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### The Bounds of Executive Discretion in the Regulatory State

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## INTRODUCTION

### THE BOUNDS OF EXECUTIVE DISCRETION IN THE REGULATORY STATE

CARY COGLIANESE<sup>†</sup> & CHRISTOPHER S. YOO<sup>††</sup>

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Today's Congress appears to be far from the kind of robust institution that the Framers of the U.S. Constitution feared when they characterized the legislature as the most dangerous branch of government.<sup>1</sup> Political polarization and gridlock have hampered Congress's ability to act and undoubtedly contributed to the fact that today's worries about the concentration and abuse of federal power usually center on the executive branch.<sup>2</sup> Legal scholar Bruce Ackerman, for example, has decried how modern circumstances have "transformed the executive branch into a serious threat to our constitutional tradition."<sup>3</sup> Arguing that executive power threatens American democratic governance, scholar Peter Shane has plainly declared that "the President is the most dangerous branch."<sup>4</sup>

Such claims of excessive executive power call to mind historical examples of forceful exertions of presidential authority, such as when President Truman asserted inherent executive authority to seize and run the nation's steel mills, a move the Supreme Court famously blocked in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>5</sup> But present-day concerns over executive power have emerged as more than a matter of historical interest. Contemporary scholarly voices of alarm join with those of political leaders from both the right and the left who, not surprisingly, in their turn deplore exercises of executive authority by administrations of their opposing parties.<sup>6</sup> Democrats have resoundingly criticized President George W. Bush and his Administration's invocation of the unitary executive theory, while Republican members of Congress have taken

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1 See, e.g., THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . . [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."). This fear of legislative tyranny explains why the Constitution divided the Congress into two houses, each of which must consent before any bill can become law.

2 Such alarm is, of course, hardly new. See ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY viii (1973) (describing an increasing "conception of presidential power so spacious and peremptory as to imply a radical transformation of the traditional polity" and arguing that "[t]he constitutional Presidency . . . has become the imperial Presidency").

3 BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 4 (2010).

4 PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 18-21 (2009). Ackerman and Shane are not alone in this regard. For examples of similar arguments, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1821 (1996), claiming that "the executive branch long ago supplanted its legislative counterpart as the most powerful—and therefore most dangerous—in the sense that the Founders meant," and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 223 (1994), asserting that "[t]ruly, the executive—the Presidency—is the most dangerous branch."

5 See 343 U.S. 579, 587 (1952) ("Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.").

6 See Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 638 (2010) (noting that "Democrats can be expected to be more critical of the exercise of presidential power by Republican Presidents, and vice versa").

to criticizing—even suing—the Obama Administration over executive initiatives on policies as varied as health care, immigration, and gun control.<sup>7</sup>

Although fierce, many recent legal controversies over executive power have involved what remains, at least to the larger public, a relatively obscure aspect of government: namely, the implementation of domestic policies by the many cabinet departments and other administrative agencies that carry out governmental functions on a day-to-day basis. This vast apparatus of the regulatory state, centered within the executive branch, has grown dramatically since the founding of the United States. Although less visible to most Americans than other governmental institutions like Congress or the presidency, federal departments and agencies wield power over vast segments of the economy, affecting almost every important facet of contemporary life. 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.

Not only do contemporary controversies revolve around the day-to-day operation of the regulatory state, but they also increasingly involve still subtler exercises of executive discretion than (merely) deciding what policies to adopt or actions to take. Several important controversies in recent years center not so much on executive *action* at all—as was the case with Truman’s attempt to seize control of steel mills—but rather on the strategic deployment of executive *inaction*. When the Obama Administration announced in 2013 that it was effectively extending certain compliance deadlines under the Affordable Care Act, it did so by declaring that it would *refrain from* taking enforcement actions for the period of the extension.<sup>8</sup> Similarly, when President Barack Obama announced a major immigration reform initiative in 2014, the centerpiece of that reform package was

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<sup>7</sup> See, e.g., Ashley Parker, ‘Imperial Presidency’ Becomes a Rallying Cry for Republicans, N.Y. TIMES (Mar. 31, 2014), <http://www.nytimes.com/2014/04/01/us/politics/imperial-presidency-becomes-republicans-rallying-slogan.html> [https://perma.cc/FN73-DJCZ] (observing that Republicans have called President Obama an imperial President, “encapsulat[ing] their criticisms about government overreach” due to the President’s policy initiatives). Contrasting assessments by U.S. Senators from different parties are illustrative. Compare Dianne Feinstein, U.S. Senator, Warning Against the Bush Administration’s Efforts to Vastly Expand Executive Power (May 30, 2006), <http://www.feinstein.senate.gov/public/index.cfm/2006/5/5b391b57-7e9c-9af9-72a8-c4f965foa085-post> [https://perma.cc/XFM3-JWCD] (“[The Bush] Administration has, in my view, implemented a multi-pronged, ongoing effort to concentrate power under the Executive - contrary to our constitutional framework . . .”), with Ted Cruz, *The Obama Administration’s Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL’Y 63, 99 (2015) (“There is no basis in history for [President Obama’s] sweeping view of executive power.”).

