

---

---

## FROM PRESIDENTIAL ADMINISTRATION TO BUREAUCRATIC DICTATORSHIP

*Kathryn E. Kovacs\**

### I. INTRODUCTION

Twenty years ago, Justice Elena Kagan published *Presidential Administration* in the *Harvard Law Review*.<sup>1</sup> Seventy-five years ago, President Harry Truman signed the Administrative Procedure Act<sup>2</sup> (APA). The most important statute in administrative law and Kagan's enormously influential article are like ships passing in the night. Kagan interrogated the fundamental question of how to control agency discretion.<sup>3</sup> Yet she engaged with the APA only in passing. Her 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.

In her "seminal"<sup>4</sup> article, then-Professor Kagan celebrated presidential control of the administrative state. "[P]residential supervision" of federal agencies, she argued, "could jolt into action bureaucrats suffering from bureaucratic inertia."<sup>5</sup> It would make agencies "more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."<sup>6</sup> Accordingly, Kagan advocated interpreting statutes that delegate authority to agency officials "as allowing the President to assert directive authority."<sup>7</sup> This interpretive move allowed her to bypass the constitutional objections to a President usurping power that is delegated by statute to another officer.<sup>8</sup> Her tour de force in administrative law released a flood of scholarship both celebrating and criticizing her analysis.<sup>9</sup>

---

\* Professor, Rutgers Law School, The State University of New Jersey. The author received funding from the C. Boyden Gray Center for the Study of the Administrative State to prepare and present this Essay at the Presidential Administration and Political Polarization Research Roundtable. Many thanks to Roundtable participants for assistance in shaping this paper. Thanks also to David Noll, Chris Walker, and the *Harvard Law Review* editors for helpful comments.

<sup>1</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>2</sup> 5 U.S.C. §§ 551, 553–559, 701–706.

<sup>3</sup> Kagan, *supra* note 1, at 2254.

<sup>4</sup> Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1130 (2021).

<sup>5</sup> Kagan, *supra* note 1, at 2249.

<sup>6</sup> *Id.* at 2252.

<sup>7</sup> *Id.* at 2251.

<sup>8</sup> *See id.*

<sup>9</sup> *See* Kevin Bohm, Note, *The President's Role in the Administrative State: Rejecting the Illusion of "Political Accountability,"* 46 HASTINGS CONST. L.Q. 191, 201 (2018) (discussing the influence of *Presidential Administration*); Daniel A. Farber, *Presidential Administration: Then and*

Twenty years later, presidential administration is beginning to resemble authoritarianism. As Professor Paul Gowder recently observed:

[A] president may decide that he dislikes Muslims, and hence may decree that immigrants from a bunch of predominantly Muslim countries are not allowed; he may decide to deter the exercise of the lawful right of asylum by taking helpless children, separating them from their families, and locking them up in cages; or he might decide that he dislikes a number of cities who have offered him insult and send federal SWAT teams to beat people up in some of them, while having his Department of Justice declare others among them “anarchist jurisdictions” and seek to withhold law enforcement funds from them.<sup>10</sup>

*Structural Deregulation*, an article by Professors Jody Freeman and Sharon Jacobs in the most recent issue of the *Harvard Law Review*, reveals some fundamental flaws in Kagan’s analysis.<sup>11</sup> Unlike Kagan, Freeman and Jacobs do not assume that every President acts in good faith to enhance the capacity of federal government agencies to fulfill their statutory mandates.<sup>12</sup> Rather, some Presidents employ “structural deregulation,” which “targets an agency’s core capacities” and “erodes [its] staffing, leadership, resource base, expertise, and reputation.”<sup>13</sup> While a President employing the tools of “substantive” deregulation aims to weaken “particular agency rules or policies,”<sup>14</sup> a President pursuing “structural deregulation” targets “the agency’s capacity to accomplish its statutory tasks.”<sup>15</sup> Freeman and Jacobs assert that their analysis “complicates Justice Kagan’s narrative by showing that not all Presidents are committed to maintaining the institutional capacity of the bureaucracy.”<sup>16</sup> Actually, their analysis does far more than complicate Kagan’s narrative; it undermines that narrative substantially.

Professor David Noll, in an upcoming issue of the *Michigan Law Review*, dubs a similar phenomenon “Administrative Sabotage.”<sup>17</sup> Like

---

Now, ADMIN. & REG. L. NEWS, Fall 2017, at 4 (calling *Presidential Administration* “enormously influential”).

<sup>10</sup> Paul Gowder, 31 LAW & POL. BOOK REV. 12, 42 (2021) (book review) (reviewing CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020)), <http://www.lpbr.net/2021/01/law-and-leviathan-redeeming.html> [<https://perma.cc/7EV7-MW8B>] (arguing that “our conception of executive power and the permissibility of the administrative state needs to shift with the private stakes involved”); see also Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 163–64 (2018) (canvassing “the current array of warning signs,” *id.* at 163).

<sup>11</sup> Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

<sup>12</sup> Compare Kagan, *supra* note 1, at 2339 (assuming that “Presidents have a large stake in ensuring an administration that works”), with Freeman & Jacobs, *supra* note 11, at 623–24.

<sup>13</sup> Freeman & Jacobs, *supra* note 11, at 587.

<sup>14</sup> *Id.* at 588.

<sup>15</sup> *Id.* at 587.

<sup>16</sup> *Id.* at 629.

<sup>17</sup> David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. (forthcoming Mar. 2022) (manuscript at 4) (on file with the Harvard Law School Library).

Freeman and Jacobs, Noll rejects the assumption that Presidents administer statutory programs in good faith.<sup>18</sup> On the contrary, Noll states that “presidents use agencies to pursue statutory retrenchment that is costly, if not impossible, to obtain directly from Congress.”<sup>19</sup> Under a deregulatory President, “presidential administration is a transmission belt for sabotage.”<sup>20</sup>

Like Freeman and Jacobs, Noll understates the significance of his analysis. Both articles help to demonstrate that we face a major problem with the American presidency, a problem that extends beyond structural deregulation or administrative sabotage. Whether the President favors regulation or deregulation, building agencies or tearing them down, Presidents now overstep their bounds regularly.<sup>21</sup> For American democracy, the problem is existential.<sup>22</sup>

This Essay builds on Freeman and Jacobs’ *Structural Deregulation* by examining the consequences of Kagan’s failure to engage with the APA in *Presidential Administration*. She searched for the best means to control agency discretion,<sup>23</sup> but overlooked Congress’s superstatutory answer to that question.<sup>24</sup> Over the past twenty years, many scholars have interrogated Kagan’s analysis,<sup>25</sup> but none has analyzed her failure to recognize the importance of the APA.<sup>26</sup> The APA is the fundamental charter of the modern administrative state. Its enactment in 1946 marked a constitutional moment at which Congress, the President, and

<sup>18</sup> See *id.* (manuscript at 10, 14, 59).

<sup>19</sup> *Id.* (manuscript at 4–5).

<sup>20</sup> *Id.* (manuscript at 23).

<sup>21</sup> Cf. Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1650 (2016) (“[T]he presidency of the United States has the institutional disposition and capacity for constitutional arrogance — to take unilateral actions challenging its constitutional boundaries and extending its powers at other authorities’ expense.”).

<sup>22</sup> Cf. Huq & Ginsburg, *supra* note 10, at 85 (“[C]onstitutional retrogression is a clear and present risk to American constitutional liberal democracy.”).

<sup>23</sup> See Kagan, *supra* note 1, at 2254.

<sup>24</sup> See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015) [hereinafter Kovacs, *Superstatute Theory*] (arguing that the APA is a superstatute).

<sup>25</sup> According to Westlaw, *Presidential Administration* has been cited more than 1,200 times. Citations to *Presidential Administration* include: Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 554 (2018); Nina A. Mendelson, *Another Word on the President’s Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2457 (2011); Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488 (2011); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 266 (2006); and Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 684 (2016).

<sup>26</sup> Cf. Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 761 (2021) (“[T]he presidential administration Professor Kagan described operates almost entirely outside the contours of the APA.”).

the Supreme Court accepted broad delegations of policymaking authority to agencies, but only if the agencies were procedurally constrained and subject to judicial oversight.<sup>27</sup>

Part II of this Essay shows that presidential administration has led the United States' democracy down the path toward authoritarianism. Presidents from both parties regularly make final decisions unilaterally with little check from Congress or the courts.<sup>28</sup>

Part III sketches the strategy Kagan employed in *Presidential Administration* to avoid the constitutional difficulties her theory posed. Kagan bypassed those issues by interpreting statutes that delegate authority to a particular officer as allowing the President to assume that power. With the benefit of hindsight, we can see now that her strategy enabled dangerous growth of presidential power.<sup>29</sup>

Part IV then argues that the APA undermines the constitutional foundation upon which presidential administration stands. The APA reflects Congress's proper role as the primary overseer of the administrative state. It codifies the conditions that legitimize statutory delegations of authority to agencies and the procedures that Congress, the President, and the Supreme Court agreed were appropriate before imposing agency authority on citizens. And it reflects the judgment of those who lived through the Great Depression, European fascism, and World War II about how best to construct a federal bureaucracy without paving a path to tyranny.

Finally, Part V argues that refocusing on the APA's core values — public participation, transparency, deliberation, and uniformity — would help to forestall the United States' democratic backsliding. Overlooking the APA allowed Kagan to substitute her values — efficiency and accountability — for Congress's values. The APA represents the grand bargain of the administrative state, as well as an agreed-upon set of normative principles motivated by constitutional and rule of law values. By devaluing it, Kagan undermined this monumental political bargain, long-standing constitutional principles, and values that prevent the

---

<sup>27</sup> See Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 90 (2020) [hereinafter Kovacs, *Constraining the Statutory President*]; see also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 90 (1998) (“[I]nsofar as the APA is tantamount to an immutable regulatory ‘constitution,’ the passage of which resembled a constitutional moment quite distinct from the passage of most statutes, then it *really* matters . . .” (footnote omitted)).

<sup>28</sup> See generally Gerhardt, *supra* note 21.

