An Age of Statutes or an Age of Executive Orders? Conflicting Judicial and Presidential Visions of Policymaking

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Two decades ago, then-Professor Elena Kagan hailed the era of presidential administration in which Presidents would launch major policy initiatives within the executive branch and end run congressional gridlocks. Since then, the President's role in the regulatory state has snowballed. In his second term, President Donald Trump has used this authority to the utmost in a quantum leap in presidential administration. Paradoxically, the same Justices who have championed the unitary executive have created roadblocks to presidential policymaking. Overruling the Chevron *doctrine, the Court has sought to cabin the role of agencies, and thus the newly supreme President, in statutory administration. The Court also articulated the major questions doctrine, which has been used almost exclusively to strike down agency actions taken under presidential directives. This Article argues that, despite the Court's celebration of the unitary executive, it remains wedded to a view of policymaking that is at odds with that of recent presidents, most notably President Trump. That view seeks to center Congress, not the President, as the primary source of domestic policy. In contrast, recent presidents seem to view congressional action as only a launchpad for their own policy initiatives. A collision between these perspectives seems inevitable.*

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INTRODUCTION

A book by a leading legal scholar once hailed the modern era as the "Age of Statutes,"[1] but the ordinary person today might well see it instead as the "Age of Executive Orders." That person, relying on newspapers or social media, could be forgiven for thinking that the White House, not Congress or state legislatures, is the primary source of public policy in the United States.

This has been particularly true under President Donald Trump. The sheer volume of executive actions is telling. As of late May 2025, Trump had signed over one hundred seventy executive orders in his first six months in office,[2] showing a clear effort to fill the policy space.[3] These executive orders attempt to bring broad swathes of government action under the President's sway, and they frame congressional enactments only as possible constraints on presidential policymaking rather than as alternative sources of policy. This flurry of executive orders raised alarms not only among liberals but also eminent conservative observers.[4]

This is not a new phenomenon. At the turn of this century, Justice Elena Kagan prophetically wrote that "[w]e live today in an era of presidential administration."[5] Modern presidents seemingly envision themselves as controlling domestic policy—even more than Congress—as Policymakers-in-Chief.[6] In his second term, Trump seems to be following a particularly strong version of this vision, just

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1. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

2. Press Release, White House, President Trump Marks Six Months in Off. with Historic Successes (July 20, 2025), https://www.whitehouse.gov/articles/2025/07/president-trump-marks-six-months-in-office-with-historic-successes.

3. *See Donald Trump's Executive Orders and Actions, 2025*, BALLOTPEDIA, https://ballotpedia.org/Donald_Trump%27s_executive_orders_and_actions,_2025-2026 (last visited Oct. 23, 2025).

4. Goldsmith and Bauer suggest that:

> If this is the theory behind the executive orders—and again, we are speculating here based on the views of one hugely influential Trump advisor—then the orders are not merely setting up Supreme Court test cases. They are, rather, bombarding the Court with a wave of legal challenges about the proper scope of Article II (among many legal issues) with the aim of provoking a confrontation over the legitimacy of the existing legal order, at least with regard to Article II, and perhaps more broadly. And the administration might be planning to dare the Court to say "no" with threats of noncompliance.

Jack Landman Goldsmith & Bob Bauer, *The Trump Executive Orders as "Radical Constitutionalism,"* AM. ENTER INST. (Feb. 3, 2025), https://www.aei.org/op-eds/the-trump-executive-orders-as-radical-constitutionalism. It is notable that this opinion piece appeared on the webpage of one of the most established conservative think tanks.

5. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001). An alternative view of the history is presented by Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2133 (2024).

6. For the argument that the Court has effectively increased presidential control over agencies at the expense of their responsiveness to congressionally enacted policies, see Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499, 500 (2023).

when the Supreme Court has been signaling its skepticism about the shift from congressional to presidential policymaking.

Although Trump has arguably taken matters to new lengths, he has been able to build on a long period of evolving presidential control over policy. In 2001, when Justice (then-Professor) Kagan wrote *Presidential Administration*, the transition from the Administrative State to the Presidential State was about halfway complete.[7] Since then, the trend has accelerated, taking a leap on January 20, 2025, when the newly inaugurated President Trump issued twenty-six executive orders, twelve presidential memoranda, and four proclamations.[8]

Precedents may exist for Trump's uses of power. But the difference in scale is itself extremely important. As shown by the flood of executive orders covering everything from water pressure in showerheads to check-processing by the Treasury Department, presidential control is extending to a broader range of policy issues and is providing more detailed directives, basically saturating the policy space.[9] This is not just a continuation of past trends but a major acceleration. Besides the change of scale, we are also seeing the continuing erosion of the guardrails that people like Justice Kagan had expected to restrain abuses of power. While the Trump Administration is not the version of presidential administration that Kagan and others envisioned, it builds on a long-term trend toward enhanced presidential power.

In taking this trend to a new height, Trump was able to take advantage of Supreme Court opinions that have increasingly elevated the President's supremacy over the executive branch—partly in the name of providing uniformity and coherence to policy, mostly in the name of majority rule.[10] These rulings increase presidential hegemony within the executive branch. But this form of presidentialism is not just a battle for internal control of the executive

7. For another enthusiastic endorsement of presidentialism, see generally, Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021). A useful overview of presidential administration is provided by Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 562–63 (2018).

8. Sarah Fortinsky, *Trump Executive Orders and Actions: By the Numbers*, HILL (Jan. 21, 2025, 14:44 ET), https://thehill.com/homenews/administration/5098445-trump-executive-orders-first-day.

9. *See* Exec. Order No. 14,264, 50 Fed. Reg. 15619 (Apr. 15, 2025); Exec. Order No. 14,249, 90 Fed. Reg. 14011 (Mar. 28, 2025).

10. Trump v. United States, 144 S. Ct. 2312 (2024), which largely immunized presidents from accountability for criminal acts, provides the classic statement of this view: "The President 'occupies a unique position in the constitutional scheme,' as 'the only person who alone composes a branch of government.'" *Id.* at 2329 (citations omitted). Note that, on this view, agencies are merely avatars of the President with no independent minds of their own. Even prior to the presidential immunity case, the Court had already embraced the populist "understanding of democracy wholesale" and viewed the President's ability to speak for the People the basis for administrative legitimacy. Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2151–52 (2023).

branch for its own sake. It was aimed at placing the President in the driver's seat in setting national policy. Paradoxically, while strengthening the President's internal authority, the Court has also worked on a parallel project of diminishing the executive branch's leeway in making policy, in the name of legislative primacy in policymaking. There may be reasons to doubt whether the Court's decisions really empower Congress, but what is important for our purposes is the Court's apparent skepticism toward presidential efforts to accomplish large-scale policy change. The Court's vision of policymaking is deeply at odds with Trump's vision and with the larger historical project of overcoming congressional gridlock via presidential administration.[11]

Part I of this Article traces the history of presidential administration from President Ronald Reagan through President Joe Biden. Trump has gone further than his predecessors, but in retrospect, they were laying the foundation that set the stage for Trump's effort at presidential dominance. Although Justice Kagan had some caveats that Trump ignored, in many ways, he has epitomized the presidential initiative and energy that Kagan praised, though perhaps well past her comfort zone. Part II documents the opening phases of Trump's second term, in which he has gone far beyond previous presidents in taking ownership over American domestic policy. Part III then turns to the Supreme Court and shows how the Court's embrace of the major questions doctrine, its overruling of *Chevron v. Natural Resources Defense Council*,[12] and its endorsement of "hard look" review combine to undermine presidential administration. This is not an accident: These judicial doctrines were forged in reaction to earlier efforts at presidential administration, and they reflect a vision of the policy process that is starkly at odds with Trump's.

I. PRESIDENTIAL ADMINISTRATION FROM 1980 TO 2024

As is often the case, to understand where we are, it is important to see where we have been. It may be possible to trace the roots of the process even earlier,[13] but the road toward presidential administration—and presidential control of policymaking—began in earnest with President Reagan.[14] Soon after taking

11. For instance, as Jerry Mashaw has argued, there is a deep tension between presidential administration and the administrative law norm of reasoned explanation. *See* Jerry L. Mashaw, *Is Administrative Law at War With Itself?*, 29 N.Y.U. ENV'T. L.J. 421, 423–24 (2021).

12. 467 U.S. 837 (1984).

13. As Kagan said, "[s]ince the dawn of the modern administrative state, Presidents have tried to control the bureaucracy only to discover the difficulty of the endeavor." Kagan, *supra* note 5, at 2272. For an account of developments from the Nixon Administration through the Carter Administration, see Ahmed et al., *supra* note 5, at 2146–52.

