The President's Role in the Administrative State: Rejecting the Illusion of "Political Accountability"

by KEVIN BOHM*

Introduction

Near constant attention is focused on President Donald J. Trump—errant tweets routinely enflame debate over the actions of his administration.[1] The President's blustering language may endear him to his devotees, but his behavior often draws wider scrutiny. Even the nature of his tweets and his blocking of followers on Twitter is litigated.[2] Though the President would likely disagree, a high level of scrutiny is not unique to the Trump presidency. Each administration has had its critics and drawn the ire of their political opponents.[3] But even in the midst of spotlight and scandal, the government must govern—or at least attempt to do so—as political hyper-polarization and gridlock threaten to derail its operations. In times of political gridlock, administrative agencies must continue to function and keep the government operating. But, amidst the gridlock, may the President bypass the legislative process and direct agencies to take specific actions? And if so, what would justify such unilateral decision making?

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1. *See* Maggie Haberman, Glenn Thrush, and Peter Baker, *Inside Trump's Hour-By-Hour Battle for Self-Preservation*, N.Y. TIMES (Dec. 9, 2017), https://www.nytimes.com/2017/12/09/us/politics/donald-trump-President.html; Andrew Buncombe, *Donald Trump one year on: How the Twitter-President changed social media and the country's top office*, INDEPENDENT (Jan. 17, 2018), http://www.independent.co.uk/news/world/americas/us-politics/the-twitter-President-how-potus-changed-social-media-and-the-presidency-a8164161.html.

2. John Herrman & Charlie Savage, *Trump's Blocking of Twitter Users Is Unconstitutional, Judge Says,* N.Y. TIMES (May 23, 2018), https://www.nytimes.com/2018/05/23/business/media/trump-twitter-block.html.

3. *See* Alicia Parlapiano & Wilson Andrews, *Limits on Presidents Acting Alone*, N.Y. TIMES (Jan. 20, 2015), https://www.nytimes.com/interactive/2015/01/20/us/politics/Presidental-executive-action.html.

For some time, direct presidential control of administrative agencies has been the subject of debate among academics.[4] As the discussion of the president's authority to direct specific actions has evolved over time, the justification citing to the chief executive's "political accountability" to the broad American electorate most notably came to center stage in Elena Kagan's 2001 article entitled *Presidential Administration*.[5] As discussed below, the ability of a President to specifically direct administrative agencies is in tension with the foundational American principle of separation of powers. Furthermore, the notion of political accountability is at best a precarious attempt to balance normative expectations of what a President ought to do with what Congress intended his role to be.

Article II of the United States Constitution gives the executive branch the authority and power necessary to carry out and enforce the law, vesting "[t]he executive Power . . ." and obligates the President to "take Care that the Laws be faithfully executed."[6] The skeletal nature of the Constitution means that it merely outlines the scope of presidential power in broad strokes.[7]This vagueness leaves much room for debate and political punditry with respect to the President's obligations and limits.

The Constitution gives a smidge of specificity with respect to administrative agencies in Article II, Section 2: "[t]he President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . ."[8] There is no doubt that a President sets the policy for his administration, and may oversee agency operations, but what is the extent of his interference with an agency's functions? Is the President entitled to specifically dictate an agency action absent clear constitutional or statutory authority?

There is a mountain of commentary about presidential power and the President's relationship with the administrative state.[9] Debates of constitutional authority and concerns over the delicate separation of powers permeate the academic discussion of the presidency.[10] Numerous theories

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4. *See infra* note 10.

5. *See infra* note 73.

6. U.S. CONST. art. II, §§ 1, 3.

7. *See* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967 (2001).

8. U.S. CONST. art. II, § 2.

9. JERRY L. MASHAW, ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 302 n.2 (5th ed. 2003).

10. *See*, *e.g.*, James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851 (2001); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM.

of "presidential control" have attempted to develop a constitutional justification for the chief executive's ever-growing entanglement with the administrative state, and to defend the current administrative organization as being consistent with the intent of our government's structure.[11] Tracking this debate provides an opportunity to survey the conversation among prominent academics; and in doing so, it is useful to recognize that this debate does not take place in a vacuum. As in any discipline, legal discussions are subject to the influence of broader societal changes, the crossing-over of ideas from other disciplines, and public sentiment at large.[12] Placing presidential control theories and critiques in the context of their intellectual and historical background may add a useful lens through which to view and understand them and help articulate the spirit of the time.

The discussion sparked by Supreme Court Justice, and former Solicitor General Elena Kagan's indisputably influential article, *Presidential Authority*, led to numerous critiques.[13] Kagan's prominence, and the fact that her article is widely cited, makes her work an excellent choice to focus on.[14] In her article, Kagan analyzed President Bill Clinton's use of directive authority to guide agency actions that furthered his policy agendas.[15] After describing the history and development of presidential oversight of administrative agencies during the Reagan, Bush I, and Clinton years, Kagan argues that the increased use of executive authority for agency oversight and intervention is permissible, beneficial, and desirable.[16] Though she does not embrace a unitarian view of executive power, Kagan nonetheless defends a President's ability to assert control and direct the administrative state by relying on the doctrines of statutory interpretation and a normative "political accountability" argument.[17]

This note begins with relevant highlights from constitutional and administrative law pertaining to the subject of presidential control followed by an overview of the main aspects of Kagan's theory to orient the

L. REV. 573, 649 (1984) (explaining that Congress can delegate decision making authority to the agency rather than the President) [hereinafter Strauss 1984]; Peter L. Strauss, *Overseer, or the Decider? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (the President has no decision making authority with respect to an agency unless congress explicitly gives him a role) [hereinafter Strauss 2007].

11. *Id.*

12. *See* DANIEL T. RODGERS, THE AGE OF FRACTURE 8–9 (2011).

13. Elena Kagan, *Presidential Authority*, 114 HARV. L. REV. 2245 (2001).

14. *Presidential Administration* was cited 371 times in its first year alone. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1495 (2012).

15. Kagan, *supra* note 13.

16. *Id.*

17. *See id.*

discussion. Specifically, the focus will be on the development of the presidential administration theory, a selection of prominent critiques to form observations of Kagan's work, and the larger presidential control framework. Though legal theories are often portrayed as dispassionate and purely analytical, they are not insulated from broader external influences, and broader social trends may be influencing legal thought on an aspect of presidential power.[18] Finally, the political backdrop during the emergence of presidential control theories in the Reagan era is contrasted with the more recent period; culminating with an argument rejecting "political accountability" as a justification for presidential directives in the face of political and institutional gridlock.

I. Constitutional Structure of the Administrative State

Distrust of a powerful unified government is at the core of the American creation story. Think back to stories from elementary school history and the heroic depictions of the American revolutionaries fighting back against a despotic English monarch. James Madison wrote in the Federalist Paper that, "[i]f angels were to govern men, neither external nor internal controls on government would be necessary."[19] To allay fears of a strong national government the framers devised our tripartite structure designed to separate and distribute powers, creating incentives for each branch to "[keep] each other in their proper places."[20]

Our government derives all authority from a Constitutional granted by the people.[21] "We the People—remember the Preamble—have granted limited and enumerated powers to the three branches of the federal government."[22] The first three articles of the Constitution outline the basic structure and power of the legislative, executive, and judicial branches.

