

# DELIBERATIVE ADMINISTRATION

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## RETHINKING POPULAR REPRESENTATION IN AGENCY RULEMAKING<sup>+</sup>

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### ABSTRACT

*Do administrative agencies undermine popular sovereignty when they engage in rulemaking? Some scholars have suggested that lawmaking by unelected agency bureaucrats compromises popular sovereignty, and that this tension should be resolved by accepting the President's managerial authority as a proxy for "the will of the people." By committing all agency rulemaking to the President's control, administrative law supposedly could promote popular preferences throughout the federal system.*

*This conventional wisdom is misguided. As political scientists have long recognized, public ignorance about federal regulation prevents the electorate from developing coherent preferences about most questions of regulatory policy. Moreover, even if discrete preferences could be attributed to the People as a whole, the American presidency does not in practice serve as a reliable proxy for popular preferences in the administrative state.*

*This Article argues that popular representation is best achieved in agency rulemaking through "fiduciary representation," not presidential "proxy representation." Like private-law fiduciaries, all federal officers exercise discretionary administrative authority for the benefit of those subject to their power, and all are bound by duties of fairness, reasonableness, purposefulness, and solicitude. Rather than focus on a representative's obedience to the popular will, fiduciary representation emphasizes deliberative rationality and fidelity to the public welfare. Under this conception of popular representation, presidential control is not the only strategy for reconciling administrative lawmaking with popular sovereignty; indeed, it may not even be the most promising framework for promoting fiduciary representation throughout the administrative state. By vesting final rulemaking authority in appointed agency administrators rather than the nationally elected President, Congress may counterintuitively promote popular representation in agency rulemaking, provided it does so in the right way. The Article concludes with three steps Congress should take to harmonize the Administrative Procedure Act's general rulemaking requirements with the fiduciary model of popular representation.*

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INTRODUCTION

Ever since Alexander Bickel published *The Least Dangerous Branch* in 1962, American constitutional theorists have agonized over the supposedly “counter-majoritarian” character of judicial review.<sup>1</sup> Bickel’s quandary can be summarized succinctly: Judicial review empowers federal judges to strike down legislation in defiance of congressional majorities and the popularly elected president. Yet unlike Congress and the President, federal judges are arguably poor proxies for the popular will because they are appointed for life, do not answer directly to any particular constituency, and are not called to account for their decisions outside the four corners of their published decisions.<sup>2</sup> Explaining why judicial interpretations of the Constitution should trump executive and legislative interpretations, and under what circumstances, has occupied legal theorists for a generation.<sup>3</sup> At the heart of these

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<sup>1</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986) (1962).

<sup>2</sup> *Id.* at 16-19; *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 41 (1980) (suggesting that unless courts could develop “a principled approach” to judicial review “that is not hopelessly inconsistent with our nation’s commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away”).

<sup>3</sup> *See, e.g.*, ELY, *supra* note 2, at 87 (seeking to resolve Bickel’s counter-majoritarian difficulty through a “participation-oriented, representation-reinforcing approach to judicial review”); Rebecca

debates lies Bickel's faith in popular representation as the keystone of American constitutional democracy.

Curiously, while Bickel singled out judicial review for censure as "a deviant institution in the American democracy," he casually dismissed the notion that administrative lawmaking might also undermine popular representation.<sup>4</sup> Bickel believed that federal agencies posed little danger to the popular will because their lawmaking authority was merely "interstitial or technical" and could be exercised only pursuant to congressional authorization.<sup>5</sup> Such sentiments reflected the conventional wisdom of the early 1960s, a time when agency rulemaking had yet to emerge as the dynamic and pervasive force it is today. When Bickel composed *The Least Dangerous Branch*, federal agencies still operated primarily through adjudicatory proceedings, devoting scant attention and few resources to rulemaking initiatives.<sup>6</sup> Over the next several years, however, a chorus of criticism about perceived regulatory torpor prompted the Kennedy and Johnson administrations to emphasize agency rulemaking as a device for reinvigorating administrative governance.<sup>7</sup> Congress followed suit, creating new agencies with rulemaking authority and expanding existing agencies' rulemaking jurisdiction.<sup>8</sup> As a result of these developments, federal rulemaking experienced explosive growth during the 1960s and 1970s, with the annual number of federal rulemaking initiatives increasing 500% between 1960 and 1974.<sup>9</sup> By the 1970s, the dawning "age of rulemaking"<sup>10</sup>

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Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998) (arguing that the Constitution does not seek to promote majoritarian preferences but rather individual liberty); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *Countermajoritarian Difficulty, Part Five*]; Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982) (observing that counter-majoritarianism is not unique to judicial review but is part and parcel of representative government); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1889 (1991) (arguing that the counter-majoritarian difficulty is largely misplaced because "judges are entirely dependent on the cultural understandings that make meaning possible").

<sup>4</sup> BICKEL, *supra* note 1, at 16-18.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145-46 (2001).

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

<sup>8</sup> *Id.* at 1148-49.

<sup>9</sup> *Id.* at 1147; *see also* THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979) (observing that the size of the *Federal Register* expanded from 2,400 pages in 1936, to 20,000 pages in 1970, to 60,000 pages by 1976); RICHARD J. PIERCE, JR. ET AL.,

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would pose an existential challenge to Bickel's democratic faith, which Bickel failed to anticipate, namely: how to reconcile agency lawmaking with the Republic's constitutional commitments to popular sovereignty and representative democracy?

If anything, subsequent developments have only enhanced this question's salience.<sup>11</sup> Federal agencies today generate roughly 4,000 regulations per year, far outpacing Congress's annual output of fewer than 400 bills.<sup>12</sup> The rising tide of federal regulation over the last four decades cannot easily be dismissed as merely "interstitial and technical," because federal regulators increasingly have assumed primary responsibility for resolving portentous policy questions in fields such as the environment, energy, and occupational health and safety. Agency regulations commonly have the force of law, subject to the same sanctions as federal legislation.<sup>13</sup> Although most agency rulemaking initiatives are subject to judicial review for compliance with congressional standards, federal statutes often provide vague or ambiguous instructions, and federal courts routinely defer to agencies' statutory interpretations under the *Chevron* and *Mead/Skidmore* doctrines.<sup>14</sup> As a result of these and other developments, the scope of agency rulemaking powers has expanded dramatically since Bickel's era.

Concerns about the perceived counter-majoritarian character of administrative rulemaking have prompted some legal scholars and executive-branch officials to suggest that federal administrative law should enhance popular representation through "presidential administration." They argue that agencies should recognize the President's legal authority to direct agency rulemaking initiatives toward policies that best reflect the "will of the people."<sup>15</sup> As the only

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ADMINISTRATIVE LAW AND PROCESS 33-34 (3d ed. 1999) (recounting the creation and expansion of federal administrative agencies between 1960 and 1980); Kristen Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) (noting "a virtual explosion of agency rulemaking" during the 1960s and 1970s, "with agencies seeking to achieve more policy objectives through general authority regulations").

<sup>10</sup> J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 376 (1974).

<sup>11</sup> See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.6 (4th ed. 2002).

<sup>12</sup> See Clyde Wayne Crews Jr., *Competitive Enter. Inst., Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State 2* (2007), available at <http://www.cei.org/pdf/6018.pdf> (last visited Dec. 8, 2008) (noting that in 2006, agencies issued 3718 rules—down from 3943 the year before—while the President signed only 321 bills into law).

<sup>13</sup> BERNARD SCHWARTZ, ADMINISTRATIVE LAW §§ 2.25, 4.3, 90-91, 169 (3d ed. 1991).

<sup>14</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>15</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995) ("Representing as he does a national electoral college majority, the President at least has an incentive to steer national resources toward the 51% of the nation that last supported him (and that might support him again)."); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV.

federal official elected by and accountable to a national constituency, the President (with the Vice-President) arguably receives a unique popular mandate in matters of national policy. This mandate, combined with continuing political pressures to honor public opinion supposedly ensures that the President will ordinarily resolve regulatory disputes in conformity to the public will.<sup>16</sup> Supporters of presidential administration argue further that enhanced presidential control over agency regulation would improve the transparency of agency rulemaking, facilitate interagency cooperation, and ultimately make agencies more effective and accountable instruments for advancing the public interest.<sup>17</sup> Acting through the President, the American people would be better able to craft regulations responsive to their own collective perception of the common good.

This vision of presidential control as a pathway to enhanced popular representation has profoundly influenced public discourse about American administrative governance for the past quarter century. As I will explain more fully in Part I, every president since Richard Nixon has taken steps to strengthen and formalize White House influence over agency rulemaking proceedings, from Ronald Reagan's introduction of rigorous regulatory review by the Office of Management and Budget's (OMB) Office of Information Review and Analysis (OIRA)<sup>18</sup> to Bill Clinton's innovation of formal presidential directives designed to spur agency rulemaking.<sup>19</sup> The Supreme Court famously invoked the rhetoric of presidential popular representation in *INS v. Chadha*,<sup>20</sup> emphasizing the President's unique electoral mandate as a prophylaxis against regional factionalism and special-interest

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2245, 2335 (2001) (“[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.”); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105-06 (1994) (“[B]ecause the President has a national constituency . . . it appears to operate as an important counterweight to factional influence over administration.”); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193-95 (1994) (characterizing the presidency as comparatively resistant to factional pressures).

<sup>16</sup> See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 875-76 (1997) 875-76 (observing that the president's plebiscitary connection to the median voter has been used to justify control over administrative agencies); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1227-28 (2006) (same).

<sup>17</sup> See, e.g., Kagan, *supra* note 15, at 2331-46 (accountability, effectiveness); Rodriguez, *supra* note 15, at 1193-95 (coordination).

<sup>18</sup> See Exec. Order No. 12,291, 3 C.F.R. 127 (Feb. 17, 1981).

<sup>19</sup> See Kagan, *supra* note 15, at 2290-303; David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Politicization*, 76 GEO. WASH. L. REV. 1095, 1114-20 (2008).

<sup>20</sup> 462 U.S. 919, 948 (1983).

capture.<sup>21</sup> Although the case for presidential administration has been challenged on constitutional<sup>22</sup> and statutory grounds,<sup>23</sup> the underlying normative vision of presidential administration as a formula for strengthening popular representation in agency rulemaking has gained widespread acceptance and continues to attract adherents today.

This Article accepts Bickel's premise that popular representation is foundational to political legitimacy in a democratic republic, but it nonetheless challenges the thesis that presidential administration is an effective strategy for advancing popular representation in agency rulemaking. Part II demonstrates that none of the leading arguments for equating the President's preferences on questions of regulatory policy with the "will of the people" can withstand close scrutiny. Over the years, political scientists have assembled a wealth of empirical evidence that national elections do not confer mandates upon presidents to pursue specific regulatory policies.<sup>24</sup> Nor does the post-election threat of a future electoral defeat or the disapproving judgment of future historians ensure that presidents will adopt policies consistent with majority opinion. In practice, there are simply no guarantees that particular presidential regulatory policies will be more closely correlated with public opinion than policies developed through ordinary agency rulemaking proceedings. Moreover, the argument for presidential administration founders on a more basic problem: the public's pervasive ignorance about regulatory governance. The notion that presidents (or any other public officials) might serve as reliable proxies for public opinion in agency rulemaking becomes indefensible once one acknowledges that the American public generally knows little or nothing about even those regulatory initiatives that most directly affect their interests. For the vast majority of agency rulemaking proposals, the public simply does not have any coherent opinion.<sup>25</sup> Thus, the notion that presidents might act as proxies for the body

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<sup>21</sup> See *id.* at 948 ("[T]he Presentment Clauses serve the important purpose of assuring that a 'national perspective' is grafted on the legislative process."); *id.* at 948 ("The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all . . . ." (quoting *Myers v. United States*, 272 U.S. 52, 123 (1926))).

<sup>22</sup> See, e.g., Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001); Michael Froomkin, *The Imperial President's New Vestments*, 88 NW. U. L. REV. 1346 (1994)

<sup>23</sup> See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

<sup>24</sup> See, e.g., MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); STANLEY KELLEY, JR., INTERPRETING ELECTIONS (1983); Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355 (1990); John A. Ferejohn, *Information and the Electoral Process*, in INFORMATION AND DEMOCRATIC PROCESSES 3, 3 (John A. Ferejohn & James Kuklinski eds., 1990).

<sup>25</sup> See, e.g., DELLI CARPINI & KEETER, *supra* note 24, at [add cites].

politic does not offer a credible response to the demand for popular representation in agency rulemaking.

In Part III, I argue that administrative law should abandon the search for a unitary oracle of the public will and instead safeguard popular sovereignty in agency rulemaking by adopting a fiduciary model of popular representation.<sup>26</sup> Administrative agencies, like private-law fiduciaries, exercise discretionary power of an administrative nature over the legal or practical interests of their beneficiaries, the people subject to state power. To satisfy the principle of popular representation under the fiduciary model of the state, administrative agencies must exercise their rulemaking powers in a manner that is other-regarding, purposive, and institutional.<sup>27</sup> At a minimum, these criteria obligate federal agencies to act deliberately (not reflexively) and deliberatively (not arbitrarily or unilaterally) when considering potential rulemaking actions, taking appropriate care to investigate reasonable alternatives and to provide rational explanations for their decisions on the public record. This fiduciary model of popular representation, which has deep roots in American political theory, does not necessarily ensure that federal regulations will always satisfy public opinion, but neither does presidential administration in a pluralistic society plagued by pervasive public ignorance about federal regulation. What the fiduciary model does offer is a vision of administrative lawmaking that promotes rational deliberation, honors congressional delegations of authority to agency heads, utilizes agency experience and expertise, and minimizes the dangers of clandestine interest-group influence.

One important—and somewhat counterintuitive—implication of the fiduciary model is that Congress may promote popular representation by entrusting final rulemaking authority to unelected agency administrators rather than the popularly elected President, provided it does so in the right way. Agency administrators tend to possess greater expertise in their fields of labor and are better positioned than the President to engage in detailed, deliberative consideration of particular regulatory proposals. As a result of federal procedural requirements, agency administrators are also more likely to engage diverse perspectives and provide reasoned justifications

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<sup>26</sup> For an argument that U.S. administrative law as a whole rests upon a fiduciary model of state authority, see Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

<sup>27</sup> These requirements are discussed in greater detail in EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (forthcoming 2009); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. (forthcoming 2009); and Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEENS L.J. 259 (2005) [hereinafter Fox-Decent, *State Legal Authority*]. See also J.J. Spigelman, *Foundations of Administrative Law: Toward General Principles of Institutional Law*, 58 AUSTL. J. OF PUB. ADMIN. 3, 9 (1999) (noting “similarities between the regulation of the exercise of public power and the traditional control by courts of equity of the exercise of fiduciary powers,” including the overarching requirements of purposefulness, rationality, and solicitude).

for their decisions. By and large, therefore, agency heads are better qualified than presidents to serve as fiduciary representatives in administrative lawmaking.

I conclude in Part IV with a brief discussion of three proposals, which should guide future efforts to harmonize federal rulemaking procedures with the fiduciary model of popular representation. I refer to the fiduciary model's decision-making heuristic for agency rulemaking as "deliberative administration," because the principles of public deliberation and rational justification traditionally associated with republican theory and deliberative democracy theory lie at the heart of the state-subject fiduciary relation. Specifically, I argue that Congress should operationalize the fiduciary model of popular representation in federal rulemaking by amending the federal Administrative Procedure Act to: (1) eliminate the categorical exceptions to notice-and-comment rulemaking, (2) expand judicial review of agency inaction, and (3) include all White House communications concerning pending agency rulemaking on the public record. The common thread that connects these three proposals is a vision of agency rulemaking as a locus of other-regarding, purposive, and institutional deliberation. Deliberative administration promises popular representation unencumbered by the fictions and pathologies associated with presidential control over agency rulemaking.

#### I. PRESIDENTIAL ADMINISTRATION

By the early morning hours of November 3, 2004, exit polls reported that George W. Bush, had defeated his Democratic rival, John Kerry, and successfully completed his quest for a second term in the White House.<sup>28</sup> News media hailed the President's three-million-vote margin nationally as a "solid mandate" for his domestic and foreign policy agendas.<sup>29</sup> Basking in the glow of victory, Bush accepted this assessment with enthusiasm. "America has spoken," he declared.<sup>30</sup> "Let

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<sup>28</sup> Todd S. Purdum, *President Seems Poised To Claim a Mandate*, N.Y. TIMES, Nov. 3, 2004, available at <http://www.nytimes.com/2004/11/03/politics/campaign/03assess.html> 9 (last visited Dec. 9, 2008).

<sup>29</sup> *Id.*; John F. Harris, *For Bush and GOP, a Validation*, WASH. POST, Nov. 3, 2004, at A-1, available at <http://www.washingtonpost.com/wp-dyn/articles/A20547-2004Nov3.html> (last visited Dec. 9, 2008) (describing Bush as winning "a narrow but unmistakable mandate"); Doyle McManus & Janis Hook, *Majority Win Could Make Second Term More Partisan*, L.A. TIMES, Nov. 4, 2004, at A-1, available at <http://articles.latimes.com/2004/nov/04/nation/na-agenda4> (last visited Dec. 9, 2008) ("Bush can claim a solid mandate . . .").

<sup>30</sup> *Victorious Bush Vows To Reach out to Kerry Voters: Democrat Concedes After Nail-Biting Night that Focused on Ohio*, msnbc.com, Nov. 3, 2004, available at <http://www.msnbc.msn.com/id/6363692> (last visited Dec. 9, 2008).

me put it to you this way: I have earned capital in the campaign, political capital, and now I intend to spend it.”<sup>31</sup>

President Bush spent much of his newly won “political capital” advancing his domestic regulatory agenda and consolidating the White House’s institutional control over the administrative state. As public watchdog groups observed, the Bush Administration redoubled its efforts to manage agency rulemaking initiatives by intervening in rulemaking actions, line-editing reports from agency scientists, and blocking rulemaking proposals dealing with controversial issues such as climate change and the protection of endangered marine life.<sup>32</sup> Bush also sought to enhance presidential administration—the White House’s systemic institutional influence over agency rulemaking—by placing new procedural restraints on agency rulemaking discretion. While many of the administration’s tools for shaping federal regulation had been passed down from previous administrations, President Bush also introduced significant innovations of his own, leading some observers to characterize his second term as the advent of a new era of vigorous presidential administration.<sup>33</sup>

To place the Bush Administration’s practice of presidential administration in proper context, this Part furnishes a brief intellectual history of presidential administration in American legal theory, explaining how presidential administration seeks to address anxiety over popular representation in the administrative state. I then summarize the last four decades of presidential administration, describing how modern presidents from Richard Nixon to George W. Bush have operationalized presidential administration through ever-intensifying levels of regulatory review.

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<sup>31</sup> Richard W. Stevenson, *Confident Bush Outlines Ambitious Plan for 2nd Term*, N.Y. TIMES, Nov. 5, 2004, available at <http://www.nytimes.com/2004/11/05/politics/campaign/05bush.html> (last visited Dec. 8, 2008).