14. Kagan detailed these developments and the resulting controversies. *See* Kagan, *supra* note 5, at 2277–81. According to another historical account, "the core innovation of E.O. 12,291 is its novel legal foundation.

office, he issued an executive order governing cost-benefit analysis. This bold effort to centralize control of the regulatory state transformed the regulatory process by requiring advance clearance from the White House for new regulations and the use of a new, non-statutory regulatory standard by all executive agencies.[15] The underlying legal theory was that Article II empowered the President to control whether agencies could issue rules and to require them to exercise their discretion in line with his policies.[16] In effect, that executive order made presidential control of agency decisions the default, reversing earlier norms.[17]

The *Chevron* decision, issued about halfway through Reagan's presidency, gave another significant boost to presidential administration.[18] The *Chevron* doctrine boosted presidential administration in two ways. First, it instructed courts to accept any reasonable interpretation of ambiguous statutory language.[19] Second, it recognized that an agency's choice of interpretation could be driven by policy considerations.[20] By expanding the role of policy, *Chevron* indirectly expanded presidential influence. Reagan had set the precedent for presidents to impose their policy preferences on agencies, and *Chevron* gave agencies discretion to use those policies in interpreting statutes. Moreover, the

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According to the Office of Legal Counsel (OLC), Reagan could lawfully promulgate E.O. 12,291 because it was 'generally within the President's constitutional authority' and did not 'displace functions vested by law in particular agencies.'" Ahmed et al., *supra* note 5, at 2157. Notably, White House control also nullified much of the administrative process for rulemaking, because White House officials "could change final rules without considering or even thinking to consider written comments and could hide new facts and influences from the public. This distorted the rulemaking process and incentivized lobbying over reasoned argument." *Id.* at 2165–66.

15. Kagan, *supra* note 5, at 2247.

16. Ahmed et al., *supra* note 5, at 2137.

17. *Id.* at 2141. The authors refer to a speech by former Justice Abe Fortas as an exemplar of the more traditional view:

> In 1974, former Supreme Court Justice Abe Fortas summed up the view of the presidency that had prevailed more or less since the Founding and which we have called administration under law: "The President is a *part* of the government; he is not *the* government." The Framers designed "a modest Presidency." "[T]he ultimate power to make the rules, to legislate, is not the President's; it is the Legislature's."

Id. at 2143–44 (footnotes omitted).

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

19. *Id.* at 842–43.

20. *Id.* at 865.

Court emphasized the accountability of agencies to the President in justifying its approach,[21] thereby legitimizing presidential efforts to exercise more authority over agencies. *Chevron*, in effect, treated statutes as incomplete, giving agencies and the White House the job of supplementing the statute.

Presidential administration has been bipartisan. It received another boost from Reagan's first Democratic successor, President Bill Clinton. As Kagan documented, "presidential control of administration, in critical respects, expanded dramatically during the Clinton years, making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda."[22] Clinton launched important regulations with White House directives and ended the process with public relations measures to ensure that the public viewed the regulations as his own, not the work of an agency.[23]According to Kagan:

> President Clinton treated the sphere of regulation as his own, and in doing so made it his own, in a way no other modern President had done. Clinton came to view administration as perhaps the single most critical—in part because the single most available—vehicle to achieve his domestic policy goals. He accordingly developed a set of practices that enhanced his ability to influence or even dictate the content of administrative initiatives.[24]

Kagan pointed to two examples: a Food and Drug Administration ("FDA") tobacco regulation and workplace regulation affecting women. Regarding tobacco regulation, Clinton said that "by executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers."[25] Of course, he had no power to do such a thing; what he meant was that "his" FDA would do so, although it had never regulated tobacco in the past. A second example involved paid parental leave, where Clinton said he would use his "executive authority as President" to direct the Secretary of Labor to

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21. As the Court put it:

> In contrast, an 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—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. at 865–66. Thus, the Court viewed the President as a democratically accountable source of political legitimacy official and viewed the "administration's philosophy"—that is, the President's policy preferences—as an appropriate factor in an agency's interpretation of statutes.

22. Kagan, *supra* note 5, at 2248.

23. *Id.* at 2249–50. These techniques allowed Clinton to claim personal credit for new regulations and to pressure agencies to adopt his policy initiatives rather than their visions of what a regulatory scheme required.

24. *Id.* at 2281–82.

25. *Id.* at 2283.

issue a regulation allowing states to provide parental leave through the unemployment system.[26]

Clinton also issued his own modified version of Reagan's executive order on cost-benefit analysis.[27] In one respect, he went much further than Reagan. Reagan purported to leave the agency with the final call on whether to issue a rule, but Clinton made the presidential role explicit, appointing himself as the final judge of disputes between an agency and the White House office that supervised agency use of cost-benefit analysis.[28] Thus, Clinton made clear his view that he, rather than the agency selected by Congress to implement a law, was entitled to the final word on what regulations the agency could issue. He exhibited that view in other ways as well, with "the frequent issuance of . . . memoranda to executive branch agency heads instructing them to take specified action within the scope of the discretionary power delegated to them by Congress."[29] This was a decisive break from his predecessors, who rarely issued such directives,[30] and it ultimately made Trump's complete control over all executive branch policy decisions possible.

Clinton made sure that the public viewed his policy role as dominant. "In event after event, speech after speech," Kagan wrote, "Clinton claimed ownership of administrative actions, presenting them to the public as his own—as the product of his values and decisions."[31] In short, Kagan says, the era when agencies exercised independent judgment was over:

> As these directives and announcements show, Clinton effectively placed himself in the position of a department head with respect to nearly every

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26. *Id.* at 2282–84.

27. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

28. Kagan, *supra* note 5, at 2288–89.

29. *Id.* at 2290. For a cogent argument against this claim of presidential authority, see Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007).

30. According to Kagan:

> President Reagan issued, by my count, nine directives to heads of domestic policy agencies regarding substantive regulatory policy—four in his first term and five in his second. His first directive, issued in conjunction with his initiation of the OMB review process, postponed all proposed and pending regulations for a short period; his most detailed subsequent directives concerned nuclear energy, narcotics, HIV, and family policy. President Bush issued four directives in his single term, two imposing moratoria on rulemaking and ordering an administration-wide review and reform of existing regulations, and two relating to discrete policy issues. President Clinton, by contrast, issued 107 of these orders. Beginning slowly, he issued five, four, and six, respectively, in his first three years in office; then leaping to another plateau, he issued in subsequent years seventeen, seventeen, eighteen, twenty, and twenty.

Id. at 2294–95. After issuing these directives, White House staff monitored agency compliance. *Id.* at 2295. As we will see, President Trump issued more executive order in the first months of his second term than Clinton issued in eight years.

31. *Id.* at 2300. Kagan added, "Clinton's appropriation of regulatory product, even when wholly post hoc, sent a loud and lingering message: these were *his* agencies; *he* was responsible for their actions; and *he* was due credit for their successes." *Id.* at 2302.

> possible method of administrative policymaking. In rulemakings, he ordered and announced the issuance of proposed regulations for public comment, as well as the issuance of final regulations after the legally prescribed comment period had ended.[32]

Clinton and his staff, Kagan says, "put in place a set of mechanisms and practices, likely to survive into the future, that greatly enhanced presidential supervision of agency action, thus changing the very nature of administration (and, perhaps too, of the Presidency)."[33] That observation proved prophetic. It is almost eerie from today's perspective to see how much Clinton's approach to governance laid the foundation for the current Trump Administration's use of executive power.

If Clinton made the crucial leap from presidential oversight to presidential control of policy, then his successors were not reluctant to continue that path. As Kagan pointed out, this trend was partly due to the increasing difficulty of obtaining policy changes through the legislative process, forcing presidents to double down on the use of the administrative process to achieve their goals.[34] This was a self-reinforcing process: The more presidents were seen as responsible for everything agencies did, the greater the imperative for them to exercise total control.[35] Thus, Clinton's public relations moves encouraged the public to view agencies as an extension of the President, increasing the political incentives for later presidents to tighten their grip.[36]

Kagan wrote at the beginning of the George W. Bush Administration that it was "unlikely . . . that President Bush will elect to cede this power."[37] A careful study by Peter Shane confirmed that, on the contrary, Bush aggressively

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32. *Id.* at 2306.

33. *Id.* at 2250.

34. *Id.* Whether Clinton was really faced with a congressional blockade is contested. *See* Ahmed et al., *supra* note 5, at 2215 ("[O]n this score, Kagan's story is more prospectively attractive than historically plausible.").

