

# ARTICLES

## Faithful Execution: Where Administrative Law Meets the Constitution

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*The administrative state and administrative law are commonly understood to be the product of statutes, judicial doctrines, and agency practices rather than constitutional text. In recent years, however, federal courts have been forced to confront important constitutional questions concerning the President’s exercise of administrative discretion under broadly worded federal statutes. Among those questions: (1) Does the Constitution impose any independent constraints on the administrative discretion that is available to the President under the text of federal statutes? (2) If so, are judges obliged to determine whether that discretion has been abused? and (3) How should judges make such determinations?*

*This Article argues that the Take Care Clause of Article II, Section 3 constrains the President’s administrative discretion and that judges are obliged to determine whether that discretion has been “faithfully” exercised. It then constructs a faithful execution framework that judges can use to implement the “letter”—the text—and the “spirit”—the functions—of the Take Care Clause. To that end, it makes use of a theory of fiduciary government that informed the content and structure of the Take Care Clause and draws upon well-established administrative law doctrines. It uses the faithful execution framework to evaluate President Barack Obama’s 2014 Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program and President Donald Trump’s 2017 travel bans. By so doing, this Article shows that central components of modern administrative law rest upon sound constitutional foundations. It also provides judges with constitutionally inspired tools that can be used to promote presidential accountability, discipline presidential discretion, secure the rule of law, and thwart presidential opportunism.*

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*Can we exactly say how far a faithful execution of the laws may extend? or what may be called or comprehended in a faithful execution?*<sup>1</sup>

## INTRODUCTION

The administrative state and administrative law are commonly understood to be the product of statutes, judicial doctrines, and agency practices rather than anything set forth in the text of the Constitution of the United States.<sup>2</sup> In recent

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1. Letter from William Symmes to Captain Peter Osgood, Jr. (Nov. 15, 1787), in 4 THE COMPLETE ANTI-FEDERALIST 54, 60 (Herbert J. Storing & Murray Dry eds., 1981) [hereinafter Letter from William Symmes].

2. See, e.g., Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1218 (2014) (arguing that “administrative law has evolved into an unwritten constitution that governs

years, however, the Supreme Court has been forced to confront constitutional questions concerning the President's exercise of administrative discretion under broadly worded federal statutes—administrative discretion that may implicate Article II, Section 3, which provides that “[the President] shall take Care that the Laws be faithfully executed.”<sup>3</sup> The questions: (1) Does the Take Care Clause impose any independent constraints on the President's administrative discretion? (2) If so, should judges determine whether that discretion has been “faithfully” exercised? and (3) How should judges make such determinations?

This Article argues that the Take Care Clause does impose independent constraints on the President's administrative discretion and that judges ought to determine whether that administrative discretion has been faithfully exercised. It then provides a framework that judges can use to make such determinations. In constructing that framework, it draws upon existing administrative law doctrines that are consistent with the original functions of the Take Care Clause.

Part I canvasses notable invocations of the Take Care Clause over the years by presidents, legislators, and concerned citizens, and it summarizes the treatment of the Take Care Clause by the Supreme Court. It then focuses attention on two highly visible and controversial sets of presidential decisions that may implicate the Take Care Clause.<sup>4</sup> The first set: President Barack Obama's 2014 executive actions establishing the program known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).<sup>5</sup> The second set: President

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the administrative power not contemplated by the U.S. Constitution”); Jerry L. Mashaw, *Governmental Practice and Presidential Direction: Lessons from the Antebellum Republic?*, 45 WILLAMETTE L. REV. 659, 660 (2009) (averring that there is a “hole in the Constitution where administration might have been”); Mila Sohoni, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 20 (2017) (stating that the “administrative constitution is rooted in the enactment of . . . statutes—most importantly the APA—and in the meaning and conventions encrusted around those statutes by agency practice and judicial elaboration” (footnote omitted)). *But see* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 87–95 (2017) (arguing that central features of the administrative state and administrative law are constitutionally required). As Sohoni notes, Metzger's arguments “diverge[] in critical respects from long-held conceptions of the administrative state's constitutional status and role.” Sohoni, *supra*, at 13.

3. U.S. CONST. art. II, § 3.

4. These are not the only recent presidential actions that arguably implicate the Take Care Clause. For an argument that the Trump Administration's refusal to enforce the individual mandate and other provisions of the Affordable Care Act violates the Take Care Clause, see Nicholas Bagley & Abbe R. Gluck, *Trump's Sabotage of Obamacare Is Illegal*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/opinion/trump-obamacare-illegal.html>. *See also* Complaint at 5, *City of Columbus v. Trump*, No. 18-cv-2364 (D. Md. Aug. 2, 2018) (alleging that the President “neglect[ed] to faithfully implement the ACA and affirmatively [took] numerous executive actions to sabotage it”).

5. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship and Immigration Servs., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action\\_2.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_2.pdf) [<https://perma.cc/7QNM-CMCY>] (announcing the establishment of the DAPA program). DAPA was rescinded on June 15, 2017. *See* Memorandum from John F. Kelly, Sec'y, U.S. Dep't of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al., *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for*

Donald Trump's 2017 executive actions banning travel from several specified countries to the United States (travel bans).<sup>6</sup>

Part II deploys the theory of good-faith constitutionalism that has been elaborated in previous articles<sup>7</sup> to identify the legal duties that the Take Care Clause imposes upon Presidents and to equip judges to enforce those duties. It begins by summarizing the theory of good-faith constitutionalism, according to which: (1) constitutional decisionmakers ought to follow the original meaning of the relevant constitutional text—its “letter”—when that meaning is clear,<sup>8</sup> and (2) constitutional decisionmakers ought to articulate and follow decision rules that are tailored to implement the original function or functions of the relevant constitutional text—its “spirit”—when its original meaning is unclear.<sup>9</sup> It then argues that the original meaning of the Take Care Clause is informed by a theory of fiduciary government<sup>10</sup>—that the text of the Take Care Clause imposes legal duties on the President that resemble those that have long been imposed on private-law fiduciaries like agents, guardians, corporate directors, and trustees. Specifically, the President must personally exercise the discretionary power delegated to him, either by executing the laws himself or by supervising the execution of the laws by executive officers; he must exercise that discretion with reasonable care; he must follow the instructions set forth in the text of the Constitution and in the text of constitutionally authorized statutes; and he must act in good faith—that is, consistently with the text and original functions of constitutional provisions and with the text and original functions of constitutionally authorized statutes.

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Parents of Americans and Lawful Permanent Residents (“DAPA”) (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf> [<https://perma.cc/AK8M-BP4U>].

6. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (restricting entry into the United States for individuals from seven predominantly Muslim countries); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (replacing the first Executive Order); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (replacing the second Executive Order).

7. See Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1605 (2019) [hereinafter Barnett & Bernick, *No Arbitrary Power*]; Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3–7 (2018) [hereinafter Barnett & Bernick, *The Letter and the Spirit*].

8. That is, the original meaning of the Constitution's “letter” is lexically prior to its original function(s) (or “spirit”). See JOHN RAWLS, *A THEORY OF JUSTICE* 38 (Harvard Univ. Press rev. ed. 1999) (defining a “lexical order” as “order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on”).

9. Barnett & Bernick, *The Letter and the Spirit*, *supra* note 7, at 35.

10. For other recent contributions to a growing literature on fiduciary government, see generally EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016); EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* (2011); GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); Edward B. Foley, *Voters as Fiduciaries*, 2015 U. CHI. LEGAL F. 153; Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513 (2015); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE WESTERN RES. L. REV. 243 (2004); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013); Sidney A. Shapiro & Rena I. Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 L. & CONTEMP. PROBS. 99 (2006).

This Article is not the first to trace the fiduciary roots of the Take Care Clause to ascertain its original meaning. Recently, Andrew Kent, Ethan Leib, and Jed Shugerman have done so in exhaustive detail and concluded that the original meaning of the Clause requires the President to “be like a fiduciary, who must pursue the public interest in good faith republican fashion rather than pursuing his self-interest, and who must diligently and steadily execute Congress’s commands.”<sup>11</sup> These scholars have not, however, constructed ready-to-hand rules that constitutional decisionmakers can use to implement the Clause.<sup>12</sup> As they put it, their goal has “not [been] to develop clear rules of constitutional law” and their work “does not cleanly dispose of many of the most significant and pressing contemporary issues implicated by assertions of presidential authority.”<sup>13</sup>

With an eye toward constructing and implementing rules of constitutional law, Part II then proceeds beyond the letter of the Take Care Clause to identify its “spirit”—its original functions. Those functions include: (1) ensuring presidential accountability; (2) facilitating the exercise of bounded presidential discretion; (3) securing the rule of law; and (4) thwarting presidential opportunism.

Part III constructs a framework—the faithful execution framework—for judicial implementation of the Take Care Clause. To that end, it draws upon three important administrative law doctrines. With an eye to promoting presidential accountability, it argues that judges should evaluate executive actions that are: (a) personally taken by the President; (b) formally directed by the President; or (c) in part the product of presidential input that is documented in publicly available sources and for which the President subsequently takes credit or is subsequently held responsible, on the basis of facts and reasons that actually informed the President’s decisionmaking. That is, judges should evaluate presidential actions by means of a modified version of the rule that the Supreme Court articulated and applied to judicial review of agency decisionmaking in *SEC v. Chenery Corp. (Chenery I)*.<sup>14</sup> In the service of promoting bounded presidential discretion and securing the rule of law, it argues that judges should apply a presumption of nonreviewability to executive decisions not to bring enforcement actions against

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11. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019).

12. The authors do offer some tentative conclusions about current doctrine. For example, they opine that “the Supreme Court’s willingness to defer to executive discretion in ‘failure to act’ claims under the Administrative Procedure Act . . . in those cases of underfunding, imprecision, or lack of specificity by congressional command is consistent with the history of faithful execution.” *Id.* at 2185–86 (footnote omitted). They tentatively support *Chevron* deference to reasonable executive interpretation of ambiguous statutes; and they express doubts about the Court’s reliance on the Take Care Clause to disable Congress from “writ[ing] citizen suit provisions in its laws to help vindicate the ‘public interest’ through ‘individual right[s]’ to bring lawsuits against the Executive.” *Id.* at 2187.

13. *Id.* at 2190, 2192.

14. 318 U.S. 80, 95 (1943) (holding that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”). Scholars of administrative law commonly refer to this decision as *Chenery I* to distinguish it from a follow-up case that shares its name. See *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947).

individual parties, consistent with a presumption of nonreview of agency nonenforcement actions that was developed in *Heckler v. Chaney*.<sup>15</sup> Finally, it argues that judges should use a modified version of hard-look arbitrary and capricious review of agency action, as set forth in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,<sup>16</sup> to thwart opportunistic presidential abuses of administrative discretion.

Part IV illustrates how the faithful execution framework would work in practice by applying it to DAPA and the travel bans. It finds that DAPA ought to have been upheld because it did not violate either the letter or the spirit of statutory law and it was consistent with a core function of the Take Care Clause—promoting accountability in the execution of the laws. By contrast, the travel bans ought to have been held unconstitutional because the evidentiary connection between the travel bans and the concededly legitimate statutory end of promoting national security interests was so weak as to warrant an inference of faithless execution.

Part V considers the objections that: the theory of fiduciary government does not fit the modern Executive Branch; the Court has rightly rejected the proposition that ordinary administrative law binds the President; and the faithful execution framework requires unduly stringent judicial review that will prevent the Executive Branch from capitalizing upon its comparative institutional advantages during emergencies and in other dire circumstances.

#### I. THE IMPORTANCE OF THE TAKE CARE CLAUSE: THE NEED FOR A THEORY AND A FRAMEWORK

The Take Care Clause has played a prominent role in American constitutional culture and constitutional law since the Founding Era. Presidents have used the Take Care Clause to justify some of their most consequential decisions; their critics have invoked it to condemn those same decisions. The Take Care Clause has featured in a number of seminal Supreme Court cases in a variety of doctrinal contexts.

Even so, the precise meaning and legal significance of the Take Care Clause remain elusive and unsettled. In an introduction to an illuminating overview of the Supreme Court's "long and varied course of interpretation" of the Clause, John Manning and Jack Goldsmith write that "no one can really know why the Framers included such language or placed it where they did."<sup>17</sup> Although scholars have explored the history of the Take Care Clause,<sup>18</sup> one scours the literature in

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15. 470 U.S. 821, 831 (1985).

16. 463 U.S. 29, 57 (1983).

17. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016).

18. See, e.g., Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 219–230 (2015) (using contemporaneous dictionaries to shed light on the Clause's meaning); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 803–08 (2013) (using English constitutional history to develop an argument that the Clause was

vain for detailed answers to the earnest questions raised by William Symmes.<sup>19</sup>

This Part provides a brief overview of how the Take Care Clause has been treated inside and outside the courts since the Founding Era and discusses two controversies that throw the contemporary relevance of the Clause into sharp relief. It thereby establishes the need for a theory of what the Take Care Clause means, and for a framework that constitutional decisionmakers can use to implement the Clause when its meaning does not clearly resolve legal questions.

#### A. THE TAKE CARE CLAUSE IN CONSTITUTIONAL CULTURE

From the earliest days of the Republic, Presidents have understood the Take Care Clause to impose a grave and personal constitutional duty. George Washington invoked his “high and irresistible duty, consigned . . . by the Constitution, ‘to take care that the laws be faithfully executed’” to justify his actions in suppressing the Whiskey Rebellion.<sup>20</sup> In defending his decisions to pardon those convicted of Sedition Act violations and to order his district attorneys to terminate ongoing Sedition Act prosecutions, Thomas Jefferson wrote that his “obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law.”<sup>21</sup> More recently, Presidents have appealed to the Take Care Clause to justify the removal of chairmen of independent agencies,<sup>22</sup> the refusal to spend funds appropriated by Congress,<sup>23</sup> and the limitation of the use of “enhanced interrogation” techniques by United States officials.<sup>24</sup>

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designed in part to prevent the President from dispensing with or suspending the law); Kent et al., *supra* note 11, at 2179–81 (investigating the Clause’s fiduciary-law background); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 61–70 (1994) (detailing the work of the Committee of Style on the Clause during the Philadelphia Convention); Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 873–74 (1994) (focusing attention on the Clause’s emergence from “the four hundred year struggle of the English people to limit the king’s prerogative and achieve a government under law rather than royal fiat”); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1631–33 (2008) (reading the Take Care Clause in conjunction with the Supremacy and Presidential Oath Clause to implicitly forbid the President from executing unconstitutional laws).

19. See Letter from William Symmes *supra* note 1 and accompanying text.

20. George Washington, President, Proclamation (Sept. 25, 1794), *reprinted in* 33 THE WRITINGS OF GEORGE WASHINGTON 508–09 (John C. Fitzpatrick ed., 1940).

21. Letter from Thomas Jefferson, President, to Wilson Cary Nicholas (June 13, 1809), *in* 11 THE WORKS OF THOMAS JEFFERSON 108, 111 (Paul Leicester Ford ed., 1905).

22. See Transmittal from Franklin D. Roosevelt to Congress of the Record of Removal of the Chairman of the Tennessee Valley Authority (Mar. 25, 1938), <https://www.presidency.ucsb.edu/documents/transmittal-congress-the-record-the-removal-the-chairman-the-tennessee-valley-authority> [<https://perma.cc/B7KD-SX98>] (citing the Take Care Clause as authority for removing chairman Arthur E. Morgan).

23. Thus did President Richard Nixon. See *Impoundment: Differing Views on the Figures*, 31 CONG. Q. 185, 270 (1973) (defending impoundment on Take Care Clause grounds).

24. Thus did President Obama. See Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4893 (Jan. 22, 2009) (citing the Take Care Clause as authority for revocation of “[a]ll executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals”).



The Take Care Clause has long been a part of debates over the constitutional scope of executive power. The most famous early example emerged from the First Congress's debate over the establishment of the Department of Foreign Affairs, which focused on a bill providing that the Secretary of Foreign Affairs was "[t]o be removable from office by the President of the United States."<sup>25</sup> This language began a month-long debate over who had the constitutional authority to remove executive officers. James Madison, who led one party to this debate, declared that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."<sup>26</sup> Madison drew upon the Take Care Clause, questioning how the President could discharge the duty that the Clause imposed upon him if he lacked removal power:

If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end. Now, if the officer when once appointed is not to depend upon the President for his official existence, but upon a distinct body . . . I confess I do not see how the President can take care that the laws be faithfully executed.<sup>27</sup>

Additionally, the Take Care Clause has also been cited in connection with "signing statements" that Presidents append to legislation in order to signal that they will interpret statutory provisions to avoid constitutional problems. Presidents cite the Take Care Clause in signing statements when identifying their constitutional objections to particular statutory provisions; their critics cite the Take Care Clause when raising constitutional objections to signing statements.

An example of the former: President Obama indicated a constitutional objection to a provision of a compromise budget law that prohibited any congressional appropriations from being used to pay the salaries and expenses of his "czars" of energy, health reform, auto recovery, and urban affairs. He stated that "[I]n legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers . . . undermin[e] the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed."<sup>28</sup>

An example of the latter: an American Bar Association report accused President George W. Bush of violating the Take Care Clause by failing to "faithfully execute all laws."<sup>29</sup> It stated that "his obligation is to veto bills he believes

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25. 1 ANNALS OF CONG. 455, 455, 479–80 (1789) (Joseph Gales ed., 1834).

