

EXTRAORDINARY POLICYMAKING POWERS OF THE
EXECUTIVE BRANCH: A NEW APPROACH

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INTRODUCTION

In recent years, the U.S. executive branch has exercised its powers in unprecedented ways to advance and shape high-stakes policy changes. These executive actions raise a variety of legal issues as well as much public and scholarly debate.

Allowing the executive branch¹ to energetically promote solutions to high-stakes policy problems involves both legal anxieties and benefits.² “High-stakes” policy decisions are heavily value-laden and attempt to solve large-scale national—sometimes even global—policy challenges. This article focuses on what I call “extraordinary decisions”: executive actions taken in response to policy issues that present international coordination challenges.

In recent years, the executive branch has been leveraging congressional gridlock as justification for expanding and redefining its own authority. The chief justification that the executive branch provides for its unorthodox role is that it is compelled to act because of a dysfunctional legislative branch. One prominent example is former President Barack Obama’s statement on climate change:

I urge this Congress to get together, pursue a bipartisan, market-based solution to climate changeBut if Congress won’t act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.³

Another example is his statements on immigration:

Now, I continue to believe that the best way to solve this problem is by working together to pass that kind of common sense law. But until that happens, there are actions I have the legal authority to take as President—the same kinds of actions taken by Democratic and Republican presidents before me—that will help

¹ Throughout this piece I use the term “executive branch” to refer collectively to the president and federal agencies of the United States.

² For examples of the many anxieties and ambivalences in the administrative state, *see, e.g.*, Ethan J. Leib, *Also, No*, 53 TULSA L. REV. 267 (2018) (book review); Cary Coglianese & Christopher S. Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1589 (2016) (“What actions these domestic agencies take and how they make their decisions matter greatly, making the discretion exercised by these administrative institutions a proper matter for both investigation and concern.”).

³ President Barack Obama, State of the Union Address (Feb. 12, 2013), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

make our immigration system more fair and more just. Tonight, I am announcing those actionsAnd to those members of Congress who question my authority to make our immigration system work better, or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill. I want to work with both parties to pass a more permanent legislative solution. And the day I sign that bill into law, the actions I take will no longer be necessaryAmericans are tired of gridlock. What our country needs from us right now is a common purpose—a higher purpose.⁴

At the same time, administrative and constitutional law doctrines have become largely insensitive to partisan legislative gridlock. With a few notable exceptions,⁵ recent jurisprudence tends to ignore the reality of the modern legislative process.

This article focuses on when an executive implements an ambitious and controversial policy agenda that in an ideal world would be more suitable to enactment as legislation. Instead of waiting for Congress to pass such legislation, the executive branch utilizes legal tools, such as creative interpretations of language in vague and ambiguous statutory provisions, to alter a gridlocked status quo.

Because the executive branch cannot act without legislative authority, it must find some statutory “hook” for its claimed authority to act. It is a basic administrative law principle that the executive branch is not authorized to realize its powers in areas where it lacks authority.⁶ However, a situation where no statutory “hook” can be found is rare, as there are a myriad of statutes in various areas of the law that involve at least a vague delegation of authority by the legislature to the executive branch.

⁴ President Barack Obama, Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

⁵ See *King v. Burwell*, 135 U.S. 2480 (2015) (implementing a statutory interpretation more reflective of the actual reality of the modern legislative process); see also Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64 (2015) (“*King* is the Court’s most explicit recognition ever of modern statutory complexity. At the same time, it is the Court’s most optimistic characterization of both its own and Congress’s abilities in years.”).

⁶ See generally *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008); Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363 (2010); Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L. J. 1003 (2015); see also Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1182 (2018) (explaining that the nondelegation doctrine says that “[E]xecutive agencies cannot make certain kinds of decisions unless Congress has explicitly authorized them to do so.”).

The goal of this article is not to examine whether the executive's invoked authority actually complies with the delegated authority. Its focus is not the "ordinary" statutory interpretations for agency policymaking resolutions. Instead, this article deals with the competence and institutional legitimacy of the executive branch to decide certain questions. This analysis considers the circumstances under which administrations should be making national—and perhaps even international—policy judgments.⁷

Critics of strong executive action contend that by taking this active agenda-setting role, the executive branch attempts to transcend the boundaries of its jurisdiction. This critique is concerned with a possibly limitless reach of executive power—an aggressive and boundless executive branch that circumvents congressional deliberation and encroaches on the primary role of the legislature.⁸

But extraordinary executive branch action is neither inherently good nor bad. As the current judicial approach to analyzing these types of actions has been inadequate, a more nuanced and sophisticated view is needed. As a representative example, although congressional gridlock leads to worldwide gridlock on policy issues that affect the entire globe, courts ignore global collective action challenges in their analysis.

This article argues that allowing the executive branch to use unorthodox mechanisms to promote policy goals in high-stakes domains is justified when the executive can establish sufficient legitimacy. To offset this broader policymaking leeway, however, more robust safeguards and limitations on executive policymaking are needed.

Accordingly, this article proposes a new multi-factor test that offers initial guidelines to determine when it is legitimate for the executive branch to exercise extraordinary authority and push the boundaries of delegation under the Administrative Procedure Act (APA).⁹ Although developing clear rules presents an arduous challenge, this article highlights the lack of a comprehensive framework for evaluating extraordinary executive branch action in a reality where the lawmaking branch of government is all but broken.

⁷ These are questions of comparative institutional choice, namely who should be deciding major policymaking challenges in certain situations. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 1-52 (1994).

⁸ *See, e.g.*, DEAN REUTER & JOHN YOO, LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE (2016) (providing a harsh critique on the expanding power of the federal government, and specifically the Obama administration).

⁹ 5 U.S.C. §§ 551-559 (2012).

The proposed criteria include (1) the presence of a problem with significant global dimensions or considerations of emergency or necessity; (2) the extant authority of the executive branch over the area of the desired policy initiative; (3) the driving force behind the policymaking initiative; (4) process and procedure; (5) the agencies' characteristics and participation of alternate actors; (6) Congress's view of the issue, second-best alternative and the consideration of divided or unified government; and (7) protection of constitutional principles and values or abuse of discretion.

There is a stronger normative justification for executive action when the policymaking initiative at hand is designed to promote solutions to global challenges that impact the United States and require transnational collective action. Some collective action problems—including climate change—demand U.S. participation because the United States is a dominant and crucial actor at the global level.

This article pursues these questions through an analysis of two case studies from the Obama administration. The first is the Environmental Protection Agency's ("EPA") interpretation of the Clean Air Act ("CAA")¹⁰ to address climate change via the Clean Power Plan ("CPP") regulations. The second is the immigration reform initiatives, enacted through comprehensive nonenforcement policies for certain categories of undocumented immigrants.

The case studies demonstrate the challenges that arise out of such executive policymaking. The analysis compares similarities and differences between separate instances where the executive branch has attempted to make profound policy determinations of social, economic, and political significance, and it identifies the distinctive features that merit greater justification for strong executive action. The lessons from these case studies enable us to develop a more accurate account of executive policymaking. In addition, the two case studies present salient questions on the evolving area of administrative constitutionalism.¹¹ The analysis of these case studies presents a timely debate on the nature of expansive executive action, notwithstanding the fact that these specific policy initiatives are not currently being implemented due to the change in presidential administrations in 2017. Since the new president has expressed his determination to act unilaterally on a broad range of

¹⁰ 42 U.S.C. § 7401 et seq. (1970).

¹¹ See generally Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015) (explaining that agencies engage in administrative constitutionalism when they resolve questions with constitutional implications).

issues,¹² this article's approach will remain relevant into the future. In addition, in 2019, the Supreme Court announced that it will address the immigration reform initiatives next term.¹³

Part I of this article provides factual and legal background on the two case studies from the Obama administration. Part II opines on the causes and implications of congressional dysfunction. It illustrates the current political system's departure from the rationales that are reflected in public law doctrines. It proceeds by exploring the issue of redefining executive authority, demonstrating the necessity of adjusting public law doctrines to reflect such authority. Part III details the concurrent escalation of the administrative state and its powers, and the anxieties that have resulted from this massive expansion in executive discretion. It elaborates on the president and agencies as institutions and the mechanisms that enable their broad policymaking discretion. It then details the current judicial approach to analyzing these questions. Finally, Part IV proposes a novel, factor-based legal approach to grapple with extraordinary executive policymaking in an era of congressional dysfunction, and, as a demonstrative exercise, applies these factors to the climate change and immigration case studies.

I. TESTING MAJOR EXECUTIVE POLICYMAKING POWERS: TWO CASE STUDIES

Like many presidents before him, President Obama had a tepid and often hostile relationship with a dysfunctional Congress. Following futile attempts to push major legislative reforms on climate change and immigration through Congress,¹⁴ President Obama instead decided to move forward with his desired policy reforms through executive actions. While Congress, some legal academics, and many members of the general public viewed these actions as executive overreach, President Obama acted to prevent what he viewed as environmental and humanitarian tragedies in the United States and around the world.¹⁵ With the shift in administrations in 2017, President Trump sought to roll back many of his predecessor's policies and institute unilateral actions of his

¹² See, e.g., Ashley Parker, *Going It Alone: Trump Increasingly Relies on Unilateral Action to Wield Power*, THE WASH. POST (June 11, 2018) https://www.washingtonpost.com/politics/going-it-alone-trump-increasingly-relies-on-unilateral-action-to-wield-power/2018/06/11/6124866a-6a80-11e8-bbc5-dc9f3634fa0a_story.html?utm_term=.f88cfc0d267e.

¹³ Michael D. Shear & Adam Liptak, *It's Now the Supreme Court's Turn to Try to Resolve the Fate of the Dreamers*, N.Y. TIMES (June 28, 2019) <https://www.nytimes.com/2019/06/28/us/politics/supreme-court-daca-dreamers.html>.

¹⁴ See Part IV.D (on the application of the case studies).

¹⁵ For the first factor of the multi-factor test, see *infra* Part IV.C.1.

own.¹⁶ Thus, although this Part focuses on President Obama's executive actions on climate and immigration reforms, these examples provide a suitable template for understanding extraordinary executive policymaking in the modern presidency in general.

A. *Climate Change: Policymaking through Interpretation*

Although climate change has local effects, environmental regulatory policy addressing climate change is a response to a global, transnational collective action challenge. Climate change policymaking also is an exemplar of legislative dysfunction. Although environmental lawmaking in general is difficult to accomplish,¹⁷ climate change in particular poses a distinct lawmaking challenge. Climate change, as Richard Lazarus defines it, is a “‘super wicked problem’ for public policy resolution and therefore legal redress.”¹⁸

Although there is wide agreement among experts and academics that a congressional initiative to reduce emissions is highly desirable,¹⁹ Congress has not enacted major environmental legislation since 1990.²⁰

¹⁶ See *infra* note 51 and accompanying text; see also Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *83 Environmental Rules Being Rolled Back under Trump*, *The New York Times* (June 7, 2019), <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html>.

¹⁷ See, e.g., Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 *CORNELL L. REV.* 1153, 1179-84 (2009); Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 *NOTRE DAME L. REV.* 2323, 2397 (2013) (“Congress has been completely dysfunctional when it comes to the nation's most pressing environmental issues, such as climate change, energy policy, enforcement authority, and the protection of critically important but non-navigable waterways.”); see also Richard J. Lazarus, *Flexing Agency Muscle*, 48 *GA. L. REV.* 327, 331 (2014) (noting that the environmental disaster of the 2010 Gulf Oil Spill in the Gulf of Mexico did not produce new federal legislation aimed at preventing future spills).

¹⁸ Lazarus, *Super Wicked Problems*, *supra* note 17, at 1159.

¹⁹ See, e.g., Ann E. Carlson, *The President, Climate Change, and California*, 126 *HARV. L. REV. F.* 156, 156 (2013) (“The world would be a better place if Congress enacted a national program to reduce greenhouse gases. Such a program would have as its centerpiece a well-designed set of policies to place a price on carbon, either through a tax or a cap-and-trade program.”); Richard Lazarus, *Environmental Law Without Congress*, 30 *J. LAND USE & ENVTL. L.* 16, 30 (2014) (“A new law is desperately needed in order to address today's most pressing environmental problem.”).

²⁰ See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 *U. PA. L. REV.* 1, 5, 8 (2014) (“Congress has not passed a major environmental statute in nearly a quarter-century, nor has it produced more than incremental reforms to federal energy legislation during that time, despite dramatic technological, economic, and social changes in these fields that would seem to demand a legislative response [I]n both the energy policy and environmental policy realms, Congress appears to have lost the capacity to react to new policy challenges as efficiently or effectively as it did in the past.”); Lazarus, *supra* note 19, at 27 (“Since 1990, Congress has not passed any meaningful new environmental statutes, nor has it amended any important legislation.”); David M. Uhlmann, *The Quest for a Sustainable Future and the Dawn of a New Journal at Michigan Law*, 1 *MICH. J. ENVTL. & ADMIN. L.* 1, 5 (2012) (“During the course of the 1970s and 1980s, more than two dozen environmental and natural resource statutes were enacted by Congress.

Recent bills explicitly seek to prevent federal agencies from addressing or regulating climate change.²¹ For example, a national cap-and-trade system as proposed in the Waxman-Markey Bill of 2009²² failed to pass the Senate due to strong political and industry opposition.²³

Policymakers and scientists agree that the global challenge of climate change requires substantial worldwide cooperation.²⁴ Climate change has unique characteristics: wherever greenhouse gases (“GHGs”) are emitted, they mix into the atmosphere and have global impacts.²⁵ The world’s total emissions level is the key driver of global climate change, rather than the geographic location of local emissions. Local actions to reduce emissions can work to decrease the world’s total concentration of GHGs,²⁶ but these actions generally have no uniquely local climate benefits.²⁷ The Earth’s climate is a global public good, and efforts to curb climate change help protect this shared global resource. The United States, for example,

Most passed with nearly unanimous support—margins that would be unthinkable today—and many were signed into law by Republican presidents Moreover, the events that motivated Congress to enact environmental laws had appeal across partisan lines.”). In fact, the House of Representatives voted for more anti-environmental bills in 2011 and 2012 than at any other time in the history of the republic. Committee on Energy and Commerce - Democratic Staff, *The Anti-Environment Record of the U.S. House of Representatives in the 113th Congress* (December 2013), available at <https://www.hsdl.org/?view&did=748326>. During the first half of the 113th Congress, House Republicans voted many times to block or hinder federal efforts to curb carbon pollution and prevent climate change, including a vote to prevent the EPA from considering the damage caused by carbon pollution and climate change in agency rulemaking. *Id.*

²¹ See, e.g., Stopping EPA Overreach Act of 2017, H.R. 637, 115th Cong. (2017) (clarifying that federal regulatory authority excludes GHGs regulation under the CAA).

²² American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

²³ See *infra* notes 328-329.

²⁴ Some scholars even argue that climate change should only be addressed at the international level because only international cooperation can effectively reduce emissions. See Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1967 (2007); ERIC A. POSNER & DAVID WEISBACH, *CLIMATE CHANGE JUSTICE* 69 (2010); Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL’Y REV. 245, 277 (2010) (“In sum, policymakers and academics alike acknowledge that the only means of successfully addressing the threat of climate change is an international agreement that includes the major greenhouse gas producers and most of the potential major greenhouse gas producers.”).

²⁵ For an explanation on the science of climate change, see, e.g., U.S. Global Change Research Program (USGCRP), *Climate Science Special Report: Fourth National Climate Assessment (NCA4), Vol. 1* (2017), <https://science2017.globalchange.gov> (“[T]his assessment concludes, based on extensive evidence, that it is extremely likely that human activities, especially emissions of greenhouse gases, are the dominant cause of the observed warming since the mid-20th century.”).

²⁶ The major fuel-consuming sectors contributing to CO₂ (carbon dioxide) emissions from fossil fuel combustion are electricity production and the transportation, industrial, residential, and commercial “end-use” sectors.

²⁷ Cary Coglianese & Jocelyn D’Ambrosio, *Policymaking under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411, 1418-1419 (2008).

benefits from foreign action on climate change.²⁸ Since the effects of climate change are felt regardless of geographic borders, countries must consider the global externalities of their carbon pollution emissions.²⁹

Unlike previous administrations, the Obama administration sought a more active role in forming climate policy.³⁰ Following the legislative failures of cap-and-trade, the president and his administration took more direct and unilateral action to combat climate change³¹ by releasing a national comprehensive plan to reduce GHG emissions in 2013,³² which took the form of executive orders and a presidential memorandum.³³

In the absence of federal legislation on climate change, the executive branch's main tool was the existing Clean Air Act ("CAA"), which was originally designed to regulate air pollution, not climate change. Air pollutants, unlike GHGs, have direct and immediate local impacts. The CAA, which vests its regulatory authority in the EPA, presents the classic

²⁸ Peter Howard & Jason Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 COLUM. J. OF ENVTL. L. 203, 223-25 (2017) ("[T]he United States has already benefited from foreign climate action and will continue to benefit tremendously if foreign countries fulfill their existing pledges for future action.").

²⁹ See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); see also Howard & Schwartz, *supra* note 28, at 223 ("Many other countries have adopted either carbon taxes or carbon allowances that seem to reflect concern for the extraterritorial effects of greenhouse gas pollution.").

³⁰ See generally Cass R. Sunstein, *Changing Climate Change, 2009-2016*, 42 HARV. ENVTL. L. REV. 231-36 (2018) (surveying the variety of the Obama administration's executive actions on climate change).

³¹ See, e.g., Remarks by the President on Climate Change at Georgetown University (June 25, 2013), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/2013/06/25/remarks-president-climate-change> ("So today, for the sake of our children, and the health and safety of all Americans, I'm directing the Environmental Protection Agency to put an end to the limitless dumping of carbon pollution from our power plants, and complete new pollution standards for both new and existing power plants. I'm also directing the EPA to develop these standards in an open and transparent way, to provide flexibility to different states with different needs, and build on the leadership that many states, and cities, and companies have already shown.").

³² EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN (2013), <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf> (directing the EPA to promulgate what would become the CPP).

³³ Exec. Order No. 13,653, *Preparing the United States for the Impacts of Climate Change* (Nov. 1, 2013); Presidential Memorandum, Federal Leadership on Energy Management (Dec. 5, 2013). See also Exec. Order No. 13677, *Climate-Resilient International Development* (Sep. 23, 2014); Exec. Order No. 13,693, *Planning for Federal Sustainability in the Next Decade*, 80 Fed. Reg. 15,871 (2015) (directing reduction in federal government's GHG emissions); Michael B. Gerrard & Shelley Welton, *US Federal Climate Change Law in Obama's Second Term*, TRANSNATIONAL ENVTL. L. (2014); *The Economic Record of The Obama Administration: Addressing Climate Change* (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160921_record_climate_energy_cea.pdf; Yumehiko Hoshijima, *Presidential Administration and the Durability of Climate-Conscious Reasoning*, 127 YALE L.J. 170 (2017) (on issuing a set of policies that advanced climate-consciousness in the executive branch by accepting climate change as a key decisional criterion in decision making).

example of an “old statute”³⁴ because this legislation was not designed to combat climate change. In a 2013 presidential memorandum, President Obama directed the EPA to issue climate change regulations under Sections 111(b) and 111(d) of the CAA.³⁵ The EPA published a milestone regulation for new power plants under the CAA in 2015.³⁶ The scope and complexity of this rule were unique and proved controversial from a legal standpoint. Indeed, the “EPA’s effort to reach these plants under 111(d) was the greatest test to date of its strategy to adapt the CAA to climate change.”³⁷ Even scholars who defend strong policymaking powers of agencies admitted that “there is no question that EPA’s interpretation [was] novel and far-reaching.”³⁸

In 2015, the EPA issued its ambitious rule, titled the Clean Power Plan (“CPP”), a major part of the Obama administration’s Climate Action Plan.³⁹ The CPP seemed to be an ambitious and efficient policy, setting the first-ever federal limits on carbon pollution from existing U.S. power plants. The CPP set carbon dioxide emission reduction requirements for the states. As part of the CPP, the federal executive branch relied on state policies to establish a national policy, and direct engagements with the states, which will continue to play a major role.⁴⁰ The CPP gave states the time and flexibility to develop tailored, cost-effective plans to reduce their emissions. It mandated an eight-year interim compliance period,⁴¹ and if a state failed to submit a satisfactory Section 111(d) plan by the deadline, Section 111(d) authorized the EPA to prescribe a federal plan for the state.⁴²

³⁴ The term “old statute” refers to legislation that is not adapted or not adequately adapted to address newer challenges. *See, e.g.*, Freeman & Spence, *supra* note 20, at 63.