35. *Id.* at 2310. As Kagan wrote, "The more the demands on the President for policy leadership increase and the less he can meet them through legislation, the greater his incentive to tap the alternate source of supply deriving from his position as head of the federal bureaucracy." *Id.* at 2312. Later observers confirmed that "[t]he more presidents take control, the more the public expects them to exercise it—whatever the formal statutory allocation of authority." Mashaw & Berke, *supra* note 7, at 593.

36. The rise of presidential administration was clearly a response to congressional gridlock and political polarization. An imponderable is whether presidential administration might have worsened those conditions at least to some extent. Centering regulatory decisions on the person of the President may have contributed, along with other factors, to nationalizing congressional elections and thereby making parties more ideologically homogenous. They may also have raised the political profile of regulatory issues and thereby made them more broadly contentious. Finally, the increased availability of administrative action to achieve party objectives may have reduced the incentives for the party in power to compromise to pass legislation, perhaps increasing gridlock. All of this is necessarily speculative. In sum, presidential administration may have contributed at least at the margins to the conditions that then made further expansions of presidential administration appealing.

37. Kagan, *supra* note 5, at 2317.

expanded presidential authority.[38] Shane found that Bush not only continued Clinton's efforts to control the administrative state but also embraced the unitary executive theory, which portrays such control as a constitutional necessity.[39]

Presidential control of policy strengthened further under President Barack Obama and in Trump's first term.[40] Obama famously was said to have proclaimed that he had a phone and a pen, and thus the ability to make policy without Congress.[41] Frustrated by congressional gridlock, Obama created an administrative pathway for some undocumented immigrants to become permanent residents through an exercise of discretionary enforcement that immunized them from deportation.[42] Due to a similar frustration with Congress over climate change, Obama used executive powers to craft a bold Environmental Protection Agency ("EPA") regulation[43] that, in the eyes of some observers, including a later Supreme Court majority, came close to accomplishing the same results as failed legislation.[44] These were ostensibly the actions of individual agencies, but in reality, the key decisions were made in the White House, with agencies exercising only nominal control. Obama also placed heavy emphasis on the use of White House "policy czars" to oversee agencies working on key policy issues.[45]

In his first term, Trump was at least as bold as Obama in his use of executive power.[46] Shortly after taking office, he made his own intervention into immigration policy with a ban on immigration from a list of predominantly Muslim countries.[47] Notably, where previous presidents were content to have

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38. PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009).

39. *Id.* at 132. Unlike Shane, Rodríguez lauds the rise of presidential dominance in the governance system. *See* Rodríguez, *supra* note 7, at 58.

40. This evolution is traced in Mashaw & Berke, *supra* note 7.

41. As Rosenblum recounts:

> "President Obama has a new phrase he's been using a lot lately," NPR reported in 2014: "I've got a pen, and I've got a phone." The expression, much referenced by Obama and his team in the face of an opposition Congress, captured the president's plan to drive change on his own. "[W]ith the stroke of a pen," he could sign executive orders, making policy unilaterally. With his phone, he could serve as the nation's chief convener, if not its executive, bringing stakeholders together to take collective action. With his pen and his phone, Obama implied, he would be able to work around a recalcitrant legislature to realize his agenda. As he summarized his approach: "I am going to be working with Congress where I can . . . but I am also going to act on my own if Congress is deadlocked."

Rosenblum, *supra* note 10, at 2147 (footnotes omitted).

42. Mashaw & Berke, *supra* note 7, at 563–68.

43. *Id.* at 580.

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

45. Mashaw & Berke, *supra* note 7, at 592.

46. Some saw the first Trump Administration as continuing the techniques used by his predecessors, while others saw it as a wake-up call about the dangers of presidential administration to democracy. *See* Ahmed et al., *supra* note 5, at 2220.

47. Mashaw & Berke, *supra* note 7, at 569–73.

practical control of policy but leave the formal issuance of regulations to agencies, Trump issued the travel ban himself.[48] He then attempted to undo Obama's immigration policies,[49] reversed Obama's climate regulations. and undertook a slew of other efforts to roll back environmental protection.[50] More broadly, Trump embarked on a "deconstruction" of the administrative state,[51] an effort that was amplified to unprecedented levels at the beginning of his second term.[52] On top of existing requirements for cost-benefit analysis, Trump added new requirements intended to skew agency action toward rescinding or weakening existing regulations by penalizing agencies based on a regulation's costs without considering its benefits.[53]

These administrations crossed lines that Kagan had attempted to draw based on the Clinton Administration practices. A 2018 study found:

> [I]n both administrations bold attempts to accrete executive power; presidential administration insinuating itself more and more into areas where proponents of presidentialism have cautioned against aggressive use of presidential directive authority; and the rise of organizational techniques, like policy czars and "shadow cabinets," that institutionalize presidential control in the absence of specific presidential directions.[54]

Further, "Kagan expressed a hesitancy about presidentialism seeping into prosecution (as opposed to regulatory policymaking), but Obama's white-collar enforcement ramp-up and Trump's deportation guidance moved precisely in that direction. Trump's climate-science interventions at the EPA are again the types of political interventions in government science that Kagan warned against."[55] By the end of Trump's first term, some observers were worrying about a slide toward authoritarianism.[56] On the other hand, it was also notable that many administrative efforts to avoid the strictures of administrative law were blocked

48. *See generally* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

49. Mashaw & Berke, *supra* note 7, at 573–76.

50. *Id.* at 584–86.

51. *Id.* at 597.

52. *See infra* Part.II.

53. Mashaw & Berke, *supra* note 7, at 598. Thus, "agencies will have a strong incentive to pick the rule that is least costly to industry stakeholders—even if the net benefits of a slightly more costly rule would be substantially greater—in order to meet budget caps." *Id.* at 599 (footnote omitted).

54. *Id.* at 551.

55. *Id.* at 606 (footnotes omitted).

56. *See* Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. 104, 109 (2021) ("The hallmark of authoritarianism is unilateral decisionmaking by a single person. Certainly, the United States is not an authoritarian nation, but unilateral presidential decisionmaking has grown steadily over the past fifty years.").

by the courts, leaving the first Trump Administration with a historically bad level of litigation success.[57]

The transition from Obama to Trump also highlighted one of the biggest weaknesses of presidential administration: A lack of policy durability as successive presidents reversed course.[58] Indeed, it is now said, "[c]ontrol of the White House is so central to our governance that the transition from one President to another amounts to 'regime change.'"[59] This is something that Kagan did not appear to anticipate, perhaps because she was writing in a period when political polarization, while rising, had not yet reached the heights it has today.

The transition from Trump to Biden caused not only similarly drastic changes in policies but also a continuation of forceful presidential control of policy.[60] Biden issued executive orders on inauguration day that dramatically changed the position of the government on major policy decisions, literally

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57. After a survey of the Administration's compliance with administrative law requirements, Amy Orlov concluded:

> Overall, there has not been a substantial change in administrative law following the conclusion of Donald Trump's presidency. Due to pervasive administrative litigation and strong judicial response, courts have served as a check on agency "regulatory slop," preventing this behavior from influencing finalized agency actions. Furthermore, statistics show that the Administration has experienced relatively little judicial success as compared to other administrations. Although the Trump Administration certainly made substantive changes to the law and altered the staffing and structure of many agencies, at its core, administrative law's procedural norms and standards have remained intact, even when not initially adhered to, because courts have continuously affirmed these requirements.

Amy Orlov, Essay, *Promises Unfulfilled: Did the Trump Administration Substantially Change the Administrative State?*, 89 GEO. WASH. L. REV. 1306, 1329 (2021) (footnotes omitted). It is too early at this writing to know whether Orlov's observation about Trump's first term will also hold true in the second one.

58. Mashaw & Berke, *supra* note 7 at 551. As the authors put it, "The rise of administrative governance, combined with muscular presidentialism, can produce dramatic, but perhaps ephemeral, shifts in public policy in the face of congressional inertia and the durability of the statutory bases for administrative action." *Id.* Or, even more emphatically, they wrote:

> Lastly, the Trump experience shows how presidential administration can, as it grows stronger, cancel itself out across administrations. Even putting aside Trump's legally suspect regulatory process changes and failed shadow cabinet, when one combines Trump's other deregulatory strategies—information control and rescission of sub-regulatory guidance, the CRA, and sharply conservative appointments—one sees that Obama's major regulatory accomplishments are, for the most part, gutted or on the road to being gutted.

Id. at 607 (footnote omitted); *see also* Rodríguez, *supra* note 7, at 50–52 (describing how the increasing ease of rolling back a predecessor's policies makes it difficult for presidents to achieve permanent policy changes). Rodríguez seems inured to the persistence of this phenomenon as allowing contesting parties at least short-term opportunities to implement their policies, with the thought that the public might eventually give one of the parties a more stable grip on power.