26. *Id.* at 463 (statement of James Madison on June 16, 1789).

27. *Id.* at 496–97 (statement of James Madison on June 17, 1789).

28. Office of the Press Sec'y, *Statement by the President on H.R. 1473*, WHITE HOUSE (Apr. 15, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/04/15/statement-president-hr-1473> [<https://perma.cc/B2H9-2LM2>].

29. NEIL R. SONNETT ET AL., ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, REPORT 19 (2006), <https://www.americanbar.org/content/dam/aba/publishing/abanews/1273179616signstaterereport.authcheckdam.pdf> [<https://perma.cc/8V5Y-ELFV>].

are unconstitutional” and that the President may “not sign them into law and then emulate King James II by refusing to enforce them.”<sup>30</sup>

The Take Care Clause has even made its way into impeachment proceedings. One of the articles of impeachment filed against President Andrew Johnson charged him with violating the Take Care Clause by removing Edwin Stanton from the office of Secretary for the Department of War, in defiance of the Tenure of Office Act.<sup>31</sup> Dereliction of what Madison described as the duty to “oversee[] and control[] those who execute the laws” served as the basis for one of the articles of impeachment filed against President Richard Nixon in connection with the Watergate break-in.<sup>32</sup> Specifically, Nixon was accused of having “failed to take care that the laws were faithfully executed by failing to act when he knew or had reason to know that his close subordinates endeavored to impede and frustrate lawful inquiries by duly constituted executive, judicial, and legislative entities.”<sup>33</sup>

The Take Care Clause is thus part of what Mark Tushnet has called “the Constitution outside the courts.”<sup>34</sup> It shapes the constitutional understanding of presidents, legislators, and members of the public and inspires action on the basis of that understanding, even when the prospects of litigation are remote.

#### B. THE TAKE CARE CLAUSE IN THE COURTS

The Supreme Court’s case law concerning the Take Care Clause is somewhat opaque. Jack Goldsmith and John Manning helpfully organize it into five categories,<sup>35</sup> which I borrow here for the purposes of summary—although I also add a sixth.

First, the Take Care Clause plays a role in cases involving the President’s removal power. The Court’s most extensive analysis of the constitutional scope of the removal power remains *Myers v. United States*, in which the Court considered the constitutionality of a statute that prohibited the President from removing a postmaster first class without the advice and consent of the Senate.<sup>36</sup> In language that tracked Madison’s statements during the First Congress’s removal debate, Chief Justice William Howard Taft wrote, “As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that . . . he should select those who

30. *Id.*

31. See STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT 47–48 (Comm. Print 1974) (“Article I charged that Johnson, ‘unmindful of the high duties of . . . the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully . . . [discharge Edwin M. Stanton].’”). Johnson argued that the Tenure of Office Act unconstitutionally restricted his removal power. See Message from Andrew Johnson to the Senate on the Removal of Edwin M. Stanton as Secretary of War (Feb. 21, 1868), <http://www.presidency.ucsb.edu/ws/index.php?pid=72192> [<https://perma.cc/AFE9-5YGP>].

32. See 1 ANNALS OF CONG. 455, 463 (1789) (Joseph Gales ed., 1834); H.R. REP. NO. 93-1305, at 3–4 (1974).

33. H.R. REP. NO. 93-1305, at 3–4.

34. See Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437, 437 (1992).

35. Goldsmith & Manning, *supra* note 17, at 1839–53.

36. 272 U.S. 52, 117 (1926).

were to act for him under his direction in the execution of the laws.”<sup>37</sup> Taft added that, because the President can in practice only execute the laws with the aid of subordinate officers, the President must be able to remove officers whom he finds to be “negligent and inefficient.”<sup>38</sup>

The Court in *Humphrey’s Executor v. United States* subsequently upheld restrictions on the President’s authority to remove members of the Federal Trade Commission after describing the agency’s functions as “quasi-legislative” and “quasi-judicial” rather than “purely executive.”<sup>39</sup> In *Wiener v. United States*, the Court also decided that the Take Care Clause did not empower the President to remove members of “quasi-judicial” bodies at will.<sup>40</sup> When the Court later repudiated the “purely executive” distinction in *Morrison v. Olson*, both the majority and Justice Antonin Scalia in a vigorous dissent invoked the Take Care Clause in support of the proposition that Congress possesses only a limited capacity to restrict the President’s exercise of his removal power.<sup>41</sup>

More than two decades after *Morrison*, the Court in *Free Enterprise Fund* held unconstitutional “dual” for-cause limitations on the removal of members of the Public Company Accounting Oversight Board.<sup>42</sup> The Court concluded that these limitations “contravene[d] the President’s ‘constitutional obligation to ensure the faithful execution of the laws’” by depriving the President of the constitutionally required quantum of control over his officers.<sup>43</sup>

Second, the Take Care Clause has contributed to the development of standing doctrine. Recognizing standing in cases which are—as the Court put it in *Allen v. Wright*—“brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties,” may impede the execution of the laws.<sup>44</sup> In *Allen*, the Court determined that it could not recognize standing in a case involving allegations that the Internal Revenue Service had failed to enforce a federal policy denying a charitable tax exemption to private schools that engaged in racial discrimination “without running afoul” of the Take Care Clause.<sup>45</sup>

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37. *Id.*

38. *Id.* at 135.

39. *Humphrey’s Executor v. United States*, 295 U.S. 602, 627–30 (1935).

40. 357 U.S. 349, 352–54 (1958).

41. 487 U.S. 654, 689–90 (1988); *Id.* at 725–26 (Scalia, J., dissenting).

42. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). The Court assumed that SEC Commissioners were removable only for cause by members of the Merit Systems Protection Board, who are unquestionably removable only for cause by the President. *Id.* at 487. This assumption was questionable, because the SEC’s organic statute—unlike those of scores of other agencies—says nothing about removal. *See Id.* at 548 (Breyer, J., dissenting) (arguing that the Court “read[] into the statute books a ‘for cause removal’ phrase that does not appear in the relevant statute and which Congress probably did not intend to write”).

43. *Id.* at 484 (quoting *Morrison*, 487 U.S. at 693).

44. 468 U.S. 737, 761 (1984).

45. *Id.*

In *Lujan v. Defenders of Wildlife*, the Court cited the Take Care Clause in denying standing to challenge a regulation stating that federal funding restrictions in the Endangered Species Act do not apply to federally funded overseas projects.<sup>46</sup> Justice Scalia reasoned that allowing Congress “to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts [would] permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”<sup>47</sup>

The third category of Take Care cases involves the exercise of prosecutorial discretion—the choice of whether to bring either criminal or civil enforcement actions. In *Heckler v. Chaney*, the Court held that agency nonenforcement decisions were presumptively unreviewable under the Administrative Procedure Act (APA) and linked this presumption to the Take Care Clause.<sup>48</sup> In *United States v. Armstrong*, the Court declared that the Attorney General and United States Attorneys enjoy “broad discretion” to enforce federal criminal laws “because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>49</sup>

Fourth, the Court has maintained that the Take Care Clause prohibits the Executive from either making law or dispensing with the law’s obligations in individual cases.

President Harry Truman’s 1952 order to the Secretary of Commerce to take possession of and operate most of the nation’s steel mills gave rise to the Court’s most high-profile discussion of the anti-lawmaking principle.<sup>50</sup> President Truman issued the order in response to a nationwide labor strike that threatened to slow the production of military equipment and supplies during the Korean War.<sup>51</sup> The Truman Administration conceded that it lacked statutory authority to seize the mills, but it defended its actions as an exercise of the President’s powers under Article II’s Vesting, Commander-in-Chief, and Take Care Clauses.<sup>52</sup>

In *Youngstown Sheet & Tube Co. v. Sawyer*, a seven-Justice majority held the seizure unconstitutional.<sup>53</sup> Justice Robert Jackson’s now-canonical concurrence and Justice Hugo Black’s majority opinion affirmed two related propositions concerning the President’s faithful execution duties. First, the President is bound by

46. 504 U.S. 555, 577 (1992).

47. *Id.* (citing U.S. CONST. art. II, § 3).

48. 470 U.S. 821, 832 (1985) (stating that “an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’” (citing U.S. CONST. art. II, § 3)).

49. 517 U.S. 456, 464 (1996) (citing U.S. CONST. art. II, § 3).

50. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

51. *Id.* at 583.

52. *Id.* at 587.

53. *Id.* at 589.

law. Justice Jackson described the Take Care Clause as providing for “a governmental authority that reaches so far as there is law” and embodying the principle that “ours is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules.”<sup>54</sup> Second, the President may not make law. Writing for the majority, Justice Hugo Black declared that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>55</sup>

The Court forcefully articulated the anti-dispensation principle in *Kendall v. United States ex rel. Stokes*, which concerned whether a writ of mandamus was available to compel the Postmaster General, Amos Kendall, to pay the full amount appropriated by Congress for the sum due on a contract that William Stokes and others had made with the Post Office.<sup>56</sup> The Court rejected the argument that “the postmaster general was alone subject to the direction and control of the President,” stating that “[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the [C]onstitution, and entirely inadmissible.”<sup>57</sup> To recognize such a power, wrote Justice Smith Thompson, “would be vesting in the President a dispensing power, which has no countenance for its support in any part of the [C]onstitution.”<sup>58</sup> Similarly, in *In re Neagle*, the dissent emphasized that, although it is “the President’s duty to take care that the laws be faithfully executed, it is not his duty to *make* laws or a law of the United States.”<sup>59</sup> The dissent added that “[t]he laws [the President] is to see executed are manifestly those contained in the Constitution, and those enacted by Congress.”<sup>60</sup>

Fifth, the Court has invoked the Take Care Clause in connection with what Goldsmith and Manning term the President’s “completion power”—the power “to take ‘incidental’ measures that may be necessary to effectuate statutory commands.”<sup>61</sup> The Court in *In re Neagle* relied upon the Take Care Clause in determining that the President could provide a bodyguard for Justice Stephen Field absent statutory authorization.<sup>62</sup> Justice Thompson reasoned that, as the President needed no statute to “train . . . guns upon [a foreign] vessel” to secure the release of a foreign national, “make an order for the protection of the mail and of the persons and lives of its carriers,” or “place guards upon the public territory to protect [federally owned] timber,” neither did the President need Congress’s permission to protect a federal officer in the performance of his official duties.<sup>63</sup>

54. *Id.* at 646 (Jackson, J., concurring).

55. *Id.* at 587 (majority opinion).

56. 37 U.S. (12 Pet.) 524 (1838).

57. *Id.* at 612–13.

58. *Id.* at 613.

59. 135 U.S. 1, 83 (1890) (Lamar, J., dissenting).

60. *Id.*

61. Goldsmith & Manning, *supra* note 17, at 1851–53. The authors coined the term in Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2280 (2006).

62. *In re Neagle*, 135 U.S. at 63–64.

63. *Id.* at 64–67.

Finally, the Court has cited the Take Care Clause for the proposition that the President is the nation's chief administrator and enforcer of federal laws. In *Nixon v. Fitzgerald*, Justice Lewis Powell identified "the enforcement of federal law" as one of the "supervisory and policy responsibilities of utmost discretion and sensitivity," which is entrusted to the President "who is charged constitutionally to 'take Care that the Laws be faithfully executed.'"<sup>64</sup> In *United States v. Valenzuela-Bernal*, Justice William Rehnquist described the Take Care Clause as imposing a "duty" on the President to "apprehend[] and obtain[] the conviction of those who have violated criminal statutes of the United States."<sup>65</sup> Lastly, in *Printz v. United States*, Justice Scalia stated that "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through [executive] officers."<sup>66</sup>

### C. RECENT CONTROVERSIES

Goldsmith and Manning observe that, although the Supreme Court's "decisions rely heavily on the Take Care Clause," the Court "almost never interpret[s] it, at least not in any conventional way."<sup>67</sup> Chief Justice Taft's seventy-page exploration in *Myers* of how the members of the Philadelphia Convention and the First Congress understood the removal power, the background understanding of executive power reflected in English jurisprudence, and the nature of the Executive's removal power under state constitutions, is the exception rather than the rule. Recent presidential actions illustrate the importance of developing a theory of the meaning of the Take Care Clause and of constructing a framework that constitutional decisionmakers can use to enforce the Clause.

#### 1. President Obama's DAPA Program

In June 2012, the Department of Homeland Security (DHS) announced a deferred action program for people present in the United States who had entered the country unlawfully when they were children—known as the Deferred Action for Childhood Arrivals (DACA) program.<sup>68</sup> A memo from Secretary of Homeland Security Janet Napolitano "set[] forth how . . . [DHS] should enforce the Nation's immigration laws against certain young people" and provided five "criteria [that] should be satisfied before an individual is considered for an exercise of prosecutorial discretion."<sup>69</sup> In November 2014, DHS expanded DACA's eligibility criteria and extended "[t]he period for which

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64. 457 U.S. 731, 750 (1982) (quoting U.S. CONST. art. II, § 3).

65. 458 U.S. 858, 863 (1982).

66. 521 U.S. 898, 922 (1997) (citation omitted) (quoting U.S. CONST. art. II, § 3).

67. Goldsmith & Manning, *supra* note 17, at 1838.

68. See Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low> [https://perma.cc/5MDZ-5SW5].

69. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), <https://www.dhs.gov/xlibrary/>

DACA and the accompanying employment authorization is granted” from two years to three.<sup>70</sup> It also established a deferred action program for “individuals who . . . have, [as of November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident” and meet five additional criteria.<sup>71</sup> In a memo setting forth what would become known as DAPA, DHS Secretary Jeh Johnson emphasized that “[d]eferred action [did] not confer any form of legal status in this country, much less citizenship,” but that it did permit individuals “to be lawfully present in the United States” for “a specified period of time.”<sup>72</sup>

Twenty-six states challenged DAPA under the APA and the Take Care Clause.<sup>73</sup> The APA—which has been aptly described as a “subconstitution” for the administrative state<sup>74</sup>—establishes the procedural and substantive criteria that agency action must satisfy and provides instructions to courts concerning the review of agency action. The states argued that DAPA violated the APA because: (1) it was a procedurally defective legislative rule that had not been issued through the notice-and-comment process required by section 553 of the APA; and (2) it was a substantively defective rule that was “not in accordance with law” under section 706(2) of the APA—it violated the Immigration and Nationality Act of 1965 (INA).<sup>75</sup> As to the Take Care Clause, the states argued that the President—acting through DHS—had opportunistically suspended duly enacted law and effectively made new law without congressional approval.<sup>76</sup>

A federal district court in Texas enjoined DAPA after determining that the states would likely prevail on the merits of their APA claims,<sup>77</sup> and the United States Court of Appeals for the Fifth Circuit affirmed the injunction.<sup>78</sup> The Take Care Clause claims did not receive any judicial attention. However, when the Government appealed and the Supreme Court granted certiorari, among the questions on which the Court sought briefing was “[w]hether [DHS’s] Guidance

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assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/97T6-NARV].

70. See Memorandum from Jeh Charles Johnson, *supra* note 5, at 3.

71. *Id.* at 4.

72. *Id.* at 2.

73. Elise Foley, *Over Half the States Are Suing Obama for Immigration Actions*, HUFFINGTON POST (Jan. 27, 2015, 6:54 PM), [https://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration\\_n\\_6550840.html](https://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration_n_6550840.html).

74. See Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363. For an extended discussion of the APA’s structure, content, and judicial elaboration, see generally Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018).

75. *Texas v. United States*, 809 F.3d 134, 149, 178 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

76. See Brief for State Respondents at 71–77, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

77. *Texas v. United States*, 86 F. Supp. 3d 591, 613, 677 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

78. *Texas v. United States*, 809 F.3d at 188.

violates the Take Care Clause of the Constitution, Art. II, § 3.”<sup>79</sup>

The Take Care Clause question received immediate scholarly attention. Robert Delahunty and John Yoo took to the pages of the *Texas Law Review* to provide a detailed account of the original meaning of the Take Care Clause and to argue that the Obama Administration’s actions amounted to an unconstitutional suspension of the immigration laws—that none of the constitutionally legitimate reasons for which a president might decline to execute duly enacted laws could justify those actions.<sup>80</sup> In the same issue, Saikrishna Prakash responded that at least two of the reasons that Delahunty and Yoo claimed would justify non-execution—scarce resources and equity<sup>81</sup>—could in fact justify the Obama Administration’s actions.<sup>82</sup> Christina Rodríguez and Adam Cox also defended DAPA, contending that it made the best of a non-ideal situation created by vast congressional delegation of immigration enforcement authority without any discernible priority setting for enforcement.<sup>83</sup>

In something of an anticlimax, the Supreme Court failed to form a majority and affirmed the Fifth Circuit’s decision by default.<sup>84</sup> The injunction stood, and the questions concerning faithful execution that were raised by President Obama’s deferred action programs remained open.