³⁵ Presidential Memorandum to EPA, Power Sector Carbon Pollution Standards (June 25, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>. Clean Air Act § 111(b), 42 U.S.C. § 7411(b), (d) (2012).

³⁶ *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,509 (Oct. 23, 2015) (codified at 40 C.F.R. pts. 60, 70, 71, 98).

³⁷ Freeman & Spence, *supra* note 20, at 33.

³⁸ *Id.* at 37.

³⁹ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). *See also* MSNBC, *President Obama Unveils Clean Power Plan*, YOUTUBE (Aug. 3, 2015), <https://www.youtube.com/watch?v=OHS8zm8hVj0>.

⁴⁰ Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 985 (2016). *See also* CONG. RES. SERV., R44145, EPA’S CLEAN POWER PLAN: HIGHLIGHTS OF THE FINAL RULE (2016); JAMES E. MCCARTHY ET AL., CONG. RES. SERV., R44341, EPA’S CLEAN POWER PLAN FOR EXISTING POWER PLANTS: FREQUENTLY ASKED QUESTIONS (2016).

⁴¹ LINDA TSANG & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN WEST VIRGINIA V. EPA 8-9 (2017).

⁴² *Id.*

According to federal projections, the overall benefits of the CPP regulation were expected to significantly outweigh their implementation costs.⁴³ The EPA concluded that the CPP's compliance costs would far outweigh its climate and health benefits.⁴⁴ The EPA's Regulatory Impact Analysis ("RIA") "estimated that the CPP would generate between \$32 and \$54 billion in annual benefits, compared to between \$5.1 and \$8.4 billion in annual costs."⁴⁵

But the CPP battle soon ended up in the courts. In *West Virginia v. EPA*,⁴⁶ petitioners argued that the EPA's new climate change regulations exceeded its authority under CAA Section 111(d).⁴⁷ In 2016, the Supreme Court, in an unprecedented ruling, granted requests by the fossil-fuel industry and by twenty-nine states to stay the CPP.⁴⁸ This interlocutory order stayed the CPP on an interim basis while the plaintiffs challenged the rule on the merits. The *West Virginia* decision was the first time the Supreme Court stopped the application of a federal agency regulation before any court had reviewed it on the merits. By granting the requested stay, the Court acted as a court of first resort, without a clear legal basis as to whether it had jurisdiction to issue the order.⁴⁹ The CPP included an interim-compliance period, meaning that the stay was granted in an early stage where the states were only required to plan for anticipated future compliance.⁵⁰

Then, at the beginning of his term, President Trump signed an expansive executive order designed to roll back the Obama

⁴³ NADRA RAHMAN & JESSICA WENTZ, SABIN CTR. FOR CLIMATE CHANGE LAW, *THE PRICE OF CLIMATE DEREGULATION: ADDING UP THE COSTS AND BENEFITS OF FEDERAL GREENHOUSE GAS EMISSION STANDARDS* 7, 14 (2017) (explaining that the rules were expected also to generate other benefits, such as improved public health outcomes and the creation of jobs, as well as climate mitigation benefits).

⁴⁴ DENISE A. GRAB & JACK LIENKE, INSTITUTE FOR POLICY INTEGRITY, *THE FALLING COST OF CLEAN POWER PLAN COMPLIANCE* 17 (2017), http://policyintegrity.org/files/publications/Falling_Cost_of_CPP_Compliance.pdf (concluding that based on multiple updated assessments conducted by independent NGOs, the CPP's emission targets "could be achieved for significantly less than the agency projected in 2015.").

⁴⁵ *Id.* at 1 ("If EPA were to update its RIA with current data that reflected these developments, it would project even lower compliance costs than it did in 2015.").

⁴⁶ 136 S.Ct. 1000 (2016) (mem.).

⁴⁷ Application by 29 States and State Agencies for Immediate Stay of Final Agency Action during Pendency of Petitions for Review, *West Virginia v. EPA*, No. 15A773, at 15-18 (U.S. Jan. 26, 2016), available at <https://www.scotusblog.com/wp-content/uploads/2016/01/15A773-application.pdf>.

⁴⁸ 136 S.Ct. at 1000.

⁴⁹ Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425, 428-31 (2016) (explaining that the Court did not identify its jurisdictional basis for granting the stay and did not explain its decision. Heinzerling argues that the Court's decision to stay the CPP resulted from one of the Court's "power canons.").

⁵⁰ *Id.* at 429.

administration's environmental policies.⁵¹ The order directed the EPA to review and rewrite the CPP and related regulation.⁵² It revoked several of President Obama's executive orders and memoranda, directed review of the social cost of carbon ("SCC"),⁵³ and disbanded the working group charged with calculating the metric. In response to President Trump's order, the EPA issued a rule that would repeal the CPP.⁵⁴ The effort to roll back the CPP was but one instance of the Trump administration attempting to overturn other Obama administration actions.

B. Immigration: Policy-Based Nonenforcement

In addition to climate change policy reforms, the Obama administration was determined to implement reforms to respond to humanitarian challenges in the face of outdated immigration laws.⁵⁵

Following congressional inaction on comprehensive immigration reform,⁵⁶ the Obama administration utilized a strategy of discretionary nonenforcement to unilaterally achieve the administration's policy goals. Through a creative use of executive *inaction*, therefore, the Obama

⁵¹ It is almost surprising to see how fast the Trump administration has acted to successfully unwind many of the previous administration's executive policies. For an overview of the limits that apply to agencies seeking to change course and rollback or suspend regulations that they previously issued, see note 146 below.

⁵² Promoting Energy Independence and Economic Growth, Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-03-31/pdf/2017-06576.pdf>; <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>.

⁵³ The SCC reflects the global valuation of GHG emissions.

⁵⁴ In 2018, EPA proposed to replace the CPP with revised emissions guidelines: the Affordable Clean Energy (ACE) rule. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 4,8035 (Oct. 16, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-10-16/pdf/2017-22349.pdf>. In June 2019, the EPA finalized its Affordable Clean Energy (ACE) rule. https://www.epa.gov/sites/production/files/2019-06/documents/frn_ace_2060-at67_final_rule_20190618disc.pdf.

⁵⁵ Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1800 (2016); The Dep't of Homeland Sec.'s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C., 1, 25 (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> (hereinafter "OLC Opinion") ("DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country.").

⁵⁶ Congress considered—but did not adopt—a very similar program to what President Obama ultimately implemented. See, e.g., DREAM Act of 2010, S. 3992, 111th Cong. (2010), <https://www.congress.gov/bill/111th-congress/senate-bill/3992> (authorizing the executive branch to extend legal status to individuals who entered illegally before age 16); see also David Nakamura & Ed O'Keefe, *Timeline: The Rise and Fall of Immigration Reform*, WASH. POST (Jun 26, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/06/26/timeline-the-rise-and-fall-of-immigration-reform/?utm_term=.35acba57e56a (discussing Congress's failure to pass the comprehensive bill pushed by the bi-partisan "gang of eight" that included a "path to citizenship").

administration attempted to use the weight of the executive branch to reshape national immigration policy.⁵⁷ Nonenforcement decisions are not subject to judicial review.⁵⁸ Generally, agencies are permitted to defer decisions, namely to “decide whether to decide, ultimately saying, ‘Not now.’”⁵⁹ In the immigration context, deferred action is a decision not to initiate the enforcement action of deportation. President Obama announced a set of policies concerning undocumented immigrants.⁶⁰ He argued that the actions were well within his statutory authority and that he did not require congressional approval to implement these changes.⁶¹ These actions, which took the form of two distinct policy changes, were effectuated by the Secretary of Homeland Security and directed by the president. The enforcement policies were adopted in a Department of Homeland Security (“DHS”) memorandum aimed at DHS personnel. While DHS did not use the notice-and-comment rulemaking process to implement these initiatives,⁶² these policies nonetheless generated public input.⁶³

Under these immigration initiatives, undocumented aliens who met certain criteria were eligible to apply for relief from deportation and for work authorization. The first of these policies, Deferred Action for Childhood Arrivals (“DACA”), was adopted in 2012.⁶⁴ Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)

⁵⁷ Adam Cox & Cristina Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 126-27 (2015).

⁵⁸ Standing requirements often prevent the public from challenging agency nonenforcement decisions. *See, e.g.*, Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1591-92 (2016); Aaron L. Nielson, *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* (BYU Research Paper No. 17-27, 2017) (examining agency nonenforcement practices, and particularly regulatory waivers and exemptions, and prosecutorial discretion); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1867 (2016) (“[R]arely do courts scrutinize an agency’s inaction or its failures to enforce, regulate, repeal, or amend its requirements.”).

⁵⁹ Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 163 (2014).

⁶⁰ Remarks by the President in Address to the Nation on Immigration, *supra* note 4 (“Tonight, I am announcing those actions . . . It does not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive – only Congress can do that. All we’re saying is we’re not going to deport you . . . What I’m describing is accountability – a common-sense, middle-ground approach: If you meet the criteria, you can come out of the shadows and get right with the law. If you’re a criminal, you’ll be deported.”).

⁶¹ *Id.*

⁶² *See infra* Section IV.D.2.

⁶³ *Id.*

⁶⁴ Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

was announced in 2014.⁶⁵ The DACA program applied to unauthorized immigrants who had come to the United States before the age of sixteen and had continuously resided in the country for at least five years, while DAPA deferred the deportation of parents of U.S. citizens and lawful permanent residents who had entered the country illegally.⁶⁶

Scholars argue that these efforts to better organize the enforcement bureaucracy ultimately advanced the core rule-of-law values of consistency, transparency, and accountability.⁶⁷ Others argue that the immigration initiatives were unconstitutional because they would have given the executive branch unchecked power to grant work authorization and benefits to millions of aliens,⁶⁸ undermining separation of powers and usurping congressional authority.⁶⁹

After their issuance, twenty-six states challenged the immigration initiatives in *Texas v. United States*.⁷⁰ In 2015, the U.S. District Court for the Southern District of Texas concluded that DAPA was a legislative rule,⁷¹ and thus the Obama administration violated the APA by failing to

⁶⁵ Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Director, U.S. Citizenship & Immigration Serv., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), <https://www.dhs.gov/publication/exercising-prosecutorial-discretion-respect-individuals-who-came-united-states-children>; Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Thomas S. Winkowski, Acting Director, U.S. Immigration & Customs Enf't, et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁶⁶ See Memo from Napolitano to Aguilar, *supra* note 64; Memo from Johnson to Rodriguez, *supra* note 65.

⁶⁷ See, e.g., Cox & Rodríguez, *supra* note 57, at 174; Ming H. Chen, *Administrator-In-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 352 (2017) (arguing that the success of the immigration policies is based on the president "acting as a good and fair administrator of his agencies.").

⁶⁸ Brief for the State Respondents at 76, *United States v. Texas*, 2016 WL 1213267 (2016) (No. 15-674) ("DAPA is an extraordinary assertion of Executive power. The Executive has unilaterally crafted an enormous program—one of the largest changes ever to our Nation's approach to immigration. In doing so, the Executive dispensed with immigration statutes by declaring unlawful conduct to be lawful.").

⁶⁹ For a narrow approach on executive policymaking, see, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 761, 769 (2014) ("However attractive it might be as a matter of policy, the DACA program appears to violate the proper respect for congressional primacy in lawmaking that should guide executive action, even when substantial exercises of prosecutorial discretion are inevitable. To the extent Congress has adopted overly broad and unduly harsh immigration laws, Congress should remain accountable for its choice. The executive branch should not presume the authority to let Congress off the hook . . . Absent a congressional delegation of lawmaking power, Presidents must execute the law, not make it. A proper conception of executive duty requires them to respect that limit on their power.").

⁷⁰ *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015).

⁷¹ See *infra* note 145 and accompanying text.

subject the program to notice-and-comment rulemaking.⁷² On these narrow procedural grounds, the court entered a preliminary injunction to halt the implementation of DAPA. The Fifth Circuit affirmed and signaled its skepticism of the government's position,⁷³ stating that it would have required internal administrative law documents that bound the discretion of agency officials to go through formal notice-and-comment procedures.⁷⁴ Both the Fifth Circuit and district court explicitly declined to address the separation of powers issue.⁷⁵

On appeal in the Supreme Court, the Obama administration argued that the DAPA program was a general statement of policy and as such was exempt from notice-and-comment rulemaking. Administrative law professors writing as amici curiae argued that requiring notice-and-comment "every time an agency head promulgates binding internal guidance would fundamentally impair agency heads' ability to direct the agencies they are statutorily charged with overseeing."⁷⁶

The Supreme Court issued a 4-4 opinion in *United States v. Texas*⁷⁷ affirming the lower courts' invalidation of the initiative.⁷⁸ It did not offer its reasoning.

After the change in administrations in 2017, the Trump administration quickly moved to rescind the DACA program.⁷⁹ In 2018, the Ninth Circuit held in *Regents of the University of California v. DHS* that the rescission was based solely on the administration's belief that DACA was unconstitutional from its inception due to a lack of executive authority

⁷² *Texas*, 86 F. Supp. 3d at 671.

⁷³ *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam).

⁷⁴ *Id.*

⁷⁵ *Texas*, 86 F. Supp. 3d at 677; *Texas*, 809 F.3d at 187.

⁷⁶ Brief of Administrative Law Scholars as Amici Curiae in Support of Petitioners at 4, *United States v. Texas*, 2016 WL 946985, at *1 (2016) (No. 15-674). The contrary argument was that DAPA exempted individuals from applicable law. DAPA was a substantive rule that binds agency officials, and is not a mere statement of policy. Brief of Legal Scholars Ronald A. Cass and Christopher C. Demuth and the Judicial Education Project as Amici Curiae in Support of Respondents, *United States v. Texas*, 2016 WL 1445331 (2016) (No.15-674).

⁷⁷ 136 S. Ct. 2271 (2016) (per curiam).

⁷⁸ For further discussion on the gridlock of the Court on this issue, see Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 304 (2016) ("Going forward, the Court's fragmented decisions in both cases resolve little and saddle the lower courts with the unenviable task of deciding issues the Justices couldn't.").

⁷⁹ Memorandum on Rescission of November 20, 2014, Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) (June 15, 2017) (on file with DHS), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf>; Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA) (Sep. 5, 2017) (on file with DHS), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

(rather than being based on a discretionary choice to end DACA).⁸⁰ The circuit ruled that the administration erred in its legal conclusion as to DACA's lawfulness.

* * *

The CPP regulation was promulgated through a novel interpretation of an old statute, whereas the immigration initiatives dealt with enforcement discretion. Despite their differences, both case studies illustrate situations where the executive branch has used a distinct "hook" for its claimed (and highly contested) authority to address major policymaking reforms.

II. LONG-LASTING CONGRESSIONAL DYSFUNCTION AND ITS IMPLICATIONS

To help explain the rise of extraordinary executive action, this Part elaborates on the legislative powers of Congress as part of the separation of powers model and provides a normative account of congressional dysfunction. It then details the responses of the judicial and executive branches to this dysfunction, and explains how public law doctrines have failed to adjust accordingly.

A. *Gridlock and Its Impact on Separation of Powers*

The most pressing policy problems are frequently complex in nature. In an ideal world with clear separation of powers, the legislature would address these problems through comprehensive, well-crafted legislation. The assumption that it is the legislature's role to make sensitive policy choices and set the policy agenda is grounded in the legislature's institutional legitimacy to answer policy questions with far-reaching implications.⁸¹ Since Congress is composed of elected politicians from all fifty states, it is considered to be the branch most accountable to, and most representative of, the American people.

Scholars have cast doubts on the values and advantages that are traditionally associated with the legislative process.⁸² While the

⁸⁰ *Regents of the University of California v. DHS*, No. 18-15068, slip op. at 55, 69-70, 89 (9th Cir. Nov. 8, 2018) (holding, in a unanimous panel opinion, that the rescission of DACA was motivated by unconstitutional racial animus in violation of the Equal Protection). In another court decision, a federal district court held this DHS rescission of DACA was arbitrary and unlawful because the agency did not provide adequate reasons to support its decision. *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018); *NAACP v. Trump*, civil action no. 17-1907 (D.D.C. 2018).

⁸¹ See, e.g., Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 469-70 (2010).

⁸² For example, in terms of comparative institutional competence, agency actions, especially notice-and-comment rulemaking, could actually be more transparent than congressional actions. Likewise, agencies can act more deliberatively than Congress. Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948 (2008) ("For each of the classic elements of representational

rudimentary lines of the traditional separation of powers have become murky, this phenomenon has been further compounded by congressional dysfunction. Many pressing policy challenges are not met with comprehensive legislation.⁸³ This is not a one-time coincidence, but rather a recognized phenomenon that exists due to congressional dysfunction.⁸⁴ Political scientists have identified several possible causes of this gridlock, such as polarization⁸⁵ and partisanship.⁸⁶

democracy—accountability, transparency, and deliberativeness—agencies are in many contexts better suited to consider federalism concerns than are Congress or the federal judiciary.”).

⁸³ For an overview on the political science literature on the topic, see, for example, Freeman & Spence, *supra* note 20, at 12 (arguing that enacting legislation is the product of the combination of “public pressure and a partisan environment in Congress that is conducive to building a majority.”).

⁸⁴ Some of the causes of congressional gridlock are divided government, increased party polarization, interest groups, the congressional committee system, Senate rules, electoral pressures, and the economy. See Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1108 (2013); see also generally DAVID R. MAYHEW, *DIVIDED WE GOVERN* (2005); Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. (2015); Sarah A. Binder, *Polarized We Govern?*, BROOKINGS INST. (2014); Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U. L. REV. 1159 (2014); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Freeman & Spence, *supra* note 20, at 14-15 (“[C]ongress is more likely to produce legislation . . . when the ideological middle in Congress is strong—that is, when legislators’ preferences are not ideologically polarized. Today, however, the ideological middle is unprecedentedly weak and growing weaker . . . [C]ongress is more ideologically polarized (and the gridlock interval larger) than ever before in the modern regulatory era. The parties have grown steadily farther apart ideologically since the 1970s, making bipartisan action to address important problems significantly more difficult. A large and growing academic literature has documented this growing polarization.”); Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 21 (Nathaniel Persily ed., 2015) (“Although there is a broad scholarly consensus that Congress is more polarized than any time in the recent past, there is considerably less agreement on the causes of such polarization.”).

⁸⁵ Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1487 (2015) (arguing that party polarization undermines the institutional power of Congress because legislators will often align their interests with their parties for reasons such as reelection and satisfying constituencies); see also Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015) (reviewing political science scholarship on the nature, extent, and causes of congressional polarization).

⁸⁶ See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012) (identifying several sources of dysfunction: first, the mismatch between the political parties and a governing system that makes it difficult for majorities to act; second, one of the two major parties, the Republican Party, has become ideologically extreme); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011) (exploring the causes of the American partisan polarization). For the impact of divided party control on the enactment of major laws, see generally DAVID R. MAYHEW, *DIVIDED WE GOVERN* (2005). For a detailed explanation of how ideological polarization in Congress both increases the probability of gridlock and decreases the capacity of Congress to take legislative action, and of the evidence of increasing ideological polarization (and corresponding increasing probability of gridlock) in Congress in recent decades, see Freeman & Spence, *supra* note 20 (concluding that “the average Republican is much more conservative, and the average Democrat slightly more liberal, than four decades ago. There are fewer moderates and overlapping members

Gridlock refers to the legislature's inability to make substantive policy decisions.⁸⁷ The legislative output is a direct result of the gridlock: fewer laws have been enacted during recent congresses than ever before.⁸⁸ As Sarah Binder has concluded, the state of legislating is one of "a national legislature plagued by low legislative capacity. Half measures, second bests, and just-in-time legislating are the new norm, as electoral, partisan, and institutional barriers limit Congress's capacity for more than lowest-common-denominator deals."⁸⁹

of Congress, suggesting that there are fewer members willing and able to build legislative coalitions across party lines. . . . All of this suggests that the political environment in Congress is less conducive to the enactment of legislation addressing problems of public concern now than at any time since 1970."); see also Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2338 (2006) ("Partisan competition in government now means a Democratic Party dominated by liberals, with few moderates and no conservatives, pitted against a Republican party dominated by conservatives, with few moderates and no liberals. Under divided governments, the absence of a bloc of centrist legislators willing to cross party lines will make policy agreement more difficult and interbranch disagreement more intense. Under unified governments, smaller partisan majorities will be able to effect major policy change without the full range of checks and balances that are supposed to divide and diffuse power in the Madisonian system."); Gillian E. Metzger, *Agencies, Polarization, and the States*, 116 COLUM. L. REV. 1739, 1748 (2015).