59. Ahmed et al., *supra* note 5, at 2133.

60. *See* Rodríguez, *supra* note 7, at 14 (describing the Trump to Biden transition as "regime change" and a fundamental shift in "personality, legal positions, policy priorities, and governing style"). Rodríguez's argument evokes a vision of the President as an embodiment of the popular will.

overnight.[61] During the COVID-19 pandemic, Biden took unilateral action on many fronts: waiving student debt,[62] requiring workers to be vaccinated or masked,[63] and imposing a nationwide moratorium on tenant evictions.[64]

At each stage of this process, the opposition party decried the President's abuse of executive power; yet when in power, both parties followed the same playbook of presidential policymaking.[65] One might have expected Trump's second term to continue along the lines of his first term or the Biden presidency, perhaps with a moderate acceleration in assertiveness. As it turned out, however, Trump had something more ambitious in mind.

II. TRUMP 2.0: A QUANTUM LEAP IN PRESIDENTIAL CONTROL OF POLICYMAKING

The drastic strengthening of presidential administration in 2025 was not simply due to Trump's own desire for more muscular authority. Equally important, the political forces that had restrained previous presidents had weakened significantly. In writing about presidential administration, Kagan said that "[t]he point is not that the President rules; that would be an impossible change in a context in which Congress, bureaucratic experts, and interest groups historically have played important roles and retain powerful incentives to do so."[66] But things had changed by 2025: Congress was under single-party control, and that party was unusually subservient to the White House. Hyperpolarization meant that there were fewer and fewer moderate swing voters, making it ever more important to guarantee turnout among the party faithful.[67] The Supreme Court's seeming embrace of presidential sovereignty

61. *See id.* at 48.

62. Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling The "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511, 537–39 (2024).

63. *Id.* at 546.

64. *Id.* at 548–49.

65. For instance, Republican who decried Obama's use of executive power hailed Trump's unilateral presidential actions. *See* Jane C. Timm, *Republicans Alarmed Over Obama's Executive Orders, Cheer Trump's On*, NBC NEWS (Jan. 26, 2017, at 11:08 PT), https://www.nbcnews.com/politics/politics-news/republicans-alarmed-over-obama-s-executive-orders-cheer-trump-s-n712231.

66. Kagan, *supra* note 5, at 2317.

67. Thus, it was no longer true—and Trump certainly did not behave as if he thought it was true—that "[t]he more important point is prospective: because the President has a national constituency, he is 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." *Id.* at 2335. Kagan also notes that "[a] prudent President, once elected, works to expand his base of support among the public." *Id.* Kagan also thought:

> Presidents want a bureaucracy that responds to them and provides them with the tools they need to be, and be perceived as, successful leaders. But among those tools is a high level of administrative effectiveness as commonly understood: the capacity to achieve set objectives, without undue cost, in an expeditious and coherent manner.

over the executive branch made it possible to crush bureaucratic opposition.[68] The result was something like presidential administration on steroids.

Speaking of Clinton's use of directives to agencies, Kagan said that "[t]he unofficial became official, the subtle blatant, and the veiled transparent."[69] But by current standards, Clinton was courteous in his directions to agencies. Today, the iron fist is more in evidence than the velvet glove; what was presidential leadership has increasingly verged on presidential domination.

Whether we think that Trump himself has abused this authority, it seems clear that concentrating total control of the executive branch in one person would dramatically expand that person's control over policy at all levels, from regulation to enforcement.[70] That naturally increases the risk of abuse of power while accentuating the risk of policy instability.

At least for some observers, this situation recalled concerns that Kagan had discussed but dismissed—that "institutional arrangements promoting dynamic government, such as the presidential control of bureaucracy, pose a risk of both tyranny and instability that should not be tolerated."[71] Kagan cannot be faulted because she failed to foresee the political and legal forces that have taken hold twenty years later, but in retrospect, her enthusiasm for presidential activism may seem disquieting. Those who find it invigorating under one president may well worry about the fate of democracy under another.

What is the role of statutes in all this? No president to date has claimed the power to ignore statutes at will. But they have generally seen presidential policy authority as plenary except when actions are clearly prohibited by statute. Even

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Id. at 2339 (footnotes omitted). Trump has also given little evidence that he views this as a necessity. Kagan may have underestimated the degree to which deregulatory goals could be achieved by pulverizing agencies and their expertise rather than utilizing them to unwind prior regulations. *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587 (2021).

68. When Kagan wrote, the conventional view of administrative law supported by Supreme Court precedent was that "the President lacks the power to direct an agency official to take designated actions within the sphere of that official's delegated discretion." Kagan, *supra* note 5, at 2323.

69. *Id.* at 2299.

70. Kovacs contends that Kagan's "failure to recognize the APA's significance yielded an analysis that, with the benefit of twenty years' hindsight, stands as an apologia for the United States' continuing slide toward authoritarianism." Kovacs, *supra* note 56, at 104; *see also id.* at 105 ("Twenty years later, presidential administration is beginning to resemble authoritarianism."). Kagan might reply to this observation with the adage that "the dose makes the poison": something that is harmless or even beneficial in small doses may be deadly in large ones. By analogy, a little presidential administration may be great, while too much could be a threat to democracy. Kagan could well argue that her earlier endorsement of presidential administration was explicitly predicated at key points on assumptions about the viability of limitations stemming from the bureaucracy and Congress, and that institutional and political changes in the meantime had undermined those assumptions. This leaves open the question of whether Kagan had embarked on a slippery slope, in which expanding presidential power might both reinforce itself and weaken existing institutional restraints. Note that Rodríguez's later defense of robust presidential administration did not rely on these assumptions about background conditions, which had already changed by the time she wrote after the end of Trump's first term in office.

71. Kagan, *supra* note 5, at 2342.

in the Reagan era, there was no effort to show that cost-benefit analysis reflected statutory policies, so long as it did not contravene a clear statutory mandate. This approach has some resemblance to a somewhat simplistic—some would say caricatured—view of the *Chevron* doctrine as allowing open-ended discretion unless unmistakably contravened by statutory language.

Trump's funding freezes most clearly reflect his view of presidential domination in policymaking. One of Trump's first executive orders froze billions of dollars of funding appropriated under the Infrastructure Investment and Jobs Act and the Inflation Reduction Act of 2022 until they could be reviewed for consistency with administration policy.[72] The executive order aimed "to ensure that no Federal funding be employed in a manner contrary to the principles outlined in [Section 2], unless required by law."[73]

Novel funding conditions have similar phrasing. One executive order directed agencies to eliminate educational funding for what the President terms "gender ideology," or for the support of a student's "social transition" (such as modifying a student's pronouns), "to the maximum extent consistent with applicable law."[74] Note that "applicable law" appears only as a possible constraint, not a source of policy.

Similarly, Trump imposed a lengthy freeze on the enforcement of the Foreign Corrupt Practices Act.[75] Any new enforcement guidelines were supposed to "prioritize American interests, American economic competitiveness with respect to other nations, and the efficient use of Federal law enforcement resources."[76] There was not a word about furthering the anti-corruption policies that the statute itself embodies. Rather, the goal was to eliminate "excessive barriers to American business abroad" with little to no regard to controlling corruption.[77]

Another example involves regulations governing environmental impact statements. In calling for new agency regulations, Trump directed the Chairman of the Council on Environmental Quality to focus primarily on administrative priorities:

> "Consistent with applicable law, all agencies must prioritize efficiency and certainty over any other objectives, including those of activist groups, that do

72. Exec. Order No. 14,154, 90 Fed. Reg. 8353, 8357 (Jan. 20, 2025).

73. *Id.* at 8354.

74. Exec. Order No. 14,190, 90 Fed. Reg. 8853 (Feb. 3, 2025).

75. Exec. Order No. 14,209, 90 Fed. Reg. 9587, 9587 (Feb. 10, 2025).

76. *Id.*

77. *Id.* For a discussion of the issues raised by presidential non-enforcement directives, see generally Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments Over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235 (2016).

> not align with the policy goals set forth . . . in this order or that could otherwise add delays and ambiguity to the permitting process."[78]

Apparently, regulations implementing the National Environmental Policy Act ("NEPA")—a law that by its own terms is about the environment rather than administrative certainty and efficiency—are supposed to prioritize interests like eliminating delays over environmental goals whenever legally permissible.