## 2. President Trump’s Travel Bans

On January 27, 2017, President Donald Trump, relying upon the authority delegated to him under the INA to “suspend the entry of all aliens or any class of aliens” when the President finds that such entry “would be detrimental to the interests of the United States,”<sup>85</sup> issued an executive order (EO-1) that temporarily prohibited refugees and citizens of seven majority-Muslim countries—including visa holders—from entering the country.<sup>86</sup> Chaos ensued.

Thousands of visas were immediately canceled, hundreds of visa holders were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travelers were detained.<sup>87</sup> The travel ban was immediately met with a variety of legal challenges,<sup>88</sup> many of which focused on Trump’s alleged

79. See Brief for Petitioners at (I), *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

80. Delahunty & Yoo, *supra* note 18, at 781–87.

81. *Id.* at 841–51.

82. See Saikrishna Bangalore Prakash, Response, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. 115, 118 (2013).

83. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015).

84. *United States v. Texas*, 136 S. Ct. 2271, 2272, *reh’g denied*, 137 S. Ct. 285 (2016).

85. 8 U.S.C. § 1182(f) (2012).

86. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). The countries included in the ban were Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

87. Laura Jarrett, *Over 100,000 Visas Revoked, Government Lawyer Says in Virginia Court*, CNN POLITICS (Feb. 3, 2017, 6:08 PM), <https://www.cnn.com/2017/02/03/politics/over-100000-visas-revoked-government-lawyer-says-in-virginia-court/index.html>.

88. See, e.g., *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017); *Aziz v. Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017); *Louhghalam v. Trump*, 230 F. Supp. 3d 26 (D. Mass. 2017).



desire to express animosity toward Muslims rather than to achieve any national-security-related end.<sup>89</sup> A federal district court issued a nationwide injunction against the ban a week later,<sup>90</sup> and the United States Court of Appeals for the Ninth Circuit upheld the injunction.<sup>91</sup>

President Trump responded by issuing a second executive order (EO-2) on March 6, 2017 that was narrower in scope and set forth factual recitations in support of claimed national security interests.<sup>92</sup> A district court enjoined EO-2,<sup>93</sup> and the United States Court of Appeals for the Fourth Circuit upheld the injunction.<sup>94</sup>

On September 24, 2017, the President issued yet another travel ban, this time via proclamation rather than executive order (Proclamation).<sup>95</sup> In a pair of unsigned orders, the Supreme Court allowed the Proclamation to go into effect.<sup>96</sup> Panels of the Ninth<sup>97</sup> and Fourth<sup>98</sup> Circuits subsequently held that the Proclamation was also unlawful and enjoined it—the Ninth Circuit because it exceeded the President’s authority under the INA and the Fourth Circuit because it violated the Establishment Clause.

The Fourth Circuit opinion enjoining EO-2 is representative of how lower courts evaluated the travel bans.<sup>99</sup> Chief Judge Robert Gregory explored evidence adduced by the plaintiffs that “national security” was a “pretext for what really is an anti-Muslim religious purpose.”<sup>100</sup> The evidence included statements during Trump’s presidential campaign in which he promised a “Muslim ban”;<sup>101</sup> statements that he would fulfill his campaign promise by focusing on territories rather

89. See, e.g., *Sarsour v. Trump*, No. 1-cv-00120, 2017 WL 7035908 (E.D. Va. Dec. 26, 2017) (“As the Trump Administration’s regular and vulgar attacks against Islam and Muslims make clear, the attempt to ban Muslim immigration is but one part of a multipronged attempt to demonize Islam and marginalize Muslims in the United States.”).

90. See *Washington*, 2017 WL 462040, at \*3.

91. See *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

92. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). Among other things, EO-2 excluded visa holders from the travel ban and authorized them to renew their status. *Id.* at 13,213–14. The countries included in the ban were Iran, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* at 13,210–11.

93. See *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 547 (D. Md. 2017), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), *vacated and remanded sub nom. Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017).

94. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), *vacated and remanded sub nom. Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017).

95. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017). The countries included in the ban were Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. *Id.* at 45,164.

96. See *Trump v. Hawaii*, 138 S. Ct. 542 (Mem.) (2017); see also *Trump v. Int’l Refugee Assistance*, 138 S. Ct. 542 (2017).

97. *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018).

98. See *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018), *as amended* (Feb. 28, 2018).

99. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 558–59 (D. Md. 2017) (discussing evidence of pretext, including anti-Muslim statements by Trump).

100. *Int’l Refugee Assistance Project*, 857 F.3d at 591.

101. *Id.* at 594.

than religion;<sup>102</sup> EO-1 and EO-2's targeting of only majority-Muslim countries;<sup>103</sup> and statements of President Trump and his advisors that EO-2 "[had] the same policy goals as EO-1."<sup>104</sup>

The panel ultimately determined that the plaintiffs had "plausibly alleged with particularity that an immigration action was taken in bad faith."<sup>105</sup> Accordingly, the panel held that an established principle of deference to "facially legitimate and bona fide" executive exclusion decisions that implicate constitutional rights—a principle associated with the Supreme Court's decision in *Kleindienst v. Mandel*<sup>106</sup>—did not apply.<sup>107</sup> The panel proceeded to "look behind" the Government's national security rationale, using the Establishment Clause test outlined in *Lemon v. Kurtzman*<sup>108</sup> to "evaluate the government's purpose for acting."<sup>109</sup> Finding that "the evidence in the record, viewed from the standpoint of the reasonable observer, create[d] a compelling case that EO-2's primary purpose is religious," the panel held that the plaintiffs were likely to succeed on the merits of their Establishment Clause claims.<sup>110</sup>

In *Trump v. Hawaii*, the Supreme Court upheld the third travel ban.<sup>111</sup> Writing for a 5–4 majority of the Court, Chief Justice Roberts "assume[d]" that it was appropriate to look "beyond the facial neutrality of the [Proclamation],"<sup>112</sup> which did not mention religion. Roberts did not, however, make any concerted effort to ascertain the President's actual ends, averring that the Court would "uphold the policy so long as it can *reasonably be understood* to result from a justification independent of unconstitutional grounds."<sup>113</sup>

The language of bad faith saturated both district and appellate court opinions holding the travel bans unlawful, as well as Justice Sotomayor's principal dissent in *Trump v. Hawaii*. It is easy to imagine how the travel bans could have been challenged as failures to take care that the immigration laws be faithfully executed—although in fact they were not challenged on this ground. If the INA delegates broad power to the President to temporarily prevent foreign nationals from entering the country, it does not follow that that power can be wielded in the service of invidiously discriminatory goals.

If executive actions like DAPA and the travel bans implicate the Take Care Clause, constitutional decisionmakers need a coherent, manageable framework that they can use to distinguish good-faith presidential exercises of prosecutorial

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102. *Id.*

103. *Id.*

104. *Id.* at 591.

105. *Id.* at 592.

106. 408 U.S. 753, 770 (1972).

107. *Int'l Refugee Assistance Project*, 857 F.3d at 592.

108. 403 U.S. 602, 612–13 (1971).

109. *Int'l Refugee Assistance Project*, 857 F.3d at 592.

110. *Id.* at 594.

111. 138 S. Ct. 2392, 2423 (2018).

112. *Id.* at 2441.

113. *Id.* at 2420 (emphasis added).

discretion from bad-faith presidential usurpations of legislative power, and good-faith presidential exercises of broad statutory authority to protect national interests from bad-faith expressions of presidential hostility toward particular religious groups. No such framework has been developed.

The next Part briefly describes a theory of interpreting and implementing constitutional text—good-faith constitutionalism. It then applies that theory to the Take Care Clause.

## II. GOOD-FAITH CONSTITUTIONALISM AND THE LETTER AND SPIRIT OF THE TAKE CARE CLAUSE

A comprehensive description and normative defense of good-faith constitutionalism has been provided elsewhere.<sup>114</sup> To summarize, good-faith constitutionalism holds that decisionmakers who are confronted with a constitutional question are obliged to make a good-faith effort to: (1) ascertain the original meaning of the relevant constitutional text and follow that meaning if it clearly resolves the question; and (2) failing that, either develop or rely upon a previously developed decision rule that is designed to implement the original function or functions of the relevant text. The first activity consists of what many originalists refer to as “interpretation”;<sup>115</sup> the second takes place in what has been termed “the construction zone.”<sup>116</sup> In this Part, I will summarize a concept that is of central importance to good-faith constitutionalism—the concept of fiduciary government. After investigating the original meaning of the Take Care Clause—its letter—and determining that it will likely not resolve every question concerning the President’s exercise of administrative discretion, I proceed to identify the Clause’s original functions—its spirit. That spirit, I argue, ought to guide the implementation of the Clause in the construction zone.

### A. CONSTITUTIONAL DECISIONMAKERS AS FIDUCIARIES

Good-faith constitutionalism, in both its interpretive and constructive dimensions, conceptualizes the relationships between public officials and private citizens as fiduciary relationships. Understanding the theory of fiduciary government upon which good-faith constitutionalism rests requires a brief overview of private fiduciary law.

Private-law fiduciary duties comprise a set of discretion-constraining rules that attach in the context of certain kinds of relationships. All such relationships involve: (1) discretionary power exercised by one party (2) over resources belonging to a second party (3) who cannot perfectly monitor the first party’s

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114. See, e.g., Barnett & Bernick, *The Letter and the Spirit*, *supra* note 7.

115. For a discussion of the ascendancy of the interpretation–construction distinction within originalism and the controversy surrounding it, see *id.* at 10–18.

116. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 458 (2013) (explaining that constitutional decisionmakers enter the construction zone when “the constitutional text does not provide determinate answers to constitutional questions”).

exercise of discretion, and (4) is thus vulnerable to the first party's abuse of that discretion. Familiar examples of fiduciaries include agents, guardians, attorneys, corporate directors, and trustees.

Typically, fiduciary relationships are created when the first party, the beneficiary, intentionally delegates power to manage his resources to the second party, the fiduciary, in order to achieve a limited set of goals, and the latter agrees to thus manage them.<sup>117</sup> Fiduciary obligations may, however, be imposed upon power-exercising parties in the teeth of their preferences, in order to prevent the latter from pursuing their own interests at the expense of those whose resources they control.<sup>118</sup> Even when fiduciary relationships do arise from mutual consent, not all of the duties that attach to those relationships can be fairly described as mere "default rules" that can be modified or even discarded with the consent of both parties—beneficiaries cannot, for instance, authorize fiduciaries to act in bad faith.<sup>119</sup>

However fiduciary relationships arise, fiduciary duties serve to reduce the costs associated with the divergence between the interests of beneficiaries and those of fiduciaries—termed agency costs.<sup>120</sup> Agency costs are typically grouped into three broad categories: (1) monitoring costs, or the costs to beneficiaries of overseeing fiduciary performance; (2) bonding costs, consisting in the costs to fiduciaries of guaranteeing to beneficiaries that they will not take actions that will harm beneficiary interests; and (3) residual losses arising from the misalignment of interests between fiduciary and beneficiary, including both those that result from shirking—the failure to work as diligently as promised—and those that result

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117. Significant theoretical works on fiduciary law include, for example, TAMAR FRANKEL, *FIDUCIARY LAW* (2011); LEONARD I. ROTMAN, *FIDUCIARY LAW* (2005); J.C. SHEPHERD, *THE LAW OF FIDUCIARIES* (1981); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69 (1962); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51 (1981); Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975).

118. See Gregory Klass, *What if Fiduciary Duties Are Like Contractual Ones?*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 93, 101–02 (Paul B. Miller & Andrew S. Gold eds., 2016) (explaining that though "one does not become a trustee, an executor, a guardian, a corporate director, a joint venturer, an agent, an attorney, a teacher or a priest by accident," the law may impose legal duties on such people "not because they want" them but for "other reasons," namely, "protect[ing] the non-fiduciary against neglect and opportunism").

119. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 78, cmt. c(2) (AM. LAW INST. 2007); RESTATEMENT (THIRD) OF AGENCY § 8.06(1)(a), (2)(a) (AM. LAW INST. 2006); UNIF. POWER OF ATTORNEY ACT § 114(a) (UNIF. LAW COMM'N 2006); UNIF. TRUST CODE § 105(b)(2) (UNIF. LAW COMM'N 2000).

120. Foundational articles on agency cost theory include, for example, Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene F. Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Benjamin Klein, *Contracting Costs and Residual Claims: The Separation of Ownership and Control*, 26 J.L. & ECON. 367 (1983).

from opportunism—the pursuit of unauthorized goals.<sup>121</sup>

To reduce these agency costs, private law requires that fiduciaries exercise their discretion in particular ways, under penalty of damages and disgorgement.<sup>122</sup> These duties include the duty to follow the beneficiary’s instructions, the duty to personally exercise delegated power, the duty to take care in pursuing the beneficiary’s interests, and the duty of loyalty, which includes a duty on the part of the fiduciary to pursue in good faith the particular purposes for which discretion was delegated by the beneficiary.<sup>123</sup> When these duties are reliably enforced, beneficiaries can spend less on monitoring, it is less expensive for fiduciaries to credibly commit to the pursuit of beneficiary interests, and the expected benefits of shirking and opportunism to fiduciaries are reduced.

Certain of the above duties are arguably not distinctively fiduciary. There are many legal contexts, for instance, in which the law imposes a duty of care on discretion-exercising parties.<sup>124</sup> Further, different fiduciary duties are enforced differently, depending on the particular relationship at issue and the costs associated with enforcement. Thus, corporate law’s deferential “business judgment” rule is arguably less a standard of review of managerial or directorial decisions than an abstention doctrine that requires judges to abstain from evaluating the substantive reasonableness of managerial or directorial decisions for compliance with the duty of care.<sup>125</sup> The business judgment rule has been defended on the grounds that: (1) judges lack business acumen, and they may err in evaluating business situations and undo net-beneficial deals; (2) competent managers and directors may be insufficiently unwilling to take risks that can increase the welfare of investors if they are too fearful of facing personal liability; and (3) because well-functioning capital markets realize most of the costs of managerial and directorial negligence without judicial assistance, assistance will generate deadweight loss.<sup>126</sup> Yet, fiduciary

121. See Jensen & Meckling, *supra* note 120, at 308; see also Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL’Y REV. 265, 277 (1998) (describing agency cost theory’s assumption that “if not sufficiently monitored or bonded, agents will be lazy or irresponsible—or at least not entirely selfless in their motivations”).

122. On fiduciary law as a means of reducing agency costs, see, for example, Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 705–708 (1982); Darian M. Ibrahim, *Individual or Collective Liability for Corporate Directors?*, 93 IOWA L. REV. 929, 946–58 (2008); Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 233; Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 638–48 (2004).

123. See Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 257–62 (2007).

124. See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879, 915 (arguing that the duty of care is not distinctively a fiduciary duty); Ibrahim, *supra* note 122, at 960 n.138; Ribstein, *supra* note 122, at 220–21.

125. See generally Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004) (providing an overview of the business judgment rule and contending that it is best understood as “a doctrine of abstention pursuant to which courts in fact refrain from reviewing board decisions unless exacting preconditions for review are satisfied”).

126. See FRANK EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 97–102 (1996); Bainbridge, *supra* note 125, at 109–29 (discussing these and other context-specific rationales for the business judgment rule).

law's commitment to reducing agency costs can be perceived in the law's treatment of all fiduciary relationships.

In representative governments, the relationship between public officials and other members of the public closely resembles those relationships in which private law imposes fiduciary duties. Representative governments rest upon the premise that government power ought to be exercised in order to achieve ends that are valuable to members of the public.<sup>127</sup> To say that public officials have historically enjoyed a great deal of discretion over citizens' resources and that citizens are vulnerable to harms arising from official shirking and opportunism would be a considerable understatement. It is thus easy to understand why the government–citizen relationship has been conceptualized using a fiduciary framework for centuries.<sup>128</sup>

During the Founding Era, the theory of fiduciary government was broadly accepted by Americans across the political spectrum. References to government officials as agents, guardians, and trustees can be found throughout Founding Era literature and in public debates, and Gary Lawson, Guy Seidman, and Robert Natelson have demonstrated that the text of the 1788 Constitution reflects the influence of fiduciary government theory.<sup>129</sup>

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127. See Paul B. Miller, *Fiduciary Representation*, in *FIDUCIARY GOVERNMENT* 21, 45 (Evan J. Criddle et al. eds., 2018) (noting that “the limits of formally representative government are reached in states governed by despots who rule for personal gain”).

128. See Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1083–87 (2004) [hereinafter Natelson, *The Constitution and the Public Trust*] (tracing the concept of fiduciary government back to classical Greece). It is beyond the scope of this Article to explore the ways in which fiduciary government theory has served a hegemonic function—how it has “provide[d] a widespread legitimacy to dominant institutions and interests” at various points in historical time. See CARL BOGGS, *GRAMSCI'S MARXISM* 49 (1976) (describing Italian Marxist Antonio Gramsci's highly influential concept of hegemony). I acknowledge that fiduciary government theory has been used to justify the abuse of state power—particularly by colonizing states. See Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 404, 405 (Andrew S. Gold & Paul B. Miller eds., 2014) (acknowledging “that imperial powers abused fiduciary rhetoric as a pretext for subjugating, exploiting, and even destroying indigenous communities”). Fiduciary government theory has, however, also been used to resist the abuse of state power and to mitigate historical injustice. See CRIDDLE & FOX-DECENT, *supra* note 10, at 61 (describing the ways in which fiduciary government theory underwrites international law requirements, including requirements that states consult with indigenous peoples prior to undertaking projects that implicate their rights and honor the cultural and linguistic identities of ethnic minorities). It is not clear to me that the historical associations between fiduciary government theory and colonial domination are strong enough to justify the claim that fiduciary government theory lends itself more easily to oppressive governance than alternative political theories.