⁸⁷ See, e.g., Richard L. Revesz, *Challenging the Anti-Regulatory Narrative*, THE REGULATORY REV. (July 23, 2018), <https://www.theregreview.org/2018/07/23/revesz-challenging-anti-regulatory-narrative> ("On the first proposition, there appears to be consensus that in recent years Congress has become increasingly gridlocked. One effort to measure congressional gridlock looks at the percentage of salient legislative items that failed to pass, finding an upward trend since the mid-20th century. Between 2011 and 2012, for instance, Congress failed to pass 71 percent of salient legislative items on its agenda, ranking it as one of the two least productive Congresses between 1947 and 2012."); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2218 (2013); Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2111 (2013); Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2073 (2013).

⁸⁸ See Freeman & Spence, *supra* note 20, at 1-4, 14-15; Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989, 1008 (2013); Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. (2015); Cynthia R. Farina & Gillian E. Metzger, *Introduction: The Place of Agencies in Polarized Government*, 115 COLUM. L. REV. 1683, 1686 (2015) ("In recent years, however, institutional disability seems to have degenerated into institutional incapacity.")

⁸⁹ Sarah A. Binder, *Polarized We Govern?*, BROOKINGS INST. (2014). To be sure, a gridlocked Congress is only one aspect of the problem, and not all scholars agree that gridlock is the main problem. See, e.g., R. Shep Melnick, *Conventional Misdiagnosis: Why Gridlock is Not Our Central Problem and Constitutional Revision is Not the Solution*, 94 B.U. L. REV. 767, 768 (2014) ("[O]ur central problem is not that government 'can't get anything done' or that our institutions have become insulated from public opinion, but rather that we are doing so many things and responding to so many political demands that we are incapable of resolving the serious conflicts among them."). I also do not claim that Congress is entirely incapable of enacting major legislative reforms or responding to other branches. For example, the enactment of the Cybersecurity Act of 2015, Pub. L. No. 114-113, 129 Stat. 2242, is considered to be a historic compromise bill. Other leading examples of major legislation are the sweeping tax reform of 2017 (P.L. 115-97), Obamacare, and the repeal of portions of Obamacare. See also Colby Itkowitz, *To Be Fair, Congress Actually Managed to Do Its Job a Few Times This Year*, WASH. POST (Dec. 19, 2018), <https://www.washingtonpost.com/politics/2018/12/19/be-fair-congress-actually-managed-do-its->

The consequences of this inability to legislate⁹⁰ are two-fold. First, it galvanizes the executive branch to take action, expanding its power dramatically through attempts to fill the policy vacuum through presidential initiatives and agency policy development.⁹¹ Congressional paralysis leads to an increased presidential unilateralism in order to achieve partisan goals,⁹² including increased assertions of policymaking authority and control over agencies.⁹³ Second, it deprives Congress of the ability to effectively check the other branches,⁹⁴ making it is less likely that agencies' decisions will be overridden by legislation,⁹⁵ and leaving

job-few-times-this-year/?noredirect=on&utm_term=.397a5a80c42a ("But the passage Tuesday night of criminal justice legislation, an almost decade-in-the-making bipartisan endeavor, caps a year of Congress working to get some significant laws passed with overwhelming bipartisan support . . . To get it passed, Democrats and Republicans did a thing they so rarely do anymore: They compromised."); see also Ittai Bar-Siman-Tov, *Mending the Legislative Process – The Preliminaries*, 3 THE THEORY AND PRACTICE OF LEGISLATION 245, 256 (2015) ("[T]he task of mending the contemporary legislative process is daunting. In some political systems, the challenge may seem herculean. The problems are many and their roots are varied and deep. Hence, any hope to find a panacea or a 'magic bullet' would be foolish.").

⁹⁰ Instead of enacting legislation, Congress acts indirectly through oversight mechanisms (such as hearings and investigations) and delay strategies, through budgetary constraints and appropriations, and by refusing to confirm appointments to vacancies in senior positions. Metzger, *supra* note 86, at 1748-51. Congress traditionally uses procedural requirements as a mechanism to control agencies, rather than legislating directly. Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 118 (2015) ("A substantial literature in the positive political theory (PPT) tradition argues that Congress uses procedural requirements to control agencies.").

⁹¹ See, e.g., Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 837 (2017) ("When Congress is gridlocked, pressure increases on the President to direct administrative lawmaking in order to solve mounting social problems."); Metzger, *supra* note 86, at 1757; Hasen, *supra* note 88, at 1007-08 ("The President, too, has gained power at the expense of Congress, in foreign affairs and domestically—through executive orders, agency decisions, and other unilateral action.").

⁹² See, e.g., Rao, *supra* note 85, at 1487 ("When Congress fails to act, the President can move unilaterally on policy issues, taking advantage of power granted under open-ended delegations and the executive's natural ability to act expeditiously.").

⁹³ See Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2236 (2018) ("With normative understandings of the President's role in the policy process firmly entrenched, changes in the underlying political conditions—in particular, the rise of divided government—helped to cement another norm: presidential control over domestic policymaking through the administrative process.").

⁹⁴ For the effects of the political polarization on the relative power of Congress and the Supreme Court that interprets the statutes that Congress legislates, see generally Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013).

⁹⁵ Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542 (2005) ("Congress is a poor source of constraint on presidential action"). It would be difficult for Congress to overturn unilateral presidential action by legislation due to built-in challenges of the legislative process, particularly the president's veto power. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1857 (2015); Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 396-397 (2009) ("Unless and until party polarization diminishes, Congress is unlikely to assert its institutional prerogatives.").

the ultimate determinations of appropriate policy to the courts.⁹⁶ Thus, it is unsurprising that some contend that legislative gridlock undermines the separation of powers and frustrates the checks and balances between the three branches of government.⁹⁷

B. Other Branches' Responses to Gridlock

Congressional dysfunction has been noticed by the other branches. In 2015, then-Supreme Court Justice Anthony Kennedy testified before the House Appropriations Committee—giving a rare glimpse of the motivations that guide the Justices. He noted that the Court ignores political gridlock when it interprets statutes:

We routinely decide cases involving federal statutes, and we say, 'Well, if this is wrong, the Congress will fix it.' But then we hear that Congress can't pass the bill one way or the other, that there's gridlock. And some people say, 'Well that should affect the way we interpret the statutes.' That seems to me a wrong proposition. We have to assume that we have three fully functioning branches of the government that are committed to proceed in good faith and with good will toward one another to resolve the problems of this republic.⁹⁸

Some scholars agree with the general approach expressed in Justice Kennedy's testimony: they warn that separation-of-powers constraints on the presidency should not be adjusted to reflect the contemporary political dynamic.⁹⁹ But the modern political and legal climates have shown that the judiciary is too idealistic to rely on an "assumption" of functioning branches of government, and to ignore the vast political science and legal scholarship on congressional dysfunction.¹⁰⁰ A failure to recognize long lasting realities has the potential to undermine the rationales that stand beyond prominent public law doctrines. Notwithstanding developments

⁹⁶ For an elaboration on judicial "power grabs", see Heinzerling, *supra* note 49.

⁹⁷ See Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2220-27 (2013).

⁹⁸ Justice Anthony Kennedy, Statement before the House Appropriations Committee in a hearing on the U.S. Supreme Court Budget for F.Y. 2016 (Mar. 23, 2015), <https://www.youtube.com/watch?v=spLCISTFF9k>.

⁹⁹ See, e.g., William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 791 (2014) (arguing that unilateral presidential power "is more dangerous to a democracy" than congressional obstruction).

¹⁰⁰ See, e.g., Michael Greve & Ashley C. Parrish, *Administrative Law without Congress*, 22 GEO. MASON L. REV. 501, 545 (2015) ("In particular, we counsel skepticism with respect to any doctrine that rests on an idealized Congress with an actual collective will.").

in unorthodox policymaking practices,¹⁰¹ there is an evident stagnation in administrative law doctrines. David Farber and Anne Joseph O’Connell have coined this gap “the lost world of administrative law”—contemporary realities of the administrative state diverge from the assumptions underlying the APA and classic judicial decisions, in a way that “administrative law seems more and more to be based on legal fictions.”¹⁰²

While Justice Kennedy’s statement suggests that the judiciary tends to discount political reality, the executive branch has recently begun to leverage congressional dysfunction as justification for expanding and redefining its own authority.¹⁰³ A prominent example is the “We Can’t Wait” campaign.¹⁰⁴ President Obama famously stated, “[W]e can’t wait for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will.”¹⁰⁵ This sentiment manifested itself in the unprecedented expansion of immigration authority through a novel interpretation of executive discretion to deport.¹⁰⁶

In his analysis of the Obama administration’s “We Can’t Wait” campaign, David Pozen paved a way for redefining executive authority with his original and unconventional use of the legal concept of “self-help.”¹⁰⁷ In constitutional self-help situations, one government branch can attempt to redress a perceived wrong by another branch through its own unilateral action. Pozen defines “self-help” as the extension of self-help to public law or similarly, as an analogy to the law of self-help.¹⁰⁸ Pozen suggests that the “We Can’t Wait” campaign was a proper venue for the

¹⁰¹ See, e.g., Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1792, 1799 (2015) [hereinafter Gluck, *Unorthodox Lawmaking*] (“These questions loom ever larger today. Our regulatory landscape looks very different than it did just a few decades ago, but the theories and doctrines of legislation and administrative law still remain structured around the then-revolutionary innovations in policymaking of the 1970s . . . Unorthodox policymaking is now often the norm rather than the exception.”).

¹⁰² Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014).

¹⁰³ Remarks by the President in Address to the Nation on Immigration, *supra* note 4 (“Meanwhile, don’t let a disagreement over a single issue be a dealbreaker on every issue . . . Americans are tired of gridlock. What our country needs from us right now is a common purpose—a higher purpose.”).

¹⁰⁴ We Can’t Wait, the White House, <https://obamawhitehouse.archives.gov/economy/jobs/we-cant-wait>. See Section I.B.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4 (2014) (arguing that this can be justified by means that but for that wrongdoing would be impermissible).

¹⁰⁸ *Id.* at 8, 60-61 (suggesting the international law doctrine of countermeasures as a possible legal ground. The basic principles of the use of self-help are: an urgent situation, a proportionality requirement, notice and demand requirements, incentivizing adjudication, and categorical prohibitions for invoking self-help in creating danger, such as use of deadly force).

executive branch to argue for constitutional self-help, as President Obama felt that the executive required enhanced discretion due to congressional dysfunction.¹⁰⁹ Pozen is aware that acceptance of this doctrine, however, could facilitate opportunistic behavior and presidential power grabs in particular.¹¹⁰

Congressional dysfunction has presented unique challenges to the checks and balances that have traditionally existed between each branch, and the executive and judicial branches have struggled to adapt. In particular, the executive has accumulated enormous discretion in response to congressional gridlock.

III. EXTRAORDINARY POLICYMAKING AND FEARS OF EXECUTIVE OVERREACH

To lay the backdrop for my proposed test, this Part elaborates on the array of policymaking tools acquired by the President and administrative agencies in recent decades. Next, it discusses the judicial review frameworks, and especially the major questions doctrine, which the courts currently use to evaluate extraordinary policymaking decisions.

Some scholars stress that by taking an active role in agenda setting, the executive branch attempts to transcend the boundaries of its jurisdiction, to circumvent congressional deliberation, and to encroach on the primary role of the legislature.¹¹¹ A separate group of academics supports energetic executive action and views these actions as “sincere attempts to use existing legislation to fashion solutions to problems within [its] jurisdiction.”¹¹² These scholars have observed that the executive “feel[s] compelled to act on [its] own initiative, despite recognizing that the regulatory challenges at hand would be better addressed through legislation.”¹¹³ These scholars emphasize the numerous mechanisms that constrain executive discretion and that come from a myriad of legal and

¹⁰⁹ *Id.* at 77-79 (“The implicit theory seems to be that when the lawmaking branch of government is broken, the law executing branch must enjoy greater freedom to utilize the laws with which it is stuck.”).

¹¹⁰ *Id.* at 84.

¹¹¹ See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). Cf. Adrian Vermeule, *No: “Is Administrative Law Unlawful?”*, 93 TEX. L. REV. 1547 (2015) (book review) (providing a hostile review of Hamburger’s book); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1980 (2015) [hereinafter Merrill, *Presidential Administration*] (“The attempts by recent Presidents to occupy policy space not delegated to the White House by Congress are thus inconsistent with a fundamental design principle reflected in our evolved constitutional order.”).

¹¹² Freeman & Spence, *supra* note 20, at 77.

¹¹³ Metzger, *supra* note 86, at 1758.

non-legal sources, including public opinion and politics,¹¹⁴ Congress, the president, the judiciary, the states,¹¹⁵ and internal agency constraints.¹¹⁶

A. An Era of Presidential Administration: Centralization and Politicization

While the presidency is an institution composed of many actors,¹¹⁷ it presents built-in concerns because the power is centered in a single individual.¹¹⁸ Michael Gerhardt argues that the presidency has the institutional disposition and capacity for “constitutional arrogance”: unilateral action challenges the presidency’s constitutional boundaries and extends executive powers at other branches’ expense.¹¹⁹ Unilateral action expands the presidency’s control over policymaking and manifests

¹¹⁴ There is an ongoing debate over whether the executive branch has limited discretion due to legal constraints. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC*, 4, 13-17 (2010) (arguing that Presidents are constrained merely by politics and public opinion); Dino P. Christenson & Douglas L. Kriner, *Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897, 912 (2015) (arguing that legal constraints on presidential unilateral power are weak because of the chances that their actions will be overturned by Congress or the courts, whereas political constraints are robust); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1424 (2012) (book review). Cf., e.g., Merrill, *Presidential Administration*, *supra* note 111, at 1969 (“If Presidents are unconstrained by law, it is unclear why they always seek to justify their actions as being consistent with law, threaten to veto legislation they do not like, and obey judgments of courts based on judicial interpretations of the law.”); Saikrishna Prakash & Mike Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 975, 981 (2012).

¹¹⁵ For example, the *Texas* litigation was filed by 26 states that challenged the legality of the Obama administration’s immigration initiatives. See *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015). The *West Virginia* litigation, which challenged the legality of the EPA’s clean power plan regulation, included 26 states as the challenging parties. See *West Virginia v. EPA*, 136 S.Ct. 1000 (2016) (mem.).

¹¹⁶ These include professional norms, fears of judicial reversal and harm to the agency’s reputation, interagency coordination and consultation requirements. Metzger, *supra* note 86, at 1746, 1760-1761; Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015); Elizabeth Magill & Adrian Vermeule, *Allocating Power within Agencies*, 120 YALE L.J. 1032 (2011); Freeman & Spence, *supra* note 20, at 67-68 (arguing that agencies are being careful due to internal and external checks).

¹¹⁷ It is important to bear in mind that generally, the term “the president” is used “as a placeholder for the cluster of actors inside the White House complex.” Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, note 4 (2017); Merrill, *Presidential Administration*, *supra* note 111, at 1979 (“[T]he President is a ‘they,’ not an ‘it.’”).

¹¹⁸ See, e.g., Marshall, *supra* note 99; Devins, *supra* note 95, at 399-400 (“In other words, the President’s personal interests and the presidency’s institutional interests are often one and the same. For this very reason, Presidents have expanded the reach of presidential power by advancing favored policies[.]”).

¹¹⁹ See generally Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649 (2016); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); *THE IMPERIAL PRESIDENCY AND THE CONSTITUTION* (Gary J. Schmitt, Joseph M. Bessette, & Andrew E. Busch eds., 2017) (arguing that debates over the imperial presidency are unavoidable in a constitutional democracy).

constitutional arrogance.¹²⁰ Gerhardt argues that the Constitution's indeterminacy facilitates constitutional arrogance by allowing presidents to interpret and exploit the Constitution to their advantage.¹²¹

As scholars have emphasized, presidents are under constant "political pressure to use the bureaucracy effectively"¹²² to change the status quo. As David Barron mentions,

The president overcomes the powerlessness brought about by legislative gridlock, divided government, ossified rulemaking structures, and a fragmented bureaucracy. He does so by taking control over the national administrative process. He gets things done. He brings coherence where none existed before.¹²³

Unilateral presidential action is faster than the congressional legislative process.¹²⁴ In taking unilateral action, the president does not need to obtain agreement from or coordinate with others. Although bold assertions of unilateral presidential authority are not a novel phenomenon,¹²⁵ political science literature confirms that "recent presidents have exerted their unilateral powers with unparalleled frequency."¹²⁶

Presidents can unilaterally issue signing statements, executive orders, and directives.¹²⁷ The increased use of executive orders and memoranda

¹²⁰ See generally Gerhardt, *supra* note 119; Schlesinger, *supra* note 119; see also PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (arguing that the Constitution does not support our extreme contemporary presidentialism and exploring the harm to government that results from its practice). Shane states that "Adopted as an ethos of government, aggressive presidentialism breeds an insularity, defensiveness, and even arrogance within the executive branch that undermines sound decision making, discounts the rule of law, and attenuates the role of authentic deliberation in shaping political outcomes." *Id.* at 24-25.

¹²¹ Gerhardt, *supra* note 119, at 1655.

¹²² Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264 (2006) ("[P]residents are held politically accountable for how the federal government as a whole functions, and in particular for how administrative agencies exercise their vast delegated powers.").

¹²³ David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1151 (2008).

¹²⁴ Stack, *supra* note 122, at 264.

¹²⁵ For a discussion on the reasons why presidential power continues to expand, see William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 509 (2008).

¹²⁶ Dino P. Christenson & Douglas L. Kriner, *Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897, 900 (2015).

¹²⁷ For a discussion on the jurisprudence of executive orders and the difficulties to challenge them in court, see John C. Duncan, *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 408 (2010) ("Whatever the limits on executive orders may be, in the present day the President may act where Congress has placed no explicit restraints. Successful challenges to presidential authority are rare."); see also generally PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT

functions “as [a] substitute[] for failed domestic-policy legislative efforts.”¹²⁸ Presidents may also have directive authority over regulatory decisions allocated by statute to administrative agency heads,¹²⁹ although courts have not yet conclusively resolved the question of such presidential directive authority.¹³⁰ Simply put, the question is whether the president can “step in” and substantively decide various policy issues instead of an agency official. The prevalent view is that the president does not have directive power because the removal power does not imply the power to control (rather than merely to persuade) decision-making entrusted by law to agency heads.¹³¹

Justice Kagan, in her seminal article as a law professor, recognized the phenomenon of “presidential administration”—a dramatic rise in strong

ACTION (2014); Cong. Res. Serv., RS20846, *Executive Orders: Issuance, Modification, and Revocation* 3 (2014).

¹²⁸ Gluck, *Unorthodox Lawmaking*, *supra* note 101, at 1820-21. Moreover, presidents issue signing statements in order to note potential constitutional problems and state their intention to construe the statute to avoid it. Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1833 (2016). Signing statements provide specific interpretations to disputed statutory provisions in a way that effectively changes legislation after its enactment. *See generally* Cong. Res. Serv. R133667, *Presidential Signing Statements: Constitutional and Institutional Implications* (2012); Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597 (2006).