<sup>32</sup> See, e.g., OMB Watch, *White House Climate Change Policy—Delay, Delete, and Deny*, July 27, 2008, available at <http://www.ombwatch.org/article/articleview/4308/1/97?TopicID=1> (last visited Dec. 12, 2008) (citing “strong efforts” by the Bush Administration “to censor climate change information that reaches the public and Congress” including pressuring the EPA “to make changes to its regulatory process regarding climate change”); Juliet Eilperin & R. Jeffrey Smith, *EPA Won’t Act on Emissions This Year: Instead of New Rules, More Comments Sought*, WASH. POST, July 11, 2008, at A-1 (“[T]he White House has walked a tortured path, editing its officials’ congressional testimony, refusing to read documents prepared by career employees and approved by top appointees, requesting changes in computer models to lower estimates of the benefits of curbing carbon dioxide, and pushing narrowly drafted legislation on fuel-economy standards that officials said was meant to sap public interest in wider regulatory action.”); Juliet Eilperin, *Cheney Aides Altered CDC Testimony, Agency Official Says*, WASH. POST, July 8, 2008 (reporting that “Members of Vice President Cheney’s staff censored congressional testimony by a top federal official on the health threats posed by global warming”).

<sup>33</sup> See, e.g., Peter L. Strauss, *Overseer, or “the Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702 (2007) (describing Executive Order No. 13,422 as “effect[ing] a dramatic increase in presidential control over regulatory outcomes—an increase effected by the President’s own unilateral action and not authorized by Congress”).

A. *Three Models of Popular Representation*

Since the New Deal, legal scholars have tended to take for granted that the administrative state's political legitimacy depends, at least in part, upon its congeniality to popular representation. If administrative lawmaking frustrates popular sovereignty, the legitimacy of the entire enterprise could be called into question. Thus, an enduring challenge for apologists of the administrative state has been to construct a model of agency rulemaking that would reconcile discretionary agency lawmaking with mainstream democratic theory.

Several models of popular representation have emerged over the years to fill this gap. Prior to World War II, the conventional view was that legislative processes satisfied the demand for popular representation in the administrative state. Congress, acting as popular representative, would resolve any disputed policy matters in statutory directives to federal agencies, and agencies, in turn, would translate and implement those generalist directives in specific contexts.<sup>34</sup> This vision of agencies as dispassionate transmission belts for congressional policy decisions became untenable, however, once Legal Realists turned their sights to the ubiquity of agency policymaking discretion.<sup>35</sup> In practice, vague legislative directives left too many critical policy questions to be resolved at the level of agency implementation. Far from acting as mere technocratic servants of Congressional directives, federal agencies frequently had to resolve fundamental policy questions with little direction from Congress.

One response to the transmission belt model's collapse was the emergence of an "interest group representation" model rooted in public choice theory.<sup>36</sup> Rather than focus on Congress's statutory instructions as a source of democratic legitimacy, the interest group representation model characterized the public's direct participation in notice-and-comment rulemaking proceedings under the Administrative Procedure Act (APA) as a form of popular representation. "The job of the public administrator, according to this vision, was to accommodate—to the extent possible—the varying demands placed upon government by competing groups," explained Robert Reich. "The public administrator was a referee, a skillful practitioner of negotiation and compromise."<sup>37</sup> Agency administrators, like legislators, would seek to maximize

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<sup>34</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1673-75 (1975); see also Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 577-78 (1985) (describing these models); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1618 (1985) (same).

<sup>35</sup> See Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 574 (1992) (discussing the influence of Legal Realism on the theory of administrative law).

<sup>36</sup> Stewart, *supra* note 34, at 1760; see also Garland, *supra* note 34, at 579 ("The interest representation model evolved in response to widespread disillusionment with both the 'transmission belt' and 'expertise' models of administrative action.").

<sup>37</sup> Reich, *supra* note 34, at 1619-20.

popular preferences as revealed during the public comment phase of informal notice-and-comment rulemaking. In contrast, judicial review was viewed with suspicion as a potentially deviant intrusion into majoritarian rulemaking processes.<sup>38</sup>

As Richard Stewart and others have observed, the interest group representation model could not withstand scrutiny as a theory of popular representation.<sup>39</sup> In practice, agencies did not always seek to maximize popular preferences when selecting between policy alternatives. All too often, agencies were perceived as catering to narrow interest-group preferences rather than broad majoritarian preferences. More troubling still, federal courts rendered only limited assistance as agents of interest-group “representation reinforcement.” Even under so-called “hard look” review of agency regulations, federal courts did not compel agencies to accept interest group comments as binding referenda on regulatory policy; rather, proposed rules could satisfy judicial review as long as agencies provided a rational explanation for rejecting interest group preferences.<sup>40</sup> Viewed in this light, the interest group representation model was far less persuasive. Critics began calling into question the value of notice-and-comment procedures, contending that public participation dramatically increased the administrative costs of regulation without yielding the desired benefit: popular control over regulatory policy.<sup>41</sup>

As the interest group representation model fell into disfavor, the late 1970s and 1980s witnessed a swell of enthusiasm for presidential administration as a new pathway to popular representation in the administrative state.<sup>42</sup> Some scholars sought to make the case for presidential administration on constitutional grounds, arguing that the Vesting and Faithful Execution Clauses of Article II established a “unitary” executive branch under the president’s undivided managerial control.<sup>43</sup> Others

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<sup>38</sup> Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 484 (2003).

<sup>39</sup> See Stewart, *supra* note 34, at 1775-81.

<sup>40</sup> See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); cf. Stewart, *supra* note 34, at 1775, 1777 (noting that public “participation in [informal rulemaking] proceedings may have little impact on agency policy determinations”).

<sup>41</sup> See Bressman, *supra* note 38, at 483-85; Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 42 DUKE L.J. 1385 (1992); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

<sup>42</sup> See, e.g., Rodriguez, *supra* note 15, at 1180-81; Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

<sup>43</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 570-82 (1994) [hereinafter Calabresi & Prakash, *President’s Power*]; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 166 (1992) [hereinafter Calabresi & Rhodes, *Structural Constitution*]; Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991 (1992); *The Council on Competitiveness: Executive Oversight of Agency Rulemaking*, 7 ADMIN. L.J. AM. U 297, 317-20 (1993-1994)

suggested either that the President's authority to direct agency rulemaking initiatives could be inferred from more general constitutional themes such as popular accountability or aversion to factionalism<sup>44</sup> or that such authority was implicit in statutory delegations of rulemaking authority.<sup>45</sup> The Supreme Court arguably rejected the most aggressive textualist versions of this "unitary executive theory" during the late 1980s,<sup>46</sup> and more modest formulations of the theory based on general constitutional values and implied statutory authorization have been soundly critiqued in academic commentary.<sup>47</sup> For present purposes, it will suffice to note simply that the case for viewing presidential administration as a constitutional or statutory requirement remains deeply controversial.

Presidential administration has shown itself to have broader appeal as a general normative theory of popular representation in agency rulemaking. Influential public officials and scholars on both sides of the political spectrum have embraced Woodrow Wilson's vision of the presidency as the only "national voice" for the American people as a whole.<sup>48</sup> The President, by virtue of his or her national election and accountability to a national constituency, purportedly receives a unique popular mandate in the administrative state.<sup>49</sup> According to this theory, the President is thought to act as a proxy for the People in agency rulemaking proceedings,

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(comments of David V. Rivkin) [hereinafter Rivkin, *President's Administrative Powers*] (arguing that "the Vesting Clause of Article II did place the totality of executive power in the President").

<sup>44</sup> See Rivkin, *President's Administrative Powers*, *supra* note 43, at 309 (arguing that presidential administration is beneficial because "political leaders cannot escape accountability by claiming that unpopular regulatory decisions were made by 'faceless bureaucrats'"); Lessig & Sunstein, *supra* note 15, at 102-03 ("Today . . . a strong presumption of unitariness is necessary in order to promote the original constitutional commitments").

<sup>45</sup> See Kagan, *supra* note 15, at 2251, 2326.

<sup>46</sup> See *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (holding that Congress may constitutionally limit the President's removal power for certain officers to "good cause").

<sup>47</sup> See, e.g., Froomkin, *supra* note 22; Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 632 (1989)

<sup>48</sup> See Dahl, *supra* note 24, at 360 (quoting Wilson) ("There is no national party choice except that of President. No one else represents the people as a whole, exercising a national choice. . . . That nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs."); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. (forthcoming 2009) (describing Wilson as crafting "twentieth-century picture of the President as the unique voice of democratic self-rule, interpreter-in-chief of the electoral tumult that carried him into office").

<sup>49</sup> Brown, *supra* note 3, at 549 ("Today, those committed to the principle of accountability . . . argue that the only way to save the constitutionality of independent agencies is to allow the President to have full control over them."); Cutler & Johnson, *supra* note 42, at 1409 ("Only elected officials can provide the requisite overview, coordination, and practical political judgment to weigh competing claims, make the necessary ultimate decisions, and stand accountable at the polls.").

translating majoritarian preferences into national regulatory policies. Presidential control thus purports to offer a corrective to agency counter-majoritarianism: when disputes arise about the proper policy for an agency to adopt in rulemaking proceedings, the president's views should control because they are more likely to reflect the national will than the views of any political appointee or career civil servant.<sup>50</sup> Enthusiasts of presidential administration contend further that by accepting direction from the White House on questions of regulatory policy, agencies may become more responsive to the public will, while also energizing their administration, sparking innovation, improving inter-agency coordination, and rendering the administrative state as a whole more transparent to public scrutiny.<sup>51</sup> As this movement has attracted supporters across the political spectrum, some commentators have claimed "a growing degree of consensus for the proposition that all roads to regulatory reform lead to (or, perhaps more accurately, from) the President."<sup>52</sup>

### B. Operationalizing Presidential Administration

How has Wilson's vision of the President as a proxy for the public will shaped the President's role in agency rulemaking? Even before Wilson took office, presidents of both political parties aspired to tame administrative policymaking to the President's managerial control.<sup>53</sup> Over time, this aspiration has come ever closer to fulfillment as presidents have taken proactive steps to operationalize presidential administration, pressing beyond their traditional oversight and advisory roles toward more robust managerial control over agency rulemaking.<sup>54</sup>

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<sup>50</sup> See Cutler & Johnson, *supra* note 42, at 1397; Calabresi, *supra* note 15, at 59.

<sup>51</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 580-81 (2004) (Thomas, J., dissenting) (arguing that a "unitary Executive" is "essential" to energize government decision-making) (citing *THE FEDERALIST* No. 23, at 146-147 (J. Cooke ed. 1961) (Alexander Hamilton)); *Morrison v. Olson*, 487 U.S. 654, 727-32 (1988) (Scalia, J., dissenting) (arguing that a "unitary Executive" promotes individual liberty and uniform application of the law); BICKEL, *supra* note 1, at 186 (arguing that the President's "whim should rule, because it is desirable to enlarge as much as possible his personal political responsibility, and this demands a special kind of loyalty and responsiveness of his immediate subordinates"); *id.* at 2249, 2286 (arguing that presidential control potentially energizes administration and enhances transparency); Comm'n on Law & the Econ., Am. Bar Ass'n, *Federal Regulation: Roads to Reform* 79 (1979) (recommending that Congress make agency rulemaking subject to presidential directives); Cutler & Johnson, *supra* note 42, at 1417 (emphasizing presidential transparency); Kagan, *supra* note 15, 2307 (emphasizing the public nature of Clinton's directives to agencies).

<sup>52</sup> Rodriguez, *supra* note 15, at 1180.

<sup>53</sup> See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY PRESIDENT: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11 (1995).

<sup>54</sup> See Pildes & Sunstein, *supra* note 53, at 11-16; Strauss, *supra* note 33.

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The modern history of presidential administration arguably begins in 1970, with President Nixon's creation of the OMB to coordinate interagency review of rulemaking proposals involving environmental protection, consumer protection, and public health and safety.<sup>55</sup> Drawing on Nixon's example, Gerald Ford later created a Council on Wage and Price Stability to combat inflation by studying the fiscal impact of proposed regulations.<sup>56</sup> Similarly, Jimmy Carter unveiled his own Regulatory Analysis Review Group to evaluate proposed regulations that were likely to have an economic impact equal to or exceeding \$100 million<sup>57</sup> and created OIRA, the OMB office now primarily responsible for White House regulatory review.<sup>58</sup> Seeking to minimize burdensome federal regulations and facilitate interagency coordination, Presidents Ronald Reagan and George H.W. Bush expanded executive oversight through more rigorous OMB review,<sup>59</sup> Reagan's "Presidential Task Force on Regulatory Relief," and Vice-President Dan Quayle's Council on Competitiveness.<sup>60</sup> Throughout this period of intensifying White House oversight, proponents of these changes argued that presidential participation was vital to safeguard the political legitimacy of federal regulation. Critics, on the other hand, warned that OMB review and the White House's "hidden-hand" influence undermined agency legitimacy by enabling interest-group capture and subverting congressionally mandated programs.<sup>61</sup>

Although President Clinton relaxed OMB review somewhat during his tenure, in many respects he claimed even greater oversight authority than his predecessors. To a degree previously unknown, Clinton sought to take credit and assume responsibility for the work product of administrative agencies, no doubt

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<sup>55</sup> See Exec. Order No. 11,541, 3 C.F.R. 939, 939 (1966-1970), reprinted in 31 U.S.C. § 501 (1994); James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 863-64 (2001); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546-47 (1989).

<sup>56</sup> See *id.*; Percival, *supra* note 22, at 987.

<sup>57</sup> See Exec. Order No. 12,044, 3 C.F.R. 152, 152 (1979), reprinted in 5 U.S.C. § 553 (1994); Percival, *supra* note 22, at 987 (describing creation of the Regulatory Analysis Review Group).

<sup>58</sup> Paperwork Reduction Act of 1980, § 3503, Pub. L. No. 96-511, 94 Stat. 2812, 2814-15 (current version at 44 U.S.C. §§ 3501-3520 (1994)); Percival, *supra* note 22, at 988 (describing the creation of OIRA).

<sup>59</sup> Exec. Order No. 12,291 pmb1., 3 C.F.R. 127, 127 (1982); see also JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 268 (5th ed. 2003) (describing Executive Order No. 12,291 as "impos[ing] detailed responsibilities on OMB for managing the process of producing and reviewing regulatory impact statements, . . . and . . . requir[ing] executive agency heads, to the extent permitted by statute, to be guided by both the order's stated policy goals and its procedural requirements in the exercise of administrative discretion").

<sup>60</sup> See MASHAW, *supra* note 59, at 294-95.

<sup>61</sup> See Symposium, *The Council on Competitiveness: Executive Oversight of Agency Rulemaking*, 7 ADMIN. L.J. AM. U. 297 (1993-1994).

seeking to compensate for his inability to advance his legislative agenda in a hostile Congress.<sup>62</sup> Over his eight years in office, Clinton issued more than one hundred presidential orders directing agencies to adopt regulations targeting social ills such as youth smoking and gun violence.<sup>63</sup> He also asserted the prerogative to resolve definitively any “disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of [OIRA].”<sup>64</sup> Clinton thus heartily embraced and promoted the movement for presidential administration.

Upon taking office in 2001, President Bush employed a similarly multifaceted strategy for influencing agency rulemaking. First, through his Chief of Staff, Andrew Card, Bush directed all federal agencies to suspend rulemaking actions carried over from the Clinton Administration pending reconsideration by the new Republican leadership.<sup>65</sup> As in previous administrations, Bush required agencies contemplating significant regulatory actions to submit their proposed regulations to OIRA for cost-benefit review. Although Bush did not continue Clinton’s practice of formally directing agencies toward particular rulemaking actions, he attached a signing statement to legislation that committed “final authority” over certain prosecutorial training grants to a subordinate of the Attorney General, arguing that this unconstitutionally impaired his authority to direct agency action.<sup>66</sup> In addition, during Bush’s first term OIRA issued over a dozen “prompt letters” urging agencies to consider undertaking specific regulatory actions.<sup>67</sup> For the most part, these efforts mirrored the practices of previous administrations and did not formally displace administrators’ statutory authority as the ultimate decision-makers in federal rulemaking proceedings.

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<sup>62</sup> See Bressman, *supra* note 38, at 487-88. As Dean Elena Kagan has noted, Clinton’s efforts to pursue his policy agenda through the administrative process began in earnest following the 1994 congressional elections, when Republicans gained a majority of seats in the House of Representatives, and accelerated in 1998, during the waning days of his post-impeachment tenure. See Kagan, *supra* note 15, at 2282.

<sup>63</sup> See Kagan, *supra* note 15, at 2304-07.

<sup>64</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993).

<sup>65</sup> See Memorandum from Andrew H. Card, Jr., White House Chief of Staff, to the Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/20010123-4.html> (last visited Dec. 12, 2008).

<sup>66</sup> See Harold J. Krent, From a Unitary to a Unilateral Presidency 16, *available at* [www.ssrn.com](http://www.ssrn.com) (last visited Dec. 12, 2008) (providing examples).

<sup>67</sup> *E.g.*, Letter from John D. Graham, Administrator, Office of Information and Regulatory Affairs, to Tommy G. Thompson, Secretary of Health and Human Services (Sept. 18, 2001), *available at* [http://www.whitehouse.gov/omb/pubpress/hhs\\_prompt\\_letter.html](http://www.whitehouse.gov/omb/pubpress/hhs_prompt_letter.html) (last visited Dec. 12, 2008); Letter from John D. Graham, Administrator, Office of Information and Regulatory Affairs, to John Henshaw, Assistant Secretary of Labor, Occupational Health and Safety Administration (Sept. 18, 2001), *available at* [http://www.whitehouse.gov/omb/pubpress/osha\\_prompt\\_letter.html](http://www.whitehouse.gov/omb/pubpress/osha_prompt_letter.html) (last visited Dec. 12, 2008).

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What was truly remarkable about President Bush's second term was his administration's push to formalize White House control over agency rulemaking policy. Rather than rely on OMB regulatory review and informal consultation to shape proposed agency regulations, Bush sought to dilute the statutory authority of agency heads as the final decision-makers in agency rulemaking activities. In January 2007, Bush issued Executive Order No. 13,422, amending a previous Clinton directive which had required all agencies to designate an agency employee to serve as the agency's "regulatory policy officer" (RPO).<sup>68</sup> Under the Clinton Administration, RPOs had served as agency liaisons for OIRA review.<sup>69</sup> Bush's executive order, in contrast, proclaimed that all RPOs must be political appointees, required agencies to obtain OMB approval of their RPOs, and thereby made RPOs *de facto* political gatekeepers for agency rulemaking actions.<sup>70</sup> Executive Order No. 13,422 also removed language from the previous Clinton directive which had provided that RPOs "shall report to the agency head"<sup>71</sup> and that the agency's regulatory plan "shall be approved personally by the agency head."<sup>72</sup> These structural changes significantly augmented RPOs' roles and correspondingly diminished agency heads' traditional rulemaking authority.