129. See LAWSON & SEIDMAN, *supra* note 10, at 28–48; see also GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 68–70 (2010); Gary Lawson et al., *The Fiduciary Foundations of Federal Equal Protection*, 94 *B.U. L. REV.* 415, 419–24 (2014); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 *U. RICH. L. REV.* 191, 192–93 n.5 (2001); Natelson, *The Constitution and the Public Trust*, *supra*, at 1082–87. My claims regarding the meaning of the Take Care Clause do not rest upon the accuracy of Lawson, Natelson, and Seidman's conclusions that the Constitution was originally understood to be a fiduciary document or that those who drafted and ratified it would have expected then-prevailing fiduciary-law doctrines to be used as interpretive tools. Regardless of whether Lawson, Natelson, and Seidman are correct about the Constitution as a whole, my claim—that the text of the Take Care Clause was originally understood to

Good-faith constitutionalism holds that because the text of the Constitution creates relationships between public officials and ordinary members of the public that resemble fiduciary relationships recognized by private law, constitutional interpretation and construction ought to be informed by fiduciary principles for normative reasons similar to those that justify imposing fiduciary duties on private parties.<sup>130</sup> Both public officials and private law fiduciaries enjoy a tremendous amount of delegated discretionary power over resources belonging to others. That discretionary power is justified by the power-exercisers' pursuit of ends that are deemed valuable to others, and the vulnerability of resource owners to abuses of delegated discretion requires that constraints be imposed upon the exercise of that discretion.

Consider Article II. Perhaps the fiercest and longest-running debate involving the text of Article II centers upon its first clause, which states that “[t]he executive power shall be vested in a President of the United States.”<sup>131</sup> Roughly, the debate concerns whether the vesting takes place immediately or later on in Article II. If vesting takes place immediately, the President would seem to enjoy all of an unspecified “executive power,” with the specific powers later enumerated in the Article being corollaries of that power but not exhaustive of it.<sup>132</sup> If vesting takes place later on in Article II, the President would seem to enjoy only those later-enumerated powers.<sup>133</sup>

However, regardless of whether the first sentence of Article II actually vests “[t]he executive power” in the President or merely identifies the executive, it is uncontroversial that the President is both empowered and constrained by the Constitution to pursue particular ends through particular means.<sup>134</sup> It is also

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embody a theory of fiduciary government—rests on its own. *See also* Kent et al., *supra* note 11, at 2119 (characterizing the Take Care and Presidential Oath Clauses as “substantial textual and historical commitments to what we would today call fiduciary obligations of the President”).

130. In developing the normative case for good-faith constitutionalism elsewhere, I have emphasized that public officials in the United States voluntarily assume power over other people's resources. *See* Barnett & Bernick, *The Letter and the Spirit*, *supra* note 7, at 23–26 (arguing that “[a]lthough a mere document cannot create binding moral obligations simply by virtue of its existence, officials entrusted with power *over other people* by virtue of a voluntary promise to adhere to the terms of that document are morally and legally bound to keep that promise”). For the reasons elaborated below, I believe that the normative case for good-faith constitutionalism does not depend upon official consent. Rather, it depends upon the structure of the relationship between public officials and citizens and the vulnerability of citizens to officials' abuse of their discretionary powers.

131. U.S. CONST. art. II, § 1, cl. 1.

132. *See* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570–81 (1994) (arguing that the clause grants power).

133. *See generally* Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009) (denying that the clause grants power); Lessig & Sunstein, *supra* note 18 (same).

134. That is, the Constitution, by its express terms and through its design features, grants the President power and imposes constraints on the exercise of that power. Were the Constitution thoroughly evil or demonstrably ineffective in securing the kinds of goods upon which the legitimacy of governments depend, it is not clear that the President would be morally constrained to comply with those constraints—even if no one forced him to run for office, and even if he promised to “faithfully execute” the Constitution. *See* RAWLS, *supra* note 8, at 302 (arguing that “[a]quiescence in, or even

uncontroversial that the precise contours of those constraints are not textually specified, and that perfect monitoring of presidential compliance with those constraints is impossible.<sup>135</sup>

Thus, having ascended to office through constitutionally prescribed processes, the President wields a great deal of discretionary power over resources belonging to the public. High agency costs loom, given the diverging interests between the President and the public in the former's adherence to constitutional limits on his discretionary power and the public's inability to perfectly monitor the exercise of that discretion. The President is not unique in this regard—every government official exercises considerable discretionary power over public resources, may be tempted to behave opportunistically, and is imperfectly monitored.

Good-faith constitutionalism seeks to keep these agency costs under control. To that end, it holds that all government officials ought to conduct themselves as fiduciaries, both in interpreting the meaning of constitutional text and in implementing that meaning. When engaging in interpretation, our fiduciaries in government should personally, carefully, and faithfully strive to ascertain the meaning of text—the “letter” of the law—and act accordingly.<sup>136</sup> When original meaning does not clearly determine the answer to a particular legal question, constitutional decisionmakers should personally, carefully, and faithfully develop and apply implementing rules calculated to fulfill the original function or functions of the constitutional text—its spirit—rather than use their discretion under the letter to pursue other goals.<sup>137</sup>

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consent to, clearly unjust institutions does not give rise to obligations”). It is beyond the scope of this Article to defend the proposition that the Constitution is indeed “good enough” to justify holding those who are elevated to public office through constitutionally authorized processes to its letter and spirit. That being said, I hold that the Constitution is “sufficiently just to deserve the support of those who are subject to [it] in the absence of better, realistically attainable alternatives.” Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1798 (2005). That minimal moral legitimacy is, in my view, enough to generate a *pro tanto* (defeasible) moral obligation on the part of public officials, including the President, to adhere to the Constitution's letter and spirit. I hope to elaborate upon the strength of that obligation and discuss how it can be defeated in a future work.

135. Concerning textual specification, the limits of language, the costs of political transactions, and human beings' lack of omniscience effectively guarantee that the text of ordinary laws and constitutions will be “incomplete” in the sense that it will not provide for every contingency. See THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., 2001) (“[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas”); DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 197–98 (1999) (documenting how the costs of political transactions lead legislators to delegate to future decisionmakers rather than to specify how difficult questions are to be resolved); Neil K. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191, 195 (1987) (observing that “[s]ince constitutions cover periods of indefinite length and the broadest and most complex of subject matters, it is not at all surprising that they leave much unresolved”).

136. See Barnett & Bernick, *The Letter and the Spirit*, *supra* note 7, at 22.

137. See *Id.* at 26; see also Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (explaining that a legal question has a single determinate answer “if and only if the set of results that can be squared with the legal materials contains one and only one result”).



## B. INTERPRETING THE TAKE CARE CLAUSE

Good-faith constitutionalism begins with an inquiry into original meaning. Constitutional decisionmakers should only turn to the spirit of the Constitution to develop textually unspecified implementing rules if the original meaning does not clearly resolve a given legal question. To ascertain the original meaning of the Take Care Clause, I will begin by investigating the context in which the Take Care Clause was ratified.<sup>138</sup> I will proceed to draw connections between particular words and phrases in the Clause and fiduciary principles. Finally, I will discuss three presidential decisionmaking contexts that implicate the Take Care Clause.

## 1. Historical Context

Understanding the text of Article II requires an appreciation of Americans' experience of state governance between 1776 and 1787. Under British rule, colonial legislatures were often seen as bulwarks of liberty, whereas executive departments—controlled by the royal governor—were often viewed as engines of oppression.<sup>139</sup> The Articles of Confederation substantially revised this view in some influential quarters. In those quarters, state legislatures came to be seen as engines of oppression, and state executives came to be seen as inadequate because they could not do much of anything about that oppression.<sup>140</sup>

The state constitutions enacted in the wake of the Revolution were responsible for the legislative dominance that followed. Most of these constitutions provided that chief magistrates held office for short terms, faced strict limits on re-eligibility, and were to be elected by the legislature.<sup>141</sup> Certain state constitutions—

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138. Methodologically, this section is an exercise in public meaning originalism. It seeks to identify “the meaning actually communicated to the public by the words on the page.” Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 413 (2013). For a discussion of the move within originalism from the “old” Framers’ intent originalism to the “new” public meaning originalism, see Barnett & Bernick, *The Letter and the Spirit*, *supra* note 7, at 7–14. Because original meaning—whether in the form of Framers’ or ratifiers’ communicative intentions or the meaning that the public actually attached to the ratified text on the basis of the Framers or ratifiers’ expressions of their communicative intentions—is considered to be at least one consideration to which constitutional interpreters ought to assign weight, the original meaning of the Take Care Clause is not merely of sectarian interest. For acknowledgements of the importance of original meaning to nonoriginalist constitutional interpretation, see, for example, PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7–8 (1982); Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1, 32 (2009); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L.J.* 1765, 1794 (1997); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189, 1189–90 (1987); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *OHIO ST. L.J.* 1085, 1086 (1989).

139. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 134–43 (1998 ed. 1998) (detailing how colonial experience and an “unaltered Whig fear of magisterial power” informed the framing of state constitutions that imposed stringent restrictions on executive power).

140. *Id.* at 406–07 (“[T]he laws were repeatedly unjust [and]. . . . [t]he governors were mere ciphers . . . with little or no power to resist or control the political and social instability.”).

141. See SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 12 (2015); CHARLES C. THACH, *THE CREATION OF THE AMERICAN PRESIDENCY 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 28 (1922).

Virginia's among them<sup>142</sup>—effectively submitted the scope of executive power entirely to legislative determination.<sup>143</sup> For the most part, the power of appointment was given either to the legislature or to the people, and the executive held no veto power.<sup>144</sup>

Strong legislatures and weak executives proved a dangerous mix. Debtor laws and retaliatory commercial restrictions wrought economic havoc by preventing robust credit markets from developing and by discouraging trade;<sup>145</sup> judges were made dependent upon legislative grace for their salaries and tenure, which legislators adjusted in the service of political ends;<sup>146</sup> and religious, political, and ethnic minorities were subjected to discriminatory laws.<sup>147</sup>

Although overwhelming popular majorities often backed these measures, those who were to play leading roles at the Philadelphia Convention viewed them as disastrous.<sup>148</sup> As James Madison put it, “[e]xperience had proved a tendency in our governments to throw all power into the Legislative vortex.”<sup>149</sup> It also illustrated the dangers of excessive fear of executive tyranny.

To make matters worse, no proper national executive existed. Article IX of the Articles of Confederation authorized Congress to appoint “committees and civil officers as may be necessary for managing the general affairs of the [U]nited [S]tates under [Congress’s] direction,”<sup>150</sup> and Congress initially worked through

142. See VA. CONST. of 1776 (stating that the governor “shall, with the advice of a Council of State, exercise the executive powers of government, according to the laws of the Commonwealth”). Thomas Jefferson complained that his state’s constitution inadequately separated the three powers of government and that “[a]ll the powers . . . legislative, executive, and judiciary, result[ed] to the legislative body.” Thomas Jefferson, *Notes on Virginia (Continued)* (1784), in 4 THE WORKS OF THOMAS JEFFERSON 3, 20 (Paul Leicester Ford ed., 1904); see also 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 80–81 (1803) (stating that “[t]his declaration instantly levelled the barriers of distinction between the legislative authority, and that of the executive, rendering the former completely paramount to the latter”).

143. See, e.g., DEL. CONST. of 1776, art. VII (stating that the chief magistrate may “exercise all the other executive powers of government . . . according to the laws of the State”); GA. CONST. of 1777, art. XIX (stating that the governor may “exercise the executive powers of government, according to the laws of this State and the constitution thereof”); MD. CONST. of 1776, art. XXXIII (stating that the governor may “exercise all other the executive powers of government”); N.C. CONST. of 1776, art. XIX (same).

144. The only state constitutions that vested a veto in the executive were those of South Carolina, Massachusetts, and New York.

145. See generally James Madison, *Vices of the Political System of the United States* (1787), in 2 THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 361, 361–69 (Gaillard Hunt ed., 1901) (presenting a litany of complaints concerning the state legislatures of the Confederation period).

146. See JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 20 (2012).

147. See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 324 (2008).

148. See MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 214 (2016) (detailing how “[m]ost of the delegates” had concluded that “tax and debt relief legislation proved the need for strong executives who could resist populist political pressure”).

149. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 35 (Max Farrand ed., 1911).

150. ARTICLES OF CONFEDERATION OF 1781, art. IX, ¶ 5.

committees to handle administrative matters.<sup>151</sup> Congress depended primarily on state executives to give effect to its resolutions. It had no ability to respond to other nations' trade discrimination with retaliatory tariffs, stop states' widespread defiance of federal treaties, or compel states to pay their debts. Lack of an energetic executive at the national level left Congress's policies hortatory and prevented the federal government from carrying out essential tasks with any vigor or speed. This made for a state of affairs that all of the delegates to the Philadelphia Convention regarded as unsatisfactory, despite their differences concerning how to improve.<sup>152</sup>

The 1777 New York Constitution was a notable exception to the general rule that the experience of state constitutionalism served as a cautionary tale. New York's constitution vested the governor with the "supreme executive power";<sup>153</sup> a share in making appointments;<sup>154</sup> and a veto—albeit one that could be overridden by a legislative supermajority.<sup>155</sup> The governor was appointed by the people, rather than the legislature, served for a three-year term, and faced no re-eligibility limits.<sup>156</sup> Along with considerable power and independence, the governor was subject to an explicit personal duty to "take care that the laws are faithfully executed to the best of his ability."<sup>157</sup>

James Wilson appealed to the example of New York when he advanced his momentous proposal for a single, popularly elected chief executive at the Philadelphia Convention.<sup>158</sup> As historian Charles C. Thach notes, "[e]ven the term which was recommended . . . was that of the New York governor."<sup>159</sup> Although not all of Wilson's proposed principles of organization would be incorporated into Article II, the Convention did decide in favor of a single chief executive unencumbered by an executive council, thus departing from prevailing state constitutional practice in favor of that of New York.

As initially advanced on May 29, 1787, the "Virginia Plan," which served as the Convention's focal point, included neither references to care nor to faithfulness, and it did not clearly describe a single chief executive. Rather, it provided only that the "National Executive" would have "general authority to execute the National laws."<sup>160</sup> Not until the Convention voted in favor of Wilson's proposal

151. See KLARMAN, *supra* note 148, at 213.

152. See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 21 (2009) ("The men responsible for initiating the call for a constitutional convention, their hopes and fears shaped by the challenges and frustrations of fighting a long, costly war and of securing peace and public order at home, had come to believe that the continental government's lack of 'energy' posed an equally formidable threat to liberty.");

153. N.Y. CONST. of 1777, art. XVII.

154. *Id.* art. XXIII.

155. *Id.* art. III.

156. *Id.* art. XVII.

157. *Id.* art. XIX.

158. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 56 (Max Farrand ed., 1911) [hereinafter 1 FARRAND'S RECORDS].

159. THACH, *supra* note 141, at 88.

160. 1 FARRAND'S RECORDS, *supra* note 158, at 21.

for a single chief executive and the provision was sent to the Committee of Detail on July 26th was the above language given substantial attention. When it received that attention, the language evolved along the lines of the analogous clause in the New York constitution.

The Committee of Detail considered two proposed formulations of what would become the Take Care Clause. The first read: “He shall take Care to the best of his Ability, that the Laws . . . of the United States . . . be faithfully executed.”<sup>161</sup> The second, advanced by John Rutledge, read: “It shall be his duty to provide for the due [and] faithful exec[ution] of the Laws . . . of the United States . . . to the best of his ability.”<sup>162</sup> The language of the first proposal was substantially identical to that of the New York constitution, with “to the best of his ability” being placed in the middle rather than at the end of the clause.<sup>163</sup> The Committee chose the former option. For reasons that remain unclear, the “best of his ability” language was later dropped and incorporated instead into what would become the Presidential Oath Clause.<sup>164</sup>

## 2. Text

There was little recorded discussion of the text of the Take Care Clause, either at the Philadelphia Convention or at the state ratifying conventions. Pre-enactment commentaries on the Constitution touch upon the Take Care Clause only briefly.<sup>165</sup>

161. 1 FARRAND’S RECORDS, *supra* note 158, at 171.

162. *Id.*

163. Compare this to N.Y. CONST. of 1777, art. XIX, which provided that the governor shall “take care that the laws are faithfully executed to the best of his ability.”

164. See U.S. CONST. art. II, § 1, cl. 8 (providing that the President, “[b]efore he enter on the Execution of his Office . . . shall take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States’”). There is no record of any discussion concerning why the “best of [his] ability” language was moved around.