<sup>8</sup> See Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Ctrs. for Medicare & Medicaid Servs., Dep’t of Health & Human Servs., to Ins. Comm’rs. (Nov. 14, 2013), <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf> [https://perma.cc/M9XL-XZQW] (“Under this transitional policy, health insurance coverage in the individual or small group market that is renewed for a policy year starting between January 1, 2014, and October 1, 2014, and associated group health plans of small businesses, will not be considered to be out of compliance with the market reforms specified below under the conditions specified below.”).

the Administration's stated commitment *not to enforce* immigration laws against certain undocumented immigrants whose children are U.S. citizens or legal permanent residents.<sup>9</sup> In both of these instances, the Obama Administration justified its policy choices at least in part on executive discretion *not* to pursue certain enforcement actions.<sup>10</sup>

It has long been accepted that, absent any express statutory restriction to the contrary, the executive branch possesses broad discretion over which cases it prosecutes and which ones it does not.<sup>11</sup> Legal restrictions on executive authority have typically applied only after the executive branch has decided to act, not before it acts. Before any final action occurs, the executive branch possesses what the Supreme Court has recognized as an "absolute discretion," at least when it comes to enforcement.<sup>12</sup> Yet today, the absoluteness of that discretion is being put up for debate. As Presidents and their appointees increasingly find more creative ways to achieve substantive policy results through what have previously been considered completely discretionary means, it becomes understandable that scholars, governmental leaders, and

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<sup>9</sup> See Press Release, The White House Office of the Press Sec'y, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> [<https://perma.cc/3VJ5-YTR7>] ("DHS will also create a new deferred action program for people who are parents of U.S. Citizens or Lawful Permanent Residents (LPRs) and have lived in the United States for five years or longer if they register, pass a background check and pay taxes.").

<sup>10</sup> On the ACA, see Greg Sargent, *White House Defends Legality of Obamacare Fix*, WASH. POST: PLUM LINE (Nov. 14, 2013), <https://www.washingtonpost.com/blogs/plum-line/wp/2013/11/14/white-house-defends-legality-of-obamacare-fix> [<https://perma.cc/P82F-3QAU>], which quoted the Obama Administration's response that "[t]he Supreme Court held more than 25 years ago that agencies charged with administering statutes [sic] have inherent authority to exercise discretion to ensure that their statutes are enforced in a manner that achieves statutory goals and are consistent with other administrative policies." On immigration, see Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action\\_1.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf) [<https://perma.cc/4858-KALY>], which stated that "[d]eferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission."

<sup>11</sup> On occasion, Presidents have even challenged provisions of statutes mandating enforcement as unconstitutional infringements on their enforcement discretion. See Statement on Signing the Immigration Act of 1990, 2 PUB. PAPERS 1717, 1718 (Nov. 29, 1990) ("I do not interpret this provision [on "temporary protected status"] as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions."); Statement on Signing the Safe Drinking Water Act Amendments of 1986, 1 PUB. PAPERS 802, 803 (June 19, 1986) ("The principle of prosecutorial discretion is an essential ingredient in the execution of the laws. I believe that the Congress cannot bind the Executive in advance and remove all prosecutorial discretion without infringing on the powers of the Executive.").

<sup>12</sup> See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

the public are beginning to wonder about whether there should be any limits on this approach to the exercise of executive power. It was not very surprising that the Supreme Court granted certiorari to review a district court injunction blocking the Obama Administration's immigration policy.<sup>13</sup> But it was telling that the Court, on its own accord, added to the questions raised by the parties a constitutional question involving the duty of a President to take care that federal laws are faithfully executed.<sup>14</sup>

Although the Court ultimately declined to answer any of the questions raised in that case,<sup>15</sup> the central question remains: what are the proper bounds of executive discretion in the regulatory state, especially over administrative decisions not to take enforcement actions? This question, which, just by asking it, would seem to cast into some doubt the seemingly absolute discretion the executive branch has until now been thought to possess, has become the focal point of the latest debate to emerge over the U.S. Constitution's separation of powers. That ever-growing, heated debate is what motivated more than two dozen distinguished scholars to gather for a two-day conference held late last year at the University of Pennsylvania Law School, a conference organized around the papers appearing in this special Issue of the *University of Pennsylvania Law Review*. We are pleased to introduce this insightful collection of scholarship by explicating the conceptual contours underlying the contemporary debate over executive discretion, and its bounds, in the regulatory state.

## I. THE FACES OF EXECUTIVE DISCRETION

To begin to understand how executive discretion is or should be bounded, it helps to define what "executive discretion" means. We take "discretion" plainly to mean the unconstrained exercise of governmental power. We take "executive" to encompass not only the President but also the White House staff as well as the appointees and other officers who serve within the administrative agencies that carry out the laws adopted by Congress. To ask about the bounds of executive discretion, then, is to ask about how much unconstrained power the President and administrative officials should possess. In this introductory Article, we do not offer answers to that question, for, broadly speaking, that question is what the articles that follow in this Symposium seek to address. Here, we simply note that what bounds are, or should be, placed on executive discretion will likely depend on the type of power under consideration.

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<sup>13</sup> *United States v. Texas*, 136 S. Ct. 906, 906 (2016).

<sup>14</sup> *See id.* ("In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.'").

<sup>15</sup> The Court affirmed the Fifth Circuit decision in a per curiam ruling with an evenly split Court. *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

### A. *Three Faces of Executive Power*

Political scientists have long grappled with the meaning of power, and, over forty years ago, political theorist Steven Lukes offered a significant advance by articulating what have come to be known as the three faces of power.<sup>16</sup> Greatly simplifying, these three faces comprise the powers to make decisions, set agendas, and shape preferences.<sup>17</sup> Lukes's framework conceptualizes power within any social and political arena, including government.

Without denying the value of Lukes's framework as a matter of sociology, we think that, from the standpoint of constitutional and administrative law, it is helpful to recognize three slightly different ways of conceiving of the faces of *executive* power: the power to *command*, *persuade*, and *defer*. These three faces of executive power are not incompatible with Lukes's framework, but they serve to illuminate key questions about how (or by how much) each type of executive power should be constrained by law.