The text of the respective vesting clauses varies and, in keeping with the Constitution as a whole, are vague, but "[w]ill it be sufficient to mark, with precision, the boundaries of these [branches], in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?"[23] The blending of powers necessary to form administrative agencies challenge the strict formalist adherence to the idea of separation of powers, and potentially breaks down the adversarial nature that was meant

18. *See* RODGERS, *supra* note 12.

19. THE FEDERALIST No. 51 (James Madison).

20. *Id.*

21. *Id.*

22. MICHAEL STOKES PAULSEN, ET AL., THE CONSTITUTION OF THE UNITED STATES 69 (3rd ed. 2016).

23. THE FEDERALIST No. 48 (James Madison).

to keep governmental institutions in check. Centralized power, and single-minded governance seems to have been what the framers sought to prevent. James Madison warned, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands False . . may justly be pronounced the very definition of tyranny."[24]

Given their revolutionary heritage, the framers were fearful of an overbearing central power and sought to create a government of divided powers to prevent the tyrannies of the recently displaced English Crown.[25] Whether the existence of the modern administrative state should raise this same sort of concern is still up for debate.[26] "Controlling and checking administrative agencies poses an important constitutional problem, unaddressed by the text or the framers' intent."[27] We are left to ask: where exactly is decision making authority vested when Congress creates an executive agency, and to what extend may the President control his own people?[28]

II. Administrative Law: Separation of Powers Operationalized

Administrative agencies have existed since George Washington's presidency.[29] However, the modern administrative state looks dramatically different from the government as it existed in the founding era. In 1802, there were 2,597 employees of executive agencies, by 1997 the number had grown to 1,872,000.[30] According to the most recent report from 2017, the number stands at 2,087,747 federal employees working in executive agencies.[31] As the administrative state has grown in size, scope, and complexity, the balance of power in the government has decidedly shifted

24. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 342 (5th ed. 2017), quoting THE FEDERALIST No. 47 (James Madison).

25. Richard R. Beeman, *The Constitutional Convention of 1787: A Revolution in Government*, NAT'L. CONSTITUTION CR., (last visited Apr. 15, 2018), https://constitutioncenter .org/interactive-constitution/white-pages/the-constitutional-convention-of-1787-a-revolution-in government.

26. The modern administrative state has, to a large extent, evolved out of necessity as the government requires technical expertise and adequate staff to administer the law and programs Congress has created.

27. CHEMERINSKY, *supra* note 24.

28. *See*, *e.g.*, *supra* note 10.

29. Congress created the Department of Foreign Affairs, which would later be renamed the State Department in July 1789. *See* Percival, *supra* note 7, at 973 n.49.

30. *Id.* at 975 (citing Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 691 (2000)).

31. OFFICE OF PERSONNEL MGMT., SIZING UP THE EXECUTIVE BRANCH, FISCAL YEAR 2017 (2018).

towards the executive branch.[32] However, this accumulation of power in a branch of government run by a single person may not be a desirable phenomenon.

Agencies, being creatures of statute, are delegated their authority by Congress.[33] The creation of an agency is a legislative exercise, while the actual operation is an executive function.[34] Once created, the agency is handed to the President for him to administer. This arrangement between Congress and the President creates issues of power sharing. There is disagreement about whether the principle of separation of powers even allows for allocation of authority from one branch to another, and if so, what would be substantively required?[35] However, it is interesting to note that this separation of powers question is a problem created by Congress itself. Precisely because administrative agencies are creatures of statute, Congress could resolve issues of presidential control if it would be more explicit about the design and structural intent of administrative agencies and how they are to operate. As will be discussed later, Kagan herself states that she "accepts Congress's broad power to insulate administrative activity from the president."[36] Congress need only weigh in on the matter. However, that would necessitate taking a stance on an issue—something unlikely to happen.

Taking the uncertainty of the Constitution as a given, there are a few tools that can be used to analyze constitutional issues. With respect to separation of powers inquiries, the two main analytical flavors come in the form of formalist or functionalist inquiry.[37] The formalist approach emphasizes the explicit power vested by the Constitution in the three branches of government.[38] For formalists, the structure of the Constitution itself demands that power be kept separate.[39] The question is if power "is exercised by the appropriate department in the appropriate way."[40] This offers a simple front-end check on administrative agency power by looking to the source of authority rather than a more uncertain inquiry into the action

32. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001).

33. Percival, *supra* note 7, at 967; CHEMERINSKY, *supra* note 24, at 355–56.

34. Congress delegates functions of all three branches to agencies, but my focus will be on theories of the relationship between the President and administrative agencies with respect to the actual operation of the agency.

35. Magill, *supra* note 32, at 607.

36. Kagan, *supra* note 13, at 2251.

37. Magill, *supra* note 32, at 608.

38. *Id.*

39. Reflecting a strict textual and structural interpretation.

40. Magill, *supra* note 32, at 609.

itself. For example, Congress may enact laws and implement policy decisions via the legislative process, then hand them over to the President to execute. However, Congress may not delegate its own legislative functions over to the executive branch. Under a formalistic approach, delegations are permissible as long as they do not blur the boundaries between branches as created by the Constitution.

A. The Formalist Approach

The influence of the formalist approach seemed to be at its height in the 1930's when the Supreme Court struck down two statutes on the grounds that they violated the nondelegation doctrine.[41] "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite government."[42] The only two cases where the Supreme Court struck down congressional delegations of power as impermissible are *Panama Refining Co. v. Ryan*, and *A.L.A Schechter Poultry Corp. v. United States*, both in 1935. The delegations in *Panama Refining* and *Schechter Poultry* were invalidated because the delegation purportedly granted the President legislative power without clear guidelines, or an adequate "intelligible principle."[43] Therefore, a presidential directive to an administrative agency absent a clear intelligible principle would not be permissible. Almost two decades later, in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Black concluded that a presidential directive, absent clear congressional delegation of authority, violated the framers' decision to "[entrust] the lawmaking power to the Congress alone in both good and bad times."[44] Justice Black's statement is in keeping with later arguments that a President should not have unilateral authority in all realms, showing that concerns of executive overreach are nothing new.

For formalists, the intelligible principle is a way for Congress to accomplish a constitutional transubstantiation of sorts, whereby the scope of executive delegation is limited even if not precisely defined by the express terms of the statute.[45] "When the issue is delegation by Congress to the executive branch, the Supreme Court follows a standard it articulated in 1928—that there must be an 'intelligible principle' in the legislation to guide

41. The nondelegation doctrine is based on a textualist interpretation of the vesting clauses (the clauses say nothing about the ability to delegate power to other branches), as well as a strict structuralist interpretation of the three separate branches of government.