165. See, e.g., THE FEDERALIST NO. 69, *supra* note 135, at 357 (Alexander Hamilton) (reciting the Take Care Clause, among other provisions in Article II, and stating that “[i]n most of these particulars, the power of the president will resemble equally that of the king of Great Britain, and of the governor of New York”); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 445 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter 2 ELLIOT’S DEBATES] (statement of Rep. James Wilson) (stating that, pursuant to the Constitution’s design features, “[i]t is not meant . . . that the laws shall be a dead letter; it is meant that they shall be carefully and duly considered before they are enacted, and that then they shall be honestly and faithfully executed”); *Id.* at 513 (Rep. James Wilson) (describing Take Care Clause as a “power of no small magnitude intrusted to [the President]”); 4 THE DEBATES IN THE SEVERAL STATE CONVENTION AT PHILADELPHIA IN 1787, at 136 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter 4 ELLIOT’S DEBATES] (statement of Rep. Archibald Maclaine) (opining that the Take Care Clause was “one of the best provisions contained in [the Constitution]” and that if the President “takes care to see the laws faithfully executed, it will be more than is done in any government on the continent”); *A Jerseyman: To the Citizens of New Jersey Trenton Mercury*, 6 November, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 146, 149 (Merrill Jensen et al. eds., 1988); James Sullivan, *Cassius, X: To the Inhabitants of this State*, MASS. GAZETTE, Dec. 21, 1787, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 38, 39 (Paul Leicester Ford ed., 1892) (reciting Article II, Section Three, including Take Care Clause, and stating that “[v]ery little more power is granted to the president of the United States, by the above section, than what is vested in the governours of the different states”); Letter from William Symmes, *supra* note 1.

Fiduciary-law principles, however, can help fill some gaps in our understanding. To establish the connection between the Clause and fiduciary-law principles, I will break the Clause’s text into four discrete components and identify particular words and phrases that have fiduciary roots. I will then reconstruct the Clause as an embodiment of a unitary vision.

*a. “He shall.”*

The first two words of the Take Care Clause make plain that what follows is a personal duty. Because the Clause was given its final form only after the decision was made in favor of a single rather than plural executive, we know that “[h]e” is an individual person, not a collective body.<sup>166</sup> The imperative “shall,” as elsewhere in Article II, indicates that the President is bound by the Clause.

Does the Take Care Clause also confer power that the President would not otherwise enjoy—or does it merely constrain the exercise of powers delegated through other provisions in Article II? Recall that Madison argued that the Take Care Clause *presupposed* that the President “should have that species of power which is necessary” to “see the laws faithfully executed”—namely, the power to remove subordinates who did not faithfully execute the laws.<sup>167</sup> But Madison did not argue that the Take Care Clause *conferred* removal power that the President would not have otherwise possessed.<sup>168</sup>

Nor would it have made much sense for Madison to do so. As Prakash points out, the removal debate concerned the Secretary of Foreign Affairs, who was not actually delegated any power to execute the laws.<sup>169</sup> The statute that created the Department of Foreign Affairs provided that the Secretary would “perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States” and offered a nonexhaustive list of “matters respecting foreign affairs” to which those duties would be related.<sup>170</sup> Because the Secretary was not empowered to execute the laws at all, there was no need to remove him if he executed the laws unfaithfully.<sup>171</sup> Analogous language in the New York constitution imposed a “duty,”<sup>172</sup> and James Wilson,<sup>173</sup> William Paterson of New Jersey (presiding over the 1806 trial of William Smith and

166. We also know that “[h]e” need not be a male. The conditions for presidential eligibility are gender-neutral. *See* U.S. CONST. art. II, § 1, cl. 5 (providing that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President”).

167. 1 ANNALS OF CONG. 496 (Joseph Gales ed., 1834) (statement of James Madison on June 17, 1789).

168. *See Id.*

169. Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1837 (2006).

170. Act of July 27, 1789, ch. 4, 1 Stat. 28, 29 (1789).

171. Prakash, *supra* note 169.

172. N.Y. CONST. of 1777, art. XIX.

173. James Wilson, *Lectures on Law (Part 2)*, in 2 COLLECTED WORKS OF JAMES WILSON 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007) (“[The President has] authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established.”).

Samuel Ogden),<sup>174</sup> and William Rawle of Virginia<sup>175</sup> all described the Take Care Clause as a power-limiting clause. It would not make sense to adopt a power-conferring understanding of the Take Care Clause against the weight of what little evidence exists.

The personal responsibility imposed by the Take Care Clause resembles that imposed by fiduciary law. Both during the Founding Era and today, fiduciaries who were and are often chosen because of their superior knowledge and judgment were and are obliged to actually make use of that knowledge and judgment in the service of their beneficiaries' goals.<sup>176</sup> Fiduciaries were and are presumptively forbidden to subdelegate their powers to others absent the consent of their beneficiaries.<sup>177</sup> Although that presumption can be overcome if the nature of the delegated powers is such that the principal's consent to the appointment of subagents can be presumed<sup>178</sup>—say, when an agent who is known not to be a licensed auctioneer is charged by his principal with selling property by auction<sup>179</sup>—fiduciaries must still personally take care in appointing and supervising subagents, lest the delegated powers not be competently or faithfully exercised.<sup>180</sup>

The text of Article II states that the President may delegate power to subordinate officers as a necessary component of executing laws. Throughout, Article II contemplates that others will be able to assist the President in discharging his constitutional responsibilities. Thus, the President is granted authority to “require the Opinion, in writing, of the principal Officer in each of the executive Departments”;<sup>181</sup> he is given the power to “nominate, and by and with the Advice and Consent of the Senate . . . appoint . . . Officers of the United States”;<sup>182</sup> and

174. *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (Paterson, J.) (recognizing that the Take Care Clause entails that “[t]he [P]resident of the United States cannot control [an act of Congress], nor dispense with its execution”).

175. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 147–50 (2d ed. 1829) (“It declares what is [the President’s] duty, and it gives him no power beyond it. The Constitution, treaties, and acts of congress, are declared to be the supreme law of the land. He is bound to enforce them; if he attempts to carry his power further, he violates the Constitution.”).

176. See Easterbrook & Fischel, *supra* note 117, at 426.

177. See 1 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 526 (Charles Edward Dodd et al. eds., T. & J.W. Johnson & Co. 1876) (1730) (“One who has an authority to do an act for another must execute it himself, and cannot transfer it to another.”); RESTATEMENT (THIRD) OF AGENCY § 3.15(2) (AM. LAW INST. 2006) (“An agent may appoint a subagent only if the agent has actual or apparent authority to do so.”).

178. See Gareth H. Jones, *Delegation by Trustees: A Reappraisal*, 22 MOD. L. REV. 381, 381–82 (1959) (citing common law cases from 1754, 1838, 1841, and 1883 in support of the proposition that, “at an early date,” it was recognized that the “principle of *delegatus non potest delegare* could not be applied in its full rigour”).

179. LAWSON & SEIDMAN, *supra* note 10, at 115.

180. RESTATEMENT (THIRD) OF AGENCY § 3.15 cmt. d (AM. LAW INST. 2006) (explaining that “an appointing agent is responsible for a subagent’s action and has the right and duty to control the subagent”); see Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 951–56 (1990) (discussing a director’s duty to monitor).

181. U.S. CONST. art. II, § 2, cl. 1; see also RESTATEMENT (THIRD) OF TRUSTS § 171 cmt. h. (AM. LAW INST. 2012) (“Fiduciary prudence must then be exercised as well in the selection of an agent . . . and in monitoring or supervising the agent’s performance.”).

182. U.S. CONST. art. II, § 2, cl. 2.

he is authorized to “fill up all Vacancies that may happen during the Recess of the Senate.”<sup>183</sup>

It does not appear that anyone from the Founding Era understood Article II to require the President to personally perform every executive function, however mundane, or to “complete” every statutory scheme himself. In 1792, Representative William Findley of Pennsylvania expressed what appears to have been a uniform understanding that “it is of the nature of Executive power to be transferrable to subordinate officers.”<sup>184</sup> This does not, however, cast doubt upon the proposition that the Take Care Clause imposes a personal duty on the President with which he cannot dispense—even if he discharges it through delegation and supervision.<sup>185</sup>

*b. “Take Care.”*

The text of the Constitution imposes three express requirements on the President’s conduct: (1) He must “[f]aithfully execute the Office of President of the United States”;<sup>186</sup> (2) He must “to the best of [his] Ability, preserve, protect and defend the Constitution of the United States”;<sup>187</sup> and (3) He must “take Care that the Laws be faithfully executed.”<sup>188</sup>

Again, fiduciary law can help us understand the text. As Andrew Kent, Ethan Leib, and Jed Shugerman have shown, “take care” was a commonly used “directive from a superior to an agent, directing that special attention be paid to ensure that a command or duty was carried out” that can be “found in a vast number of legal documents in the centuries before 1787.”<sup>189</sup> The language of caretaking was familiar in 18th Century fiduciary law. Then, as now, private fiduciaries were subject to a duty of care. Founding Era fiduciaries, as Robert Natelson has emphasized, “were not insurers of everything that might go wrong under their administration.”<sup>190</sup> They were, however, subject to a “basic duty of care or diligence.”<sup>191</sup>

Gary Lawson and Guy Seidman observe that this deferential standard made “a great deal of sense for an era in which fiduciaries were often not professionals but . . . ordinary citizens.”<sup>192</sup> Were the standard of care too demanding, “the social

183. *Id.* art. II, § 2, cl. 3.

184. 3 ANNALS OF CONG. 712 (1792) (describing Representative Findley’s views of Presidential power in the context of a Resolution on a speech of the President of the United States).

185. See *Runkle v. United States*, 122 U.S. 543, 557 (1887) (“There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. . . . [T]heir official acts, promulgated in the regular course of business, are presumptively his acts.”).

186. U.S. CONST. art. II, § 1, cl. 8 (emphasis added).

187. *Id.* (emphasis added).

188. *Id.* art. II, § 3 (emphasis added).

189. See Kent et al., *supra* note 11, at 2133–35 (discussing evidence from corporate charters, orders from the crown to colonial governors, statutory definitions, and military orders, among other sources).

190. LAWSON ET AL., *supra* note 129, at 58.

191. *Id.*

192. Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, 69 FLA. L. REV. 1385, 1399 (2017).

costs of discouraging people from serving in . . . fiduciary capacities would have been enormous.”<sup>193</sup> A demanding standard of care would also have discouraged those who did serve from being sufficiently energetic in taking actions informed by their superior knowledge and judgment. If the prospect that potential presidential candidates would be discouraged from seeking office by a strict standard of liability seems implausible today, the concern that Presidents would have been either unwilling or unable to act energetically, to the nation’s detriment, was nonetheless central to leading Federalists’ arguments concerning the content of Article II.<sup>194</sup>

c. “*The Laws.*”

The President is tasked with ensuring the execution of “the Laws,” which uncontroversially includes federal statutes. But which federal statutes? Are Presidents obliged to enforce statutes that they believe to be unconstitutional?<sup>195</sup>

Article I provides that “[e]very [bill]” that passes both Houses of Congress and is either signed by the President or passed over his veto “shall become a Law.”<sup>196</sup> It does not follow, however, that duly enacted but unconstitutional statutes are among “the Laws” which the President is bound to carry into execution by the Take Care Clause.

Article VI’s Supremacy Clause provides that only “the Laws of the United States which shall be made in Pursuance” of the Constitution become part of the “supreme Law of the Land.”<sup>197</sup> Participants in the ratification debates repeatedly stated that unconstitutional statutes would be treated as “null and void” by both the Judicial and the Executive Branches.<sup>198</sup> Thus, James Wilson affirmed to the Pennsylvania Convention that the President “could shield himself, and refuse to carry into effect an act that *violates* the Constitution.”<sup>199</sup> Theophilus Parsons, speaking at the Massachusetts Convention, stated that if Congress “infringe[d] on any one of the natural rights of the people by this Constitution,” its actions “could not be enforced.”<sup>200</sup> Alexander Hamilton in Federalist 33 insisted that congressional statutes “which are *not pursuant* to [the Federal Government’s]

193. *Id.*

194. See THE FEDERALIST NO. 71, *supra* note 135, at 371 (Alexander Hamilton) (insisting that a four-year term and the possibility of reelection will encourage a president “to dare to act his own opinion with vigour and decision”); 5 THE DEBATES IN THE SEVERAL STATE CONVENTION AT PHILADELPHIA IN 1787, at 334 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter 5 ELLIOT’S DEBATES] (statement of Rep. Gouverneur Morris) (opposing legislative appointment of the executive on the ground that Americans must “renounce the blessings of the union, or provide an executive with sufficient vigor to pervade every part of it”).

195. Compare Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 381 (1986) (suggesting the affirmative), and May, *supra* note 18, at 867–69 (same), with Frank H. Easterbrook, *Presidential Review*, 40 CASE WESTERN RES. L. REV. 905, 907–08 (1989) (suggesting the negative), and Prakash, *supra* note 18, at 1616 (same).

196. U.S. CONST. art. I, § 7, cl. 2.

197. U.S. CONST. art. VI, cl. 2.

198. See, e.g., 5 ELLIOT’S DEBATES, *supra* note 194, at 356 (statement of Rep. James Madison).

199. 2 ELLIOT’S DEBATES, *supra* note 165, at 446 (statement of Rep. James Wilson).

200. 2 ELLIOT’S DEBATES, *supra* note 165, at 162 (statement of Rep. Theophilus Parsons).



constitutional powers, but which are invasions of the residuary authorities of the [states]” would not “become the supreme law of the land” but would be “acts of usurpation . . . to be treated as such.”<sup>201</sup> And James Madison in Federalist 44 implicitly recognized an obligation on the part of the Judicial and Executive Branches to disregard unconstitutional statutes when he stated that the “success” of any congressional usurpation would “depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts.”<sup>202</sup>

Because unconstitutional statutes do not become part of “the supreme Law of the Land,” the Take Care Clause requires the President to give effect to the Constitution rather than to unconstitutional statutes. Indeed, if the President were obliged by the Take Care Clause to take care that unconstitutional statutes be executed, he would arguably be obliged to violate the Presidential Oath Clause<sup>203</sup> as well as the Supremacy Clause.<sup>204</sup> How could he credibly claim to “preserve, protect, and defend the Constitution” while either he or his officers violate it?<sup>205</sup>

The fiduciary duty to follow instructions can sharpen our understanding of this obligation.<sup>206</sup> The President must take care that “the Laws” be faithfully executed because “the Laws” constitute the instructions given by his beneficiaries: “We the People.”<sup>207</sup> Those instructions are set forth in the instrument that delegates power to the President, which specifies a hierarchy of those “Laws” that comprise the “supreme Law of the Land.” “This Constitution” is at the top of that hierarchy, followed by constitutionally authorized statutes and treaties. Accordingly, because unconstitutional statutes are not part of the “supreme Law of the Land,” the duty to follow instructions requires that the President give effect to the Constitution rather than to unconstitutional statutes.

*d. “Be Faithfully Executed.”*

The last three words of the Take Care Clause are framed in the passive voice and lack a subject. Who is to “faithfully execute[]” the laws? Several scholars have concluded that the passive voice requires execution by people other than the

201. THE FEDERALIST NO. 33, *supra* note 135, at 161 (Alexander Hamilton).

202. THE FEDERALIST NO. 44, *supra* note 135, at 235 (James Madison).

203. See U.S. CONST. art. II, § 2, cl. 8.

204. See U.S. CONST. art. VI, cl. 2.

205. See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509–10, 523 (2012) (discussing permutations of the President’s duty not to enforce unconstitutional laws).

206. See RESTATEMENT (THIRD) OF AGENCY § 8.09 (AM. LAW INST. 2006) (describing specific duties to follow instructions and remain within authority); Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 321–30 (Andrew S. Gold & Paul B. Miller eds., 2014) (explaining areas of uncertainty in responsibilities under fiduciary duties); Natelson, *supra* note 123, at 255–57 (explaining the requirement to remain within the limited authority of the fiduciary duty).

207. U.S. CONST. pmb1.

President.<sup>208</sup> Otherwise, the Clause would provide that “*He* shall carefully and faithfully execute the laws,” or something similar.

Perhaps, then, the President has no duty under the Clause to be personally “faithful”—only a duty to ensure others’ faithfulness. Perhaps he is actually forbidden to personally execute a statute if the statute expressly confers power upon other named executive officials. Thus William Wirt, Attorney General to Presidents James Monroe and John Quincy Adams, maintained that if a law assigns “a particular officer . . . to perform a duty, not only is that officer bound to perform it, but no other officer”—including the President—“can perform it without a violation of the law.”<sup>209</sup>

Prakash has observed that this conclusion is not compelled as a matter of syntax. The language of the Take Care Clause implies only that “someone—the [P]resident, others, or the [P]resident and others—execute the laws.”<sup>210</sup> This conclusion is also historically implausible. No one during the framing or ratification process denied that the President would enjoy the power to execute the laws personally. Even Edmund Randolph, who favored a plural executive at the Philadelphia Convention, affirmed that the President’s powers would include “carry[ing] into execution the national laws.”<sup>211</sup> The Take Care Clause contemplates a unitary executor of the laws—albeit one who can subdelegate and supervise the execution of the laws to others who wield it only “as a result of the explicit or tacit delegation and approval of the President.”<sup>212</sup> The better view, therefore, is that the President is required by the Take Care Clause to be both “care[ful]” and “faithful[]” in the context of law execution, whether he is personally executing the laws, subdelegating the execution of the laws, or supervising the execution of the laws.