The first face of executive power is the *power to command*. For most readers, this will be the kind of power that most naturally springs to mind when thinking about executive discretion. It is also very closely related to Lukes's first face of power of decisionmaking. The power to command is the power, as political scientist Robert Dahl once wrote, to compel people to do what they "would not otherwise do."<sup>18</sup> Truman's executive order seeking to seize control of the nation's steel mills is a paradigmatic example of the power to command. It is a power that compels action, invoked any time government adopts an order or a rule.<sup>19</sup>

Well-accepted principles of U.S. constitutional and administrative law treat this type of power most suspiciously, making it more likely to be subject to judicial review than any other type of executive power. The Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>20</sup> blocking President Truman's steel seizure order, makes plain that presidential action of this first type must be grounded in law and will be scrutinized by the courts. As Justice Robert Jackson's concurring opinion in *Youngstown* makes clear, when a President acts in contravention of a statute, "his power is at its lowest ebb."<sup>21</sup>

Likewise, when an administrative agency exercises its power to command, the Administrative Procedure Act (APA) affords anyone adversely affected an

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<sup>16</sup> See generally STEVEN LUKES, *POWER: A RADICAL VIEW* (1974).

<sup>17</sup> *Id.* at 32.

<sup>18</sup> Robert A. Dahl, *The Concept of Power*, 2 *BEHAV. SCI.* 201, 202-03 (1957).

<sup>19</sup> See Administrative Procedure Act (APA), 5 U.S.C. § 551(13) (2012) (defining "agency action" to mean the adoption of a "rule, order, license, sanction, relief, or the equivalent").

<sup>20</sup> 343 U.S. 579 (1952).

<sup>21</sup> *Id.* at 637 (Jackson, J., concurring).

opportunity to seek judicial review of the agency's action.<sup>22</sup> The courts can hold invalid agency actions that offend constitutional or statutory requirements, fail to derive from proper procedure, or are determined to be "arbitrary" or "capricious."<sup>23</sup>

The second face of executive power is the *power to persuade*. Chief Justice John Roberts had this type of power in mind when, writing in his majority opinion in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, he castigated Justice Stephen Breyer's dissenting opinion for essentially relegating the President to a position of "cajoler-in-chief."<sup>24</sup> But at least as far back as the presidency of Theodore Roosevelt, with his popularization of the bully pulpit, the President's power to cajole has been well-established and acknowledged to be influential. As a matter of real impact, persuasion may well be the President's most important, if not only, real source of power for most purposes. Political scientist Richard Neustadt thought as much, defining presidential power explicitly in terms of the power of persuasion.<sup>25</sup> Although Chief Justice Roberts seemed to suggest that cajoling diminished the office of the presidency, Presidents actually have a distinctive capacity to persuade others, particularly when it comes to what issues should be on the broader policy agenda. As political scientist John Kingdon has noted, "[T]he president can single-handedly set the agendas, not only of people in the executive branch, but also of people in Congress and outside the government."<sup>26</sup> Despite this substantial and practically important type of power, the power to persuade, unlike the power to command, is not constrained by law in any meaningful way.<sup>27</sup>

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<sup>22</sup> See 5 U.S.C. § 702 (2012) ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.")

<sup>23</sup> *Id.* § 706.

<sup>24</sup> 561 U.S. 477, 501-02 (2010).

<sup>25</sup> RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 30 (Free Press 1991) (1960). Joining him in this view is political scientist Clinton Rossiter, who recognized, though, that persuasion is not always easy, even for a President. See CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 41 (1956) (positing that the President's most difficult challenge stems from the need "to persuade the pertinent bureau or agency—even when headed by men of his own choosing—to follow his direction faithfully").

<sup>26</sup> JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 23 (updated 2d ed. 2011). For a discussion of presidential influence over the rulemaking agendas at administrative agencies, see Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93 (2016).

<sup>27</sup> We recognize, of course, that regulatory agencies can try to use the power to persuade as a strategy for shaping behavior and will be subject to legal constraints when they do so. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 255 (2008) (making a case for the use of "the gentle nudge" as a means of accomplishing regulatory goals). Whether in adopting default rules or information disclosure regulations, agencies are still actually exercising a power to *command* regulated entities to act in certain ways; they are just, for example, requiring these entities to disclose information with the aim of activating third parties who will persuade the disclosers to change other behavior. See *id.* at 190-92 (describing a requirement that companies disclose their releases of toxic chemicals, creating "bad publicity" that motivates companies to reduce their pollution). As such, regulatory nudges will be constrained in much the same way as other regulatory commands. They must be consistent with legal authority, promulgated through proper procedure, and grounded in sound policy reasoning.



The third face of executive power is the *power to defer*. This type of power involves the use of *inaction* as a lever to achieve policy outcomes. It is this face of power that underlies several of the most recent controversies over executive power. When the Obama Administration announced that it would not enforce certain employer deadlines in the Affordable Care Act, and when it announced that it would refrain from taking immigration action against certain undocumented immigrants, it asserted its power to defer.<sup>28</sup> Although these current uses of the power to defer have stirred much controversy, the governmental power to defer has been around for a long time and is especially prevalent in the context of law's enforcement.<sup>29</sup> Prosecutorial discretion is a paradigmatic example. The power lies not merely in prosecutors' freedom to defer pressing charges, but also in the way that discretion affords prosecutors considerable influence over defendants. By using their discretion over what charges to file as a bargaining chip, prosecutors can lead many defendants to waive their right to a jury trial and plead guilty.

In the regulatory state, an administrative agency's power to defer can sometimes have a similar "bargaining chip" effect. By steering enforcement resources toward certain kinds of behavior and away from others, agencies have sometimes tried to use their power to defer in an attempt to shape private conduct. In the 1990s, for example, the Occupational Safety and Health Administration (OSHA) announced a policy according to which the Agency would allow regulated firms to "choose" the level of scrutiny that OSHA would apply to them.<sup>30</sup> If a company cooperated and put in place a health and safety management system (which was not something required by law), OSHA would place the company on a low-priority status for inspection.<sup>31</sup> If a company did not cooperate by putting in place OSHA's

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<sup>28</sup> See *supra* notes 8–10 and accompanying text.