<sup>29</sup> Ashraf Ahmed, Lev Menand & Noah Rosenblum, *The Tragedy of Presidential Administration* 3 (Antonin Scalia L. Sch., Ctr. for the Study of the Admin. State, Working Paper No. 21-39, 2021), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/09/Ahmed-Menand-Rosenblum-The-Tragedy-of-Presidential-Administration.pdf> [<https://perma.cc/VSQ6-42V3>] (“Kagan thought she was announcing the dawn of a new age of democratic governance. In fact, she was speeding the arrival of a dangerous form of plebiscitarianism.”).

federal bureaucracy from becoming the tool of a dictator. In administrative law, we ignore the APA at our peril.

## II. DEMOCRATIC BACKSLIDING IN THE UNITED STATES

Kagan's *Presidential Administration* has turned out to be an important piece. It was the most cited article of 2001.<sup>30</sup> Leading minds in the field call *Presidential Administration* "foundational"<sup>31</sup> and "enormously influential."<sup>32</sup> Moreover, Kagan was a preeminent academic and public servant before taking a seat on the Supreme Court, where she has become a brilliant and influential Justice.<sup>33</sup> As attorney Kevin Bohm observed: "This is a person whose thoughts on constitutional issues matter a great deal."<sup>34</sup>

In *Presidential Administration*, Kagan observed that "the courts usually have ignored the very existence of the President in their articulation of administrative law,"<sup>35</sup> seemingly assuming "the absence of strong presidential involvement in agency decisionmaking."<sup>36</sup> Now it is impossible to ignore the President's power over the federal bureaucracy and the dangers of presidential administration.<sup>37</sup>

Twenty years after Kagan celebrated presidential administration, the United States' democracy is moving toward authoritarianism.<sup>38</sup> The

<sup>30</sup> See Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1495 (2012).

<sup>31</sup> Watts, *supra* note 25.

<sup>32</sup> Farber, *supra* note 9; see also Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1115 (2020) (calling *Presidential Administration* "influential"); Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 90 (2017) (same); Peter L. Strauss, *The Administrative Conference and the Political Thumb*, 83 GEO. WASH. L. REV. 1668, 1671 (2015) (same).

<sup>33</sup> See *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/JE9K-6PCQ>].

<sup>34</sup> Bohm, *supra* note 9; see also Sam Kalen, *The Death of Administrative Common Law or the Rise of the Administrative Procedure Act*, 68 RUTGERS U. L. REV. 605, 609 (2016) (calling *Presidential Administration* "pioneering").

<sup>35</sup> Kagan, *supra* note 1, at 2271.

<sup>36</sup> *Id.* at 2272.

<sup>37</sup> See Ahmed, Menand & Rosenblum, *supra* note 29, at 4 ("In the twenty years that followed, presidential administration became plebiscitary democracy, something Kagan never wanted, but to which she helped open the door."). *But see* Chachko, *supra* note 32, at 1118 ("[C]ontrary to the 'presidentialization of administration' that Kagan identified in the domestic policy context, the trend in administrative national security has been gradual *de*presidentialization and reduced de facto presidential control." (footnote omitted) (quoting Kagan, *supra* note 1, at 2252)).

<sup>38</sup> Cf. BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 3 (2020); Gowder, *supra* note 10, at 28 ("[O]ur government contains a substantial amount of . . . actually-existing tyranny . . ."); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, COLUM. L. REV. (forthcoming Jan. 2022) (manuscript at 67–68) (on file with the Harvard Law School Library) (arguing that "the presidency of Donald Trump has been fascistic," *id.* (manuscript at 67), insofar as it allowed the bureaucracy to "function as an extension

umbrella term “[a]uthoritarianism . . . refers to non-democratic systems,” including totalitarian, fascist, and dictatorial regimes that “rely on a mix of legitimacy and coercion” to retain power.<sup>39</sup> Authoritarian governments may conduct elections and have some democratic institutions, as well as courts and constitutions. But “they use those elements to maintain their power.”<sup>40</sup> A democracy may become authoritarian through a gradual process that Professor Nancy Bermeo calls “democratic backsliding” or “executive aggrandizement” whereby “an elected executive uses legal channels to disassemble institutional checks on executive power and interbranch accountability.”<sup>41</sup> In other words: “A constitutional liberal democracy can degrade without collapsing.”<sup>42</sup>

The hallmark of authoritarianism is unilateral decisionmaking by a single person.<sup>43</sup> Certainly, the United States is not an authoritarian nation, but unilateral presidential decisionmaking has grown steadily over the past fifty years.<sup>44</sup> Professor Phillip Cooper dedicated a fantastic

---

of Trump’s personality,” *id.* (manuscript at 68), “although not fully successfully,” *id.* (manuscript at 67).

<sup>39</sup> Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 574 (2021) [hereinafter Kovacs, *Avoiding Authoritarianism*] (quoting Edward Webb, *Totalitarianism and Authoritarianism*, in 1 21ST CENTURY POLITICAL SCIENCE: A REFERENCE HANDBOOK 249, 250 (John T. Ishiyama & Marijke Breuning eds., 2011)).

<sup>40</sup> *Id.*; see also David Driesen, *The Specter of Dictatorship Behind the Unitary Executive Theory*, CPRBLOG (July 20, 2021), <https://progressivereform.org/cpr-blog/specter-dictatorship-behind-unitary-executive-theory> [https://perma.cc/3ZG7-SGFC] (“[E]lected autocrats seeking to destroy democracies do so largely by centralizing their control over administration and using that control to cement their power.”).

<sup>41</sup> Kovacs, *Avoiding Authoritarianism*, *supra* note 39 (quoting Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 5–6, 10–11 (2016)); see also Huq & Ginsburg, *supra* note 10, at 122. Professors Huq and Ginsburg argue that “the greatest risk to democracy in the U.S.” comes from “constitutional retrogression,” *id.* at 117, which refers to democratic backsliding whose “modal endpoint is a hybrid regime that is neither pure democracy nor unfettered autocracy,” *id.* at 95.

<sup>42</sup> Huq & Ginsburg, *supra* note 10, at 94.

<sup>43</sup> See Kovacs, *Constraining the Statutory President*, *supra* note 27, at 120; David Little, *Law, Religion, and Human Rights: Skeptical Responses in the Early Twenty-First Century*, 31 J.L. & RELIGION 354, 356 (2016); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 448 (2015).

<sup>44</sup> See PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 4 (2d ed. 2014); PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 146–58 (2009); Kovacs, *Avoiding Authoritarianism*, *supra* note 39, at 574–75; Henry A. Giroux, *The Emerging Authoritarianism in the United States: Political Culture Under the Bush/Cheney Administration*, 14 SYMPLOKE 98, 98 (2006); Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1820–22 (2015); Errol Morris, *Anatomy of a Photograph: Authoritarianism in America*, THE ATLANTIC (Aug. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/errol-morris-this-is-what-authoritarianism-looks-like/615181> [https://perma.cc/B862-GCDW]; Dalibor Rohac, Liz Kennedy & Vikram Singh, *Drivers of Authoritarian Populism in the United States*, CTR. FOR AM. PROGRESS (May 10, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/05/10/450552/drivers-authoritarian-populism-united-states> [https://perma.cc/K95J-38QQ]. But see Kenneth Lowande & Jon C. Rogowski, *Presidential Unilateral Power*, 24 ANN. REV. POL. SCI. 21, 37 (2021).

volume to detailing the many mechanisms of “presidential direct action.”<sup>45</sup> Sometimes Presidents act as the “Statutory President” pursuant to statutes that delegate power to the President.<sup>46</sup> President Obama, for example, redirected up to \$70 million to meet “unexpected urgent refugee and migration needs” and entered into the Trans-Pacific Partnership Agreement.<sup>47</sup> President Trump withdrew from the Trans-Pacific Partnership Agreement and redirected billions of dollars to build a wall between the United States and Mexico.<sup>48</sup> On the day he was inaugurated, President Biden halted construction of the wall.<sup>49</sup> Other times, Presidents act pursuant to statutes that delegate authority not to the President but to some other officer, effectively putting the President in the position of Supersecretary in Chief.<sup>50</sup> For example, even though the Immigration and Nationality Act delegates enforcement discretion to the Secretary of Homeland Security,<sup>51</sup> Presidents Obama, Trump, and Biden all dictated U.S. immigration enforcement policy.<sup>52</sup>

Presidents have created new mechanisms for controlling the substance of broad swaths of regulatory activity. Ten days after his inauguration, for example, President Trump issued an executive order that required agencies to repeal two regulations for every new one issued.<sup>53</sup> The same Order imposed on all agencies a regulatory budget capping the incremental cost of new regulations.<sup>54</sup> A month later, Trump ordered agencies to create Regulatory Reform Task Forces to evaluate which existing regulations could be repealed or modified.<sup>55</sup> Trump made unprecedented forays into agency adjudication. For example, he prohibited agencies from initiating enforcement action or taking any action with legal consequences based on standards of conduct that have not

<sup>45</sup> COOPER, *supra* note 44, at 2.

<sup>46</sup> See generally Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005); Kovacs, *Constraining the Statutory President*, *supra* note 27.

<sup>47</sup> Kovacs, *Constraining the Statutory President*, *supra* note 27, at 67 (quoting Presidential Determination No. 2016-05, 81 Fed. Reg. 68,925 (Jan. 13, 2016)).

<sup>48</sup> See *id.* at 67–68.

<sup>49</sup> See Proclamation No. 10,142, 86 Fed. Reg. 7,225 (Jan. 20, 2021).

<sup>50</sup> See Kathryn E. Kovacs, *The Supersecretary in Chief*, 94 S. CAL. L. REV. POSTSCRIPT 61, 62 (2020) [hereinafter Kovacs, *Supersecretary*].

<sup>51</sup> 8 U.S.C. § 1103(a).