But what exactly is required of the President—whether he is executing the laws himself or executing them through his subagents? The language of “faithful” execution can be found in a variety of Anglo–American legal instruments that were used in the centuries preceding the Founding Era.<sup>213</sup> The language of

208. See, e.g., HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 455 (2006); David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 83 (2009); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 *L. & CONTEMP. PROBS.* 107, 108 (2000).

209. *The President and Accounting Officers*, 1 Op. Att’y Gen. 624, 625 (1823).

210. PRAKASH, *supra* note 141, at 95. *Accord* Kent et al., *supra* note 11, at 2126 (observing that the passive voice, standing alone, “does not exclude direct law execution by the President, especially since ‘the executive power’ was vested in this office by the first sentence of Article II”).

211. 1 FARRAND’S RECORDS, *supra* note 158, at 145.

212. Calabresi & Prakash, *supra* note 132, at 595.

213. See, e.g., *The Frame of Government of the Province of Pennsylvania, and the Territories Thereunto Belonging*, AVALON PROJECT (Nov. 1, 1696), [https://avalon.law.yale.edu/17th\\_century/pa06.asp](https://avalon.law.yale.edu/17th_century/pa06.asp) [<https://perma.cc/FW86-U73L>] (stating that judicial officers must attest that they will “well and faithfully execute the office”); VT. CONST. OF 1777, ch. 2, § XXXVI, AVALON PROJECT (July 8, 1777), [http://avalon.law.yale.edu/18th\\_century/vt01.asp](http://avalon.law.yale.edu/18th_century/vt01.asp) [<https://perma.cc/3M9X-A4UV>] (stating that all government officials will take an oath to “faithfully execute the office”). See also 7 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 320 (Charles Edward Dodd et al. eds., T. & J.W. Johnson & Co. 1876) (1730) (“[I]n the grant of every office it is implied, that the grantee execute it faithfully and

“faithful[ness]” suggests a duty of good faith—a duty that attached then and attaches now in the context of both ordinary contractual relationships and fiduciary relationships. Kent, Leib, and Shugerman have shown that English ministers and other royal officials who engaged in self-dealing and other forms of maladministration were condemned for acting contrary to their oaths to execute their offices “faithfully.”<sup>214</sup> They have also shown that the language of faithful execution carried fiduciary connotations during the Founding Era. Both the Presidential Oath Clause—which also uses the language of “faithful execut[ion]”—and the Take Care Clause were “discussed as duties or restrictions” during the ratification process.<sup>215</sup> This comes as no surprise, given that “[f]or centuries, commands and oaths of faithful execution established relational hierarchy—and subordinated an officeholder to a principal or purpose.”<sup>216</sup>

The duty of good faith performance has been recognized as a general principle of contract law for centuries.<sup>217</sup> It serves to preserve each party’s reasonable expectations in receiving the performance of the other party and in receiving the benefit of their bargain with the other party. It is also a means of thwarting opportunism, understood as “self-interest seeking with guile.”<sup>218</sup> Among the forms of opportunism curbed by the duty of good faith performance is the use of discretion by one party under the text or “letter” of contracts to recapture opportunities that that party forewent by entering into the contract and thereby defeat the original “spirit” or purpose for which the other party entered the agreement.<sup>219</sup>

In fiduciary law, the duty of good faith serves similar ends but is more stringent. Because fiduciaries are given discretion over resources belonging to dependent beneficiaries, it is ordinarily easier for fiduciaries to expropriate value from beneficiaries than it is for contracting parties dealing with one another at arms’ length to expropriate value from one another.<sup>220</sup> Thus, fiduciary law goes beyond ordinary contract law to require that fiduciaries continually avoid self-

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diligently.”); WILLIAM CRUISE, A DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY 144 § 92 (rev. 2d ed. 1818) (“[I]n the grant of every office, there is a condition implied that the grantee shall execute it faithfully”; if not, “the office is forfeited.”). For a comprehensive collection of references to faithful execution that span the time period between the Magna Carta and the Founding Era, see Kent et al., *supra* note 11, at 2137–81.

214. Kent et al., *supra* note 11, at 2147–48.

215. *Id.* at 2128.

216. *Id.* at 2181.

217. See E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 670 (1963) (tracing the duty of good-faith performance back to Roman law).

218. See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* 47 (1985) (coining the famous definition).

219. *Id.* at 62 (opportunism consists in “tak[ing] advantage of . . . the letter of the contract when the spirit of the exchange is emasculated”). See also Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) (articulating the foregone-opportunities theory of good-faith performance).

220. See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1407 (2002).

interested behavior that harms beneficiaries, not simply that they act consistently with reasonable expectations.<sup>221</sup>

In the Take Care Clause, the framers and ratifiers indicated their interest in the President’s execution of what the Constitution recognizes as laws. To “faithfully” pursue that interest is to ensure that the laws—their letter and, when the letter fails, their spirit—are executed.

*e. “He Shall Take Care That the Laws Be Faithfully Executed.”*

Breaking down the Take Care Clause into its component parts enables us to see how the Clause as a whole is designed to make a particular kind of relationship work. The duties of personal responsibility, care, obedience to instructions, and good faith have structured fiduciary relationships for centuries. Although these duties are distinguishable from one another, they work together to make relationships characterized by discretionary power over resources, imperfect monitoring, and corresponding vulnerability of resource-owners a net gain for all concerned. The language of the Take Care Clause embodies a unitary vision of the nation’s chief executive as a fiduciary of the American people who will conduct his law-execution responsibilities accordingly.

*f. Judicial Enforcement*

If we have a right to faithful execution, what is the remedy for breach of this trust? The Supreme Court does not consider every constitutional requirement to be judicially enforceable. The stock example is the Guarantee Clause,<sup>222</sup> compliance with which is treated as a “political question” in which the judiciary does not get mired.<sup>223</sup> In *Baker v. Carr*,<sup>224</sup> the Court delineated a six-factor test for identifying political questions, only two of which are emphasized today:<sup>225</sup> (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department”;<sup>226</sup> and (2) “lack of judicially discoverable and manageable standards for resolving it.”<sup>227</sup>

Zachary Price contends that the Take Care Clause ought to be incompletely judicially enforced in certain respects. Specifically, Price argues that because

221. *See Id.*

222. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government. . .”).

223. *See* Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 603 (2018) (“For well over a century, federal courts have viewed the provision—traditionally known as the Guarantee Clause but now referred to by some as the ‘Republican Form of Government’ Clause—as a paradigmatic example of a nonjusticiable political question.”).

224. 369 U.S. 186 (1962).

225. *See* *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (stating that a political question is presented when there is either “a textually demonstrable constitutional commitment of the issue to a coordinate political department” or “a lack of judicially discoverable and manageable standards for resolving it” and omitting consider other factors (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (internal quotations omitted))).

226. *See* *Davis v. Bandemer*, 478 U.S. 109, 121 (1986) (quoting *Baker*, 369 U.S. at 217).

227. *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (quoting *Baker*, 369 U.S. at 217).

“[b]ringing enforcement suits and prosecutions in particular cases is a textually assigned function of the [E]xecutive [B]ranch, while the broader executive task of setting priorities for enforcement frequently presents a judicially unmanageable inquiry,” nonenforcement decisions should be treated as political questions.<sup>228</sup>

What little discussion of the Take Care Clause took place during the framing and ratification process did not concern mechanisms for enforcement. Historical practice is not much more illuminating.<sup>229</sup> The language of the Take Care Clause, however, does not suggest unbridled executive discretion. Both “care” and “faithfully” denote limits on discretion that, in the context of private fiduciary law, were judicially enforced during the Founding Era and are judicially enforced today. Although private fiduciary law also contains doctrines—like the business judgment rule—that are designed to provide fiduciaries with some space to act energetically by insulating some of their decisions from stringent judicial review, even the business judgment rule does not insulate corporate managers and directors from liability for faithless execution of their responsibilities.<sup>230</sup> The question of how judges should hold the President to his fiduciary duties will be explored in due course.

### 3. Contexts for Caretaking

Because the fiduciary duties imposed by the Take Care Clause apply whenever members of the Executive Branch are executing the laws, it is difficult to identify particular contexts in which the President must be especially mindful of those duties. Conceivably, even decisions to spend excessive time on the golf course could lead the President to neglect those duties.<sup>231</sup> This subsection focuses on three broad categories of decisions: (1) decisions about whether to implement statutes; (2) decisions about how to implement statutes; (3) decisions about the supervision of the implementation of statutes.

#### *a. Deciding Whether to Implement Statutes*

By requiring the President to take care that “the Laws” are faithfully executed, the Take Care Clause prohibits the President from violating the Constitution. The President must therefore carefully and faithfully determine—or ensure that others carefully and faithfully determine—whether the statutes that his administration is

228. Zachary S. Price, *Law Enforcement As Political Question*, 91 NOTRE DAME L. REV. 1571, 1574 (2016).

229. See Kent et al., *supra* note 11, at 2120 (finding that from the colonial period to the Revolution, “enforcement mechanisms . . . for commands of faithful execution r[an] the gamut from judicial enforcement via damages, fines, injunctions, bond forfeiture, and criminal penalties, to impeachment and removal from office”).

230. See Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities*, 54 U. KAN. L. REV. 975, 983–84 (2006) (explaining that “[t]o qualify for business judgment rule protection, the following conditions must be satisfied: (1) good faith; (2) a conscious decision to act or not act; (3) an adequate informational basis for the decision; and (4) the absence of a conflict of interest”).

231. See Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEX. L. REV. 1521, 1538 (2015) (raising the possibility that the President may breach fiduciary duties by neglecting executive responsibilities for “extensive golf outings”).

implementing are in fact constitutional. This duty attaches regardless of whether a given statute was enacted prior to his taking office, enacted over his veto, or enacted and signed into law by him notwithstanding his constitutional misgivings about any of its provisions. The constitutionality of a statute, after all, does not turn on any of these circumstances.

A variety of decision procedures could enable the President to discharge this duty without violating the text of the Take Care Clause. The President might carefully interpret both the relevant statute and the Constitution himself, come to his own conclusion about whether the former is consistent with the latter, and decide whether to enforce the statute based on that conclusion without seeking the input of anyone else. He might request that his Attorney General evaluate the constitutionality of the statute, and acquiesce in the Attorney General's constitutional conclusion if it does not appear unreasonable. He might seek the opinions of a number of different executive officers from various executive departments. He might solicit opinions from a specialized office within the Executive Branch that has developed a reputation for high-quality constitutional interpretation. He might assign great weight to those opinions, some weight to those opinions, or as much weight as he determines that the reasoning in those opinions warrants on a given occasion.

The text of the Take Care Clause does not compel a particular choice between these options.<sup>232</sup> It does, however, impose a personal obligation on the President to ensure that unconstitutional statutes are not executed. Whether the President makes the relevant constitutional determinations himself or delegates the majority of those determinations to others, he must exercise care and good faith in doing so.

#### *b. Deciding How to Implement Statutes*

Congressional delegation to administrative agencies via broadly worded statutes is routine in the modern administrative state, and the implementation of those statutes through a variety of policy instruments constitutes much of what the modern Executive Branch does. Some incompleteness in legislative expression is inevitable given the complexity of the subject matter of modern legislation, the political transaction costs associated with negotiating, drafting, and enacting legislation, and the inherent imprecision of language.<sup>233</sup>

The text of the Take Care Clause does not dictate that the President fill statutory gaps in any particular way. Again, a variety of possibilities present themselves. The President could: acting with the benefit of policy advice from agency heads, issue executive orders or memoranda setting forth policy priorities and goals that agencies must follow; designate officers within agencies [who will ensure that his priorities and goals are pursued by agencies; instruct the head of a

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232. A future work will explore in greater depth how such choices ought to be made.

233. See EPSTEIN & O'HALLORAN, *supra* note 135, at 46 ("To convince oneself that this is so, assume the opposite and then imagine the details that would have to be included [in legislation]. . . .").

dedicated office within the White House to ensure that significant rules issued by agencies are reviewed for consistency with the President's priorities and goals and to return them to the originating agencies if they are inconsistent with those priorities or goals; issue formal directives to the heads of agencies to either engage in rulemaking or to withdraw rules; or informally communicate with them to the same effect.

What if a statute expressly delegates decisionmaking authority to someone other than the President? If Congress can—as the Court held in *Humphrey's Executor*<sup>234</sup>—insulate certain agency decisionmakers from removal by the President absent “inefficiency, neglect of duty, or malfeasance in office,”<sup>235</sup> can Congress provide that only those agency decisionmakers may exercise discretion under that statute? If so, might the President be foreclosed from either implementing the statute himself or directing the named decisionmaker to exercise discretion consistently with his will?

Viewed in the context of the Take Care Clause's fiduciary-law premises, the proposition that Congress may prohibit the President from either exercising statutory discretion himself or directing the execution of the laws by his subordinates appears dubious at first. Congress is not the beneficiary to the President's fiduciary—both are fiduciaries, and “We the People” are the beneficiaries. Accordingly, the Take Care Clause does not permit the President to follow instructions that exceed the authority conferred upon Congress by the Constitution. If—as argued above—the Take Care Clause contemplates a single executor of the laws, it might be thought that Congress cannot restrict the President's ability to execute the laws personally or give legally binding directives to his subordinates.

As noted above, however, the President has a number of means at his disposal to ensure the execution of the laws.<sup>236</sup> Would a President who is forced to incur the political costs<sup>237</sup> associated with firing and replacing an official, rather than taking the “cheaper” route of formally ordering that official to act in a particular way, really be deprived of “that species of power, which is necessary”<sup>238</sup> to execute the laws?

This is a question that the Take Care Clause, which presupposes presidential law-execution power but does not grant it, cannot directly answer. Still, it is worth emphasizing that the Take Care Clause does not require that the President perfectly exercise whatever law-execution power he has. Congress might enjoy the constitutional power to delegate authority to agency officials in ways that

234. See *Humphrey's Executor v. United States*, 295 U.S. 602, 628–30 (1935).

235. See 15 U.S.C. § 41 (2012).

236. See also Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 294 (2006) (detailing means of Presidential influence other than directive authority).

237. *Id.* at 295 (observing that “[f]iring typically has a much higher political cost to the President than (successfully) directing an official's exercise of discretion,” and pointing to President Nixon's efforts to remove Archibald Cox as special prosecutor during the Watergate affair as an example).

238. 1 ANNALS OF CONG. 496 (Joseph Gales ed., 1834) (statement of James Madison on June 17, 1789).

make it marginally more difficult for the President to ensure that the laws are carefully and faithfully executed by his subordinates than it would otherwise be. But that would not necessarily—in the words of President Franklin Pierce’s Attorney General, Caleb Cushing—transform the President into a “nominal executive chief utterly powerless”<sup>239</sup> to discharge his Take Care duties. If the Constitution does confer directive authority on the President, that authority is not located in the Take Care Clause.

*c. Supervising the Implementation of Statutes*

To the extent that he relies on subordinates to implement the laws on his behalf, the President is obliged to supervise his subordinates. The personal character of his fiduciary duties is such that he cannot leave the delegates of his law-implementation power unmonitored.<sup>240</sup> But this is easier said than done.

The modern administrative state is vast, and Gillian Metzger observes that “[a]lmost none of the federal government’s administrative structure—the different departments, their responsibilities, leadership, interrelationships—is constitutionally specified.”<sup>241</sup> Just as there must be some degree of presidential participation in executive policymaking, so too must there be some level of enforcement supervision, lest the President’s personal obligation to take care that either he or his subordinates faithfully execute the laws go unfulfilled. Justice Stephen Breyer made this point in his concurrence in *Clinton v. Jones*, when he affirmed that “a President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it.”<sup>242</sup>

Determining precisely how the President should fulfill his duty to supervise the enforcement of statutes is a complex problem that may be susceptible to resolution through a variety of approaches. For present purposes, it is enough to say that the duty to supervise is personal to the President, and he cannot abdicate it.

C. IMPLEMENTING THE TAKE CARE CLAUSE

Investigating the historical background of the Take Care Clause and parsing its language has yielded some valuable information about the concrete obligations it imposes. But these inquiries have not yielded enough information to warrant confidence that there will be clear answers to all questions concerning the requirements of the Take Care Clause in respect of personal, careful, faithful presidential decisionmaking.<sup>243</sup> Although the President must follow his constitutional and constitutionally authorized instructions, those instructions may underdetermine the answers to some legal questions.

239. Relation of the President to the Executive Departments, 7 Op. Att’y Gen. 453, 470 (1855).

240. See *supra* notes 176–80.

241. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875 (2015). Accord Mashaw, *supra* note 2, at 660. But see generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing that the modern administrative state is affirmatively unconstitutional).

242. 520 U.S. 681, 713 (1997) (Breyer, J., concurring).

243. See Kent et al., *supra* note 11, at 2119 (reaching the similar conclusion that the “traditional sources of original meaning remain insufficient” to resolve key questions concerning faithful execution).