<sup>29</sup> It is not only present in the enforcement context, of course. When a statute delegates broad rulemaking authority but offers little direction as to when or how an agency must use that rulemaking authority, the agency will also be able to exercise its power to defer. It should also be acknowledged that other branches of government have the power to defer, as well. The Supreme Court, for example, can defer granting petitions for certiorari on important issues until the Justices believe they have a case that frames issues productively. See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 236 (1991) ("When assessing whether or not a case is a good vehicle, the decision must be made in terms of 'is a better case likely?'").

<sup>30</sup> See Occupational Safety and Health Administration Directive CPL 02-00-119, OSHA High Injury/Illness Rate Targeting and Cooperative Compliance Programs (Dep't of Labor 1997), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=1516&p\\_table=DIRECTIVES](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=1516&p_table=DIRECTIVES) [<https://perma.cc/PX9L-VZ8V>] [hereinafter "OSHA Directive"] (detailing the agency's "Cooperative Compliance Program" under which facilities that "choose to participate" will be placed on secondary or tertiary inspection lists that reduce their chances of inspection by at least seventy to ninety percent). For further background on this "choose your OSHA" approach, see John D. Donahue, *The Unaccustomed Inventiveness of the Labor Department*, in INNOVATIONS IN GOVERNMENT: RESEARCH, RECOGNITION, AND REPLICATION 93, 96 (Sandford Borins ed., 2008).

<sup>31</sup> OSHA Directive, *supra* note 30.

desired management system, then the Agency assured the company of a high likelihood of receiving an inspection, and presumably a very rigorous one at that.<sup>32</sup> OSHA claimed merely to be exercising its power to defer, its discretion over when and who to inspect, but a panel of the U.S. Court of Appeals for the D.C. Circuit rejected that position.<sup>33</sup> According to the court, OSHA's policy was more than just an internal "inspection plan"; it actually amounted to a new regulation, and thus the agency needed to go through a full notice-and-comment rulemaking procedure.<sup>34</sup>

Although the court rejected OSHA's attempt to use its power to defer to achieve the Agency's strategic goals, in most circumstances agency decisions to defer on inspections or enforcement actions have been left entirely unconstrained. In *Heckler v. Chaney*, the Supreme Court rejected a statutory challenge to the Food and Drug Administration's (FDA) decision to decline to take enforcement action against state correctional facilities that were administering the death penalty through lethal injection.<sup>35</sup> The federal Food, Drug, and Cosmetic Act (FDCA) gives the FDA the authority to enforce its many provisions, which include a requirement that drugs be approved as "safe and effective" before they can be lawfully administered.<sup>36</sup> Even though it seemed facially obvious that the use of drugs for lethal injections violated the FDCA, the Court refused to order the FDA to take any enforcement action against the states. The Court held that, in cases of agency "[r]efusals to take enforcement steps," "the presumption is that judicial review is not available."<sup>37</sup> The Court reasoned that setting enforcement priorities were policy choices, not legal ones:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The

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<sup>32</sup> *Id.*

<sup>33</sup> *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 211-13 (D.C. Cir. 1999).

<sup>34</sup> *Id.* at 212-13.

<sup>35</sup> 470 U.S. 821, 828 (1985).

<sup>36</sup> *Id.* at 824.

<sup>37</sup> *Id.* at 831. The Court noted that the APA, 5 U.S.C. §701(a)(2), does not afford judicial review to actions that are "committed to agency discretion" by law. *Id.* at 832.

agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>38</sup>

Furthermore, the Court noted that decisions not to act do not usually amount to an exertion of “coercive power over an individual’s liberty or property rights,” which would present the kinds of issues that courts typically seek to protect.<sup>39</sup>

Although the *Heckler* Court unanimously concluded that the APA did not authorize the courts to compel FDA enforcement, it did acknowledge that agencies cannot decline to take enforcement actions if doing so would contravene statutory guidelines. “Congress may limit an agency’s exercise of enforcement power if it wishes,” the Court noted, “either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”<sup>40</sup> Furthermore, as Cass Sunstein has argued, it appears that *Heckler* “does not authorize the executive to fail to enforce those laws of which it disapproves.”<sup>41</sup> But exactly how to determine whether decisions to defer are based on mere disapproval will not always be clear, something even Sunstein has acknowledged.<sup>42</sup> At present, what does seem quite clear is that *Heckler* gives government agencies a strong presumption of absolute discretion whenever they exercise their power to defer.

Looking across all three faces of executive power—command, persuade, and defer—it is possible to say that these powers correspond to three degrees or levels of legal constraint. The power to command faces the greatest constraint and oversight by the courts. *Youngstown* teaches that when commanding, the President must possess authority to do so and must not act in opposition to legislative principles. The APA makes plain that when agencies issue orders or rules, those who are adversely affected by them may seek to review the substantive and procedural legality of those actions. By contrast, the power to persuade faces the least amount of constraint—basically none at all. Somewhere in between, but usually close to the “no constraint whatsoever” end of the spectrum, lies the power to defer, at least absent any specific guidelines for action contained within an applicable statute.

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<sup>38</sup> *Id.* at 831-32.

<sup>39</sup> *Id.* at 832.

<sup>40</sup> *Id.* at 833.

<sup>41</sup> Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985).

<sup>42</sup> *Id.* at 672-73.

B. *Executive Discretion: Presidential and Administrative*

Just as distinguishing the three faces of executive power helps to clarify the bounds of executive discretion in the regulatory state, it can also prove helpful to distinguish between two main components of “executive” in the concept of executive discretion: Presidents versus the administrators they appoint to head administrative agencies. Obviously Presidents spring immediately to mind in any consideration of executive power; after all, Article II of the Constitution declares that “[t]he executive power shall be vested in a President.”<sup>43</sup> Yet under most statutes, Congress has delegated authority to administrators; they are the officials granted the express powers to command or defer in ways that carry out the aims and responsibilities contained in specific legislation. These powers, exercised ultimately by administrators, are the ones that give rise to the kinds of questions about the bounds of executive discretion that are addressed throughout this Symposium.

