies as a strategy Presidents embrace alongside centralization and politicization to advance their agendas).

<sup>56</sup> Barron, *supra* note 49, at 1096.

<sup>57</sup> See, e.g., Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 410-13 (2009); Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative*

In President Obama's phrase, "We Can't Wait": if Congress would not address climate change, immigration, internet regulation, and other important questions, the administration would act.<sup>58</sup> When the Clean Power Plan, DAPA and DACA, and net neutrality arrived in court, the main legal question was whether statutory delegations could encompass these administrative policies. The issue was not presidential direction of the EPA, DHS, and FCC, but rather whether the Clean Air Act, the Immigration and Nationality Act, and the Communications Act authorized these agencies to adopt such policies.<sup>59</sup>

Even as litigation has focused on the connection between statutes and administrative policy, commentators have defended a presidential administration that is not bounded by congressional authorization but is instead autonomous in its authority. Kagan's account of presidential administration depicted a powerful executive, but she took care to link presidential administration to congressional decisions: "Administrative action is unlikely to provide a President with all he could obtain through legislation: Congress, after all, has set bounds on administration through prior statutory enactments."<sup>60</sup> In the last decade, scholars have suggested that these prior statutory enactments may not impose substantial limits on presidential policymaking.<sup>61</sup>

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*Law*, 92 TEX. L. REV. 1137, 1155-60 (2014); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1752-57 (2015); see also Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869 (2016) (studying how presidential direction of agency action is perceived by the public).

<sup>58</sup> E.g., Kenneth S. Lowande & Sidney M. Milkis, "We Can't Wait": Barack Obama, *Partisan Polarization and the Administrative Presidency*, 12 THE FORUM 3 (2014).

<sup>59</sup> See *supra* note 5.

<sup>60</sup> Kagan, *supra* note 17, at 2313. Kagan was skeptical of the *current* Congress, arguing that the "Congress" at work overseeing exercises of administrative discretion was in fact "members of congressional committees and subcommittees almost guaranteed by their composition and associated incentive structure to be unrepresentative of national interests." *Id.* at 2336. And she recognized that Presidents might "push the envelope when interpreting statutes." *Id.* at 2349. But she advocated judicial review of agency action as the answer to the threat of presidential lawlessness and never questioned that Congress was the author of the whole arrangement.

<sup>61</sup> See generally Farber & O'Connell, *supra* note 57, at 1155-57, 1183 (arguing, against the assumption "that the source of authority of agency action is statutory," that "[i]n the real world of administrative law, the White House is the main player"); Merrill, *supra* note 18 (noting that administrative governance is outrunning statutory authorization and that scholars are increasingly justifying administrative action with respect to transparency and other process values rather than legal authorization).

Most dramatically, Professors Eric Posner and Adrian Vermeule argue that executive power is largely unconstrained by law.<sup>62</sup> Treating the President and agencies as continuous,<sup>63</sup> they posit that “[l]ong-term economic and institutional forces—most generally . . . the rapidity of change in the policymaking environment and the institutional incapacity of legislatures and courts to supply the necessary policy adjustments—make executive governance inevitable.”<sup>64</sup> Instead of indulging “tyrannophobia”<sup>65</sup> or trying to resurrect Madisonian separation of powers, Posner and Vermeule suggest, we should recognize politics as the only plausible check and focus on “making executive government more credible and more responsive to public opinion.”<sup>66</sup>

Other scholars have offered more modest accounts of the legally unconstrained executive. Some posit the executive branch as an independent policymaker that need not—or cannot—be bound by congressional will in particular areas. For example, Professors Adam Cox and Cristina Rodríguez argue that the President should not be constrained by congressional immigration enforcement priorities, which are largely a chimera.<sup>67</sup> They propose instead a “two-principals” model of immigration policymaking.<sup>68</sup> Against charges of lawlessness, they respond not only that presidential policymaking is inevitable and disciplined by politics but also that procedural regularity and transparency are the relevant legal constraints. Other scholars call for the President to displace Congress as the nation’s principal lawmaker; Professors William Howell and Terry Moe advocate making “Congress less central to the legislative process and presidents more central.”<sup>69</sup>

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<sup>62</sup> ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 15 (2010) (“[L]aw does little to constrain the modern executive.”); *id.* at 112 (“[T]he basic aspiration of legal liberalism to constrain the executive through statutory law has largely failed.”). *But see* Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1403, 1408-09 (2012) (reviewing POSNER & VERMEULE, *supra*) (arguing that Posner and Vermeule do not provide empirical evidence for this claim and in fact furnish a theoretical explanation for why self-interested Presidents would accept law as a constraint).

<sup>63</sup> POSNER & VERMEULE, *supra* note 62, at 5-7 (defining the “executive” and noting substantial presidential influence over both executive and independent agencies).

<sup>64</sup> *Id.* at 16.

<sup>65</sup> *Id.* at 176-205.

<sup>66</sup> *Id.* at 16.

<sup>67</sup> Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 109-10 (2015).

<sup>68</sup> *Id.* at 110.

<sup>69</sup> WILLIAM G. HOWELL & TERRY M. MOE, *RELIC: HOW OUR CONSTITUTION*

In different ways, these and other accounts both describe and defend an expansive, autonomous variant of presidential administration.<sup>70</sup> Unlike early accounts that focused on the President's relationship to agencies, more recent accounts assume substantial identity between the President and both executive and independent agencies and inquire into the power of the executive branch more generally.

## II. THE CURRENT PREDICAMENT

Today, presidential administration is entrenched and expansive. Significant policy decisions of the Obama and Trump Administrations have been advanced through agency action rather than legislation. But presidential administration may be both stronger and weaker than ever. Most apparently, muscular presidential administration can be quite fragile over time, as a new administration has both the incentive and the ability to revise its predecessor's policies.<sup>71</sup> President Obama's most significant regulatory achievements have been repealed or are in the process of being repealed by the Trump Administration. The Clean Power Plan, DACA and DAPA, and federal net neutrality rules were all early targets of presidential directives and agency action.<sup>72</sup> So too were the Department of Labor's fiduciary rule;<sup>73</sup> environmental rules regulating fracking, limiting methane leaks, and banning drilling for oil in the Arctic; education rules furnishing protections for transgender students and regulating campus sexual assaults; and numerous other policies.<sup>74</sup> For skeptics of presidential control, these reversals bolster

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UNDERMINES EFFECTIVE GOVERNMENT—AND WHY WE NEED A MORE POWERFUL PRESIDENCY xv (2016) (arguing that whereas Congress is parochial, the President is a national leader, concerned for her legacy, and invested in a coherent approach to all of government, and thus a superior lawmaker).

<sup>70</sup> See generally Merrill, *supra* note 18 (canvassing accounts that replace positive law with process norms).

<sup>71</sup> See Mashaw & Berke, *supra* note 10, at 607 (“The President’s ability to control administration has become sufficiently powerful that erasing a prior Administration requires little more than determination—and perhaps a dash of ruthlessness.”).

<sup>72</sup> See *supra* note 6.

<sup>73</sup> Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (2016).

<sup>74</sup> See *supra* notes 7-9; Philip Bump, *What Trump Has Undone*, WASH. POST., Dec. 15, 2017, [https://www.washingtonpost.com/news/politics/wp/2017/08/24/what-trump-has-undone/?utm\\_term=.e844d065f1d6](https://www.washingtonpost.com/news/politics/wp/2017/08/24/what-trump-has-undone/?utm_term=.e844d065f1d6) (compiling Trump reversals of Obama regulatory policies during his first year in office). See generally Noll & Revesz, *supra* note 21 (documenting Trump’s rollbacks of Obama-era regulations).

longstanding criticisms grounded in expertise, reasoned decisionmaking, and pluralism, but proponents of presidential administration also have reason to worry about such regulatory whiplash.<sup>75</sup>

If political transitions illustrate presidential administration's inability to sustain policies over time, a different set of problems appears in doctrine and scholarship. The Supreme Court increasingly embraces presidential control over agencies, but it is setting the "President" and "administration" at odds with one another, requiring greater presidential control over agencies while also limiting the reach of agency policymaking. Scholars who defend administration, in turn, respond to an overweening President by conflating bureaucratic and representative forms of legitimacy, threatening to undermine the force of both.

#### A. *Doctrine: Pro-President as Anti-Administration*

As the scope of presidential administration has expanded, the Supreme Court has developed an ambivalent doctrine: empowering the President vis-à-vis the bureaucracy but also seeking to limit the administrative domain over which she presides. To the extent presidential administration's clearest forbearer was the unitary executive theory, there was always some irony to its serving as a legitimating theory of administration. But in the 1980s and 1990s, "the new formalism [did] not emphasize the nondelegation doctrine and dismantling of the regulatory state" even as it stressed Article II power.<sup>76</sup> Leveraging presidential power to undermine administrative governance is a more recent development.

Over the past decade, the Court has cast presidential control over agencies as both a constitutional edict and a demand of popular sovereignty. For example, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court invalidated "double for-cause" removal protections as infringing Article II's vesting of executive power in the President.<sup>77</sup> Describing why the formal problem was also a threat to political accountability, the Court equated presidential administration with popular control over the bureaucracy:

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<sup>75</sup> See *infra* Section V.A (considering the accountability defense of presidential administration).

<sup>76</sup> Farina, *supra* note 39, at 181.

<sup>77</sup> 561 U.S. 477, 495-99 (2010). The insulation was "double" because PCAOB members were appointed by SEC Commissioners, who were themselves understood to enjoy for-cause removal protection.

Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.<sup>78</sup>

In *Lucia v. SEC*, the Court more modestly determined that administrative law judges working for the SEC are inferior officers.<sup>79</sup> It did not take up the Solicitor General's request that it deem for-cause removal protections for such ALJs unconstitutional, but that question will likely return to a Court whose newest member appears to be a committed unitary executive.<sup>80</sup>

Recent decisions have also embraced politicized, presidentially directed agency action. Reviewing the Secretary of Commerce's decision to include a citizenship question on the Census, the Court stated, "[A] court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a 'rarified technocratic process, unaffected by political considerations or the presence of Presidential power.'"<sup>81</sup> Reviewing politicized agency decisions during the George W. Bush Administration, the Court had invalidated executive positions it "found untrustworthy, in the sense that executive expertise had been subordinated to politics."<sup>82</sup> But in the Census case, the Court cast "political considerations" and "Presidential power" as not only permissible, but legitimating. Even as it held that the Secretary of Commerce's furnished explanation was pretextual, it opened the door to a more overtly political justification and favorably

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<sup>78</sup> *Id.* at 499; *see also, e.g.,* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) ("[Agencies] have political accountability, because they are subject to the supervision of the President, who in turn answers to the public."); *City of Arlington v. FCC*, 569 U.S. 290, 313-14 (2013) (Roberts, C.J., dissenting) (noting that "the Constitution empowers the President to keep federal officers accountable," but expressing concern that the President cannot sufficiently superintend agency action in practice).

<sup>79</sup> 138 S. Ct. 2044 (2018).

<sup>80</sup> *See, e.g.,* *PHH Corp. v. CFPB*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

<sup>81</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *Sierra Club v. Costle*, 657 F.3d 298, 408 (D.C. Cir. 1981)).

<sup>82</sup> Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52; *see* *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Gonzales v. Oregon*, 546 U.S. 243 (2006).

distinguished “the Secretary’s policymaking discretion” from “the Bureau’s technocratic expertise.”<sup>83</sup>

As its distinction between the “technocratic” and the political suggests, at the same time as the Court has embraced presidential control, it has expressed skepticism about the scope of administration.<sup>84</sup> Presidential superintendence may be necessary to administration’s constitutional and political legitimacy, on this view, but it is not sufficient to justify the current reach of the administrative state. A number of Justices have questioned the doctrinal building blocks of administrative power, from a generous nondelegation test to judicial deference. In its most recent Term, the Court imposed a new “step zero” for *Auer* deference and could not garner a majority to defend such deference.<sup>85</sup> It likewise found only four votes in support of the longstanding

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<sup>83</sup> *Dep’t of Commerce*, 139 S. Ct. at 2571; *see id.* (“[T]he Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options”).

<sup>84</sup> *See* John Harrison, *The Unitary Executive and the Scope of Executive Power*, 126 YALE L.J. F. 374 (2017) (noting Justice Alito’s distinction between the scope of executive power and who within the executive branch controls such power); Metzger, *supra* note 20, at 37 (distinguishing the concern that executive power is politically unaccountable from the concern that executive power is aggrandized).

<sup>85</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019) (noting that *Auer* deference “often doesn’t” apply because it applies only when a regulation is genuinely ambiguous, the interpretation is reasonable, and the interpretation is the agency’s official position that implicates its substantive expertise and reflects its fair and considered judgment); *see id.* at 2424-25 (Roberts, J., concurring in part) (joining only the parts of the opinion that did not defend the merits of *Auer* deference); *id.* at 2425 (Gorsuch, J., concurring in the judgment) (stating that “it should have been easy for the Court to say goodbye to *Auer v. Robbins*,” calling on lower courts to “take courage from today’s ruling and realize that it has transformed *Auer* into a paper tiger,” and noting that “this case hardly promises to be this Court’s last word on *Auer*”); *cf.* Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (describing *Chevron* Step Zero).

In other cases, several Justices have more generally expressed reservations about administrative discretion. *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (“These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference.”); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment) (expressing concern about “aggrandizement of the power of administrative agencies”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”); *see also City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (“[T]he danger posed by the growing power of the administrative state cannot be dismissed. . . . And with hundreds of federal agencies poking

“intelligible principle” approach to the nondelegation doctrine.<sup>86</sup> More significant than any express limitations are subtler ways in which the Court is pruning deference. Even while applying *Chevron*, it has read statutes aggressively to reject agency interpretations, including at step two,<sup>87</sup> and it has applied the major question exception in a manner that destabilizes the very premise of deference.<sup>88</sup> Recently, Justice Gorsuch frankly described the Court’s deployment of this doctrine as an effort to “rein in Congress’s efforts to delegate legislative power” by a “different name[.]”<sup>89</sup>

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into every nook and cranny of daily life, [citizens might] understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.”).

<sup>86</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130-31 (2019) (Alito, J., concurring in the judgment) (noting that he would “support th[e] effort” to “reconsider the approach” to delegation the Court has “taken for the past 84 years”); *see id.* at 2131 (Gorsuch, J., dissenting) (arguing for a substantially narrower delegation test and stating that “[t]o leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people’s representatives in order to protect their liberties”); *see id.* at 2130 (Kagan, J.) (“If SORNA’s delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”).

The *Gundy* dissenters did not appear to have similar reservations about an open-ended delegation to the Secretary of Commerce to make decisions about the Census. *Dep’t of Commerce*, 139 S. Ct. at 2576 (Thomas, J., concurring in part and dissenting in part). Although not likely the rationale, the comfort with this broad delegation is consistent with then-Professor Kagan’s argument, contra extant nondelegation doctrine, for greater acceptance of delegated power when agency actions are “clothed with the imprimatur and authority of the President.” Kagan, *supra* note 17, at 2369.

<sup>87</sup> *See, e.g., Michigan*, 135 S. Ct. at 2706-07 (rejecting an agency interpretation as unreasonable at step two of *Chevron*).