While the practical import of these developments has been disputed, some critics have argued that President Bush's alterations to the agency rulemaking process represented a quiet revolution in the White House's relationship with the administrative state.<sup>73</sup> Prior to 2007, presidents had been content to talk the talk of

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<sup>68</sup> Exec. Or. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007).

<sup>69</sup> See Exec. Order No. 12,866, § 6(a)(2), 3 C.F.R. 638, 640, 645 (Sept. 30, 1993).

<sup>70</sup> 72 Fed. Reg. at 2764-65.

<sup>71</sup> Compare Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007), with Exec. Order No. 12,866 § 6(a)(2), 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993).

<sup>72</sup> Compare Exec. Order No. 13,422 § 4(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007), with Exec. Order No. 12,866 § 4(c)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993).

<sup>73</sup> See House Committee on Science and Technology's Subcommittee on Investigations and Oversight (Apr. 26, 2007) (statement of Subcommittee Chairman Brad Miller), available at [http://science.house.gov/publications/hearings\\_markups\\_details.aspx?NewsID=1777](http://science.house.gov/publications/hearings_markups_details.aspx?NewsID=1777) (last visited Dec. 12, 2008) (describing Executive Order No. 13,422 as creating "an almost insuperable bias in favor of agency inaction" and "shift[ing] to the President powers that the framers of our Constitution intended to be exercised by Congress"); *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 12 (Feb. 13, 2007) (statement of Subcommittee Chairman Linda T. Sanchez), available at <http://judiciary.house.gov/oversight.aspx?ID=269> (last visited Dec. 12, 2008) (expressing "concern[] that the main thrust of this new Order appears to shift control of the regulatory process from the agencies—the entities that have the most substantive knowledge and experience—to the White House"); *Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology*, 110th Cong. 12 (Feb. 13, 2007) (statement of Peter L. Strauss), available at [http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/strauss\\_testimony.pdf](http://democrats.science.house.gov/Media/File/Commdocs/hearings/2007/oversight/26apr/strauss_testimony.pdf) (arguing that "the assignment of decisional responsibility

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presidential administration without going so far as to formally displace agency heads' final discretionary authority. In Executive Order No. 13,422, however, Bush arguably crossed the Rubicon dividing agency rulemaking discretion from presidential administration by placing veto power in the hands of RPOs and thereby formally trespassing upon administrators' statutory authority. While it remains to be seen whether this feature of Executive Order No. 13,422 will survive into the Obama Administration, past experience suggests that President Obama and other future occupants of the Oval Office are unlikely to forfeit the Bush Administration's gains in managerial control. Thus, Executive Order No. 13,422 could very well represent a tipping point in the White House's decades-long campaign for presidential administration.

As critical as these formal mechanisms may have been for consolidating White House influence over agency rulemaking, they arguably pale in comparison to the Bush Administration's informal influence over the rulemaking process. Bush and other recent presidents have claimed the prerogative to fill the swelling ranks of political appointees with personal loyalists, facilitating the politicization of administrative rulemaking.<sup>74</sup> This trend toward agency politicization can be observed, for example, in Vice-President Cheney's skillful direction of agency policy through networks of political appointees in areas of personal interest to him such as environmental policy and national security.<sup>75</sup> Through informal pressure, persuasion, and negotiation behind the scenes, the Bush Administration was able to exercise substantial managerial control over agency regulation largely outside the scope of public scrutiny.

## II. PROXY REPRESENTATION

To its defenders, presidential administration gives the electorate a powerful voice in federal regulation. Presidents serve as proxies for the People, translating general public preferences into specific directives to administrative agencies. The more influence presidents exercise in agency rulemaking, the theory goes, the more likely federal regulations will reflect the "will of the people."

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to others is part of the laws to whose faithful execution [the President] must see"); Public Citizen. New Executive Order Is Latest White House Power Grab, *available at* <http://www.citizen.org/pressroom/release.cfm?ID=2361> (last visited Dec. 12, 2008) (describing Executive Order No. 13,422 as a "power grab" by the White House that undermines public protections and lessens congressional authority).

<sup>74</sup> Barron, *supra* note 19; *see also* R. Jeffrey Smith, *Under Bush, OSHA Mired in Inaction*, Wash. Post, Dec. 29, 2008, A-1, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2008/12/28/AR2008122802124.html?hpid=topnews&sid=ST2008122900346&s\\_pos=](http://www.washingtonpost.com/wp-dyn/content/article/2008/12/28/AR2008122802124.html?hpid=topnews&sid=ST2008122900346&s_pos=) (last visited Dec. 29, 2008) (reporting conflicts between OSHA political appointees and career staff).

<sup>75</sup> *See id.* at 1132-33 (citing Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1).

This theory of presidential administration might have some intuitive appeal, but it rests on questionable assumptions. Is it really the case, for example, that the public possesses determinate preferences on questions of federal regulatory policy? Is the President better equipped to discern the “will of the people” than administrative agencies? Are agency regulations more likely to satisfy popular preferences when developed and refined under presidential control?

Sadly, the case for viewing presidents as reliable proxies for the “will of the people” collapses remarkably quickly once its assumptions are exposed to close scrutiny. In practice, presidents are ill-equipped to represent popular preferences because the very notion of popular preferences in regulatory policymaking is ordinarily a fiction. The public at large is not sufficiently engaged in the work of the federal agencies to develop informed views about the myriad policy questions raised in agency rulemaking proceedings. Most members of the voting public simply have no working knowledge and, hence, no determinate preferences about most matters of regulatory policy. Under these conditions, presidential elections cannot reasonably be thought to qualify presidents to serve as proxies for the popular will. Indeed, even if elections could be construed as plebiscites on questions of regulatory policy, presidential candidates’ bundled policy platforms would make it virtually impossible to equate any particular presidential initiative with popular preferences. More disturbing still, experience has shown that presidential administration is susceptible to certain recurrent pathologies, which undercut its attractiveness as a pathway to popular representation. For these reasons and many others, the managerial presidency cannot deliver on its promise to speak “the will of the people” in the administrative state.

#### A. *Three Fictions of Presidential Administration*

The argument for presidential administration as proxy representation rests on three misconceptions about the president’s relationship to the federal bureaucracy: the fiction of popular authorization, the fiction of popular accountability, and the fiction of presidential management.

##### 1. *The Fiction of Popular Authorization*

Americans have become accustomed to hearing their politicians characterize election returns as decisive popular authorization for their own policy agendas. Long before President Bush exulted over the “political capital” he had won upon reelection, President John F. Kennedy famously declared that even a single-vote margin of victory would represent a “mandate” for change.<sup>76</sup> During the height of the Watergate scandal, President Richard Nixon fought off challengers by invoking his

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<sup>76</sup> Purdum, *supra* note 28, at A-1.

own “mandate” from the 1972 presidential election.<sup>77</sup> For better or worse, the presidential “mandate” has become a central trope of our political mythology.<sup>78</sup> At least with respect to questions of regulatory policy, however, the reality of modern electoral politics tells a very different story.

Political scientists have long recognized that presidential elections can rarely, if ever, be construed as conferring genuine mandates for presidents to pursue particular regulatory policies. Perhaps the most obvious difficulty with interpreting election-night victories as mandate-conferring constitutional moments is the nebulous relationship between presidential elections and majoritarian preferences. Presidents Kennedy, Clinton, and George W. Bush each reached the White House without winning a majority of the popular vote.<sup>79</sup> Woodrow Wilson, the presidential mandate’s intellectual champion, won the 1912 elections with only 41.9% of the popular vote.<sup>80</sup> Likewise, Abraham Lincoln prevailed in the momentous 1860 presidential election with a bare 39.8% of the popular vote.<sup>81</sup> Conversely, presidential candidates may win the popular vote only to lose the election, as Nixon and former Vice-President Al Gore experienced in 1960 and 2000, respectively.<sup>82</sup> If the Americans truly desired to elect presidents who would serve as faithful proxies for popular preferences, the Electoral College system established in Article II, Section 1 and the Twelfth Amendment to the U.S. Constitution would hardly seem the most promising design. Indeed, the historical record suggests that the Constitution’s framers designed the Electoral College’s indirect system for

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<sup>77</sup> KELLEY, *supra* note 24, at 99.

<sup>78</sup> See, e.g., BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 246 (2005) (“The transformation of the presidency into a plebiscitary office is not a minor detail. It is a dominating fact of constitutional life.”); Adler, *supra* note 16, at 875 (“In recent years, the Plebiscitary President—by which I mean a President who is, in some way, responsive to the judgments, preferences, beliefs or other attitudes of a majority of the citizenry—has loomed increasingly large in . . . the legal literature on the separation of powers and administrative law.”); Dahl, *supra* note 24, at 361 (suggesting that this mandate reflects a societal “belief that elections carry messages about problems, policies, and programs—messages plain to all and specific enough to be directive”); Brian Knowlton, *Obama Vows To Cut Budget Waste*, N.Y. TIMES, Nov. 25, 2008, available at <http://www.nytimes.com/2008/11/26/us/politics/25cnd-transition.html?hp> (last visited Nov. 25, 2008) (quoting President-Elect Obama: “I don’t think that there’s any question that we have a mandate to move the country in a new direction”).

<sup>79</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW THE PEOPLE CAN CORRECT IT)* 82-83 (2006).

<sup>80</sup> *Id.* at 83.

<sup>81</sup> *Id.*

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

presidential succession precisely to combat fears that national elections might fall prey to tyrannical majoritarianism or demagoguery.<sup>83</sup>

Polling data from past presidential elections further undermines the mandate theory of popular representation. According to political scientists, most voters cast their votes based primarily upon “candidate centered” factors such as experience and temperament rather than “issue centered” factors such as a candidate’s specific views on Social Security reform, tax cuts, or foreign policy.<sup>84</sup> Indeed, even the most decisive electoral victories are difficult to construe as conferring issue-centered popular mandates. Robert Dahl has observed that the closest American politics has come to a landslide election during the last half-century was President Lyndon B. Johnson’s victory in 1964 and President Nixon’s in 1972.<sup>85</sup> In each case, however, only 21% of voters cited issue-centered factors—as opposed to candidate-centered factors—as their primary reason for supporting their chosen candidates.<sup>86</sup> In the 1980 presidential elections, when Reagan won 51% of the popular vote, a substantial percentage of voters indicated that they cast their votes against then-President Carter’s policies rather than for Reagan’s policies.<sup>87</sup> Four years later, Reagan’s margin of victory was significantly larger, but Democratic candidates for the House of Representatives still won 52% of votes nationally.<sup>88</sup> It would be difficult, therefore, to dispute Dahl’s conclusion that “no elected leader, including the president, is uniquely privileged to say what an election means—nor to claim that the election has conferred on the president a mandate to enact the particular policies the president supports.”<sup>89</sup>

Even if Americans did cast their votes based solely on candidates’ policy positions, presidents still would not be entitled to interpret national election returns as a sweeping popular mandate to direct agency rulemaking. The Constitution’s framers generally viewed Congress as the best representative of popular opinion,

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<sup>83</sup> See THE FEDERALIST No. 10, at 329-30 (Clinton Rossiter, ed. 1961) (Madison); ACKERMAN, *supra* note 78, at 5; Jeffrey Tulis, *The Two Constitutional Presidencies* 59, 64-67, in THE PRESIDENCY AND THE POLITICAL SYSTEM (Michael Nelson, ed. 1984); Brown, *supra* note 3, at 570.

<sup>84</sup> Francis Rourke, *Presidentializing the Bureaucracy: From Kennedy to Reagan* 123, 126, in THE MANAGERIAL PRESIDENCY (James P. Pfiffner, ed. 1991).

<sup>85</sup> Dahl, *supra* note 24, at 364.

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

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

<sup>88</sup> *Id.* at 365; see also Nzelibe, *supra* note 16, at 1261 (noting that in “the fifteen presidential elections in the postwar period . . . the winner failed to obtain a majority of the popular vote [in six elections], and in seven the opposition had a majority in at least one house of Congress.”); Rourke, *supra* note 84, at 126 (“To be sure, American elections do not comport very well with the concept of mandate. The returns may point in very conflicting policy direction[s] . . .”).

<sup>89</sup> Dahl, *supra* note 24, at 366; see also KELLEY, *supra* note 24, at 4 (“The count of votes tells no one how far voters will follow the victorious candidate, or for how long, or in what direction.”).

believing that the collective wisdom of individual legislators would enable that body to “think, feel, reason, and act like” “the people at large.”<sup>90</sup> In contrast, the presidency was never well suited to serve as a “national voice” in the administrative state because no single public officer could reasonably be expected to reflect popular opinion in all matters of regulatory policy.<sup>91</sup> As Peter Shane has observed, presidential candidates pose a classic “bundled preferences” problem: elections require an up-or-down vote on candidates’ aggregate platform, forcing voters to compromise some personal preferences in order to advance other deeply held commitments.<sup>92</sup> When undertaking this calculus of compromise, particular questions of regulatory policy tend to have low salience for voters; indeed, polls suggest that even issue-minded voters are likely to cast their votes based on candidates’ perceived “competence,” “experience, record in public life, [or] strength of leadership” rather than their views on particular policies.<sup>93</sup> Most voters know far too little about American government generally—let alone the inner workings of the administrative state—to make an informed decision regarding a presidential candidate’s views on specific questions of regulatory policy.<sup>94</sup> As Barry Friedman has noted, the premise that the President will represent the will of the people “assumes there is such a thing as an identifiable majority will, when there is not.”<sup>95</sup> Or as two prominent political

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<sup>90</sup> John Adams, *Letter to John Penn*, IV WORKS 195, 205 (1852-65); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 132, 141-42 (Max Farrand, ed. 1927) (James Wilson) (asserting that “the legislature ought to be the most exact transcript of the whole society” and “the faithful echo of the voices of the people”).

<sup>91</sup> Indeed, Peter Shane has suggested that “[a] President whose every view tracked the majority in the latest relevant opinion poll would presumably be so conspicuously lacking in any internal compass as to call into question at least the President’s capacity for leadership, not to mention his mental health.” Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 198 (1994).

<sup>92</sup> See *id.* at 197-99 (discussing bundling in presidential elections); Cynthia Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997) (noting that the bundling “problem is especially acute for presidential elections precisely because the issue bundles presented to the electorate are greater in size and complexity than those in any other race”); Martin Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 211 (1981) (“Voters often elect a candidate because they support his position on issues that they consider fundamental, and they may disagree with many of his other stances. If permitted to legislate by executive order, the President can enact his less popular policies with a simple stroke of the pen.”).

<sup>93</sup> KELLEY, *supra* note 24, at 101, 107.

<sup>94</sup> See Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty*, 89 IOWA L. REV. 1287, 1291 (2004) (reviewing evidence of massive voter ignorance about politics and observing that academic literature has largely ignored the implications of this data for judicial review); cf. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. at 14 (forthcoming 2009) (“If citizens do not know about the existence of a policy issue, they will probably not have formed any meaningful preferences on its most desirable resolution.”).

<sup>95</sup> Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 583, 629 (1993).

scientists have put it: “On the vast majority of issues dealt with by the bureaucracy, citizens have no specific demands or needs; they operate in a vague, impressionistic world, which leaves politicians with a wide zone of acceptance.”<sup>96</sup> In this “vague, impressionistic world” of voter ignorance, the notion that national elections confer a popular “mandate” upon the President to use particular means or pursue particular ends in administrative rulemaking proceedings is problematic, at best.

My purpose in critiquing the fiction of presidential authorization is not to suggest that there is no correlation between candidates’ campaign platforms and voter behavior in national elections. Clearly, voters are not wholly indifferent to candidates’ substantive views on the issues of the day, and these views in turn shape voters’ perceptions of candidates’ wisdom and character. What the empirical record does suggest, however, is that presidential elections communicate far less information about popular preferences than the proxy theory assumes: although the voting public vests powers of public administration in the President (albeit indirectly), their votes almost never communicate discrete majoritarian directives regarding specific policy choices in specific regulatory fields.

## 2. *The Fiction of Presidential Accountability*

Advocates of presidential administration argue in the alternative that presidents’ unique political accountability qualifies them to serve as proxies for the will of the people in agency rulemaking.<sup>97</sup> In theory, presidential accountability could result from multiple political pressures, including the ambition for reelection, the threat of impeachment, the influence of the President’s political party, the need to maintain popular support for legislative initiatives, the desire to be followed by a like-minded successor, and concerns about the judgment of history. Citing each of these factors, supporters of presidential administration have argued that the President “has an incentive to steer national resources toward the 51% of the nation that last supported him (and that might support him again).”<sup>98</sup> The presidency’s “unitary power structure, its visibility, and its ‘personality’” supposedly strengthen public accountability, mitigate the threat of factionalism, and ensure that the President will speak with a “national voice.”<sup>99</sup>

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<sup>96</sup> B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* 146 (1994); see also Libby Copeland, *Another Peek Inside the Brain of the Electorate*, WASH. POST (July 11, 2008) at C-1 (noting recent empirical research confirming that the average American voter is “dismally ill-informed”).

<sup>97</sup> See, e.g., Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557 (1987) (arguing that presidential supervision provides accountability for the activities of unelected agency bureaucrats).

<sup>98</sup> Calabresi, *supra* note 15, at 35.

<sup>99</sup> Kagan, *supra* note 15, at 2332. Lessig & Sunstein, *supra* note 15, at 2-4, 85-86, 94-95, 98. But see Heidi Kitrosser, *The Accountable Executive*, MINN. L. REV. (forthcoming 2009) (arguing that

Over the last few years, this argument for presidential administration has been hotly contested across the legal academy. Ed Rubin has argued, for example, that “voters cannot, through the process of election, hold a public official accountable in any real sense,” and that meaningful accountability is best achieved through the institutional web of agency bureaucracy.<sup>100</sup> Glen Staszewski has characterized electoral accountability as “wildly unrealistic” because it requires a degree of public engagement with federal administration that far exceeds actual practice.<sup>101</sup> Similarly, Heidi Kitrosser and Peter Shane have shown that presidential control over information flow within the administrative state can obscure the president’s influence, impeding public monitoring and thereby diluting political accountability.<sup>102</sup> Perhaps the greatest obstacle to the Wilsonian vision of presidents as proxies for the public will, however, is the public’s pervasive ignorance about federal governance. As John Ferejohn has noted, “Nothing strikes the student of public opinion and democracy more forcefully than the paucity of information most people possess about politics.”<sup>103</sup> Under these circumstances, the notion that the electorate might possess coherent preferences on discrete questions of regulatory policy defies common sense. The vast majority of agency rulemaking actions simply fly under the public radar, eluding the attention of all but the most well-informed members of the electorate.<sup>104</sup> One cannot readily assume, therefore, that the public as a whole has any discernable “will” about particular regulatory policy questions, much less that the President could readily discern and implement that “will” in agency rulemaking proceedings.