¹²⁹ Directive authority is “the power to act directly under the statute or to bind the discretion of lower level officials.” Stack, *supra* note 122, at 267; *see also* Adrian Vermeule, *The Third Bound*, 164 U. Penn. L. Rev. 1949, 1952 (2015) (“[T]he scope and limits of the directive power of the President are among the most contested issues in administrative law[.]”).

¹³⁰ Scholars have emphasized that administrative law has been unsuccessful in meaningfully taking presidential control into account. *See, e.g.*, Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 686 (2016).

¹³¹ Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487 (2011) (arguing that the removal prerogative over agency heads allows the president the ability to influence their decisions or to persuade them, but not to dictate their decisions. It is the agency heads’ ultimate authority to decide when the statute so orders); Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-Unitary Executive*, 51 DUKE L.J. 963, 1011 (2001). Many perspectives on this issue have emerged, including those of Justice Elena Kagan, who supports presidential directive authority, and Kevin Stack, who does not. *See generally* Watts, *supra* note 130, at 729; *see also* Nina A. Mendelson, *Another Word on the President’s Statutory Authority Over Agency Action*, 79 FORDHAM L. REV. 2455, 2474, 2485 (2011) (arguing that generally, the text of a statutory delegation alone does not represent a particular congressional intent regarding presidential directive authority or supervision of agency action.). Kevin Stack supports narrow constructions of the scope of the President’s statutory powers—the President has directive authority only when the statute expressly delegates power to the President herself. Stack, *supra* note 122, at 268, 314 (arguing that the agency has an obligation to carefully consider the President’s position, though the ultimate decision as to whether to adopt this position rests with the agency). Justice Kagan has argued that delegations to executive officials imply statutory authorization for the president to direct agency actions. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2326-31 (2001). Peter Strauss is skeptical that the President is a “decider” rather than a passive “overseer” of the administrative state. Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

presidential control over the regulatory state.¹³² Scholars have demonstrated that presidential control has deepened even further during recent presidencies.¹³³

Presidents assert control over the administrative state through the strategies of centralization and politicization.¹³⁴ Centralization involves “the accumulation of authority directly in the White House and in its offices.”¹³⁵ Politicization is achieved through presidential political appointments in agencies to ensure the loyalty of personnel and the agencies’ commitment to the president’s preferred policy agenda. Agency leaders, for example, are presidentially appointed.¹³⁶ As a result, the president’s political and ideological agendas and the agency head’s interests and efforts are often strongly aligned, and this alignment moves executive action forward.¹³⁷

Increased centralization and politicization¹³⁸ has allowed the White House to merge with—rather than “take over”—the federal bureaucracy in a way that has made the federal bureaucracy a “fully committed member of the White House regime.”¹³⁹ As part of this phenomenon, the White House conducts regulatory oversight¹⁴⁰ primarily through the Office of Information and Regulatory Affairs (“OIRA”), which conducts a review of major agency regulations and oversees regulatory activities.¹⁴¹ The oversight process is often aimed at advancing political policy

¹³² Kagan, *supra* note 131, at 2248.

¹³³ See, e.g., Metzger, *supra* note 86, at 1742 (“Polarization has reinforced the already strong trend toward presidential administration, as Presidents seek to use agencies to advance partisan policy agendas stymied by congressional stalemate.”); Merrill, *Presidential Administration*, *supra* note 111, at 1980 (“[P]residential administration undermines the role of Congress in allocating power among governmental institutions.”).

¹³⁴ See, e.g., Michael Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 54 (2015).

¹³⁵ *Id.* at 49.

¹³⁶ The Senate has the right to advise and consent to the appointment of governmental officers.

¹³⁷ Agency heads set the agency’s agenda and priorities and are responsible for the final decision-making. See, e.g., Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 236, 246 (2016).

¹³⁸ Scholars have asserted that “Obama . . . elevated White House control over agencies’ regulatory activity to its highest level ever, relying on a mix of covert control and overt command.” Watts, *supra* note 130, at 698.

¹³⁹ Barron, *supra* note 123, at 1151.

¹⁴⁰ For a detailed account on OIRA’s historical and contemporary functions, see Ethan J. Leib & Nestor M. Davidson, *Regleprudence – at OIRA and Beyond*, 103 GEO. L.J. 259, 275-279 (2015).

¹⁴¹ See Nina A. Mendelson & Jonathan B. Wiener, *Executive Discretion and the Rule of Law: Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL’Y 447, 459 (2014).

preferences.¹⁴² OIRA review sometimes lacks transparency and consistency.¹⁴³

B. Policymaking by Agencies and Judicial Review of Extraordinary Agency Action: A No-Deference Posture

Agencies are generally involved when presidents develop and achieve policy reforms, because agencies exercise significant power in promulgating regulations. Prominent agency actions are rulemaking, issuing guidance documents, and “pooling.”

Rulemaking carries the weight of legislative authority because the promulgation of regulations creates legally binding norms that carry the force and effect of law.¹⁴⁴ Because these legislative rules have the force of law, they must undergo the notice-and-comment process as required under the APA.¹⁴⁵ Notice-and-comment rulemaking binds future administrations because rescinding a regulation requires the notice-and-comment process as well.¹⁴⁶

Agencies also can issue guidance documents (interpretive rules and general policy statements) that are nonlegislative and therefore exempted in the APA from notice-and-comment requirements.¹⁴⁷ Agencies can also informally decide other questions of internal policy.¹⁴⁸

Another essential policymaking technique is “pooling” to accumulate more power from within and to respond to congressional gridlock.¹⁴⁹

¹⁴² See, e.g., Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019 (2015); Leib & Davidson, *supra* note 140, at 280-281.

¹⁴³ Leib & Davidson, *supra* note 140; Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1298-99 (2017).

¹⁴⁴ See, e.g., Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L. J. 1003 (2015).

¹⁴⁵ 5 U.S.C. § 553(c) (2012).

¹⁴⁶ Metzger, *supra* note 86, at 1763; see also, e.g., Emerson Tiller & Frank B. Cross, *Response: Modeling Agency / Court Interaction*, 20 HARV. L. REV. F. 13, 19 (2009); Bethany A. Davis Noll & Denise A. Grab, *Deregulation: Process and Procedures That Govern Agency Decisionmaking in an Era of Rollbacks*, 38 ENERGY L. J. 269 (2017).

¹⁴⁷ 5 U.S.C. § 553(b)(A) (2012) (creating exemption to notice-and-comment rulemaking for interpretative rules and general statements of policy). General policy statements are pronouncements that advise the public prospectively about the way an agency will exercise discretionary authority, namely they inform the public of agency policies. See generally Cong. Res. Serv., R44468, *General Policy Statements: Legal Overview* (2016); Gluck, *Unorthodox Lawmaking*, *supra* note 101, at 1803, 1814.

¹⁴⁸ Metzger & Stack, *supra* note 143. The test courts employ to determine whether a document the agency issued actually constitutes a legislative rule is whether it purports to be legally binding. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278, 288 (2010). This is part of a more functional test of whether the agency restricted its own discretion.

¹⁴⁹ Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 213, 275 (2015) (explaining that “[p]ooling blends the legal authorities that different agencies derive from distinct statutory scheme.

Pooling occurs when a joint structure of two or more executive entities work together in coordination and share authority.¹⁵⁰

APA section 706(2)(A) “arbitrary and capricious review” limits courts’ consideration in this area to the agency record and statutory factors, and this standard of judicial review requires that agency action be reached through a reasoned decision-making when it involves questions of policy.¹⁵¹ However, courts do not consistently require agencies to comply with rulemaking procedures, and the case law in this area is vague and inconsistent.¹⁵² Avoiding procedural process gives agencies greater policymaking autonomy.¹⁵³ Agencies can cite an exemption to the APA’s mandates and emphasize the cumbersome characteristics of the process, sometimes in what seems like an attempt to promulgate rules without prior notice-and-comment.

The extent to which agencies are capable of advancing policy changes depends, among other things, on the scope and breadth of judicial review controls on agency policymaking actions. The judicial framework addressing presidential power is non-comprehensive, however.¹⁵⁴ Executive orders and presidential directives are not subject to the APA because the Supreme Court has held that the president is not an “agency” as the term is used in the statute.¹⁵⁵ Hence the president has “no APA, no oversight, no rules of construction, no established account of the deference, or not, that his or her legislative-regulatory actions receive.

And it enables the executive to combine one agency’s expertise with legal authority allocated to another.”).

¹⁵⁰ *Id.* at 219.

¹⁵¹ 5 U.S.C. § 706 (2012); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51-52 (1983) (setting the principle of reasoned decision-making for questions of policy). Agencies should consider “relevant factors, important aspects, and alternative solutions.” Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1778 (2007).

¹⁵² See, e.g., Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 88-90 (2015).

¹⁵³ *Id.* at 78.

¹⁵⁴ Renan, *supra* note 93, at 2195 (“Though not entirely absent, judicial doctrine has not developed a robust normative framework for presidential governance. The case law, to the extent that it imposes constitutional constraints on presidential power, is famously vague and abstract, leaving the contours of presidential duty—or the normative understandings that govern day-in, day-out presidential behavior—underspecified in core respects.”); see also Adam J. White, *The Administrative State and the Imperial Presidency: Then and Now*, in *THE IMPERIAL PRESIDENCY AND THE CONSTITUTION* 41 (Gary J. Schmitt, Joseph M. Bessette, & Andrew E. Busch eds., 2017) (“[J]udicial deference doctrines often prove capacious enough to allow the president and his administrators to proceed.”).

¹⁵⁵ *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (holding that the APA does not cover the President because the President is not expressly included within the APA’s definition of “agency”). Signing statements do not merit *Chevron* deference for the president’s statutory interpretation. Gluck, *Unorthodox Lawmaking*, *supra* note 101, at 1861.

These actions also are exceedingly difficult to challenge in court because of current standing doctrine.¹⁵⁶ Justice Kagan argues that *Chevron* deference should be given where the agency action is the product of the president's involvement or influence.¹⁵⁷ Alternatively, Kevin Stack proposes that when presidents act under statutory authorization, they should be subject to administrative law.¹⁵⁸ Stack argues that the same legal framework for judicial review should apply to both presidential and administrative agency assertions of statutory authority.¹⁵⁹ Stack suggests that presidents are eligible for *Chevron* deference in this case because of their accountability¹⁶⁰ and visibility as well as the transparency of their orders.¹⁶¹

The contemporary judicial approach in reviewing agency action is to examine whether the executive seeks to act on “big” questions. If the court determines that the action is non-major (i.e., an ordinary agency decision), then judicial review is highly deferential, which allows the agency broad discretion in developing policymaking.¹⁶² Additionally, Supreme Court decisions have signaled a judicial tendency to broaden agency development of policymaking. For example, in *City of Arlington*

¹⁵⁶ Gluck, *Unorthodox Lawmaking*, *supra* note 101, at 1819.

¹⁵⁷ Kagan, *supra* note 131, at 2376-79.

¹⁵⁸ Kevin Stack argues that a presidential construction of authority is eligible for *Chevron* deference if the statute expressly grants authority to the president. Stack, *supra* note 122, at 307. Executive orders and presidential directives can bind the discretion of executive officials (or third parties) if the president acts under a statute granting power to the president. Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009) (arguing that the reviewability barrier which excludes judicial review of the determinations the President makes to invoke statutory powers—should be abandoned).

¹⁵⁹ Stack, *supra* note 95, at 570 (rejecting presidential exceptionalism, namely treating the president differently).

¹⁶⁰ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1271 (2018) (on the accountability concept in the context of the presidency).

¹⁶¹ Stack, *supra* note 95, at 585.

¹⁶² Under the *Chevron* doctrine, a court will defer to an agency's reasonable interpretation of an ambiguous statute that the agency administers. *Chevron U.S.A. Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984). *Chevron* “step one” examines the extant authority of the agency under the statute delegating power to the agency, i.e. whether the statute is ambiguous. “Step two” examines whether the interpretation is reasonable or permissible. This standard of “reasonableness” in “step two” does not require a “reasoned decision-making” and therefore it is an easy test for agencies to prove: all they need to prove is that their interpretation is reasonable. Under the *Mead* holding, non-legislative rules that did not go through a notice-and-comment process can receive reduced judicial “deference” to agency legal interpretations—a Skidmore deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *United States v. Mead Corp.*, 533 U.S. (2001) (according respect rather than “automatic” deference to these agency interpretations). While *Chevron* is a longstanding legal doctrine, the new composition of the Supreme Court makes the prospects for *Chevron*'s abolishment more plausible than ever before. See, e.g., Gillian E. Metzger, *1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 1, 24, 27 (2017).

v. FCC,¹⁶³ the Supreme Court clarified that even agencies' interpretations of their own jurisdiction—the scope of their authority—are subject to *Chevron* deference.¹⁶⁴ In *Auer v. Robins*, the Court went even further and held that courts must defer to agencies' reasonable interpretations of their own regulations.¹⁶⁵ That makes *Auer* deference a “super-deference,” even stronger than *Chevron*.¹⁶⁶ Thus, the doctrine of *Auer* deference profoundly enlarges executive authority.¹⁶⁷

Extraordinary decisions, however, are so high-stakes that courts apply the “major questions” doctrine, meaning that courts will not defer to the executive branch because the questions at issue are too important for them to decide. A major (or extraordinary) question will likely result in the court eliminating sole executive authority to resolve the issue and deciding it *de novo*. The major questions doctrine thus operates as a vehicle for the courts to avoid a posture of deference in situations where judicial review is ordinarily highly deferential.¹⁶⁸ Major questions decisions require a clear and explicit congressional delegation to the agency for courts to be willing to recognize executive authority on the issue.¹⁶⁹ This is a judge-made interpretive canon that serves nondelegation functions,¹⁷⁰ and it determines whether the executive branch will receive deference with respect to its interpretation of a statute or regulation.

Under the major questions doctrine, “significant” or “major” questions are agency decisions with enormous social, economic, or political consequences.¹⁷¹ In determining whether an issue constitutes a “major

¹⁶³ 569 U.S. 290 (2013).

¹⁶⁴ The rationale is that agencies are best suited to interpret their enabling legislation in the face of gaps and ambiguities. *Id.* at 306-07.

¹⁶⁵ 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is “controlling unless ‘plainly erroneous or inconsistent with the regulation’”).

¹⁶⁶ Leib, *supra* note 2, at 274. The Supreme Court recently upheld *Auer* in *Kisor v. Wilkie*, 588 U.S. —, 139 S. Ct. 2400 (2019), while noting that it has cabined *Auer*'s scope. Slip op. at 18-19.

¹⁶⁷ Because reversal of interpretive regulations does not require notice-and-comment process, however, it would be easy for future administrations to reverse such regulations.

¹⁶⁸ Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1199 (2018) (“It does not say that agencies cannot produce certain substantive outcomes. Instead it says that whether agencies can produce certain substantive outcomes will be decided by courts, not agencies.”).

¹⁶⁹ Note, *Major Question Objections*, 129 HARV. L. REV. 2191 (2016); *see also* Metzger, *supra* note 86, at 1779.

¹⁷⁰ *See* Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1675 (2019).

¹⁷¹ *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 161 (2000) (basing decision on the overall statutory scheme and the existence of a specific legislation on the issue which clearly precluded the FDA's interpretation (applying *Chevron* “step one”)); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *see also generally* Blake Emerson, *Administrative Answers to “Major Questions”: on the Democratic Authority of Agency Statutory Interpretation*, 102 MINN.

question,” the reviewing court assesses several indications: significant change in the scope of the regulatory authority, political controversy, thin statutory basis (“mouseholes”),¹⁷² and economic significance. For example, in *FDA v. Brown & Williamson Tobacco Corporation*, the Supreme Court invalidated the Food and Drug Administration’s (“FDA”) attempt to regulate tobacco products through an interpretation of the term “drugs” under the governing statute.¹⁷³ The court did not defer to the FDA’s interpretation of that statute, partly because that interpretation would have led to substantial national policy change by requiring a nationwide ban on tobacco altogether.¹⁷⁴

Similarly, in *Utility Air Regulatory Group v. EPA* (“*UARG*”),¹⁷⁵ the Supreme Court struck down the EPA’s claimed authority to regulate the GHG emissions from virtually any stationary source, including small sources. The Court applied the major questions doctrine at *Chevron* “step two,” rendering the agency interpretation unreasonable.¹⁷⁶ Justice Scalia, writing for a five-Justice majority, held that EPA’s interpretation was

unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate

L. REV. 2019, 2021-22 (2018). For the notion that “major questions” issues should be resolved by the political process, see, for example, Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241 (2016).

¹⁷² See *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes.”); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 20 (2010) (explaining that under the “elephants-in-mouseholes doctrine,” the Court forbids agency efforts to “significant[ly] expan[d] regulatory authority” in the absence of a “clear statement in an obvious place”).

¹⁷³ *Brown & Williamson*, 529 U.S. at 125.

¹⁷⁴ *Id.* at 137-39.

¹⁷⁵ 134 S. Ct. 2427 (2014). In *UARG*, the EPA interpreted “any air pollutant” to mean that a source could become subject to the “prevention of significant deterioration” (PSD) program or Title V permitting by reason of its GHG emissions. The EPA then issued the Tailoring Rule for practical reasons of mitigating the expected results of its interpretation. The Tailoring Rule exempted small sources from otherwise applicable permitting requirements in order to avoid absurd legal consequences of the EPA having to regulate many small sources as a result of its interpretation of the permitting triggers. The rule’s purpose was that only the largest stationary sources would be triggered by the permitting requirements. The rule “tailored” the application of the PSD program to sources based on their GHG emissions in order to prevent a massive burden on the EPA and the regulatory sources themselves.

¹⁷⁶ The Court held that the definition of “any air pollutant” in the PSD program was ambiguous, and that the EPA’s interpretation of the triggers to include GHGs was unreasonable. The Court held that the Tailoring Rule’s rewrite of statutory thresholds could not save the unreasonable interpretation itself. It was an impermissible rewrite of clear and unambiguous statutory numerical thresholds in the guise of “tailoring” them.

‘a significant portion of the American economy,’ . . . we typically greet its announcement with a measure of skepticism.¹⁷⁷

Recent Supreme Court decisions have been somewhat reluctant to grant agencies deference. One especially notable decision in this vein is *King v. Burwell*,¹⁷⁸ in which the Court refused to grant deference to the IRS interpretation of the Affordable Care Act (“ACA” or “Obamacare”), the 2009 national healthcare reform legislation.¹⁷⁹ In that case, the Court decided the issue of whether the ACA’s tax credits were available in states that had exchanges—health insurance marketplaces—operated by the federal government instead of the state government. The ACA is a highly complex statutory scheme which involves “web of controls.”¹⁸⁰ There was ongoing political resistance to the statute, and many legislative attempts to repeal the it.¹⁸¹ The Department of Health & Human Services (“HHS”) exercises broad authority under the ACA, and due to congressional gridlock, no legislative fixes were forthcoming. Under these circumstances, the Obama administration took unilateral action to address implementation challenges in the absence of legislation.¹⁸² The Internal Revenue Service (“IRS”) promulgated a rule that made the tax credits available on both state-run and federally-run exchanges. In *King*,¹⁸³ the Supreme Court applied the major questions doctrine as an exception to *Chevron* deference and held that the courts must not defer to the agency in these situations, thus depriving agencies of potential interpretive primacy.¹⁸⁴ The Court held that statutes should not be lightly construed to empower the executive branch to resolve “a question of deep ‘economic and political significance’ that is central to this statutory scheme.”¹⁸⁵

The *King* decision demonstrates a lack of deference to the IRS interpretation, despite an ambiguous statutory framework. According to the majority opinion, the sloppy drafting of the ACA rendered the provision ambiguous.¹⁸⁶ Even though the Court determined that the ACA

¹⁷⁷ *UARG*, at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159).

¹⁷⁸ 135 S. Ct. 2480 (2015) (the decision dealt with overlapping delegations to the IRS and HHS).

¹⁷⁹ *Id.* at 2489 (“[I]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”).

¹⁸⁰ Metzger, *supra* note 86, at 1772; *see also* Gluck, *supra* note 5, at 67 (mentioning that the ACA is the result of a highly deliberative process and that “[t]he ACA’s legislative process was extremely intense, lengthy, and complex.”).