<sup>88</sup> The notion that a question’s deep “political significance” means it cannot be entrusted to an agency and must instead fall to the judiciary is in considerable tension with *Chevron*’s suggestion that such questions are better left to agencies than constituency-less judges. Yet in recent cases, the Court has expanded the major question exception “from a caution against reading broad powers into narrow language into a general presumption that important questions are simply inappropriate for agency resolution.” Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2033 (2018); *see, e.g., King v. Burwell*, 135 S. Ct. 2480 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

<sup>89</sup> *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting); *see id.* at 2141 (“Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

Although it remains to be seen whether the Court will meaningfully alter the scope of the administrative state,<sup>90</sup> at a minimum, its decisions endorse a shift of power to the President and political appointees from other agency employees and fire warning shots about the fate of future “pro-regulatory”<sup>91</sup> administrative policymaking. In response to these warning shots, commentators have assailed the Court’s reductionist equation of the President and the people and its unspoken assumptions about where administrative power would flow if removed from agencies. The approach suggested in recent opinions requires either implausible assumptions about congressional capacity or else willingness to endorse rule-by-judiciary in the service of resolving a democratic deficit. Despite a compelling diagnosis of this “anti-administrative”<sup>92</sup> turn, however, leading responses have themselves been warped by the extent of presidential control over administration.

### B. *Scholarship: Bureaucracy as the Separation of Powers*

Confronting persistent attacks on the administrative state,<sup>93</sup> scholars have long sketched two complementary accounts of its legitimacy. Put simply, “external” accounts emphasize agencies’ connections to the three named branches of government, focusing on constitutional structure, politics and elections, while “internal” accounts emphasize autonomous values of agency decisionmaking, such as expertise, deliberation, and reason-giving.<sup>94</sup>

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<sup>90</sup> For different predictions, compare, for example, Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1651 (2018) (“Two things seem clear: attacks on the administrative state are likely to continue and are likely to be unsuccessful.”), and Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2465 (2017) (“[O]utside of a largely elite discourse of ‘classical liberals,’ libertarians and nostalgists for an imagined common law past, the administrative state has never been more secure”), with Metzger, *supra* note 20, at 17-33, 47-51 (cataloging judicial and academic challenges to the contemporary administrative state and suggesting that the attack is a genuine threat).

<sup>91</sup> Kagan, *supra* note 17, at 2249.

<sup>92</sup> Metzger, *supra* note 20.

<sup>93</sup> See generally JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY* (1978); Beermann, *supra* note 90; Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997); Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016) (book review).

<sup>94</sup> Although external accounts may claim the mantle of democracy, it is more precise to associate such accounts with representative democracy given the frequent reliance of internal accounts on deliberative democracy. See MASHAW, *supra* note 29, at 157-58 (noting “two rather distinct grounds for the legitimacy of administrative lawmaking—agencies’

Both an external and an internal perspective are necessary to defend the administrative state. Neither suffices on its own. But if recent “anti-administrative” attacks tend to neglect expertise, reason-giving, and deliberation, recent “pro-administrative” defenses themselves tend neglect external political engagement. The reason is not hard to see. Twentieth-century accounts emphasized ways in which the three named branches participated in guiding and overseeing agency action.<sup>95</sup> In Professor Peter Strauss’s formulation, for example, Congress, the President, and the courts all “share[d] the reins of control” over agencies, so the separation of powers in the administrative state was the constitutional separation of powers acting upon the administrative state.<sup>96</sup> But recent scholarship has all but given up on Congress. In a concession to presidential administration as a descriptive reality, this scholarship begins from the premise of a dominant President. It then seeks to counterbalance presidential power with bureaucratic mechanisms, not other representative institutions.

Recognizing that the White House has largely displaced other political controls over administration, scholars have begun to cast expertise, deliberation, and reason-giving as responses to presidential power as such. The internal turn purports to do the work of external controls, but as scholars effectively replace Congress with administrative actors, they give up too easily on political representation beyond the President herself.

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accountability to political controllers and agencies’ capacity to exercise statutorily delegated power on the basis of knowledge,” and arguing that the distinction is not between politics and expertise so much as between electoral and deliberative forms of democracy). That said, the deliberative-democracy premise of justification or acceptability may “exclude certain persons from concern or . . . treat them as hypothetical persons who would reason differently than they actually do,” *id.* at 169—a move that largely collapses the space between deliberative democracy and expertise.

<sup>95</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984) (“The theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches; its vitality, rather, lies in the formulation and specification of the controls that Congress, the Supreme Court and the President may exercise over administration and regulation.”). See generally Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341, 1345 (2004) (describing the American “postwar constitutional settlement”: “the concentration of power in the executive and administrative spheres would be tolerated as a constitutional matter, but only on the condition that, at the subconstitutional level, delegated authority would be subject to a range of political and legal controls that would act as a substitute for the formal structural protections of separation of powers”).

<sup>96</sup> Strauss, *supra* note 95, at 579.

In her recent response to “the administrative state under siege,” for example, Professor Gillian Metzger argues that bureaucracy is not only consistent with but in fact necessary to realizing the separation of powers in the twenty-first century. Because presidential administration is the “central reality of the contemporary national government”<sup>97</sup> and broad delegations from Congress are inevitable, the constitutional imperative is to reduce the “risk of executive branch unilateralism and aggrandizement.”<sup>98</sup> Enter bureaucracy: Metzger proposes that “the internal complexity of the administrative state—the way it marries together presidential control, bureaucratic oversight, expertise, professionalism, structural insulation, procedural requirements, and the like—. . . holds the key to securing accountable, constrained, and effective exercise of executive power.”<sup>99</sup> Reviving a strand of James Landis’s defense of administrative process,<sup>100</sup> Metzger argues that bureaucratic actors and procedure are constitutionally obligatory means of realizing separation of powers commitments in an age of presidential administration.<sup>101</sup>

Professor Jon Michaels makes a more literal internal separation of powers argument. If Metzger suggests that certain commitments of the constitutional design may be realized within the administrative realm, Michaels assigns the roles and functions of each branch to particular administrative units: agency leaders represent the President; the civil service represents the judiciary; and

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<sup>97</sup> Metzger, *supra* note 20, at 75.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 78; see also Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (describing limits of external constraints and advocating internal constraints on agency action).

<sup>100</sup> JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938) (“The administrative process is, in essence, our generation’s answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power. If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.”).

<sup>101</sup> See also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316-17 (2006) (“If major decisions are going to be made by the President, then how might separation of powers be reflected within the executive branch? The first-best concept of ‘legislature v. executive’ checks and balances must be updated to contemplate second-best ‘executive v. executive’ divisions. . . . A critical mechanism to promote internal separation of powers is bureaucracy.”).

civil society represents Congress.<sup>102</sup> The “constitutional revivalism” he propounds likewise reasons from the reality of a strong President in need of checks and balances Congress cannot supply: “[T]he administrative separation of powers ensures that when the president channels legislative-like responsibilities into the administrative domain, inclusive, rivalrous, and heterogeneous governance perdures—and checks and balances are preserved notwithstanding the apparent circumvention of the constitutional separation of powers.”<sup>103</sup>

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<sup>102</sup> JON D. MICHAELS, CONSTITUTIONAL COUP 8-9 (2017) (“[T]he nascent administrative architecture of the 1930s and 1940s was refashioned and made to resemble the framers’ tripartite scheme. . . . Specifically, within the administrative arena, agency leaders stood in for the president, taking on the president’s political, agenda-setting role; the tenured, expert civil service acted the part of our independent and largely apolitical federal judiciary, insisting on reasoned explanations and an intra-agency commitment to the rule of the law; and the public writ large (what I call civil society) re-created Congress’s populist, pluralistic, and cacophonous deliberative role, bringing new and diverse opinions and sentiments into the administrative polis”); *see id.* at 59-77 (elaborating this framework).

<sup>103</sup> *Id.* at 150. These are not the first accounts to hybridize external and internal forms of legitimacy. For example, the civic republicanism of the 1990s reimagined agency deliberation as a broadly participatory process. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515, 1560 (1992) (arguing that “having administrative agencies set government policy provides the best hope of implementing civic republicanism’s call for deliberative decisionmaking informed by the values of the entire polity” and that “the paradigmatic process for agency formulation of policy—informal rulemaking—is specifically geared to advance the requirements of civic republican theory”); Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401, 1417 (1994) (“[C]ivic republican administrative theorists imaginatively reconstruct the evidence to find republicanism alive and well in the informal rulemaking, administrative hearings, and staff discussions that the national bureaucracy oversees daily. Rhetorically, civic republicanism attempts to connect this reconstruction to a normatively attractive vision of highly participatory and deliberative politics.”); *cf.* Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 580 (1990) (suggesting that public boards of directors, citizen groups chosen by lot, and ad hoc task forces might be integrated into federal administration). A version of this argument appears today in celebrations of notice-and-comment rulemaking, in particular, as an externally-facing form of agency deliberative democracy, with the public at large speaking for itself rather than through representative institutions. *See generally* Emerson, *supra* note 88, at 2081 (arguing that presidential direction of the administrative state must be accompanied by participation by “the public at large” to “ensure its democratic legitimacy”); Bertrall Ross, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 568 (2015) (“[P]ublic input into one of the most important forms of agency decision-making—notice-and-comment rulemaking—is derived from a process that is more deliberative than majoritarian or special interest captured.”).

The internal-as-external account reflects the form of recent attacks on the administrative state<sup>104</sup>: it is a defense that responds to separation-of-powers arguments by mirroring their structure. But merging the internal and external in this manner risks undermining the force of each. Not only do expertise, professionalism, and procedure appear nonresponsive to formal constitutional arguments; they also sell short the particular logic of administrative decisionmaking and the ways in which these values are distinct from “electorally based representative government.”<sup>105</sup> More pertinent here, the internal turn paradoxically reinforces presidential power. Expertise, procedure, and professional judgment may well tame presidential power—indeed, they may complement it with more deliberative forms of engagement—but they do not connect administration to representative democracy.<sup>106</sup> By abandoning other connections between agencies and representative institutions, recent internal accounts leave the President as the sole political representative authoring administrative policy.

### III. LOST ROOTS

If we are living more than ever in an age of presidential administration, so too do practice, doctrine, and theory alike reveal presidential control to be an inadequate foundation for today’s administrative state. Courts may embrace presidential control over agency actions, only to hold that agencies themselves cannot act, for example, or one President may rely on agencies to set domestic policy, only to see her decisions erased by her successor.

To more fully understand both the force and the limits of presidential administration, we need to look beyond Washington. Once we bring the states

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<sup>104</sup> *E.g.*, PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

<sup>105</sup> Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 459 (2003). *See generally* Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 469-73 (2012) (arguing that a “deliberative-constitutive paradigm” of administrative legitimacy focuses on expertise, deliberation, and reason-giving as forms of “inside-out accountability”).

<sup>106</sup> *See, e.g.*, Rahman, *supra* note 10, at 1704 (“We cannot expect the administrative process to by itself do all the moral and political work of catalyzing, sustaining, channeling, and ultimately legitimizing political contestation and policy outcomes. At some point, we have to look to our broader democratic ecosystem . . . .”); Stewart, *supra* note 105, at 459; *cf.* Kagan, *supra* note 17, at 2353 (“[A]gency experts have neither democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most administrative policymaking.”).

into view, presidential administration appears still-more potent in key respects: working together with the states, Presidents have long realized policy outcomes they could not achieve through federal agency action alone, and such policies outlive their administrations. But states also introduce new connections between administration and representative democracy: when the President establishes policy in conjunction with state governments, she is no longer the only elected official in the administrative domain.

Although twenty-first century political polarization brings new urgency to the state role, as the next Part explores, intergovernmental presidential administration is longstanding. Scholars typically trace presidential administration to the work of President Franklin Delano Roosevelt's Brownlow Committee, which "established the infrastructure underlying all subsequent attempts by the White House to supervise administrative policy."<sup>107</sup> A number of the Committee's arguments are familiar touchstones, particularly its suggestion that presidential control was a response to the "headless 'fourth branch'"<sup>108</sup> and its insistence that a powerful executive was essential to, rather than a threat to, democratic government.<sup>109</sup>

Complementing these arguments was a set of claims grounded in territory: the Committee relied on federalism, localism, and regionalism to make its case for presidential control over administration. First, consistent with then-emerging premises of cooperative federalism, the Brownlow Committee recognized that even a robust federal administration would lack power to effectuate domestic policy on its own; it would have to collaborate with the states to achieve certain ends. Administration would necessarily be intergovernmental. Second, it proposed that the need to coordinate the work of federal agencies both with one another and with state and local

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<sup>107</sup> E.g., Kagan, *supra* note 17, at 2275; see also, e.g., Sidney M. Milkis, *Executive Power and Political Parties: The Dilemmas of Scale in American Democracy*, in *THE EXECUTIVE BRANCH* 379, 392 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (labeling the resulting 1939 Reorganization Act the "organic statute of the 'modern presidency.'"); Peri E. Arnold, *The Brownlow Committee, Regulation, and the Presidency: Seventy Years Later*, *PUB. ADMIN. REV.*, Nov/Dec. 2007, at 1030, 1035 ("Seventy years after Roosevelt submitted the Brownlow Committee's final report to Congress, the new administrative order that the committee championed is ascendant, and the committee's goals for regulation have been achieved in principle.").

<sup>108</sup> BROWNLOW REPORT, *supra* note 27, at 36.

<sup>109</sup> *Id.* at 47 ("[T]he really imminent danger now is that our democracy . . . may be led by false or mistaken guides to place their trust in weak and faltering inaction, which in the bitter end runs to futility and defeat. . . . Strong executive leadership is essential to democratic government today.").

administration required a stronger President. Administration would necessarily be presidential. Finally, the Committee suggested that geographical decentralization could furnish representative government within the broad domain of the executive branch. Intergovernmental presidential administration meant that executive, rather than legislative, policymaking need not amount to “overcentralization.”<sup>110</sup>

#### A. *The Brownlow Committee*

To appreciate the Brownlow Committee’s territorial arguments requires a brief note on the backstory of its work. President Roosevelt convened the Committee to offer a plan with respect to “administrative management—the organization for the performance of the duties imposed upon the President in exercising the executive power vested in him by the Constitution of the United States,”<sup>111</sup> a task he understood to be of constitutional moment.<sup>112</sup> Before creating the Brownlow Committee, however, Roosevelt had planned to have the National Resources Committee (NRC)<sup>113</sup> issue his executive reorganization

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<sup>110</sup> *Id.* at 26.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> See SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES* 109 (1993) (“Soon after the 1936 election, FDR revealed that he viewed the Committee as a surrogate constitutional convention. . . . [Roosevelt] said that since the election he had received a great many suggestions that he move for a constitutional convention for the United States and observed that there was no way of keeping such an affair from getting out of hand what with [Father] Coughlin and other crackpots about. “But,” he said, “there is more than one way of killing a cat, just as in the job I assigned you.”” (quoting Luther Gulick’s notes from a November 1936 planning session with FDR and Brownlow)). Ultimately, after an initial reorganization plan died in Congress in 1933, a less ambitious plan was adopted the following year. Reorganization Act of 1939, Pub. L. No. 76-19, §§ 1-12, 53 Stat. 561, 561-64 (1939), superseded by Act of Sept. 6, 1966, Pub. L. No. 554, §§ 901-906, 80 Stat. 378, 394-96 (1966). Pursuant to this Act, President Roosevelt created the Executive Office of the President, and he moved an expanded Bureau of the Budget (later to become OMB) to this office from the Treasury Department. Franklin D. Roosevelt, *The President Presents Plan No. I to Carry Out the Provisions of the Reorganization Act* (Apr. 25, 1939), 7 PUB. PAPERS 245 (1941); Exec. Order No. 8248, 3 C.F.R. §§ 576, 577 (1938-1943). The reorganization also created the National Resources Planning Board, but this vehicle for territorial, democratic planning was killed off by Congress in 1943 (shortly after it issued a postwar plan that underwrote FDR’s proposed second Bill of Rights). Independent Offices Appropriations Act of 1944, ch. 145, 57 Stat. 169 (1943).