42. Mistretta v. United States, 488 U.S. 361, 371 (1989) (upholding the delegation of power to promulgate federal sentencing guidelines to an independent Sentencing Commission).

43. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

44. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

45. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473–76 (2001).

the discretion of the government officials who are to implement the law."[46] The mere presence of an intelligible principle in the statutory delegation has the power to transform legislative power *into* executive power by sufficiently cabining the executive branch's discretion.

In an effort to maintain the separation of powers, the Court requires Congress to provide an intelligible principle to guide agency action with determinate criteria.[47] While the Court invalidated the two challenges to statutes from the *Panama Refining* and *Schechter Poultry* cases discussed above, it has not invalidated a statute for lacking an adequate intelligible principle since.[48] The "[nondelegation] doctrine has had one good year, and 211 bad ones (and counting)."[49]

In modern jurisprudence, the Supreme Court has broadly accommodated congressional delegations to the administrative state as a practical necessity "of our increasingly complex society."[50] Though the nondelegation principle has largely gone by the wayside, the formal requirements of the intelligible principle live on in modern separation of powers jurisprudence; however, the structural constraint lacks the bite it once had.

B. The Functionalist Approach

On the other hand, the functionalist approach accepts that the branches of government will have overlapping powers and responsibilities. Instead of the more formal textual and structural inquiry, the functional inquiry is if the overall balance between the branches has been upset by a particular delegation.[51] This balancing test was articulated in Justice Jackson's

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46. Stephen Wermiel, *SCOTUS for law students: Non-delegation doctrine returns after long hiatus*, SCOTUSblog (Dec. 4, 2014, 8:00 PM), http://www.scotusblog.com/2014/12/scotus-for-law-students-non-delegation-doctrine-returns-after-long-hiatus/.

47. *See Whitman*, 531 U.S. at 457 (holding that the EPA's mandate under the Clean Air Act to set levels "requisite to protect human health" was sufficient to cabin agency discretion).

48. Though there have been attempts to revive the nondelegation doctrine over the years, the Supreme Court recently announced that it will hear another nondelegation challenge in the upcoming *Gundy v. United States* case (asking whether Congress improperly delegated authority to the Attorney General in the context determinations under the Sex Offender Notification and Registration Act); *see* Mark Joseph Stern, *The Supreme Court May Revive a Legal Theory Last Used to Strike Down New Deal Laws*, SLATE (Mar. 5, 2018, 12:26 PM), https://slate.com/news-and-politics/2018/03/supreme-court-may-revive-non-delegation-doctrine-in-gundy-v-united-states.html; Amy Howe, *Justices grant review in two new cases*, SCOTUSBLOG (Mar. 5, 2018, 11:31 AM), http://www.scotusblog.com/2018/03/justices-grant-review-two-new-cases/.

49. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

50. Mistretta v. United States, 488 U.S. 361, 372 (1989).

51. *See* Magill, *supra* note 32.

concurrence in *Youngstown* where he acknowledged the inevitable blurring of powers:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.[52]

Modern functionalists accept the delegation of legislative power to the executive as long as the delegation is somehow limited by statute. Justices Stevens and Souter articulated this position in their concurring opinion in *Whitman v. American Trucking Associations*:

> The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is "legislative" but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not "legislative power." Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "legislative power."[53]

For Justices Stevens and Souter "[a]s long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it."[54]

Either through the flexible interpretation of the functionalists, or by the strict logic of the formalists, the Supreme Court permits Congress to delegate a considerable amount of discretion and authority to administrative agencies. However, given the President's domination in the administrative arena, broad delegations to agencies have resulted in the accumulation of vast

52. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

53. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., and Souter, J., concurring).

54. *Id.* at 490.

power in the executive branch.[55] The modern separation of powers battleground has shifted from scrutinizing the delegation itself to the rights and responsibilities of the President.[56]

As the validity of delegations themselves has been largely accepted, the inquiry then shifts to that of identifying to whom statutory discretion is in fact delegated. The text of the statutes themselves often vest authority in the administrator of the agency.[57] Yet Unitary Executive Theorists[58] would argue that the President is obligated to intervene with governance by such appointees as a matter of constitutional mandate.[59] Under the Unitary view, the President may, and should, commandeer the operations of an agency. However, direct presidential decision making in the realm of the agency raises issues of statutory construction and separation of powers concerns. "[The] separation of powers reflects a conscious effort to diffuse authority to prevent abuses of power."[60]"Inherent in this division of power is the notion that the President must respect statutory commands even when they require a result contrary to his own policy preferences."[61] The discussion that follows focuses on the President himself and his ability to direct and supplant agency decisions. This raises legal questions of whether that directive power is permitted, and the separate normative question of whether centralized decision making is even desirable. And even if unilateral presidential control is indeed desirable—a dubious contention—should the simplistic notion of "political accountability" be worthy of our faith as the bedrock of presidential checks and balances in the administrative arena? Can it serve as a meaningful check on presidential whims to assuage concerns of arbitrary action?

55. *See* Magill, *supra* note 32.

56. *See, e.g.,* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–85 (2003); Lisa S. Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A critical look at the practice of Presidential control,* 105 MICH. L. REV. 47, 52–56 (2006); Blumstein, *supra* note 10; Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

57. The administrator of the agency (or board as may be the case with some agencies) is often explicitly named as the person to whom Congress has delegated discretion when implementing the law.

58. Unitary Executive Theory suggests the answer to this question is a matter of constitutional interpretation. If the President has been delegated "*the* Executive Power" by the Constitution, then he may—and is in fact obliged to—take charge of everything happening under his authority in the executive branch.

59. *See* U.S. CONST. art. II, §§ 1, 3.

60. Percival, *supra* note 7, at 969.

61. *Id*.

III. Presidential Control of the Administrative State

Elena Kagan's *Presidential Administration* was the most widely cited law review article of 2001.[62] At the time, Kagan's theory was the latest iteration in a line of presidential control theories used to justify the administrative state.[63] *Presidential Administration* is an important work to examine, given Kagan's prominence in the legal field. She is a legal academic, and was a law professor at both the University of Chicago School of Law and Harvard Law School.[64] She served in the Clinton administration as Associate Counsel to the President, then Deputy Assistant to the President for Domestic Policy.[65] Kagan then returned to academia to serve as Dean of Harvard Law School from 2003-2009 before returning to government when President Obama nominated her as Solicitor General in 2009.[66] Most importantly, she took her seat on the United States Supreme Court as an Associate Justice in 2010.[67] This is a person whose thoughts on constitutional issues matter a great deal. As a high-profile legal figure, her opinions carry tremendous weight and are worthy of attention. It is no wonder that her article is debated so frequently.

Many articles that discuss *Presidential Administration* recognize it as a significant contribution to the development of the presidential control model.[68] However, the vast majority of academic papers that cite to *Presidential Administration* merely reference it in passing with a single footnote.[69] Given a sample of 105 journal articles which cite to *Presidential Administration*, only 15% address Kagan's proposed theory with much detail.[70] Yet even those

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62. Shapiro & Pearse, *supra* note 14, at 1495 (*Presidential Administration* with an estimated 371 citations in the first year after publication).