Strikingly, many executive orders do not merely give directives to agencies or announce administration policy; they also purport to declare the "policy of the United States" on a host of matters. While previous presidents made similar efforts, a partial listing shows just how pervasive Trump's effort to set national policy has been. What is most notable is Trump's claim to speak for the entire government (and presumably the country as a whole). Here is a list of some of these presidentially enacted national policies during the first three months alone:

> It is the policy of the United States to sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security.[79]

> [I]t is the policy of the United States that it will not fund, sponsor, promote, assist, or support the so-called "transition" of a child from one sex to another, and it will rigorously enforce all laws that prohibit or limit these destructive and life-altering procedures.[80]

> It shall also be the policy of the United States to oppose male [i.e., transgender women's] competitive participation in women's sports more broadly, as a matter of safety, fairness, dignity, and truth.[81]

> It is the policy of the United States to establish a Strategic Bitcoin Reserve. It is further the policy of the United States to establish a United States Digital Asset Stockpile that can serve as a secure account for orderly and strategic management of the United States' other digital asset holding.[82]

> It is the policy of the United States that coal is essential to our national and economic security.[83]

> It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.[84]

> It is . . . the policy of the United States to end the use of paper straws.[85]

78. Exec. Order No. 14,154, 90 Fed. Reg. 8353, 8355 (Jan. 20, 2025).
79. Exec. Order No. 14,179, 90 Fed. Reg. 8741, 8741 (Jan. 23, 2025).
80. Exec. Order No. 14,187, 90 Fed. Reg. 8771, 8771 (Jan. 28, 2025).
81. Exec. Order No. 14,201, 90 Fed. Reg. 9279, 9279 (Feb. 5, 2025).
82. Exec. Order No. 14,233, 90 Fed. Reg. 11789, 11789 (Mar. 6, 2025).
83. Exec. Order No. 14,261, 90 Fed. Reg. 15517, 15517 (Apr. 8, 2025).
84. Exec. Order No. 14,281, 90 Fed. Reg. 17537, 17537 (Apr. 23, 2025).
85. Exec. Order No. 14,208, 90 Fed. Reg. 9585, 9585 (Feb. 10, 2025).

> It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality.[86]
>
> It is the policy of the United States to promote the productive harvest of our seafood resources; unburden our commercial fishermen from costly and inefficient regulation; combat illegal, unreported, and unregulated (IUU) fishing; and protect our seafood markets from the unfair trade practices of foreign nations.[87]
>
> It is the policy of the United States that the regulation of manufacturing pharmaceutical products and inputs be streamlined to facilitate the restoration of a robust domestic pharmaceutical manufacturing base.[88]

Some of these policies seem insignificant (no paper straws!); others deal with issues in great controversy, such as racial discrimination and transsexuality; others bear on issues with profound long-term consequences like climate change and artificial intelligence. What they have in common is that, more than ever, national policy is being set by the President rather than Congress, courts, or agencies.

These executive orders also illustrate just how extensively Trump has tried to fill the available policy space. Beyond the list above, there are many executive orders dealing with other topics that either lack explicit policy declarations or phrase them as the policies of the Administration rather than the nation as a whole. It is not easy to think of an important domain of domestic policy that has not been the subject of one or more executive orders. The multitude of executive orders may also provide more detailed direction to agencies than in the past, such as the orders referenced earlier dealing with minutiae like paper straws and water pressure in showerheads.

Kagan viewed presidential administration as a cure for the weaknesses of the bureaucratic process, "foremost among which are inertia and torpor."[89] In Kagan's view, by emphasizing the need to control agency action, the standard account of administrative law obscured the problem: Rather than controlling over-active agencies, "the need to control bureaucracy may be more a matter of providing direction and energy than of imposing constraints."[90] Trump has

86. Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025).

87. Exec. Order No. 14,276, 90 Fed. Reg. 16993, 16993 (Apr. 17, 2025).

88. Exec. Order No. 14,293, 90 Fed. Reg. 19615, 19615 (May 5, 2025).

89. Kagan, *supra* note 5, at 2263. Whatever else one might say about the Trump Administration, torpor is not one of its flaws. Nor does the flood of executive orders seem likely to abate, since Trump reportedly has a stack of executive orders that are already prepared and ready to issue when the right moment arises. *See* Natalie Allison, Emily Davies & Michael Birnbaum, *Cards in Deck: Trump Keeps Stack of Orders Ready to Play as Needed*, WASH. POST (June 6, 2025), https://www.washingtonpost.com/politics/2025/06/06/trump-executive-orders-strategy.

90. Kagan, *supra* note 5, at 2264. Kagan did not explain why the presidential appointees who head agencies were incapable of playing this role without intrusive White House participation.

combined both—with more than enough energy and vigor, coupled with strict directives—to constrain agencies.

Moreover, Trump seems to think that state laws contrary to the Administration's policies cannot be tolerated. In an executive order denouncing state climate policy, Trump complains: "These State laws and policies are fundamentally irreconcilable with my Administration's objective to unleash American energy. They should not stand."[91]

President Trump has also not been shy about asserting his own views of highly technical issues. The social cost of carbon is an estimate of the harm caused by an additional ton of carbon dioxide over the lengthy period it remains in the atmosphere warming the planet.[92] There is an extensive economic literature about the technical issues involved in this estimate.[93] A Trump executive order jumped into the fray, opining that "[t]he calculation of the 'social cost of carbon' is marked by logical deficiencies" and "a poor basis in empirical science," and should therefore be abandoned.[94]

A more recent executive order opines on the health effects of low-level radiation, which Trump believes have been overestimated. According to Trump, "The NRC utilizes safety models that posit there is no safe threshold of radiation exposure and that harm is directly proportional to the amount of exposure. Those models lack sound scientific basis and produce irrational results . . . ."[95] Later in the same executive order, Trump directs the Nuclear Regulatory Commission ("NRC") to "reconsider reliance on the linear no-threshold (LNT) model for radiation exposure and the 'as low as reasonably achievable' standard, which is predicated on LNT" on that ground that "[t]hose models are flawed."[96]

There is no way to know whether these confident technical pronouncements were the results of dialogue with agency experts, personal discussions with outside experts, communications from lobbyists, or input from a media figure or conservative think tank. One can only hope that government experts were consulted, but even that is unknown.

Trump's efforts to seize control of domestic policy to the maximum extent possible may have been invited by congressional dysfunction and political demands for dramatic change fed by polarization. They may also reflect his own inclination and vision of governance. Whatever their roots, these efforts challenge visions of governance that place Congress in the center of

91. Exec. Order No. 14,260, 90 Fed. Reg. 15513, 15514 (Apr. 8, 2025).

92. *See* ENV'T PROT. AGENCY, No. EPA-HQ-OAR-2021-0317, EPA REPORT ON THE SOCIAL COST OF GREENHOUSE GASES: ESTIMATES INCORPORATING RECENT SCIENTIFIC ADVANCES 1 (Nov. 2023), https://www.epa.gov/system/files/documents/2023-12/epa_scghg_2023_report_final.pdf.

93. *See id.* at 107–40 (bibliography of relevant technical literature).

94. Exec. Order No. 14,154, 90 Fed. Reg. 8353, 8356 (Jan. 20, 2025).

95. Exec. Order No. 14,300, 90 Fed. Reg. 22587, 22587 (May 23, 2025).

96. *Id.* at 22589.

policymaking and give the President only an interstitial role. As detailed in Part III, the current Supreme Court seems wedded to that conventional vision.

III. THE SUPREME COURT AND PRESIDENTIAL POLICYMAKING

A crucial goal of presidential administration is to give presidents the power to lead major new policy initiatives without new legislation.[97] Scholars who have recently analyzed this concept have concluded that "presidential administration's triumph required the demise of a prior form of governance where Congress played a larger role."[98] In this Section, we consider the tension between the Supreme Court's embrace of presidential dominance of the executive branch with doctrines that cabin presidential administration in practice.

A. THE TENSION BETWEEN PRESIDENTIAL PRIMACY AND ADMINISTRATIVE LAW DOCTRINES.

When she wrote in 2001, Kagan said that "the courts today do not so much exercise an independent check on agency action as they protect or promote (in various ways and to varying degrees) the ability of the other entities . . . to perform that function."[99] Kagan did see a risk "that presidential administration might displace the preferences of a prior (rather than of the contemporaneous) Congress by interpreting statutes inconsistently with their drafters' objectives."[100] However, she thought that courts would provide a sufficient check to prevent this.[101] Still, Kagan admitted that presidents might pose a greater danger than agencies of lawlessness because "[p]residents, more than agency officials acting independently, tend to push the envelope when interpreting statutes."[102] Regardless of the inclination of any particular president toward being law-abiding, their institutional role is not defined in terms of implementing particular statutory schemes, but rather in terms of their public policy agendas.

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97. As Rodríguez puts it:

> In today's context, it is easy to point to specific problems that require boundary-pushing executive action, driven by political officials, for their management or resolution. Perhaps the best and most urgent example of the need for decisive, consistent, and wide-ranging executive and regulatory action is the imperative of combatting climate change. The contemporary reality is that, without the Executive's willingness to use its authorities creatively and aggressively, the phenomenon will overtake our human capacity to address it, both in the face of legislative stasis and even if and when Congress acts.