<sup>113</sup> President Roosevelt created the National Resources Committee (first called the National Planning Board and the National Resources Board) to offer a plan for addressing “the physical, social, governmental, and economic aspects of public policies,” including

plan.<sup>114</sup> Although he ultimately committed the project to a newly constituted group under his greater personal control, when Louis Brownlow and his colleagues took up the question of administrative management, they drew on the NRC's work, especially its recently published study of *Regional Factors in National Planning and Development*.<sup>115</sup> Focusing on "important problems of planning and development which overlap State lines or which require the use of combined Federal and State powers,"<sup>116</sup> *Regional Factors* responded to a burgeoning interstate cooperation movement,<sup>117</sup> to the federal government's regional approach to organizing federal agencies,<sup>118</sup> and to concerns about

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questions of intergovernmental coordination. Exec. Order No. 6777 (1934) ("The functions of the Board shall be to prepare and present to the President a program and plan of procedure dealing with the physical, social, governmental, and economic aspects of public policies . . . . The program and plan shall include the coordination of projects of Federal, State, and local governments . . . ."); see also Exec. Order No. 7065 (1935) ("[The Committee shall] collect, prepare and make available to the President, with recommendations, such plans, data and information as may be helpful to a planned development and use of land, water, and other national resources, . . . [and shall] consult and cooperate with agencies of the Federal Government, with the States and municipalities or agencies thereof . . ."). The first incarnation of the National Resources Committee was the National Planning Board, created by Harold Ickes pursuant to the National Industrial Recovery Act. In 1934, the National Planning Board was replaced by the National Resources Board to include members of the Cabinet, Exec. Order No. 6772 (1934), and in 1935, the National Resources Board became the National Resources Committee, Exec. Order No. 7065 (1935). Ultimately, pursuant to the Reorganization Act of 1939, FDR reconstituted the National Resources Committee as the National Resources Planning Board, which persisted until Congress terminated it in 1943. See *supra* note 112.

<sup>114</sup> In the end, the NRC and Brownlow Committee shared a member, Charles Merriam, and Louis Brownlow had recommended Merriam, as well as Wesley Mitchell and Frederic Delano, to serve on a proposed national planning board, after Merriam and Mitchell had completed their work on President Hoover's Research Committee on Social Trends. Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163, 182-83. Moreover, both committees drew on work by some of the same scholars, including James Fesler.

<sup>115</sup> U.S. NAT. RES. COMM., REGIONAL FACTORS IN NATIONAL PLANNING (1935) [hereinafter NRC REPORT]; see Karl, *supra* note 114, at 183 ("[T]he Brownlow Committee proceeded to do its work, but building somewhat surreptitiously on a report issued by the planning board in 1935 . . . entitled *Regional Factors in National Planning and Development*.")

<sup>116</sup> NRC REPORT, *supra* note 115, at iii.

<sup>117</sup> See, e.g., Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution*, 34 YALE L.J. 685 (1925).

<sup>118</sup> A survey concluded in February 1935 found, for example, that 74 federal agencies recognized the need for regional organization of administration, and because some used multiple regional organizations, 108 different federal regional schemes were being deployed.

sectional stress.<sup>119</sup> Unsurprisingly, then, *Regional Factors* offered an account of administration grounded in territory. The NRC treated both the vast area of the United States and the constraints of constitutional federalism as primary considerations for the rapidly developing administrative state. Although this territorial emphasis was significantly muted in the subsequent Brownlow report, it informed the Committee's understanding, as key passages reveal.

### 1. Administration as Intergovernmental Administration

Reading the Brownlow report together with the NRC's *Regional Factors* report underscores, first, that administration was understood to involve both federal and state activity—and that an ambitious President would need to collaborate with the states to achieve his objectives. Along with their contemporaries, members of the NRC and Brownlow Committee assumed that the constitutional division of powers between the states and the federal government limited what the latter could do on its own. But against a dual federalism that insisted on more thoroughgoing separation, they described the constitutional division of power as occasion for joint enterprise.<sup>120</sup> Although “Government in the United States is frequently presented as a conflict between the National Government and the States,” the NRC's opening statement of principles maintained, “there are many functions for which coordinated action is required.”<sup>121</sup> Solving public problems demanded “a sharing of powers” among federal and state authorities,<sup>122</sup> as the many New

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NRC REPORT, *supra* note 115, at 71; *see also* James W. Fesler, *Federal Administrative Regions*, 30 AM. POL. SCI. REV. 257, 259-60 (1936) (comparing federal regional schemes).

<sup>119</sup> *See, e.g.*, DONALD DAVIDSON, *THE ATTACK ON LEVIATHAN: REGIONALISM AND NATIONALISM IN THE UNITED STATES* (1938); HOWARD W. ODUM & HARRY E. MOORE, *AMERICAN REGIONALISM: A CULTURAL-HISTORICAL APPROACH TO NATIONAL INTEGRATION* (1938); FREDERICK JACKSON TURNER, *THE SIGNIFICANCE OF SECTIONS IN AMERICAN HISTORY* (1932). *See generally* Yishai Blank & Issachar Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. 1895, 1922-28 (2018) (discussing federal regionalism in the 1920s-1940s); Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 394-415 (2018) (exploring how regionalism shaped the administrative state's development).

<sup>120</sup> *See, e.g.*, NRC REPORT, *supra* note 115, at 183 (“Coordination of program-making . . . is required because the division of powers between Federal, State, and local governments under the Constitution of the United States, of the States, and the laws of both, prevents any one unit from dealing comprehensively with many problems.”).

<sup>121</sup> *Id.* at vii; *see id.* at 7 (endorsing “cooperation” of state and federal government in the “attack upon problems whose solution requires the exercise of constitutional powers distributed among them”).

<sup>122</sup> *Id.* at 7. *See generally* JANE PERRY CLARK, *THE RISE OF A NEW FEDERALISM* (1938)

Deal programs that relied on “Federal-State administration, and not . . . national administrative agencies alone” underscored.<sup>123</sup> Even as the report urged a harmonious cooperative federalism, moreover, the authors described sectional tensions and posited state and regional differentiation of federal policy as a way to manage the nation’s divisions.<sup>124</sup> Theirs was a political as well as managerial project.

Although the Brownlow Committee was not similarly focused on federalism and regionalism, its members likewise recognized that numerous policy areas were reserved to the states and that cooperation was an administrative imperative. In proposing a permanent National Resources Board in the White House to “cooperate with departmental, State, and local agencies,” the Committee argued that intergovernmental cooperation was “one of the most valuable services rendered by a National Resources Board” and that it would require “diplomacy and intelligent interest rather than . . . legal authority and high command.”<sup>125</sup> In its proposals to reorganize the federal executive branch, the Committee likewise stressed the need to improve the federal government’s “cooperat[ion] with State and local governments in the conduct of its affairs.”<sup>126</sup> The Brownlow Committee not only recognized the necessity of intergovernmental coordination but also appreciated that federalism might bolster its account of presidential power.

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(describing cooperative federalism); JAMES T. PATTERSON, *THE NEW DEAL AND THE STATES* (1969) (same).

<sup>123</sup> NRC REPORT, *supra* note 115, at 182-83.

<sup>124</sup> *See, e.g., id.* at ix (“The rapid and drastic changes occurring in our national life necessarily subject the Nation to heavy internal strains. . . . The conflicting sectional interests interact through the national elections and through the Federal Congress, without serious disorder. . . . [A] series of interrelated regions, closely cooperating with the Federal establishment, would tend to cement the union and to promote the national solution of intersectional maladjustments”); *id.* at 8 (discussing Frederick Jackson Turner’s account of sectionalism); DAVIDSON, *supra* note 119, at 59 (noting that the NRC report was “amazing” as a government publication because it took up “a systematic consideration of the taboo question of sectional stress and conflict”).

<sup>125</sup> BROWNLOW REPORT, *supra* note 27, at 25-26; *see also id.* at 27 (calling for the National Resources Board to be “provided with an annual appropriation, a considerable part of which should be used for aiding the several States in the maintenance of their State planning boards”).

<sup>126</sup> *Id.* at 30.

## 2. Intergovernmental Administration as Presidential Administration

Both the NRC and the Brownlow Committee cited the need for intergovernmental coordination as an important justification for greater presidential control over administration. In the NRC's account, "The very profusion of governmental agencies may prevent there being taken at any point a total view of governmental policies relating to a given community, State, or group of States . . . . The responsibility of taking such a total view and formulating policies and objectives and priorities that must flow from it is that of the president."<sup>127</sup> Coordination problems that abounded in Washington alone were still more numerous once state and federal programs had to be integrated across the country. With a prefectorial logic, this areal coordination problem was met with proposals to "concentrate responsibility in a single official," who could only be "the president of the United States."<sup>128</sup>

The Brownlow Committee likewise invoked the need to coordinate both rapidly proliferating federal agencies and state and local government activity to make its case for presidential administration. The report cited chaos in national planning given the varied activities of regional, state, and local boards, and it called attention to regionally incongruent approaches to administration by the federal government.<sup>129</sup> The "109 different plans of geographical

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<sup>127</sup> NRC REPORT, *supra* note 115, at 183; *see also id.* at 199 ("Nor should we forget the very heavy responsibility which is placed, in our Government, upon the President and his colleagues in the formulating of administrative policy. While one may say that he is exercising Federal power alone, the fact is that every exercise of such power has its impact at local points somewhere in the area of the United States.").

<sup>128</sup> Leonard White, *Public Administration*, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 440, 444 (1930) ("As the variety, extent and complexity of public administration developed, and its costs mounted, the need for coordination and central direction became urgent. . . . There is a strong tendency toward unity in the whole system, combined with the intent to concentrate responsibility in a single official, . . . the president of the United States."); *see also* NRC REPORT, *supra* note 115, at 183 (arguing that presidential coordination was required "because of the division of powers between Federal, State, and local governments under the Constitution of the United States, of the States, and the laws of both [that] prevents any one unit from dealing comprehensively with many problems" and "because the allotment of duties and responsibilities among national departments, among State departments, and among departments in local governments requires coordinated action among them for dealing adequately with many problems"); *cf.* Daniel J. Elazar, *Is Federalism Compatible with Prefectoral Administration*, 11 PUBLIUS 3, 3 (1981) ("[I]t is the essence of the prefectorial approach that hierarchical decision making, executed through a bureaucratic structure, should not only establish a chain-of-command but a power pyramid which comes to a single point at the top.").

<sup>129</sup> BROWNLOW REPORT, *supra* note 27, at 35.

subdivision of the United States in use by the various governmental agencies” exacerbated problems of coordination among agencies that had “grown up without plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm.”<sup>130</sup> To be sure, the Brownlow Committee’s argument for enhanced presidential control over administration did not depend on the challenge of intergovernmental coordination; the challenges it perceived within the federal government itself demanded a streamlined federal apparatus and a “responsible and effective chief executive as the center of energy, direction, and administrative management.”<sup>131</sup> But the need for intergovernmental coordination reinforced the argument for presidential control: the federal government had to be reduced to a single point, capable of taking “an over-all view,”<sup>132</sup> in order to interface effectively with other governments.

### 3. Decentralized Centralization

If federalism bolstered the coordination-based argument for presidential control over federal administration, it also moderated the claim, suggesting that presidential control need not amount to “overcentralization.”<sup>133</sup> The NRC and Brownlow Committee cited geographical decentralization as a way to preserve local representation and even democratic responsiveness within a system of presidential administration. State, local, and regional participation could, they insisted, humanize a system that increasingly concentrated power in the Chief Executive.

Both committees began from an assumption that the burgeoning federal administrative state shifted power to the executive branch from Congress.<sup>134</sup> This became most explicit in discussions of national planning, as the National Resources Board was expressly intended to “emancipate national policy from the inertia and parochialism of Congress.”<sup>135</sup> Policymaking would increasingly

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<sup>130</sup> *Id.* at 29-30.

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.* at 30.

<sup>133</sup> *Id.* at 26.

<sup>134</sup> This was a trope of the day. *See, e.g.*, White, *supra* note 128, at 447 (noting concerns that the executive branch was “trench[ing] on the traditional duties of legislatures and courts,” but stating that “Administration has come to such a varied, extensive and technical state that no body of men deriving from a political environment, rapidly changing in personnel, meeting intermittently and absorbed with issues of public policy, can expect to act effectively as a board of directors”).

<sup>135</sup> MILKIS, *supra* note 112, at 129; *see id.* at 347 n.16 (1993) (quoting Notes of the Meeting of June 25, 1934 with the President, Papers of the National Resources Planning

be the responsibility of the executive rather than legislature. The Brownlow Committee's most direct response to the separation of powers questions this raised came in the unconvincing statement that administrative management would improve the "Accountability of the Executive to the Congress."<sup>136</sup> Adhering to the template of prior reorganization committees, the suggestion that "a coherent executive branch and responsible president are more easily held accountable by the legislature" marked the only part of the report to "embrace[] a dichotomous view of administration and politics."<sup>137</sup>

But if the authors of the Brownlow report did not seem persuaded by this particular argument, they worried aloud about "autocracy"<sup>138</sup> and "overcentralization."<sup>139</sup> What might counteract "excessive centralization" in an executive-centric government? Not the bureaucracy, certainly. In contrast to James Landis's subsequent account,<sup>140</sup> Brownlow and his colleagues were hostile to a "headless 'fourth branch'"<sup>141</sup> on constitutional, democratic, and managerial grounds; they posited bureaucracy itself as a "dictatorial" threat.<sup>142</sup>

Instead, they suggested, territorial decentralization was the appropriate "democratic" response to the consolidation of executive power.<sup>143</sup> Neither the NRC nor the Brownlow Committee equated decentralization with federalism

Board) (Roosevelt saying that a national planning agenda was intended to "withstand Congressional pressure"); *see also* Alan Brinkley, *The National Resources Planning Board and the Reconstruction of Planning*, in *THE AMERICAN PLANNING TRADITION* 173, 181 (Robert Fishman ed., 2000) (noting that the National Resources Planning Board "served as a symbol to many members of Congress of their increasing irrelevance to basic policymaking").

<sup>136</sup> BROWNLOW REPORT, *supra* note 27, at 43-44.

<sup>137</sup> PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* 106 (2d ed. 1998).

<sup>138</sup> BROWNLOW REPORT, *supra* note 27, at 47.

<sup>139</sup> *Id.* at 26. Notably, the Brownlow Report was published the winter after the three members of the Committee—Louis Brownlow, Charles Merriam, and Luther Gulick—and other public administration scholars had traveled to Europe and met with Hitler. In the years leading up to that meeting, they had justified cooperation with the Nazi government in Germany by insisting on a separation between administration and politics, but after the summer of 1936, they rejected their prior view that the two could be neatly separated, and passages in the Brownlow Report were intended to defend democracy against fascism. *See* Alasdair Roberts, *Shaking Hands with Hitler: The Politics-Administration Dichotomy and Engagement with Fascism*, 79 *PUB. ADMIN. REV.* 267, 273 (2019).

<sup>140</sup> *See* LANDIS, *supra* note 100; *supra* Section II.B.

<sup>141</sup> BROWNLOW REPORT, *supra* note 27, at 36.

<sup>142</sup> *Id.* at 30 ("The safeguarding of the citizen from narrow-minded and dictatorial bureaucratic interference and control is one of the primary obligations of democratic government.").

<sup>143</sup> *Id.*

as such: they proposed that regional field offices of federal agencies would allow government to “be carried to the people . . . to make it fit their needs [and] to keep it from becoming distant and bureaucratic.”<sup>144</sup> This sort of argument was potentially more radical than relying on the states: Congress, not the executive branch, was organized by area and constituted to represent state, local, and regional interests within the federal government, but these reports posited the executive branch as a territorial as well as functional creature. Reliance on federal regions only went so far, however. The committees argued not simply that regional units would bring the federal government “nearer to the people themselves” but also that they would allow the federal government to “better cooperate with State and local governments in the conduct of its affairs.”<sup>145</sup>

It was in this return to cooperative federalism that the Brownlow Committee tried to strike a balance between centralization and decentralization. The federal executive branch would set national policy, but that national policy might in turn be geographically differentiated in the course of administration. Ultimately, the NRC and Brownlow Committees proposed, presidential superintendence could mark the diminishment of congressional authority, but the very interests Congress represented might be advanced through cooperative federalism and regional administration.