Let us return to the example of the Department of Labor’s choose-your-OSHA policy from the 1990s. That enforcement policy came about following a public announcement by President William Clinton of a “New OSHA” initiative, under which the agency would adopt smarter approaches to reducing workplace injuries, including the choose-your-OSHA compliance policy.<sup>44</sup> Vice President Albert Gore even presented OSHA with an award for a regional prototype of the policy as part of a White House–driven initiative, called the National Performance Review, which sought to encourage agencies to pursue innovative regulatory strategies.<sup>45</sup> Yet despite these White House efforts, the policy was formally adopted by the Department of Labor, and it was the Secretary of Labor who was named in the D.C. Circuit litigation over the policy. For similar reasons, even though President Obama may have announced his Administration’s actions to delay the compliance period for mandated health insurance and to defer taking deportation actions against certain undocumented immigrants, these actions were legally effectuated by the Administrators heading the Internal Revenue Service and the Department of Homeland Security, respectively.

Distinguishing between the President, who possesses “the executive power” under Article II, and a series of administrators, who are granted delegated authority to act by statute, proves to be crucial to understanding

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<sup>43</sup> U.S. CONST., art. II, § 1, cl. 1.

<sup>44</sup> See Press Release, U.S. Dep’t of Labor, OSHA Expands Cooperative Compliance Programs to Reduce Injuries and Illnesses in the Workplace (Nov. 25, 1997), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=1075](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=1075) [<https://perma.cc/TJ4C-VVWS>] (“CCPs are part of the new, common-sense approach to OSHA announced by President Clinton in May 1995.”).

<sup>45</sup> *Id.*

the broader debate over the unitary executive.<sup>46</sup> On the one hand, we can ask whether the statutory grant of authority to a specific administrator implies some limitation on presidential involvement in the actions undertaken by that administrator. On the other hand, is a statutory grant to an administrator still subject to the Constitution's vesting of executive power in "a" President? These questions have been debated throughout the nation's history and examined extensively in constitutional scholarship.<sup>47</sup> We thus do little here beyond noting these larger questions, although they do turn out to be relevant to much of the discussion in this Symposium, even if they are only lurking in the background at times. The key point for our purposes here is simply that the statutorily authorized, as well as practically vital, role for administrators in executive governance also helps to explain why so much constitutional law involving the separation of powers has centered on the President's relationship to administrators, particularly with respect to the President's authority to appoint and remove those administrators.<sup>48</sup>

The distinction between Presidents and administrators also lies at the heart of the Take Care Clause, which several of the contributors to this Symposium analyze in detail. This clause may well constrain executive power to defer, imposing an obligation to enforce laws "faithfully," as perhaps hinted by the Supreme Court when it added the Take Care Clause question to its grant of review of the Obama Administration's immigration deferred action program.<sup>49</sup> Without a doubt, the clause speaks to the President, imploring that "*he* shall take Care that the Laws *be* faithfully executed."<sup>50</sup> As Professor Sunstein has written, this provision articulates a clear "duty" and "imposes an obligation on the President."<sup>51</sup>

But recognizing that the clause imposes some duty on the President does not make clear what bounds might exist on executive discretion to defer. Instead, it raises two further questions. First, what exactly is the duty imposed by the clause? Surely it is not for the President directly to enforce

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<sup>46</sup> See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 3-4 (2008) ("[T]he theory of the unitary executive holds that the Vesting Clause of Article II . . . is a grant to the president of all of the executive power, which includes the power to remove and direct all lower-level executive officials.")

<sup>47</sup> See *id.* at 3-21 (reviewing the debate in constitutional scholarship over the President's authority over subordinate executive officials). See generally *id.* (tracing historical claims surrounding Presidents' assertion of authority over executive officials).

<sup>48</sup> For seminal cases on the President's relationship to agency administrators, see *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010); *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); and *Myers v. United States*, 272 U.S. 52 (1926).

<sup>49</sup> *United States v. Texas*, 136 S. Ct. 906, 906 (2016).

<sup>50</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>51</sup> Sunstein, *supra* note 41, at 670.

the law, but rather, as the text of the provision makes plain, it is for the President to see that the law is faithfully executed *by others*—namely, by the administrators who are given statutory authority to implement and enforce. Second, what duty, if any, does the clause impose on those administrators themselves? The text of the Take Care Clause would seem plainly to impose its obligation on *the President*, not on the administrators.

Yet can it really be the case that the President has a constitutional duty to see that the laws are faithfully executed, but that administrators have no similar constitutional obligation to execute laws, faithfully or otherwise? Answering this question about the Take Care Clause brings us back to the debate over the unitary executive theory.<sup>52</sup> It also brings us back to the three faces of executive power.<sup>53</sup>

Asking whether the Take Care Clause imposes obligations on administrators, either directly or indirectly, contemplates a scenario much like that raised by the Obama Administration's deferred action immigration plan, where *an Administrator* sought to exercise the power to defer.<sup>54</sup> Admittedly, the President happened to agree with the Administrator—and, in fact, the Administrator may even have been directed by the President to implement the deferred action program. But for sake of analysis, let us vary the scenario slightly to imagine a President who does not support an administrator's exercise of the power to defer. Does the President have the power to command that the administrator no longer defer? If so, and if the administrator has a duty to obey the President's command, then the duty that the Take Care Clause imposes on the President can effectively be transferred to the administrator by the use of a presidential order.