<sup>52</sup> See Kovacs, *Supersecretary*, *supra* note 50, at 66; see also *President Biden's Executive Actions on Immigration*, CTR. FOR MIGRATION STUD. (May 24, 2021), <https://cmsny.org/biden-immigration-executive-actions> [<https://perma.cc/U8K4-J7KW>]. But see Amy Howe, *Court Won't Block Order Requiring Reinstatement of "Remain in Mexico" Policy*, SCOTUSBLOG (Aug. 24, 2021, 9:38 PM), <https://www.scotusblog.com/2021/08/court-wont-block-order-requiring-reinstatement-of-remain-in-mexico-policy> [<https://perma.cc/J3E5-594U>].

<sup>53</sup> Exec. Order No. 13,771 § 2(a), 82 Fed. Reg. 9,339, 9,339 (Jan. 30, 2017); see also Jodi L. Short, *The Trouble with Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. 93, 97 (2018) (evaluating the empirical and legal value of regulation counting).

<sup>54</sup> Exec. Order No. 13,771 § 2(b), 82 Fed. Reg. at 9,339.

<sup>55</sup> Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

been “publicly stated.”<sup>56</sup> Trump even politicized the hiring and firing of all federal employees in policymaking positions.<sup>57</sup> For his part, President Biden ordered all federal agencies to advance equity for “communities that have been historically underserved”<sup>58</sup> and “make evidence-based decisions guided by the best available science and data.”<sup>59</sup>

Much unilateral presidential decisionmaking goes unchecked. Certainly, Congress does not rein in the President effectively.<sup>60</sup> Judicial oversight also falls short.<sup>61</sup> As Freeman and Jacobs observe, while “‘presidential administration’ is at its apex, courts are unwilling to check executive power.”<sup>62</sup> The President is not amenable to suit under the APA.<sup>63</sup> Indeed, the federal courts of appeals are split on the most basic

<sup>56</sup> Exec. Order No. 13,892 § 4, 84 Fed. Reg. 55,239, 55,241 (Oct. 9, 2019); *see also* Peter M. Shane, *Trump’s Quiet Power Grab*, THE ATLANTIC (Feb. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/trumps-quiet-power-grab/607087> [<https://perma.cc/Y89B-JFWZ>] (“The executive order says that no such agency determination may be issued unless the agency has first warned the public — through a specific rule — that the general legal standard prohibits the conduct the agency would now challenge.”). *But see* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) (reaffirming that agencies may choose to make policy through either rulemaking or adjudication).

<sup>57</sup> Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020); *see also* Hilary Silver, Opinion, *Trump’s Assault on the Federal Government Isn’t Over*, THE HILL (Jan. 19, 2021, 12:30 PM), <https://thehill.com/opinion/white-house/534795-trumps-assault-on-the-federal-government-isnt-over> [<https://perma.cc/WY2P-DMGT>].

<sup>58</sup> Exec. Order No. 13,985, 86 Fed. Reg. 7,009, 7,009 (Jan. 20, 2021).

<sup>59</sup> Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking, 86 Fed. Reg. 8,845, 8,845 (Jan. 27, 2021); *see also* Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7,223 (Jan. 20, 2021); Lisa Schultz Bressman, *Flipping the Mission of Regulatory Review*, REGUL. REV. (Feb. 18, 2021), <https://www.theregview.org/2021/02/18/bressman-flipping-mission-regulatory-review> [<https://perma.cc/5JNV-WG8A>] (arguing that President Biden’s Modernizing Regulatory Review memo aims to give the Office of Information and Regulatory Affairs a role in developing regulations).

<sup>60</sup> *See* Freeman & Jacobs, *supra* note 11, at 590 (noting that “Congress is gridlocked”); Huq & Ginsburg, *supra* note 10, at 144 (“The most likely motor of antidemocratic dynamics in the American political system is the presidency, acting with the acquiescence of a copartisan Congress.”); Kagan, *supra* note 1, at 2312–15 (describing Congress’s inability to constrain the President); *cf.* Jeremy Herb, Manu Raju, Ted Barrett & Lauren Fox, *Trump Acquitted for Second Time Following Historic Senate Impeachment Trial*, CNN (Feb. 14, 2021, 11:42 AM), <https://www.cnn.com/2021/02/13/politics/senate-impeachment-trial-day-5-vote/index.html> [<https://perma.cc/V4SN-TNBZ>].

<sup>61</sup> *See* SHANE, *supra* note 44, at 29; Huq & Ginsburg, *supra* note 10, at 148 (“[T]he well-established federal judiciary lacks the institutional incentive to impede retrogression away from constitutional, democratic norms.”).

<sup>62</sup> Freeman & Jacobs, *supra* note 11, at 590; *see also id.* at 639–42; Lowande & Rogowski, *supra* note 44, at 31 (“On the unilateral directives that are issued, moreover, the courts overwhelmingly side with the president. . . . [Eighty-three percent] of the executive orders challenged in federal court between 1942 and 1998 were ultimately upheld.”).

<sup>63</sup> *See* Kovacs, *Constraining the Statutory President*, *supra* note 27, at 66. Kagan opined that when the President directs an agency official to take a particular action that is delegated by statute to that agency official, “the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency’s action should govern.” Kagan, *supra* note



question of whether the courts may ensure that the Statutory President has acted within the scope of their statutory authority.<sup>64</sup> No federal court will review presidential decisions for abuse of discretion.<sup>65</sup> 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.<sup>66</sup> Freeman and Jacobs elucidate other reasons for the courts' failure to oversee structural deregulation adequately: constitutional and prudential doctrines governing the availability of judicial review; deference to agency inaction and delay; and inadequate statutory provisions for judicial review.<sup>67</sup> Despite some notable exceptions,<sup>68</sup> overall the courts have not constrained presidential power adequately.

Twenty years' experience has demonstrated that “presidential administration . . . raises the specter of tyranny.”<sup>69</sup> It “is downright dangerous.”<sup>70</sup> Obviously, national elections do not prevent autocracy.<sup>71</sup> By centering “national politics around a single, charismatic leader who claims a democratic mandate,” presidential administration “walks perilously close to a kind of plebiscitary dictatorship.”<sup>72</sup> Hence, in his book analyzing the dangers of presidential unilateralism, Professor Peter Shane warns that we face a “constitutional perfect storm [that] has put the design of our democratic republic at risk.”<sup>73</sup> To make matters worse, presidential administration is a “one-way ratchet.”<sup>74</sup> Each President builds on the prior President's framework for controlling the government.<sup>75</sup> In Shane's words: “The groundwork has been laid for

---

1, at 2351. I agree, but only as a second-best alternative to striking down the presidential action as unconstitutional. See Kovacs, *Supersecretary*, *supra* note 50, at 76–77.

<sup>64</sup> Kovacs, *Constraining the Statutory President*, *supra* note 27, at 79–83.

<sup>65</sup> *Id.* at 83.

<sup>66</sup> *Id.* at 113.

<sup>67</sup> See Freeman & Jacobs, *supra* note 11, at 638–52.

<sup>68</sup> See, e.g., *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (holding that the Secretary of Commerce's decision to add a citizenship question to the census was arbitrary and capricious).

<sup>69</sup> Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 324 (2019); see also *id.* at 272 (“Defenses of executive power as ‘accountable’ and ‘effective’ increasingly seem not only empty but dangerously autocratic.”).

<sup>70</sup> Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 115 (2021).

<sup>71</sup> See Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 633–34 (2016) (“A conception of democracy this thin offers no principled basis for a critique of autocratic government, so long as it features periodic elections.”).

<sup>72</sup> Emerson & Michaels, *supra* note 70.

<sup>73</sup> SHANE, *supra* note 44, at 3; see also Huq & Ginsburg, *supra* note 10, at 168 (“The threat to constitutional liberal democracy in the U.S. context is real . . .”).

<sup>74</sup> SHANE, *supra* note 44, at 4.

<sup>75</sup> COOPER, *supra* note 44, at 118; see also Gerhardt, *supra* note 21, at 1654 (“Presidents rarely relinquish power they have acquired; instead, they fortify expansions in their authority over time.”).

an executive branch dangerously excessive in its exercise of effectively unchecked power, no matter who is in the White House.”<sup>76</sup>

### III. KAGAN’S STATUTORY-INTERPRETATION DETOUR

Kagan recognized that presidential administration posed constitutional challenges. Rather than face those issues head-on, however, Kagan used a theory of statutory interpretation to bypass them. That strategy ultimately failed. Kagan legitimated presidential administration by offering a high-profile defense from a prominent Democratic scholar and public servant and thus helped to grease the skids for the United States’ slide toward authoritarianism.<sup>77</sup>

Kagan recognized that presidential administration raises “serious constitutional questions.”<sup>78</sup> She located the problem in separation of powers doctrine: when the President assumes power delegated by statute to another federal officer, “the President . . . exceeds the appropriate bounds of [the] office.”<sup>79</sup> She agreed that the President “must respect” Congress’s decision to delegate decisionmaking authority to a particular officer.<sup>80</sup> President Truman’s seizure of the steel mills, for example, “violated the Framers’ decision to ‘entrust[] the lawmaking power to the Congress alone.’”<sup>81</sup> Kagan further acknowledged the “conventional view”<sup>82</sup> that “Congress, under the [Supreme Court’s] removal precedents, can insulate administrative policymaking from the President, and Congress has exercised this power by delegating the relevant discretion to a specified agency official, rather than to the President.”<sup>83</sup> In other words, Congress can limit the President’s ability “to direct administrative officials in the exercise of their substantive discretion,” effectively forcing the President to fire an official who refuses to follow a presidential directive.<sup>84</sup>

Kagan did not employ the contrary unitary executive theory, which posits that the President has “plenary control over all heads of agencies,” to justify presidential administration.<sup>85</sup> Proponents of the unitary executive theory had not proven their claim to her satisfaction “as a matter

---

<sup>76</sup> SHANE, *supra* note 44, at 25.

<sup>77</sup> Ahmed, Menand & Rosenblum, *supra* note 29, at 3 (“Kagan provided cover for the growth of anti-democratic tendencies.”).

<sup>78</sup> Kagan, *supra* note 1, at 2319.

<sup>79</sup> *Id.* at 2320; *see also id.* at 2279–80.

<sup>80</sup> *Id.* at 2320.