### B. *Reprising the Argument*

Each of the Brownlow Committee’s claims—that administration had an ineluctably intergovernmental dimension; that this intergovernmental dimension bolstered the case for presidential control; and that incorporating states, localities, and regions into federal administration might decentralize and humanize executive-centric government—echoed across the twentieth century. Some thirteen years after the Brownlow report, for example, the Hoover Commission linked intergovernmental relations and executive power. Noting that “a very large part of the executive and administrative task of the

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<sup>144</sup> *Id.* Although Merriam disclaimed reliance on the academic studies he called “nonsupporting documents,” this argument was consistent with a suggestion in James Fesler’s study of the field service: that the real concern about expanded federal power was about the “centralized regimentation of the remotest hamlet by an unsympathetic bureaucracy” and that “humanizing Federal administration” and “orienting it with reference to the citizenry that it is intended to serve” might generate greater acceptance of national policymaking. James W. Fesler, *Executive Management and the Federal Field Service*, in *id.* at app. 275, 277.

<sup>145</sup> BROWNLOW REPORT, *supra* note 27, at 30.

Federal government is concerned with problems, functions, and services involving Federal-State relations,” the Commission argued that intergovernmental relations demanded stronger presidential control over federal administration.<sup>146</sup>

In the 1960s, the Great Society and expansion of federal funds flowing to states meant that the “president was increasingly staking his reputation in domestic affairs on the success or failure of new grant-in-aid programs.”<sup>147</sup> In response to this development, task forces established by Presidents Lyndon Johnson and Richard Nixon relied on decentralization and devolution to argue for greater presidential control. The Heineman Task Force called for greater presidential staff and machinery “to control and pull together the related programs of Federal departments in Washington and in the field . . . [and] to reflect the Presidential perspective in program areas requiring cooperation between Federal agencies and between the Federal, State, and local governments.”<sup>148</sup> It also echoed the Brownlow Committee’s appeal to centralized decentralization, suggesting that “far more decentralization of operational program decisions is essential, subject to precise policy guidance from Washington.”<sup>149</sup>

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<sup>146</sup> U.S. COMM’N ON ORG. OF THE EXEC. BRANCH OF THE GOV’T, THE HOOVER COMMISSION REPORT 33, 39 (1949). In dissent, Dean Acheson and James Forrestal argued that the Commission was exceeding its jurisdiction: established to make recommendations about the executive branch, it was exploring state-federal relations, including grants-in-aid, which lay “in the realm of legislative policy.” *Id.* at 25 n.1. That cooperative federalism was to be overseen by Congress rather than the President was, however, precisely what the majority of commissioners disputed.

<sup>147</sup> Gary Bombardier, *The Managerial Function of OMB: Intergovernmental Relations as a Test Case*, 23 PUB. POL’Y 317, 321-22 (1975). As the President was “drawn into the intergovernmental thicket,” he and his staff interacted directly with state and local “political leaders [who were] not always willing to accept the decisions of the President’s administrative subordinates in the executive departments.” *Id.* at 322; Allen Schick, *The Budget Bureau that Was: Thoughts on the Rise, Decline, and Future of a Presidential Agency*, 35 L. & CONTEMP. PROBS. 519, 538 (1970).

<sup>148</sup> PRESIDENT’S TASK FORCE ON GOV’T ORG., THE ORGANIZATION AND MANAGEMENT OF GREAT SOCIETY PROGRAMS 2 (1967) (Indiana University Libraries) (on file with author); *see also id.* at 4, 7 (proposing a new Office of Program Coordination that would exist alongside the Bureau of the Budget in the Executive Office of the President but also have a “field force organized in ten Federal regions” “to reflect the President’s perspective, concerns, and desires in program areas requiring cooperation between two or more Federal agencies, and State and local governments”).

<sup>149</sup> *Id.* Compare BROWNLOW REPORT, *supra* note 27, at 30 (proposing “decentralizing the actual administrative operation” after “so centralizing the determination of administrative policy that there is a clear line of conduct laid down for all officialdom to follow”).

Nixon's Ash Council similarly cited the complexity of intergovernmental relations to justify presidential control. Consistent with the broader agenda of New Federalism "to decentralize major domestic decision-making activities from the Washington, D.C., level to federal regional agencies and to the states and local governments,"<sup>150</sup> the Ash Council emphasized geographical decentralization—but at the expense of congressional and agency, not presidential, power.<sup>151</sup> As Nixon put it, "Bringing power to the White House was necessary to dish it out."<sup>152</sup> Decentralization and the "administrative presidency"<sup>153</sup> went hand in hand, as the President sought to exercise power through a "vertical alliance" running from the White House to "statehouses and city halls."<sup>154</sup>

#### IV. THE PRESIDENT AND THE STATES

Although the overlap of state and federal policy domains has long led Presidents to engage with the states, and presidential task forces have repeatedly emphasized states' significance to questions of executive power and administrative management, contemporary accounts of presidential administration attend almost exclusively to federal agencies. In so doing, they neglect some of Presidents' most effective tools for setting domestic policy, from waivers and grants to nonpreemption of state law. They also neglect an

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<sup>150</sup> AM. SOC. FOR PUB. ADMIN., *THE ADMINISTRATION OF THE NEW FEDERALISM: OBJECTIVES AND ISSUES* 3 (1973).

<sup>151</sup> See ARNOLD, *supra* note 137, at 292-93 ("The political context within which the Ash Council formulated its views favored devolution . . . But the clearly higher objective for the council was to make federal activities at local and regional levels conform to national (read: 'presidential') priorities.").

<sup>152</sup> MILKIS, *supra* note 112, at 227 (quoting Nixon). Leonard Garment, who served on Nixon's White House legal staff, elaborated: "the central paradox of the Nixon administration was that in order to reduce federal power, it was first necessary to increase presidential power. . . [Nixon felt] only a very strong president could 'reverse the flow of power from the states and communities to Washington. Accordingly, his commitment to decentralization went hand in hand with a program of administrative reform that would help him accomplish his policy goals by executive fiat." *Id.* (quoting Garment).

<sup>153</sup> RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983).

<sup>154</sup> MARTHA A. DERTHICK, *BETWEEN STATE AND NATION: REGIONAL ORGANIZATIONS OF THE UNITED STATES* 180 (1974); see also Herbert Kaufman, *Administrative Decentralization and Political Power*, 29 PUB. ADMIN. REV. 3, 8 (1969) (considering how "decentralization" when "characterized as organization by area as opposed to the present almost exclusive organization by functional departments and bureaus" may strengthen central authority).

important source of durability: state policies may outlast any President's tenure, conferring resilience that federal agency action frequently lacks.

Incorporating the states into understandings of presidential administration reveals not only additional resources for presidential policymaking, however, but also a set of actors who may oppose the President's choices. If congenial state policymaking extends the President's reach, antagonistic state policymaking limits it at the same time. Consistent with the Brownlow Committee's suggestion, intergovernmental presidential administration calls for more nuanced conceptions of centralization and decentralization alike. States may help realize a President's policy agenda and supply a justification for greater presidential supervision of federal administration, but so too do states diversify administrative policy and broaden the representative base for administrative action beyond the President herself.

#### A. *Federalism as a Tool of Presidential Administration*

##### 1. Beyond Centralization and Politicization

Especially given federalism's role in formative accounts of presidential administration, we might expect it to feature as well in the contemporary literature. Why, then, do states figure marginally at best?<sup>155</sup> Beyond disciplinary conventions that may lead administrative law scholars to study only federal institutions, the most likely reason is that states lie outside any plausible chain of command: Presidents cannot demand that states carry out federal programs, submit state legislation to OIRA review, or the like.<sup>156</sup> And states are not themselves federal agencies, however much they participate in federal administration. Thus, on Kagan's centralization-focused account, it would be odd to regard state policymaking as an aspect of presidential administration rather than a distinct, if sometimes complementary, form of governance.<sup>157</sup>

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<sup>155</sup> A notable exception is Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in *THE EXECUTIVE BRANCH*, *supra* note 107, at 486. *See id.* at 502, 515 (arguing that devolution may enhance federal executive power and that "control over the presidency and a few governorships can be a sufficient base to launch important policy innovations").

<sup>156</sup> *See, e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>157</sup> Although she did not consider state policymaking to be a tool of presidential administration, Kagan did note that many examples of Clinton's presidential administration involved "the incorporation of state and local actors into the sphere of federal administration." Kagan, *supra* note 17, at 2306; *see also infra* notes 168-173 and accompanying text (describing examples of intergovernmental presidential administration in Kagan's

Even in Washington, however, presidential administration relies as much on politicization and agency officials who willingly align their policymaking with the President's agenda as on centralization that brings decisions to the White House.<sup>158</sup> If presidential administration need not depend on command but may be furthered through willing partnerships, state and local officials begin to look more similar to federal officials. States and the federal government regulate largely overlapping policy domains, and state and federal actors are closely linked both ideologically and organizationally through national political parties.<sup>159</sup> Political polarization both dampens the significance of hierarchical control in Washington and facilitates presidential administration beyond Washington.

If polarization underscores that intergovernmental coordination may be a technique of presidential administration, it also underscores why Presidents would be particularly eager for state inputs: they require policymaking capacity beyond that available in federal agencies to carry out their agendas. Commentators often attribute the urgency of contemporary presidential administration to partisan polarization and divided government, which make legislative accomplishment difficult. But when Presidents look beyond Congress to federal agencies to achieve their objectives, they may still come up short, or at least arguably so. The most significant challenges to executive action in recent years have not alleged that the President was overreaching vis-à-vis federal agencies; they have argued that federal agencies lacked authority to carry out presidentially instigated actions. This—not limits on presidential direction of agencies—was the story of President Obama's major initiatives, from the Clean Power Plan to DAPA and DACA, and more.<sup>160</sup> Rapidly eclipsing the question of whether the President can control federal agencies is the question of whether these agencies can act.

This question will only loom larger if the Supreme Court continues to distinguish presidential power from administrative policymaking and to bless

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account).

<sup>158</sup> See *supra* Section I.B.

<sup>159</sup> See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

<sup>160</sup> See e.g., *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (enjoining DAPA and expansion of DACA); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (vacating anti-discrimination and anti-blocking requirements of FCC's 2010 Open Internet Order); Opening Brief of Petitioners on Core Legal Issues, *West Virginia v. U.S. EPA*, No. 15-1363 (D.C. Cir. Feb 19, 2016) (challenging Clean Power Plan). See generally Renan, *supra* note 55, at 213 (arguing that presidential "power to" is a significant question alongside presidential "power over").

the former while curtailing the latter.<sup>161</sup> Indeed, if this doctrinal development persists, a core question of past debates—whether the President is a “decider” or only an “overseer” of agency action<sup>162</sup>—will recede in favor of the former answer. But it will be an empty victory for those who see presidential administration as part of a “pro-regulatory governing agenda”<sup>163</sup>: a “decider” role may give the President control over federal agencies, but that will be of little use if courts deem these agencies’ resulting decisions beyond their authority. Consideration of presidential administration must take into account both the President’s relationship to federal agencies and the ability of these agencies themselves to advance the President’s agenda.

Understanding presidential administration to involve the President’s effectuation of a domestic policy agenda through administrative means—and not simply the President’s control over federal agencies—returns us to early, generative accounts of presidential administration. During the New Deal, the constitutional division of power meant that a range of domestic policy areas were understood to be reserved to the states. The NRC and Brownlow Committee appreciated that the President had to rely on cooperative federalism to achieve domestic policy objectives.<sup>164</sup> The increase in grants-in-aid during the Great Society likewise required Presidents to engage with the states, as the Heineman Task Force and Ash Council explained.<sup>165</sup> The question of the President’s control over administration has long included both the question of presidential control over federal agencies and the question of presidential direction of federal policy more broadly, including in conjunction with the states.

Today’s issue is less one of constitutional authority than the scope of federal legislation: the necessity of “coordinated action”<sup>166</sup> may not be apparent because Congress in almost all cases could confer authority on federal agencies. When a statute has not conferred such authority, however, the consequences for federal administrative action are not so different from a

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<sup>161</sup> See *supra* Section II.A.

<sup>162</sup> See Peter L. Strauss, Foreword, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 719–38 (2007); cf. Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017) (arguing that Presidents already have numerous strategies to effectively direct agencies’ work without violating purported decisional limits).

<sup>163</sup> Kagan, *supra* note 17, at 2249.

<sup>164</sup> See, e.g., *supra* Part III.

<sup>165</sup> See, e.g., *supra* notes 147-154 and accompanying text.

<sup>166</sup> NRC REPORT, *supra* note 115, at vii.

regime of dual federalism. Federal statutes that authorize federal agency action may also confer distinct responsibilities on state actors, making cooperative federalism a statutory rather than constitutional imperative.<sup>167</sup> Collaboration with the states thus remains an important way for Presidents to achieve policy objectives in the face of limited federal authority.

## 2. Examples and Techniques

Once we look for the states in the already-recognized domain of contemporary presidential administration, they are ubiquitous. Indeed, it is curious that states have been all but absent from the literature because they play an important role in Kagan's own account. *Presidential Administration* highlights two examples of the phenomenon. One, the Department of Labor's rule about paid parental leave, relied expressly on states from the start: President Clinton directed the Secretary of Labor "to issue a rule to allow States to offer paid leave to new mothers and fathers," and the final rule granted states the flexibility to use unemployment insurance to provide such support.<sup>168</sup> States were to be the primary actors furthering the President's vision; the federal agency was only to facilitate state innovation.<sup>169</sup>

The second example—an FDA rule limiting the marketing and advertising of tobacco to children<sup>170</sup>—had a subtler, but significant, federalism dimension. After the FDA promulgated a rule consistent with the President's proclaimed objectives, the Supreme Court held that the rule exceeded the agency's statutory authority.<sup>171</sup> Presidential administration, understood solely as

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<sup>167</sup> See, e.g., Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1567 (2015) (noting that "federal-state collaboration" has become "the regulatory model of choice for policy initiatives big and small," and arguing that consent procedures mediate "the power and influence of state and federal political actors"); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014) ("[F]ederalism now comes from federal statutes."); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) ("Congress continues to enact 'cooperative federalism' regulatory programs that invite state agencies to implement federal law.").

<sup>168</sup> See Kagan, *supra* note 17, at 2284 (quoting Commencement Address at Grambling State University in Grambling, Louisiana, 1 PUB. PAPERS 836, 839 (May 23, 1999)).

<sup>169</sup> Subsequent Presidents have continued to encourage states to develop programs rather than construct a federal paid-leave program. See, e.g., DOL Factsheet: Paid Family and Medical Leave (June 2015), [https://www.dol.gov/wb/resources/paid\\_leave\\_fact\\_sheet.pdf](https://www.dol.gov/wb/resources/paid_leave_fact_sheet.pdf) ("The President's 2016 budget will include more than \$2 billion in new funds to encourage States to develop paid family and medical leave programs.").

<sup>170</sup> See Kagan, *supra* note 17, at 2282-84.