Accordingly, we must enter the construction zone. I will pursue the original functions of the Take Care Clause with an eye toward constructing decision rules that judges can use to resolve such questions.

Identifying the original functions of constitutional provisions entails recourse to many of the same materials used in identifying the meaning of their text. Thus, in seeking to determine the meaning of the “due process of law,” one needs to investigate the Anglo–American legal history from which the phrase emerged.<sup>244</sup> Investigation of that same history also illuminates why the concept of due process of law was developed in the first place—namely, to protect individuals against arbitrary power that is grounded in mere will rather than contextually legitimate reasons.<sup>245</sup>

The same is true of the Take Care Clause. By investigating many of the same historical materials discussed above, we can identify four functions of the Take Care Clause: (1) ensuring presidential accountability; (2) facilitating the exercise of bounded discretion; (3) securing the rule of law; and (4) thwarting opportunism.

### 1. Ensuring Presidential Accountability

Recall that private fiduciaries are often chosen because of their superior knowledge and judgment.<sup>246</sup> Although that superior knowledge and judgment has considerable benefits, delegated discretion comes with agency costs. It is costly for beneficiaries to monitor their fiduciaries’ management of their resources, and it is costly for beneficiaries to hold fiduciaries accountable for deviations from the letter or spirit of their agreements. These agency costs would be higher still if fiduciaries were free to subdelegate their discretionary power to third parties whenever it suited their interests.

The choice of a single chief executive rested in significant part upon the conviction that a single individual would be more energetic in executing the laws and easier to monitor and hold accountable for the abuse of discretion than a plurality of individuals.<sup>247</sup> As Hamilton put it, a plural executive would more easily “conceal faults, and destroy responsibility,” because fault could be “shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author.”<sup>248</sup> The result would be that “though we may clearly see upon the whole that there has been

244. See Barnett & Bernick, *No Arbitrary Power*, *supra* note 7, at 1605–12.

245. *Id.* at 1643–47.

246. See *supra* Section II.B.2.a.

247. See 1 FARRAND’S RECORDS, *supra* note 158, at 65 (Rep. John Rutledge) (single executive would “feel the greatest responsibility and administer the public affairs best”); *Id.* at 119 (Rep. James Wilson) (single executive will ensure that “officers . . . be appointed by a single, responsible person”); THE FEDERALIST NO. 70, *supra* note 135, at 368 (Alexander Hamilton) (“When power, therefore, is placed in the hands of so small a number of men, as to admit of their interests and views being easily combined in a common enterprise, by an artful leader, it becomes more liable to abuse, and more dangerous when abused, than if it be lodged in the hands of one man. . . .”)

248. THE FEDERALIST NO. 70, *supra* note 135, at 366.

mismanagement, . . . it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.”<sup>249</sup>

As discussed above, the Take Care Clause became a personal directive only after the single-executive question was resolved and the language of the New York Constitution was adopted in place of the language of the Virginia Plan.<sup>250</sup> The personal duty imposed by the Take Care Clause should therefore be understood as a means of ensuring presidential accountability.

## 2. Facilitating Bounded Discretion

The provision of the Virginia Plan that would later become the Take Care Clause was altered to remove language which might have suggested that the President was required to be a kind of law enforcement automaton—to “execut[e] . . . the national laws,” full stop. The enacted text requires careful, not mechanical execution. The language of “care” is the language of discretion—discretion bounded by “the Laws,” but discretion nonetheless.

Such discretion might not have been attractive to Americans in the immediate aftermath of the Revolution. But subsequent experience had shown the need for an energetic executive who would be accountable to the national legislature without being dominated by it. The language of “care” allows the President flexibility to adjust to changing circumstances, as any fiduciary inevitably must do in order to achieve his beneficiary’s goals.

In the late 18th Century, fiduciary flexibility did not license gross irresponsibility.<sup>251</sup> But neither did fiduciary law make private fiduciaries strictly liable for everything that happened under their watch. The text of the Take Care Clause was designed to ensure that Presidents would enjoy some space to make use of the superior knowledge and judgment that they would (ideally, at least)<sup>252</sup> possess, to the benefit of the public. But it was also designed to ensure that presidential decisionmaking would be calculated to implement “the Laws.”

## 3. Securing the Rule of Law

The Take Care Clause’s reference to “the Laws” and its imposition of a duty on the President and his subordinates to execute them indicates that the President is bound by—and bound to enforce—rules that are either specified in the Constitution or are authorized by the Constitution. As Lawrence Lessig and Cass

249. *Id.*

250. *See supra* Section II.B.1.

251. LAWSON ET. AL, *supra* note 129, at 58.

252. 2 ELLIOT’S DEBATES, *supra* note 165, at 448 (statement of Rep. James Wilson) (defending the vesting of veto power in the President on the grounds that the President “will have before him the fullest information of our situation; he will avail himself not only of records and official communications, foreign and domestic, but he will have also the advice of the executive officers in the different departments of the general government”); THE FEDERALIST NO. 68, *supra* note 135, at 354 (Alexander Hamilton) (expressing confidence that the process for electing the President will “afford[] a moral certainty, that the office . . . will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications” and affirming “that there will be a constant probability of seeing the station filled by characters preeminent for ability and virtue”).

Sunstein have distilled it: “[T]he President must obey the law, and . . . he may not order his subordinates to do otherwise.”<sup>253</sup>

We have seen that Founding Era commentators treated the Take Care Clause as an affirmation that the President is bound by law. The Take Care Clause has since been invoked in support of the proposition that the President may violate the Constitution in order to preserve the nation. Among the most memorable instances of this was President Abraham Lincoln’s defense of his unilateral suspension of habeas corpus during the Civil War.<sup>254</sup> But there is scant evidence that the Take Care Clause was understood during the Founding Era to convey to the President a Lockean prerogative power<sup>255</sup> to act outside the law.<sup>256</sup>

The rule of law is a deeply—perhaps essentially<sup>257</sup>—contested concept.<sup>258</sup> It thus bears emphasizing that, by directing the President to execute “the Laws”—which includes the written Constitution and does not include unconstitutional statutes—and to “preserve, protect, and defend the Constitution,”<sup>259</sup> the Take Care Clause directs the President to comply with rules contained in or authorized by the Constitution. It does not license the President to violate those rules, even in the service of what he regards as the most normatively attractive understanding of the rule of law.

#### 4. Thwarting Opportunism

Scholars agree that the Take Care Clause was designed in part to deny the President the power to suspend the execution of constitutional laws or dispense

253. Lessig & Sunstein, *supra* note 18, at 61.

254. See Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 423 (Roy P. Basler ed., 1953).

255. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). (“[T]is fit that the Laws themselves should in some Cases give way to the Executive Power, or rather to this Fundamental Law of Nature and Government, viz. That as much as may be, all the Members of the Society are to be preserved. . . . [There exists t]his Power to act according to discretion, for the publick [sic] good, without the prescription of the Law, and sometimes even against it.”). For an argument that attributing any such power to the President “cannot survive a close reading of Locke,” see Thomas S. Langston & Michael E. Lind, *John Locke & the Limits of Presidential Prerogative*, 24 POLITY 49, 50 (1991).

256. See PRAKASH, *supra* note 141, at 206–13 (recounting episodes during the Washington Administration in which the President declined to invoke “a generic emergency power to do whatever was necessary to avert or weather crises”); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1175 (2019) (adducing evidence that “the standard term for the bundle of nonstatutory powers held by the Crown was ‘royal prerogative’ and that ‘executive power’ referred to one distinct branch of the prerogative: the authority to execute the law”).

257. See Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7 (1997) (arguing that the rule of law has “evaluative as well as descriptive elements, and its correct application cannot be fixed simply by appeal to ordinary [linguistic] usage”—rather, it “depends on the resolution of contestable normative issues”).

258. See generally BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) (describing the historical development of, and contestation over, the concept of the rule of law); see also W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF ARISTOTELIAN SOC’Y 167, 169 (1957) (defining “essentially contested concepts” as “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users”).

259. See PRAKASH, *supra* note 141, at 300–03 (arguing that the original meaning of the Presidential Oath Clause “forbids presidential violations of the Constitution”).

with their obligations in particular cases.<sup>260</sup> Delahunty and Yoo, for instance, point to James Wilson’s post-ratification explanation that the Take Care Clause recognized an “authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established.”<sup>261</sup>

Prakash questions this conventional wisdom. He observes that delegates in three state ratifying conventions proposed bars on suspension without congressional consent and that the Vermont Constitution had both a faithful execution precursor and a bar on suspensions and dispensations, thus suggesting that the former was not understood to deny the Executive a suspension or dispensation power.<sup>262</sup> But it is noteworthy that both Wilson and Justice William Paterson<sup>263</sup> described the Clause as denying the President suspension or dispensation powers shortly after it was ratified.<sup>264</sup>

Even if the Take Care Clause does not merely bar suspension and dispensation, understanding what made suspension and dispensation problematic can provide insight into the spirit of the Take Care Clause. Executive suspension and dispensation constitute breaches of the fiduciary duty of loyalty. Specifically, they breach the duty of good faith. Both suspension and dispensation require a deliberate decision to seize power that, by 1788, was understood not to be executive in nature.<sup>265</sup> It would be impossible to specify and proscribe every kind of bad-faith execution, and those who framed and ratified the Take Care Clause did not attempt to do so. Instead, they chose a term—“faithful”—that proscribed opportunistic presidential behavior.

The text of the Take Care Clause bears the marks of a theory of the relationship between government and citizen understood by those who ratified the Constitution to be normatively sound and to have some practical legal bite. Enforcement of the Clause, however, requires the development of implementing doctrines that constitutional decisionmakers can use today to resolve vexed questions.

### III. ENFORCING FAITHFUL EXECUTION

Although the case law on the Take Care Clause contains little inquiry into the specific obligations that it imposes or consideration of whether those obligations are judicially enforceable, administrative law imposes obligations on agencies

260. See, e.g., Blackman, *supra* note 18, at 226; Delahunty & Yoo, *supra* note 18, at 803–08; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1304–05 (1996); May, *supra* note 18, at 873–74.

261. Delahunty & Yoo, *supra* note 18, at 802 (citing Wilson, *supra* note 173, at 829, 878).

262. Prakash, *supra* note 18, at 1651.

263. See Wilson, *supra* note 173; *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (Paterson, J.).

264. See Kent et al., *supra* note 11, at 2131 (finding “little evidence” that either the Take Care or the Presidential Oath Clause “was viewed during ratification as allowing the President authority to suspend execution of the laws, whether based on his policy preferences or his own interpretations of the Constitution, and a substantial amount of evidence cutting the other way”).

265. See Prakash, *supra* note 18, at 1651.

that sound in fiduciary law and serve some of the same ends as the Take Care Clause. This Part focuses attention on three doctrines that could be imported, with minor modifications, into a judicially manageable framework that is consistent with the letter and tailored to implement the spirit of the Take Care Clause: (1) the *Chenery* principle; (2) the *Heckler* presumption; and (3) hard-look arbitrary and capricious review.

#### A. OUR FIDUCIARY ADMINISTRATIVE LAW

Administrative law has been said to resist unified theory.<sup>266</sup> Some common themes, however, can be discerned. Evan Criddle has developed a fiduciary theory of administrative law that agencies descriptively are, and normatively ought to be, treated by administrative law as fiduciaries that are obliged to discharge fiduciary-like duties.<sup>267</sup> Several of these doctrines serve purposes that are consistent with the spirit of the Take Care Clause.

##### 1. The *Chenery* Principle

Few principles of administrative law are better established than the principle that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”<sup>268</sup> Kevin Stack observes that this principle “has been taken as settled since it was announced, and administrative law has grown up around it, incorporating the principle into new structures.”<sup>269</sup>

In *Chenery I*,<sup>270</sup> the Court refused to uphold a decision by the SEC after concluding that the agency “was in error in deeming its action controlled by established judicial principles”—specifically, that the SEC wrongly determined that fiduciary-law principles precluded officers and directors of a corporation “merely because they [were] officers and directors, from buying and selling the corporation’s stock.”<sup>271</sup> The Court made plain, however, that it would have upheld the SEC’s decision had the agency relied upon its statutory authority to “take appropriate action for the correction of reorganization abuses found to be ‘detrimental

266. See generally Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (discussing a number of views regarding the purpose and legitimacy of the administrative state and arguing that our administrative law honors multiple normative goals).

267. See, e.g., Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) [hereinafter Criddle, *Fiduciary Foundations*]; Evan J. Criddle, Response, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325 (2016). I do not mean to endorse every aspect of Criddle’s descriptive account of administrative law as resting on fiduciary foundations or adopt his normative arguments in full. For a critique of Criddle’s theory, see Richard J. Pierce, Jr., Response, *Presidential Control is Better than the Alternatives*, 88 TEX. L. REV. SEE ALSO 113 (2009).

268. SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 95 (1943).

269. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 956 (2007).

270. By way of distinguishing it from a subsequent case that shares its name, it is referred to as “*Chenery I*.” See *supra* note 14 and accompanying text.

271. 318 U.S. at 88, 90.

to the public interest or the interest of investors or consumers.”<sup>272</sup> And so the Court upheld an identical SEC decision that rested on that ground four years later.<sup>273</sup>

Where did the *Chenery* principle come from? The Court in *Chenery I* did not expressly derive that principle from any positive law. Stack argues that the *Chenery* principle rests upon constitutional foundations—that it serves some of the same functions as the present form of the nondelegation doctrine, which requires Congress to specify some legislative standards or “intelligible principles” to which agencies must conform when Congress confers power upon them.<sup>274</sup> In particular, Stack maintains that the *Chenery* principle promotes accountability in the exercise of delegated power by forcing those agency policy experts who are the intended delegates of that power to defend their actions on the basis of reasons that actually informed their substantive decisions, rather than reasons invented after the fact by agency lawyers.<sup>275</sup>

Adrian Vermeule contests Stack’s account of *Chenery*, arguing that the nondelegation doctrine is concerned with allocating power *away from* agencies and toward Congress, whereas *Chenery* is concerned with reallocating power *within* agencies—away from lawyers and toward policy experts.<sup>276</sup> But even on Vermeule’s account, *Chenery* promotes accountability in the exercise of delegated power. Denying agency lawyers the ability to defend agency actions on the basis of reasoning that did not in fact play a role in the initial decisionmaking process prevents lawyers from getting policy experts off the hook at a later date if those policy experts seek to achieve illegitimate goals at an earlier date.

For the same reason, the *Chenery* principle is also consistent with the fiduciary duty to personally exercise delegated power. As courts have recognized, insofar as agencies are delegated power because they possess superior knowledge and judgment, it is not the knowledge and judgment of agency lawyers but of agency policy experts that is sought.<sup>277</sup> *Chenery* ensures that the delegated power to make policy is in fact exercised by its intended delegates.

## 2. The *Heckler* Presumption

Although the Court presumes that agency decisions are reviewable under the APA, that presumption does not apply to certain kinds of decisions.<sup>278</sup> In *Heckler*

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272. *Id.* at 92.

273. See SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 209 (1947).

274. Stack, *supra* note 269, at 982 (“My core suggestion is that the *Chenery* principle supplements the enforcement of the nondelegation doctrine as it is currently formulated.”). The intelligible principle doctrine was first articulated in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

275. See Stack, *supra* note 269, at 993–96.

276. ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 198–99 (2016).

277. *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971) (“Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.”).

278. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (establishing the presumption of reviewability).

v. *Chaney*, the Court held that a decision by the Food and Drug Administration not to take action to prevent particular drugs from being used in executions by lethal injection was an unreviewable exercise of discretionary power that “share[d] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict.”<sup>279</sup> The Court provided a litany of reasons for this holding, most of them related to the superior institutional competence of agencies:

First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>280</sup>

The Court offered two important qualifications. First, it emphasized that “Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”<sup>281</sup> Second, the Court noted that in *Heckler* it was not confronting a “situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>282</sup> That is to say, the Court made plain that the agency’s enforcement discretion was bounded.

To illustrate what kind of agency behavior was out-of-bounds, the Court cited the D.C. Circuit’s en banc decision in *Adams v. Richardson*.<sup>283</sup> In *Adams*, the court determined that the U.S. Departments of Health, Education, and Welfare had “consciously and expressly adopted a general policy” of not enforcing Title VI’s requirement that federal agencies cease to provide segregated schools with federal assistance, and thus had “abdicat[ed] . . . its statutory duty.”<sup>284</sup>

Eric Biber has shown that the resource allocation rationale is prominent in *Heckler* cases, and that the outcome of those cases tends to turn on whether an agency has developed “a general rule or policy as to when it will invoke its enforcement powers” or whether it has instead—as in *Heckler* itself—decided not to exercise its enforcement powers against particular parties.<sup>285</sup> According to

279. 470 U.S. 821, 832–34 (1985).

280. *Id.* at 831–32.

281. *Id.* at 833.

282. *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

283. 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

284. *Id.* at 1162.

285. Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 489 (2008).