¹⁸¹ Metzger, *supra* note 86, at 1774.

¹⁸² *Id.* at 1776.

¹⁸³ *King*, 135 S. Ct. at 2496.

¹⁸⁴ *See, e.g.*, Note, *Major Question Objections*, *supra* note 169, at 2193.

¹⁸⁵ *King*, 135 S. Ct. at 2489.

¹⁸⁶ *Id.* at 2491-92.

provision was ambiguous, it refused to apply *Chevron*.¹⁸⁷ The Court applied the “new” major questions doctrine at *Chevron* “step zero” as a threshold matter and found *Chevron* deference inappropriate.¹⁸⁸ The Court then undertook de novo review, interpreted the imperfect statute with the statutory mistakes itself, and eventually reached the same conclusion as the agency’s interpretation.¹⁸⁹ The Court held that

[T]he tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.¹⁹⁰

The Court refused to apply *Chevron* deference because this was one of the “extraordinary cases” where Congress did not intend an implicit delegation on such an important policy question with far-reaching economic and political consequences.¹⁹¹ Justice Scalia dissented and suggested that the majority opinion was attempting to rewrite and repair the law despite its clear statutory language.¹⁹²

The major questions doctrine as applied in *King* seemed to serve as a safety valve against possible opportunistic use by the executive branch of an expected application of *Chevron* deference, a “kind of ‘carve out’ from *Chevron* deference when a major question is involved.”¹⁹³ But the current doctrines of administrative law have been impractical in evaluating when a bold exercise of executive authority is proper. Part IV illustrates the shortcomings of these existing doctrinal approaches and proposes a new standard for evaluating extraordinary executive actions.

¹⁸⁷ *Id.* at 2488.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 2489-95 (concluding that the tax credits are not limited to State Exchanges).

¹⁹⁰ *King*, 135 S. Ct. at 2489.

¹⁹¹ Heinzerling, *supra* note 49, at 427 (arguing that the Court applied a power canon).

¹⁹² *King*, 135 S. Ct. at 2506 (Scalia, J., dissenting) (“It is not our place to judge the quality of the care and deliberation that went into this or any other law. A law enacted by voice vote with no deliberation whatever is fully as binding upon us as one enacted after years of study, months of committee hearings, and weeks of debate. Much less is it our place to make everything come out right when Congress does not do its job properly.”).

¹⁹³ Sunstein, *supra* note 168, at 1198.

IV. A PROPOSED FRAMEWORK FOR EVALUATING EXECUTIVE BRANCH ASSERTIONS OF EXTRAORDINARY POLICYMAKING POWER

A. The Lack of a Satisfactory Framework for Evaluating Extraordinary Policymaking Initiatives

Recent administrations have essentially been free to act unilaterally and push forward extraordinary policy reforms. Currently, presidential administrations can simply assert that they have the authority required for their actions, even though presidents do sometimes acknowledge that the best option to accomplish their goals is through legislative action.¹⁹⁴ Rather than recognizing publicly that their extraordinary actions are problematic and could possibly undermine democratic values by being inconsistent with the law, administrations tend to minimize the extraordinary nature of their action. Administrations can promote massive policy reforms via legal vehicles such as nonenforcement discretion or ambiguous statutory provisions that do not necessarily address the policymaking change at hand. These legal tools, however, were not intended to carry out extraordinary policy reforms.

In the realm of judicial review of extraordinary executive action, scholars have pointed out the incoherence resulting from the inconsistent application of the major questions doctrine.¹⁹⁵ Agencies often tackle big questions, with climate change being a prime example. Climate change regulation represents a politically controversial policy issue with deep economic implications.¹⁹⁶ Nonetheless, in *Massachusetts v. EPA*,¹⁹⁷ the Supreme Court refused to apply the major questions doctrine even though the EPA attempted to regulate climate change through its authority from an old statute that was not designed to tackle the issue.¹⁹⁸

Substantively, the distinction between a major and a non-major issue could be artificial because judgments about economic and political importance are subjective and unpredictable.¹⁹⁹ It is difficult to know what counts as a major question, and the determination leads to unpredictable and often contradictory results. The major questions doctrine considers only if the question is “major,” but extraordinary executive decisions are complex and nuanced and thus do not merit such a “black and white” analysis.

¹⁹⁴ See *supra* note 22.

¹⁹⁵ See *supra* Part III.B.

¹⁹⁶ Metzger, *supra* note 86, at 1779.

¹⁹⁷ 549 U.S. 497 (2007) (on regulation of GHGs from new motor vehicles).

¹⁹⁸ *Id.* at 528-32.

¹⁹⁹ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 245-47 (2006) (“[T]he distinction between major questions and non-major ones lacks a metric.”).

Congressional gridlock affects the entire world by causing worldwide gridlock on issues of global importance.²⁰⁰ The major questions doctrine, however, tends to ignore global collective action challenges,²⁰¹ undermining efforts to address these concerns. Thus, the existing legal framework for reviewing extraordinary policymaking initiatives of executive action is untenable.²⁰² While designed to be a safety valve to prevent executive overreach, the doctrine could block desirable executive actions as well.

Finally, although some types of executive actions are easier to revise or reverse, the outcome of the analysis of extraordinary executive action generally should not depend on the legal vehicle that the administration chooses to achieve its policymaking initiative. In contrast, the proposed test applies whether the executive creates policy through an interpretation of old statutes, enforcement discretion, internal guidance, or other policymaking impetus. This approach will consider several factors, making it a more balanced solution than a strict elimination of authority. As demonstrated by the proposed test, the fact that a case involves a “major question” does not necessarily diminish the rationales for executive regulation.

B. A Proposal for a Multi-Factor Test

This article proposes a set of criteria to examine extraordinary executive policymaking attempts in an era of polarization. The normative assessment in the article and the lessons gleaned from the case studies shape this list of factors.

²⁰⁰ See *infra* notes 217-221 and accompanying text.

²⁰¹ Courts do not consider whether the issue is a global collective action problem when deciding the scope of the executive branch’s authority.

²⁰² See, e.g., Note, *Major Question Objections*, *supra* note 169, at 2203 (arguing that the major questions doctrine should be cancelled because it is actually an equitable intervention, much like the anti-abuse principle in tax law, existing to prevent opportunistic use of the *Chevron* doctrine by agencies); Blake Emerson, *Administrative Answers to “Major Questions”*: on the Democratic Authority of Agency Statutory Interpretation, 102 MINN. L. REV. 2019, 2093 (2018) (proposing to revise the major questions doctrine as follows: “judicial deference to an agency’s resolution of a major question would require not only the use of deliberative decision-making procedures, but would also require that the relevant economic or political questions had been rationally addressed by the agency on the record.”). Some scholars suggest creative solutions in order to avoid the application of the major questions doctrine. For example, Coenen and Davis suggest that the Supreme Court (rather than lower courts) exclusively would be able to invoke the major questions doctrine. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 779, 831 (2017). Other scholars disagree with their solution of allowing only the Supreme Court—one court that hears few cases per year—exclusive jurisprudence over the doctrinal development. Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 149 (2017).

As the analysis of the factors in the next section articulates, the ultimate purpose of these factors is to further the legal legitimacy of executive decisionmaking. At its core, this article addresses the question of how stakeholders and scholars can best articulate and apply a set of criteria that underscores the legitimacy currently absent from this type of executive action. The proposed factors allow a more nuanced inquiry outside the confines of current doctrines used in judicial review.

Integrating the proposed multi-factor test into the legal system will yield several benefits. While allowing the executive branch excessive discretion is dangerous, practical constraints justify broader leeway to act in legitimate situations. The alternative of forcing the executive branch to “sit and wait” for Congress to act rather than taking action, especially when it is crucial to protect life and prevent tragedies, is a false panacea that exacerbates the policy problems. Using the multi-factor test will reduce situations where the executive branch pays insufficient attention—whether intentionally or even negligently—to important considerations and democratic values. Transparency and candid analysis are often absent from executive branch behavior, and these values are crucial to relax anxieties.

A well-crafted multi-factor test will facilitate more rational and evidence-based policies in the public law and policy arena. As an illustration, this approach could prevent imprudent analyses such as the Office of Legal Counsel (“OLC”) opinion that approved President Trump’s initial versions of the “travel ban” orders, which were quickly invalidated by later judicial review.²⁰³ This multi-factor test operates to curb excessive power and constrain policymaking discretion from the executive branch, given that some recent extraordinary assertions may not have been considered legally acceptable under a more thorough framework for evaluation.

I propose that sticky, complex policymaking challenges exhibiting strong signals of congressional dysfunction will make “extraordinary” executive policymaking initiatives eligible for consideration under the multi-factor test. While the political system is built upon the notion that policy changes require a certain amount of agreement within Congress to be enacted as legislation, these notions are based on an assumption of functioning branches, and in fact these parameters are influenced and exacerbated by political dysfunction.²⁰⁴ Even when Congress refrains

²⁰³ U.S. Dep’t of Justice, OLC Memorandum on Proposed Executive Order Entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States” (Jan. 27, 2017), <https://www.politico.com/f/?id=0000015a-00dd-deae-a75f-42fd5fd00002> (“The proposed Order is approved with respect to form and legality.”). See *infra* notes 252-256 and accompanying text.

²⁰⁴ See *supra* Part II.

from legislating due to profound congressional disagreement or strong uncertainty as to how to respond in the face of the variety of policy choices and remedial pathways, this should not necessarily prevent the executive branch from crafting legitimate solutions to major challenges.

While a full examination of which body is appropriate to administer the multi-factor test is outside the scope of this article, I suggest that the OLC implement this test. The OLC is an office in the U.S. Department of Justice that provides legal advice to the executive branch, often on complex constitutional matters.²⁰⁵ While the OLC has built-in challenges as a result of it being an internal body of the administration,²⁰⁶ the office has the reputation, credibility, and integrity for “providing candid, independent legal advice based on its best view of the law—mak[ing] an outright reversal highly unlikely.”²⁰⁷ Its legal advice is “treated as binding within the Executive Branch until withdrawn or overruled,”²⁰⁸ and it is “virtually unheard of for the White House [Counsel] to reverse OLC’s legal analysis.”²⁰⁹

I suggest the following procedure for implementation: for extraordinary policymaking initiatives, the executive branch would have to first obtain the OLC’s approval. The OLC would analyze the policymaking initiative based on the multi-factor test’s considerations.²¹⁰ Then the OLC would issue a written opinion to be published and accessible to the public. Thus, instead of the existing practice of open-ended and abstract executive discretion in making the public disclosure decision, this in-depth analysis will lead to better transparency. An authorization for the OLC to enforce the multi-factor test can be granted in presidential executive orders that will direct the OLC to review these

²⁰⁵ See, e.g., Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010).

²⁰⁶ Scholars have pointed out that OLC’s internal legal review has failed to constrain presidential power and that it is not insulated from presidential control. See, e.g., Renan, *supra* note 117, at 812 (“[I]t has always been a tool of presidential administration itself.”). Indeed, internal review institutions tend to become political and are subject to external pressures. Merrill, *Presidential Administration*, *supra* note 111, at 1983 (“But experience has shown that internal review institutions either bend to the political winds when they become imperative or are displaced by other “legal advisors” who are more overtly political in their orientation.”).

²⁰⁷ Morrison, *supra* note 205, at 1468, 1470.

²⁰⁸ *Id.* at 1464.

²⁰⁹ *Id.* at 1467.

²¹⁰ By comparison, for example, medical researchers found that the use of a simple tool as a “checklist” in complex procedures substantially reduced mistakes and wrong treatments in patients by physicians. Atul Gawande, *The Checklist*, NEW YORKER (Dec. 10, 2007), <https://www.newyorker.com/magazine/2007/12/10/the-checklist> (“Intensive-care medicine has become the art of managing complexity—and a test of whether such complexity can, in fact, be humanly mastered.”).

factors, similar to how OIRA's authority was established by executive orders.²¹¹

Another possible solution would be for the courts to adopt the multi-factor test's criteria as part of judicial review. This approach is problematic because these criteria grant considerable discretion and broad judgment. Allowing the judiciary such broad discretion to conceive and administer this test outside of a congressional mandate would be a significant departure from current legal practices.²¹² Moreover, this article does not propose this test to be a proper standard of review by courts; rather, it seeks to answer the normative question of how the executive branch may gain greater legitimacy when justifying energetic executive action.

In sum, the suggested framework provides a richer account of executive policymaking for the sub-set of extraordinary executive actions. It is designed to assure increased legitimacy and subsided risks of undermining democratic values, so that only the most legitimate initiatives move forward.

C. The Multi-Factor Test's Criteria

Before introducing the criteria for examining extraordinary executive actions, some caveats are warranted. An inevitable aspect of the presidency is that "views concerning the proper scope of, and limits on, executive power depend in large part on which political party controls which branch of government."²¹³ It is nearly impossible to avoid the political affiliation of a specific president when analyzing executive actions, and people tend to decide whether they support strong executive action based on who is currently controlling the institution. Posner and Sunstein call these decisions "*institutional flip-flops*: judgments that shift dramatically with changes in the political affiliations and substantive views of those who occupy the offices in question."²¹⁴ A closely-related

²¹¹ OIRA's mandate originates in a series of executive orders. The first is Exec. Order No. 12,866, 58 Fed. Reg. 51,734, § 3(f) (1993). See Merrill, *Presidential Administration*, *supra* note 111, at 1971; Farber & O'Connell, *supra* note 102, at 1164.

²¹² Other scholars have expressed their opinion that the courts are not well-suited to handle these issues. See, e.g., Renan, *supra* note 93, at 2191-92 ("I argue, perhaps dishearteningly, that the judicial role is inescapably limited. Courts cannot solve the problems of constitutional governance. They are not immune to political polarization, and the tools that they possess are largely inadequate to the task.")

²¹³ Robert V. Percival, *Presidential Power to Address Climate Change in an Era of Legislative Gridlock*, 32 VA. ENVTL. L.J. 134, 150 (2014).

²¹⁴ Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 486, 490 (2016) (noting that theoretically, these are short-term considerations that should not affect the institutional question. Posner and Sunstein acknowledge that an attempt to use a "veil" that ignores the specific identity might make it "exceptionally difficult to identify clear answers to institutional

parameter that affects people is the president's specific personality.²¹⁵ Therefore, those who ultimately implement the multi-factor test should take care to minimize their biases of personal preference or political affiliation.

1. Presence of a Policy Problem with Significant Global Dimensions or Emergency/Necessity

In the realm of particularly significant decisions, it is necessary to limit possible excessive and illegitimate executive discretion. For these reasons, the multi-factor test starts with a threshold criterion: whether the extraordinary decision involves the existence of a policy problem with global dimensions, a global collective action challenge, or other considerations of emergency or necessity. This criterion considers whether the extraordinary executive policymaking initiative attempts to address a global collective action problem that impacts the United States and to which the United States significantly contributes.²¹⁶

There is a stronger normative justification in favor of executive action where the policymaking initiative at hand is designed to promote solutions to global challenges that impact the United States and require international collective action.²¹⁷ Many collective action problems

questions.”); *see also* Marshall, *supra* note 99, at 779 (“[T]ime after time those who have adamantly opposed presidential power by one President suddenly become executive power proponents when their own candidate is in office (and vice versa).”).

²¹⁵ Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1626 (2016); Marshall, *supra* note 125, at 522 (“Finally, we all need to resist the temptation, alluded to in the introduction of this Essay, to reflexively support as constitutional the actions of Presidents whom we support.”).

²¹⁶ *See, e.g.*, Merrill, *Presidential Administration*, *supra* note 111, at 1983 (“The root of the problem is the inability of the Congress and the courts to expand their decisional capacities to match the demands of a rapidly changing and globalizing world, and the greater capacity of the White House to do so, at least in relative terms.”).

²¹⁷ Globalization receives more prominent room in legal systems. *See, e.g.*, Stephen Breyer, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 281 (2015) (arguing that the “Supreme Court must increasingly consider the world beyond our national frontiers.”). Globalization considerations can create conflicts with classic legal notions. *See, e.g.*, JULIAN KU & JOHN YOO, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* (2014) (exploring the tensions between globalization and the U.S. Constitution, such as the Constitution’s commitment to the principle of popular sovereignty). Also, foreign affairs and national security present special considerations and assumptions. In these areas, either the Constitution grants the president direct, independent authority or Congress delegates broad statutory authority to the president. For example, there is a wide array of explicit legislation that grants authority to the president in the areas of national security and foreign affairs. *See, e.g.*, Bradley & Goldsmith, *supra* note 160, at 1257 (2018) (noting that “[a] foundational tenet of American separation of powers is that all presidential action must be authorized by the Constitution or an act of Congress[.]” and concluding that “Congress has delegated a tremendous amount of discretionary foreign affairs authority to the President”). In the U.S. Supreme Court, cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Dames & Moore v. Regan*, 453 U.S. 654 (1981) address Presidential authority in foreign affairs

demand the participation of the United States because, at the global scale, the United States is a dominant and crucial actor. For example, in assessing climate change policy, evaluators must account for the status of the United States as both the world's second-largest emitter of greenhouse gases and the world's largest economy.²¹⁸

Scholars have observed that international outcomes are in fact dictated by domestic politics. Helen Milner developed a theory of domestic influence on international relations among nations.²¹⁹ Milner emphasized the importance of domestic politics, arguing that “domestic and international factors interacted to shape cooperation among nations” and that “domestic politics and international relations are inextricably interrelated.”²²⁰ Specifically, “two aspects of the structure of domestic preferences are critical: the degree of divided government and the preferences of the executive.”²²¹

Scholars also have acknowledged the need for an emergency-like justification.²²² Congressional dysfunction alone cannot satisfy this standard.²²³ Merely asserting self-help arguments could incentivize pernicious power grabs by the executive branch and could become a slippery slope. As scholars have noted concerning Pozen's self-help

and national security matters. Following the *Youngstown* decision, the Court found broad implied congressional authorizations of presidential war and foreign relations authority. See, e.g., A.J. Bellia & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. 1795 (2010); Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT 87, 95 (2002). For these reasons, executive action that involves a global policy concern may have more legitimacy or a stronger normative justification than an action that has primarily domestic effects.

²¹⁸ Howard & Schwartz, *supra* note 29, at 267 (“Though the United States is now only the second-largest greenhouse gas emitter (after China), some studies estimate that, overall, no country comes close to matching the total, historic U.S. contribution to climate change.”).

²¹⁹ Helen Milner argues that domestic and international factors interact to shape cooperation among nations. Under this thesis, international affairs are not only affected, but are in fact dictated, by domestic politics. Thus, international outcomes are substantially determined by domestic politics. HELEN V. MILNER, INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997).

²²⁰ *Id.* at 3, 233.

²²¹ *Id.* at 235.

²²² See Duncan, *supra* note 116, at 408 (“[W]hen the nation perceives immediate threats, it may seek to avoid the slow and cumbersome process of congressional action. It desires something quick, affirmative, and decisive instead. When the President acts under such conditions, he may have more than the force of law behind him. He may very well have the force of the nation (the people) behind him as well. It is conceivable that the attitude of the nation as a whole is construable as both a source and a limitation on presidential power.”); Marshall, *supra* note 99, at 791 (“there may be a need for some exceptions if and when congressional obstruction truly threatens the nation.”).

²²³ Although some scholars are willing to admit that there is room for exceptions where congressional obstruction threatens the nation, those exceptions should be highly limited. Marshall, *supra* note 99, at 791.

justification,²²⁴ “certainly the mere claim that ‘we can’t wait’ or that ‘America does not stand still’ should not alone provide the necessary justification to increase the President’s powers.”²²⁵ Some scholars object to the self-help remedy because it would “trump formal constitutional safeguards”²²⁶ in the sense that adding this ambiguous tool to the already powerful presidential arsenal would exacerbate anxieties concerning presidential powers.²²⁷ Allowing the executive branch to argue that Congress is acting “deeply irresponsibly” is not strong enough to satisfy the “urgency” requirement. In order to meet this first criterion, the administration must show a concrete and specific policymaking challenge of emergency or necessity. These are broad, open-ended definitions, and it is futile to attempt to cabin their definition here.