<sup>171</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

presidential direction of agency action, did not count for much because the agency did not have authority to act. Yet the demise of the federal rule did not mark the end of the policies it advocated: state and local governments pursued the regulatory objectives Clinton had outlined until Congress expressly conferred authority on the agency more than a decade later.<sup>172</sup> Provisions in the Master Settlement Agreement of 1998 and state regulations restricting cigarette vending machines, smoking in public places, advertising, and the like—rather than federal agency rules—constituted the relevant “action to prevent the young people of the United States from the awful dangers of tobacco.”<sup>173</sup>

Other major initiatives of the Clinton Administration likewise joined federal agency action with state initiative. For instance, Clinton and the Department of Health and Human Services encouraged and granted waivers that allowed states to depart substantially from existing requirements of the Aid to Families with Dependent Children program.<sup>174</sup> George W. Bush also relied on intergovernmental collaboration when acting through administrative means. For instance, his administration granted states waivers to alter Medicaid and Children’s Health Insurance programs, while his Faith-Based Initiative sought to channel state and local social service contracts to religious organizations.<sup>175</sup>

In the face of unyielding Republican opposition in Congress after his first two years in office, Obama more extensively conjoined federal and state administrative action. For example, he instructed the EPA to respond to climate change with a new regulatory program that directly engaged “with States, as they will play a central role in establishing and implementing

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<sup>172</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009); see Theodore W. Ruger, *The Story of FDA v. Brown & Williamson: The Norm of Agency Continuity*, in STATUTORY INTERPRETATION STORIES 335 (William N. Eskridge Jr. et al. eds., 2011).

<sup>173</sup> Kagan, *supra* note 17, at 2283 (quoting The President’s News Conference, 2 PUB. PAPERS 1237 (Aug. 10, 1995)); see, e.g., Master Settlement Agreement 29 (1998), <https://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf> (precluding settling tobacco companies from opposing “state or local legislative proposals or administrative rules . . . intended by their terms to reduce Youth access to, and the incidence of Youth consumption of, Tobacco”); Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1224-36 (2014).

<sup>174</sup> Clinton estimated that 75% of AFDC recipients were involved in waivers by the time Congress enacted welfare reform. See Gais & Fossett, *supra* note 155, at 508.

<sup>175</sup> See *id.* at 509, 513.

standards for existing power plants.”<sup>176</sup> The resulting Clean Power Plan was “based on” and intended to “reinforce the actions already being taken by states.”<sup>177</sup> The Obama Administration also used waivers and grants to incentivize states to adopt educational standards in keeping with the federal executive’s priorities,<sup>178</sup> and it granted states waivers to achieve broader participation in the Affordable Care Act’s Medicaid expansion and insurance exchanges.<sup>179</sup> In each of these cases, Obama superintended federal agency action in a manner consistent with existing accounts of presidential administration—he issued directives or instructions, for example, or claimed ownership of agency policies—but the President and federal agencies alike further depended on state policymaking. The Administration’s environmental, education, and healthcare initiatives simply could not have been achieved through federal agency action alone.<sup>180</sup>

The Trump Administration has continued to rely on state and local policymaking. For instance, it has granted states waivers to impose work and other requirements on Medicaid recipients.<sup>181</sup> It has supported efforts by states such as Texas to increase subnational participation in federal immigration enforcement well beyond that required by federal law.<sup>182</sup> And it has issued a

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<sup>176</sup> Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535, 39,536 (July 1, 2013).

<sup>177</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,832, 34,850 (proposed June 18, 2014); *see* Clean Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,665 (Oct. 23, 2015) (noting that the Clean Power Plan is “designed to build on and reinforce progress by states, cities and towns”).

<sup>178</sup> *See* Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CALIF. L. REV. 565, 595–99, 603–04 (2015); Overview Information; Race to the Top Fund Assessment Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 75 Fed. Reg. 18,171, 18,171 (Apr. 9, 2010).

<sup>179</sup> *See* John Dinan, *Implementing Health Reform: Intergovernmental Bargaining and the Affordable Care Act*, 44 PUBLIUS 399 (2014); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018); Shanna Rose, *Opting In, Opting Out: The Politics of State Medicaid Expansion*, 13 THE FORUM 63 (2015).

<sup>180</sup> *See generally* Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016) (exploring and defending executive federalism as a form of joint state-federal policymaking, with a focus on the Obama Administration).

<sup>181</sup> *See* Kaiser Family Found., Medicaid Waiver Tracker, <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state> (last visited July 9, 2019). *But see, e.g.*, *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (holding that Kentucky’s work requirement was unlawful and vacating HHS’s approval).

<sup>182</sup> *E.g.*, Brief of Amicus Curiae the United States of America in Support of Texas’s

series of “Dear Governor” letters seeking to prompt state actions undoing Obama Administration environmental and healthcare policies.<sup>183</sup>

These and other examples suggest that the catalog of tools commonly associated with presidential administration is incomplete. Including both the three techniques Kagan discussed (regulatory review, directives, and appropriation), which sound in centralization, as well as techniques her successors have studied, many of which sound in politicization, a list of recognized techniques would be:

- *Regulatory Review.* Presidents require agencies to submit any proposed major regulation (and sometimes any significant guidance document) to OMB, which assesses the regulation under cost-benefit analysis and may demand revisions of, delay, or reject proposed rules.<sup>184</sup>
- *Directives.* Presidents issue memoranda to agency heads instructing them to take certain actions that lie within their powers.<sup>185</sup>
- *Appropriation.* Presidents publicly assert ownership of agency actions through speeches, news conferences, social media, and the like.<sup>186</sup>

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Motion for a Stay Pending Appeal, *El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018). *See generally* Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029, 2033-41 (2018) (describing state facilitation of and resistance to Obama and Trump Administration policymaking).

<sup>183</sup> *E.g.*, Letter from Thomas E. Price, Sec’y, U.S. Dep’t of Health & Human Servs., to Governor (Mar. 13, 2017), <https://perma.cc/HK95-CE7X>; Letter from Thomas E. Price, Sec’y, and Seema Verma, CMS Adm’r, U.S. Dep’t of Health & Human Servs., to Governor (Mar. 14, 2017), <https://perma.cc/5Q6Q-3B79>; Letter from E. Scott Pruitt, Adm’r, U.S. EPA, to Matt Bevin, Governor of Ky. (Mar. 30, 2017), <https://perma.cc/S45L-FVHP>.

<sup>184</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (President Ronald Reagan); Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (President William Clinton); Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (President George W. Bush); Exec. Order No. 13,563, 3 C.F.R. 215 (2011) (President Barack Obama); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (2017) (President Donald Trump); *see, e.g.*, DeMuth & Ginsburg, *supra* note 32; Kagan, *supra* note 17, at 2285-90; Watts, *supra* note 18, at 688-700. OMB also reviews agencies’ annual regulatory plans, and it has sometimes used “prompt” and “review” letters to shape the regulatory process in phases other than the proposed-to-final rulemaking stage. *See, e.g.*, Watts, *supra* note 18, at 694-95. Scholars continue to debate whether OMB review is best understood as a form of presidential control. *See supra* note 35.

<sup>185</sup> *See, e.g.*, Kagan, *supra* note 17, at 2290-99; Watts, *supra* note 18, at 691-703; Farber, *supra* note 18, at 23-25.

<sup>186</sup> *See, e.g.*, Kagan, *supra* note 17, at 2299-2303; Watts, *supra* note 18, at 703-04.

- *Appointments.* Presidents appoint politically responsive actors to positions in agencies.<sup>187</sup>
- *Czars.* Presidents designate White House officials to oversee agency policy in particular substantive areas.<sup>188</sup>
- *Enforcement.* Presidents oversee agency enforcement activity.<sup>189</sup>
- *Budget.* OMB prepares the President's budget and oversees agencies' execution of the budget.<sup>190</sup>

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Appropriation both contributes to the President's ability to shape administrative action and colors public perceptions about presidential control over agencies. *See generally* Coglianesi & Firth, *supra* note 57.

<sup>187</sup> *See, e.g.,* LEWIS, *supra* note 49; Barron, *supra* note 49; Livermore, *supra* note 53; Moe, *supra* note 35; Moe & Wilson, *supra* note 49.

<sup>188</sup> *See, e.g.,* Saiger, *supra* note 55; Watts, *supra* note 18, at 704-05. President Obama, in particular, relied on czars to coordinate policy in areas such as energy and the environment, health care, and auto recovery. The early months of President Trump's administration suggested a twist on this strategy, with presidential loyalists installed in federal agencies to monitor agency heads as a "shadow cabinet," although this effort was short-lived. *See, e.g.,* Lisa Rein & Juliet Eilperin, *White House Installs Political Aides at Cabinet Agencies To Be Trump's Eyes and Ears*, WASH. POST, Mar. 19, 2017, [https://www.washingtonpost.com/powerpost/white-house-installs-political-aides-at-cabinet-agencies-to-be-trumps-eyes-and-ears/2017/03/19/68419f0e-08da-11e7-93dc-00f9bdd74ed1\\_story.html?utm\\_term=.32f3c6916310](https://www.washingtonpost.com/powerpost/white-house-installs-political-aides-at-cabinet-agencies-to-be-trumps-eyes-and-ears/2017/03/19/68419f0e-08da-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.32f3c6916310); Michael Grunwald et al., *Trump Starts Dismantling His Shadow Cabinet*, POLITICO, May 1, 2017, <https://www.politico.com/story/2017/05/01/trump-starts-dismantling-his-shadow-cabinet-237819>.

<sup>189</sup> *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013) (calling attention to the significance of the President's role in administrative enforcement, and arguing for greater presidential coordination of agency enforcement). If the first round of literature on presidential control over administration focused on executive branch organization and the second focused on rulemaking, *see, e.g.,* SEIDMAN, *supra* note 31, at 103, more recent accounts, including Professor Andrias's, reflect a more recent shift in agency policymaking away from notice-and-comment rulemaking to other tools, including guidance and enforcement policy.

<sup>190</sup> *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016) (exploring how the White House is able to control agency policymaking through OMB's preparation of the budget, oversight of agency execution of the budget, and creation of various management initiatives through the budget process).

- *Pooling*. Presidents integrate legal and policy resources dispersed across multiple agencies to achieve desired ends.<sup>191</sup>

These are important techniques by which Presidents shape federal agency action, but they are not the only ones. Moreover, they are useful only insofar as federal agencies already possess authority to advance the President's policy ends. If agencies lack statutory authority to promulgate a certain rule, for example, it is of no moment that the President may direct them to do so (or review or personally appropriate their activity).<sup>192</sup> Especially given the emerging judicial skepticism of agency action, limits on the President's "power to" may be more significant than those on her "power over."<sup>193</sup>

It is here that states come squarely into view. Intergovernmental cooperation expands the field for presidential administration through the following tools<sup>194</sup>:

- *Waivers*: Presidents and federal agencies exempt states from particular statutory or regulatory requirements or allow states to substitute their own policy choices.<sup>195</sup> (For example, Clinton's welfare waivers.<sup>196</sup>)

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<sup>191</sup> Renan, *supra* note 55, at 244 (arguing that, although agencies may also combine resources on their own, Presidents have "both the incentives and the institutional capabilities to nurture pooling"); see also Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1174 (2012) (exploring "the President's special burden, heightened incentive, and unique capacity to spur [interagency] coordination specifically through centralized supervision"); Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 224 (2013) ("[I]nteragency administration can be a boon for executive power.").

<sup>192</sup> See, e.g., *supra* notes 168-173, 176-180 and accompanying text (discussing administrative policies of Presidents Clinton and Obama that could not be implemented by federal agencies alone).

<sup>193</sup> See Renan, *supra* note 55, at 213.

<sup>194</sup> For discussions of techniques Presidents use to influence state policymaking, see generally Jessica Bulman-Pozen & Gillian Metzger, *The President and the States: Patterns of Contestation and Collaboration Under Obama*, 46 PUBLIUS 308, 314-25 (2016), and Gais & Fossett, *supra* note 155.

<sup>195</sup> See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); Bulman-Pozen & Metzger, *supra* note 194, at 315-18; Gais & Fossett, *supra* note 155, at 508-11; Bryan Shelly, *The Bigger They Are: Cross-State Variation in Federal Education and Medicaid Waivers, 1991-2008*, 43 PUBLIUS 452, 452-55 (2013); Frank J. Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. HEALTH POL., POL'Y & L. 971 (2007).

<sup>196</sup> See *supra* note 174 and accompanying text.

- *Grants*: Presidents and federal agencies offer financial incentives to induce states to adopt particular policies.<sup>197</sup> (For example, Obama’s Race to the Top program that granted states funds to overhaul their education systems consistent with Administration priorities.<sup>198</sup>)
- *Rulemaking Incorporation*: Presidents and federal agencies adopt regulations that build state law or policy into federal rules.<sup>199</sup> (For example, the Clean Power Plan that incorporated state and regional cap-and-trade plans.<sup>200</sup>)
- *Nonpreemption*: Presidents and federal agencies permit state law to stand in areas also regulated by federal law.<sup>201</sup> (For example, the Trump Administration’s decision not to challenge certain state immigration laws and to defend these state laws against other parties’ preemption challenges.<sup>202</sup>)

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<sup>197</sup> See, e.g., Bulman-Pozen & Metzger, *supra* note 194, at 317-19; Valentino Larcinese et al., *Allocating the U.S. Federal Budget to the States: The Impact of the President*, 68 J. POL. 447 (2006); Sean Nicholson-Crotty, *Leaving Money on the Table: Learning from Recent Refusals of Federal Grants in the American States*, 42 PUBLIUS 449 (2012).

<sup>198</sup> See *supra* note 178 and accompanying text; see also, e.g., Paul Manna & Laura L. Ryan, *Competitive Grants and Educational Federalism: President Obama’s Race to the Top Program in Theory and Practice*, 41 PUBLIUS 522 (2011).

<sup>199</sup> See, e.g., Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process*, 39 J. HEALTH POL., POL’Y, & L. 441 (2014); Bulman-Pozen & Metzger, *supra* note 194, at 321-22.

<sup>200</sup> See *supra* notes 176-177 and accompanying text.

<sup>201</sup> See, e.g., Bulman-Pozen, *supra* note 180, at 1023-25; White House, Memorandum for the Heads of Executive Departments and Agencies, Re: Preemption (May 20, 2009), *available at* [https://obamawhitehouse.archives.gov/realitycheck/the\\_press\\_office/Presidential-Memorandum-Regarding-Preemption](https://obamawhitehouse.archives.gov/realitycheck/the_press_office/Presidential-Memorandum-Regarding-Preemption) (“The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values.”).

<sup>202</sup> See *supra* note 182 and accompanying text. In contrast, the Obama Administration challenged Arizona’s immigration law, and the Supreme Court held much of the state law preempted. *Arizona v. United States*, 567 U.S. 387 (2012).

- *Nonenforcement*: Presidents and federal agencies decide not to enforce, or to reduce enforcement of, federal law based on conflicting state law.<sup>203</sup> (For example, the Obama Administration’s decision to minimize enforcement of federal law with respect to marijuana in states that had legalized the drug.<sup>204</sup>)
- *Encouragement*: Presidents and federal agencies prod the adoption of congenial policies as state law.<sup>205</sup> (For example, Obama’s push to expand the minimum wage as a matter of state law.<sup>206</sup>)

Not all concordant state and federal policymaking should be regarded as a form of presidential administration, as the “encouragement” category, especially, might suggest. The simple fact that a state adopts a policy favored by the President is not sufficient reason to attribute that policy to the President, but negotiations and other interactions between the state and the federal executive can make the case.

These various tools—waiver, grants, rulemaking, nonpreemption, nonenforcement, and encouragement—expand the reach of presidential administration. Their exercise generally involves presidential direction of federal agencies; for instance, the President might instruct the Department of Health and Human Services to give a state a waiver, she might work with the Department of Education to confer grants on particular states, or she might use White House czars to interact directly with state officials. But by collaborating with states, Presidents achieve ends they cannot through federal agency action alone. Especially as Presidents confront judicially-imposed limits

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<sup>203</sup> See, e.g., Bulman-Pozen & Metzger, *supra* note 194, at 324-25; Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014).

<sup>204</sup> See U.S. Dep’t of Justice, Office of the Deputy Attorney Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://perma.cc/88G7-QP38>; Bulman-Pozen, *supra* note 180, at 979-82.