63. *See* Bressman, *supra* note 56 (Professor Bressman provides an overview of the development of Presidential control models in Section I. Past models include: transmission belt, expertise, and interest group representation models.).

64. *Current Members of the United States Supreme Court*, SUPREME COURT OF THE UNITED STATES (last visited Mar. 17, 2017, 12:23 PM), https://www.supremecourt.gov/about/biographies.aspx.

65. *Id.*

66. *Id.*

67. *Id.*

68. Whether the authors agree or not with Kagan's particular take on presidential control, *Presidential Authority* is often regarded as a significant addition to the presidential control field.

69. In a sample of 105 articles that reference Kagan's *Presidential Administration* (*PA*), 38 mentioned *PA* once, 36 mentioned *PA* two to five times, with only 16 mentioning *PA* in more than ten footnotes. Articles were found using Westlaw. To keep the search manageable for this short project, the search was focused on journals published by law schools ranked in the top 14 by *U.S. News & World Report*, and student notes were removed.

70. *Id.*, with "much detail" meaning that the article cited to *Presidential Authority* 10 or more times.

scholars tend to discuss presidential control theories in general rather than the specific merits of Kagan's propositions.[71] In articles where the discussion does center on the theory of presidential authority, the focus seems to be on the implausibility of Kagan's political accountability argument.[72] Meanwhile, Kagan's more specific contribution of a statutory interpretation justification does not seem to have gained much traction.[73] Overall, her justifications seem to be challenged rather than embraced.[74]

IV. Traditional Presidential Control

Kagan embraces a strong view of presidential control over the executive branch.[75] This view is articulated in *Presidential Authority*, where she describes a middle ground between the "traditional" view and the "unitary executive theory."[76]

According to the traditional view, Congress has the constitutional authority to directly vest discretionary authority in the head of an agency.[77] Following the traditional separation of powers approach and the current method of statutory interpretation, the delegation to an agency head is understood to preclude presidential directives:[78]

> Basic separation of powers doctrine maintains that Congress must authorize presidential exercises of essentially lawmaking functions. In directing agency officials as to the use of their delegated discretion, the President engages in such functions, but without the requisite congressional authority. Congress indeed has

71. Referring to the sample of articles mentioned *supra* note 69.

72. *See, e.g.,* Kagan, *supra* note 13.

73. *See* Percival, *supra* note 7 (arguing that Kagan's statutory interpretation framework is inconsistent with constitutional text, as well as congressional intent regarding administrative agency structure); Blumstein, *supra* note 10 (dismissing structural arguments as being policy arguments in camouflage); Bressman, *supra*, note 56 (political accountability is an insufficient rationale for justifying presidential directive authority); Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314 (2006) (Presidential agendas are too short-term oriented to provide sufficient incentives to justify political accountability rationale for reaching the best long term interests—efficiency is not the same as wisdom).

74. Of the articles in my sample, only one supported Kagan's political accountability argument; *see* Blumstein, *supra* note 10.

75. *See* Kagan, *supra* note 13.

76. *Id.*

77. Todd B. Tatelman, *Supreme Court Nominee Elena Kagan: Presidential Authority and the Separation of Powers*, U.S. CONGRESSIONAL RESEARCH SERVICE 7 (Report No. R41272, June 4, 2010).

78. Kagan, *supra* note 13, at 2319–20.

> delegated discretionary power, but only to specified executive branch officials; by assuming responsibility for this power, the president thus exceeds the appropriate bounds of his office.[79]

Expressed another way, because "Congress has, by statute, specifically vested the decision making authority in the agency head, the President cannot 'go so far as to displace the agency head's discretion to make decisions vested in that officer by law.'"[80] For traditionalists, the statutory delegations seem to stand on the plain meaning of the text and precludes presidential interference.

In contrast, unitary executive theorists assert that the Constitution vests exclusive control of the executive branch in the hands of the President.[81] Any attempt by Congress to limit the President's control over the executive branch is unconstitutional—particularly with respect to the creation of independent agencies. In addition to a strict reading of the Constitution, unitarians invoke a political accountability argument to further justify unitary executive control by the President, as he is ultimately held responsible for the collective action of the government.[82] However, Kagan explicitly rejects such a strong stance, and states that "the unitarians have failed to establish their claim for plenary control as a matter of constitutional mandate."[83] "The original meaning of Article II is insufficiently precise and, in this area of staggering change, also insufficiently relevant to support the unitarian position."[84]

V. Kagan's Presidential Administration

As control of the administrative state has become more centralized over time, various models of presidential control have emerged as an attempt to justify this framework as consistent with the Constitution's structural separation of powers.[85] It seems that Kagan uses the term "presidential administration" to describe a middle ground between the traditional view that is dominant in modern administrative law, and the minority Unitary Executive understanding of presidential power. Her theory is primarily based on observations of President Clinton's practice while in office and his

79. Kagan, *supra* note 13, at 2319–20.

80. Tatelman, *supra* note 77.

81. *Id.*, at 8; U.S. CONST. art. II, § 3 (the "take care" clause).

82. *Id.* at 9 (citing Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. 103, 116 (2009)).

83. Kagan, *supra* note 13, at 2326.

84. *Id.*

85. Bressman & Vandenbergh, *supra* note 56, at 52–56.

innovations on preexisting presidential control techniques.[86] Those innovations include re-tooling review by the Office of Information and Regulatory Affairs (OIRA)—shifting from Reagan's deregulatory agenda, issuing directives, and publicly taking credit/responsibility for certain agency action.[87]

Before sketching the framework of presidential administration, Kagan gives a review of "non-presidential" mechanisms of administrative control, which includes: congressional control of delegations, self-control (similar to agency expertise justifications), interest group control, and judicial control.[88] Since the tools underlying presidential administration did not originate in the Clinton Administration, Kagan also reviewed the origins of centralized executive review of agency rulemaking by OIRA, which was established by President Reagan.[89] President Ronald Reagan's innovative use of presidential power transformed the chief executive's relationship with the administrative state, setting the tone for his successors in office.[90] "From controversial fringe to mainstream in twenty years, centralized presidential regulatory review has now taken center stage as an institutionalized part of the modern American presidency."[91]

However, Kagan's theory presented in *Presidential Administration* is based on President Clinton's unique brand of presidential control. Kagan recognizes that President Clinton built on President Reagan's novel regulatory review process[92] by expanding presidential authority over administrative agencies, and in some circumstances even claiming the power to direct outcomes.[93] But, one of the key features that distinguished Clinton's practice of presidential control was his "articulation and use of directive authority over regulatory agencies."[94] Kagan defined "directive authority" as the President's "commands to executive branch officials to take specified actions within their statutorily delegated discretion."[95] The second

86. Kagan, *supra* note 13.

87. *Id.* at 2290–303.

88. *Id.* at 2253–69. The development and demise of the expertise and interest group control models are discussed by Professor Bressman in her article; *see* Bressman, *supra* note 56, at 469–78.