It is important to elaborate on the more general issue of the global effects of domestic policies. In most other domestic regulatory contexts, agencies ignore global impacts in setting the scope of their cost-benefit analysis and look into domestic effects only—a U.S.-centric approach.²²⁸ This issue is illustrated in discussing whether policymakers can consider the benefits of climate change policies from a global perspective.²²⁹ International reciprocity is the principal policy justification for a global valuation of GHGs.²³⁰ A global perspective on climate costs and benefits promotes U.S. interests in securing international reciprocity and in maximizing benefits locally.²³¹ A global perspective is expected to build trust and a reputation for fairness, and it may be required to prevent arbitrary regulatory actions.²³² The United States could lead by example with unilateral action, and this would stimulate cooperative international action from other countries. Courts too have acknowledged this global

²²⁴ See *supra* notes 107-110 and accompanying text.

²²⁵ Marshall, *supra* note 99, at 791.

²²⁶ William P. Marshall, *Warning: Self-Help and the Presidency*, 124 YALE ONLINE L.J. F. 95, 98 (2014).

²²⁷ *Id.* at 115.

²²⁸ Arden Rowell, *Foreign Impacts and Climate Change*, 39 HARV. ENVTL. L. REV. 371, 373, 392 (2015).

²²⁹ See, e.g., Ted Gayer & W. Kip Viscusi, *Determining the Proper Scope of Climate Change Policy Benefits in U.S. Regulatory Analyses: Domestic versus Global Approaches*, 11 REV. OF ENVTL. ECONOMICS & POLICY 174 (2017).

²³⁰ Howard & Schwartz, *supra* note 29, at 238.

²³¹ *Id.* at 210, 237.

²³² *Id.* at 227-228, 238, 245-246 (mentioning additional policy justifications for using global SCC, such as the significant spillover effects, U.S. responsibility for the global commons, U.S. interests in conducting business abroad, and an altruistic willingness of U.S. citizens to pay to protect some foreign welfare. International law commits the United States to account for global effects in their regulatory impact assessments. For example, the United Nations Framework Convention on Climate Change art. 3(3). The Convention “reflects an ethical responsibility to prevent transboundary environmental harms.”). It also raises questions of intergenerational justice, namely considering the effects on future generations.

consideration as reasonable. In *Zero Zone Inc. v. Department of Energy*, for example, the Seventh Circuit concluded that the agency's consideration of the global climate effects was reasonable.²³³

Key statutory provisions that could be interpreted to require consideration of global climate costs include Section 115 of the CAA as well as provisions of the National Environmental Policy Act (NEPA).²³⁴ Section 115 of the CAA—the international air pollution provision—directs EPA and the states to mitigate emissions that endanger the health and welfare of foreign countries that have granted the United States reciprocal rights.²³⁵ Section 115 has not been invoked by the EPA as authority for its climate regulations. Yet there is a strong argument that it could be used for these purposes, requiring the United States to take a global perspective on its climate effects.²³⁶

2. The Extant Authority of the Executive Branch over the Subject Matter of the Desired Policy Initiative

Assuming that the OLC finds that the proposed policy satisfies the first criterion, the second criterion examines the authority of the executive branch over the area of the desired policy initiative as shaped through statutory delegations, judicial precedents interpreting the executive branch authority, and historical practice. The delegating statutory scheme should be closely examined, including the characteristics of the designated authority.

It is a central tenet of administrative law that agencies must operate within their delegated statutory authority. That authority may be implied from an agency's enabling statute, and courts routinely decide questions of statutory interpretation in order to determine the scope of the delegated authority.²³⁷ This legal authority for taking action could be some higher

²³³ The Court of Appeals found that for the Department of Energy “[t]o determine whether an energy conservation measure is appropriate under a cost-benefit analysis, the expected reduction in environmental costs needs to be taken into account.” *Zero Zone, Inc. v. Dep’t of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (“We have no doubt that Congress intended that DOE have the authority under the EPCA [Energy Policy and Conservation Act] to consider the reduction in SCC.”).

²³⁴ NEPA states in a provision titled “International and National Coordination of Efforts” that federal agencies shall “recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.” 42 U.S.C. § 4332(2)(f) (2012); Howard & Schwartz, *supra* note 29, at 248-249, 254.

²³⁵ 42 U.S.C. § 7415; Michael Burger et al., *Legal Pathways to Reducing Greenhouse Gas Emissions Under Section 115 of the Clean Air Act*, 28 GEO. ENVTL. L. REV. 359 (2016).

²³⁶ It explicitly requires a global perspective on climate costs and benefits, and it can be argued that its perspective informs the entire CAA.

²³⁷ See *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (explaining that the question of agency interpretation of a statute it administers fundamentally asks whether the agency acted within the bounds of its statutory authority).

law, such as the Constitution, or a statute—any agency action must be consistent with the law.²³⁸ Needless to say, the more specific and clear the authority is, the easier it will be to recognize the executive branch's actions.

In evaluating extraordinary executive decisions, the starting point is that the extant authority is ambiguous. Initially, it is at least unclear that the executive branch is authorized to act at all. For these reasons, this factor should not be decisive in and of itself in deciding whether a unilateral executive action is tolerable. However, it is crucial when evaluating such an action to engage in an in-depth analysis of the complexities and nuances of the delegated authority presented in each case and the gradual variations in the scope and breadth of that authority.

3. The Driving Force Behind the Policymaking Initiative

This criterion examines the driving force beyond the policymaking initiative, namely whether the president is acting unilaterally, whether an agency is acting at the president's behest and carrying out the initiative in accordance with the president's agenda, or whether the initiative was conceived within the administrative agency itself.

First, generally, unilateral action taken by the president alone usually weakens the justification in favor of the extraordinary executive action at issue.²³⁹ The reason is that a presidential unilateral action is more likely to be questionable or suspect.²⁴⁰ In a rare and extreme situation, if presidents are aggressively using agencies as mere tools for implementing their presidential preferences, then the agencies have no true discretion at all to decide and the action falsely appears to be the agency's decision. This situation could be viewed as a sham meant to cover up unilateral presidential policymaking, and it is therefore highly suspect. Separately, where the initiative is in reality carried out by bureaucratic agencies, the baseline assumption should be that there is a stronger justification in favor of the executive action.

A more delicate distinction is required, however. As explained above, there is significant debate in the legal and academic community over whether presidential involvement and influence is a desirable quality,

²³⁸ Merrill, *Presidential Administration*, *supra* note 111, at 1961.

²³⁹ Similarly, unilateral action is questionable in the international law arena. Some scholars have pointed out the drawbacks of unilateral action. Unilateral decisions instinctively create fear of coercive decisions and overreach. A state acts unilaterally when it "does not channel through a formal international process the decision to act." Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT'L. L. J. 105, 111 (2014).

²⁴⁰ For example, a substantial portion of the public reacted skeptically to the "travel ban" immigration executive orders issued by President Trump. The lower courts and Justice Sotomayor's dissent in *Trump v. Hawaii* affirmed the serious concerns about the lack of adherence to legal norms. *See infra* notes 253-265 and accompanying text.

similar to the debate over whether agencies can consider political factors in their decisions. Whether agencies can take into account political considerations—executive views that reflect or are influenced by presidential preferences—is controversial. These considerations are “political” if the source communicating them is the president or a politically-appointed agency head.²⁴¹ Although courts view political influence as suspect, they generally ignore presidential involvement.²⁴² Scholars have rejected as inadequate this judicial approach under which agencies cannot consider political considerations;²⁴³ forcing agencies to “hide” political considerations undermines transparency and public review.²⁴⁴

If presidential involvement or influence is perceived as beneficial,²⁴⁵ then policy initiatives that have benefitted from presidential supervision should have an increased presumption of legitimacy. In this instance, however, there must be transparency as to how political considerations helped to shape the policy agenda.

Based on this analysis, presidential involvement or influence could be viewed as suspect.²⁴⁶ When the president is involved in the policymaking initiative or has influenced it, then, the policy could be presumed to be less legitimate.

²⁴¹ The considerations are deemed “political” based not on their content but on their source. Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1175 (2010).

²⁴² See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1925 (2015) (“The most frequent judicial response to presidential oversight of administrative decisionmaking is to ignore it. Agencies rarely acknowledge presidential involvement in explanations of agency decisions, and courts rarely invoke it on their own.”).

²⁴³ Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L. J. 1003, 1042 (2015) (arguing that political influences can be beneficial, and it is impractical to ignore them because rulemaking is lawmaking and it inherently involves value-laden policy issues). Scholars have therefore pushed for greater process transparency through a disclosure of any presidential influence or involvement in rulemaking. See Mendelson, *supra* note 241, at 1159; Watts, *supra* note 130, at 734.

²⁴⁴ Watts, *supra* note 130, at 720.

²⁴⁵ For example, Justice Kagan views presidential involvement as beneficial. See also Metzger, *supra* note 86, at 1842, 1845, 1863, 1899-1900 (calling to infer that a constitutional presidential duty to supervise is used “to ensure that the transferred authority is used in a constitutional and accountable fashion.” Moreover, the duty to supervise should prevent systemic management and supervisory failures in administrative governance, and it includes “internal supervision adequate to preserve the overall hierarchical control and accountability of governmental power.”).

²⁴⁶ Some scholars have suggested revisiting presidential supervision as a basis for the legitimacy of the administrative state. See Mendelson, *supra* note 241, at 1178 (“[T]he potential taint that some perceive coming from presidential fingers in the regulatory pie may be a signal that submerged presidential supervision may, on balance, undermine, rather than reinforce, the legitimacy of agency decisions [I]f, for example, executive oversight turns out generally to be motivated by clearly improper political considerations or aimed, not at policy or value issues, but at manipulating technical or scientific conclusions when agency officials possess superior expertise.”).

4. Process and Procedure

This criterion examines the process and procedure that the executive branch chooses to employ in developing its policy initiative. For example, evaluators should consider whether the extraordinary policymaking initiative is subjected to a full process of notice-and-comment rulemaking (such as the CPP regulation), is described in an internal administrative law document (such as the immigration initiatives), or is a unilateral presidential policy.

Related issues are whether the administration acts with adequate transparency, integrity, and accountability in pushing the initiative²⁴⁷ and whether there is satisfactory public participation and deliberation. This criterion looks into the reasons and explanations that the executive branch provides to justify its actions and whether these explanations provide meaningful answers to possible critiques of the initiative. The greater the deliberation, public participation, and overall process entailed in the extraordinary policymaking initiative, the more reasonable the conclusion that the public should be less concerned about the motivations behind the initiative and have greater comfort in the legitimacy of the executive action.²⁴⁸

An important caveat is that, despite the appeal of relying on process, “full” process should not legitimize what might otherwise be substantively problematic.²⁴⁹

Agencies hold broad discretion to make procedural choices between policymaking forms.²⁵⁰ It would generally be appropriate that, absent special considerations, extraordinary policymaking changes should take effect through the deliberative and inclusive process of notice-and-comment rulemaking. For example, there is a concern that agencies effectively create legislative rules in the guise of policy statements.²⁵¹ In

²⁴⁷ Transparency and accountability are process norms and rule-of-law values. See Leib & Galoob, *supra* note 58, at 1859 (explaining that “[i]t is not enough for an agency to reach the correct answer or to arrive at the correct policy. The norms of administrative governance can be violated by deficient deliberative procedures alone.”).

²⁴⁸ See, e.g., Leib, *supra* note 2, at 274 (“Process helps judges feel more confident that agencies are orienting their deliberations to the kinds of considerations that are relevant under the statute and not acting out of inappropriate motivations.”).

²⁴⁹ See also Merrill, *Presidential Administration*, *supra* note 111, at 1983 (arguing that questions of pure process cannot address concerns of government structure or individual rights).

²⁵⁰ See *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947); Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384-85 (2004).

²⁵¹ Watts, *supra* note 130, at 742; Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 821 (2010) (concluding that agencies do not engage in widespread abuse of guidance); see generally Richard A. Epstein, *The Role of Guidances in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEGAL ANAL. 47 (2015); Aaron Saiger, *Is it Better Not to Know?: Bathroom Access for Transgender Students and the*

this sense, guidance documents can be used to effectively change the law and expand the scope of the agency's regulatory authority.

Recent events demonstrate the importance of this criterion even in areas where the president has traditionally broad discretion. For example, the Immigration and Nationality Act ("INA") vests the president with the authority to restrict the entry of aliens into the country.²⁵² The Trump administration has attempted to implement its own immigration agenda with a strong national security and foreign policy emphasis. The "travel ban," issued through the unilateral action of three versions of presidential executive orders,²⁵³ seeks to block entry into the United States by citizens of certain Muslim-majority countries. President Trump encountered judicial orders restricting some versions of the travel ban due to his perceived motivations of anti-Muslim religious discrimination, as evidenced by his social media declarations and campaign statements. The "process" involved in these unilateral actions of the first and second executive orders was deeply flawed.²⁵⁴

Daphna Renan presents President Trump's "travel ban" orders as examples of breaches of presidential norms because regular process and procedures were not followed:

The President's rush to fulfill a campaign pledge to "shut down" the entry of Muslims, seemingly uninterested in the facts or considered views of his own national security agencies, threatened the legitimacy of a judicial decision to uphold it. The President's sweeping national security powers are accepted in our legal culture because a President exercises those powers consistent with certain norms of limitation, including those norms that promote a fact-, policy-, and law-informed judgment.

Problem of the Big-Deal Guidance (forthcoming) (expressing concerns whether applying more procedural requirements to big-deal guidance will make agencies avoid issuing guidance in the first place and as a result the public will not be notified of the agencies' positions); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 420-33 (2007).

²⁵² 8 U.S.C. §1182(f) (2013).

²⁵³ Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (first version of the travel ban); Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar 6, 2017) (second version of the travel ban); Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Exec. Order No. 9645, 82 Fed. Reg. 45,161 (Sep. 24, 2017) (third version of the travel ban).

²⁵⁴ See, e.g., W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. F. 825, 826 (2018) ("Whatever the substantive merits of these policies may be, the breakdown of institutional norms in crucial internal legal processes has consistently undermined the Trump Administration's policy agenda in the courts, which have viewed the procedural deficiencies as evidence of discriminatory purpose.").

Judicial deference, in the context of the modern presidency, is implicitly tethered to these institutional features.²⁵⁵

States challenged the presidential travel ban orders, and lower courts found that the orders discriminated based on nationality.²⁵⁶ The Supreme Court allowed the third version of the travel ban to take effect pending appeal.²⁵⁷ Then, in *Trump v. Hawaii*,²⁵⁸ the Court ruled 5-4 in favor of the third iteration of the President's travel ban. A deeply divided Court upheld President Trump's travel ban against potential immigrants from Muslim-majority countries. The majority relied on the clear statutory language under the INA and held that "by its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings, following a worldwide, multi-agency review, that entry of the covered aliens would be detrimental to the national interest."²⁵⁹ The Court ruled that the Proclamation was within the scope of presidential authority under the INA.²⁶⁰ The Court also accepted the Trump administration's justification and held that "the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility," essentially ignoring the President's anti-Muslim statements.²⁶¹

It is important to notice the rationales behind the dissent opinions, which criticized the highly problematic processes and lack of integrity behind the administration's behavior. For example, the dissenting Justices suspected that the process through which the administration issued the travel ban was defective. According to Justice Breyer's dissent, the promulgation and content of the proclamation were significantly

²⁵⁵ Renan, *supra* note 93, at 2267.

²⁵⁶ See, e.g., *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (denying the administration's request to stay the temporary restraining order that blocked the entry restrictions for the first version of the travel ban), *reconsideration en banc denied*, 853 F.3d 933 (9th Cir. 2017); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (reviewing the second version of the travel ban); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam) (upholding the nationwide preliminary injunctions barring enforcement of the entry suspension, which were entered by the respective district courts, and concluding that the President exceeded the scope of his statutory authority). The Supreme Court granted certiorari and stayed the injunctions. *Trump v. Int'l Refugee Assistance Project*, 582 U. S. ___, 137 S. Ct. 2080 (2017) (per curiam). The temporary restrictions in the second travel ban expired before the Court took action, and the Court vacated the lower court decisions as moot. *Trump v. Int'l Refugee Assistance Project*, 583 U. S. ___, 138 S. Ct. 353 (Mem.) (2017); *Trump v. Hawaii*, 583 U. S. ___, 138 S. Ct. 2392 (2017).

²⁵⁷ *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 542 (Mem.) (2017).

²⁵⁸ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

²⁵⁹ *Id.* at 2408.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 2421 ("The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.").

affected by religious animus against Muslims.²⁶² Although the proclamation had provisions for case-by-case exemptions and waivers, Justice Breyer suspected that the administration was not applying the order “as written” due to the presidential statements showing antireligious bias.²⁶³ According to Justice Sotomayor’s dissent, the Establishment Clause claim had merit. Because President Trump’s statements created “the appearance of discrimination,” she wrote, “a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus”²⁶⁴ rather than by the administration’s asserted national security justifications. Justice Sotomayor also concluded that the majority opinion “empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public.”²⁶⁵

5. The Agencies’ Characteristics and Participation of Alternate Actors

When agencies are involved in the policymaking initiative, this criterion examines the characteristics of these participating agencies as well as the potential for participation of alternate actors, such as the states. The more expert and less political the agency is, the more this factor weighs in favor of a broader recognition of the extraordinary policy initiative. However, the agency’s expertise should not be examined in the abstract. The question should not solely be whether or to what extent an agency holds expertise. Instead, expertise actually must be *exercised* by the agency in reaching the particular policymaking initiative at hand.²⁶⁶ The agency should practice as an expert by utilizing its expertise in exercising its discretion. Recent actions of the EPA demonstrate this distinction between an agency’s expertise in the abstract versus in practice.²⁶⁷

²⁶² *Id.* at 2430 (Breyer, J., dissenting).

²⁶³ *Id.* at 4.

²⁶⁴ *Id.* at 2440 (Sotomayor, J., dissenting) (“Ultimately, what began as a policy explicitly ‘calling for a total and complete shutdown of Muslims entering the United States’ has since morphed into a ‘Proclamation’ putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact[.]”).

²⁶⁵ *Id.* at 2443.

²⁶⁶ *Cf.* *Kisor v. Wilkie*, 588 U.S. —, 139 S.Ct. 2400, 2413 (2019).

²⁶⁷ *See, e.g.*, Albert C. Lin, *President Trump’s War on Regulatory Science*, 43 HARV. ENVTL. L. REV. 247 (2019) (arguing that the Trump Administration is engaging in a war on regulatory science, as these actions take aim specifically at regulatory science). The former EPA administrator Pruitt hardly received input from career staff or consulted them. *See* David M. Uhlmann, *Undermining the Rule of Law at the E.P.A.*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/opinion/contributors/epa-rule-of-law-pruitt.html?_r=0. The EPA’s career scientists and legal experts have claimed that they were largely excluded from the process of policymaking. Coral Davenport, *Counseled by Industry, Not Staff, E.P.A. Chief is Off to*

Scholars have emphasized that the expertise advantage of agencies makes the executive branch “the most knowledgeable branch.”²⁶⁸ The executive branch has extraordinary information-gathering advantages over the legislative and judicial branches.²⁶⁹ Civil servants, including professionals such as lawyers, economists, and scientists, work for the government, and they help with various tasks. The majority are insulated from political pressure and are tenure-protected.²⁷⁰

This criterion also considers the availability of alternate, capable actors that can engage in policymaking, such as states. For example, if states are capable of mobilizing policy initiatives effectively and are authorized to do so, it detracts from the argument that the federal government should be authorized to execute its policy initiative when its authority is questionable.

6. The State of the Legislature and Its Policy Involvement:
Congress’s View of the Issue, Second-Best Alternative, and
Divided or Unified Government

This criterion captures Congress’s view of the policy issue that is the subject of extraordinary executive action. Specifically, it tracks whether Congress considered the same or a similar policy initiative yet rejected it and the reasons why Congress refrained from legislating, whether Congress has not considered the issue at all, or whether the initiative is contrary to Congress’s directives.²⁷¹

a Blazing Start, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html?mcubz=0>.