<sup>205</sup> See, e.g., Thomas Kalil, *Policy Entrepreneurship at the White House: Getting Things Done in Large Organizations*, 11 INNOVATIONS 4 (2017); Gregory Korte, *To Get Around Congress, Obama Turns to City Halls*, USA TODAY, May 25, 2015, <https://www.usatoday.com/story/news/politics/2015/05/25/obama-state-and-local-strategy/27602149/>.

<sup>206</sup> See, e.g., Michael A. Memoli, *Democratic Governors Join Obama in Push for Higher Minimum Wage*, L.A. TIMES, Feb. 21, 2014, <http://articles.latimes.com/2014/feb/21/news/la-pn-obama-governors-minimum-wage20140221>.

on federal agency action, intergovernmental presidential administration is likely to become even more prominent in shaping domestic policy.

### B. *An Ambivalent Tool*

Has federalism become simply one more tool of presidential control in an executive-dominant system? Looking only at presidential initiation of intergovernmental collaboration may yield that conclusion: Presidents reach out to friendly states when they cannot achieve desired ends through new legislation or purely federal administrative action.<sup>207</sup> As the NRC and Brownlow Committees suggested, however, presidential reliance on the states is not purely President-aggrandizing; decentralization may be both a strategy for and also an antidote to the concentration of executive power. Federalism enhances presidential policymaking capacity in a different manner from many other capacity-building strategies: it depends on a cadre of actors with their own constituencies, electoral responsibilities, and pluralism of viewpoints.<sup>208</sup> Presidential reliance on state policymaking and implementation to effectuate a domestic agenda empowers independent actors within the administrative realm.

Even when Presidents affirmatively seek state cooperation, the resulting state action is therefore often not entirely in line with their interests. Copartisans who share high-level goals may disagree about the particulars, and

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<sup>207</sup> Indeed, such collaborations may not only increase presidential power in Washington but also enhance federal control over state and local governments. *See generally* James W. Fesler, *Approaches to the Understanding of Decentralization*, 27 J. POL. 536, 565 (1965) (“Decentralization from a national government to a provincial government or regional administrative office may actually tighten centralized controls over local governments and district administrative offices.”); Gais & Fossett, *supra* note 155, at 515-16.

<sup>208</sup> Notably this is a point about state and local governments as such—not federal administrative regions, which the NRC and Brownlow Committee relied on for their decentralized vision. Although federal regions may continue to diversify administrative policy and to insulate certain decisions from presidential control, they are relatively obscure components of government that lack forms of independence and the representative connection to the people possessed by the states themselves. *See, e.g.*, Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* 11 (Feb. 24, 2015) (unpublished manuscript), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6121&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6121&context=faculty_scholarship) (arguing that the “cultural salience” of administrative regions is “approximately zero”). Even as it hoped that planning regions might elicit a regional consciousness, the NRC itself appreciated in the 1930s that “no Californian ever boasted of living within the Twelfth Federal Reserve District; no Washingtonian of being a resident of the Fourth Procurement Zone.” NRC REPORT, *supra* note 115, at 157.

states may possess constitutional or statutory entitlements, or political rather than strictly legal powers, that give them leverage when the President seeks to enlist their help. The Obama Administration's negotiations with states about expanding Medicaid coverage in the wake of *NFIB v. Sebelius* furnish a high-profile illustration of how state-federal interactions may be more mutual than a top-down account of presidential administration suggests.<sup>209</sup> Lower-profile negotiations are pervasive.<sup>210</sup>

Moreover, states do not only participate in federal administration at the invitation of the current President. Sometimes they are carrying out parts of a federal statutory regime at Congress's invitation.<sup>211</sup> Sometimes they are engaged in their own independent policymaking in a space also occupied by the federal government. Sometimes they are continuing an administrative program designed by a prior President. As that last possibility indicates, states do not support or oppose presidential policy as a general matter; they support or oppose particular Presidents and particular policies. Just as the President is best conceptualized as a political location rather than an individual, so too do state actors instantiate broader partisan and ideological commitments.<sup>212</sup> In a two-party system, this means state opposition to one President will often entail support for her predecessor or her successor.

## 1. Presidential Administrations

Considering multiple presidential administrations offers a useful lens on states' role. For example, states that were leading implementers of Obama's initiatives now find themselves defending those initiatives—and opposing Trump's reversals.<sup>213</sup> These states have numerous ways to side with a prior administration against the current one. Perhaps the most visible is litigation: state-led challenges to the federal executive have become more prominent in the past decade, as red states challenged Obama Administration policies and blue states have challenged Trump Administration policies.<sup>214</sup> When they

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<sup>209</sup> See, e.g., Metzger, *supra* note 57, at 1772-86.

<sup>210</sup> See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011).

<sup>211</sup> See generally Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (describing how state administration of federal law can constrain federal executive power).

<sup>212</sup> See generally Bulman-Pozen, *supra* note 159; see *supra* Section I.B. and text accompanying note 30.

<sup>213</sup> See *supra* notes 11-16 and accompanying text.

<sup>214</sup> See, e.g., Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L.

litigate as separate sovereigns, however, states tend to resemble private opponents of presidential policy; they may have a distinct path into the courthouse, but their arguments could be made by other plaintiffs as well.

States have a unique, and more powerful, position when they operate within the administrative domain.<sup>215</sup> For example, states may withhold their cooperation from a new enforcement policy. If the federal government is dependent on states to execute federal law, states may choose not to accommodate any given administration's priorities. In the past two years, uncooperative states have limited the extent to which President Trump's rejection of President Obama's immigration policies has been realized. At the same time as Texas mandates broader state assistance to ICE than federal law contemplates,<sup>216</sup> California curtails its assistance and thereby limits the reach of federal enforcement in its borders.<sup>217</sup> Even if Trump may direct the activity of the relevant federal agencies, then, that alone is not sufficient to control immigration policy. The federal executive branch relies on state cooperation to achieve its objectives, but states' legal and political independence allows them to set the terms of their participation, including by rejecting policy choices of the current administration.

Notably, although California and other "sanctuary" jurisdictions make arguments sounding in state sovereignty to defend their policies against legal

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REV. 851 (2016); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43 (2018).

<sup>215</sup> See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (exploring how states use regulatory power conferred by the federal government to resist federal policy choices); Bulman-Pozen, *supra* note 211 (exploring how states use regulatory power conferred by Congress to resist presidential choices, in particular); Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131 (2017) (book review) (considering how states both enhance and complicate the President's foreign affairs power); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 33-44 (2010) (discussing states' "power of the servant"). Sometimes, state litigation itself depends on the state's role in a federal scheme. See generally Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism,"* 105 CALIF. L. REV. 1739 (2018) (considering how states' representative role in federal statutory schemes may confer standing to challenge the allocation and exercise of authority in the federal government).

<sup>216</sup> See An Act Relating to the Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration, S.B. 4 (codified in TEX. GOV'T CODE ANN. chs. 752, 772 (Vernon 2018) & scattered sections of other Texas Codes).

<sup>217</sup> See California Values Act S.B. 54 (codified at CAL. GOV'T CODE §§ 7282-7282.5, 7284-7284.12 (West 2018)).

challenge, their broader commitments echo the Obama Administration's deferred action guidance. State and local governments including California, Massachusetts, and New York City do not limit all cooperation with ICE; instead, they train state resources on violent and other serious criminal offenses as the Obama Administration's policies sought to do.<sup>218</sup>

States may also keep a federal regulatory program disfavored by the current President alive within their borders. Although the Trump Administration has rescinded the Clean Power Plan,<sup>219</sup> for example, a number of states are continuing to comply with their obligations and to adopt new commitments to renewable energy.<sup>220</sup> This continuity is facilitated by the Clean Power Plan's own reliance on state efforts. Recognizing the role of numerous states—most notably California and the northeastern states participating in the Regional Greenhouse Gas Initiative (RGGI)—in regulating greenhouse gas emissions, the Obama Administration incorporated state efforts into the federal rule. Now, states are furthering these efforts despite the rollback of the federal rule. State officials argue both that they are resisting Trump's agenda and that they are advancing policy commitments they shared with the Obama Administration.<sup>221</sup>

In addition, states may reinstate now-disfavored federal policy as state policy through their independent initiative. A number of states have codified as state law versions of the net neutrality policy the FCC adopted under Obama and has withdrawn under Trump.<sup>222</sup> Using repealed federal policy as a

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<sup>218</sup> See, e.g., CAL. GOV'T CODE §§ 7282.5, 7284.2(b)-(c), 7284.6. California and other jurisdictions permit law enforcement officers to transfer individuals and share information with federal agents if these individuals have been convicted of certain crimes. See, e.g., *id.* §§ 7282.5(a), 7284.6(a).

<sup>219</sup> See Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 84 Fed. Reg. 32,520 (July 8, 2019).

<sup>220</sup> See sources cited *supra* note 12.

<sup>221</sup> See, e.g., Statement from Governor Andrew M. Cuomo (Oct. 10, 2017), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-162> (“While the Trump Administration takes a back a seat to the rest of the world, New York . . . will continue to lead the fight to meet the standards set forth in both the Paris Accord and the Clean Power Plan.”); see also Georgetown Climate Center, *State Reactions to Trump Repealing the Clean Power Plan* (Oct. 10, 2017), <https://www.georgetownclimate.org/articles/state-reactions-to-trump-repealing-the-clean-power-plan.html> (collecting similar statements by state officials). See generally Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009) (arguing that interactions between the federal government and the states have spurred regulatory innovation).

<sup>222</sup> See *supra* notes 4, 6, & 15 and accompanying text.

guide, these states are actively seeking to “restore” the open-internet protections.<sup>223</sup> Florida and other states have likewise adopted offshore drilling restrictions imposed by the Obama Administration and withdrawn under Trump.<sup>224</sup> California has codified the affirmatively furthering fair housing policy adopted by Obama’s Department of Housing and Urban Development and rescinded by Trump’s HUD.<sup>225</sup> Nevada has reinstated the Obama-era fiduciary rule through state legislation.<sup>226</sup>

As noted above, these state actions can fairly be understood as either an extension of or a limitation on presidential policymaking—or, perhaps more accurately, both at once. On the one hand, state legislative and executive decisions provide durability federal presidential administration lacks: with President Obama out of office and federal agencies rescinding rules, guidance, and the like, states may entrench presidential policies in a way federal actors cannot. The oft-invoked rhetoric of “restoration” is apt, particularly because states are self-consciously designing their own legislation, rules, enforcement policies, and more with reference to prior federal policies; they are not adopting entirely new policies so much as shifting disavowed federal policies into state forms. On the other hand, the same states that are providing an afterlife for Obama-era policies are actively rejecting President Trump’s administrative decisions. If the rhetoric of “restoration” applies, so too does the more popular rhetoric of “resistance.”

This dual character relates to a second key point: any given state might be said to be extending a prior administration’s policies or opposing a current administration’s policies, but there is not only one state. Some states can be expected to support a particular President’s agenda, while others—principally those controlled by the opposite party—can be expected to oppose this

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<sup>223</sup> Johnson, *supra* note 15. Some of these state laws are now being challenged by the Trump Administration. *See infra* Section IV.B.2 (discussing executive preemption).

<sup>224</sup> *See, e.g.*, FLORIDA CONST. AMEND. 9 (approved 2018); An Act to add Section 6245 to the Public Resources Code, Relating to State Lands, S.B. 834 (codified at CAL. GOV’T CODE § 6245 (West 2018)); An Act to Amend Title 7 of the Delaware Code Relating to Offshore Drilling and the Coastal Zone, S.B. 200 (to be codified at DEL. CODE ANN. tit. 81); STOP Offshore Oil and Gas Act, A.B. 839 (to be codified at N.J. REV. STAT. tit. 13).

<sup>225</sup> An Act Concerning Affirmatively Furthering Fair Housing, A.B. 686 (codified at CAL. GOV’T CODE §§ 8899.50, 65583, 65583.2 (West 2018)).

<sup>226</sup> An Act Relating to Financial Planners, S.B. 383 (to be codified at NEV. REV. STAT. §§ 628A.010, 628A.040, 688C.212); *see* Joe Lustig, *Fiduciary Rule May Go Away, but States Are Stepping In*, BLOOMBERG (June 2018, 2017), <https://www.bna.com/fiduciary-rule-may-b73014460927/>; *see also* An Act Requiring Administrators of Certain Retirement Plans to Disclose Conflicts of Interest, Conn. Pub. Act. No. 17-142 (2017).

agenda. To be sure, the references to California throughout this discussion are not a coincidence; some states are “more equal than others” when it comes to regulatory capacity and influence.<sup>227</sup> But there are more and less powerful red and blue states alike. Texas will not agree with California; Vermont will not agree with Alabama. The state role is necessarily multivalent.

## 2. Courts and Congress

The most apparent lesson to be gleaned from recent practice is for Presidents themselves: if a President wants her regulatory preferences to outlast her administration, she should embrace cooperation with, even reliance on, states as a vehicle for promoting policy stability. The contours of intergovernmental presidential administration are necessarily determined not only by states and the federal executive branch, however, but also by other actors. In particular, state efforts to perpetuate or restore federal policy—and, in so doing, to oppose the current President’s administrative policies—are vulnerable to legal challenge and judicial invalidation.

Recognizing risks of regulatory volatility, commentators have recently called for courts to more closely scrutinize federal agencies’ policy reversals pursuant to APA arbitrary-and-capricious review.<sup>228</sup> But also important is the space courts leave for states to act. When federal agencies change course, are states prohibited from adhering to a previous policy or reinstating it as a matter of state law? Existing doctrine already reserves some space for the states. The anticommandeering principle, reaffirmed last Term in *Murphy v. NCAA*, prevents the federal executive branch from compelling states to regulate in accord with its preferences.<sup>229</sup> For example, sanctuary jurisdictions need not lend support to federal immigration enforcement.<sup>230</sup> Whether state

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<sup>227</sup> See generally DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995) (describing the “California effect”).

<sup>228</sup> See, e.g., Michael A. Livermore & Daniel Richardson, *Administrative Law for an Era of Partisan Volatility*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3278745](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3278745) (manuscript at 34-37); see also Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397, 405-23 (describing presidential reversals as a species of maladministration that may warrant judicial skepticism).

<sup>229</sup> *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (holding unconstitutional a federal law banning state government “authorization” of sports gambling under state law); see also *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>230</sup> See, e.g., *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 329 (E.D. Pa. 2018), *aff’d in relevant part*, 916 F.3d 276 (3d Cir. 2019); *New York v. U.S. Dep’t of Justice*, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 873

policies reflect independent state judgment or an attempt to advance a broader national commitment is of no moment; the federal government may not “dragoon[]” states into “administering federal law” regardless of the reasons states reject cooperation.<sup>231</sup>

More complicated questions arise with respect to preemption. Almost immediately upon their enactment, for instance, the Trump Administration argued that California’s immigration and net neutrality laws were preempted.<sup>232</sup> On its logic, California could not adopt distinct policies from the federal executive because federal law displaced contrary state approaches. Beyond the limits anticommandeering doctrine itself sets on such claims,<sup>233</sup> courts should be wary of executive preemption—attempts to displace state policymaking that come from the executive branch rather than Congress.<sup>234</sup> To be sure, the President and federal agencies will often defend their decisions with reference

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(N.D. Ill. 2018). *See generally* Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87 (2016) (discussing state refusals to assist federal immigration enforcement efforts); Ilya Somin, *Making Federalism Great Again: How the Trump Administration’s Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247 (2019) (exploring litigation concerning state refusals to cooperate with Trump immigration enforcement efforts).

<sup>231</sup> *Printz*, 521 U.S. at 928.