Of course, some scholars will no doubt still be inclined to argue that the President has no directive authority that can impose a duty to execute on the administrator. Any such duty, they would argue, would need to be imposed by Congress, especially given that the Supreme Court in *Heckler* has acknowledged that Congress can impose that duty. As for the President, if he possesses no directive authority over his administrators, then he must seek to fulfill his constitutional duty to see that the laws are faithfully executed by exercising his power to persuade, a power which presumably can be made stronger by also making threats to exercise his authority to remove a recalcitrant administrator.

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<sup>52</sup> See CALABRESI & YOO, *supra* note 46.

<sup>53</sup> See *supra* Section I.A.

<sup>54</sup> See *supra* note 9 and accompanying text.

## II. THE BOUNDS OF EXECUTIVE DISCRETION

Up to this point in this introduction, our aim has been to provide some conceptual order to illuminate and organize the underlying legal issues implicated by recent controversies over the use of executive power. We have argued that any analysis of the bounds of executive discretion in the regulatory state should begin by distinguishing between the type of executive power exercised as well as the executive actor under scrutiny, the President versus administrator. The discretion by an administrator not to act ought to be distinguished from that same administrator's discretion over what actions to take—as well as from the discretion inherent in the President's exercise of executive power. With *Heckler* as the principal foundation, we have argued that an administrator's power to defer has virtually no legal bounds on it at all—at least (a) without some statutory compulsion or guidelines, or (b) absent (i) a relevant presidential order, and (ii) an obligation on the part of the administrator to follow the President's order.

As should be clear, this framework still leaves much to be worked out, not the least of which will be some of the persistent points of debate over separation-of-powers law, such as the question of an administrator's duty to obey presidential orders. Still, we offer the framework here to help clarify the importance of the scholarship presented in this Symposium. Discerning the bounds of executive discretion in the regulatory state, as we hope should by now be evident, requires attention to the proper scope of executive power in U.S. constitutional governance, consideration of special concerns about the use of executive discretion to defer administrative action, and an assessment of possible doctrinal and nondoctrinal bounds on that discretion to defer. In this Section, we briefly introduce the articles that follow in this Symposium and explain how they contribute to a better understanding of the vital issues implicated by executive discretion and its limits.

### A. *The Scope of Executive Power*

The first three articles in this Symposium examine a baseline question of whether the executive branch wields too much power. In his article drawing on his keynote address at the University of Pennsylvania Law School conference, Professor Cass Sunstein argues that, when compared with the legislative and judicial branches, the executive branch possesses a superior ability to gather and process information.<sup>55</sup> Drawing on a case study of a Department of Transportation rule that requires automobile manufacturers

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<sup>55</sup> See Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1613 (2016) (“With respect to the acquisition of information, the executive branch is usually in a far better position than the legislative and judicial branches.”).

to install backup cameras in cars, he contends that the power exercised by the executive branch generally makes for better regulatory decisions. As a result, Sunstein suggests that courts should keep from constraining executive discretion too severely and even apply a more deferential standard of review when reviewing agency interpretations of their own regulations.<sup>56</sup>

Professor Michael Gerhardt expresses some skepticism that the legislative branch is as deficient as Sunstein argues; however, even accepting that the executive branch has a greater informational advantage, Gerhardt calls attention to what he considers an inherent tendency of the presidency to aggrandize its powers, making it the branch most prone to “constitutional arrogance.”<sup>57</sup> Gerhardt suggests that the legislative and judicial branches can check the aggrandizement of presidential power to some extent, as can public opinion. But he concludes with a degree of pessimism about the effectiveness of these checks—particularly public opinion—especially when low-salience issues are involved.<sup>58</sup>

Professor Eric Posner suggests that framing the issue as one of striking the proper balance between executive and legislative power focuses attention on the wrong question.<sup>59</sup> Posner argues that decisions about the propriety of executive and legislative action should draw guidance from a more direct analysis of the government’s optimal structure rather than a comparison of the relative strength of the various branches.<sup>60</sup> The question of how “much” executive power should be constrained, in other words, cannot be answered in the abstract. Similarly, given the dynamic interaction that necessarily exists between the branches of government, it is difficult to forecast how any change to a single structural rule will affect the relative power of any branch.

### B. *Executive Power to Defer*

The next three articles analyze specific exercises of executive discretion: the implementation of the Affordable Care Act; the Obama Administration’s

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<sup>56</sup> See *id.* at 1629 (“An appreciation of the epistemic advantages of the executive branch, and the relevance of those advantages to the ascertainment of meaning in the face of genuine ambiguity, strongly suggests that *Auer* is entirely right.”).

<sup>57</sup> See Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1651 (2016) (explaining that Presidents display “constitutional arrogance” by “using their unilateral powers to break boundaries and displace other constitutional authorities”).

<sup>58</sup> See *id.* at 1657, 1669 (observing that “it is common for Presidents to bypass Congress” and that “[t]he courts generally—and the Supreme Court in particular—defer to administrative agencies and uphold executive actions more often than not” (footnote omitted)).

<sup>59</sup> Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive “Underenforcement,”* 164 U. PA. L. REV. 1677, 1680 (2016) (noting “the difficulty of defining and measuring power, let alone determining whether the power of different branches ‘balances’”).

<sup>60</sup> See *id.* at 1682 (positing that, instead of seeking to balance power between the Executive and Congress, “[a] more promising approach is for the judicial department to address directly the social costs and benefits of proposed changes to government structure that end up in court”).



immigration reform; and the use of presidential signing statements. Each of these examples focuses on the use of nonenforcement discretion—or the power to defer—to achieve policy objectives.