89. *Id.* at 2277–81.

90. Blumstein, *supra* note 10, at 853.

91. *Id.* at 854–55.

92. *See* Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981).

93. *See* Kagan, *supra* note 13, at 2281–2319; Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), (giving the president the power to resolve disputed between an agency and OIRA, "[t]o the extent permitted by law").

94. Kagan, *supra* note 13, at 2250.

95. *Id.*

component of this new form of presidential control was Clinton's "assertion of personal ownership over regulatory product."[96] This presidential ownership of agency action was achieved by personal announcement and appropriation of regulatory decisions and actions at public appearances by the President to "promote himself and his policies."[97] Importantly, these enhancements on the more traditional behind-the-scenes approach to regulatory oversight are what give presidential administrations a claim to greater transparency. "[President Clinton thus] emerged in public, and to the public, as the wielder of "executive authority" and, in that capacity, the source of regulatory action."[98] This more transparent aspect of presidential administration, as compared to prior theories of presidential control, lays the "political accountability" underpinnings for Kagan's take on statutory interpretation. However, as seen below, this argument is lacking in regard to persuasive power because it is an oversimplification of the process, and glosses over the fact that the President can simply hide or distance himself from less popular actions.

VI. Statutory Interpretation

Kagan's proposed shift from the traditional separation of powers viewpoint to the one proposed in *Presidential Administration* hinges on changing how Congressional delegations to administrative agencies are interpreted.[99] Under the traditional view of separation of powers, the specific delegation of decision making authority to an agency head precludes presidential intervention, unless explicitly provided for.[100] Whereas, Unitarians argue that the President has inherent authority over the administrative officials that stem directly from the constitutional grant of executive authority. Although, unlike Unitarians, Kagan accepts congressional primacy in the delegation arena.[101] However, she argues that recognizing congressional control does not necessarily mean that the President lacks directive power:

> [M]y acceptance of congressional authority in this area does not require the conclusion, assumed on the conventional view, that the President lacks all power to direct administrative officials as to the

96. Kagan, *supra* note 13, at 2250.
97. *Id*. at 2299–300.
98. *Id*. at 2300.
99. Kagan, *supra* note 13, at 2320.
100. *Id.*
101. *Id*. at 2326.

> exercise of their delegated discretion. That Congress could bar the President from directing discretionary action does not mean that Congress has done so; whether it has is a matter of statutory construction.[102]

Kagan's legal innovation is the creation of a middle ground between the Traditional and Unitary views with her shift in statutory interpretation.[103] Kagan "acknowledge[s] that Congress generally may grant discretion to agency officials alone and that when Congress has done so, the President must respect the limits of this delegation."[104] But as she points out, congressional limitations precluding presidential influence are focused on insulating independent agencies.[105] In general, Kagan argues, the limitation of delegated discretion should not apply to "regular" executive agencies. The "statutory predicate" underlying the traditional separation of powers view is but one of two constitutionally permissible interpretive methods.[106] She suggests "that most statutes granting discretion to [the] executive branch—but not independent—agency officials should be read as leaving ultimate decision making authority in the hands of the President."[107] That is, unless specifically excluded, the President should not be read out of delegations of power.

Kagan addresses the constitutional concerns raised by her theory by invoking key Supreme Court decisions that have commented on the scope of presidential control, such as *Youngstown* and the removal line of cases (e.g., *Myers*, *Humphrey's Executor*, and *Morrison*).[108] After distinguishing the key cases and addressing legal hurdles, Kagan concludes that it is permissible to "assume that the delegation runs to the agency official specified, rather than to any other agency official, but still subject to the ultimate control of the President."[109] When attempting to decipher congressional intent, Kagan argues, it is permissible—and in her perspective, desirable—to assume that "Congress knows . . . that executive officials stand

102. Kagan, *supra* note 13, at 2326.

103. *See id*.

104. *Id.* at 2320.

105. *Id*.

106. Kagan, *supra* note 13, at 2320

107. *Id.*

108. *Id.* at 2320–37; *see also* Myers v. United States, 272 U.S. 52 (1926)*,* Humphrey's Executor v. United States, 295 U.S. 603 (1935), *and* Morrison v. Olson, 487 U.S. 654 (1988).

109. Kagan, *supra* note 13, at 2326–27.

in all other respects in a subordinate position to the President."[110] This understanding is what led congress to impose statutory restrictions on presidential involvement with independent agencies.[111] However, statutes should not be read to restrict presidential involvement in executive branch agencies, unless explicitly stated. Her conclusion, that Congress may not place removal restrictions on *all* administrative officers, is based on the President's right to procedural oversight and directive authority.[112] "[W]hen Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President."[113]

If taking the perspective that the branches are in competition, it may be expected that Congress would guard its constitutional power to legislate and make policy decisions.[114] After all, executive agencies have no authority other than that given to them by Congress. Ideally, this separation of powers acts as a check on the administrative state. "To the extent that Congress delegates specifically and clearly to administrative agencies, it performs this control function effectively."[115] However, Congress has given away vast amounts of policy making authority to administrative agencies through open-ended delegations.[116] Congress has made the decision—whether made of concern for efficiency, the desire for agency expertise, or perhaps to avoid the political liability of decision making—to delegate broad powers to the executive branch.[117]

Kagan argues that the assumption that Congress intended to retain control of agencies, or insulate them from the President, "does not square with many other aspects of Congress's behavior."[118] Furthermore, the existence of removal restrictions in independent agencies shows that Congress knows how to prevent presidential interference when it wants to. The fact that Congress did not restrict presidential influence on other agencies can just as validly be assumed to infer acceptance of the practice.[119]

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110. Kagan, *supra* note 13, at 2327 (this conclusion is related to Kagan's discussion of the removal line of cases which have established the President's authority to remove certain officers without cause).

111. *Id.* at 2325–26 (the limitations of Presidential influence come from congress' ability to place removal restrictions).

112. *Id.* (emphasis added)

113. *Id.* at 2328.

114. Kagan, *supra* note 13, at 2255.

115. *Id.*

116. *Id.*

117. *See id.* at 2254–61.

118. *Id.* at 2330.

119. *Id.* at 2327.