Even in cases where a president’s actions attract intense public scrutiny, the bundled preferences problem resurfaces to frustrate proxy representation.<sup>105</sup> For example, even if the vast majority of voters disapproved of a president’s efforts to manage agency entitlement programs, they might nonetheless reelect the president based on sympathy for the president’s views on foreign policy or social issues. Moreover, between elections the electorate has few effective tools to hold presidents accountable for even the most disastrous regulatory failures, as illustrated recently by the disastrous home-loan credit crisis and the Federal Emergency Management

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presidential administration increases the President’s control over information and thereby undermines accountability).

<sup>100</sup> Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2078-80, 2134-35 (2005).

<sup>101</sup> Staszewski, *supra* note 94.

<sup>102</sup> Kitrosser, *supra* note 99; Shane, *supra* note 91, at 204-09.

<sup>103</sup> Ferejohn, *supra* note 24, at 3; *see also* Somin, *supra* note 94, at 1304 (“The most important point established in some five decades of political knowledge research is that the majority of American citizens lack even basic political knowledge.”).

<sup>104</sup> *See* DELLI CARPINI & KEETER, *supra* note 24, at \_\_\_.

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

Agency's inept response to Hurricane Katrina. For all intents and purposes, Sandy Levinson's assessment would seem to be correct that a "noncriminal president" receives "an unbreakable four-year lease on the White House."<sup>106</sup>

Other political constraints on presidential conduct fail to bridge the gap between presidential preferences and the popular will. While supporters of presidential administration have argued that presidents have strong incentives to seek public support and party approval for their policy initiatives,<sup>107</sup> these incentives are vastly overstated. Presidents Carter and George W. Bush famously took pride in bucking popular opinion, reasoning that a president's role is to provide visionary leadership, not adhere slavishly to the latest polling data.<sup>108</sup> President Clinton paid greater attention to public opinion polls,<sup>109</sup> but he also deliberately ignored majority preferences in several high-profile decisions.<sup>110</sup> The incongruities between presidential policy and public opinion tend to expand during a president's second term, when the president no longer needs to campaign for reelection and may more safely discharge political debts to ideological allies and campaign supporters.<sup>111</sup> Thus, the political constraints on presidential policymaking are hardly adequate to qualify the President as an effective proxy for the public will in agency rulemaking.

### 3. *The Fiction of Presidential Management*

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<sup>106</sup> Levinson, *supra* note 79, at 117.

<sup>107</sup> See MASHAW, *supra* note 59, at 298 ("[I]t is by now a truism of presidential scholarship that a President's standing among the general public critically affects his ability to achieve his policy and political agenda.").

<sup>108</sup> See Lawrence R. Jacobs & Robert Y. Shapiro, *The Politicization of Public Opinion: The Fight for the Pulpit*, in *THE SOCIAL DIVIDE* 96 (Margaret Weir ed., 1998) ("Carter advertised his defiance of public opinion as a sign of his responsible 'trustee' style of leading, though he too commissioned and used private surveys."); Katharine Q. Seelye, *Bush Again Defends his Presidency*, *N.Y. Times*, Jan. 20, 2009, available at <http://thecaucus.blogs.nytimes.com/2009/01/20/bush-again-defends-his-presidency/?hp> (last visited Jan. 20, 2009) ("I never took an opinion poll to tell me what to think."); see generally HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 214 (1967) ("The more sure a representative is of their view of the right, the less likely they will draw on constituent feelings.").

<sup>109</sup> SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES IN PRESIDENTIAL LEADERSHIP* 41 (4<sup>th</sup> ed. 2007) (noting that George H.W. Bush spent \$216,000 of RNC money on in-house polling in one year, and that Clinton spent nearly ten times that amount in 1993 alone).

<sup>110</sup> See Jacobs & Shapiro, *supra* note 108, at 98 (discussing Clinton's decision to integrate gay men and women in the military under the "don't ask, don't tell" policy).

<sup>111</sup> See, e.g., R. Jeffrey Smith, *A Last Push To Deregulate: White House To Easy Many Rules*, *WASH. POST*, at A1 (Oct. 31, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/30/AR2008103004749.html?hpid=topnews> (last visited Dec. 12, 2008) (noting that "[t]he doors at the New Executive Office Building have been whirling with corporate officials and advisers pleading for relief or, in many cases, for hastened decision making" from the outgoing Bush Administration).

The notion that presidents serve as reliable proxies for the body politic fails for yet another reason: centralizing policymaking authority in the presidency does not ensure that the president will personally manage agency rulemaking. In most cases, presidential management of agency rulemaking is a fiction that disguises bureaucratic management. The President cannot feasibly review or respond to every agency rulemaking proposal personally.<sup>112</sup> Instead, he or she necessarily relies on the White House's ever-expanding internal bureaucracy—including, but not limited to, OIRA—to oversee rulemaking proceedings across the administrative state. Indeed, the more assertive presidents have been in seeking managerial control over the federal bureaucracy, the more they have been forced to bureaucratize the presidency itself.<sup>113</sup> As critics have observed, these bureaucratic dynamics dictate that “OIRA will in general have free rein to manage the regulatory state without the kind of robust White House oversight that advocates [of presidential administration] claim will blunt the effect of public choice imbalances.”<sup>114</sup> Whether or not the President can properly claim public authorization or public accountability for their policy guidance, the notion that presidential administration facilitates popular representation becomes far too attenuated once the President delegates this critical function to unelected White House staff.

Recent empirical work underscores just how problematic the bureaucratization of presidential administration has become. In one important study, Professors Lisa Bressman and Michael Vandenbergh conducted interviews with dozens of past and present Environmental Protection Agency (EPA) officials in an effort to discern the form and extent of White House participation in agency rulemaking.<sup>115</sup> Interviewees explained that the White House did not consistently speak in a singular “national voice” on questions of public policy. Instead, the EPA often received conflicting guidance on proposed rulemaking actions from as many as nineteen different White House offices.<sup>116</sup> Far from providing univocal presidential policy direction, these internal tensions within the White House tended to foster “a

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<sup>112</sup> See CRAIG A. RIMMERMAN, *PRESIDENCY BY PLEBISCITE: THE REAGAN-BUSH ERA IN INSTITUTIONAL PERSPECTIVE* (1993) (asserting that “the managerial conception of the presidency is untenable”); Thomas O. Sargentich, *Normative Tensions in the Theory of Presidential Oversight of Agency Rulemaking*, 7 *ADMIN. L.J. AM. U.* 325, 326 (1993) (noting that any “notion of national political accountability needs to be tempered by the reality that the president is generally not the person doing the overseeing”).

<sup>113</sup> See PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY* 164 (2007); James P. Pfiffner, *Can the President Manage the Government? Should He?*, in JAMES P. PFIFFNER, *THE MANAGERIAL PRESIDENCY* 1, 13 (1991).

<sup>114</sup> Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *COLUM. L. REV.* 1260, 1277-80 (2006).

<sup>115</sup> Lisa S. Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 *MICH. L. REV.* 47 (2006).

<sup>116</sup> *Id.* at 49-50, 68.

climate of internal combat and coalition building.”<sup>117</sup> The Bressman-Vandenbergh study also found that White House review of agency rulemaking tended to be “unsystematic” and “selective,” depending primarily on “the interests of the particular officials involved” rather than the rigorous, systemic oversight that would ensure adequate representation across the administrative state under a proxy theory of presidential administration.<sup>118</sup> For this reason alone, the prevailing theory of presidential administration as a form of proxy representation remains unpersuasive in practice.

*B. The Pathologies of Presidential Administration*

Whether or not presidents are reliable proxies for popular preferences, the question remains whether presidential administration might nonetheless be desirable on other grounds. Some advocates for presidential administration have reasoned that White House control would improve interagency coordination, facilitate transparency and public monitoring, and minimize special-interest influence.<sup>119</sup> In practice, however, experience has shown that presidential administration often has precisely the opposite effect, sowing disharmony through inconsistent directives, privileging concentrated special interests over diffuse majority preferences, and reducing governmental transparency.

Far from advancing popular preferences, presidential administration may very well frustrate popular preferences in a variety of contexts. One need look no further than recent public opinion polls to appreciate the profound disconnect that may develop between presidential policies and the will of the people. During the waning hours of his presidency, President George W. Bush’s public disapproval rating hit 76%, the highest disapproval rating in six decades.<sup>120</sup> Public approval of Bush’s handling of economic policy bottomed out at 21%, with 72% disapproving.<sup>121</sup> The public also expressed strong disapproval of Bush’s environmental policies, with 91% of respondents indicating that the administration was either treading water or affirmatively weakening environmental protections.<sup>122</sup> Granted, the President

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

<sup>118</sup> *Id.* at 49.

<sup>119</sup> See, e.g., Kagan, *supra* note 15, at 2331-46; Rodriguez, *supra* note 15, at 1193-95.

<sup>120</sup> Paul Steinhauser, *Bush Leaving Office More Unpopular Than Nixon*, at <http://www.cnn.com/2008/POLITICS/11/10/bush.transition.poll/index.html> (last visited Nov. 10, 2008) (reporting the results of a CNN/Opinion Research Committee Survey).

<sup>121</sup> American Research Group, Inc., *George W. Bush’s Overall Job Approval Rating Improves Based on Support from Republicans*, Nov. 20, 2008, available at <http://americanresearchgroup.com/economy> (last visited Dec. 12, 2008).

<sup>122</sup> Gallup’s Pulse of Democracy: The Environment, Aug. 4, 2008, available at <http://www.gallup.com/poll/1615/Environment.aspx?version=print> (last visited Dec. 12, 2008); see also Riley E. Dunlap, *Bush and the Environment: Potential for Trouble?*, Apr. 5, 2004, available at

enjoyed considerably higher public approval in other areas such as national security policy. But this observation only underscores how difficult it is to generalize about the relationship between presidential policy and public opinion.

Centralizing rulemaking authority in the White House also arguably enables factionalism and government capture by special interests. Anecdotal evidence suggests that presidents often cater to “narrow, sub-national political interests, including those playing major roles in national campaigns and parties.”<sup>123</sup> For example, during his campaigns for the presidency, Clinton lavished attention on California and Florida voters, two constituencies vital to his prospects for re-election.<sup>124</sup> Similarly, George W. Bush worked hard to earn “the support of the rightwing of the Republican Party, [a strategy] which proved to be critical during the political primary season of 2000 . . . , during his first term, and during his 2004 re-election campaign.”<sup>125</sup> Solicitude toward narrow constituencies such as these can easily extend beyond the campaign trail as “imperfections in the political process and voter psychology . . . permit the President to reap rewards by dictating particular regulatory outcomes to benefit special interest groups.”<sup>126</sup> Indeed, presidential administration magnifies the risks associated with White House capture by increasing the President’s leverage over the rulemaking process. An opportunistic managerial president might arbitrarily delay or block agency rulemaking initiatives<sup>127</sup> or adopt regulations inconsistent with an agency’s expert judgment<sup>128</sup> or

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<http://www.gallup.com/poll/11179/Bush-Environment-Potential-Trouble.aspx?version=print> (last visited Dec. 12, 2008) (reporting 46% of respondents indicating that Bush doing a “poor job” on the environment as opposed to only 41% indicating he was doing a “good job”).

<sup>123</sup> Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 27 (2007).

<sup>124</sup> *Id.* at 6.

<sup>125</sup> *Id.* at 27-28 (internal citations omitted).

<sup>126</sup> Seidenfeld, *supra* note 252, at 19. One influential study found that “fully fifty-six percent of the meetings that OIRA held to discuss proposed or final agency rulemakings involved only ‘narrow interests’ (i.e., industry groups), as compared to just ten percent that involved only ‘broad interests’ (i.e., nonprofit public interest groups).” Bagley & Revesz, *supra* note 114, at 1306-07 (summarizing the findings of Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 858 (2003)).

<sup>127</sup> See, e.g., Amy Goldstein & Sarah Cohen, *Bush Forces a Shift in Regulatory Thrust: OSHA Made More Business-Friendly*, WASH. POST, Aug. 15, 2004, at A1 (“Unlike his two predecessors, Bush has canceled more of the unfinished regulatory work he inherited than he has completed . . . .”); OMB Watch, *The Bush Regulatory Record: A Pattern of Failure*, Sept. 2004, available at <http://www.ombwatch.org/article/archive/328> (last visited Dec. 12, 2008) (reviewing rulemaking initiatives withdrawn by EPA, FDA, NHTSA, and OSHA during the first Bush-43 term).

<sup>128</sup> See HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 465 (2006) (observing that President Clinton directed the FDA to adopt the tobacco regulation later struck down in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), despite the fact that FDA lawyers had already concluded the agency lacked the requisite statutory authorization).

popular opinion.<sup>129</sup> In short, presidential administration does not reliably reduce the threat of factionalism in agency rulemaking and could greatly exacerbate the problem.

The lack of transparency in presidential administration only aggravates the danger of regulatory counter-majoritarianism. White House communications with administrative agencies are not ordinarily subject to the Freedom of Information Act's (FOIA) mandatory disclosure requirements,<sup>130</sup> and the White House has resisted efforts to expose its communications with agencies to public scrutiny on grounds of executive privilege.<sup>131</sup> Sunshine provisions adopted during the Clinton Administration do require OIRA to disclose contacts from private parties during formal OIRA review,<sup>132</sup> and OIRA has adopted a similar "informal practice" of disclosing such contacts on draft rules.<sup>133</sup> In addition, OIRA is required to disclose its communications with agency officials following publication of a final rule.<sup>134</sup> However, these disclosure requirements do not apply to communications from other offices within the White House. Insofar as the White House declines to disclose its reasons for initiating, modifying, suspending, or terminating rulemaking initiatives, its preferences and motivations remain inscrutable to the electorate. Thus, presidential administration could enable White House officials to exploit their

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<sup>129</sup> For example, President Reagan reportedly defied public opinion on abortion by guiding the Department of Health and Human Services to withhold federal funding from programs that offered "counseling concerning the use of abortion as a method of family planning" or "referral for abortion as a method of family planning." See Rourke, *supra* note 84, at 125; Friedman, *supra* note 95, at 635 n.290. Similarly, "Clinton's proposal to allow gays in the military was inconsistent with the public's deep-seated attitudes toward homosexuality," and "his sweeping health reform proposal openly defied sustained public fears regarding excessive government interference and erosion of quality and choice of care." Jacobs & Shapiro, *supra* note 108, at 98.

<sup>130</sup> See 5 U.S.C. § 552(b)(5) (exempting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 & 150 (1975) (holding that FOIA protects presidential communications generally and materials related to intra-agency deliberative processes); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004) ("There is [in FOIA] a built-in presidential communications privilege for records in the possession of, or created by, immediate White House advisers . . .").

<sup>131</sup> See generally Morton Rosenberg, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, Congressional Research Service Report for Congress, updated Aug. 21, 2008, available at <http://www.fas.org/sgp/crs/secr/RL30319.pdf> (last visited Dec. 12, 2008) (reviewing presidential assertions of executive privilege from Kennedy to Bush-43); Gary D. Bass & Sean Moulton, *The Bush Administration's Secrecy Policy* (OMB Watch Working Paper Oct. 2002), available at [www.ombwatch.org/rtk/secr/RL30319.pdf](http://www.ombwatch.org/rtk/secr/RL30319.pdf) (last visited Dec. 12, 2008).

<sup>132</sup> See Exec. Order No. 12,866, 3 C.F.R. 638, 646 (1993), reprinted in 5 U.S.C. § 601 (Supp. 1993) (requiring agencies to log communications with persons outside the executive branch and limiting OIRA contact with persons outside the executive branch).

<sup>133</sup> Bagley & Revesz, *supra* note 114, at 1282.

<sup>134</sup> Exec. Order No. 12,866, § 6(b)(4)(D), 3 C.F.R. at 648.

influence for personal or institutional self-aggrandizement or to benefit narrow factions arbitrarily at the broader public's expense.

Presidential administration also raises a problem of regulatory entrenchment. When agencies adopt counter-majoritarian regulations pursuant to presidential instructions, these regulations become cemented into federal law and are not easily dislodged. To overturn unpopular federal regulations, Congress would have to override the President's veto—a daunting proposition—or wait for a new president with different views to take office. Federal courts are ill-equipped to check counter-majoritarian presidential administration, because White House directives are not directly subject to judicial review and the mere unpopularity of proposed regulations is not, in and of itself, a basis for relief under the APA.<sup>135</sup> Thus, committing rulemaking authority to the President's formal control could effectively entrench counter-majoritarian regulations against Congress's legislative override.

To be fair, Bickel's distinction between "majoritarian" and "counter-majoritarian" governance may be too crude a standard for evaluating the performance of judges, legislators, presidents, agency administrators, and other state actors.<sup>136</sup> As Bickel himself conceded, the "will of the people" is best understood as a conceptually convenient "abstraction," not a readily ascertainable empirical reality.<sup>137</sup> Relatively few questions that arise in agency rulemaking—or in federal governance generally—attract sufficient public attention to generate coherent national preferences. Yet to the extent that it is ever possible to draw conclusions about "the will of the people" from public opinion polls or other barometers of popular preferences, it appears that there are many good reasons to abandon the notion that presidents serve as reliable proxies for the public will in agency rulemaking.

In theory, the United States could take measures to strengthen the link between presidential policymaking and public preferences such as instituting binding national referenda on questions of regulatory policy or developing procedures for the electorate directly to censure or recall presidents who disregard public opinion. In practice, however, such reforms would require profound changes to our constitutional system and have little chance of success in the near term. Moreover, given the public's profound disengagement from the administrative process, it appears unlikely that even such radical innovations would ensure that presidential policymaking was grounded in genuine majoritarian preferences. The American presidency is simply ill-suited to serve as an oracle for the "will of the people" in the administrative state.

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<sup>135</sup> Bagley & Revesz, *supra* note 114, at 1309.

<sup>136</sup> See, e.g., Friedman, *supra* note 95, at 582.

<sup>137</sup> BICKEL, *supra* note 1, at 16.

C. *The Perils of Presidential Administration*

Ironically, strengthening the White House's managerial authority over agency rulemaking might not even be in the President's own best interest. Political scientists have argued that recent presidents have felt compelled to assume greater control over federal agencies in order to meet the public's rising expectations of presidential leadership.<sup>138</sup> Allowing the President to exercise formal control over agency rulemaking would not break the vicious cycle of unrealistic expectations, however. To the contrary, presidential administration would arguably exacerbate the problem by elevating public expectations about the President's involvement in federal regulation to even less realistic levels. The more authority presidents claim over the administrative state, the more the electorate will expect them to master and manage the minutia of federal regulation, and the less feasible it will be for presidents to meet those expectations.<sup>139</sup> As such, the proxy theory of popular representation is best viewed as an attractive nuisance—a superficially alluring but ultimately hazardous trap—for the American presidency.