Professor Nicholas Bagley discusses the Obama Administration's use of executive discretion in implementing the Affordable Care Act (ACA), exhaustively assessing the legality of a variety of executive actions that have generated criticism. Although he finds the Obama Administration mostly acted lawfully in implementing the ACA, he does question the legality of the Administration's announcement that it would temporarily decline to enforce certain statutory deadlines and would reallocate certain appropriations to ensure the ACA could be rolled out.<sup>61</sup> Bagley acknowledges that the Administration may have thought these actions were justifiable as a matter of policy or politics, but he warns that the long-term adverse consequences of the steps the Administration took may outweigh the short-term benefits.<sup>62</sup>

Professor Patricia Bellia uses the Take Care Clause to analyze the Obama Administration's attempt to frame its decision not to enforce the immigration laws against certain types of people as a matter of prosecutorial discretion.<sup>63</sup> Bellia notes that the Take Care Clause cuts both ways in terms of discretion, recognizing that Presidents possess discretion in how the law is enforced, while simultaneously obligating them to execute the law in a faithful manner.<sup>64</sup> Her review of the existing judicial precedents, as well as the opinion issued by the Office of Legal Counsel on the legality of the Obama Administration's immigration initiative, indicates that answers to the key questions remain unsettled.<sup>65</sup>

Professor Christopher Yoo examines another form of executive discretion that has proven increasingly controversial: the presidential signing

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<sup>61</sup> See Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1721-25, 1729-35 (2016) (noting legal issues pertaining to "administrative delays" and "cost-sharing subsidies").

<sup>62</sup> See *id.* at 1746-47 ("The price of such self-help, however, is likely to be paid in the further accretion of executive power, in the setting of precedents that make it easier for future Presidents to sidestep legal constraints, and in the tit-for-tat escalation of interbranch conflict.").

<sup>63</sup> See Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1756 (2016) ("This Article uses DAPA to explore the tension between the discretion-granting and discretion-limiting features of the Faithful Execution Clause.").

<sup>64</sup> See *id.* (arguing that "the clause seemingly embeds some flexibility to decide when and how to exercise that power," but also that "the clause calls for the President not merely to ensure that the laws be executed, but that they be 'faithfully' executed").

<sup>65</sup> See *id.* at 1791 (contending that "[t]he OLC framework appears to collapse [statutory and constitutional] inquiries," and that therefore its framework "may introduce too much elasticity into the analysis").

statement.<sup>66</sup> If viewed as a prospective statement of how a statute will and will not be enforced, signing statements can be seen as a form of nonenforcement discretion.<sup>67</sup> Yoo argues that signing statements raising constitutional objections are implicit both in *Marbury v. Madison*<sup>68</sup> as well as in the longstanding tradition of permitting Presidents not to defend the constitutionality of every statute.<sup>69</sup> Signing statements about the interpretation of statutes, Yoo urges, should be governed by an equal dignity principle, which holds that presidential and congressional legislative history should receive equal treatment, either by ignoring both or giving each equal weight.<sup>70</sup>

### C. *Assessing Possible Bounds*

The articles in the final part of this Symposium offer careful consideration of the potential bounds on executive discretion in the regulatory state. Professors Jack Goldsmith and John Manning augment Professor Bellia's discussion of the ways that the Take Care Clause both recognizes and limits presidential discretion by considering still three additional ways: supporting the President's power to remove subordinate executive officers; limiting courts' authority to second-guess Presidents' enforcement discretion; and serving as the textual basis for what Henry Monaghan called the "protective power"<sup>71</sup> (and what Manning and Goldsmith have elsewhere called the "completion power"<sup>72</sup>). Manning and Goldsmith argue that, to date, the courts have not

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<sup>66</sup> Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1802-04 (2016) (observing that both President George W. Bush and President Barack Obama have been criticized for using signing statements).

<sup>67</sup> See *Developments in the Law—Presidential Authority*, 125 HARV. L. REV. 2057, 2068, 2072, 2077 n.67 (2012) (explaining that signing statements have been used to advance various goals within the executive branch, including "communicating (and at times expanding) presidential nonenforcement authority").

<sup>68</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>69</sup> See Yoo, *supra* note 66, at 1809-12 (exploring the sources that establish presidential "authority and obligation" to evaluate the constitutionality of statutes).

<sup>70</sup> See *id.* at 1823 ("Treating all three actors specified in Article I, Section 7, Clause 2, with equal dignity requires giving equal weight to their pronouncements of the meaning of a statute. The fact that Presidents are essential actors in the legislative process provides strong reason to give as much weight to their views of the meaning of a statute as to the views of the House or the Senate.").

<sup>71</sup> See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61 (1993) (describing the "protective" power of the Executive as the "power to preserve, protect, and defend the personnel, property, and instrumentalities of the national government").

<sup>72</sup> See Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (defining "completion power" as "the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme").

recognized the tension between these purposes and consequently have yet to provide any clear guidance as to the Take Care Clause's meaning.<sup>73</sup>

Professor Cary Coglianese and Kristin Firth focus on the central relationship embedded in the Take Care Clause, namely the relationship between the President and the heads of administrative agencies.<sup>74</sup> Starting with the assumption that the ultimate actor in implementing domestic policy is the agency head, they offer an analysis of possible constitutional constraints on the President's ability to direct the actions those officials take (including strategic forms of inaction).<sup>75</sup> Drawing on a series of original survey-based experiments, they assess how different norms that might constrain presidential involvement may affect public perceptions about the legitimacy of the law and legal institutions. One such possible constraint would permit Presidents to oversee agencies but not to make decisions for them.<sup>76</sup> Coglianese and Firth find that this loose formulation leads to a decline in public legitimacy relative to a constraint based on a clear, bright-line test that demands that heads of agencies formally sign off on agency action.<sup>77</sup> They also find evidence indicating that, regardless of whether the White House oversees or decides administrative matters, Presidents stand to take the political blame for those actions when something goes wrong.