"Congress knows, after all, that executive officials stand in all other respects in a subordinate position to the President."[120]

> . . .Congress has reposed considerable, and ever-increasing, authority in the [executive branch]. So too if the assumption [of competition for power between the branches] were true, recent assertions of presidential authority over all agencies, executive and independent, would have met stiffer resistance from Congress than they in fact encountered. For reasons earlier discussed, Congress tends to defend its institutional interests poorly. There seems little reason to presume that as to the single matter of directive authority, Congress self-consciously has adopted such an uncommonly self-protective posture.[121]

Alternatively, Kagan recognizes that it is equally, if not more, likely "that Congress generally has no intent on the matter" of presidential directive authority.[122]

As stated previously, Congressional delegation of authority is a choice—and perhaps this confusion and constitutional handwringing is in large part the fault of Congress and its inability to express its intent clearly, if at all. As Kagan suggests, absent a clear delegation to *only* the agency head or restriction, a role for the President should not be read out of the statutory delegation.[123] Kagan also argues that the method of statutory interpretation is also a choice.[124] She ultimately suggests that a default interpretive principle that leaves space for presidential control is not only consistent with statutory delegation, but may more accurately reflect the intent and understanding of Congress.[125] Referencing the structure of the administrative state itself, Kagan argues that if Congress intended to retain greater control over policymaking, and preclude presidential interference, independent agencies would be more common than executive agencies; which is not the case.[126] However, this discounts the fact that it is difficult to divine congressional intent from what it has not done, and might be the result of an overly simplistic reduction of the political process. Can the

120. Kagan, *supra* note 13, at 2327.
121. *Id.* at 2330.
122. *Id.*
123. Kagan, *supra* note 13, at 2328.
124. *Id.*
125. *Id.* at 2330.
126. *Id.*

inaction, or political inability/unwillingness of Congress to act, really be interpreted as a positive desire to hand such power to a rival branch?

VII. Political Accountability

For Kagan, two core issues are central to presidential control models; (1) making the administration accountable to the public, and (2) making the administration efficient or otherwise effective.[127] These two goals are often viewed to be in conflict with each other because increased efficiency is often associated with increased delegation to unelected agency officials.[128] Kagan makes the case that presidential administration resolves this conflict by consolidating ultimate agency leadership and decision making authority in a single politically accountable agent—i.e., the President—enhancing both transparency and efficiency.[129]

Kagan argues that enhancing the President's role increases political accountability, because it "establishes an electoral link between the public and the bureaucracy," where no such direct link existed before.[130] This link is desirable "because the President has a national constituency, [and] he is likely to consider . . . the preferences of the general public, rather than merely parochial interests."[131] "The Presidency's unitary power structure, its visibility, and its 'personality' all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate."[132] If nothing else, this *assumption* of accountability to a broad national constituency is consistent with the President's selfish incentives for his reelection and favorable legacy.[133]

"Because the public holds Presidents, and often Presidents alone, responsible for so many aspects of governmental performance, Presidents have a large stake in ensuring an administration that works, at least in the eyes of the public."[134] Therefore, given a President who is responsive and politically accountable to the electorate, his direct control of the administrative state will not only enhance its functioning, but is in fact

127. Kagan, *supra* note 13, at 2331.

128. *Id.*

129. *Id.*

130. *Id*. at 2332.

131. *Id.* at 2335.

132. Kagan, *supra* note 13, at 2332.

133. *Id.* ("The advent of what has become known as the permanent Presidential campaign, a development linked to fundamental changes in polling technology and mass media, at once demonstrates and reinforces the President's attention to the national electorate's views and interests.").

134. *Id.* at 2339.

democratically desirable.[135] From an institutional choice perspective, "the President holds the comparative advantage" with respect to the oversight of the administrative state compared to Congress.[136]

Kagan's central argument is that it is permissible, and likely desirable, to shift the default method of statutory interpretation *because* the President is a politically accountable elected official.[137] Her reframing of the statutory interpretive lens does the "legal work" in *Presidential Administration*, while "political accountability" provides the normative footing.

It is her reliance on the unique position of the presidency in relation to the administrative state and the claimed benefits of political accountability that provide the policy rationales used to defend her theory of presidential control.[138] Kagan shifted the conversation away from constitutional analysis and statutory interpretation to a normative discussion of political accountability—the critiques followed suit. The result seems to be that Kagan's statutory shift has gotten lost in the ether as the majority of responses focus on the normative political accountability rationale.

VIII. The Response

At first blush, the academic response to Kagan's *Presidential Administration* looks extensive. An initial database search yielded 905 different sources that have cited *Presidential Authority*.[139] There is no doubt that her work is influential, but the substance of presidential authority is not as widely debated as that initial number might suggest.

For the purposes of this note, attention was focused on a subset of prominent articles written by the most influential academics in the administrative law field. As a proxy for "prominent academic," the sample was limited to articles published by journals associated with law schools in the top 16 of the *U.S. News & World Reports*.[140] Articles with titles "clearly unrelated" to presidential control, administrative agencies, statutory

135. Kagan, *supra* note 13, at 2335–37.

136. *See id.* at 2336–37.

137. *Id.*

138. *See id.* at 2346–80 (Kagan uses the concept of political accountability to deflect concerns of decreased congressional oversight (at 2347), the pushing out of agency experts (at 2352), the displacement of constituency input (at 2358), non-delegation challenges (at 2364), and traditional reliance on judicial review (at 2372)).

139. Sources include all documents that cite Kagan's *Presidential Authority* from 2001–18 as listed in the WestLaw, Lexis, and JSTOR databases. The sources were distributed as follows: Cases, 11; Briefs, 25; Administrative Decisions, 6; Journal Articles, 841; "Other Legal", 12; "Law Adjacent" (Political Science articles), 10.

140. Student notes were also eliminated.

interpretation, or separation of powers were removed (e.g., statute or case-specific notes).[141]

Of the 105 articles in my subset between 2001 and 2018, *Presidential Authority* was cited an average of 5.3 times, with 71% of articles citing it five times or fewer; 37%, merely included a single passing reference. This suggests that many articles were citing the article in recognition of its popularity but did not in fact discuss Kagan's propositions. To further narrow the focus of review, the number of citations to *Presidential Administration*, were used as a proxy for an article's depth of analysis of Kagan's arguments. Removing articles with fewer than ten references left a sample set of 16 articles for more in-depth review.[142]

Of the 16 articles reviewed, only one supported Kagan's ultimate conclusions for direct presidential control. However, the author did not adopt Kagan's statutory interpretation argument.[143] The author instead, argued from the Unitarian perspective, stating that "on the issue of centralized presidential regulatory review—about its desirability, its legality, and the methods of its implementation—it appears that we are all (or nearly all) Unitarians now."[144]

The main critiques of *Presidential Administration* come in three categories which argue on: statutory interpretation grounds alone, a mix of statutory and political accountability arguments, or by highlighting the faults of the political accountability justification.

XI. Statutory Interpretation Critiques

An example of the formalist-type critique of *Presidential Administration* can be seen in Professor Strauss's article *Overseer, or "The Decider"? The President in Administrative Law*.[145] In his article, Strauss shows that the President's constitutional role in the administrative state is limited to that of overseer, unless Congress specifically outlines a decision making role.[146] His arguments are structural and textual in nature. He explains how the Constitution delegates authority over the administrative state to Congress—highlighting this Congressional preference by noting

141. "Clearly unrelated" often included language indicating a very narrow topic, usually discussions of a specific case or statute.

142. This process likely eliminated some excellent articles that are on point but, given the nature of a student note, the criteria seemed to be an appropriate way to sufficiently limit the scope of review.

143. *See* Blumstein, *supra* note 10, at 851.

144. *Id*. at 852.