III. FIDUCIARY REPRESENTATION

If plebiscitary presidential administration is descriptively and prescriptively implausible, what consequences follow for the otherwise uncertain relationship between popular sovereignty and administrative governance? In what sense might administrative agencies represent the People in rulemaking proceedings, if not as proxies for the public will?

In this Part, I explore these questions from a new perspective by developing a theory of popular representation in administrative lawmaking based on the idea that public officers serve as fiduciaries for the people subject to their power. This model of popular representation draws on arguments advanced in my recent article, *Fiduciary Foundations of Administrative Law*,<sup>140</sup> but extends these insights about the legal structure of administrative law generally to further illuminate the fiduciary character of agency rulemaking authority in particular. Along the way, this Part also considers how the fiduciary character of public administration might inform the respective roles of the President and agency administrators as popular representatives in the administrative state.

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<sup>138</sup> See, e.g., ROBERT F. DURANT, *THE ADMINISTRATIVE PRESIDENCY REVISITED* 10 (1992); Terry M. Moe, *The Politicized Presidency* 136, 140, in JAMES P. PFIFFNER, *THE MANAGERIAL PRESIDENCY* (1991); RIMMERMAN, *supra* note 112, at 33.

<sup>139</sup> Peri Arnold aptly summarizes this dilemma when he observes that “the managerial conception of the presidency” forces presidents into an “untenable” position by “rais[ing] public expectations about presidential performance that cannot be met.” PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905-1996* (2d ed. 1998).

<sup>140</sup> Criddle, *supra* note 26.

The fiduciary model of popular representation hearkens back to a tradition in political theory that predates Wilson's now-ascendant view of the presidency as the People's singular "voice" in national affairs. Centuries before Wilson, the concept of state institutions and officials as "agents" or "trustees" for the People shaped the thought of luminaries such as Cicero,<sup>141</sup> John Locke,<sup>142</sup> Edmund Burke,<sup>143</sup> James Madison,<sup>144</sup> and Alexander Hamilton.<sup>145</sup> The fiduciary theory was deeply influential among the American political elite during the founding period and throughout the nineteenth century, as reflected in the republican vision "that each American had an equal part in forming the sovereignty of the United States, the body of political power."<sup>146</sup> Leading intellectuals of the early twentieth-century such as John Stuart Mill and Frederick Maitland likewise characterized public powers as being held in "trust" by the state for the benefit of the nation as a whole.<sup>147</sup> Although the fiduciary

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<sup>141</sup> See, e.g., MARCUS TULLIUS CICERO, *ON MORAL DUTIES (DE OFFICIIS)*, bk. I, § 25 ("[A]s the guardianship of a minor, so the administration of the state is to be conducted for the benefit, not of those to whom it is entrusted, but of those who are entrusted to their care.").

<sup>142</sup> JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT* (1960), reprinted in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU*, at 125-126 (Ernest Baker ed. 1948) (asserting that legislative power is "only a Fiduciary Power to act for certain ends" and that "there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.").

<sup>143</sup> See, e.g., Edmund Burke, *Thoughts on the Case of the Present Discontents*, in *BURKE'S POLITICS* (1949) (1770) ("The king is the representative of the people; so are the lords; so are the judges. They are all trustees for the people.").

<sup>144</sup> See, e.g., *THE FEDERALIST* 46, at 294 (James Madison) (New American Library 1961) (1788) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.");

<sup>145</sup> *THE FEDERALIST* 65, at 397 (Alexander Hamilton) ("The delicacy and magnitude of trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves.").

<sup>146</sup> See PA. CONST. of 1776, art. IV. ("[A]ll power being . . . derived from the people: therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."); Purdy, *supra* note 48, at 10 (observing that this "idea that power flowed from the whole political community to the government, which held it in 'trust,' was central to American political language in the nineteenth century."); *id.* at 10 n.38 (citing James Madison, First Inaugural Address (Mar. 4, 1809) (referring to his "awful sense of the trust to be assumed"); James Madison, Second Inaugural Address (Mar. 4, 1813) (invoking "the momentous period at which the trust has been renewed"); James Monroe, First Inaugural Address (Mar. 4, 1817) (referring to the need for a President to hold "a just estimate of the importance of the trust and of the nature and extent of its duties"); *id.* (referring to American government officials as "the faithful and able depositaries of their trust [that of the American people]"); and Andrew Jackson, Second Inaugural Address (Mar. 4, 1833) (referring to the office as a "sacred trust" which he "receive[d] from the people").

<sup>147</sup> See John Stuart Mill, *Representative Government*, in *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* 318 (1947) (describing public power as a "trust" that must be "fulfilled"); Frederick William Maitland, *Trust and Corporation*, in *SELECTED ESSAYS* 120 (H.D. Hazeltine et al., eds. 1936) (explaining that "when new organs of local government are being developed, . . . it is natural . . . that their governmental powers should be regarded as being held in

concept of state legal authority is perhaps somewhat less pervasive in public discourse today than in times past, it continues to shape how federal and state courts conceptualize the role of public officers in our government.<sup>148</sup> The question is what this venerable tradition might teach us about popular representation in the twenty-first century administrative state.

A. *Conceptualizing Fiduciary Representation*

As a first step toward reclaiming the fiduciary model of state authority, we will need to unpack the fiduciary concept and clarify how the fiduciary model of state authority might transcend mere metaphor and provide meaningful guidance for contemporary administrative law.

Historically, the fiduciary concept has its roots in private law paradigms. Beginning in the twelfth century and continuing on throughout the Middle Ages, the law of England recognized the “use” or “trust” as a legal device for authorizing certain individuals to manage assets or perform other services subject to strict legal and ethical duties of fidelity to their beneficiaries’ interests.<sup>149</sup> Over time, Anglo-American courts extended the fiduciary concept to an expanding family of legal relations, including agency, partnerships, guardianships, receiverships, corporations, security arrangements, franchises, and, more recently, certain confidential counseling relations such as the attorney-client and doctor-patient relationships.<sup>150</sup>

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trust. Those powers are, we say, ‘intrusted to them’ or they are ‘intrusted with’ those powers”). *See also* Taylor v. Beckham, 178 U.S. 548, 577 (1900) (describing administrative agencies as “mere agencies or trusts”); Stone v. Mississippi, 101 U.S. 814, 820 (1879) (“The power of governing is a trust committed by the people to the government. . . . The people, in their sovereign capacity, have established agencies for the preservation of the public health and the public morals, and the protection of public and private rights.”); ERNEST BARKER, *ESSAYS ON GOVERNMENT* 56 (1951) (describing the representative parliament as “the trustee which the nation has authorized to act on its behalf; and it exercises sovereign power, under the terms of the trust, for the nation”); HENRY J. FORD, *REPRESENTATIVE GOVERNMENT* 148 (1924) (describing representative government as “by its essential nature . . . a trusteeship”); PITKIN, *supra* note 108, at 128 (“Representation certainly is, as many writers have pointed out, a fiduciary relationship, involving trust and obligation on both sides.”).

<sup>148</sup> *See, e.g.*, Metro Wash. Airport Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252, 272 (1991) (describing government institutions as fiduciaries for the people); Nuesse v. Camp, 385 F.2d 694, 706 (D.C. Cir. 1967) (describing the fiduciary nature of public legal authority as a “living tenet of our society”); Black River Regulating District v. Adirondack League Club, 121 N.E.2d 428 (N.Y. 1984) (approving “the theory that the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good”); Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433 (1951) (describing public officials as fiduciaries with an “inescapable obligation to serve the public with the highest fidelity”).

<sup>149</sup> *See* FOX-DECENT, *supra* note 27, at 48-52; Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139 (1996).

<sup>150</sup> *See* Jerry W. Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 NOTRE DAME L. REV. 199, 214-18 (1992).

What distinguishes fiduciary relations such as these from other types of legal or extra-legal relationships? At their most basic level, all fiduciary relations share a common legal structure: the law entrusts a party (the fiduciary) with discretionary administrative authority over the legal or practical interests of another party (the beneficiary). Within the fiduciary relation, the beneficiary is unable, either legally or practically, to protect herself against the abuse of fiduciary power. The law therefore obligates the fiduciary to exercise entrusted discretionary power in furtherance of legally authorized purposes<sup>151</sup> and with due care for the beneficiary's interests.<sup>152</sup> In cases where fiduciaries have multiple beneficiaries, the duty of loyalty requires even-handed treatment among beneficiaries.<sup>153</sup> These principles of integrity, fairness, reasonableness, diligence, and solicitude define and circumscribe the fiduciary's administrative authority.

To facilitate adherence to these duties, fiduciary law also contains prophylactic information-forcing rules, which promote transparency and facilitate monitoring and enforcement. Fiduciaries are required to "keep clear and accurate accounts"<sup>154</sup> and give beneficiaries a complete and accurate accounting of their performance upon request.<sup>155</sup> Fiduciaries must comply with these requirements whether or not beneficiaries are able to show they have suffered a distinct injury.<sup>156</sup> These duties of disclosure are necessary to ensure fiduciaries' adherence to their primary fiduciary duties.

Evan Fox-Decent and I have argued that the fiduciary relation's legal basis is best perceived through the lens of Immanuel Kant's conception of parent-child fiduciary relations.<sup>157</sup> According to Kant, all children have an innate right to their parents' care "without any special act being required to establish this right."<sup>158</sup>

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<sup>151</sup> Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, at 808 & n.48 (1983); see also Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 10 (1976) ("The extent of the fiduciary's discretion is demarcated, and the fiduciary obligation is imposed in order to compel a proper exercise of that discretion within the scope of the authority thus delineated.")

<sup>152</sup> See *Nagel v. Todd*, 45 A.2d 326, 327 (Md. 1945) (stating that fiduciaries must act "primarily for the benefit of [their beneficiaries] on matters relating to the undertaking"); *Christallina, S.A. v. Christie*, 117 A.D.2d 284, 293 (N.Y. 1986) (implied duty to use best efforts); 2 RESTATEMENT (THIRD) OF TRUSTS § 174 (2003) [hereinafter TRUST RESTATEMENT] (duty to exercise "such care and skill as a man of ordinary prudence would exercise in dealing with his own property").

<sup>153</sup> *Meinhardt v. Salmon*, 249 N.Y. 458, 469 (1928) (describing this "rule of undivided loyalty" as "relentless and supreme").

<sup>154</sup> 2A AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS §§ 172 (William Franklin Fratcher ed., 4th ed. 1991).

<sup>155</sup> *Id.*

<sup>156</sup> Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456 (2004).

<sup>157</sup> I owe this insight to Professor Fox-Decent's illuminating discussion in Fox-Decent, *State Legal Authority*, *supra* note 27, at 273-81. See also Criddle & Fox-Decent, *supra* note 27.

<sup>158</sup> IMMANUEL KANT, THE METAPHYSICS OF MORALS 98-99 (Mary Gregor trans., 1991) (1797).

Parents cannot “abandon” or “destroy their child as if he were something they had *made* (since a being endowed with freedom cannot be a product of this kind) or as if he were their property.”<sup>159</sup> Rather, once parents in the exercise of their freedom bring a child into the world, recognition of the child’s equal freedom as a “citizen of the world” places the parents under a fiduciary obligation “to make the child content with his condition so far as they can.”<sup>160</sup> In Kant’s view, a parent’s fiduciary obligations to their child arises from the general imperatives of innate right, namely, each parent’s right to exercise their freedom, as limited necessarily by the child’s equal dignity as a free and autonomous moral agent.

Extending Kant’s theory of innate right beyond familial relations, the same demands of rightful conduct *vis-à-vis* children extend likewise to other fiduciary relationships such as trust-beneficiary, agent-principal, corporation-shareholder, and lawyer-client. Although most beneficiaries are not children or incompetents and need not be treated as such, all beneficiaries are vulnerable to abuse of administrative power, and the dignity intrinsic to their legal personality places fiduciaries under special moral and legal duties. The coupling of a fiduciary’s discretionary authority with the beneficiary’s vulnerability and innate right to freedom obligates the fiduciary to observe basic principles of fairness, reasonableness, diligence, and solicitude within the scope of their legal relation.

As in any a form of representation, fiduciaries are bound to act deliberately, not reflexively. “When we act for someone we may not act on impulse,” observes Hannah Pitkin. Instead, “we ought to have reasons for what we do, and be prepared to justify our actions to those we act for, even if this accounting or justification never actually takes place.”<sup>161</sup> The deliberate character of representation thus involves a formal principle of justifiability, which informs both proxy representation and fiduciary representation, albeit in different ways. In proxy representation, the proxy is expected to identify and implement the principal’s actual preferences. A fiduciary representative, on the other hand, need not always conform her actions to the beneficiary’s will. Indeed, it is precisely the *discretionary* character of a fiduciary’s administrative power (due typically to the beneficiary’s absence, incompetence, or abdication of authority) that distinguishes fiduciary relations from other forms of representation. When exercising discretionary powers, the fiduciary must independently assess what course of action will best promote her beneficiary’s welfare. In reaching this determination, a fiduciary must be prepared to explain why her actions are fair, reasonable, other-regarding, and appropriately purposive. Her actions must be reasonably calculated to promote her beneficiary’s interests, not merely her own. While the beneficiary’s actual preferences may be germane to this

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

<sup>160</sup> *Id.*

<sup>161</sup> PITKIN, *supra* note 108, at 119.

assessment and should not be dismissed lightly, they are not ordinarily dispositive for the fiduciary as they would be for a proxy. Thus, unlike the proxy, the fiduciary is bound to exercise her entrusted discretionary power deliberately in the interest of her beneficiary, but not necessarily adhering strictly to her beneficiary's actual preferences.

It follows that fiduciary representation is qualitatively distinct from proxy representation in another important sense: fiduciary representation is not only *deliberate* but also *deliberative*. To satisfy the paradigmatic fiduciary duty of care, a fiduciary representative must exercise her administrative discretion through a deliberative process, which includes, at a minimum, clarifying the nature of the problem or opportunity, discerning the range of permissible actions, evaluating the pros and cons of each alternative, and developing an objectively reasonable rationale for the action taken.<sup>162</sup> The fiduciary representative must give consideration to relevant experience or expertise, be it the fiduciary's own expert judgment or the consultation of other specialists.<sup>163</sup> She may not arbitrarily neglect or ignore readily accessible sources of information that may be important to their decision.<sup>164</sup> Above all, the principle of formal justifiability dictates that a fiduciary's exercise of discretionary power must follow prudent and rational deliberation, and the fiduciary must provide a complete and satisfactory accounting of her stewardship upon request.<sup>165</sup> The fiduciary concept thus represents a robust alternative to proxy representation, reframing popular representation as a product of deliberative rationality, purpose, and solicitude to the beneficiary's interests.

#### B. *Fiduciary Representation in the Administrative State*

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<sup>162</sup> Cf. *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985) ("Under the business judgment rule there is no protection for directors who have made 'an unintelligent and unadvised judgment.'" (quoting *Mitchell v. Highland-W. Glass Co.*, 167 A. 831, 833 (Del. Ch. 1933))); *Brehm v. Eisner (Disney II)*, 746 A.2d 244, 264 (Del. 2000) ("Irrationality is the outer limit of the business judgment rule." (footnote omitted)).

<sup>163</sup> See Patricia A. Vlahakis, *Takeover Law and Practice 2008*, in 40TH ANNUAL INSTITUTE ON SECURITIES REGULATION, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 1087, 1119 (2007) (describing consultation of legal and financial experts as part of the duty of care).

<sup>164</sup> See *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. 1993) (holding that directors violated their duty of care because they did not "adequately inform" themselves of all reasonably available material information before approving a merger agreement).

<sup>165</sup> See *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 n.9 (Del. Ch. 1986) ("[A] decision by disinterested directors following a deliberative process may still be the basis for liability if such decision cannot be 'attributed to any rational business purpose,' or is 'egregious.'" (citation omitted)); Vlahakis, *supra* note 163, at 1119 ("The core of the duty of care may be characterized as the directors' obligation to act on an informed basis after due consideration of the relevant materials and appropriate deliberation.").

Against this background, the traditional republican conception of state officers and institutions as “agents” and “trustees” for the People comes into clearer focus. The idea that public officials serve as fiduciary representatives for persons subject to their power comports with the constitutive features of fiduciary relationships generally. Like private fiduciaries, all agents and instrumentalities of the state—including the primary legislative, executive, and judicial branches—assume discretionary administrative powers to make, interpret, or enforce laws for the citizenry. Because these public powers are entrusted solely to the state and cannot be exercised by private parties without legal authorization, persons within the state are uniquely vulnerable to the state’s discretionary exercise of administrative power. All agents and instrumentalities of the state are therefore subject to duties of integrity, fairness, reasonableness, diligence, and solicitude in the discharge of their responsibilities.<sup>166</sup> Public officials, like private fiduciaries, must be prepared to provide rational reasons for their decisions commensurate with the purpose of their entrusted authority. Further, public officials must preserve records of their activities and disclose those records to the public upon request. These conditions on the discretionary exercise of state power find expression in a variety of constitutional and statutory guarantees, including the Fourth Amendment right to freedom from unreasonable searches and seizures,<sup>167</sup> the Due Process Clauses of the Fifth and Fourteenth Amendments,<sup>168</sup> and federal legislation such as FOIA.<sup>169</sup> At a more basic level, however, the principles of public fiduciary obligation represent relational constraints that the rule of law places on public officials’ exercise of administrative powers.<sup>170</sup>

Popular representation under the fiduciary model does not depend upon electoral authorization or accountability, nor does it seek to guarantee that public officials satisfy the “will of the people.” Instead, fiduciary representation acknowledges that the public will is usually an abstraction without a reliable referent in the real world. As an alternative, the fiduciary model focuses on the *process* by which public officials’ exercise discretionary powers—in particular, their fidelity to the public welfare, as measured by the formal criteria of fairness, reasonableness, purposefulness, and solicitude. For example, a police officer may be said to represent the People when making an arrest, if the arrest serves a lawfully authorized purpose, is not an abuse of discretion under the particular circumstances, and is not tainted by a self-interested motive or discriminatory intent. A federal district judge likewise represents the People when sentencing a criminal defendant if she satisfies the

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<sup>166</sup> See Criddle & Fox-Decent, *supra* note 27.

<sup>167</sup> Const. amend. IV.

<sup>168</sup> Const. amends. V & XIV.

<sup>169</sup> 5 U.S.C. § 552.

<sup>170</sup> See FOX-DECENT, *supra* note 27, at 234; Fox-Decent, *State Legal Authority*, *supra* note 27, at 1271-72.

principle of justifiability by demonstrating that the sentence is fundamentally fair and reasonable in light of the evidence before the court.<sup>171</sup> Similarly, under the fiduciary model, a member of Congress may represent the People if she supports controversial legislation based on her rational assessment of the public interest—even if she is unable to divine any coherent public will concerning the legislation.<sup>172</sup> In each of these contexts, popular representation rests on the fiduciary’s satisfaction of her basic fiduciary duties. Whether public officials are elected by, or directly accountable to, the electorate might strengthen or weaken the case for popular representation, but neither of these considerations are necessary criteria for fiduciary representation as long as the fiduciary exercises entrusted power pursuant to a lawful public purpose and in accordance with her general fiduciary duties.