<sup>81</sup> *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952)).

<sup>82</sup> *Id.* at 2323.

<sup>83</sup> *Id.* at 2325.

<sup>84</sup> *Id.* at 2323; *see id.* at 2322–23 (discussing *Myers v. United States*, 272 U.S. 52 (1926); and *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935)).

<sup>85</sup> *Id.* at 2325.

of constitutional mandate.”<sup>86</sup> The original meaning of Article II, she said, “is insufficiently precise” and the “constitutional values” supporting the theory “too diffuse.”<sup>87</sup> She also thought the case law supporting the “conventional view” was “almost certain to remain the law.”<sup>88</sup>

Rather than face head-on the constitutional problems with her theory,<sup>89</sup> however, Kagan treated the entire matter as “an interpretive question”<sup>90</sup> and employed a presumption that “a statutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority.”<sup>91</sup> Stated plainly, her assertion was: presidential administration is legal because Congress hasn’t said it isn’t.<sup>92</sup> She reasoned that Congress must know that executive branch officials are subordinate to the President.<sup>93</sup> Hence, “when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President.”<sup>94</sup> Moreover, the difficulty of distinguishing presidential directives from other forms of presidential control reinforced Kagan’s guess that Congress does not intend to limit presidential directives absent “specific evidence of that desire.”<sup>95</sup>

Later in the piece, Kagan returned to the potential downsides of her theory. Presidential administration, she recognized, “pose[s] a risk of both tyranny and instability.”<sup>96</sup> To her, those objections reflected “conservative values” that should yield to the countertradition supporting a vigorous executive.<sup>97</sup> Kagan believed that divided government and the resulting lawmaking gridlock necessitate “energetic leadership” from the President.<sup>98</sup> Kagan did not fear presidential overreach because she believed that the President’s political accountability to the public would “keep energy in check by mooring it to current . . . public

---

<sup>86</sup> *Id.* at 2326.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* In this regard, Kagan underestimated the United States’ capacity for authoritarian drift. See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (holding unconstitutional a statute limiting the President’s ability to remove the single head of the Consumer Financial Protection Bureau); see also *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2021) (same for the Federal Housing Finance Agency).

<sup>89</sup> See Kagan, *supra* note 1, at 2319–20.

<sup>90</sup> *Id.* at 2326.

<sup>91</sup> *Id.* at 2251; see also *id.* at 2320–22, 2328.

<sup>92</sup> See *id.* at 2384 (“Presidential administration . . . comports with law . . . because . . . Congress generally has declined to preclude the President from controlling administration in this manner.”); cf. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (holding that the President could withdraw public domain lands from entry despite lack of statutory authority to do so because it was a “long-continued practice, known to and acquiesced in by Congress”).

<sup>93</sup> Kagan, *supra* note 1, at 2327.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2328.

<sup>96</sup> *Id.* at 2342.

<sup>97</sup> *Id.*; see *id.* at 2342–44.

<sup>98</sup> *Id.* at 2344.

opinion.”<sup>99</sup> Congress, the courts, interest groups, and other federal officers also would help to constrain the President.<sup>100</sup> She acknowledged that Presidents may be more likely than other officers to exceed the bounds of statutory authority, but she believed that the courts could keep the President in line.<sup>101</sup> Although the President is not an “agency” subject to judicial review under the APA,<sup>102</sup> when the President “has stepped into the shoes of an agency head, . . . the review provisions usually applicable to that agency’s action should govern.”<sup>103</sup>

Determining the President’s proper role through an interpretive presumption, as Kagan did, failed to respond to the serious constitutional problems she herself acknowledged. That was her strategy.<sup>104</sup> She even acknowledged that the entire discussion had a “fictive aspect”<sup>105</sup> and ultimately turned on administrative law values.<sup>106</sup> In short, Kagan bypassed the constitutional questions her analysis raised and followed a statutory interpretation detour driven by her values. That detour led *Presidential Administration* down the path toward authoritarianism.

#### IV. CONGRESS’S SOLUTION: THE APA

Had Kagan paid the APA sufficient heed, she probably would not have taken the statutory interpretation detour, but would have stayed the constitutional course and recognized that presidential administration is deeply problematic. The APA is premised on Congress having the authority to arrange the administrative state. It codified the conditions that legitimize statutory delegations of authority to agencies. It represents an agreed-upon set of principles cabining agency authority over citizens. And it embodies the wisdom of those who lived through the Great Depression and World War II, and who witnessed the growth of European fascism, about how to build a federal bureaucracy without enabling authoritarianism. Indeed, Kagan’s analysis is inconsistent with the APA’s very existence.

---

<sup>99</sup> *Id.* at 2345–46.

<sup>100</sup> *Id.* at 2346; *see also id.* at 2346–52 (forecasting that “presidential direction of administration will goad Congress into increased oversight activity,” *id.* at 2348).

<sup>101</sup> *Id.* at 2349, 2351.

<sup>102</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

<sup>103</sup> Kagan, *supra* note 1, at 2351. As noted above, I agree, but only as a second-best alternative to striking down the presidential action as unconstitutional. *See supra* note 63.

<sup>104</sup> *See* Kagan, *supra* note 1, at 2326–27.

<sup>105</sup> *Id.* at 2330.

<sup>106</sup> *Id.* at 2330–31.

*A. Kagan and the APA*

Kagan paid scant attention to the APA in *Presidential Administration*.<sup>107</sup> She mentioned it for the first time on the eighteenth page of her 141-page article. There she explained that Congress's shift towards delegating power to agencies spurred a backlash against expertise. The APA reflects that skepticism by procedurally constraining agency policymaking.<sup>108</sup> She also recognized that judicially imposed procedural requirements that exceed the APA's requirements have made agencies hesitant to change policy.<sup>109</sup> And she noted that President Clinton adhered to APA procedures when he "effectively placed himself in the position of a department head."<sup>110</sup>

Most importantly, though, Kagan opined that the APA's judicial review provisions should apply to the President when the President usurps another officer's statutory authority.<sup>111</sup> She recognized that "presidential administration . . . poses a danger of . . . lawlessness" because "Presidents . . . tend to push the envelope when interpreting statutes."<sup>112</sup> The "simple, if sometimes imperfect, solution," she opined, is judicial oversight.<sup>113</sup> I agree that, absent an order striking down the President's usurpation as unconstitutional, the APA should apply to a President acting as Supersecretary in Chief.<sup>114</sup> Unfortunately, no federal court agrees with us.<sup>115</sup> Her engagement with the APA went no further.

Ultimately, Kagan sought to answer the "perennial question of how to ensure appropriate control of agency discretion."<sup>116</sup> She began: "The history of the American administrative state is the history of competition among different entities for control of its policies."<sup>117</sup> Her answer was "presidential administration."<sup>118</sup> Yet Congress had already answered the question of how to control the burgeoning bureaucracy when the APA passed both houses without objection in 1946 and earned President Truman's concurrence.

---

<sup>107</sup> See William Powell, *Policing Executive Teamwork: Rescuing the APA from Presidential Administration*, 85 MO. L. REV. 71, 76 (2020) (noting that *Presidential Administration* "devotes only a paragraph and a footnote to the implications of [Kagan's] proposals for the scope of the President's APA exemption").

<sup>108</sup> See Kagan, *supra* note 1, at 2262.

<sup>109</sup> See *id.* at 2265, 2267.

<sup>110</sup> *Id.* at 2306; see also *id.* at 2321 n.296.

<sup>111</sup> See *id.* at 2351; see also *id.* at 2369. But see *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that the President is not an "agency" under the APA).

<sup>112</sup> Kagan, *supra* note 1, at 2349.

<sup>113</sup> *Id.* at 2350.

<sup>114</sup> See Kovacs, *Supersecretary*, *supra* note 50, at 75–78.

<sup>115</sup> See *id.* at 63, 69–70.

<sup>116</sup> Kagan, *supra* note 1, at 2254.

<sup>117</sup> *Id.* at 2246.

<sup>118</sup> *Id.* at 2250–52.

*B. The APA's Constitutional Valence*

The APA undermines the constitutional foundation of presidential administration. First and foremost, the APA reflects Congress's proper constitutional role as the primary creator, organizer, and controller of the administrative state. In the 1930s and 1940s, as the federal bureaucracy blossomed, it was Congress that created the new agencies, specified their organization in organic statutes, and ultimately controlled their procedures and subjected their actions to judicial review through the APA.

Alongside the seventeen-year debate about administrative reform that culminated in the APA of 1946, Congress simultaneously explored the President's power to organize and control the executive branch.<sup>119</sup> President Roosevelt created the Brownlow Committee to investigate updating the administrative management of the federal government.<sup>120</sup> He transmitted the Committee's report to Congress in 1937, expressly denying that he was trying to increase the powers of the presidency.<sup>121</sup> Nonetheless, the report was seen as an attempt to shift power from Congress to a potentially dictatorial President.<sup>122</sup> Ultimately, Congress gave President Roosevelt only some of the power he sought. Under the Reorganization Act of 1939, the President's proposals to reorganize executive branch agencies would go into effect sixty days after their submission to Congress unless rejected in a concurrent resolution.<sup>123</sup>

Less than two months after President Truman signed the APA, he signed the Legislative Reorganization Act of 1946.<sup>124</sup> Concerned that it had lost control over the growing federal bureaucracy, Congress enhanced its oversight of federal agencies by moving agency oversight from ad hoc investigatory committees to a smaller number of standing committees.<sup>125</sup> The Act "promised to end administrative abuses of authority by restoring Congress to its rightful place of primacy over the

---

<sup>119</sup> See generally Rosenblum, *supra* note 38.

<sup>120</sup> See S. DOC. NO. 75-8, at 2 (1937).

<sup>121</sup> *Id.*

<sup>122</sup> Kovacs, *Avoiding Authoritarianism*, *supra* note 39, at 579–80 (quoting Daniel R. Ernst, "In a Democracy We Should Distribute the Lawyers": The Campaign for a Federal Legal Service, 1933–1945, 58 AM. J. LEGAL HIST. 4, 6 (2018)). See generally JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 111–33 (2021) (examining congressional reactions to the Brownlow Committee's report).