145. *See* Strauss 2007, *supra* note 10.

146. *Id.* at 705.

"other than the President and Vice President, no executive branch office exists without legislation."[147] Professor Strauss' views are consistent over time. A quote from a 1997 article of his shows the same interpretive stance. "Yet, as seen, the text of the Constitution settles no more than the President is to be the *overseer* of executive government, and False . . . the contours and extent of present-day government make a stronger reading unacceptably hazardous to public health."[148]

IX. Mixed Critiques

Examples of a "mixed critique" on both statutory and political accountability grounds, include articles by professors Einer Elhauge and Robert Percival. Professor Elhauge's argument relies on court precedent and judicial review of administrative actions.[149] Kagan's arguments for enhanced presidential control and political accountability are most salient during times of political gridlock—where presidential directives dramatically increase government efficiency. However, Elhauge argues against granting the President broad directive power, even in the gridlock scenario.[150] After all, the purpose of administrative law seems to be to ensure predictability and confidence in the procedural aspects of decision making. For Elhauge, the answer to the dilemma already exists within the *Chevron* framework, specifically the "extraordinary case" exception.[151] Elhauge argues against Kagan's political accountability justification and instead promotes an "enactable political preferences" standard to be used by courts in limited circumstances to maximize political satisfaction.[152] This essentially creates a sort of political reasonableness standard for the court.[153]

Elhauge further shows that the Supreme Court has specifically declined to adopt the President's political accountability as a justification for giving deference with respect to agency action.[154] Though not in the exact context of Kagan's use of political accountability, Elhauge seems to use the Court's rejection as weight for his institutional choice argument that courts are

147. Strauss 2007, *supra* note 10, at 722.

148. Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 985 (1997) (emphasis in original).

149. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

150. *Id.* at 2153.

151. *Id.*

152. *Id.* at 2152–56.

153. *See id.* at 2155–58.

154. *Id.* at 2152–53

already well suited to handle administrative issues, even in times of political gridlock.

On the other hand, Professor Percival addresses Kagan's specific arguments head on in *Presidential Management of the Administrative State: The Not-So-Unitary Executive*.[155] Percival takes a strong textualist view of separation of powers, rejecting the President's role in administrative decision making.[156] For Percival, the Constitution may grant the President the power to appoint certain officials, but he rejects the contention that the removal line of cases have any implication on the President's ability to interfere with agency decision making.[157] The power to fire is not the power to substitute discretion. Percival further builds his argument by stating that "the executive departments are creatures, not of the Constitution directly, but of Congressional statutes."[158] When Congress exercises its legislative authority to create administrative agencies pursuant to the Necessary and Proper Clause, it "suggests that the Framers envisioned that certain powers could be vested directly in executive departments or officers."[159] At most, Percival concedes that the President has "some supervisory authority over the heads of executive agencies," but is not vested with the power to direct agency decisions.[160]

Percival also disagrees with the political accountability justification for dictating agency decisions.[161] In contrast to Kagan's assertion that the President is a transparent public figure, Percival argues that giving him directive authority would likely obfuscate presidential interference, not enhance process transparency.[162] "[B]y allowing the President to countermand agency decisions, accountability would be blurred because in many cases the public would be unable to understand whether a decision was the product of the agency's expertise or a presidential directive."[163] Instead, Percival argues that the President's role is, and should be, limited to that of an advisor as he "has no authority to dictate regulatory decisions entrusted to [agencies] by law."[164]

155. *See* Percival, *supra* note 7.

156. *Id*. at 967–69.

157. *Id*.

158. *Id*. at 967.

159. *Id*. at 968.

160. Percival, *supra* note 7, at 968–69.

161. *See id*. at 1008–10.

162. *Id*. at 1009.

163. *Id*.

164. *Id*. at 1011.

X. Political Accountability Critiques

Professors Lisa Schultz Bressman and Neal Katyal advance critiques centered on the political accountability justification of presidential control. Professor Bressman takes aim at political accountability in her introductory line: "[t]his Article argues that efforts to square the administrative state with the constitutional structure have become too fixated on the concern for political accountability."[165] For Bressman, it is a mistake to focus on accountability. Instead, she argues that the primary concern of administrative law, and our entire constitutional system of checks and balance for that matter, is aimed at preventing arbitrariness.[166] Bressman turns Kagan's argument on its head by asserting that the constitutional goal of the administrative state is not accountability but the minimization of arbitrary administrative action—often achieved by *preventing* the President from asserting control.[167]

Also, as a threshold matter, Bressman notes that the base assumptions for presidential control models are overly simplistic. For her, the reality of the executive branch is not captured by the various models: ". . . [S]cholars may have underestimated the complexity of White House involvement. Presidential control is a 'they,' not an 'it.'"[168] In addition to Bressman's ordering of constitutional priorities, she argues that Kagan's theory cannot work because "transparency alone is not enough to combat arbitrary administrative decision making."[169] The validity of Kagan's political accountability justification rests on the assumption that the presidency's operations are transparent.[170] However, as with Percival above, Bressman argues that "the President has the incentive and ability to hide control."[171] Essentially, this selective transparency cannot satisfy the baseline assumptions of Kagan's theory, and therefore political accountability is an insufficient justification for presidential control. However, even if Bressman thought Kagan's assumptions were accurate, the theory would still not legitimize the administrative state in her eyes unless it protected against arbitrary action.[172] It is doubtful that a model which allows a single actor—even one politically accountable to a national constituency—to unilaterally

165. Bressman, *supra* note 56, at 461.

166. *Id*. at 468.

167. *Id*. at 523–27.

168. Bressman & Vandenbergh, *supra* note 56, at 49.

169. Bressman, *supra* note 56, at 503.

170. Clinton's transparency and political ownership was a key point in Kagan's theoretical development.

171. Bressman, *supra* note 56, at 506.

172. *Id*. at 514.

direct policy decisions would offer the procedural protections against arbitrary decision making that Professor Bressman seeks.

Finally, Professor Katyal addresses the historical context in which Kagan developed her theory as part of his critique. "Kagan was self-consciously writing in an era of divided government . . . ," and Katyal questions whether the objectivity of someone writing from the "vantage-point of an administration that wants to get things done is the proper one for setting parameters in constitutional and administrative law."[173]

Katyal also critiques a flaw in the political accountability justification, namely that the President's incentives do not necessarily align with the national interest, but instead are short-term in nature and tend to seek instant gratification.[174] He argues that centralized power with the aim of increasing efficiency may not be a good thing. "[T]here are values other than efficiency, values celebrated by our Founders. Indeed, a starting point for our government is the evil of government efficiency."[175] Professor Katyal closes his section on *Presidential Administration* with a punchy quip. "In the end, Kagan is surely right to point out that a President has a 'stake' in building an efficient government, but efficiency is not the equivalent of wisdom."[176]

XI. The Oversimplification of Political Accountability

One side will always be happy if given unilateral control. It is easy to argue for greater efficiency and authority when your preferred political party is in power. As Professor Katyal said, Kagan was writing from the "vantage-point of an administration that wants to get things doneFalse"[177] However, the trick is to think about how much power you would be willing to give your political adversaries when you are in the minority.