Dimitrios Kyritsis has argued that the fiduciary model of the state is preferable to proxy representation in the legislative process because it “more accurately reflects . . . the practice of political representation, as we know it,” and thus “better captures *our* conception of representation.”<sup>173</sup> Public preferences in republican democracies “are neither immutable nor inviolable,” he observes.<sup>174</sup> Instead, voters rely on legislators to clarify what is at stake in proposed legislation, and legislators in turn shape public preferences.<sup>175</sup> The dynamic “relationship between the representative and the constituents he represents is not one of identity between the acts and decisions of the former and the wishes and views of the latter”<sup>176</sup>; rather, legislators necessarily exercise a degree of discretion independent of their constituents’ actual preferences:

What is important for the legitimacy of legislative decisions is that legislators reconstruct from [the public’s] wishes and convictions the best possible vision of the just and well-governed polity, in which the interests of individuals deserve a place. . . . Even where their actions in their official capacity are in line with what their constituents happen to believe and want, the ground for [legislators’] actions is not that their constituents want them so to act. Rather, the ground is the more complex

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<sup>171</sup> See Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1103-07 (2008) (comparing private fiduciaries and public officials, and explaining that public officials must be prepared to justify their actions according to legal authorization).

<sup>172</sup> See Dimitrios Kyritsis, *Representation and Waldron’s Objection to Judicial Review*, 26 OXFORD J. LEG. STUD. 733, 743 (2006).

<sup>173</sup> Kyritsis, *supra* note 172, at 743; see also Adler, *supra* note 16, at 878 n.334 (noting the tension in democratic theory between the president as “trustee” and “delegate”).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 744.

<sup>176</sup> *Id.*; see also Staszewski, *supra* note 94, at 18 (observing that in one study “only 12% of voters could identify a single vote on an issue by their elected representative”).

idea that they think that certain wishes and convictions of their constituents fit into a morally attractive vision of the just and well-ordered polity.<sup>177</sup>

This fiduciary conception of the legislator-constituent relation captures how legislators actually behave—and ought to behave—in a polity characterized by malleable preferences and pervasive disengagement from the political process.

The fiduciary conception of popular representation is also well-suited to agency lawmaking the modern administrative state.<sup>178</sup> Through enabling legislation, Congress entrusts lawmaking authority to administrative agencies, placing the public in a position of acute vulnerability to the potential abuse of administrative powers. As in the legislative process, most voters do not monitor agency activities closely and lack coherent preferences concerning administrative lawmaking. Administrative agencies necessarily exercise considerable discretion in their endeavors.<sup>179</sup> Just as constituents rely on their legislative representatives to advance their interests in Congress, the electorate as a whole relies on administrative agencies to exercise their rulemaking powers fairly and reasonably in furtherance of the general public welfare. Because deliberative rationality lies at the heart of administrative agencies' fiduciary role, agency officials are obligated to study regulatory problems carefully, gathering relevant information, considering advice and criticism from interested parties, soliciting input from experts, and dispassionately evaluating the costs and benefits of alternative policies. As creatures of law, agencies are also bound to exercise their powers in a suitably purposive manner, honoring the limits of their statutory authority and advancing Congress's public-regarding objectives for statutory beneficiaries.<sup>180</sup> Thus, administrative agencies as fiduciary representatives must exercise their discretionary powers deliberately and deliberatively, and they must be prepared to account for their performance and justify their decisions upon request.

This fiduciary model of popular representation has much in common with civic-republican and deliberative-democracy theories of the administrative state,

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<sup>177</sup> Kyritsis, *supra* note 172, at 743.

<sup>178</sup> See generally Criddle, *supra* note 26, at 135-72; ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 291-92 (1993) (Cynthia R. Farina, Reporter) (characterizing government as a "fiduciary, or steward, . . . to whom power is given in order that his knowledge and skill can be brought to bear for the benefit of another" and emphasizing "the entrusting of power by 'We, the People' to those who govern for us").

<sup>179</sup> See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 106-07 (2000) (developing a public choice theory of administrative lawmaking based upon similar premises).

<sup>180</sup> See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("[The] exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes."); *Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.").

insofar as it calls on public officials to engage in reflective deliberation on “the common good.”<sup>181</sup> Like these theories, the fiduciary model focuses on the *process* of state decision-making, asking whether public officials have solicited and considered diverse perspectives on questions of regulatory policy and whether they have provided rational reasons for their decisions.<sup>182</sup> Unlike civic-republican and deliberative-democracy theories, however, the fiduciary model of the state does not treat the public’s engagement in agency deliberation as an end in itself, nor does it rely upon the deliberative process to produce a legitimating social consensus.<sup>183</sup> Instead, fiduciary representation views agency deliberation and transparency as having instrumental value as devices for reinforcing agency fidelity to the common good. While public engagement in agency deliberation might help to clarify the stakes of regulation, public apathy, ignorance, or persistent disagreement does not *ipso facto* compromise the legitimacy of administrative action. The process-oriented values of administrative governance are simply “a means to enforce the trust placed in representatives,” not a panacea for political discord or regulatory malaise.<sup>184</sup>

To some, the fiduciary model of popular representation might appear uncomfortably close to Burke’s much maligned theory that all government institutions serve as “trustees for the people.”<sup>185</sup> Burke invoked the fiduciary concept as support for the argument that public authority ought to reside in a “natural aristocracy,” namely, men of superior skills and ability who would be best equipped to discern the national interest through reasoned deliberation.<sup>186</sup> This vision of the

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<sup>181</sup> See PITKIN, *supra* note 108, at 163-65; *id.* at 192-93 (noting that Madison viewed the purpose of a well-ordered government to promote deliberation over “the common good”); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. (forthcoming 2009) (reviewing applications of civic-republican theory to administrative governance); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528-29 (1992) (linking this deliberative process of agency decision-making to the civic republican tradition, which emphasizes “the public good” rather than “majority rule”); Staszewski, *supra* note 94 (developing a deliberative-democracy theory of governmental accountability).

<sup>182</sup> See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3-4 (2004); Seidenfeld, *supra* note 181, at 1531-32 (“[T]o be legitimate, a decision must respect the positions of all interest groups and respond to their arguments in terms of the good of the community.”).

<sup>183</sup> See *id.* GUTMANN & THOMPSON, *supra* note 182, at 21-31; Seidenfeld, *supra* note 181, at 1534, 1540-41 (noting that civic republicanism “insist[s] that government actions reflect social consensus about the common good”). *But see* Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, available at <http://ssrn.com/abstract=1150411> (last visited Dec. 12, 2008) (arguing that deliberation may exacerbate group polarization rather than generating consensus).

<sup>184</sup> Brown, *supra* note 3, at 565.

<sup>185</sup> Edmund Burke, *Thoughts on the Case of the Present Discontents*, in BURKE’S POLITICS (1949) (1770); *see also id.* (“The king is the representative of the people; so are the lords; so are the judges. They are all trustees for the people.”).

<sup>186</sup> Edmund Burke, *Appeal from the New to the Old Whigs*, in BURKE’S POLITICS 397-98 (1949) (1791).

trusteeship state has been criticized as lending a false veneer of political legitimacy to aristocratic oligarchy and colonial imperialism.<sup>187</sup> “Burke could regard all government as a trusteeship,” writes one critic, because under his theory of representation “no democratic implication need be involved, nor are elections necessary.”<sup>188</sup>

While it is true that Burke’s trusteeship model and the fiduciary model of the state spring from a common intellectual tradition, the facial similarities between the two conceptions of popular representation run mostly skin deep. Unlike Burkean trusteeship, the fiduciary model of state legal authority is grounded in popular sovereignty and honors the public’s prerogative to shape government institutions, participate in government policy formation, and require government officials to provide fair, reasonable, and other-regarding justifications for their actions.<sup>189</sup> The fiduciary model provides formal criteria for evaluating the performance of public officials *qua* representatives and would deny legal effect to agency actions that transgress those principles.<sup>190</sup> Moreover, the fiduciary model does not authorize public officials to disregard the general “will of the people” entirely. To the contrary, the fiduciary model recognizes that public preferences are always relevant (if not conclusive) when public officials consider how to promote the general public welfare, and such preferences merit serious consideration within the deliberative processes of public lawmaking.<sup>191</sup> If public officials choose to take a different path in their exercise of discretionary powers, they must be prepared to furnish a reasonable explanation for their decision that responds reasonably to opposing viewpoints.<sup>192</sup> Thus, far from undermining democratic governance, the fiduciary conception of

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<sup>187</sup> See, e.g., GUTMANN & THOMPSON, *supra* note 182, at 8 (criticizing Burke’s trustee theory as “more aristocratic than democratic”); David Bromwich, *Introduction to EDMUND BURKE, ON EMPIRE, LIBERTY AND REFORM: SPEECHES AND LETTERS 1-39* (David Bromwich ed., 2000); JAMES HOGAN, *ELECTION AND REPRESENTATION 157* (1945) (describing Burke as “the last and greatest champion of Parliamentary oligarchy . . . protesting against the notion of a democratic franchise”).

<sup>188</sup> PITKIN, *supra* note 108, at 129.

<sup>189</sup> See Criddle & Fox-Decent, *supra* note 27.

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

<sup>191</sup> See PITKIN, *supra* note 108, at 161 (“Surely sometimes we can promote a person’s welfare even against his wishes; yet we would not want to say in general that people’s wishes are irrelevant to a definition of their welfare.”); cf. Edmund Burke, *Speech to the Electors at Bristol at the Conclusion of the Poll, in 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 446-48* (London: Henry G. Bohn, 1854) (“Your representative owes you . . . his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”).

<sup>192</sup> *Id.* at 163, 165 (“[W]hen a representative finds himself in conflict with his constituents’ wishes, this fact must give him pause. It calls for a consideration [and explanation] of the reasons for the discrepancy . . . . Acting contrary to their wishes is not necessarily wrong, not necessarily bad representation or in violation of a representative’s duty. It may, indeed, be required of him in certain situations.”).

popular representation facilitates transparency, rationality, consensus-building, and political accountability in government.<sup>193</sup>

Viewed from the fiduciary model's perspective, the administrative state comes into focus as a complex network of nested fiduciary relations. Presidents, legislators, judges, administrators, and other public officials all serve as fiduciaries for their beneficiaries, the people subject to their entrusted discretionary powers. When acting within the scope of their offices, all federal officers bear duties of fairness, reasonableness, diligence, and solicitude. The fiduciary model therefore posits that administrative law can promote popular sovereignty by encouraging federal officers to honor their fiduciary duties and the limits of their institutionally entrusted powers.

### C. *Fiduciary Representation in Agency Rulemaking*

The fiduciary model of popular representation has important implications for agency rulemaking proceedings, where the vast preponderance of federal lawmaking takes place today. Under the fiduciary model, popular representation does not turn on whether a particular officer can claim an electoral mandate but rather whether the officer has been entrusted with legal authority to promulgate regulations and whether she employs these powers fairly, reasonably, and with due solicitude to the general public welfare.

To whom does federal law entrust final rulemaking authority? As we have seen, legal scholars continue to debate whether federal law commits final rulemaking authority to the President or agency administrators. Some standard-bearers of the unitary executive theory such as Steven Calabresi and Christopher Yoo have argued that the Constitution vests administrative rulemaking powers—like all other “executive power”—in the President.<sup>194</sup> Others such as Elena Kagan have asserted that federal statutes implicitly authorize the President to direct agency rulemaking initiatives.<sup>195</sup> These theories share a common vision of federal law as entrusting the President with discretionary authority to exercise rulemaking powers as a steward for “We the People.”

Strong counter-arguments have been marshaled against the unitarians' claims. Peter Strauss has observed that the “Constitution itself is at best ambivalent on the question” whether the President may micro-manage agency rulemaking.<sup>196</sup>

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<sup>193</sup> See Staszewski, *supra* note 94, at 23-27 (discussing these virtues of reason-giving).

<sup>194</sup> CALABRESI & YOO, *supra* note 53, at 14; see also *Sierra Club v. Costle*, 657 F.2d 298, 405-06 (D.C. Cir. 1981) (“The authority of the President to control and supervise executive policymaking is derived from the Constitution.”); Calabresi & Prakash, *supra* note 43, at 570-85; Calabresi & Rhodes, *supra* note 43, at 166; Prakash, *supra* note 43.

<sup>195</sup> Kagan, *supra* note 15, at 2251, 2326.

<sup>196</sup> Strauss, *supra* note 33, at 702.

The text of Article II arguably gives Congress broad authority over the organizational structure of the administrative state, with the President's nonderogable constitutional powers limited to oversight functions such as appointing "Officers of the United States," monitoring agency performance, soliciting periodic reports from agency heads, and (perhaps) removing wayward administrators as authorized by statute.<sup>197</sup> Any legal authority the President might have to direct or veto agency regulations would have to come via congressional action. Yet there is little support for the proposition that Congress has entrusted the President with managerial control over agency rulemaking. As Kevin Stack has shown, most administrative enabling legislation expressly commits final rulemaking authority to agency administrators, not the president.<sup>198</sup> The Supreme Court has never addressed the limits of presidential authority in agency rulemaking, but its decisions upholding independent agencies against constitutional challenge are difficult to reconcile with a formalist unitarian conception of agency rulemaking power.<sup>199</sup> Thus, there may be good reasons to suppose that the President lacks the requisite legal authority to direct or veto agency rulemaking proceedings.<sup>200</sup>

The fiduciary conception of state legal authority does not definitively resolve this debate over the scope of the President's constitutional and statutory authority in agency rulemaking. To the extent that uncertainty lingers, however, the fiduciary theory of the state would counsel the political branches and the courts to resolve these questions of constitutional and statutory interpretation by considering whether presidents or agency administrators are more likely to act deliberatively and

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<sup>197</sup> See *id.* at 715-18; Froomkin, *supra* note 22.

<sup>198</sup> Stack, *supra* note 23, at 267; see also Percival, *supra* note 22, at 966 ("When Congress enacts regulatory legislation vesting decision-making authority in agency heads, it generally envisions that decisions will be made by persons who possess expertise in the regulatory matters entrusted to them.").

<sup>199</sup> See *Morrison v. Olson*, 487 U.S. 654, 692 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626-29 (1935); Rosenberg, *supra* note 47, at 632 (asserting that in *Morrison* and *Mistretta* the Supreme Court "expressed unequivocal approbation of a very far reaching, though not limitless, power in Congress over agency structure, location, and relationships that may properly have as its principal object the desire to limit the President's influence over the development and implementation of administration policy"); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 972 (1997) (arguing that an administrator removable only "for cause" has a "right, and in some cases it may be his obligation, to refuse the President's direction, even if he realizes that his disappointed boss may immediately send him out of office").

<sup>200</sup> See Richard J. Pierce, *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive*, by Steven G. Calabresi and Christopher Yoo, U. PA. J. OF CONST. L. (forthcoming 2009) (noting occasions on which the head of OIRA conceded that the President could only compel action from agency heads through the removal power).

rationality in the public interest, honoring the fiduciary imperatives of fairness, reasonableness, purposefulness, and solicitude.<sup>201</sup>

One approach to this question would be to ask whether the White House or administrative agencies are more susceptible to capture by special interests. While anecdotal evidence of agency capture abounds, recent studies suggest that agency capture actually might be less widespread or systematic than public choice theorists once imagined.<sup>202</sup> Despite widespread suspicions of special-interest influence on White House policymaking, it remains unclear whether recent occupants of the White House have been more or less receptive to clandestine special-interest lobbying than agency officials. Much more research would need to be done to answer these empirical questions of comparative institutional fidelity.

For present purposes, a more promising approach would be to consider whether the White House or agency administrators are more likely to engage in the type of deliberative decision-making process contemplated by the fiduciary model. In this respect, at least, agency administrators can claim significant advantages over the President. For most agency rulemaking, federal law obligates administrators to engage the public in a transparent and inclusive decision-making process, disclosing records and communications that informed their decisions, and furnishing rational justifications for their rulemaking actions.<sup>203</sup> For example, when engaging in informal legislative rulemaking under the APA, administrative agencies are required to publish notice of their proposed rule, solicit public comments, and promulgate the final rule with “a concise general statement of [the rule’s] basis and purpose.”<sup>204</sup> To satisfy judicial review, an agency must furnish a complete, contemporaneous administrative record, clarify the administrator’s rationale for their decisions, and satisfy courts that their final rule is not inconsistent with the empirical evidence before the agency.<sup>205</sup> The administrator’s rationale must address all salient aspects of

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<sup>201</sup> See Staszewski, *supra* note 94, at 47 (“Legislative delegations should be understood to commit final decision-making authority to agencies rather than the president based on superior deliberative process.”).

<sup>202</sup> See, e.g., KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 344 (1986) (reporting that agency capture “is not by any means the norm, and where capture occurs, it does not always last”); Spence & Cross, *supra* note 179, at 121-22 (“[A]gency capture is no longer considered a valid descriptive theory of bureaucratic behavior.”).

<sup>203</sup> 5 U.S.C. §§ 10-13 (2005) (requiring agency advisory committee meetings to be open to the public and transcribed, and providing for disclosure of virtually all documents used in these meetings); *id.* § 552 (2005) (permitting public access on request to a variety of documents and information, including published descriptions of the agencies’ methods of operations, procedures, substantive rules, and statements of policy); *id.* § 552b(e)(1) (requiring agencies to give advance public notice “of the time, place, and subject matter” of certain agency meetings”).

<sup>204</sup> *Id.* § 553(c) (2005).

<sup>205</sup> See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61 (1985); Richard J.

the problem, including the merits of other reasonable alternatives, and justify any deviation from past rulemaking actions.<sup>206</sup> To the extent that agencies rely on their own expertise in rulemaking, agencies must be prepared to demonstrate and defend their expert judgment during “hard look” judicial review. The APA thus contemplates that administrative agencies, like private fiduciaries, will employ procedures designed to ensure that their regulations are “the product of reasoned decision-making.”<sup>207</sup>

No such procedural safeguards apply by law to the President. When deciding questions of regulatory policy, the President and his immediate staff are under no obligation to consult experts or provide rational justifications for their decisions that address policy alternatives or explain how their chosen policies would comport with Congress’s statutory objectives. Nor are the President and his immediate staff outside OIRA legally bound to reveal their communications with interest groups. No federal statute requires disclosure of such communications, and the White House has often relied on executive privilege to preserve the secrecy of its internal decision-making processes, denying observers access to records and testimony that would facilitate public monitoring and accountability. Moreover, because most communications between private parties and the White House, and between the White House and agencies, are not included in the administrative record for judicial review, courts are limited in their ability to check inappropriate White House influence during hard look review. In short, from the perspective of deliberative process, the fiduciary model almost certainly favors entrusting final rulemaking authority to agency administrators rather than the popularly elected president.