<sup>123</sup> See Reorganization Act of 1939, Pub. L. No. 76-19, §§ 4–5, 53 Stat. 561–63; Joanna Lynn Grisinger, *Reforming the State: Reorganization and the Federal Government, 1937–1964*, at 205 (Aug. 2005) (Ph.D. dissertation, University of Chicago) (on file with the Harvard Law School Library).

<sup>124</sup> Pub. L. No. 79-601, 60 Stat. 812.

<sup>125</sup> JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 116, 123 (2012); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1180 & n.240 (2014).

administrative state.”<sup>126</sup> In the end, it may have been “more of a political achievement than a legal one,”<sup>127</sup> but it too reflects Congress’s proper constitutional role in controlling the administrative state.

Kagan’s presumption that Congress’s delegations of authority to particular officials may be disregarded flies in the face of that history and the basic constitutional tenet it reflects. Of course, Kagan knew about the Brownlow Committee.<sup>128</sup> Yet she failed to recognize the significance of Congress’s response to the Brownlow Report, followed by the APA. She did not even mention Congress’s assertion of authority in the Legislative Reorganization Act. At the time in our nation’s history when the federal bureaucracy was growing by leaps and bounds, it was Congress that exercised primacy over agencies, and it was Congress that determined how much power the President had to organize the executive branch.

Second, the APA codified the conditions that legitimize statutory delegations of authority from Congress to agencies. Professors Daniel Rodriguez and Barry Weingast explained that beginning in the Progressive Era, the Supreme Court confronted a “long series of questions . . . concerning the appropriate scope of agency power.”<sup>129</sup> During the New Deal era, “the federal government . . . expanded at a break-neck pace.”<sup>130</sup> As Congress attempted to address “new and vexing problems” with novel “institutional strategies,” the Court instructed Congress on “how to reconcile these new regulatory innovations with constitutional doctrine.”<sup>131</sup> Essentially, the Court “provide[d] a template for Congress in solving these problems.”<sup>132</sup> Congress could delegate power to agencies if it provided “intelligible principles”<sup>133</sup> to cabin agency discretion and “suitable procedural safeguards.”<sup>134</sup> *Crowell v. Benson*,<sup>135</sup> *A.L.A. Schechter Poultry Corp. v. United States*,<sup>136</sup> *SEC v. Chenery Corp.*,<sup>137</sup> and other cases, “put forth standards for agencies to follow to ensure fidelity to an emerging conception of the rule of law in the administrative law.”<sup>138</sup> In addition, if statutory

---

<sup>126</sup> GRISINGER, *supra* note 125, at 111.

<sup>127</sup> *Id.*

<sup>128</sup> See Kagan, *supra* note 1, at 2274–75.

<sup>129</sup> Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 *BYU L. REV.* 147, 154 (2020).

<sup>130</sup> Rosenblum, *supra* note 38 (manuscript at 17).

<sup>131</sup> Rodriguez & Weingast, *supra* note 129, at 160–61.

<sup>132</sup> *Id.* at 189.

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

<sup>134</sup> *Id.* at 190.

<sup>135</sup> 285 U.S. 22 (1932).

<sup>136</sup> 295 U.S. 495 (1935).

<sup>137</sup> 318 U.S. 80 (1943).

<sup>138</sup> Rodriguez & Weingast, *supra* note 129, at 154–55.

delegations to agencies were to pass muster, the judiciary would have to maintain “a supervisory role.”<sup>139</sup>

The APA grew out of that Court-Congress dialogue.<sup>140</sup> It marked the culmination of Congress’s response to those Supreme Court opinions and codified a bargain between Congress and the Supreme Court: Congress would be permitted to delegate authority to agencies if it provided for certain procedures and judicial oversight.<sup>141</sup> Essentially, the APA’s enactment marked a constitutional moment<sup>142</sup> at which all three branches of government accepted the existence of the administrative state and broad delegations of authority to agencies in exchange for procedure and judicial oversight.<sup>143</sup> This superstatute<sup>144</sup> provided the “necessary quid pro quos for the creation of administrative agencies combining traditionally separated functions and exercising broad discretionary authority.”<sup>145</sup> Thus, the legitimacy of statutory delegations of power to federal officers is premised on control of those officers as provided in the APA.

When the President exercises power assigned by statute to another federal officer, that control is missing, and the legitimacy of the delegation itself is undermined. Indeed, underlying statutory delegations is the assumption that the officers exercising delegated power will be subject to the APA’s procedural requirements and judicial review, unless the statute itself provides otherwise.<sup>146</sup> The President, however, is not an

---

<sup>139</sup> *Id.* at 193.

<sup>140</sup> *See id.* at 155, 193, 208, 213.

<sup>141</sup> No doubt some members of Congress voted for the APA because they anticipated that the next President might be a Republican who would use agencies to dismantle the New Deal, and others were simply exhausted. *See* Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 698 (2010).

<sup>142</sup> Croley, *supra* note 27, at 90 (“[T]he APA is tantamount to an immutable regulatory ‘constitution,’ the passage of which resembled a constitutional moment quite distinct from the passage of most statutes . . .”).

<sup>143</sup> Kovacs, *Supersecretary*, *supra* note 50, at 72; *see also* Kovacs, *Constraining the Statutory President*, *supra* note 27, at 90.

<sup>144</sup> *See generally* Kovacs, *Superstatute Theory*, *supra* note 24.

<sup>145</sup> Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2073 (1990); *see also* Rodriguez & Weingast, *supra* note 129, at 192 (“These procedures are an essential part of the quid pro quo for the Court’s constitutional imprimatur on agency power.”).

<sup>146</sup> Kovacs, *Supersecretary*, *supra* note 50, at 73; Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 754 (2007) (observing that when Congress delegates rulemaking authority, it intends for that authority to “be exercised . . . pursuant to the APA”); *cf. Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 97th Cong. 4 (1981) (statement of Rep. Albert Gore, Jr.) (commenting that regulatory review in the U.S. Office of Management and Budget bypasses the APA’s “neutral process for insuring that regulatory decisions would be carried out in the full light of day”).



“agency” under the APA (according to the Supreme Court), and hence is not bound by its procedural constraints or judicial oversight.<sup>147</sup>

Third, the APA codifies the procedures Congress, the President, the Supreme Court, the American Bar Association (ABA), and other interested parties agreed were appropriate before imposing agency authority on citizens. To begin, presidential administration amends the rulemaking process without bicameralism. The APA requires an agency to publish notice, accept comments, and consider the relevant matter presented before imposing a binding rule on the public.<sup>148</sup> Presidential administration short-circuits that process by allowing the President to dictate the agency’s final decision. Even if the agency goes through the notice-and-comment process following the President’s mandate, at that point the process is somewhat superfluous because the agency doesn’t have the discretion to disagree.<sup>149</sup> Presidential administration thus upends the judgment reflected in the APA about what process should precede an agency’s imposition of rules on citizens.

Professor Kenneth Culp Davis advanced a parallel point in 1982 when he argued that regulatory review in the Executive Office of the President (EOP) under Executive Order 12,291 allowed the EOP to alter agencies’ final rules without notice and comment.<sup>150</sup> The APA’s rulemaking procedures, he said, had “crystalized” the United States’ advance away from autocratic governance.<sup>151</sup> Executive Order 12,291 thus represented “a return, to some extent, to autocratic government.”<sup>152</sup>

Relatedly, presidential administration may violate the President’s duty to faithfully execute the law. As Freeman and Jacobs explain, the Take Care Clause “impose[s] an affirmative obligation on the President to enforce the laws Congress passes.”<sup>153</sup> Like any fiduciary, the President “must diligently and steadily execute Congress’s commands”<sup>154</sup> and “ensure that the laws are implemented honestly,

---

<sup>147</sup> *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). *But see Kovacs, Constraining the Statutory President*, *supra* note 27, at 83–98 (arguing that *Franklin v. Massachusetts* was wrongly decided).

<sup>148</sup> 5 U.S.C. § 553.

<sup>149</sup> *See Sherley v. Sebelius*, 689 F.3d 776, 784–85 (D.C. Cir. 2012) (holding that an agency need not consider comments suggesting that it act contrary to an executive order); *cf. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 772–73 (2004) (holding that an agency need not consider environmental impacts where a presidential order deprives it of the discretion to avoid them).

<sup>150</sup> Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849, 855 (1982); *see also* STAFF OF H. COMM. ON ENERGY & COM., 97TH CONG., PRESIDENTIAL CONTROL OF AGENCY RULEMAKING: AN ANALYSIS OF CONSTITUTIONAL ISSUES THAT MAY BE RAISED BY EXECUTIVE ORDER 12,291, at 46–54 (Comm. Print 1981).

<sup>151</sup> Davis, *supra* note 150, at 854–55.

<sup>152</sup> *Id.* at 855.

<sup>153</sup> Freeman & Jacobs, *supra* note 11, at 632.

<sup>154</sup> Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019).

effectively, and without failure of performance.”<sup>155</sup> Among other things, that obligates the President to provide whatever procedure statutes require before taking final action, including, of course, notice and comment under the APA.<sup>156</sup>

Fourth and finally, the APA reflects the Greatest Generation’s judgment about how to construct a federal bureaucracy that does not lead to authoritarianism.<sup>157</sup> I described recently how the fear that FDR would become the United States’ first dictator shaped the APA.<sup>158</sup> Many of its provisions were designed to prevent agencies from being controlled by an authoritarian President.<sup>159</sup> Judicial review, separation of functions, procedural constraints, and publication of agency materials were designed to “permit extensive government, but . . . avoid dictatorship.”<sup>160</sup> Ultimately, the APA “codified the consensus that the federal bureaucracy need not result in authoritarianism.”<sup>161</sup> Of course, the APA has not prevented democratic backsliding.<sup>162</sup> But it’s better than presidential administration. Interpreting it correctly would be better still.<sup>163</sup> In any event, it’s the law of the land, and using a theory of statutory interpretation to bypass the constitutional difficulties with her theory, as Kagan did, was flatly inconsistent with the APA.