Daniel Walters moves from a focus on constitutional constraints to the realm of statutory law, paying careful attention to the ways that the APA's procedural protections and prohibition on arbitrary and capricious agency conduct can be used to cabin executive discretion.<sup>78</sup> He argues that any means of limiting the Executive's enforcement discretion must grapple with the ubiquity of instances of nonenforcement and the accompanying strains on judicial capacity that a constitutional cause of action would impose. Walters

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<sup>73</sup> See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1863-66 (2016) (describing, for instance, the tension between prosecutorial discretion and the hesitation towards dispensation that are both read into the clause).

<sup>74</sup> Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869 (2016).

<sup>75</sup> *Id.* at 1872-73 (investigating "legal limits on a President's role in shaping action or inaction by executive branch officials appointed to lead administrative agencies," limits that take "the form of either standards or rules").

<sup>76</sup> See, e.g., Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) (arguing that Presidents may influence agencies but not "dictate substantive decisions"); Peter L. Strauss, Foreword, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704-05 (2007) (urging that the President is an overseer rather than the decider of actions taken by administrative agencies).

<sup>77</sup> See Coglianese & Firth, *supra* note 74, at 1903-05 (finding that Presidents are seen as responsible by the public as soon as they become involved, even in an overseer capacity).

<sup>78</sup> See Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1915 (2016) (explaining how courts "'translate' constitutional values" through APA review and thus can check executive discretion (footnote omitted)).

advances review under the APA as a more promising basis for limiting the use of enforcement inaction than the Take Care Clause.<sup>79</sup> Although “arbitrary and capricious” review is complex, its complexity constitutes its chief virtue, according to Walters, as it creates jurisdictional safety valves for the courts in a manner similar to Alexander Bickel’s passive virtues.<sup>80</sup> Furthermore, the ambiguity in practice between agency action and inaction, along with varying levels of deference as well as the existence of threshold criteria, such as finality, give the courts the latitude to constrain severely problematic conduct but to avoid cases that would strain judicial capacity.<sup>81</sup>

Finally, Professor Adrian Vermeule moves beyond both constitutional and statutory law to explore the possibility of conventions, or unwritten norms that are widely regarded as obligatory, as an important source of constraint on executive discretion.<sup>82</sup> Conventions, he argues, constitute a third way of constraining executive discretion, beyond the use of law or the inherent constraints provided by politics.<sup>83</sup> Law, politics, and conventions may also at times reinforce each other. Vermeule offers several prominent examples of conventions as constraints, including those demarcating the independence of certain governmental actors, such as Commissioners of the Securities and Exchange Commission, the Chair of the Federal Reserve Bank, U.S. Attorneys, the Office of Legal Counsel, and the OIRA Administrator, as well as limits on the President’s power to direct the decisions of lower executive officials, particularly those playing adjudicatory roles.<sup>84</sup>

### III. THE FUTURE OF EXECUTIVE DISCRETION

Both collectively and individually, the articles assembled in this Symposium offer important new insights about the scope of executive discretion in the regulatory state and the potential legal avenues for ensuring that executive power remains properly constrained. We predict that the ideas presented and analyzed in this Issue will resonate long into the future because neither presidential power nor the regulatory functions of the federal government are likely to recede. Furthermore, the public is likely to continue to hold Presidents responsible for actions taken by officials exercising

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<sup>79</sup> See *id.* at 1916 (discussing the value of final agency action as a backstop for courts unavailable through a freestanding Take Care Clause analysis).

<sup>80</sup> See generally Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (discussing discretion to decline to exercise judicial authority).

<sup>81</sup> See Walters, *supra* note 78, at 1916 (“Allowing courts to selectively review presidential nonenforcement discretion in turn enables them to carry more authority when they do intervene.”).

<sup>82</sup> See Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1949 (2016) (explaining conventions as being “roughly understood as unwritten but obligatory rules of the political game”).

<sup>83</sup> *Id.* at 1954-56.

<sup>84</sup> See *id.* at 1950-53 (using these situations as examples).

executive discretion. This will mean that Presidents continue to have, in addition to policy motivations for managing the regulatory state, ongoing political incentives to pay a considerable amount of attention to both administrative action and inaction.<sup>85</sup>

As has been the case in the last several presidential campaigns, we can expect that, every four years, elections will afford an opportunity for national deliberation about executive power. Both Democratic and Republican presidential challengers will no doubt continue to criticize the occupants of the White House office they seek for abusing their influence over the regulatory state. Although such partisan charges about presidential overreach can be expected to continue, there will also always remain a difference between campaigning and governing. Once successful presidential candidates assume office, they will continue to find that they face demands they could never anticipate, and they will then have two basic avenues for meeting those demands: one avenue will require that Congress adopt new legislation for the bureaucracy to implement, while the other avenue will involve the bureaucracy alone, acting on authority already granted to it under existing legislation.

With either avenue, the basic motivations for the exercise of executive power to command, persuade, or defer will continue to persist. The exigencies of the nation will call for responses by both Presidents and the government's chief administrators. How these officials exercise their executive discretion, and whether they use it to take action or to deploy strategic inaction, will undoubtedly determine whether the government succeeds in fulfilling its responsibility to the public—or whether it fails or, worse still, abuses its discretion. What counts as an abuse of executive discretion, and how best to try to prevent those abuses through law, extralegal norms, or politics, will remain among the most pressing questions at the center of constitutional governance in the United States.

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<sup>85</sup> On Presidents' policy motivations for managing the bureaucracy, see generally RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983). The incentives for Presidents to turn to the management of administrative agencies only increase in periods of divided government and, often, in Presidents' second terms. See, e.g., Cary Coglianese, *The Administrative President*, REG BLOG (Jan. 21, 2013), <http://www.regblog.org/2013/01/21/coglianese-administrative-president/> [<https://perma.cc/J9R6-N2BG>] (explaining why President Obama would “find the administrative process much more amenable to his policy goals in his second term than . . . the legislative process.”).