Rodríguez, *supra* note 7, at 67–68 (footnotes omitted).

98. Ahmed et al., *supra* note 5, at 2137.

99. Kagan, *supra* note 5, at 2254.

100. *Id.* at 2347.

101. *Id.*

102. *Id.* at 2349.

Kagan also admitted the possibility that presidential administration might "threaten a kind of impartiality and objectivity in decisionmaking that conduces to both the effectiveness and the legitimacy of the administrative process."[103] She expressed concern that presidential intrusion into enforcement posed special problems: "The crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking."[104] Yet Kagan seemed to think that governance norms and presidential prudence would keep these problems in check. As we have seen, presidential administration in practice has not always fulfilled that expectation. In this Section, we will see how Supreme Court doctrine bears on these issues.

As leading administrative law scholars have observed, there is a basic tension between presidential administration and the operation of judicial review:

> To read press accounts of the day-to-day activities of the federal government is to imagine, many times quite accurately, that the White House (now a sprawling bureaucracy in its own right) controls all administrative action. Yet at the level of administrative law doctrine, when judicial review is available, the question is always whether an agency or department has exercised this discretion in accordance with its governing statute. Judicial review of administrative action is therefore dedicated to the defense of congressional policy choice—at least where that policy can be discerned.[105]

Although the Supreme Court is skeptical of the administrative state, the Justices are also skeptical of unbridled presidential policymaking. This has appeared in cases involving judicial review of agency regulations embodying major presidential initiatives[106] and cases involving issues of agency expertise. These cases cabin the space for presidential policymaking by reserving some issues to Congress and by increasing the need for regulations to reflect the kind of technical expertise found in agencies rather than the White House.

It may seem paradoxical that the Court is emphasizing presidential control of the executive branch in one set of rulings while making it harder for the president to make major policy decisions without support from Congress in another. One could argue that the scope for executive action should be smaller,

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103. *Id.* at 2357.

104. *Id.* at 2357–58.

105. Mashaw & Berke, *supra* note 7, at 554. Similarly, these authors write:

> Courts ask whether the agency's approach flows from a correct, or at least reasonable, construction of its organic statute. They ask, in addition, whether the agency's fact-finding upon which its actions are predicated address the relevant considerations—that is, the considerations made relevant by the agency's statute. In this way, the Judiciary reinforces the authority of Congress as an institution, whatever the partisan composition of the current Congress might be.

Id. at 562 (footnote omitted).

106. *See* discussion *infra* Part.III.B.

but that within that scope, it is more democratic and efficient to centralize power completely. However, that stance is inconsistent with what presidents from Reagan to Trump have pursued, which is the ability to implement major policy initiatives without going through Congress or having to persuade the bureaucracy to be supportive. From that perspective, the Court has promoted the mechanics of presidential administration at the expense of the core goal presidents have pursued: end-running Congressional gridlock with presidential action.

B. CONGRESSIONAL PRIMACY ON MAJOR POLICY QUESTIONS

Beginning as early as the Clinton Administration (and arguably earlier under George H.W. Bush), the Supreme Court started to scrutinize regulations more intensely when it saw them as exceptionally significant, often striking them down. The regulations in question were generally the outcome of presidential administration rather than agency initiative,[107] though the opinions tended to avoid mentioning the President's leading role in a regulation's adoption. It is no accident that the rise of the major questions doctrine parallels the rise of presidential administration.[108] Indeed, the cornerstone case in the doctrine's evolution involved one of Kagan's main examples of presidential administration, the FDA regulation of tobacco instigated by Clinton, which the Court struck down under a version of the major questions doctrine.[109] While some might argue that in reality such decisions shifted power to the courts rather than Congress, they did target White House-driven policy initiatives.

This evolving doctrine received what appears to be its definitive statement in *West Virginia v. EPA*,[110] where the Court held that Obama's signature climate regulation violated the major questions doctrine, which embodies a presumption that Congress "intends to make major policy decisions itself, not leave those decisions to agencies."[111] For that reason, the Court said, it was skeptical of "extravagant" claims of statutory power over the national economy.[112] Returning to the point later in its opinion, the Court used different phrasing: "The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself."[113] The Court found it telling that

107. These cases are surveyed in Short & Shugerman, *supra* note 62, at 535–64.

108. *Id.* at 569–70. One plausible explanation is that "[t]he Justices understand that these cases are highly politicized, and so perhaps they avoid mentioning a specific president to signal that they are above the political fray." *Id.* at 575.

109. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 157–61 (2000).

110. 142 S. Ct. 2587 (2022).

111. *Id.* at 2609.

112. *Id.*

113. *Id.* at 2613.

the EPA did not have the technical and policy expertise involved in making some of the key policy decisions at issue.[114]

Like the Clinton tobacco regulation, the Obama climate regulation was unquestionably a product of presidential administration. Obama had announced in a speech at Georgetown that "for the sake of our children and the health and safety of all Americans," he was "directing the Environmental Protection Agency to put an end to the limitless dumping of carbon pollution from our power plants and complete new pollution standards for both new and existing power plants."[115]

As in earlier cases, the majority did not focus on Obama's essential role in issuing the regulation, but Justice Neil Gorsuch addressed presidential administration more directly in his concurring opinion. Joined by Justice Samuel Alito, Gorsuch vividly portrayed the risks associated with aggressive presidential administration.[116] Gorsuch worried that if the executive branch were allowed too much discretion, "legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him."[117] Gorsuch also presciently pointed to other risks: "Stability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power."[118]

Gorsuch portrayed Congress as the superior policymaker for several reasons. First, he quoted President James Madison to the effect that the Constitution "placed its trust not in the hands of 'a few, but [in] a number of hands,' so that those who make our laws would better reflect the diversity of the people they represent and have an 'immediate dependence on, and an intimate sympathy with, the people.'" [119] Furthermore, according to Gorsuch, "[b]y effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time."[120] Moreover, the legislative process protects minorities because of the need for compromise to pass new laws, and the difficulty of passing federal legislation leaves more room for the states to

114. *Id.* at 2612.
115. *See* Short & Shugerman, *supra* note 62, at 540.
116. *See West Virginia*, 142 S. Ct. at 2618, 2626.
117. *Id.* at 2618.
118. *Id.*
119. *Id.* at 2617.
120. *Id.* at 2618.

operate.[121] Executive-led policy lacks these desirable characteristics. Gorsuch closed by saying:

> When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives.[122]

In a later major questions case, *Biden v. Nebraska*, the majority made clear its rejection of presidential actions that it regarded as stepping over the line between statutory implementation and raw executive policymaking.[123] The case involved a presidentially directed waiver of student loan indebtedness, based on a statute allowing the agency to waive or modify statutory requirements. The Court rejected this effort in no uncertain terms, saying that "[t]he Secretary's plan has 'modified' the cited provisions only in the same sense that 'the French Revolution "modified" the status of the French nobility'—it has abolished them and supplanted them with a new regime entirely."[124] In the Court's view, "[w]hat the Secretary has actually done is draft a new section of the Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text."[125] This the Court could not abide.

We may not agree with the way the major questions doctrine has developed or with the Court's effort to justify it as reinforcing Congress's role in making policy.[126] It is clear, however, that the Court has embraced the idea that Congress is the primary fount of domestic policy. As time has gone by, more expansive

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121. *Id.*

122. *Id.* at 2626. Gorsuch's reference to "pen-and-phone regulations" seems to have been a reference to Obama's use of those words in espousing presidential administration. *See supra* text accompanying notes 40–45. Gorsuch's view about the dangers of centering policy authority in the President can be usefully compared David B. Froomkin's view. Froomkin argues that "[n]ondelegation concerns are heightened when Congress delegates directly to the President. Schemes authorizing the President to trigger broad powers by making vague findings create the risk that the legislative power will, for practical purposes, be located outside of Congress, precisely what the nondelegation doctrine seeks to prevent." David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. REG. 60, 63 (2024).

123. 143 S. Ct. 2355 (2023).

124. *Id.* at 2369.

125. *Id.* at 2371.

126. The major questions doctrine is controversial among scholars. *See generally* Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024) (describing how the normative arguments offered by the Supreme Court to justify the doctrine are unsatisfactory); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191 (2023) (addressing academic critiques of the major questions doctrine as illegitimate and unworkable); Daniel T. Deacon & Leah M. Litman, *The New Major Question Doctrine*, 109 VA. L. REV. 1009 (2023) (critiquing how federal courts determine whether an agency policy is major and the implications of an agency policy determined to be major); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (2023) (criticizing the Supreme Court's embrace of an aggressive major questions doctrine in *West Virginia v. Environmental Protection Agency*); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (describing how recent major questions doctrine cases are simply separation of power cases).

use of presidential administration has heightened the conflict with this judicial vision.