Ultimately, Kagan’s analysis is itself constitutionally suspect insofar as it puts courts in the position of rebalancing statutory bargains based on ungrounded statutory interpretation theories and administrative law values. As a Supreme Court Justice, Kagan now recognizes that courts don’t have the expertise to judge executive branch structure. In *Seila Law LLC v. Consumer Financial Protection Bureau*,<sup>164</sup> the Court held unconstitutional a statute requiring the President to have cause to

---

<sup>155</sup> Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1857–58 (2016).

<sup>156</sup> William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1390–91 (2018); see also Strauss, *supra* note 146, at 711 (“The important propositions are that Congress (validly) assigned decision *here* and specified that decision should be taken by *this* official, following *these* procedures, within *these* legal constraints.”); *id.* at 759 (“Congress’s arrangements of government are a part of the law that the President is to assure will ‘be faithfully executed.’”).

<sup>157</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).

<sup>158</sup> Kovacs, *Avoiding Authoritarianism*, *supra* note 39, at 573.

<sup>159</sup> *Id.*

<sup>160</sup> Shepherd, *supra* note 157, at 1559; see also Kovacs, *Avoiding Authoritarianism*, *supra* note 39, at 597.

<sup>161</sup> Kovacs, *Avoiding Authoritarianism*, *supra* note 39, at 596–97.

<sup>162</sup> See *id.* at 601–06.

<sup>163</sup> See generally Kovacs, *Constraining the Statutory President*, *supra* note 27; Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515 (2018) [hereinafter Kovacs, *Rules About Rulemaking*].

<sup>164</sup> 140 S. Ct. 2183 (2020).

remove the Director of the Consumer Financial Protection Bureau.<sup>165</sup> Kagan dissented. The Constitution, she wrote, “mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them.”<sup>166</sup> In her estimation, the courts’ “understanding of the realities of administration” is simply “inferior.”<sup>167</sup> As a consequence, when Congress assigns responsibilities to a particular officer and mandates a particular decisionmaking procedure, the courts should respect that judgment.

By the same token, courts are not equipped to weigh the various values at play in designing the administrative state. The APA struck a balance “between a host of incommensurate values,” and ultimately, “[i]t is Congress’s role, not the courts’, to strike that balance.”<sup>168</sup> The political branches are simply “better qualified to order and balance the complex . . . interests in the structure of the administrative state.”<sup>169</sup> Any attempt to rebalance those interests “is likely to be arbitrary.”<sup>170</sup>

## V. MOVING FORWARD BY LOOKING BACK

The APA represents the grand bargain of the administrative state. It also reflects an agreed-upon set of normative principles that were grounded on constitutional and rule of law values and designed to prevent the federal bureaucracy from becoming a dictator’s tool. In the APA, Congress prioritized public participation, transparency, deliberation, and uniformity. Refocusing on those values would help forestall the United States’ slide toward authoritarianism.

Kagan’s analysis in *Presidential Administration* hinged on accountability and effectiveness as “the principal values that all models of administration must attempt to further.”<sup>171</sup> In particular, her theory that statutes delegating authority to a particular officer should be read as permitting the President to exercise that authority hinged on her belief that accountability and effectiveness “optimally should determine Congress’s and the President’s choices.”<sup>172</sup> Those values’ intellectual

---

<sup>165</sup> *Id.* at 2197.

<sup>166</sup> *Id.* at 2225 (Kagan, J., dissenting).

<sup>167</sup> *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 523 (2010) (Breyer, J., dissenting)).

<sup>168</sup> Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1330 (2014).

<sup>169</sup> Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. (forthcoming 2022) (manuscript at 1) (on file with the Harvard Law School Library); see also *id.* (manuscript at 8) (arguing that “policy determination[s]” are the best ways to strive for liberty and justice within the government).

<sup>170</sup> *Id.* (manuscript at 9).

<sup>171</sup> Kagan, *supra* note 1, at 2252; see also *id.* at 2331 (“All models of administration must address two core issues: how to make administration accountable to the public and how to make administration efficient or otherwise effective.”).

<sup>172</sup> *Id.* at 2330.

roots reach at least as far back as Progressive Era public administration thinking,<sup>173</sup> if not considerably further.<sup>174</sup> Yet Kagan never explained why those values should prevail at the expense of others.<sup>175</sup>

As Professor Jessica Bulman-Pozen observed, accountability and effectiveness “may scan as more autocratic than democratic.”<sup>176</sup> Had Kagan recognized 1946 as the turning point it was, she may have noticed that the grand bargain codified in the APA involved far more than just accountability and efficiency. The APA itself put other values front and center: public participation, transparency, deliberation, and uniformity. Regardless of whether that set of values is normatively superior to accountability and efficiency, Kagan allowed her own values to undermine Congress’s core values, and her focus on those values in such an influential piece of scholarship exacerbated democratic backsliding in the United States.

#### A. Public Participation

Justice Scalia dubbed notice-and-comment rulemaking “probably the most significant innovation” in the APA.<sup>177</sup> That process prioritizes public participation in federal policymaking. Under section 4 of the APA, agencies must publish proposed rules, solicit public comment on their proposals, and consider any input before publishing final rules.<sup>178</sup> These procedures make APA rulemaking perhaps “the most open and deliberative of any processes in American federal governance.”<sup>179</sup> Those who designed the APA believed that allowing the public to comment on proposed rules would ensure that agencies were fully informed — thus

---

<sup>173</sup> See Rosenblum, *supra* note 38 (manuscript at 17, 23, 36, 61); see also *id.* (manuscript at 61) (“[The President’s Committee on Administrative Management] was deeply committed to making government efficacious and accountable. This was its inheritance from the Progressive Era tradition of public administration.”).

<sup>174</sup> See THE FEDERALIST NO. 70, at 421–22 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (discussing the need for an energetic executive); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 967 (2001) (“By placing executive authority in a single person, the Framers sought to create a chief executive who would be energetic, effective, and accountable.”).

<sup>175</sup> See Kagan, *supra* note 1, at 2331.

<sup>176</sup> Bulman-Pozen, *supra* note 69, at 316.

<sup>177</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514; see also Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 SUFFOLK U. L. REV. 287, 376 (2004) (describing notice and comment as the “era’s greatest . . . procedural innovation”); Shepherd, *supra* note 157, at 1583, 1635 (calling rulemaking “a powerful new requirement,” *id.* at 1583, and “an important new requirement,” *id.* at 1635).

<sup>178</sup> Pub. L. No. 79-404, § 4, 60 Stat. 237, 238 (1946) (codified as amended at 5 U.S.C. § 553).

<sup>179</sup> Mashaw & Berke, *supra* note 25, at 612.

improving the quality of agency rules — and protect private interests — thus making rules more fair.<sup>180</sup>

In contrast, when the President dictates policy decisions, public input is often entirely absent.<sup>181</sup> No mechanism ensures the accuracy of the President's factual assumptions or hones the President's decision to make it just. President Obama, for example, solicited no public input before announcing a new immigration enforcement policy, and President Trump didn't consult the public before rescinding it.<sup>182</sup> Similarly, President Trump didn't go through notice and comment before limiting immigration from certain Muslim-majority nations a week after his inauguration. It took three attempts to draft an order that would withstand judicial review.<sup>183</sup> As I observed previously, soliciting public input may have yielded "a more accurate and honed policy" that would have better "accomplish[ed] Trump's asserted national security goals" and "reduced public dissent simply by making the process more transparent and fair."<sup>184</sup> Likewise, Presidents do not consult the public before cutting agency staffing, leaving leadership positions open, reducing agency budgets, or taking any of the other actions Freeman and Jacobs detail in *Structural Deregulation*.<sup>185</sup> Certainly public input could influence all of those decisions to make them better informed and fair.

Notice-and-comment procedures in an agency that implements a presidential directive will not help much. Once the President stakes out a position on a policy matter, the implementing agency is unlikely to change course.<sup>186</sup> Indeed, the agency lacks the discretion to contradict a presidential order.<sup>187</sup> Consequently, an agency may ignore public comments on a proposal that suggest the agency act contrary to an executive order.<sup>188</sup>

---

<sup>180</sup> COMM. ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 103 (1941); Kovacs, *Constraining the Statutory President*, *supra* note 27, at 99–100.

<sup>181</sup> J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1744 (2018).

<sup>182</sup> See Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Kovacs, *Supersecretary*, *supra* note 50, at 66.

<sup>183</sup> See Kovacs, *Constraining the Statutory President*, *supra* note 27, at 115–17 (discussing *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)).

<sup>184</sup> *Id.* at 117.

<sup>185</sup> See Freeman & Jacobs, *supra* note 11, at 591–623.

<sup>186</sup> Kagan, *supra* note 1, at 2358 (“[O]nce the President had directed the basic content of a rule . . . the prospects for fundamental change of the proposed rule became vanishingly small.”).

<sup>187</sup> *Cf.* *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 766, 769 (2004) (holding that agency had “no ability to countermand,” *id.* at 766, a presidential order and hence need not analyze the environmental effects of its action).

<sup>188</sup> *Sherley v. Sebelius*, 689 F.3d 776, 784–85 (D.C. Cir. 2012).

Kagan devalued the rulemaking process, asserting that it “has little to do with genuine exchange between regulators and interested parties.”<sup>189</sup> Presidential decisionmaking, she believed, would not hinder less formal contacts between policymakers and interested parties.<sup>190</sup> Indeed, Kagan asserted that, because the President has a national constituency, presidential decisionmaking would be “more likely to broaden” such informal contacts.<sup>191</sup> Of course, she provided no foundation for those assumptions. Professors Jerry Mashaw and David Berke have the better of the argument in asserting that presidential decisionmaking “tends by its very nature to limit the actors who are engaged in policy discussions.”<sup>192</sup> Presidential administration tends to cut the public out of the process, thus exacerbating its authoritarian tendencies.