Considerations of comparative expertise also counsel vesting agency administrators with final rulemaking authority. Administrators generally possess greater familiarity with their fields of labor and thus are better positioned to assess the public interest, including the likely costs and benefits of proposed rulemaking actions. They are also more likely to immerse themselves in the technical details of a particular regulatory problem than presidents, whose myriad responsibilities across diverse fields preclude them from developing such specialized knowledge in every field. Administrators are therefore less likely to depend upon the advice of their subordinates when making decisions and more likely to act deliberately and deliberatively in approving or disapproving particular rulemaking proposals.

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Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995).

<sup>206</sup> See *INS v. Yang*, 519 U.S. 26, 32 (1996); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977).

<sup>207</sup> *State Farm*, 463 U.S. at 52. Cf. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 900 (observing that a fiduciary bears the burden to establish that he or she “has dealt candidly and fairly with” beneficiaries).

In sum, the fiduciary model supports the view that Congress may promote popular representation in the administrative state by entrusting final rulemaking authority to agency administrators rather than the President. Agency administrators are closer to particular regulatory fields and are more likely to develop regulations through a deliberative process that is comparatively transparent to public scrutiny and judicial review. Entrusting final rulemaking authority to administrators also leaves the door open for continued dialogue and collaboration with Congress, enabling legislators to revisit agency rulemaking decisions and revise federal regulation through their own deliberative lawmaking processes. Presidential administration, on the other hand, tends to entrench federal regulation against legislative action and suppress inter-branch dialogue (at least, in the short term), because the President could always veto legislation amending regulations adopted under his direction. Entrusting agency administrators with final rulemaking authority thus promotes deliberative administration across the three branches of government more effectively than presidential administration.<sup>208</sup>

#### *D. Fiduciary Representation and Interbranch Deliberation*

To be sure, fiduciary representation could fall prey to its own idiosyncratic fictions and pathologies. For example, even if we agree that administrative agencies bear a fiduciary obligation to promote the public welfare, we must still grapple with the fact remains that the “public welfare” is itself a highly contested, value-laden concept. Although Congress provides “intelligible principles” to guide agency assessments of the public welfare, these principles are often pitched at such a high level of generality that they give agencies broad discretion to clarify both the nature of the task at hand and the best tools for accomplishing the task.<sup>209</sup> As a result, agencies routinely confront complex policy questions, which require administrators to arbitrate between competing public preferences or conceptions of the common good. The fiduciary model’s emphasis on deliberative rationality will rarely offer simple solutions to such public debates over fundamental values.

Concerns about the broad scope of agency rulemaking discretion should be tempered by the broader institutional landscape within which agencies operate. Under the fiduciary model, Congress and the President are each vested with

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<sup>208</sup> See Farina, *supra* note 92, at 1037 (arguing that that the Constitution contemplates a “multivoiced representational construct,” in response to “the challenges of reflecting, and creating, the consent of the governed”); Shane, *supra* note 91, at 195 (noting that the alternative to presidential administration is political pluralism and polyphonic deliberation).

<sup>209</sup> See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001) (observing that although “Congress must ‘lay down by legislative act an intelligible principle’” for agencies to follow, the Supreme Court has “never demanded . . . that statutes provide a “determinate criterion” to constrain agency discretion”) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)).

oversight powers as fiduciaries for the public in their own right.<sup>210</sup> The presidency's fiduciary character is reflected in Article II, which expressly obligates the President to "take Care that the Laws be faithfully executed."<sup>211</sup> The President may discharge this fiduciary duty through informal guidance to agency administrators,<sup>212</sup> but also by removing or prosecuting administrators who violate federal law.<sup>213</sup> Congress likewise monitors agency rulemaking and may overturn agency regulations that do not comport with its collective conception of the public interest. In performing these critical oversight roles, both Congress and the President bear duties of fairness, reasonableness, purposefulness, and solicitude in their own right.<sup>214</sup> The judicial branch also plays an important role in agency oversight: when regulations are challenged in the courts, federal judges engaging in "hard look" review may also overturn agency regulations that are inconsistent with Congress's statutory objectives or are not the product of deliberative rationality.<sup>215</sup> Employed in this manner, judicial review performs a vital representation-reinforcing function, correcting deliberation failures in the rulemaking process.<sup>216</sup> Each of these checks and balances promotes deliberation among the three branches of government, as well as effective fiduciary representation within particular administrative agencies.

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<sup>210</sup> *Metro Wash. Airport Auth. v. Citizens for the Abatement of Airport Noise*, 501 U.S. 252, 272 (1991) ("Each branch, in its own way, is the people's agent, its fiduciary for certain purposes.").

<sup>211</sup> Const. Art. II, § 3. The Constitution also requires the President to provide a periodic accounting on "the State of the Union," and authorizes the President to require administrative agencies to report on "any Subject relating to the Duties of their respective Offices." *Id.*; see also *id.* § 1 (requiring the President to "solemnly swear (or affirm) that [he or she] will faithfully execute the Office of President of the United States, and will to the best of [his or her] Ability, preserve, protect and defend the Constitution of the United States"); E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025, 1026 (1975) (arguing that presidential impeachment historically reflected a fiduciary conception of public officials).

<sup>212</sup> See BRUFF, *supra* note 128, at 465 (arguing that the President may play an advisory role in agency rulemaking so long as the final decision rests with the agency); Strauss, *supra* note 33, at 759-60 (characterizing the President as an "overseer" rather than "the decider" in rulemaking proceedings).

<sup>213</sup> See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>214</sup> David Driesen has argued persuasively that the unitary-executive theory, which focuses narrowly on the President's constitutional *powers*, fails to appreciate Article II's emphasis on presidential *duties* of lawful and prudent conduct. As a corrective, Driesen develops a "duty-based theory" of the President's constitutional role. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power* (manuscript on file with the author); David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 714-18 (2008). The fiduciary model offers a normative framework for integrating the President's constitutional powers and duties within the broader state-subject fiduciary relation.

<sup>215</sup> See *supra* text accompanying notes 205-207.

<sup>216</sup> Cf. ELY, *supra* note 2 (arguing that judicial review serves a representation-reinforcing role by addressing political-process failures in majoritarian decision-making).

The fiduciary model thus offers a vision of popular representation that is well-adapted to the twenty-first century administrative state. Like the interest-group representation model from the early 1970s, which greeted private participants in rulemaking proceedings as proxy representatives for broader interests and factions, the fiduciary model focuses attention on the rulemaking process itself as the primary testing ground for popular representation. Unlike the interest-group representation model, however, the fiduciary model emphasizes the role of federal administrators as popular representatives with duties to act in the interest of the sovereign People who are the source, subject, and beneficiaries of agency rulemaking powers. Accordingly, the fiduciary model shifts attention from whether particular agency rulemaking actions are “majoritarian” or “counter-majoritarian” to whether they reflect adequate deliberation, expertise, public participation, and reasoned justification. Fiduciary representation thus furnishes an appealing normative framework for reconciling administrative lawmaking with popular sovereignty.

#### IV. DELIBERATIVE ADMINISTRATION

To what extent does federal administrative law currently satisfy the fiduciary conception of popular representation in agency rulemaking? The results are mixed, to be sure. Although some federal rulemaking procedures advance the fiduciary model’s formal criteria of fairness, reasonableness, purposefulness, and solicitude, others fall well short of the mark. As we have seen, traditional notice-and-comment rulemaking procedures advance fiduciary representation by encouraging federal agencies to act rationally, deliberatively, and transparently. So, too, do the APA’s requirements for formal rulemaking, which permit agencies to promulgate regulations only at the close of a trial-type evidentiary hearing.<sup>217</sup> FOIA and FACA likewise promote transparency by facilitating public access to a range of documents and communications relevant to agency rulemaking. These measures are hardly sufficient, however, to ensure that federal agencies serve as effective fiduciary representatives when exercising their rulemaking powers. At the very least, the fiduciary model demands more exhaustive disclosure of intra-governmental communications to ensure that special-interest pressures do not distort regulatory policy. In addition, the APA’s deliberative informal rulemaking procedures should apply much more broadly to address the omnipresent threat that public officers will abuse their rulemaking powers to advance their own personal or institutional self-interest. These gaping loopholes in federal administrative law suggest that significant work remains to be done to institutionalize the fiduciary model of popular representation.

While an exhaustive discussion of the fiduciary model’s implications for federal rulemaking lies beyond the scope of this Article, this Part will touch briefly

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<sup>217</sup> 5 U.S.C. §§ 553, 556-57.

on three procedural reforms, which Congress should adopt to bring federal rulemaking procedures into greater harmony with the fiduciary model of the administrative state. First, Congress should expand notice-and-comment rulemaking by eliminating the APA's poorly constructed exceptions. Second, Congress should require agencies to furnish a reasonable statement of reasons for abandoning rulemaking initiatives and authorize more robust judicial review of agency inaction. Third, Congress should provide for mandatory disclosure of communications between agencies and the White House related to agency rulemaking. Versions of these proposals have been articulated elsewhere in the literature on federal rulemaking, and I will not attempt to elaborate the policy arguments for and against these proposals with all of the nuance and sophistication that others have devoted to them. My purpose, instead, is simply to illustrate how the fiduciary model illuminates a new path toward popular representation in agency rulemaking.

A. *Operationalizing Deliberative Administration*

1. *Eliminate the APA's Categorical Exceptions for Informal Rulemaking*

An important first step in reforming federal rulemaking procedure would be to extend the fiduciary model's general principles of deliberative decision-making to all forms of agency rulemaking. Currently, APA Section 553 divides agency rulemaking into three broad categories: substantive rules (or "legislative rules"), interpretive rules, and procedural rules. Substantive rules generate legal obligations, altering persons' existing rights and obligations pursuant to statutory authority.<sup>218</sup> Procedural rules also command the force of law, prescribing the procedures an agency will employ in carrying out its administrative functions.<sup>219</sup> Interpretive rules, which "express an agency's course of action or its view of the meaning of a statute or regulation," are not formally binding.<sup>220</sup> The categorization of a particular rule as substantive, interpretive, or procedural has great significance as a matter of administrative procedure; while the APA requires agencies to publish all three types of rules,<sup>221</sup> only the first category—legislative rules—are subject to the APA's procedural requirements.<sup>222</sup>

The problem with exempting interpretive and procedural rules from the APA's procedural requirements is that both categories can have a significant impact on private interests and obligations. Interpretive rules, for example, may profoundly

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<sup>218</sup> SCHWARTZ, *supra* note 13, § 4.8, at 181.

<sup>219</sup> *Id.* § 4.8, at 180.

<sup>220</sup> *Id.* § 4.8, at 181.

<sup>221</sup> *See* 5 U.S.C. § 552(a).

<sup>222</sup> 5 U.S.C. § 553(b)(3)(A).

influence agency enforcement practices and judicial statutory interpretation.<sup>223</sup> Similarly, procedural rules may restrict the opportunities for regulated parties or beneficiaries to defend their interests in agency adjudicatory proceedings. Granted, not every interpretive rule or procedural rule necessarily merits a formal evidentiary hearing or full-fledged notice-and-comment process under the fiduciary model of administrative authority. But some important rules within these categories clearly do, and exempting such rules from deliberative process altogether is unsatisfactory. No matter what type of rules an agency adopts, it should be prepared to explain how the rules are fair, reasonable, purposive, and public-regarding.<sup>224</sup> In its current form, the APA does not satisfy these basic principles.

Equally disconcerting, the APA does not even require deliberative decision-making for many important categories of legislative rules. The APA expressly excludes from its requirements legislative rules that address military or foreign affairs functions,<sup>225</sup> rules governing agency management or personnel,<sup>226</sup> and rules related to “public property, loans, grants, benefits, or contracts.”<sup>227</sup> These exceptions to the APA’s ordinary rulemaking categories have been widely criticized as over-inclusive<sup>228</sup>—relics of an earlier age’s misguided commitment to the “rights”/“privileges” distinction<sup>229</sup>—yet Congress has not fully implemented recommendations for reform.<sup>230</sup> Agencies are always free to employ more robust

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<sup>223</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 400-01 (2007).

<sup>224</sup> Jessica Mantel has employed a similar “trustee” theory to advocate enhanced procedural requirements for agency guidance statements. See Mantel, *supra* note 181.

<sup>225</sup> 5 U.S.C. § 553(a)(1).

<sup>226</sup> *Id.* § 553(a)(2).

<sup>227</sup> *Id.*

<sup>228</sup> See Administrative Conference of the United States (ACUS), *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 38 Fed. Reg. 19,782 (1973); ACUS, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, ACUS Recommendation No. 69-8, 1 C.F.R. § 305.69-8 (1992) (detailing § 553(a)(2) rules pertaining to “public property, loans, grants, benefits, or contracts”); ACUS Recommendation 73-5, *Elimination of the “Military or Foreign Affairs Function” Exemption from APA Rulemaking Requirements*, 39 Fed. Reg. 4847 (1974); ACUS, *Elimination of the “Military or Foreign Affairs Function” Exemption from APA Rulemaking Requirements*, ACUS Recommendation No. 73-5, 1 C.F.R. § 305.73-5 (1992) (detailing § 553(a)(1)); Arthur E. Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 MICH. L. REV. 221 (1972).

<sup>229</sup> See SCHWARTZ, *supra* note 13, § 4.12, at 197.

<sup>230</sup> See JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 63-64 (4th ed. 2006) (discussing Congress’s piecemeal efforts to broaden notice-and-comment procedures for particular agencies).

deliberative procedures than those required under the APA, of course.<sup>231</sup> In practice, however, agencies do not always engage in transparent deliberation over rules that fall within these categories, and the APA therefore fails to ensure that agencies satisfy their fiduciary obligations in these instances.<sup>232</sup>

The fiduciary model would not necessarily require notice-and-comment procedures for all rulemaking proceedings. To borrow Justice Robert Jackson's colorful phrase, fiduciary representation is not a "suicide pact,"<sup>233</sup> nor need it lead to "paralysis by analysis." Federal agencies might reasonably dispense with notice-and-comment procedures where the cost, inconvenience, or delay attending such procedures would be "unnecessary" or "impracticable."<sup>234</sup> Indeed, the fiduciary model arguably militates *against* notice-and-comment rulemaking where the resources required would be so grossly disproportionate to the particular issue presented as to be "contrary to the public interest."<sup>235</sup> On the other hand, what the fiduciary model does not—and cannot—abide is the notion that agencies might adopt regulations materially impacting the public interest without satisfying the formal requirements of fairness, reasonableness, purpose, and solicitude. Whatever form agency rulemaking might take, agencies must engage in a robust deliberative process supported by rational reason-giving. Section 553's current categorical exceptions permit agencies to evade this basic fiduciary duty of popular representation—even when notice-and-comment procedures would be self-evidently necessary, practicable, and in the public interest.

## 2. *Expand Judicial Review of Agency Inaction*

For many critics, the most frustrating characteristic of presidential administration is its perceived tendency to enervate agency rulemaking.<sup>236</sup> Rather than spurring agencies to action, White House officials have been accused of exploiting their political influence behind the scenes to delay or block disfavored

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<sup>231</sup> See ACUS Recommendation 92-1, ¶ 2, *The Procedural and Practical Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (1992) (recommending that agencies voluntarily use notice-and-comment procedures for most procedural rules).

<sup>232</sup> Mantel, *supra* note 181; Mendelson, *supra* note 223, at 426 (observing that agencies that solicit public comments on interpretive rules do not commit to respond to those comments).

<sup>233</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)

<sup>234</sup> 5 U.S.C. § 553(b)(B).

<sup>235</sup> *Id.* Under the fiduciary model, an agency's determination that there is "good cause" to depart from notice-and-comment procedures would itself be subject to judicial review. See LUBBERS, *supra* note 230, at 106.

<sup>236</sup> See, e.g., Bagley & Revesz, *supra* note 114, at 1274 ("Agencies' decisions not to regulate can be every bit as costly to society as overly expensive regulations.").

rulemaking initiatives.<sup>237</sup> Such criticisms have dogged the Bush Administration in fields such as environmental protection and occupational health and safety.<sup>238</sup>

Whether these exercises of presidential administration should be greeted as cause for alarm will depend, of course, upon whether one accepts the proxy theory or the fiduciary theory of popular representation. Under the proxy theory, the White House's decision to stay an agency rulemaking proposal could be perceived as a pro-majoritarian check on counter-majoritarian bureaucratic decision-making, and there would be little need for judicial review to facilitate private-citizen challenges.<sup>239</sup> The outlook appears very different, however, once we recognize that presidents are not reliable proxies for the public will. Under the fiduciary model, agency inaction poses precisely the same risks of unfairness, unreasonableness, opportunism, and waste that arise in proactive agency action, and both violate agencies' basic fiduciary duties.

In theory, the APA already obligates agencies to "conclude any manner presented to" them "within a reasonable time"<sup>240</sup> and authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed."<sup>241</sup> In practice, however, federal courts have been reluctant to set aside the President's assessment of the "reasonableness" of agency inaction or the "reasonable" rulemaking timeline for their own independent assessment. Some courts have held that agency decisions to withhold or delay rulemaking action were simply unreviewable.<sup>242</sup> Others have agreed to consider claims based on agency inaction, but have deferred all too quickly to agencies' reasonableness assessments.<sup>243</sup> The Supreme Court's unanimous 2004 decision in *Norton v. Southern Utah Wilderness Alliance*,<sup>244</sup> in particular, appears to

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<sup>237</sup> OMB Watch, *supra* note 127.

<sup>238</sup> *Id.*

<sup>239</sup> See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1678-84 (2004); Nzelibe, *supra* note 16, at 1265.

<sup>240</sup> 5 U.S.C. § 555(b).

<sup>241</sup> 5 U.S.C. § 706(1).

<sup>242</sup> See, e.g., *Riverkeeper, Inc. v. Collins*, 359 F.3d 156 (2d Cir. 2004) (holding that the Nuclear Regulatory Commission's refusal to take steps to protect a nuclear plant from terrorist attack was unreviewable); *Nat'l Congress of Hispanic Am. Citizens v. Marshall*, 626 F.2d 882 (D.C. Cir. 1979) (declining to review OSHA's refusal to issue field sanitation standards).

<sup>243</sup> See, e.g., *In re Mine Workers of Am. Int'l Union*, 190 F.3d 545, 553-56 (D.C. Cir. 1999) (declining to issue a writ of mandamus to compel the Mine Safety and Health Administration to comply with statutory timelines for rulemaking); *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) ("[W]e are properly hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others." (internal quotation marks and citation omitted)). *But see* *In re International Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) (determining that OSHA's six-year delay issuing health standards on workers' exposure to cadmium was unreasonable and imposing a deadline for completion).