<sup>232</sup> *See, e.g.*, Complaint, United States v. California, No. 2:18-cv-00490-JAM-KHN (E.D. Cal. Mar. 6, 2018), 2018 WL 1181625 (arguing that California’s sanctuary state law is preempted); United States v. California, 314 F. Supp. 3d 1077 (E.D. Cal. 2018), *aff’d in part, rev’d in part*, 921 F.3d 865 (9th Cir. 2019) (granting the federal government’s motion for preliminary injunction against California in part and denying in part); Complaint for Declaratory and Injunctive Relief, United States v. California, No. 2:18-at-01539 (E.D. Cal. Sept. 30, 2018), *available at* <https://www.justice.gov/opa/press-release/file/1097306/download> (arguing that California’s net neutrality law is preempted); Brian Fung, *California Agrees Not To Enforce its Net Neutrality Law as Justice Dept. Puts Lawsuit on Hold*, WASH. POST., Oct. 26, 2018, [https://www.washingtonpost.com/technology/2018/10/26/california-agrees-not-enforce-its-net-neutrality-law-trumps-doj-puts-its-lawsuit-hold/?utm\\_term=.46ad24ad7a02](https://www.washingtonpost.com/technology/2018/10/26/california-agrees-not-enforce-its-net-neutrality-law-trumps-doj-puts-its-lawsuit-hold/?utm_term=.46ad24ad7a02) (describing agreement that DOJ will postpone litigation challenging California’s net neutrality law and California will not enforce the rules on broadband providers).

<sup>233</sup> *See* Bulman-Pozen, *supra* note 182, at 2042-47 (exploring the intersection between preemption and commandeering with respect to immigration policy).

<sup>234</sup> *See, e.g.*, Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698-99 (2008); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 870, 881 (2008). Executive *non*preemption—federal executive branch efforts to insulate state action from preemption—is a different matter. Agencies should receive greater deference for determinations that state law is not preempted than that it is. *See* Bulman-Pozen, *supra* note 180, at 1023-25.

to an underlying statute rather than autonomous executive power; in challenging California, the Trump Administration has cited the Communications Act, Immigration and Nationality Act, and other federal statutes.<sup>235</sup> But the critical preemptive decisions are coming from the executive branch, not Congress.

This is in substantial part because the most contentious executive branch policymaking of recent years has concerned questions about which Congress has not clearly spoken (e.g., climate change, net neutrality, parameters of immigration enforcement).<sup>236</sup> As some scholars have argued, it makes sense to give federal agencies latitude to regulate in these areas; they are better positioned than courts to answer new questions, so “it may be more ‘democratic’ to defer during fallow legislative periods to the agencies, rather than revert to a judicially imposed and indefinite extension of the status quo.”<sup>237</sup> But to acknowledge this is simply to acknowledge the limits of democratic inputs at the federal level. Bringing in the states offers a path around some of these limits,<sup>238</sup> a path courts can preserve by distinguishing federal agency policymaking from federal agency latitude to preempt the states.

If intergovernmental presidential administration contains lessons for Presidents and the courts, it also speaks to Congress: the case against preemption is particularly strong if Congress has expressly conferred authority on the states as, for example, in the paradigmatic case of the Clean Air Act.<sup>239</sup>

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<sup>235</sup> See, e.g., Complaint, *United States v. California*, No. 2:18-cv-00490-JAM-KHN (E.D. Cal. Mar. 6, 2018), 2018 WL 1181625 (arguing that California’s sanctuary state law is preempted by the Immigration and Nationality Act, the Immigration Reform and Control Act of 1986, and other federal laws regulating immigration); Complaint for Declaratory and Injunctive Relief, *United States v. California*, No. 2:18-at-01539 (E.D. Cal. Sept. 30, 2018), available at <https://www.justice.gov/opa/press-release/file/1097306/download> (arguing that California’s net neutrality law is preempted by the federal Communications Act, as amended by the Telecommunications Act of 1996).

<sup>236</sup> See e.g., Emerson, *supra* note 20; Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501 (2015).

<sup>237</sup> Freeman & Spence, *supra* note 236, at 76.

<sup>238</sup> See *infra* Part V.

<sup>239</sup> The Bush and Trump Administration attempts to deny California waivers have been some of the most egregious examples of presidential unilateralism insofar as they seek to override the Clean Air Act’s specific statutory entitlement with executive diktat. See Notice of Decision Denying a Waiver of Clean Air Act Preemption, 73 Fed. Reg. 12,156, 12,159-69 (Mar. 6, 2008); Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks, 83 Fed. Reg. 42,986, 43,240 (proposed Aug. 24,

The invocation of Congress here is necessarily limited. A premise of intergovernmental presidential administration is that, although Congress may retain paramount authority, it exercises it sparingly enough that the policy domain is largely executive. Without positing federal lawmaking as a solution to administration's discontents, however, we must acknowledge its role in shaping this executive domain. In particular, during periods of unified party government, Congress often has two years to pass legislation broadly setting parameters for future administrative governance. It may be tempting when the next such window arises for ambitious members of Congress to advocate unitary national solutions in various areas, from climate change to healthcare. But instead of reflexively cutting out the states, Senators and Representatives should be mindful of how future administrations may undermine their objectives. If past is prologue, state discretion is more likely to be championed by the detractors than proponents of any particular policy, but delegating authority to both the federal executive branch and the states can better secure proponents' ambitions over time, including by allowing states to keep alive and refine regulatory policies that a new federal administration revokes.<sup>240</sup>

## V. RECONSIDERING PRESIDENTIAL ADMINISTRATION

Both New Deal theories of administration, forged as the United States moved from a principally legislative to a principally executive order, and developments in government practice and politics in the years since illustrate the important role of the states. This Part returns to some contemporary questions about presidential administration with this landscape more fully in view. As Kagan argued in making her normative case, “[a]ll models of administration must address two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective.”<sup>241</sup> She contended that the presidential model fared better

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2018).

<sup>240</sup> See, e.g., William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WISC. L. REV. 1037 (arguing that retaining concurrent federal and state authority can hedge risks of regulatory reversal and implementation failure); cf. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 212 (“Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent.”). The prospects are better when the multiple agents are the states and the federal executive branch rather than multiple federal agencies, because federal agencies can be controlled by the President in a way the states cannot.

<sup>241</sup> Kagan, *supra* note 17, at 2331.

than the alternatives. As presidential administration has grown stronger, however, the already-tentative case for presidential direction of administration has become increasingly fraught. “Accountability” and “effectiveness,” in particular, may scan as more autocratic than democratic.<sup>242</sup> States’ role in both furthering and constraining presidential direction of administration introduces salutary complexity. Intergovernmental presidential administration is superior to purely federal presidential administration, even on the terms set by Kagan’s account.

#### A. *Accountability*

Kagan’s principal defense of presidential administration sounded in accountability to the public.<sup>243</sup> While acknowledging that “responsiveness to the general electorate” was not the only criterion by which to assess administration,<sup>244</sup> she argued that on this necessary-if-insufficient criterion, presidential control was superior to its alternatives: as a unitary and visible office, the presidency rendered administration more transparent,<sup>245</sup> and as the only official elected by a national constituency focused on national issues, the President was “likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”<sup>246</sup> Compared to the President, she insisted, civil servants, political appointees, interest groups, and members of congressional

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<sup>242</sup> See generally PETER M. SHANE, MADISON’S NIGHTMARE 143-74 (2009); Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 633-34 (2016).

<sup>243</sup> “Accountability” bears many different meanings. See generally Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES (Michael W. Dowdle ed., 2006). This discussion follows Kagan’s focus on electoral accountability.

<sup>244</sup> Kagan, *supra* note 17, at 2336.

<sup>245</sup> *Id.* at 2332-33.

<sup>246</sup> *Id.* at 2335. Kagan recognized that this responsiveness argument might be retrospective as well as prospective—i.e., as the only official elected by a national constituency focused on national issues, the President might be understood to have a mandate, at least with respect to salient issues. See *id.* at 2334. But she appeared at best ambivalent about the retrospective version of the argument, insisting instead on the force of the prospective claim. See *id.* (“[E]ven assuming a popular majority for a presidential candidate, bare election results rarely provide conclusive grounds to infer similar support for even that candidate’s most important positions, much less the sometimes arcane aspects of regulatory policy. Presidential claims of prior public validation indeed often have a tinny timbre.”).

committees had “a far more tenuous connection to national majoritarian preferences and interests.”<sup>247</sup>

This account was controversial from the start. Some of the most emphatic challenges focused on a plebiscitary account of presidential power, which Kagan had attempted to distinguish.<sup>248</sup> The risks such commentators recognized of grounding administrative legitimacy in a single election have only grown starker: like George W. Bush before him, Trump does not even possess whatever mandate may follow from winning the popular vote.<sup>249</sup> More problematic for Kagan’s prospective account, Trump has not sought to further “the preferences of the general public” after assuming office.<sup>250</sup> To the contrary, his administration illustrates the potential conflation of presidentialism and authoritarianism,<sup>251</sup> as well as of “national majoritarian preferences” and white nationalist populism.

Concerns about presidentialism as a mode of administrative accountability run deeper than the Trump Administration’s particular pathologies, however, because of how thoroughly presidential administration has vanquished its competitors. Recognizing that the most powerful criticisms of presidential administration contrasted presidentialism with pluralism,<sup>252</sup> Kagan responded that the question was not whether “the President is better . . . than a pluralist system” but rather whether “greater or lesser presidentialism within pluralism” was preferable given pluralism’s inevitability.<sup>253</sup> As presidential administration has grown more capacious over the past two decades, however, this hedge becomes less satisfying. The institutions and practices recognized as

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<sup>247</sup> *Id.* at 2336.

<sup>248</sup> *See, e.g.,* SHANE, *supra* note 242. *See generally* Mathews, *supra* note 242, at 633 (arguing that the “strongly plebiscitary form” of presidentialism “treats national elections, by themselves, as sufficient to legitimate the subsequent acts of the President,” so that “the removal of obstacles to executive power” is understood to be “democracy-enhancing”).

<sup>249</sup> Kagan was skeptical of such “prior public validation” claims, *see supra* note 246, and was herself writing in the wake of the 2000 election, so she recognized that “winning a national election does not necessarily entail winning more votes than any other candidate.” Kagan, *supra* note 17, at 2334.

<sup>250</sup> *Id.* at 2335.

<sup>251</sup> *See, e.g.,* Mathews, *supra* note 242, at 633-34 (discussing plebiscitary accounts of presidentialism, and cautioning that a “conception of democracy this thin offers no principled basis for a critique of autocratic government, so long as it features periodic elections”).

<sup>252</sup> *See, e.g.,* Farina, *supra* note 93, at 988-89; Shane, *supra* note 46, at 213; Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 965 (1997).

<sup>253</sup> Kagan, *supra* note 17, at 2337 n.347.

composing the pluralist system—in particular, Congress and agency officials, but also interest groups—have been either marginalized or assimilated into the practice of presidential administration itself.<sup>254</sup> Critics who dispute Kagan’s “comparative” case tend to insist that Congress or agency heads furnish at least as much public accountability as the President,<sup>255</sup> yet that rejoinder is largely beside the point in an executive-centered party system where agency heads are continuous with the presidency and Congress is not competing to control the bureaucracy.<sup>256</sup>

The relative and bounded account Kagan proposed has become more totalizing, and thus less plausible, as presidential administration has expanded. Responsiveness to the national public’s preferences and interests is a critical value for administration—even if not the sole source of accountability—but such responsiveness itself requires multiple connections between administration and the public.<sup>257</sup> Kagan’s resort to a pluralist frame underscores that the President may be defended as a principal, but not the only, tether between administration and the public. Her invocation of unitariness and singular visibility was always premised on an encompassing pluralist system. As presidential administration has come to denote broader and more autonomous presidential policymaking, however, the “pluralist system” in which Kagan sought to situate presidential administration appears to exist only, if at all, as an aspect of presidential administration itself.

This very recognition appears to motivate the recent internal turn in administrative law scholarship: lacking plausible political counterweights to the President, scholars locate new checks and balances within the bureaucracy.<sup>258</sup> But accounts that replace the external separation of powers and its inherent

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<sup>254</sup> See *supra* Section I.B.

<sup>255</sup> See, e.g., SHANE, *supra* note 242, at 158-63.

<sup>256</sup> See *supra* Section I.B. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (arguing that the partisan composition of Congress and the presidency overshadows the separation of powers as such in determining whether the branches will compete).

<sup>257</sup> See, e.g., Farina, *supra* note 93; cf. Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1112-13 (2011) (reviewing ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010)) (arguing that the resolution of both substantive issues and the proper site of resolution of these issues should frequently be left to constitutional politics); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) (framing the separation of powers and the necessary division of representation among competing institutions as a matter of the various political relationships between the people and government officials).

<sup>258</sup> See *supra* Section II.B.

pluralism with a purely internal separation of powers do not involve multiple channels for political representation and specifically electoral accountability. The internal turn reflects a broader supposition of administrative law scholarship that it is simply not possible to more fully conjoin administration and representative democracy.<sup>259</sup>

The longstanding state role in presidential administration suggests, however, that we may be giving up too easily on this project. States disaggregate national majoritarian preferences and introduce multiple channels of political representation into the administrative sphere.<sup>260</sup> For the many

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<sup>259</sup> Proposals to merge the two have long tended toward the implausible yet illuminating illustration, not the earnest suggestion. *E.g.*, Stewart, *supra* note 37, at 1791-1802 (noting that “[p]opular election of agency officials would serve to legitimate the exercise of legislative powers by administrative officials by invoking the same formal principle that legitimates the exercise of such power by legislators,” but concluding that “[t]he effort to utilize representative principles to control and legitimate agency discretion seems ultimately to lead to a dead end”).

<sup>260</sup> In this sense, states act consistently with their celebrated role as laboratories of democracy. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). That these laboratories may be functioning as national partisan laboratories does not undermine their ability to bring pluralism and diverse political representation into federal administration. *See generally* Bulman-Pozen, *supra* note 159, at 1124-30 (exploring states as laboratories of partisan politics).

In recognizing the states as democratic-administrative units, this Article shares commitments with democratic experimentalism and (at least some forms of) new governance. *See, e.g.*, Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 1 (Gráinne de Búrca & Joanne Scott eds., 2006); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 342 (2004); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *GEO. L.J.* 53 (2011). But these theories tend to regard the principal administrative challenge as problem-solving amid uncertainty and complexity and to emphasize direct democracy and deliberation, not representation and elections. Some of the accounts specifically privilege procedure, participation, and transparency as forms of such democratic deliberation, thereby tracking the recent internal turn in administrative law scholarship more generally. *See, e.g.*, Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, in *EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE* 1, 12, 18-21 (Charles F. Sabel & Jonathan Zeitlin eds., 2010) (embracing a shift from principal-agent governance to “peer review through fora, networked agencies, councils of regulators, and open methods of coordination,” and emphasizing “transparency” and “participation” as democratic requirements); *supra* Section II.B. *See generally* PETER L. LINDSETH, *POWER AND*

administrative decisions that demand popular engagement, states may render presidential administration itself plural and more broadly representative than presidential decisionmaking alone.<sup>261</sup> Federalism suggests that popular control over governmental decisionmaking is not a question of simple majoritarianism versus countermajoritarianism.<sup>262</sup> Consistent with pluralist premises, we need not reduce popular will to a single preference—all the more worrisome when this is not a majority preference formed through the mutual accommodation of a multimember body, but simply the equation of the President with a unitary national constituency.<sup>263</sup> Instead, we can understand popular will and majoritarian preferences to inhere in the aggregation of multiple policy choices.