### B. Transparency

“[T]ransparency is among the APA’s central values.”<sup>193</sup> Well before the APA, Congress had begun to prioritize transparency in the Federal Register Act, which required agencies to publish their substantive regulations.<sup>194</sup> The APA extended that requirement to procedural and organizational rules, policy statements, and interpretations.<sup>195</sup> In addition to those publication requirements, the APA advances transparency by requiring agencies to reveal their proposed rules and explain their final rules.<sup>196</sup>

The APA’s transparency is designed to reveal the machinations behind agency policymaking, machinations that the office of the

---

<sup>189</sup> Kagan, *supra* note 1, at 2360.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2361. Kagan thought that “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. Recent events have demonstrated the error in that assumption. See, e.g., Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 628 (2019) (“[T]he President’s trade policy can be captured by interests just as parochial as those that capture Congress.”).

<sup>192</sup> Mashaw & Berke, *supra* note 25, at 612; see also Harold H. Bruff, *The President’s Faithful Execution Duty*, 87 U. COLO. L. REV. 1107, 1113 (2016) (“Presidents normally respond to elite groups that either support them or can cause trouble by opposing them in Congress, not to those at the fringes of society.”).

<sup>193</sup> Kovacs, *Constraining the Statutory President*, *supra* note 27, at 102; see also Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 636 (2016) (“[T]he APA advances normative values of good government, including . . . transparency . . . .”); Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 929 (2014) (declaring transparency a value that “undergird[s] the APA”).

<sup>194</sup> Federal Register Act of 1935, Pub. L. No. 74-220, § 5(a), 49 Stat. 500, 501 (codified at 44 U.S.C. § 1505(a)(2) (2012)); Shepherd, *supra* note 157, at 1580.

<sup>195</sup> Administrative Procedure Act, Pub. L. No. 79-404, § 3(a), 60 Stat. 237, 238 (codified at 5 U.S.C. § 552(a) (2012)); see also Kovacs, *Superstatute Theory*, *supra* note 24, at 1231.

<sup>196</sup> Administrative Procedure Act § 2 (codified as amended at 5 U.S.C. § 553(b)–(c)).

President generally hides from public view.<sup>197</sup> The Federal Register Act requires publication of any presidential proclamation that binds the public.<sup>198</sup> Beyond that, the President determines the opacity of presidential procedures and decisions. Consequently, presidential decisions often are made in a black box with no means of uncovering what information the President considered, who influenced the President, or what process the President followed.<sup>199</sup> Indeed, Presidents may invoke executive privilege to hide all of this material.<sup>200</sup>

Thus, Freeman and Jacobs undoubtedly are correct in asserting that “[s]tructural deregulation’s relative obscurity . . . contravenes longstanding administrative law norms [such as] . . . transparency.”<sup>201</sup> Consider, for example, President Trump’s interference with the Centers for Disease Control and Prevention, which Freeman and Jacobs describe,<sup>202</sup> or President Obama’s creation of twenty-nine national monuments.<sup>203</sup> What process did the Presidents follow in reaching those decisions? Whom did they consult? What did they read? Without the APA, we may never know.

Kagan argued that presidential administration “enhances transparency”<sup>204</sup> insofar as it enables the public to “understand the sources and levers of bureaucratic action.”<sup>205</sup> Agencies, she asserted, are “the ultimate black box . . . impervious to full public understanding.”<sup>206</sup> The President, in contrast, has “visibility” and “personality” that she believed “render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.”<sup>207</sup> Presidential administration, she

<sup>197</sup> See Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 386 (2013); Elizabeth Figueroa, *Transparency in Administrative Courts: From the Outside Looking In*, 35 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1, 6 (2015); Kovacs, *Superstatute Theory*, *supra* note 24, at 1231; see also Farber & O’Connell, *supra* note 125, at 1163 (“Although presidents have increased the openness of the White House process over time, it remains much less transparent than the statutory process.”).

<sup>198</sup> 44 U.S.C. § 1505(a)(1).

<sup>199</sup> COOPER, *supra* note 44, at 109 (noting that executive orders “are usually not the result of an open process, provide little or no procedural regularity, and involve limited participation”); SHANE, *supra* note 44, at 160; Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 GEO. L.J. ONLINE 59, 64 (2014); Kovacs, *Rules About Rulemaking*, *supra* note 163, at 563.

<sup>200</sup> SHANE, *supra* note 44, at 160; Mashaw & Berke, *supra* note 25, at 558.

<sup>201</sup> Freeman & Jacobs, *supra* note 11, at 590; see also Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) (opining that presidential influence on agency rulemaking can lend legitimacy, but only if it is transparent).

<sup>202</sup> Freeman & Jacobs, *supra* note 11, at 617.

<sup>203</sup> CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 3 (2021).

<sup>204</sup> Kagan, *supra* note 1, at 2331.

<sup>205</sup> *Id.* at 2332.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

asserted, is more “conducive to public understanding” than agency policymaking.<sup>208</sup>

Kagan’s use of the term “transparent” diverged from the normal use of that term in administrative law. She seemed to mean that policy decisions could be attributed to the President.<sup>209</sup> In other words, “the direct connection between the President and public” makes it transparent who is driving the bureaucratic train.<sup>210</sup> What Kagan labeled “transparency,” then, is more accurately seen as a matter of political accountability.<sup>211</sup> Regardless of whether she was correct, she allowed her value — accountability — to override Congress’s value — transparency — and, in undermining transparency, she exacerbated the United States’ drift toward authoritarianism.

### C. Deliberation

Deliberation is another of the APA’s core values.<sup>212</sup> The APA’s architects designed notice-and-comment rulemaking “to assure due deliberation” in agencies.<sup>213</sup> Scholars count it among the most deliberative processes in U.S. governance.<sup>214</sup> In adjudications, the deciding official must consider facts and arguments, among other things.<sup>215</sup> Deliberation requires agencies to consider their actions carefully,<sup>216</sup> and it prevents them from acting based on raw politics and contrary to the public interest.<sup>217</sup>

Presidents, by contrast, are “inherently non-deliberative,” political actors.<sup>218</sup> Freeman and Jacobs highlight, for example, President Trump’s diversion of federal funds away from the military and the

<sup>208</sup> *Id.* at 2333.

<sup>209</sup> *Id.* at 2317 (“Because he signed the directives and he made the public announcements, presidential control of administration became more personal.”).

<sup>210</sup> *Id.* at 2332.

<sup>211</sup> Presidential transparency, she argued, restricts the President’s “freedom to play to parochial interests.” *Id.* at 2337. The more open the President’s policymaking, the more likely it is to reflect “broad public sentiment.” *Id.*; cf. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 62 (2009) (“Given that prompt letters communicate the views of the executive branch to agencies in a transparent manner that permits public scrutiny and debate, prompt letters further accountable and transparent decisionmaking.”).

<sup>212</sup> See William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 *BYU L. REV.* 413, 434 (2015) (stating that the APA reflects a central role for deliberation).

<sup>213</sup> *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996); see also 5 U.S.C. § 553(c) (requiring agencies to “consider” relevant material submitted during rulemaking).

<sup>214</sup> See Mashaw & Berke, *supra* note 25, at 612.

<sup>215</sup> 5 U.S.C. § 554(c); see also *id.* § 557(c).

<sup>216</sup> Sherman, *supra* note 212, at 417.

<sup>217</sup> Kovacs, *Constraining the Statutory President*, *supra* note 27, at 105.

<sup>218</sup> Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 *GEOR. WASH. L. REV.* 1397, 1423 (2013); see also SHANE, *supra* note 44, at 25; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. REV.* 461, 504 (2003).



Federal Emergency Management Agency to pay for a wall between the United States and Mexico and immigration enforcement.<sup>219</sup> Had the President been subject to the APA, he may have considered the ramifications of that decision for the larger public interest and found other ways to pursue his policy. Moreover, presidential decisionmaking necessarily reduces deliberation within agencies.<sup>220</sup> As explained above,<sup>221</sup> when the President dictates a decision, the deliberative processes that normally would lend democratic legitimacy to the agency's decision are short-circuited.<sup>222</sup>

Kagan did not address deliberation directly. On a related note, she asserted that most administrative policymaking is premised on "value judgments" that are "essentially political choices."<sup>223</sup> This relates back to her emphasis on accountability. Kagan preferred a policymaking process that "best promotes responsiveness to the policy preferences of the general public."<sup>224</sup> Unfortunately, the APA — the statutory constitution for the "fourth branch"<sup>225</sup> — does not share that value. The APA does not envision administrative decisionmaking as a popularity contest.

#### D. Uniformity

Finally, as I explained in detail elsewhere, one of Congress's primary goals in the APA was to achieve some level of uniformity in agency policymaking.<sup>226</sup> That goal constituted a normative commitment.<sup>227</sup> In its effort to make agencies less confusing and more fair, Congress designed the APA "to be operative 'across the board.'"<sup>228</sup> All agencies were subject to the same procedures and the same judicial review.<sup>229</sup>

Presidential decisionmaking undermines uniformity by substituting ad hoc decisionmaking for statutory procedure.<sup>230</sup> Freeman and Jacobs explain that structural deregulation "is largely informal," unilateral, and avoids the notice-and-comment process.<sup>231</sup> The many mechanisms for structural deregulation reach fruition through varied processes, making

<sup>219</sup> See Freeman & Jacobs, *supra* note 11, at 611.

<sup>220</sup> SHANE, *supra* note 44, at 25, 183.

<sup>221</sup> See *supra* p. 124.

<sup>222</sup> See Mashaw & Berke, *supra* note 25, at 612; see also Buzbee, *supra* note 156, at 1433.

<sup>223</sup> Kagan, *supra* note 1, at 2353.

<sup>224</sup> *Id.* at 2333.

<sup>225</sup> Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, 137–38 (2019).

<sup>226</sup> Kovacs, *Superstatute Theory*, *supra* note 24, at 1229–30.

<sup>227</sup> Kovacs, *Constraining the Statutory President*, *supra* note 27, at 107.

<sup>228</sup> H.R. REP. NO. 79-1980, at 250 (1945).

<sup>229</sup> S. REP. NO. 79-752, at 191 (1945).