C. STATUTORY INTERPRETATION AND PRESIDENTIAL ADMINISTRATION

The Court has also approached judicial review of agency interpretations of statutes in a way that reflects this Congress-centered vision. *Loper Bright Enterprises v. Raimondo*, which overruled *Chevron*, is largely about the role of courts, but it also embodies a conception of the role of Congress *vis-à-vis* the executive branch.[127] The Court pointed to two situations where the administrative interpretation of a statute would be relevant to a reviewing court. In the first situation, the Court said, Congress had delegated discretion to an agency, a situation that the Court seemed to view as frequent:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[ ]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," such as "appropriate" or "reasonable."[128]

In those situations, the role of a reviewing court is limited:

> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court . . . is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and

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127. 144 S. Ct. 2244 (2024). Notably, *Loper Bright* relied heavily on the Administrative Procedure Act, while Kagan's article largely ignored the statute. *See* Kovacs, *supra* note 56, at 104 ("The most important statute in administrative law and Kagan's enormously influential article are like ships passing in the night."). The APA may well have been geared to a much different vision of administration:

> The close working relationship between the President and Congress seems to have led administrative law mavens of the time to conceptualize the place of the President in the administrative state differently than we do today. He was not a runaway actor with his own agenda who needed to be checked by courts. Rather, he was Congress's ally, working with courts and the legislature to make the administrative state more accountable and efficacious.

Rosenblum, *supra* note 10, at 2170. A major puzzle about the Supreme Court's current administrative law jurisprudence is the simultaneous embrace of a populist model of administrative legitimacy as resting on presidential control alongside the adoption of doctrines that are designed to keep agencies more focused on implementing congressional rather than presidential priorities. One possible reconciliation is that the Justices envision the President as playing the kind of role that might have been anticipated by the drafters of the APA, with the President serving primarily as the People's Watchdog over the bureaucracy, not as the People's Lawmaker. Some presidents, however, may not see things that way.

128. *Loper Bright*, 144 S. Ct. at 2263 (citations omitted). The accompanying footnotes provide citations to statutes and previous cases involving such delegations. *Id.* at 2263 nn.5–6.

> ensuring the agency has engaged in "reasoned decisionmaking" within those boundaries.[129]

As to what reasoned decision-making normally entails, the Court observed in *Motor Vehicle Mfrs. Ass'n v. State Farm* that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider."[130] That would surely encompass presidential policies completely unrelated to (or worse, contrary to) the statute itself. The *State Farm* doctrine puts a premium on policy analysis, and it is the agency rather than the White House that is expert in the policy domain.

When there is no grant of discretion by Congress, however, courts independently interpret the statute. But they "may . . . seek aid from the interpretations of those responsible for implementing particular statutes."[131] Notably, it is the implementing agency's interpretation that is given respectful consideration here, not the President's. For instance, the Court quoted an 1878 case to the effect that executive branch interpretations are entitled to "most respectful consideration" because the administrators were "usually able men, and masters of the subject."[132] Elsewhere, the Court quoted *Skidmore v. Swift & Co.* as a notable articulation of this approach, including a reference to an agency with "specialized experience" as having a "body of experience and informed judgment" that could guide courts.[133] Later, the Court again stressed the role of agency expertise, saying that an agency's interpretation "may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'"[134] It is, of course, the agency, not the White House, that normally has experience and expertise in applying a specific statute.[135]

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129. *Id.* at 2263.

130. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court added that an agency action would also be arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id. Loper Bright* raises questions about how to apply this branch of statutory interpretation when a President dictates policy, either under a direct statutory grant of discretion or by directing the actions of an agency. According to Kovacs, "[n]o federal court will review presidential decisions for abuse of discretion. Suing the agency that implements the President's decision does not provide complete judicial oversight because where an agency lacks discretion—as when it is following a presidential order—its action is unreviewable." Kovacs, *supra* note 56, at 112. If this is correct, it raises serious questions about how the second step of the process outlined by the Court (a reasoned explanation of the decision) can operate in an era of presidential administration. That issue is beyond the scope of this Article.

131. *Loper Bright*, 144 S. Ct. at 2262.

132. *Id.* at 2258 (quoting United States v. Moore, 95 U.S. 760, 763 (1878)).

133. *Id.* at 2259.

134. *Id.* at 2267 (quoting Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98, n. 8).

135. In her dissent in *Loper Bright*, Justice Kagan cited accountability to the President as an argument for deferring to agency policy judgments, but her first two arguments for deference to agencies were that "agencies often know things about a statute's subject matter that courts could not hope to," and that "Congress would value

Thus, the effort in a recent executive order to override agencies' legal judgments may be counterproductive. Executive Order 14215, "Ensuring Accountability for All Agencies," provides that "[t]he President and the Attorney General's opinions on questions of law are controlling on all employees in the conduct of their official duties."[136] It prohibits any federal employee, including those in independent agencies, from advancing a contrary legal view in the regulatory process or litigation. To the extent that agency positions are driven by White House dictates, however, they may not qualify for *Skidmore* deference given that *Skidmore* deference is based on the expertise of the agency charged with implementing a law, which is not shared by the White House.[137]

The upshot of *Loper Bright* is to make presidential policy preferences a weaker justification for an agency's statutory interpretation. This is not to say that the Court views presidential influence as illegitimate, but its theory of statutory interpretation leaves markedly less room than the *Chevron* doctrine for presidential policy preferences to drive interpretation.

D. DOCTRINES EMPHASIZING AGENCY EXPERTISE

The most direct effect of *Loper Bright* is to shift control over statutory authority from agencies accountable to the President to the judiciary. As noted above, agency expertise may also be a factor in some circumstances involving statutory interpretation. More commonly, agency expertise enters the picture when courts determine whether a reasoned explanation for a regulation has been

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the agency's experience with how a complex regulatory scheme functions, and with what is needed to make it effective." *Id.* at 2298 (Kagan, J., dissenting).

136. Exec. Order No. 14,215, 90 Fed. Reg. 10447, 10448 (Feb. 18, 2025).

137. The *Skidmore* Court explained:

> Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution.

Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944).

given.[138] Kagan was critical of this type of judicial review and its tendency to empower agency experts at the expense of the President:

> The courts, by contrast, have promoted vigorously the control of administrative policy by bureaucratic experts, not only by enabling them to fill the space that Congress might have occupied but also by requiring that agency action bear the indicia of essentially apolitical, "expert" process and judgment. The sharpest judicial spur to this expert authority comes from "hard look" review, which requires an agency (on pain of judicial reversal of its action) to address all significant issues, take into account all relevant data, consider all feasible alternatives, develop an extensive evidentiary record, and provide a detailed explanation of its conclusions.[139]

Thus, she said, courts "assign to experts a dominant role in the agency's process by insisting that the agency's decisions reflect and proceed from the distinctive kind of knowledge, skills, and evaluative capacity that experts possess."[140] Kagan wanted to limit this form of review in situations where the President controlled the agency's decision, undermining the role of expertise in governance for the most important regulatory decisions.[141] Cristina M. Rodríguez, a more recent advocate of aggressive presidential policymaking, takes a similar position.[142] The Supreme Court, however, has paid no heed to these arguments.

Instead, the Supreme Court has continued to endorse close review of agency policy decisions. In *Ohio v. EPA*, it vacated an agency rule that was years in the making and had produced voluminous agency documentation.[143] The EPA had failed, in the Court's view, to provide a reasoned explanation because it had not addressed, or at least had not addressed clearly enough, the issue of whether it would make sense to continue to apply the regulation in some states

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138. For example, in a recent case, the Court stated that, "[b]lack-letter administrative law instructs that when an agency makes those kinds of speculative assessments or predictive or scientific judgments, and decides what qualifies as significant or feasible or the like, a reviewing court must be at its 'most deferential.'" Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1512 (2025) (citation omitted).

139. Kagan, *supra* note 5, at 2270.

140. *Id.*

141. *Id.* at 2382.

142. Cristina writes:

> [T]he thickening of procedure can also begin to render government ineffective and to deprive those who wield power within it from shaping government policies and practices to reflect their considered and value-laden views about what the state should do for the public. . . . To put the argument in its strongest form, the rule of law can be mobilized as an excuse to insert the judiciary in the policymaking process to thwart outcomes judges regard with suspicion, with limited discernable benefit flowing from the insistence on reason-giving.

Rodríguez, *supra* note 7, at 96–97.