²⁶⁸ Sunstein, *supra* note 215, at 1609 (arguing that this knowledge justifies giving the executive branch considerable discretion and deference when it exercises that discretion); *see, e.g.*, Freeman & Spence, *supra* note 20, at 81 (arguing that agencies “move more quickly than Congress, and they face fewer obstacles or veto-gates to action. Moreover, agencies are subject-matter specialists organized around a specified mission, and they are equipped with relevant expertise, enabling them to adjust to changed circumstances more nimbly than Congress.”). Likewise, Justice Kagan’s vision of the presidential administration has also emphasized agency expertise. Kagan, *Presidential Administration*, *supra* note 131, at 2356 (“These differences suggest at a minimum that a system of presidential administration operate with an attitude of respect toward agency experts and with a set of processes that encourage consultation. But more, these differences counsel hesitation both in acknowledging and asserting presidential authority in areas of administration in which professional knowledge has a particularly significant and needed function.”).

²⁶⁹ Sunstein, *supra* note 215, at 1613.

²⁷⁰ *See, e.g.*, Michaels, *supra* note 137, at 236-37.

²⁷¹ *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). *Cf.* Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211 (2013) (arguing that courts should draw no inference from congressional silence or inaction, when they decide issues of executive power).

The more the executive initiative contradicts a specific extant legislative directive, the more concern there should be about allowing the proposed policy initiative to move forward.

Moreover, this criterion examines whether the president made particular and sincere efforts to encourage Congress to pass the extraordinary policy initiative as legislation. If presidents propose policy initiatives as legislation and choose to act unilaterally only after Congress refuses or fails to act, perhaps extraordinary executive action is justified as a second-best alternative in order to address an urgent global policy problem. And when the government is unified, the president has the best prospects of pushing the policy initiative through the legislative process. Thus, avoiding this step should cause more concern about the legitimacy of the unilateral policy action.

This consideration is tricky because presidents are not entitled to have their desired policies adopted by the legislature. The mere fact that Congress was not willing to accept a certain policy initiative should not grant the president the freedom to act unilaterally.²⁷² Indeed, this is the underlying rationale for the separation of powers and checks and balances.

This factor also considers the divided or unitary nature of government. Daryl J. Levinson and Richard H. Pildes coined the term “separation of parties,” arguing that the traditional discourse on separation of powers does not take into account the partisan political competition in the current governmental structure—the “competition between the legislative and executive branches was displaced by competition between two major parties.”²⁷³ In fact, they argue that the level of actual “competition” between the branches depends on whether the government is divided or unified by party—whether “the same political party controls the House, the Senate, and the presidency.”²⁷⁴ When all branches are controlled by the same political party, the checks are relaxed. Thus, in a unitary government the gridlock is expected to be less severe, though there is still deep partisan division, meaning that the congressional dysfunction

²⁷² See, e.g., JOSH CHAFETZ, CONGRESS’S CONSTITUTION—LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 35 (2017) (“Divided government . . . indicates that the American people have not seen fit to entrust the entirety of governmental operations to a single party.”).

²⁷³ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006). *But see* CHAFETZ, *supra* note 272, at 28-35.

²⁷⁴ Levinson & Pildes, *supra* note 273, at 2315, 2329-30 (“When government is divided, party lines track branch lines, and we should expect to see party competition channeled through the branches. The resulting interbranch political competition will look, for better or worse, something like the Madisonian dynamic of rivalrous branches.”).

considerations remain valid.²⁷⁵ The Trump administration, as an illustrative example, began with a hyper-partisan, unified government. Under a “separation-of-parties” model, President Trump could have theoretically requested the Republican-controlled Congress to enact legislation on immigration instead of acting unilaterally on immigration policy. President Trump did not attempt to do so, issuing the first iteration of the travel ban order within a week of taking office.²⁷⁶ By comparison, during the first two years of the Obama administration, the Democrats controlled both houses of Congress, and President Obama similarly enjoyed a unified government. Yet the ACA was the result of a legislative compromise rather than a unitary action.²⁷⁷

When the government is divided, it is more difficult for presidents to work with Congress in passing their legislative agenda. For example, President Obama operated during the last six years of his term in a deeply hyper-partisan divided government after Republicans won control of the House of Representatives in 2010.²⁷⁸

7. Protection of Constitutional Principles and Values or Abuse of Discretion

This last criterion is a safety valve that negates executive authority to decide on extraordinary policymaking initiatives in situations where the potential for abuse is too extreme to allow executive action. This criterion examines two possible questions. The first question is whether it is evident that the executive branch is attempting to use its powers in an

²⁷⁵ See, e.g., K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1698 (2018) (book review) (“But executive regulatory expansion is also likely in context of unified party control of both legislature and Executive: under unified government, Congress is even less likely to exercise its oversight function over regulatory agencies, and the difficulties of party coordination and legislative action make policymaking by regulation still less costly. This shift to making more expansive public policy through regulation within existing statutes, absent new, direct statutory authorization, raises questions about the politicization of administration, and thus the legitimacy of the modern regulatory state, incentivizing regulators to engage in more realpolitik rather than deliberation in making administrative policies.”); Richard L. Revesz, *Challenging the Anti-Regulatory Narrative*, THE REGULATORY REVIEW (July 23, 2018), <https://www.theregreview.org/2018/07/23/revesz-challenging-anti-regulatory-narrative> (“The concern about congressional gridlock has not abated during the Trump presidency, despite Republicans controlling both houses of Congress and the presidency.”).

²⁷⁶ Trump probably did not pursue legislation because he did not have a filibuster-proof majority, namely the sixty votes that are needed to get substantive legislation through.

²⁷⁷ See, e.g., Sarah Kliff & Ezra Klein, *The Lessons of Obamacare*, VOX (Mar 15, 2017), <https://www.vox.com/policy-and-politics/2017/3/15/14908524/obamacare-lessons-ahca-gop>; see generally Metzger, *supra* note 86.

²⁷⁸ See, e.g., Gregory Korte, *For Obama, Fewer Bill-signing Ceremonies Reflect Years of Gridlock*, USA TODAY (Dec. 13, 2016), <https://www.usatoday.com/story/news/politics/2016/12/13/president-obama-fewer-bill-signing-ceremonies-gridlock/95352806/>.

opportunistic way to abuse its discretion.²⁷⁹ This safety valve should have a narrow construction in order not to undermine the rationale underlying the multi-factor test and make the exception into the rule. The second question is whether the initiative could undermine constitutional principles and values.²⁸⁰

Although the presence of seven factors makes this test somewhat unwieldy to apply, the results are more comprehensive and allow for greater flexibility in addressing unanticipated issues across a variety of policy areas. These criteria do not necessarily bear equal weight relative to each other. Some of the factors could be more important than others in a particular analysis. Under separate administrations' OLCs, the final decision as to a proposed action's legitimacy could be different. On balance, the overall assessment of the criteria must weigh in favor of legitimacy. For example, congressional dysfunction coupled with an executive attempt to solve a global collective action problem that directly affects the United States would make a strong case for allowing the executive branch to move forward with the initiative.

D. The Multi-Factor Test in Practice: Applying It to the Case Studies

This Section applies the multi-factor test to the case studies. The descriptions of the case studies in Part I provide a more detailed explanation of the background facts of these case studies. To the extent it would be repetitive, the explanations in this Section are kept brief.

1. Climate Change

Climate change is a politically loaded problem that is difficult to solve. Even though climate change can be thought of as a pure scientific issue, it is an endless source of political debate with regard to its causes²⁸¹ and possible solutions. The general scientific consensus on climate change

²⁷⁹ Only few procedural rules against circumvention exist in administrative law. See, e.g., Michael Greve & Ashley C. Parrish, *Administrative Law without Congress*, 22 GEO. MASON L. REV. 501, 524 (2015). In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978) the Court held that courts cannot impose additional procedural requirements beyond extant requirements in enacted law.

²⁸⁰ See Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006) (arguing that for sensitive issues in statutory ambiguities interpretation, such as matters involving constitutional rights, executive interpretation is not enough and Congress should make the determination).

²⁸¹ The partisan divide in this area is especially acute. Republicans have expressed skepticism about climate science despite an overwhelming scientific consensus on the matter. Recently, the Trump administration admitted climate change is not a hoax, yet President Trump has suggested that it is not necessarily manmade. See, e.g., *Trump Says Climate Change Not a "Hoax" But Questions If It's "Manmade"*, CBS NEWS (Oct. 15, 2018) <https://www.cbsnews.com/news/trump-says-climate-change-not-a-hoax-but-questions-if-its-manmade>.

alone does not resolve the difficult policy question of how to deal with it.²⁸² For instance, possible solutions to climate change include expensive investments in either mitigation or adaptation, and solutions usually involve choosing among alternatives. Congress is generally not active in addressing environmental issues, and climate change in particular is a “super wicked” problem.²⁸³

Policy Problem with Global Dimensions; Emergency/Necessity Considerations: It is apparent that climate change is a global collective action challenge with emergency and necessity elements. The CPP regulation was designed to pursue an international cooperation action plan. Although the effects of reducing GHG emissions are not immediate, emissions accumulate, and it is urgent to take care of this challenge as soon as possible because some of the risks that GHG emissions pose are irreversible.²⁸⁴ The sixth assessment report of the Intergovernmental Panel on Climate Change (IPCC) calls for urgent action on climate change in order to prevent worldwide disaster.²⁸⁵ In 2018, the Federal program of the U.S. Global Change Research Program (USGCRP) published a major report that outlines the dire consequences of climate change to the United States.²⁸⁶ The report states:

Climate change creates new risks and exacerbates existing vulnerabilities in communities across the United States, presenting growing challenges to human health and safety, quality of life, and the rate of economic growth.

. . .

Without substantial and sustained global mitigation and regional adaptation efforts, climate change is expected to cause growing losses to American infrastructure and property and impede the rate of economic growth over this century.²⁸⁷

The USGCRP Report highlights that “while these adaptation and mitigation measures can help reduce damages in a number of sectors, this assessment shows that more immediate and substantial global greenhouse

²⁸² For the variety of the disagreement as to the appropriate remedies, *see* Barron, *supra* note 123, at 1150.

²⁸³ Lazarus, *supra* note 17, at 1159.

²⁸⁴ *See* Section I.A.

²⁸⁵ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), SIXTH ASSESSMENT REPORT (2018), <https://www.ipcc.ch>.

²⁸⁶ The USGCRP facilitates collaboration across its 13 federal member agencies.

²⁸⁷ U.S. GLOBAL CHANGE RESEARCH PROGRAM (USGCRP), IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT II (NCA4), SUMMARY FINDINGS (2018), <https://nca2018.globalchange.gov> [hereinafter USGCRP Report].

gas emissions reductions, as well as regional adaptation efforts, would be needed to avoid the most severe consequences in the long term.”²⁸⁸

Extant Authority: Supreme Court decisions manifest contradicting perspectives as to the scope of the EPA’s authority to address climate change under the existing CAA. In the landmark decision of *Massachusetts v. EPA*,²⁸⁹ the Court held that GHGs qualify as “air pollutants” under the CAA.²⁹⁰ The EPA relied heavily on nonscientific reasons for its refusal to decide whether GHGs cause or contribute to climate change.²⁹¹ The Court’s holding in *Massachusetts v. EPA*²⁹² “make[s] it clear that [the] EPA has broad authority under the existing Clean Air Act to regulate GHG emissions The only question under consideration by the Court is which parts of the CAA can be used for that regulation.”²⁹³

There is a wide agreement, however, that the CAA’s regulatory scheme applies awkwardly to climate change.²⁹⁴ The existing CAA presents a limited mechanism, and “is not especially well designed for controlling GHG pollution.”²⁹⁵ According to Jody Freeman, the CAA “cannot do everything necessary on GHG regulation, and certainly not cost-effectively, in its current form And there appears to be no authority for [the] EPA to use a cap-and-trade program.”²⁹⁶ Freeman and Spence also argue that the EPA has been forced to engage in “interpretive jujitsu” when analyzing the CAA provisions.²⁹⁷ The EPA, facing a constant problem of adapting an outdated statute to the new regulatory

²⁸⁸ *Id.*

²⁸⁹ 549 U.S. 497 (2007).

²⁹⁰ *Id.* at 528-29, 534-35. The Supreme Court set aside EPA’s initial decision not to regulate GHGs. The decision authorized the EPA to regulate GHGs deemed to endanger public health or welfare. Subsequently, the EPA released the Endangerment Finding in 2009. Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (proposed Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

²⁹¹ 549 U.S. at 513.

²⁹² *Id.*; see also *American Electric Power v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (“We hold that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Massachusetts made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act.”).

²⁹³ Robert V. Percival, *Presidential Power to Address Climate Change in an Era of Legislative Gridlock*, 32 VA. ENVTL. L.J. 134, 154 (2014).

²⁹⁴ Philip A. Wallach, *U.S. Regulation of Greenhouse Gas Emissions*, BROOKINGS INST. (2012), <https://www.brookings.edu/wp-content/uploads/2016/06/26-climate-change-wallach.pdf> (“The CAA’s structure is largely geared toward mitigating local air pollution problems, making it an extremely awkward tool for addressing the problem of global warming.”).

²⁹⁵ Freeman & Spence, *supra* note 20, at 20.

²⁹⁶ Jody Freeman, *Climate and Energy Policy in the Obama Administration*, 30 PACE ENVTL. L. REV. 375, 389 (2012).

²⁹⁷ Freeman & Spence, *supra* note 20, at 21.

policymaking of climate change, has had to fill the gaps and respond by making strategic legal and political judgments.²⁹⁸

Nonetheless, the *UARG* holding blurred the precedential reach of *Massachusetts v. EPA* with respect to the scope of the EPA's authority to address climate change under the CAA.²⁹⁹ *UARG* involved the EPA's first significant rulemaking to address GHG emissions from major stationary sources.³⁰⁰ In *Michigan v. EPA*, the Court ruled that the EPA unreasonably failed to consider the cost of compliance (a relevant factor) when regulating power plant emissions under the CAA, another rare *Chevron* "step two" agency loss.³⁰¹

Within the context of these case law precedents, President Obama knew that the Paris Climate Agreement would not get the required supermajority approval for treaties in the Senate.³⁰² Therefore, he instead made a political commitment—an action that does not require the cooperation of the legislature and does not impose binding obligations under international law.³⁰³ The international commitment is regulated under the Paris Climate Agreement, an international agreement to combat climate change through mandatory international GHG emissions regulation; it was signed by 196 countries and the European Union³⁰⁴ and went into effect in 2016.³⁰⁵

Curtis Bradley and Jack Goldsmith have noted that the novelty in President Obama's actions was that he combined two separate presidential authorities—the political commitment to secure international cooperation and the exercise of domestic delegated statutory authority to

²⁹⁸ *Id.*

²⁹⁹ See *supra* notes 175-177 and accompanying text.

³⁰⁰ See Richard Lazarus, *Environmental Law Without Congress*, 30 J. LAND USE & ENVTL. LAW 16, 30 (2014); Richard J. Lazarus, *The Opinion Assignment Power, Justice Scalia's Un-Becoming, and UARG's Unanticipated Cloud over the Clean Air Act*, 39 HARV. ENVTL. L. REV. 37, 46 (2015).

³⁰¹ 135 S. Ct. 2699, 2711 (2015). In *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (on regulation of air pollution emitted in one state that contributes to nonattainment in other states) the Court approved consideration of costs in environmental regulation, and upheld EPA's cross-state air pollution rule. See also Heinzerling, *supra* note 49, at 427 (arguing that the Court applied a power canon in its decision).

³⁰² Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L.J. 455, 464 (2016).

³⁰³ See also Bradley & Goldsmith, *supra* note 160, at 1252 ("Then the core emissions reduction pledge, which likely could not have been made binding under any domestic authority, was crafted as a non-binding political commitment and subsequently implemented, in effect, via domestic regulations grounded in old statutes not enacted for these international ends.").

³⁰⁴ There is a scholarly debate on what type of agreement the Paris Agreement is and its legal basis. See Bradley & Goldsmith, *supra* note 160, at 1249.

³⁰⁵ Paris Agreement, Dec. 12, 2015, T.I.A.S. No. 16-1104, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

implement the international commitment domestically³⁰⁶—an “innovative strategy” that did not require involving Congress.³⁰⁷ Scholars expressed their concerns that “the problem is that the President has been using preexisting domestic delegations in the service of deeply consequential international commitments that Congress did not remotely contemplate when it delegated the authority to the President, and that Congress cannot easily unwind.”³⁰⁸ Despite the problematic aspects of this combination, these scholars conclude that “it is difficult to see why it is unlawful.”³⁰⁹

The supporters of the CPP regulation argued that, although the “proposed rule for existing power plants [was] a creative and bold assertion of EPA’s regulatory authority,”³¹⁰ “the Clean Power Plan rigorously observe[d] the many constraints on EPA’s discretion to craft emission guidelines under Section 111(d). It [was] not the reckless power grab that opponents describe, but a straightforward application of EPA’s longstanding Clean Air Act authority to regulate dangerous emissions from stationary sources of pollution.”³¹¹ A report by the Institute for Policy Integrity also concluded that “the Clean Power Plan [was] consistent with the Constitution, as well as the text of the Act and decades of efforts to implement it.”³¹²

In sum, various judicial precedents dating back to *Massachusetts v. EPA* have clarified that the EPA has broad authority to regulate climate change, despite the CAA’s status as an “old statute.” The Obama administration carefully attempted to stay within the scope of the Supreme Court’s decisions, and it innovatively grounded the domestic regulations of the CPP in an old statute to achieve international goals. Looking at this all together, the criterion of executive authority weighs in favor of tolerating this executive action.

³⁰⁶ Bradley & Goldsmith, *supra* note 160, at 1269-1270; *see also* Harold Hongju Koh, *Triptych’s End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 337, 352 (2017) (“The President can implement the new legal obligations assumed under the Paris Agreement merely by carrying out pre-existing domestic legal obligations.”).

³⁰⁷ Goldsmith, *supra* note 302, at 467.

³⁰⁸ Bradley & Goldsmith, *supra* note 160, at 1269-70.

³⁰⁹ *Id.*

³¹⁰ Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 16 (2014).

³¹¹ Richard L. Revesz, Denise A. Grab & Jack Lienke, *Bounded Regulation - How the Clean Power Plan Conforms to Statutory Limits on EPA’s Authority*, Institute for Policy Integrity 9 (2016), available at <https://policyintegrity.org/publications/detail/bounded-regulation>.

³¹² Richard L. Revesz, Denise A. Grab & Jack Lienke, *Setting the Record Straight on the Clean Power Plan: What the Challengers Got Wrong at the D.C. Circuit Oral Argument*, INST. FOR POL’Y INTEGRITY 12 (2016), available at <http://policyintegrity.org/publications/detail/setting-the-record-straight-on-the-clean-power-plan>.

Driving Force Behind the Policy: President Obama was the moving force behind the CPP regulations. He influenced and directly controlled the CPP initiative as part of his ambitious attempts to combat climate change.³¹³ There was full transparency as to these actions, and President Obama explicitly “appropriated” the initiatives that were carried out by the EPA.³¹⁴ Therefore, this criterion weighs in favor of finding an appropriate use of executive unilateral action.

Process and Procedure: In 2013, President Obama directed the EPA, in a presidential memorandum, to issue climate change regulations under Sections 111(b) and 111(d) of the CAA.³¹⁵ As elaborated above, the administration explained its acts in terms of saving the Earth and protecting public health where the legislature had failed to either amend an old statute or pass other more comprehensive solutions.

Moreover, the EPA used notice-and-comment rulemaking. The process was transparent, and it was accompanied by broad participation: the EPA reached out to interested parties; received input from industry, interest groups, and policy experts; and held public hearings.³¹⁶ EPA received more than 4.3 million public comments,³¹⁷ and it adjusted its proposals in light of these comments.³¹⁸ Therefore, the CPP regulation was carried out with a full and satisfactory process.