<sup>230</sup> See Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 933 (2017).

<sup>231</sup> Freeman & Jacobs, *supra* note 11, at 634.

presidential decisionmaking obscure and inequitable — exactly what the APA sought to avoid. Yet again, Kagan failed to recognize, much less justify her departure from, this core commitment in the APA.

*E. Don't Let Perfect Be the Enemy of Good*<sup>232</sup>

Freeman and Jacobs are no doubt correct that the APA “offers an unsatisfying response to structural deregulation.”<sup>233</sup> First, they point out that it does not apply to the President.<sup>234</sup> But the Supreme Court’s conclusion that the President is not an “agency” under the APA is wrong as a matter of statutory interpretation, history, and constitutional analysis, as I explain elsewhere.<sup>235</sup> That decision should be overturned by the Court or overridden by Congress.<sup>236</sup>

Freeman and Jacobs also point out that the APA “shields an agency’s managerial decisions from public scrutiny.”<sup>237</sup> Section 553 exempts “rules of agency organization, procedure, or practice” from notice-and-comment rulemaking requirements,<sup>238</sup> and section 552 exempts from public disclosure “matters . . . related solely to the internal personnel rules or practices of an agency.”<sup>239</sup> Assessing whether the many judicial applications of those provisions are correct is beyond the scope of this paper. Perhaps those provisions deserve amendment or clarification to combat the excesses of presidential administration. Likewise, the courts’ reluctance “to police agency inaction and delay”<sup>240</sup> may reflect erroneous interpretation or necessitate an amendment of the APA. Even with those limitations, though, effectuating the APA’s constitutional valence and normative vision would go a long way towards stalling the United States’ slide toward authoritarianism.<sup>241</sup>

## VI. CONCLUSION

In *Presidential Administration*, then-Professor Elena Kagan celebrated the Clinton Administration’s effectiveness. Twenty years later, we see that the cost of that vigor was too high. As Freeman and Jacobs

<sup>232</sup> THE OXFORD DICTIONARY OF QUOTATIONS 716 (Angela Partington ed., 4th rev. ed. 1996) (translating “[L]e mieux est l’ennemi du bien” as “[t]he best is the enemy of the good” and noting its appearance in VOLTAIRE, *LA BÉGUEULE: CONTE MORALE* 3 (1772)).

<sup>233</sup> See Freeman & Jacobs, *supra* note 11, at 648.

<sup>234</sup> See *id.* at 648–49.

<sup>235</sup> See Kovacs, *Constraining the Statutory President*, *supra* note 27, at 83–98.

<sup>236</sup> See *id.* at 120–21.

<sup>237</sup> Freeman & Jacobs, *supra* note 11, at 649.

<sup>238</sup> 5 U.S.C. § 553(b)(3)(A).

<sup>239</sup> 5 U.S.C. § 552(b)(2). This provision was part of the Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250, 251, which amended section 3 of the APA.

<sup>240</sup> Freeman & Jacobs, *supra* note 11, at 649.

<sup>241</sup> Cf. Kovacs, *Supersecretary*, *supra* note 50, at 76–77 (calling the APA a “second-best alternative” to striking down presidential exercises of another officer’s statutory authority).

explain, presidential control of the federal bureaucracy has made agencies vulnerable to evisceration. It allows a deregulatory President to undermine the substantive goals Congress sets for an agency by statute. It thus encroaches on Congress's lawmaking authority and undermines "longstanding administrative law norms,"<sup>242</sup> doing "lasting damage" to our nation.<sup>243</sup>

However, the problem Freeman and Jacobs discuss is merely one part of a larger phenomenon. If there is a flaw in their article, it's that they don't go far enough. Their analysis accomplishes far more than they claim; it helps to demonstrate that we face a much larger problem with the American presidency. Whether the President favors regulation or deregulation, building agencies or tearing them down, Presidents now overstep their bounds regularly. They act not merely as Administrator in Chief, guiding the officers who are charged with implementing federal statutes. Rather, Presidents also act as Supersecretary in Chief. They regularly direct agency action despite statutory delegations to another officer and without the procedure and judicial oversight that accompany agency decisionmaking.<sup>244</sup> The American President is now the dictator of the administrative state.

Kagan's paean to presidential administration turns out to have been shortsighted. She focused on effectiveness in part because she observed that agencies had become ossified.<sup>245</sup> With a divided Congress failing to take the lead on policy formation, and agencies stuck in a procedural mire, she turned to the President to make government work.<sup>246</sup> She didn't anticipate that a President could or would meddle with "all, or even all important, regulation."<sup>247</sup>

In many ways, the pendulum of agency effectiveness has swung back the other way, and Kagan's assumption that no President could "substitute all his preferences for those of the bureaucracy"<sup>248</sup> has proven to be myopic. In its first one hundred days, every presidential administration releases a flurry of policy changes on the most significant issues facing our nation.<sup>249</sup> Agencies rush to keep pace and implement the President's

---

<sup>242</sup> Freeman & Jacobs, *supra* note 11, at 590.

<sup>243</sup> *Id.* at 587.

<sup>244</sup> See Kovacs, *Supersecretary*, *supra* note 50, at 62, 69.

<sup>245</sup> See Kagan, *supra* note 1, at 2252, 2267; see also *id.* at 2263 ("[B]ureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor."); *id.* at 2353 ("[Agency] officials' insulation from the public, lack of capacity for leadership, and significant resistance to change pose significant risks to agency policymaking."); *id.* at 2344 (recognizing the courts' contribution to agency ossification through excessive procedural requirements).

<sup>246</sup> See *id.* at 2344.

<sup>247</sup> *Id.* at 2250 ("[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.")

<sup>248</sup> *Id.* at 2273.

<sup>249</sup> See Jason Breslow, *Biden's 1st 100 Days: A Look by the Numbers*, NPR (Apr. 27, 2021, 5:00 AM), <https://www.npr.org/2021/04/27/988822340/bidens-1st-100-days-a-look-by-the-numbers>

agenda before the clock runs out.<sup>250</sup> At the direction of the Supersecretary in Chief, agencies may sacrifice deliberation and fairness for speed.<sup>251</sup>

We must rein in the presidency to forestall the United States' slide toward authoritarianism. I've suggested one way to move in that direction: recognize that the President is an "agency" under the APA.<sup>252</sup> Thus, when the President exercises purely statutory authority, the APA's rulemaking and judicial review provisions would apply as they would to any agency. I've also argued that the Supersecretary in Chief should not be tolerated; the President should not be permitted to usurp statutory authority delegated to another officer.<sup>253</sup> Recognizing that the current Supreme Court is unlikely to follow that path, I argued that subjecting the Supersecretary in Chief to the APA provides a second-best alternative.<sup>254</sup>

Beyond rebuilding agency policymaking capacity,<sup>255</sup> Freeman and Jacobs recommend that Congress mandate minimum staffing levels in legislation;<sup>256</sup> require agencies to report to Congress before relocating staff and resources; enhance civil service protections; provide for APA review of structural changes like hiring freezes and funding reallocations; and narrow the exemption from notice-and-comment rulemaking for rules related to "agency management or personnel."<sup>257</sup> They also counsel agencies to establish criteria governing such changes in binding regulations.<sup>258</sup> And they caution courts not to allow Presidents to

---

[<https://perma.cc/3ZPJ-VXCB>]; Taylor Tepper, *Charting the First 100 Days of 6 Presidents*, FORBES (Apr. 29, 2021, 11:09 AM), <https://www.forbes.com/advisor/investing/first-100-days-of-past-presidents> [<https://perma.cc/CQT2-RHYD>].

<sup>250</sup> See generally Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENV'T & ADMIN. L. 285, 286 (2013); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011).

<sup>251</sup> See Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), [https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9\\_story.html](https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html) [<https://perma.cc/B8H5-CC52>]; Eric Lipton, *A Regulatory Rush by Federal Agencies to Secure Trump's Legacy*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/regulatory-rush-federal-agencies-trump.html> [<https://perma.cc/RF53-2WS9>]; Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [<https://perma.cc/EW4B-GRM5>]; cf. CARY COGLIANESE, NATASHA SARIN & STUART SHAPIRO, PENN PROGRAM ON REGUL., DEREGULATORY DECEPTIONS: REVIEWING THE TRUMP ADMINISTRATION'S CLAIMS ABOUT REGULATORY REFORM (2020) (analyzing the Trump Administration's regulatory output).

<sup>252</sup> Kovacs, *Constraining the Statutory President*, *supra* note 27.

<sup>253</sup> Kovacs, *Supersecretary*, *supra* note 50, at 76–77.

<sup>254</sup> *Id.* at 78.

<sup>255</sup> Freeman & Jacobs, *supra* note 11, 652–56.

<sup>256</sup> *Id.* at 657–61.

<sup>257</sup> 5 U.S.C. § 553(a)(2).

<sup>258</sup> Freeman & Jacobs, *supra* note 11, at 663.

“incapacitate agencies and then later claim incapacitation as grounds for inaction.”<sup>259</sup> Other scholars advance their own proposals for controlling the President.<sup>260</sup>

The APA must be part of the solution. It is not just the law of the land; it also “represents an extraordinary moment of deliberative democracy.”<sup>261</sup> Congress debated administrative reform bills for the better part of seventeen years, with dozens of federal agencies, the ABA, and other interested parties playing crucial roles.<sup>262</sup> The bottom line, as attorney Steven Croley observed, is that the APA “really matters,” and omitting it from any “theory of regulation is leaving much out indeed.”<sup>263</sup> Returning to the APA’s constitutional and normative vision would help forestall democratic backsliding in the United States.

---

<sup>259</sup> *Id.*

<sup>260</sup> See, e.g., Emerson & Michaels, *supra* note 70, at 117–33.

<sup>261</sup> Kovacs, *Constraining the Statutory President*, *supra* note 27, at 84.

<sup>262</sup> See generally Shepherd, *supra* note 157 (providing a thorough history of the APA); see also Kovacs, *Supersecretary*, *supra* note 50, at 72.

<sup>263</sup> Croley, *supra* note 27, at 90.