143. 144 S. Ct. 2040 (2024).

even if its implementation had been halted by courts in others.[144] This issue was barely brought to the agency's attention during the rulemaking, but the Court found that to be no excuse.[145] As Kagan pointed out, "hard look" review like this tends to empower agencies because they, not the White House, have deep technical expertise on regulatory issues (not to mention the bandwidth to sieve through hundreds or sometimes thousands of rulemaking comments).

Even when the Supreme Court has signaled a desire to loosen judicial review, it has relied on agency expertise as a justification. In a 2025 case, *Seven Country Infrastructure Coalition v. Eagle County*,[146] the Court emphasized the need for deference to agencies in cases under the National Environmental Policy Act: "The bedrock principle of judicial review in NEPA cases can be stated in a word: Deference."[147] The rationale was not that the agencies were accountable to the President and subject to presidential policy in implementing NEPA. Instead, "[b]lack-letter administrative law instructs that when an agency makes those kinds of speculative assessments or predictive or scientific judgments, and decides what qualifies as significant or feasible or the like, a reviewing court must be at its 'most deferential.'"[148]

It has been said that "'[t]he President told me to do it' is not a legal reason for agency action, except in those instances (largely concerning foreign affairs) in which the Constitution gives the President independent authority, or where Congress has statutorily delegated administration to the President."[149] If so, the agency's obligation to provide a reasoned explanation may not be satisfied by referencing an unreasoned presidential directive.[150]

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144. *Id.* at 2053–54.

145. *Id.* at 2056–57.

146. 145 S. Ct. 1497 (2025).

147. *Id.* at 1515.

148. *Id.* at 1512 (citation omitted).

149. Mashaw & Berke, *supra* note 7, at 554. In *State Farm*, Justice Rehnquist's partial dissent argued that the agency's change of position was due to the election of a new President and that this was a "perfectly reasonable basis" for reappraising the benefits and costs of a regulation "in light of the philosophy of the administration." Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist. J., concurring in part). The majority did not, however, take that view, and even Rehnquist did not contend that such a change in philosophy was a sufficient rationale for a change in an agency's position standing alone.

150. An alternative view would be that the agency lacks discretion to take any position other than the President's and therefore need not consider comments or provide any further justification. The functional basis for that view would be that the President's personal involvement negates concerns posed by unelected bureaucrats pursuing their own agenda, which the APA seeks to prevent, and replaces other sources of legitimacy with the special legitimacy provided by the President's uniquely democratic legitimacy. The upshot of this view seems to be close to a return to *Chevron*-level or even greater discretion whenever an agency acts pursuant to presidential command. A reviewing court's role would be essentially limited to ensuring that the President's view is within the outer bounds of what a statute allows. This would allow the President's decision to intervene or not intervene to control the choice between the *Loper Bright* requirement of a reasoned explanation for discretionary actions and a strong form of *Chevron* deference.

At a deeper level, the requirement that the government give a reasoned explanation of its decisions embodies a different theory of political legitimacy than presidential administration. Yale Law School Professor Jerry L. Mashaw has observed that presidential administration rests on a theory of authority based on the President's status as the only official elected by the national populace.[151] In contrast, reasoned decision-making grounds its legitimacy in other aspects of liberal democracy, such as empowerment of legislative assemblies, avoidance of arbitrary government, and transparency.[152]

Notably, the Trump Administration has been at pains to eliminate the need to obtain public comment on regulatory actions and provide explanations for such actions. One of the clearest examples is Executive Order 14270 on "Zero-Based Regulatory Budgeting to Unleash American Energy."[153] The Executive Order attempts to limit the need for agencies to go through the normal regulatory process, including explaining the reasons for their actions, when repealing previous regulations.[154] The mechanism for achieving this result is a mandate that certain agencies adopt a new regulation that retroactively inserts sunset provisions in all existing regulations, which would then allow the agency to kill past regulations merely by letting the clock run out without any affirmative action to renew the regulations. Since the agency would be engaged in inaction rather than regulatory action, procedural requirements for regulatory actions would not apply in this scenario, nor would the agency have to explain its reasons for allowing the regulation to die.

CONCLUSION

In an era of congressional gridlock, it is far from surprising that presidents have tried to step into the policy gap. Nor is it necessarily undesirable. But presidential administration has proved to have downsides that seem to worry the

151. Jerry Mashaw, *Is Administrative Law at War with Itself?*, 29 NYU ENV. L. REV. 421, 423 (2021). Mashaw argued that, "taken together, administrative law's contemporary reasonableness demands aspire to construct a system of administrative governance that is well-informed, highly participatory, complexly interconnected with political and legal monitors, and insulated against, although surely not immune from, the seizure of public power for private or partisan gain." *Id.* at 529.

152. Mashaw, *supra* note 11, at 423. Mashaw argued that, "taken together, administrative law's contemporary reasonableness demands aspire to construct a system of administrative governance that is well-informed, highly participatory, complexly interconnected with political and legal monitors, and insulated against, although surely not immune from, the seizure of public power for private or partisan gain." *Id.* at 430.

153. *See generally* Exec. Order No. 15,643, 90 Fed. Reg. 15643 (Apr. 9, 2025).

154. Under Section 4(b) of the Executive Order, unless the expiration date is extended:

> [A]gencies will treat Covered Regulations as ceasing to be effective on that date for all purposes. An agency shall not take any action to enforce such an ineffective regulation and, to the maximum extent permitted by law, shall remove it from the Code of Federal Regulations.

Id. Thus, the regulation will expire without the need for the agency to undertake a rulemaking process to repeal it.

Justices. Some observers have complained that presidential administration has created "a Sisyphean doing and undoing of the same policies—an expensive repetition that thwarts the policy goals motivating both the enactment and rescission."[155] Those observers argue that "energy" is not always good in and of itself: "[S]urely we would at least want to substitute something like 'energetic in carrying out statutory responsibilities as reasonably interpreted, respectful of constitutional liberties and limits on government power' into the simple question of whether administration has been 'energetic.'"[156] Even before the explosion of presidential action in Trump's second term, they were far from alone in believing that "[p]residentialism needs reasonable constraint to avoid excessive, unchecked executive action, given the one-way ratchet of power that recent experience seems to illustrate."[157]

Presidential leadership is central to modern American governance, but it comes with costs. Long before modern presidential administration emerged under Reagan and Clinton, advocates of increased presidential power over agencies were aware of the tension between the benefits of centralized power and the threat of overreach. On the eve of World War II, architects of modern administrative procedure believed that "[p]residential administration would make American democracy accountable and efficacious in order to stand up to European fascists abroad, while simultaneously checking the American executive in order to prevent it from becoming fascistic at home."[158]

The Court's embrace of the unitary executive theory has undermined checks within the executive branch that would encourage fidelity to statutory policies.[159] The second Trump Administration has proven that those internal safeguards are fragile. Cristina Rodríguez said that "[a]fter all, the Executive will always be constrained by the law's limits, and its innovation will eventually run into those limits, regardless of the theory of statutory interpretation pursued or the degree of energy that exists for new rulemaking and the like."[160] That assessment may, however, overestimate the capacity of courts to address and fully remedy violations of law. Slippage on either access to courts or remedies, such as standing issues or immunity doctrines, could leave the President considerable practical scope to achieve benefits from legal noncompliance in the absence of effective checks from Congress.

It is too early to know how the tension between presidential and judicial views of policymaking will play out. It does seem clear that the Court, including

155. Mashaw & Berke, *supra* note 7, at 610.

156. *Id.*

157. *Id.* at 614.

158. Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 3 (2022).

159. Ahmed et al., *supra* note 5, at 2140.

160. Rodríguez, *supra* note 7, at 91.

its most conservative Justices, has embraced a Congress-centered vision that limits the president's domain for policy innovation and makes it more difficult for presidents to succeed in policy change without support from agency experts. Unless the Court is willing to abandon that vision, it will remain committed to resisting efforts to take presidential administration to its logical conclusion.[161]

161. Mashaw suggests that these visions, while in conflict, must both be given some scope:

> The tension between these models of administrative legitimacy can really only be managed, not resolved. This I take to be an important dimension of the "dense complexity" . . . within which administrators, courts and political overseers now seek to make good on the Constitution's promise of both democracy and the rule of law. Yet, on a more optimistic note, this tension, and administrative attempts to manage it by balancing the competing claims of presidentialism and reasoned administration, also reflect a dense and complexly articulated accountability regime. That regime makes administrative policymaking accountable to multiple and sometimes competing democratic values.

Mashaw, *supra* note 11, at 434. Such a pragmatic accommodation, while at odds with theoretical purity, may be possible, but would remain at odds with the purist vision of presidential administration espoused by the current Administration.

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