Characteristics of the Agency: The EPA clearly has expertise and experience in the area of environmental policy.³¹⁹ Many of its employees are scientists or other credentialed professionals in the field. In reaching the CPP initiative, the EPA heavily exercised its scientific expertise on the issue.³²⁰

Participation of Alternate Actors: Climate change is not only an international problem but also affects localities.³²¹ There is a long

³¹³ See, e.g., Watts, *supra* note 130, at 686.

³¹⁴ See, e.g., Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 691, 703 (2016).

³¹⁵ Presidential Memorandum from President Barack Obama to the EPA, Power Sector Carbon Pollution Standards, (June 25, 2013) <https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards>.

³¹⁶ LINDA TSANG & ALEXANDRA M. WYATT CONG. RES. SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN *WEST VIRGINIA V. EPA* 6 (2017).

³¹⁷ *Id.*

³¹⁸ See, e.g., Freeman & Spence, *supra* note 20, at 77.

³¹⁹ *Id.* at 81.

³²⁰ See, e.g., JAMES E. MCCARTHY ET AL., CONG. RES. SERV., R44341, EPA’S CLEAN POWER PLAN FOR EXISTING POWER PLANTS: FREQUENTLY ASKED QUESTIONS (2016).

³²¹ See ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT PUBLISHING, CITIES AND CLIMATE CHANGE 172-76 (2010) (“Multi-level governance may help to overcome some of the many obstacles to effective design and implementation of climate policies. Tools for multi-level governance – in the form of vertical and horizontal co-operation – may help to narrow

tradition of nonfederal actors engaging in regional cooperation: state and local governments participate in various activities to reduce GHG emissions throughout the United States.³²² In particular, California is the most active state with respect to enacting environmental regulatory policies.³²³

Climate change scholarship advocates for combined, diagonal regulation and a multi-scalar approach of action by more than one level of government.³²⁴ Thus, categorizing the climate change problem as purely “local” or purely “federal” would overlook the important non-federal acts and involvement. And while incremental action at the local level is beneficial, it is not sufficient to provide a coherent, overarching solution. As the USGCRP Report states,

[C]ommunities, governments, and businesses are working to reduce risks from and costs associated with climate change by taking action to lower greenhouse gas emissions and implement adaptation strategies. While mitigation and adaptation efforts have expanded substantially in the last four years, they do not yet approach the scale considered necessary to avoid substantial damages to the economy, environment, and human health over the coming decades.³²⁵

Indeed, a national (and even transnational) action plan is required to provide an encompassing solution to climate change,³²⁶ even though states may be able to address the problems in a more limited fashion.

the ‘policy gap’ among levels of government and promote implementation of stated policy goals and plans.”).

³²² See J. R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1500 (2007) (“Regulation in response to climate change is a good example—perhaps the best in recent years—of states assuming a leadership role to address a social problem while the federal government remains inert.”). One example is the newly-founded organization “We Are Still In,” which was formed in 2017 in the face of President Trump’s anti-environmental agenda. We Are Still In, <https://www.wearestillin.com/about> (last visited Sept. 20, 2019).

³²³ See, e.g., Ann E. Carlson, *Regulatory Capacity and State Environmental Leadership: California’s Climate Policy*, 24 FORDHAM ENVTL. L. REV. 63, 63 (2013) (“California has enacted what is arguably the world’s most ambitious policy to tackle greenhouse gas emissions.”).

³²⁴ See generally Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change*, 15 ANNALS OF ECONOMICS AND FINANCE 97 (2014); Hari M. Osofsky, *Is Climate Change “International”?* *Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585, 589 (2009); Hari M. Osofsky, *The Future of Environmental Law and Complexities of Scale: Federalism Experiments with Climate Change under the Clean Air Act*, 32 WASH. U. J.L. & POL’Y 79 (2010); see also Daniel Bodansky, *What’s So Bad about Unilateral Action to Protect the Environment?*, 11 EUR. J. INT’L L. 339 (2000) (“In many cases, effective multilateral action to protect the environment is impossible, so the choice is not between unilateralism and multilateralism, but between unilateralism and inaction.”).

³²⁵ USGCRP Report, *supra* note 287 and accompanying text.

³²⁶ See *supra* note 19 and accompanying text.

Therefore, this criterion weighs in favor of finding a properly executed federal action because of the lack of alternate entities that could substitute for the federal government in taking effective action.

Congress's View of the Issue: Congress has generally not been active on environmental issues in recent years,³²⁷ and climate change in particular is a “super wicked” problem that has evaded congressional action.

In President Obama's first term, the administration was focused on pushing through a legislative fix to climate change. A national cap-and-trade system, introduced in the Waxman-Markey Bill of 2009,³²⁸ failed to pass the Senate due to strong political and industry opposition.³²⁹ The collapse of the bill spurred the Obama administration to executive action.³³⁰ Additionally, the president provided statements on climate change, such as “I urge this Congress to get together, pursue a bipartisan, market-based solution to climate change But if Congress won't act soon to protect future generations, I will.”³³¹ In sum, it seems that the requirement for exhausting the legislative alternative was satisfied here. The CPP regulations were the result of a deliberative process that used the EPA's scientific expertise to resolve the global collective action challenge of climate change based on the findings and recommendations of years of studies.

2. Immigration

Policy Problem with Global Dimensions; Emergency/Necessity Considerations: The immigration initiatives could exhibit elements of the “emergency” factor due to the perceived humanitarian crisis of a massive number of deportations. Policy problems with substantial global

³²⁷ See *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007) (distinguishing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) and noting that “EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles. Even if it had, Congress could not have acted against a regulatory ‘backdrop’ of disclaimers of regulatory authority.”).

³²⁸ H.R. 2454, 111th Cong. (2009).

³²⁹ See, e.g., John M. Broder, ‘Cap and Trade’ Loses Its Standing as Energy Policy of Choice, N.Y. TIMES (Mar. 25, 2010) <https://www.nytimes.com/2010/03/26/science/earth/26climate.html>.

³³⁰ See, e.g., Sunstein, *supra* note 30, at 232 (“And yet it all happened through the executive branch. Congress did essentially nothing to reduce greenhouse gas emissions. Its only serious efforts, initiated in 2009, were blocked in 2010, by which time it became clear that if greenhouse gas emissions were to be reduced, it would be a result of the use of pre-existing legal authorities, which were not enacted with the climate change problem in mind.”); Kate Sheppard, *Barack Obama Failed to Get a New Climate Law, But His Legacy Might Be Stronger Because of it: The Fate of Climate Rules Now Lies with the Supreme Court*, HUFF. POST (Jan. 11, 2017) https://www.huffingtonpost.com/entry/barack-obama-climate-legacy_us_586fe435e4b02b5f8588abcc.

³³¹ State of the Union Address, *supra* note 3.

dimensions could include the global migrant crisis and the rise in crime and violence in Mexico and Central America.³³² Because deporting undocumented immigrants would involve multiple countries through the movement of individuals across international borders, there is an argument that the criterion is applicable in this situation. However, this problem is less demonstrative of a global collective action problem and emergency consideration than climate change. Although migration flows occur across countries, each country is affected to a different extent and in a different way. Whereas one country alone cannot address climate change because greenhouse gas emissions affect the entire planet, one country alone may effectively address immigration policy at and within its own borders. And although immigration is an urgent issue for the individuals and communities directly affected, human migration is a perennial problem. In contrast, climate change presents an emergency situation, since missing critical opportunities to reduce greenhouse gas emissions now may prevent humanity from being able to address climate change in the future. As such, it is unclear whether the threshold criterion would be met in this case.

Extant Authority: Assuming that the OLC was convinced by the emergency justifications for the immigration initiatives, the office would then have to examine its extant authority to act under the relevant statute. The complex and detailed code of the INA expressly grants the Secretary of Homeland Security broad enforcement authority to “[e]stablish[] national immigration enforcement policies and priorities,”³³³ and to “establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority.”³³⁴

Thus, in the immigration area, Congress explicitly grants DHS broad policymaking discretion to enforce federal immigration laws. Moreover, specifically in the immigration arena, constitutional, historical, and institutional developments have “given the President tremendous power over the immigrant-screening system.”³³⁵ Adam Cox and Cristina Rodríguez labeled these developments a “de facto delegation” of

³³² See, e.g., Michael D. Shear, *Miriam Jordan and Manny Fernandez, The U.S. Immigration System May Have Reached a Breaking Point*, N.Y. TIMES (April 10, 2019) <https://www.nytimes.com/2019/04/10/us/immigration-border-mexico.html>.

³³³ 6 U.S.C. § 202(5) (2012).

³³⁴ 8 U.S.C. § 1103(a)(3) (2012).

³³⁵ Cox & Rodríguez, *supra* note 57, at 108-13 (“Far from fitting into a faithful-agent framework therefore, our modern system of presidentially driven, ex post immigration screening is better understood as embodying a ‘two-principals’ model of immigration policymaking The President has always been an immigration policymaker alongside and sometimes in competition with Congress.”).

immigration policymaking³³⁶ because the executive branch is setting enforcement priorities and substituting its policy preferences for congressional deliberation and legislation.³³⁷ These developments have magnified executive policymaking power.³³⁸ In *Arizona v. United States*, the Supreme Court reaffirmed this conclusion by recognizing the central role the president plays in shaping federal immigration law.³³⁹

For these reasons, this criterion weighs in favor of tolerating executive unilateral action.

Driving Force Behind the Policy: President Obama was the moving force behind the immigration initiatives. He influenced and directly controlled the DHS initiatives of DACA and DAPA.³⁴⁰ President Obama explicitly “appropriated” the initiatives that were carried out by DHS. This criterion pushes in the direction of tolerating unilateral executive action.

Process and Procedure: The policy reforms of DACA and DAPA were adopted in an internal DHS memorandum directed at DHS personnel.³⁴¹ DHS did not use the formal notice-and-comment rulemaking process to implement these initiatives, although some organizations helped frame the initiatives.³⁴² The agency also provided explanations for the immigration initiatives, including in relation to possible policy critiques and legal challenges.³⁴³

Under the immigration initiatives, the adjudicators of petitions in U.S. Citizenship and Immigration Services (“USCIS”) retain discretion to

³³⁶ *Id.* at 130-31, 160, 171 n. 185 & 190.

³³⁷ *Id.* at 160, 171 n. 185 & 190.

³³⁸ *Id.* at 134.

³³⁹ 132 S. Ct. 2492, 2499 (2012) (striking down a major part of Arizona’s attempts to augment federal immigration enforcement where the administration decided to preempt state law immigration enforcement policies).

³⁴⁰ *See, e.g.*, Watts, *supra* note 130, at 686.

³⁴¹ *See* Section I.B.

³⁴² *See, e.g.*, Cox & Rodríguez, *supra* note 57, at 215 (“Yet while the Obama initiatives themselves [make the exercise of enforcement discretion] more transparent, the process that produced them was opaque. Mobilized interest groups may well have informed the ultimate shape of the initiatives, but there were no formal avenues for public input into the policymaking process. The policies were drafted and vetted only within the Executive Branch and its self-defined spheres of influence.”); *see also* Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 271-72 (2017) (arguing that the lack of proper procedure was harmless because the national media coverage was adequate and because the administration offered lengthy explanations including legal ones, which provided adequate notice); *id.* (“By any measure, DHS’s actions substantially fulfilled the requirements the APA laid out. What more does Texas want?”).

³⁴³ *See* Bagley, *supra* note 342, at 270-271 (“When DHS finally adopted DAPA, the administration offered lengthy explanations of both the desirability and legality of its program. Those explanations addressed the most important criticisms that had been lodged against the program in the public debate, including in particular the claim that DHS lacked the authority to adopt the program at all.”).

deny applications even for applicants who have satisfied the eligibility criteria.³⁴⁴ These immigration initiatives do, however, “bind the exercise of prosecutorial discretion of lower-level officials to a more rule-like (categorical and prospective), institutionalized decision-making process, constrain the judgments of line-level officials by subjecting them to centralized supervision, and render the exercise of enforcement discretion far more transparent to the public than is customary.”³⁴⁵ The immigration initiatives reallocated discretion up the chain of bureaucracy to high-level officials and centralized control over prosecutorial discretion.³⁴⁶ These higher-level officials would then oversee the discretionary judgments of lower-level enforcement officials and provide transparency concerning the exercise of this discretion.³⁴⁷

The assessment under this criterion pushes in two directions. On the one hand, such a drastic policy change should have been carried out in a process of notice-and-comment rulemaking because the administration issued an internal memo to convey a substantive, extraordinary policy change. The use of internal administrative law (such as guidance documents) by agencies could be beneficial.³⁴⁸ Here, the administration’s attempt to take advantage of the exemption from the process requirement seems inappropriate. As explained previously, explicit presidential statements suggested that the initiatives were intended to circumvent Congress by creating major immigration reforms that Congress failed to enact.

On the other hand, these policies allegedly do not confer permanent legal status, suggesting that notice-and-comment rulemaking may not have been necessary.³⁴⁹ Contrary to the Fifth Circuit’s ruling in *United States v. Texas*, the Ninth Circuit in *Regents of the University of California v. DHS*³⁵⁰ rejected the notion that “DACA is a legislative rule that would require notice-and-comment rulemaking,” because DACA allows DHS officials to exercise discretion in making deferred action

³⁴⁴ Cox & Rodríguez, *supra* note 57, at 140.

³⁴⁵ *Id.* at 104.

³⁴⁶ *Id.* at 182.

³⁴⁷ *Id.* at 224.

³⁴⁸ Metzger & Stack, *supra* note 143, at 1241 (“More and more, presidents and executive branch officials rely on internal issuances and internal administration to achieve policy goals and govern effectively.”).

³⁴⁹ See OLC Opinion, *supra* note 55, at 33 (concluding that “DHS’s proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.” The different result is based on whether the exercise of enforcement discretion is consistent with congressional priorities). For an evaluation of this framework, see Bellia, *supra* note 55, at 1791.

³⁵⁰ 908 F.3d 476 (9th Cir. 2018).

decisions as to individual cases.³⁵¹ In May 2019, the Fourth Circuit issued a similar ruling.³⁵²

In sum, the process and procedure that the administration employed seems to be inadequate in light of the magnitude of the policy shift. This criterion weighs in favor of finding an improper use of executive authority.

Characteristics of the Agency: DHS has vast experience and knowledge on immigration policies. As previously described, however, the Obama administration argued that the DACA and DAPA memoranda were the product of its discretion to prioritize enforcement. An OLC opinion explained that it was legitimate for agencies with enforcement discretion to set their own priorities on how to exercise this discretion because their resources are limited.³⁵³ This is a common justification for enforcement discretion. It seems plausible, however, that these memoranda were driven by the desire to effectuate a major, value-laden policymaking shift, not a mere concern over limited resources. President Obama explicitly acknowledged this in public announcements. Therefore, it is difficult to conclude whether or not the immigration initiatives were the product of a unique expertise.

Participation of Alternate Actors: Immigration policy should not (or even could not) vary across the states. Immigration policy is a national policy that is set by the federal government.³⁵⁴ Therefore, this criterion weighs in favor of federal executive action because there is no viable or effective alternative entity that could substitute for the federal government in taking action.

Congress's View of the Issue, and Second-Best Alternative: There is wide disagreement among members of Congress about immigration policy, and this is a highly contested issue.

³⁵¹ *Id.* at 507-08; *see also id.* at 510 (“[D]eferred action programs like DACA enable DHS to devote much-needed resources to enforcement priorities such as threats to national security, rather than blameless and economically productive young people with clean criminal records. We therefore conclude that DACA was a permissible exercise of executive discretion, notwithstanding the Fifth Circuit’s conclusion that the related DAPA program exceeded DHS’s statutory authority. DACA is being implemented in a manner that reflects discretionary, case-by-case review, and at least one of the Fifth Circuit’s key rationales in striking down DAPA is inapplicable with respect to DACA.”).

³⁵² *Casa De Md. v. DHS*, 924, F.3d, 684 (4th Cir. 2019) (holding that the DACA program’s rescission was arbitrary and capricious in part because the DHS failed to give a reasoned explanation for the change in policy).

³⁵³ *See, e.g.*, OLC Opinion, *supra* note 55.

³⁵⁴ *See, e.g.*, *Arizona v. U.S.*, 567 U.S. 387, 394-395 (2012) (describing the federal government’s well-settled power to set immigration policy).

President Obama attempted to pass these extraordinary policymaking initiatives as legislation prior to realizing them as executive actions.³⁵⁵ The Obama administration utilized executive action after the immigration reform bill was blocked in Congress.³⁵⁶ Congress considered—but did not adopt—very similar programs. The “DREAM Act,” for example, would have authorized the executive branch to extend legal status to individuals who entered the country illegally before the age of sixteen.³⁵⁷ Still, in *Regents of the University of California v. DHS*,³⁵⁸ the Ninth Circuit stated that there is no argument that Congress has occupied the field with respect to DACA: DACA grants protection from deportation, while the DREAM Act would confer legal permanent residency, which can lead toward U.S. citizenship.³⁵⁹

President Obama stated that he “believe[d] that the best way to solve this problem” was by “work[ing] with both parties to pass a more permanent legislative solution,” and he insisted that “the day [he] sign[ed] that bill into law, the actions [he took would] no longer be necessary.”³⁶⁰ Thus, it seems that the requirement for exhausting the legislative alternative was satisfied.

CONCLUSION

This article seeks to illuminate the situations that grant stronger legitimacy for executive action. In doing this, it aims to contribute to a deeper understanding of contemporary developments in the functions of the federal administrative state.

The proposed multi-factor test illuminates important differences between the Obama administration’s immigration and climate change initiatives. While the immigration initiatives were likely an illegitimate unilateral use of executive power, the climate change initiatives were a legitimate and accountable exercise of authority. The proposed test demonstrates that extraordinary executive action generally requires a

³⁵⁵ For President Obama’s legislative attempts concerning immigration, see, for example, *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014) <https://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276>; Edward Morrissey, *Obama’s Original Sin on DACA*, THE WEEK (Sep. 7, 2017) <https://theweek.com/articles/723056/obamas-original-sin-daca>.

³⁵⁶ See Nakamura & O’Keefe *supra* note 56 (discussing failure of the bill from the gang of eight providing for a path to citizenship).

³⁵⁷ DREAM Act of 2010, S. 3992, 111th Cong. (2010).

³⁵⁸ 908 F.3d 476 (9th Cir. 2018).

³⁵⁹ *Id.* at 507-08 (“Congress’s failure to pass the [DREAM] Act does not signal the illegitimacy of the DACA program, partly because the DREAM Act and the DACA program are not interchangeable policies because they provide different forms of relief: the DREAM Act would have provided a path to lawful permanent resident status, while DACA simply defers removal.”)

³⁶⁰ Remarks by the President in Address to the Nation on Immigration, *supra* note 4.

high, but not insurmountable, bar—most importantly, the presence of an urgent problem with significant global dimensions. An adequate process is also of major importance. The test’s additional factors also improve on the existing judiciary tools to evaluate extraordinary executive action by taking congressional gridlock into account and giving the president greater freedom to act when Congress has failed to do so.

While some scholars advocate empowering Congress to make it “great again,”³⁶¹ this article argues in favor of stronger executive power in situations that demonstrate an appropriate need for it while embracing safeguards and caution. The proposed legal framework will allow the executive branch more leeway to act on highly significant policymaking initiatives, while simultaneously forbidding illegitimate executive assertions. Adapting the legal landscape will reduce executive branch authorization struggles and possible manipulations and will hopefully restore public trust in the government’s ability to solve complex problems.

³⁶¹ Current legislative proposals attempt to restore Congress’ lost power in the face of a bold executive branch. The Regulations from the Executive in Need of Scrutiny Act (REINS Act), H.R. 26, 115th Cong. § 3 (2017), is a bill that would require congressional approval of all new major regulations. *See also* Cary Coglianese & Gabriel Scheffler, *What Congress’s Repeal Efforts Can Teach Us about Regulatory Reform*, 3 ADMIN. L. REV. ACCORD 43, 48 (2017); JOSH CHAFETZ, CONGRESS’S CONSTITUTION—LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 315 (2017) (“Claims that Congress is somehow structurally doomed to be the least effective branch are mistaken. Congress has all the institutional powers it needs to allow it to play a vigorous role in American governance.”).