<sup>244</sup> 542 U.S. 55 (2004).

cement strong judicial deference to agency inaction by declaring that the APA empowers courts to correct agency inaction or delay only “where a plaintiff asserts an agency failed to take a *discrete* agency action that it is *required* to take.”<sup>245</sup>

While some judicial deference to agency agenda-setting and resource-allocation is no doubt appropriate, the fiduciary model supports more robust judicial review of agency inaction—whether it be an agency’s failure to initiate rulemaking, delay of ongoing rulemaking proceedings, or the unreasonable termination of rulemaking without issuance of a rule.<sup>246</sup> The best pathway to making agency fiduciary duties credible in these contexts, as in many others, would be to strengthen judicial review. This approach, in turn, would require courts to loosen: (1) the doctrine of nonreviewability, which limits the types of claims that may be raised against agency inaction; and (2) the doctrine of standing, which limits the type of parties who may bring claims.<sup>247</sup> Professor Bressman has argued persuasively that these doctrines “relieve agencies of the obligation to engage in reason-giving and standard-setting” by “immuniz[ing] agency inaction from judicial review.”<sup>248</sup> In the absence of judicial review, it becomes “more likely that agencies will respond to private or political pressure rather than the public welfare by giving those typically harmed by agency action (*i.e.*, regulated entities) more power to protest than those typically harmed by agency inaction (*i.e.*, regulatory beneficiaries).”<sup>249</sup> The solution to these factionalist pressures, she asserts, is to impose a requirement of deliberative reason-giving for agency inaction comparable to the reason-giving requirements for agency action.<sup>250</sup> Similarly, protracted delays in rulemaking proceedings should be accompanied by a reasonable statement of the grounds and purpose for delaying promulgation of an anticipated rule. As Bressman observes, “enforcing the requirements of reason-giving and standard-setting . . . will promote the conditions that prevent, or at least minimize, corrupting influences from pervading administrative . . . decision-making.”<sup>251</sup> The fiduciary model of popular

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<sup>245</sup> *Id.* at 64; *see also* American Horse Protection Ass’n, Inc. v. Lyng, 812 F.2d 1, 4-5 (D.C. Cir. 1987) (stating that an agency’s refusal to institute rulemaking “is at the high end of the [deference] range”).

<sup>246</sup> *See* LUBBERS, *supra* note 230, at 545-55 (distinguishing these three categories).

<sup>247</sup> *See* Bressman, *supra* note 239, at 1665 (distinguishing these two doctrines) (citing Heckler v. Chaney, 470 U.S. 821, 828-31 (1985) (finding claims challenging agency inaction “general[ly] unsuitab[le] for judicial review”); and Lujan v. Defenders of Wildlife, 504 U.S. 555, 574 (1992) (recognizing that standing requires party invoking judicial review to show that such party “has sustained or is immediately in danger of sustaining some direct injury”)); *see generally* Criddle, *supra* note 26, at 172-78 (comparing standing in administrative law and private fiduciary law and arguing for broader private-citizen standing).

<sup>248</sup> Bressman, *supra* note 239, at 1691.

<sup>249</sup> *Id.* at 1692.

<sup>250</sup> The APA requires agencies to “incorporate in the rules adopted a concise statement of their basis and purpose.” 5 U.S.C. § 553(c).

<sup>251</sup> Bressman, *supra* note 239, at 1693.

representation supports Professor Bressman's general proposal to promote deliberative rationality in agency inaction through mandatory reason-giving requirements backed by judicial review.

Under the fiduciary model, judicial review of agency inaction should be appropriately deferential, recognizing that agencies are best situated to determine whether exercising their regulatory powers in a particular area would advance the public interest. Deliberative administration does not inevitably require more federal regulation. What is essential, however, is that agencies provide rational justifications for inaction that are consistent with their statutory mandates and the factual record before the agency. At present, the absence of statutory reason-giving requirements for agency inaction, coupled with the federal judiciary's grudging nonreviewability and standing doctrines, allows federal agencies to deny rulemaking requests without providing any rational justification whatsoever. Such arbitrary behavior is inconsistent with the fiduciary conception of popular representation.

*3. Include White House and Inter-agency Communications in the Administrative Record*

Assuming the Constitution permits Congress to entrust final rulemaking authority to agency administrators, what role should the White House play in the rulemaking process? Advocates of presidential administration have identified some strong normative arguments for robust presidential participation in the rulemaking process. As the federal government's chief executive officer, the President bears a special responsibility to coordinate federal policy across the administrative state.<sup>252</sup> Federal agencies are more likely to promote coherent regulatory policy and minimize interagency conflicts when they coordinate their rulemaking initiatives with the White House. The quality of agency rulemaking may also benefit from an independent White House audit by OIRA officials or other White House staff to ensure that agencies give proper weight to trans-substantive policy concerns such as regulations' potential impact on the public fisc.

The fiduciary model recognizes that White House participation in the rulemaking process may promote deliberative administration if conducted in the right way. Input from the President, his staff, and other federal agencies can broaden an administrator's understanding of a rule's potential impact on other federal agencies and programs. As the Court of Appeals for the D.C. Circuit has observed, "Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief

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<sup>252</sup> See, e.g., Cutler & Johnson, *supra* note 42, at 1410-11; Rodriguez, *supra* note 15, at 1194-95; Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 13 (1994); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 189 (1986).

Executive.”<sup>253</sup> Presidential policy guidance may also expose agency regulators to national perspectives that they might otherwise overlook.<sup>254</sup> Thus, agency administrators arguably satisfy their fiduciary duties when they engage the White House and other executive departments in their deliberations, addressing information and policy guidance from these sources just as they would address input from any other source.

To ensure that White House policy guidance enhances deliberative administration, Congress should require agencies to disclose communications between the White House and agency personnel regarding pending rulemaking proceedings.<sup>255</sup> Currently, the APA forbids *ex parte* communications only in formal rulemaking proceedings, turning a blind eye to *ex parte* communications arising in ordinary notice-and-comment rulemaking.<sup>256</sup> President Clinton’s Executive Order No. 12,866 mandates some public disclosure of documents exchanged between agencies and OIRA, but it does not address communications between agencies and other White House offices.<sup>257</sup> Deliberative administration, in contrast, favors mandatory disclosure for nearly all White House communications with agencies related to pending rulemaking actions—irrespective of whether the communications convey factual information or policy advice.<sup>258</sup> While a rulemaking proposal is pending, all *ex parte* contacts related to the proposal—including communications with the White House—should be prohibited.<sup>259</sup> If the President, his staff, or other federal agencies wish to offer advice on a pending rulemaking proposal, Congress should require that they do so on the record during the agency’s public comment period.<sup>260</sup> These reforms would channel the White House’s policy guidance into the

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<sup>253</sup> *Sierra Club v. Costle*, 657 F.2d 298, 407-08 (D.C. Cir. 1981).

<sup>254</sup> Bressman & Vandenbergh, *supra* note 115, at 90.

<sup>255</sup> See Thomas O. McGarity, *Presidential Control of Regulatory Agency Decision Making*, 36 AM. U. L. REV. 443, 451-62 (1987); Rosenberg, *supra* note 92, at 242-45.

<sup>256</sup> 5 U.S.C. §§ 556(a), 557(d)(1).

<sup>257</sup> Exec. Order No. 12,866 §§ 6(a)(3)(E), 6(b)(4), 58 Fed. Reg. 51,735 (1993).

<sup>258</sup> *But see* ACUS Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (1980) (recommending a distinction between factual information and policy advice). Exceptions might be made for highly sensitive communications in fields such as national security, but in such cases the fiduciary model would support a requirement that agencies furnish a reasonable justification for withholding disclosure.

<sup>259</sup> See PIERCE, *supra* note 11, § 7.9, 356 (arguing that Congress could forbid agencies from engaging in *ex parte* contacts with the White House during rulemaking).

<sup>260</sup> See ACUS Recommendation 88-9, *Presidential Review of Rulemaking*, 1 C.F.R. § 305.88-9 (1991) (recommending disclosure of conduit communications); ABA Sec. of Admin. Law and Regulatory Practice, *Recommendation on Presidential Review of Federal Rulemaking* (Aug. 1990) (endorsing ACUS recommendations on disclosure of conduit communications); National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies* 35 (1987); McGarity, *supra* note 255, at 460-63.

public sphere where it could bolster, rather than undermine, deliberative administration.

At the close of agency rulemaking proceedings, White House communications should be included in the administrative record for judicial review. Requiring full disclosure and judicial review of communications between White House officials and agency officials would serve several salutary purposes. First, this approach would render the White House's influence over agency rulemaking more accessible to public scrutiny, reinforcing the President's electoral accountability. Aside from its proverbial disinfectant properties, transparency would likely promote greater policy coordination among the White House's internal offices, addressing the internal conflicts reported by Professors Bressman and Vandenberg.<sup>261</sup> The disclosure of White House communications would also enable federal courts to reinforce agency fiduciary representation more effectively through judicial review of agency rulemaking.<sup>262</sup> If agencies were to rely on White House information or policy guidance, courts conducting "hard look" review could consider these communications alongside other material in the administrative record such as the agency's own expert reports and comments from private parties. In theory, the disclosure of White House communications could reinforce policy coordination among administrative agencies: where agencies unreasonably disregard warnings about potential interagency policy conflicts, courts might strike down agency regulations as "arbitrary" and "capricious" under the APA.<sup>263</sup> Conversely, federal regulations could be "arbitrary and capricious" where an agency relied on White House guidance inappropriately to the neglect of important scientific facts or expert judgments. In short, we might greater White House transparency to enhance agency deliberation while reducing the risk of arbitrary political jawboning and interest-group capture.

Executive privilege does not pose an insurmountable obstacle to the disclosure of White House communications with agency officials. In *Humphrey's Executor v. United States*, the Supreme Court declared unequivocally that "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted."<sup>264</sup> Relying on this basic principle from *Humphrey's Executor*, lower courts have preserved the APA's prohibition on *ex parte*

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<sup>261</sup> See Bressman & Vandenberg, *supra* note 118, at 49.

<sup>262</sup> See McGarity, *supra* note 255, at 462 (arguing that judicial review becomes "an elaborate and expensive charade" if agencies can base their decisions on "secret communications with the President or his staff").

<sup>263</sup> 5 U.S.C. § 706(2)(A); see also Strauss, *supra* note 33, at 736 (noting anecdotally that agency administrators would occasionally "tell the President to pound sand" when "the President knew they had the political capital to win").

<sup>264</sup> 295 U.S. 602, 629 (1935).

communications against constitutional challenge in the context of White House meddling in formal agency adjudication.<sup>265</sup> Under the reasoning of *Humphrey's Executor* and its progeny, there would seem to be no reason why Congress could not also proscribe *ex parte* communications between the White House and agency administrators in informal rulemaking. Indeed, the Ninth Circuit Court of Appeals endorsed this implication of *Humphrey's Executive* in *Portland Audubon Society v. Endangered Species Committee*<sup>266</sup> when the first Bush Administration argued that the APA's restriction on *ex parte* communications unconstitutionally interfered with the President's authority to instruct and guide inferior executive officers.<sup>267</sup> The Ninth Circuit "reject[ed] this argument out of hand," emphasizing the "fundamental principle of administrative law that when an agency performs a quasi-judicial (or quasi-legislative) function its independence must be protected."<sup>268</sup> Thus, while executive privilege arguably protects many internal White House communications from public disclosure, it does not preclude Congress from proscribing *ex parte* White House communications with agency officials in informal rulemaking proceedings.

Those who view the President as an effective proxy for popular preferences will likely take issue with my proposal to subject White House policy guidance to "hard look" judicial review. If presidents are better-suited than federal judges to determine whether federal regulations comport with majoritarian preferences, a plausible argument could be made that federal law should not authorize judges to second-guess presidential policy guidance. On the other hand, if (as I have argued) White House regularly review turns out to be an unreliable proxy for popular preferences, judicial review is likely the best available safeguard for agency fiduciary representation. Hard look review would encourage agencies to engage in robust public deliberation, providing rational, purposive, other-regarding justifications for their regulatory decisions.<sup>269</sup> Judicial review would thereby promote an ethic of deliberative decision-making consistent with the fiduciary imperatives of fairness, reasonableness, diligence, and solicitude.

#### B. *The Passive Virtues of Deliberative Administration*

Sadly, the prospects of immediate legislative action to strengthen deliberative administration are not promising. In the past, Congress has deflected similar proposals to expand notice-and-comment rulemaking and judicial review. Congress

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<sup>265</sup> See *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1546.

<sup>268</sup> *Id.*

<sup>269</sup> See Seidenfeld, *supra* note 252, at 24 (noting that judicial review "encourage[s] deliberative decision-making aimed at the public interest by delineating statutory goals in terms of some public-regarding purposes").

would probably be even less receptive to my proposal to prohibit *ex parte* White House communications, because this would undermine arguments for exempting *ex parte* congressional communications from disclosure.<sup>270</sup> Until a major scandal erupts, Congress is unlikely to spend its own political capital on a contentious battle with the Executive Branch over administrative procedure, judicial review, or government transparency.

Pending legislative action on these proposals, the Obama Administration should voluntarily promote deliberative administration in agency rulemaking by observing prudential principles of nonintervention similar to Bickel's famous "passive virtues."<sup>271</sup> In *The Least Dangerous Branch*, Bickel implored the Supreme Court to employ principles such as standing doctrine, ripeness doctrine, and the political question doctrine to reduce the Court's institutional footprint on the political process.<sup>272</sup> Bickel commended these techniques of constitutional avoidance as a last line of defense "mark[ing] the point at which the Court gives the electoral institutions their head and itself stays out of politics."<sup>273</sup> In a similar spirit, the incoming Obama Administration should renounce the Bush Administration's overly aggressive assertions of executive power and observe the prudential principles of deliberative process, transparency, and respect for legally entrusted authority. For example, if Congress declines to revisit the APA's exemptions to informal rulemaking, the Defense Department and State Department should commit to employing notice-and-comment rulemaking voluntarily in all contexts where these procedures would not be impracticable. If agencies decide that notice-and-comment procedures are impracticable, they should take care to provide a rational explanation for their choice of alternative procedures. A similar statement of reasons should accompany agency decisions to abandon or delay rulemaking initiatives. President Obama should also promulgate a new Executive Order directing agencies to place on the public record all communications with White House staff regarding pending informal rulemaking proceedings. By observing these "passive virtues" of deliberative administration, the Obama Administration could greatly enhance popular representation in the modern administrative state.

These prudential principles may serve as a critical test of character for the new Obama Administration. In his inaugural address, President Obama affirmed the need for responsible government to "restore the vital trust between a people and their government" by ensuring that "those of us who manage the public's dollars will be

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<sup>270</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981) (defending *ex parte* congressional communications with the EPA on the ground that "Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws").

<sup>271</sup> BICKEL, *supra* note 1, at 200.

<sup>272</sup> See *id.* at 111-98; Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) [hereinafter Bickel, *Passive Virtues*].

<sup>273</sup> Bickel, *Passive Virtues*, *supra* note 272, at 51.

held to account, to spend wisely, reform bad habits, and do our business in the light of day.”<sup>274</sup> Yet the enormity of the current financial crisis and other pressing national and international challenges will surely test the President’s resolve to safeguard the “ideals” of deliberative, transparent government rather than compromise these principles “for expediency’s sake.”<sup>275</sup> Already there are signs that the Obama Administration may be seeking greater managerial control over the administrative state through the creation of new White House offices and the anticipated appointment of Professor Cass Sunstein, an advocate for presidential administration, to head OIRA.<sup>276</sup> Care must be taken to safeguard the “passive virtues” of deliberative administration, therefore, lest popular enthusiasm for the incoming President lead to broader centralization of administrative lawmaking and lasting setbacks for fiduciary representation in the administrative state.

#### CONCLUSION

Defenders of presidential administration have characterized the President as “a kind of democratic oracle, tasked with giving voice to the people’s power to redefine public life through democratic action.”<sup>277</sup> The problem with this Wilsonian vision of the presidency is that the “will of the people” itself is an inscrutable, Delphic guide.<sup>278</sup> Rarely does public opinion crystallize into a clear national consensus on questions of federal regulation. Moreover, it is hardly self-evident that presidential administration is the best strategy for vindicating public preferences in the administrative state.<sup>279</sup> As Cynthia Farina has observed, any attempt to equate the popular will with the President’s will “obscures complex problems . . . of information, prediction, and risk perception” and “slides over vexed questions . . . of when leaders should lead rather than follow and of how the act of governing

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<sup>274</sup> *Transcript: Barack Obama’s Inaugural Address*, N.Y. TIMES, Jan. 20, 2009, available at <http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html> (last visited Jan. 21, 2009); see also Brian Knowlton, *After a Day of Crowds and Celebrations, Obama Turns to Sobering Challenges*, N.Y. TIMES, Jan. 21, 2009, available at (last visited Jan. 21, 2009) (quoting President Obama’s observations that all executive officers were “keepers of the public trust” and that the new administration would stand not “on the side of those who want to withhold information but those who seek to make it known”).

<sup>275</sup> *Id.*

<sup>276</sup> See OMB Watch, *Transition at OIRA: What Kind of Change?*, Jan. 13, 2009, available at <http://www.ombwatch.org/article/articleview/4444/> (last visited Jan. 21, 2009) (noting concerns about Sunstein’s embrace of rigorous White House regulatory review of proposed agency regulations).

<sup>277</sup> Purdy, *supra* note 48 (describing Wilson’s view of the presidency).

<sup>278</sup> See KELLEY, *supra* note 24, at 134 (“[T]he devotee of democracy is much in the same position as the Greeks with their oracles: All agreed that the voice of the oracle was the voice of god, but everybody allowed that when he spoke he was not as intelligible as might be desired.” (quoting Sir Henry Maine)).

<sup>279</sup> Farina, *supra* note 92, at 995.

becomes a process in which the collective will is formed, rather than merely implemented.”<sup>280</sup> Confronting these complex problems of identification and implementation, no sober-minded president could believe that his or her preferences on matters of regulatory policy would correlate neatly with the ever-elusive “will of the people.”

A far more constructive conception of popular representation is the idea that public officers serve as fiduciary representatives for the people subject to their power. Under this model, popular representation depends upon whether federal regulators act fairly and reasonably, with due diligence and solicitude to the interests of the people subject to their power. Where federal law entrusts final rulemaking authority to agency administrators, these officers bear fiduciary obligations to exercise their powers fairly, reasonably, purposefully, and with due solicitude to the public interest. In contrast, the President’s fiduciary role in agency rulemaking consists primarily of oversight and persuasion, taking care that administrative agencies exercise their rulemaking powers lawfully without encroaching unlawfully upon agencies’ entrusted authority. Congress and the courts may also reinforce popular representation in the administrative state by correcting deliberation failures in agency rulemaking. Within this delicate network of nested fiduciary relations lies the best hope for popular representation in agency rulemaking.

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<sup>280</sup> *Id.* at 988, 995.