"When people are fearful, angry or confused . . . they are tempted to give away freedoms to leaders promising order."[178] Political hyperbole is ever present, however the substantive relationship of the President and the administrative state, and the interplay of transparency, accountability, legal interpretation, and politics should be the focus. And as with any political debate, the same facts can yield very different results. The diversity of perspectives seen in the discussion above are likely due to the politics of the

173. Katyal, *supra* note 73, at 2343–44.

174. *See id*. at 2345.

175. *Id*. at 2344.

176. Katyal, *supra* note 73, at 2345.

177. *Id.* at 2343–44.

178. The Economist (@TheEconomist), TWITTER (Apr. 14, 2018, 3:34 PM), https://twitter.com/TheEconomist/status/985287503899918338.

particular academic and the policy goals they may wish to advance in their work.

However, these critiques were not formed in an academic vacuum. Aside from theoretical and doctrinal distinctions discussed by the authors, there is an additional background layer that may offer some insight into the various perspectives on presidential control. Theories of presidential control evolve in imperfect ways. They are the result of a "make it work moment," incorporating various values and concepts in search of reaching legitimacy in order to achieve "a critical mass of public acceptance for the administrative state."[179]

Professor Adrian Vermeule explains that "each theorist ends up adopting a kind of *roughly optimizing pluralism of values* for the administrative state—a pluralism in which expertise, political accountability, and legalism all have some claims . . . in a way that aims to generate a critical mass of public acceptance."[180] For Vermeule, the legitimacy of the administrative state is a foregone conclusion; criticism, even those claiming illegitimacy, have the effect of reinforcing and strengthening the its integrity:

> It is a conceptual mistake to think that complaints about the administrative state, even on constitutional grounds, are necessarily sociological evidence of the illegitimacy of the regime. Such arguments may also be conventional moves *within* the regime, which vent steam and thereby actually have a legitimating effect. If they result in more or less minor adjustments of legal and institutional rules—a bit more Office of Information and Regulatory Affairs (OIRA) oversight here, a bit less judicial deference there, and so on—that is a sign of the fundamental health, adaptability, and social legitimacy of the regime, not of crisis.[181]

Vermeule's articulation that theoretical models adapt in search of achieving public acceptance plays well with a brief commentary situating the historical and social backgrounds of the development of *Presidential Authority*. This commentary hopes to provide an explanation for the surprising resistance *Presidential Authority* seems to have encountered.

In his book, *Age of Fracture*, Professor Daniel T. Rodgers, and intellectual historian, characterized the last quarter century as the "age of

179. Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffee, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2465 (2017).

180. *Id.*

181. *Id.*

fracture."[182] During the age of fracture, no other figure loomed larger than President Ronald Reagan.[183] This certainly rings true in the presidential control realm. Rodgers's observations that the obsession with the free market and the search for efficiency permeated society at large, along with a range of disciplines—including the law.[184] Notably, Rodgers showed how the obsession with efficiency and the language of economics crept into the everyday language and politics of the age.[185]

President Reagan was a successful advocate of modern presidential control practices, and Rodgers'' age of fracture coincides with the Reagan era's presidential administrative controls and deregulation. The rise of presidential control was based on the promise of optimizing government administration and promoting general efficiency—in line with the economic zeitgeist of the Reagan era. Presidential control as practiced by Reagan focused on confidential involvement behind the scenes, through OIRA, to slow down the rulemaking process.[186] Such concealment is antithetical to Kagan's modern transparency and political accountability justifications. That, however, eventually morphed into the practice of presidential administration under Clinton, with the President highlighting his role and agenda, and issuing executive orders that explicitly claim the authority to direct agency officers.[187]

By translating Kagan's justifications for presidential administration into the economic language dominant in the Reagan era: "transparency" and "political responsiveness of the President" easily become recognizable as "perfect information" and "market response" in the economic lexicon. Professor Bressman's heightened concern of "arbitrary action" tracks well with "risk aversion" and economic anxiety. The language and practice of presidential control models track well with the broader discourse of the Reagan era, helping the consolidation of presidential power gain traction.

But, what about the relatively recent pushback against the justifications used to legitimize presidential control, specifically with respect to the discussion of *Presidential Administration* after 2001? Was there a substantial break separating Rodgers' "age of fracture" the Reagan era and our new era of contested presidential power? The fact that only a single article in the sample supported Kagan's enhanced version of presidential control may indicate a lack of complacency with centralized control. This

182. RODGERS, *supra* note 12.

183. *Id.*

184. *See* RODGERS, *supra* note 12, at 80–81.

185. *Id.*

186. *See* Kagan, *supra* note 13, at 2333.

187. *Id.* at 2285–90.

could indicate that concern for efficiency has been overtaken by concerns for arbitrary decisions. Perhaps Americans have become more skeptical of the market dogma of absolute efficiency prominent in the Regan era in a period marked by high inequality and the worst economic downturn since the Great Depression. Professor Katyal's quip that "efficiency is not the equivalent of wisdom" may be an accurate reflection of the times.[188] Reliability, predictability, and protection from arbitrary game-changes might just be the new driving force. These desires weigh against the consolidation of unitary power and shift the academic discussion back towards the protection of dispersed/expert administrative authority sheltered by the separation of powers doctrine.

From the articles reviewed, efficiency, transparency, political accountability, and the concern for arbitrary action were in the forefront of the critiques. As compared to the Reagan era, information flows more readily now in the age of the 24-hour news cycle where communication is viral and instantaneous. We no longer need to rely on a single overseer to ensure government accountability when we are all watchdogs on Twitter. If anything, the very real threat of obfuscation and secret directives used to evade the spread of unfavorable news belies the "transparent" and "politically accountable" narrative built to justify presidential control over the administrative state.

The differences between the Reagan era—in which modern presidential control theory was conceived—and the apparent pushback of the current age may partially be explained by a shift away from an obsession with markets and "voodoo economics" of the past. The public now has reason to distrust markets, and market speak may not be as compelling of an analogy as it once was. If true, this would be a dramatic change from the market theology of the Reagan era that Rodgers described in *Age of Fracture*. The modern critiques on *Presidential Administration* might be an indication that academics are once again tweaking their models in search of Vermeule's "critical mass of acceptance"; while Rodgers' ' discussion illustrates the permeability between the public's aggregate state of mind and the debates of academics and government officials. Modern economic anxiety may have made the American public weary of unilateral and potentially arbitrary decision making—which may be reflected in the contemporary legal debates.

188. Katyal, *supra* note 73, at 2345.

Conclusion

Though unilateral presidential control may expedite the decision making process and "efficiency" of agencies, political accountability cannot justify presidential directives, or arbitrary policy changes and decision making of agencies. Having a careful and thoughtful government is a good thing. A deliberative process cannot, by its nature, be quick and easy. Efficiency cannot be the measuring stick of reasoned consideration.

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