Even an executive-dominated federal system is therefore more broadly representative, and potentially responsive to the general electorate, than a unitary system insofar as it involves fifty elected governors alongside the President.<sup>264</sup> These governors are independently responsible to state constituents, not mere repositories of federal authority. Moreover, while executives exercise an outsized role at the state level as well,<sup>265</sup> state

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LEGITIMACY: RECONCILING EUROPE AND THE NATION STATE 264 (2010) (“[D]ecentralized forms of experimentalist governance . . . disciplined by transparency, participation, and reason-giving . . . would seem to be a formula for a truly Weberian nightmare—technocratic domination without the possibility of any kind of plebiscitary leadership, strongly legitimated via representative government, capable of breaking through the varied and often questionable claims of expertise, whether within or beyond the state.”). In contrast, this Article seeks more directly to account for today’s polarized politics and existing channels of representative government. Instead of anticipating cooperative learning, it expects agonistic partisanship. Instead of championing direct deliberation, it focuses on political representation. And instead of proposing new institutions, it relies on the ones we have.

<sup>261</sup> See Bulman-Pozen, *supra* note 180, at 1009-15 (describing how executive federalism may advance democratic representation, and focusing on the disaggregated quality of state policymaking).

<sup>262</sup> See Bressman, *supra* note 39, at 481-91.

<sup>263</sup> For instance, the leading account of popular control over administration prior to presidentialism’s ascendancy, interest representation, took the legislative standard as a given; it suggested that the legislative process was in broad strokes replicated by interest group participation in administrative processes. When the presidential administration model dethroned the interest representation model, “it changed the locus of popular control from interest groups to the one governmental actor responsive to the entire nation.” *Id.* at 486.

<sup>264</sup> Bulman-Pozen, *supra* note 180, at 1009-15.

<sup>265</sup> See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017); see also David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017) (arguing that cooperative federalism regimes should empower state executives over legislatures because

legislatures also set policy on questions that have been left to agencies at the federal level. A number of recent accounts have cast notice-and-comment rulemaking as a surrogate for legislation, one that may be necessary to counterbalance presidentialism with additional popular inputs, but the analogy is necessarily limited.<sup>266</sup> State legislatures actually engage in lawmaking.

When California adopted net neutrality rules, it did so through legislation. When it adopted sanctuary policies limiting cooperation with federal immigration enforcement, it did so through legislation. When it adopted climate change regulation, fair housing regulation, and more, it did so through legislation. Policies that had been a matter of purely administrative action at the federal level became a matter of legislation at the state level, with the sort of electoral representation that defines legislative but not administrative bodies.<sup>267</sup> And although California has pride of place as the “State of Resistance”<sup>268</sup> in the Trump era, other states have likewise adopted legislation in the place of federal regulation.<sup>269</sup>

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gubernatorial elections are less second-order than state legislative elections).

<sup>266</sup> See, e.g., Emerson, *supra* note 88; Ross, *supra* note 103.

<sup>267</sup> See generally David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 19 (“Article I of the Constitution entrusts the legislative power of the United States to the Congress, so that democratically elected representatives will determine national policy.”); Mark E. Warren & Jane Mansbridge, *Deliberative Negotiation*, in AM. POLITICAL SCI. ASS’N, NEGOTIATING AGREEMENT IN POLITICS 86, 87 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (“[T]he legislature—the official law-giving body—has a unique and central role in a democracy. . . . Because Congress is composed of many representatives, elected from every part of the country, it . . . can come far closer than the executive to representing and communicating with the people in all of their plurality. When Congress is unable to act in the face of urgent collective problems, power flows to other parts of the political system, diminishing its democratic capacity and legitimacy.”). *But see* Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 625 (2001) (“[B]road-brush efforts to match the institutional competency or normative suitability of a ‘branch’ with the exercise of a particular power are destined to fail.”).

<sup>268</sup> MANUEL PASTOR, STATE OF RESISTANCE: WHAT CALIFORNIA’S DIZZYING DESCENT AND REMARKABLE RESURGENCE MEAN FOR AMERICA’S FUTURE (2018).

<sup>269</sup> See, e.g., sources cited *supra* notes 11-16; *supra* Section IV.A. In addition to legislation, many states use ballot initiatives and referenda, which may furnish possibilities for less mediated popular authorship as well. Like other aspects of state democracy, the initiative and referendum process is easy to criticize—subject to special interest capture, prey to voter ignorance and misinformation—but it is a powerful, existing mechanism for popular participation, and recent initiatives concerning criminal law, voting, and healthcare provide some fresh support for the “when the people lead, the leaders will follow” school of thought. Stephen Wolf, *Here’s How 2018 Ballot Measures Turned Out on Health Care, Criminal Justice, Climate, and More*, DAILY KOS, Dec. 3, 2018,

The distinct set of critics who understand the administrative state to be usurping Congress's authority might respond that state legislatures cannot stand in for the federal one. But the case is strong. State legislatures, too, advance values associated with representative lawmaking,<sup>270</sup> and they are arguably more representative than Congress itself.<sup>271</sup> Moreover, state legislatures today operate with a national, and not merely state-specific, orientation. In recent decades, state elections have come to closely mirror national elections: when individuals vote for state legislators, they use the same partisan heuristics and focus on the same policy issues as when they vote for members of Congress.<sup>272</sup> As Congress has been absent from major policy decisions—from protection for Dreamers to deportation, Medicaid expansion to work requirements, climate change regulation to its repeal—state legislators have taken sides, and state voters have both spurred and reacted to this role.<sup>273</sup>

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<https://www.dailykos.com/stories/2018/12/3/1814022/-Here-s-how-2018-ballot-measures-turned-out-on-health-care-criminal-justice-climate-and-more> (compiling November 2018 ballot initiatives).

<sup>270</sup> *E.g.*, NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY (2006); Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. Rev. 225 (2009).

<sup>271</sup> Vicki C. Jackson, *The Democratic Deficit of United States Federalism? Red State, Blue State, Purple?*, 46 FEDERAL L. REV. 645, 652 (2018) (“Based on the one-person, one-vote principle, state legislatures and Governors now have an arguably stronger claim to democratic legitimacy in representing the people of their respective states than does the Congress in representing the people of the United States.”).

<sup>272</sup> *See generally* DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED (2018) (explaining that Americans use the same criteria to choose candidates across state and national elections and are engaged with national more than state and local political questions); Bulman-Pozen, *supra* note 159 (arguing that states are sites of national partisan policymaking and national partisan affiliation).

<sup>273</sup> For example, in “blue” New York State, Republicans had controlled the state Senate almost continuously since the 1970s, but in 2018 a campaign focused on national issues including healthcare, immigration, and climate change yielded high voter turnout and flipped seats so that Democrats assumed a trifecta. *See, e.g.*, No IDC NY, <http://noidcny.org/> (describing insurgent campaign attempting to focus state primary election on national issues); Vivian Wang, *Democrats Take Control of New York Senate for First Time in Decade*, N.Y. TIMES, Nov. 7, 2018, <https://www.nytimes.com/2018/11/07/nyregion/democrat-ny-senate.html> (“[A]fter a closely watched, expensive battle, Democrats won eight Republican-held [Senate] seats, giving their party decisive command of Albany’s triumvirate of power and positioning them to unleash a cascade of long-stymied progressive legislation. . . . The Democrats had campaigned on a decidedly Washington-focused message, latching on to the language of a national ‘blue wave’ and promising to strike back at the Trump administration.”). In its first session, the newly elected New York government passed significant legislation with respect to abortion, immigration, climate change, voting, LGBTQ

State elections have become plausible substitutes for federal elections. The nationalizing of state politics may threaten certain traditional values of federalism,<sup>274</sup> but it facilitates pluralist intergovernmental presidential administration.

### B. *Effectiveness*

Even assuming presidential administration served “democratic norms,” Kagan’s account further insisted, it should also be measured against the arguably conflicting standard of regulatory effectiveness, by which she meant especially “a certain kind of dynamism or energy in administration, which entails both the capacity and the willingness to adopt, modify, or revoke regulations, with a fair degree of expedition to solve perceived national problems.”<sup>275</sup> Here again, Kagan maintained, the President had the comparative edge. As a single individual, he could “act without the indecision and inefficiency that so often characterize the behavior of collective entities”; as the head of the entire executive branch, he could coordinate the work of multiple agencies and set coherent regulatory priorities; and as an electorally accountable actor, he could “energize regulatory policy.”<sup>276</sup>

Kagan was well aware that “energy in the executive”<sup>277</sup> might just as easily be framed as “tyranny” and a departure from constitutional checks and balances.<sup>278</sup> But she maintained that “modern political developments,” particularly increasing periods of divided-party government, had yielded “a greater need for energy in government.”<sup>279</sup> Political gridlock and administrative ossification could only be overcome by a powerful President—and the risk of excessive unilateral power would itself be held contained by the President’s political accountability and the “inevitably” pluralist system she had likewise resorted to in defending such accountability.<sup>280</sup>

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rights, and more. *See* Bills & Laws, <https://www.nysenate.gov/legislation> (last visited July 16, 2019).

<sup>274</sup> *See, e.g.,* Schleicher, *supra* note 265.

<sup>275</sup> Kagan, *supra* note 17, at 2339.

<sup>276</sup> *Id.* at 2339, 2341.

<sup>277</sup> THE FEDERALIST NO. 70, at 432 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Energy in the Executive is a leading character in the definition of good government.”).

<sup>278</sup> Kagan, *supra* note 17, at 2342-43.

<sup>279</sup> *Id.* at 2343-44.

<sup>280</sup> *Id.* at 2337 n.347; *see id.* at 2345-46.

As with the accountability argument, the extension of the trends Kagan addressed—particularly with respect to partisan polarization and congressional gridlock—has rendered this hedge less convincing. Prominent critiques argue that the balance has swung too far in favor of executive power,<sup>281</sup> and in the age of Trump, the risks of an unchecked President loom particularly large.<sup>282</sup>

Less apparent, but in some respects a more direct challenge to Kagan's own account than the threat of unilateral executive power, presidential administration in an age of polarization may not be very effective, at least in the sense of producing policy results. Presidents have been relying more and more heavily on agencies to set domestic policy—but in so doing, they come up against limits on agency power.<sup>283</sup> Even when presidential control over agencies is no obstacle, these agencies themselves may not possess sufficient authority to advance the President's regulatory agenda. The limits on effectiveness are still more pronounced over time. As Mashaw and Berke note in considering the transition from one President to the next, "energy" may come to "seem like a Sisyphean doing and undoing of the same policies—an expensive repetition that thwarts the policy goals motivating both the enactment and rescission."<sup>284</sup> Regulatory whiplash is not a useful sort of vigor.

States may ameliorate each of these problems—the risk of unchecked authority; the President's inability to achieve policy goals in the first instance; and the President's inability to confer staying power on her policies. Perhaps most apparent, and consistent with longstanding celebrations of federalism as a check on national power, states introduce pluralism and outright contestation into the administrative domain. When the President is not the only political author of administrative policy, the risk of energy as unchecked authority is diminished. Of course, with this check also comes a diminishment in presidential energy itself. The President is no longer a unitary, dynamic actor responsible for setting policy; instead, fifty other governments have a role. But, much as states complicate concepts of a national majoritarian policy preference through disaggregation, so too can they complicate the idea of energy: the President may be less energetic and effective in certain jurisdictions, but she will be more so in others.

Indeed, it is important to recognize states as an extension of and not only a check on presidential power. *Successful* presidential administration is what raises the specter of tyranny, but presidential administration fails on its own terms if

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<sup>281</sup> See, e.g., SHANE, *supra* note 242.

<sup>282</sup> See, e.g., Farber, *supra* note 18.

<sup>283</sup> See *supra* Section IV.A.

<sup>284</sup> Mashaw & Berke, *supra* note 10, at 610.

it does not entail viable presidential policymaking. State cooperation addresses the latter problem, even as state opposition speaks to the former. States allow Presidents to advance policies that federal agencies themselves may lack authority to adopt. Recall, for example, how on Kagan's own account, President Clinton could not implement his youth smoking or family leave policies without the states; federal agencies lacked sufficient authority.<sup>285</sup> States were even more critical to President Obama's major initiatives.<sup>286</sup>

Moreover, these states may furnish durability to administrative policymaking that federal agencies cannot.<sup>287</sup> Durability itself might seem to cut against "energy": Kagan's account included modification and revocation as hallmarks of the dynamism she celebrated. And if the alternative is stasis—as suggested by Kagan's emphasis on divided government and administrative ossification—then perhaps even regulatory whiplash is to be preferred. Certainly it is more "energetic" than inaction pure and simple. But states suggest we need not be limited by this dichotomy: because there are numerous states, they enable multiple forms of activity, severing any assumed connection between action and unitariness. Moreover, while state institutions, particularly legislatures, are often themselves collective bodies, the prevalence of unified party government at the state level means that states act more readily than accounts of inefficient collective bodies suggest.<sup>288</sup>

More generally, intergovernmental presidential administration highlights tradeoffs with respect to time and space: reduced geographical scope for a policy may yield greater staying power, and vice versa. At any given moment, fifty states yield greater variation than the federal government. If a leading benefit of administrative governance is national uniformity, and orderliness and predictability that even federal courts cannot provide,<sup>289</sup> the variety, even chaos, of multiple state policies appears discordant with this objective. But the equation of federalism with inconsistency and of federal administration with consistency assumes a particular moment. Over time, particular states may in fact generate greater consistency, and, with it, longer lifespans for policy development.

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<sup>285</sup> See *supra* notes 168-173 and accompanying text.

<sup>286</sup> See *supra* notes 176-180 and accompanying text.

<sup>287</sup> Again, the Obama-Trump transition is illustrative. See *supra* notes 11-16 and accompanying text; *supra* Section IV.B.

<sup>288</sup> See, e.g., Kagan, *supra* note 17, at 2339 (noting the "indecision and inefficiency that so often characterize the behavior of collective entities").

<sup>289</sup> E.g., Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

The combination of political polarization and presidential dominance within the federal government means that administrative decisions may be dramatically modified with every new presidential election.<sup>290</sup> Recall the Trump Administration's response to President Obama's policies: the Clean Power Plan, net neutrality rules, and DACA and DAPA—among numerous other agency actions—have all been withdrawn or are in the process of being withdrawn.<sup>291</sup> But things are not that simple outside Washington. Even as allied states have amplified both President Obama's and President Trump's policy choices, opposed states have limited each chief executive's reach. The sheer number of states and extent of current partisan division means that states will themselves be divided on policy questions. And as some states perpetuate the commitments of a prior presidential administration, they can render federally fragile policies more resilient within their borders.

#### CONCLUSION

We still “live today in an era of presidential administration.”<sup>292</sup> Political and doctrinal obstacles to presidentialism have been removed by an executive-centered party system and a judicial embrace of presidential control over agencies. Yet the very strength of presidential administration in Washington yields vulnerabilities. Policies emerge from agency action, but they are readily undone when the presidency changes hands. Courts insist on greater presidential identity with agency policymaking, but they also limit the scope of such policymaking.

Federalism complicates this picture. States enhance presidential administration, allowing Presidents to realize policy objectives beyond federal agencies' capacity and furnishing a degree of stability in the face of federal regulatory whiplash. But states also oppose presidential decisions and introduce new forms of pluralism and representation to the administrative sphere. Scholars worried about aggrandized presidential power are increasingly looking to bureaucracy and administrative procedure. Yet while expertise, deliberation, and reason-giving are critical to the administrative state's legitimacy, these internal values do not tie administration to representative politics—an imperative not only of administrative authority but also of democratic governance in an age of administration. States provide additional channels for political responsiveness in a President-dominant system: instead

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<sup>290</sup> See, e.g., Mashaw & Berke, *supra* note 10, at 607.

<sup>291</sup> See *supra* notes 1-6 & 176-182 and accompanying text.

<sup>292</sup> Kagan, *supra* note 17, at 2246.

of a single elected official, the administrative domain includes fifty governors and more than seven thousand legislators. In the decades ahead, administrative states, not a unitary administrative state, are our best hope of marrying democracy and bureaucracy.