Biber, the dominance of this narrow reading of *Heckler* admits of a pragmatic and institutional explanation. Specifically, although “[a]ny time a court reviews an agency decision, the court is in some way interfering with agency resource allocation,” the rule-of-law benefits are higher and the resource allocation costs are lower when judges review policy-setting decisions.<sup>286</sup>

Why so? One reason is that policy-setting decisions are “binding on the world,” and the judicial correction of an erroneous policy-setting decision may avert “harm [to] a wide range of private parties or public interests,” whereas the impact of individual enforcement decisions is typically more limited.<sup>287</sup> Further, individualized enforcement decisions are made far more frequently than policy-setting decisions, and judicial review of the former would “substantially increase the resources the agency expends in order to buttress its many decisions against judicial review,” in particular, by “formaliz[ing] its prosecutorial decisionmaking process in order to ‘paper’ the record for possible judicial review.”<sup>288</sup>

There was, however, more to the Court’s explicit reasoning in *Heckler*. The Court analogized agency inaction to prosecutorial discretion,<sup>289</sup> which, as we have seen, the Court has linked to the Take Care Clause in a series of cases.<sup>290</sup> In those cases, the Court stressed that the President and his subordinates have “exclusive authority and absolute discretion to decide whether to prosecute a case.”<sup>291</sup> That is, the Court in *Heckler* said that individualized enforcement discretion was allocated to the Executive by the Constitution.

Like the Take Care Clause, then, the *Heckler* presumption is designed to promote bounded discretion and to secure the rule of law. It ensures that agencies are not micromanaged in a decisionmaking context where they enjoy a comparative institutional advantage and where the law of the land grants the Executive considerable discretionary power. But it does not allow agencies to abdicate their duty to implement the laws enacted by Congress.

### 3. Hard-Look Review

“Hard-look” review is the standard that is used to evaluate agency actions challenged as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under section 706(2)(A) of the APA.<sup>292</sup> It was formalized by the Supreme Court in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*, which involved a decision by President Ronald Reagan’s National Highway Traffic Safety Administration (NHTSA) to revoke regulations requiring vehicles produced after a certain date

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286. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 23 (2008).

287. *See Id.* at 31.

288. *See Id.* at 32; Biber, *supra* note 285, at 488.

289. *Heckler v. Chaney*, 470 U.S. 821, 832–34 (1985).

290. *See supra* notes 48–49 and accompanying text.

291. *United States v. Nixon*, 418 U.S. 683, 693 (1974).

292. 5 U.S.C. § 706(2)(A) (2012).



to include either airbags or automatic seat belts.<sup>293</sup> In the course of determining that NHTSA had erred in failing to consider viable alternatives and in making a policy choice that was unreasonable in light of the evidence in the record, the Supreme Court articulated a framework for hard-look arbitrary and capricious review that has been maintained over the years.<sup>294</sup>

Hard-look review requires a reasonably tight fit between: (1) record evidence and agency action, and (2) agency action and a legitimate statutory goal.<sup>295</sup> It requires judges to determine whether the agency actually considered the evidence before it in light of contextually relevant factors prior to making a decision.<sup>296</sup>

Evan Criddle correctly perceives that hard-look review is consistent with fiduciary principles.<sup>297</sup> The Supreme Court adopted hard-look review from the D.C. Circuit, which developed it during the 1960s and 1970s amid concerns that agencies were undermining the purposes of public-interested statutes in order to serve the interests of industry groups—a form of opportunism.<sup>298</sup>

Failure to consider relevant factors or alternatives during rulemaking or to establish a connection between means and contextually legitimate ends may reflect mere carelessness on the part of agency officials. Then again, as now-Judge Merrick Garland once put it, “[t]he result may be perfectly rational in light of the agency’s true, but unstated, motive.”<sup>299</sup> If it is often the case that agency decisions that do not pass muster under hard-look review are the product of agency opportunism, hard-look review can thwart agency opportunism without requiring judges to directly pursue it or accuse agencies of engaging in it.<sup>300</sup>

293. 463 U.S. 29, 32–40 (1983).

294. *See Id.* at 43 (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

295. *See, e.g.,* *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (holding a rule arbitrary because it was “unmoored from the purposes and concerns of the immigration laws”); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 851 (D.C. Cir. 1987) (rejecting a rule as arbitrary and capricious because the agency “failed to provide a sufficiently reasoned discussion of why this rule was adopted and alternatives were rejected in light of the purposes of the Merchant Marine Act”).

296. *See Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 784 (2016) (explaining that the Court had an “important but limited role in ensur[ing] that the [Federal Energy Regulatory] Commission engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice”).

297. *See* Criddle, *Fiduciary Foundations*, *supra* note 267, at 153 (arguing that “the APA employs notice-and-comment procedures as minimalist procedural safeguards akin to the fiduciary duties of care and loyalty in private law” and that “[t]o satisfy judicial review . . . agencies must show they exercised due care by furnishing a full, contemporaneous administrative record, explaining in detail the rationale for their decisions, and validating departures from past decisions”).

298. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 *CHI.-KENT L. REV.* 1039, 1051 (1997) (emphasizing the influence of certain judges on the D.C. Circuit, such as “men like Judges Bazelon, Leventhal, McGowan, and Wright” in developing hard-look review).

299. Merrick B. Garland, *Deregulation and Judicial Review*, 98 *HARV. L. REV.* 505, 555 (1985).

300. In recent decisions, the Court has suggested an approach that equates hard-look review with the second “step” of *Chevron* deference—the step at which judges determine whether an agency’s

Understood as a means of thwarting opportunism, hard-look review is consistent with the spirit of the Take Care Clause. Its vitality in our administrative law suggests that thwarting bad-faith executive decisionmaking is not an unmanageable enterprise. Although hard-look review has been criticized over the years as a net-detrimental burden on agency decisionmaking that has generated regulatory “ossification,”<sup>301</sup> and there is some evidence that political commitments influence its operation,<sup>302</sup> it endures, and its basic contours are relatively well-defined.

#### B. TOWARD FIDUCIARY PRESIDENTIAL ADMINISTRATION

Some readers may be wondering whether certain of the above doctrines could plausibly be applied to presidential decisionmaking at all, given the current state of administrative law. The Supreme Court in *Franklin v. Massachusetts* held that the President is not an “agency” for purposes of the APA and thus is presumably not subject to doctrines—like the *Heckler* presumption and hard-look review—that have been developed under the auspices of the APA.<sup>303</sup>

The Court in *Franklin* made plain, however, that the “President’s actions may still be reviewed for constitutionality.”<sup>304</sup> Even if the President is not bound by the APA, APA-inspired jurisprudence can, with slight modifications, be used by judges to implement the Take Care Clause. The three doctrines discussed above should be so modified.

##### 1. Modifying the *Chenery* Principle

We have seen that *Chenery* promotes the accountability of agency policy experts by forcing agency lawyers to defend the lawfulness of agency actions on the basis of facts and reasons that actually informed policy experts’ decisions. In a modified form, it could promote presidential accountability by forcing the President’s lawyers to defend the lawfulness of presidential decisions with

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interpretation of ambiguous statutory text is reasonable. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (articulating what has become a meta-rule of deference); see also *Judulang*, 565 U.S. at 52 n.7 (stating that “under *Chevron* step two, we ask whether an agency interpretation is ‘arbitrary or capricious in substance’” (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011))). For a normative defense of this approach, see generally Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 *FORDHAM L. REV.* 2359 (2018). If hard-look review is today identical to *Chevron* Step Two, it may be that *Chevron* has evolved into a means of thwarting opportunism and is, in this respect, consistent with one of the original functions of the Take Care Clause.

301. For a sampling of some of the more notable entries in a long-running, still-unresolved debate, see generally, for example, Stephen M. Johnson, *Ossification’s Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 *ENVTL. L.* 767 (2008); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 *DUKE L.J.* 1385 (1992); Richard J. Pierce, Jr., *Response, Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 *GEO. WASH. L. REV.* 1493 (2012); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making “Ossified”?*, 20 *J. PUB. ADMIN. RES. & THEORY* 261 (2006); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 *GEO. WASH. L. REV.* 1414 (2012).

302. See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 *U. CHI. L. REV.* 761, 767 (2008).

303. 505 U.S. 788, 796 (1992). *Chenery I* was decided before the APA was enacted.

304. *Id.* at 801.

reference to the facts and reasons that actually inform those decisions. Because the President is personally bound by the Take Care Clause, the possibility that his conduct might be justified by others on grounds that he did not consider is no answer to the charge that he sought to accomplish unconstitutional goals. Because the President is a single actor, identifying both the facts and reasons that inform his decisions would be less complicated for judges than identifying the facts and reasons that inform the decisions of multimember administrative bodies—which judges routinely do under *Chenery*.<sup>305</sup>

If Kevin Stack is correct that Congress can legitimately prevent presidents from exercising discretion under statutes by failing to grant discretionary power to the President by name,<sup>306</sup> judges evaluating exercises of presidential discretion must always make a threshold determination whether that discretion was in fact delegated to the President. Recall that *Chenery* is designed to ensure that the intended recipients of delegated power are held accountable for their exercise of it. Courts should not promote presidential accountability for exercises of statutory discretion if statutes are not properly understood to delegate discretion to the President at all. The *Chenery* principle's root concern with accountability in the exercise of delegated power can thus be used to justify any initial judicial inquiry into whether there has been such a delegation to the President.

If a given statute is properly read to delegate discretion to the President, judges must consider whether the Take Care Clause has been triggered through presidential action. This question is relatively easy to answer in contexts where the President has issued an order or composed a memorandum that formally directs his subordinates. In such cases, it is the President's signature that makes the order or direction legally effective—even if the substance of the underlying policy is a group effort. A rule according to which the facts and reasons being examined are those that are actually presented to him and that he actually weighs would respect the unitary nature of his ultimate decision. The problem of pretext could be addressed through the same means used to address it under *Chenery*—namely, determining whether the articulated facts and reasons that he is said to have relied upon have support in the record before the court.

What of the risk that judicial inquiry into the facts and reasons upon which presidents rely would incentivize presidents to either avoid providing regulatory input or to conceal their input? Would it not be better for purposes of promoting accountability and facilitating energetic law execution to encourage presidents to take an active role in formulating policy and to be candid about their input?

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305. *Chenery* of course also applies to decisionmaking by agencies that are headed by single administrators. See Stack, *supra* note 269, at 993 (explaining that *Chenery* “provides a structural assurance that the grounds for agency policy have been embraced by the most politically responsive and public actors within the agency—whether a single administrator or a commission”). The point is only that the epistemological problem is more tractable with an individual decisionmaker—the accountability-based rationale for *Chenery* applies regardless of whether power is delegated to an individual or a group.

306. *Id.* at 1016–17. To be clear, I claim only that the text of the Take Care Clause does not resolve this question.

Would Americans not be worse off if presidential input were driven underground or discouraged entirely?

Any concern about discouraging presidential input into regulatory decision-making would rest on an implausible premise about the marginal costs that judicial review can impose on presidents. Presidents have strong electoral and reputational incentives to exert an influence upon the implementation of statutes and to claim credit for that influence.<sup>307</sup> The expected benefits from exerting influence and credit-claiming will likely dwarf any expected costs associated with occasionally having their input judicially examined. Thus, presidential demand for visible regulatory input and credit for that input is likely to be inelastic—unaffected by any changes in price that judges can impose.

Scholars have long argued that judicial review of agency action encourages agencies to engage in “science charades”—to dress up what is, at bottom, politically motivated decisionmaking in technocratic terms.<sup>308</sup> Science charades, in turn, have been said to make it more difficult to hold accountable any elected officials whose political preferences influence that decisionmaking.<sup>309</sup> Similarly, declining to uphold agency actions that are designed primarily to achieve the President’s political goals might undermine presidential accountability to voters by encouraging presidents to conceal the political character of their input into the regulatory process.

Jodi Short has provided compelling reasons to doubt that electoral accountability can be appreciably enhanced by upholding regulatory actions for which political reasons are given.<sup>310</sup> Consulting the Federal Register and parsing judicial opinions are expensive tasks for ordinary citizens—they require a great deal of time and cognitive effort, particularly for those who do not already have knowledge of the relevant subject matter. The acquisition of information can be made less expensive through the activity of watchdog groups and the media, but

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307. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2354 (2001) (observing that “the President’s inclination to take credit for administrative success[]” is among the “hallmarks of modern presidential administration”); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 11–12 (1994) (explaining that presidents seek to build “institutional capacity for effective governance” and endeavor to be viewed as “strong leaders” because “[w]hen the economy declines, an agency falters, or a social problem goes unaddressed, it is the president who gets the blame, and whose popularity and historical legacy are on the line”).

308. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1616–17 (1995) (arguing that science-based regulatory strategies for toxic materials have failed because of a “‘science charade,’ where agencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions”).

309. See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130–31, 1163–66 (2010) (arguing that incentivizing agencies to disclose political reasons for decisions by recognizing those reasons as legitimate in the context of hard-look review would promote political accountability); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 42–44 (2009) (arguing that including political factors in arbitrary and capricious review would improve accountability because it would close the monitoring gap—the gap that exists between the courts’ ability to monitor scientific reasons and their inability to monitor political reasons).

310. See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1847–53 (2012).

cheaper information may also be less reliable, particularly if conveyed by intermediaries whose normative priors can skew the accuracy of their reporting.<sup>311</sup> Even if accurate information is acquired by citizens, it will not necessarily motivate their political choices at a later date.<sup>312</sup> Any accountability benefits associated with ratifying regulatory actions that are defended on the basis of political goals that are unconnected with statutory text or function seem purely speculative.

The bet here is as follows: presidents will continue to provide input into the exercise of administrative discretion and continue to claim credit for that input because they will continue to expect to reap substantial electoral and reputational benefits in doing so, and the faithful execution framework can provide them with an incentive to change the way in which they provide input for the better. The faithful execution framework can provide this incentive because presidents do not want policies to which they contribute and for which they claim credit to be invalidated by the courts. Accordingly, if judges apply a framework that focuses attention on the legitimacy of their goals, they will be marginally less likely to interject contextually illegitimate preferences into the administrative decision-making process.

## 2. Modifying the *Heckler* Presumption

*Heckler* does not insulate agencies against claims that they have abdicated their statutory responsibilities through general nonenforcement policies.<sup>313</sup> The constitutional and institutional reasons that counsel in favor of using a narrow, but potent, presumption against judicial review of individualized agency nonenforcement decisions under the APA also counsel in favor of using a similar rule to insulate from judicial review individualized nonenforcement decisions that are said to be the product of presidential action or culpable omission.

Not every deviation from perfect enforcement of the laws is constitutionally problematic. But both individualized nonenforcement decisions and general nonenforcement policies must be based on contextually legitimate reasons, rather than favoritism, animus, or policy disagreement with a statute that the President does not deem constitutionally objectionable. Both individualized nonenforcement decisions and general nonenforcement policies that are based on the latter reasons violate the Take Care Clause if the President initially directs or subsequently appropriates them.

It does not follow, however, that both individualized nonenforcement decisions and general nonenforcement policies should be judicially reviewable for compliance with the Take Care Clause. The Court in *Heckler* recognized that the Executive Branch is constitutionally vested with the power to decide whether to prosecute and enjoys institutional advantages over the Judicial Branch when it comes to determining how to allocate scarce enforcement

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311. *Id.* at 1848.

312. *Id.* at 1849.

313. See *supra* notes 281–84 and accompanying text.

resources.<sup>314</sup> Because federal officials make countless individualized nonenforcement decisions that could conceivably give rise to claims that the President failed to ensure faithful execution of the laws in a given case, using the *Heckler* presumption to implement the Take Care Clause follows from the same constitutional and institutional competence considerations as those that initially drove the Court to develop the presumption.

### 3. Modifying Hard-Look Review

Administrative law scholars continue to debate whether hard-look arbitrary and capricious review under the APA is net beneficial. But regardless of who has the better of that debate, there are compelling reasons to believe that the faithful execution framework could equip judges to thwart presidential opportunism while avoiding some of the costs that concern critics of hard-look review of agency action.

Review of presidential decisionmaking under the faithful execution framework, like hard-look review of agency action, would be deferential but not toothless. Litigants would ultimately bear the burden of rebutting the presumption that the President has acted lawfully. But judges would require an actual, rather than a hypothetical, fit between evidence, action, and legitimate goals.

The costs to the Executive Branch associated with the faithful execution framework would, however, be importantly different from those associated with hard-look review. As David Driesen explains in articulating a similar proposal concerning judicial review of executive orders: because the President is not subject to the APA's strictures and "need not seek public participation in his decisions or respond to any comments submitted," any substantive review of his decisions "will not reproduce the main pathology associated with arbitrary and capricious review of administrative rulemaking under the APA"—namely, "the development of an enormous record and hundreds of pages of justification."<sup>315</sup>

It is participation in the notice-and-comment process, together with administrative common-law doctrines that require agencies to respond to significant public comments<sup>316</sup> and to disclose the studies upon which they rely in rulemaking,<sup>317</sup> that make hard-look arbitrary and capricious review of agency action so expensive. Hard-look arbitrary and capricious review of agency action focuses on the record generated through the notice-and-comment process. Because the Court has held that the APA's rulemaking requirements do not apply to presidential decisionmaking, the faithful execution framework would not require presidents

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314. *Heckler v. Chaney*, 470 U.S. 821, 832–34 (1985).

315. See David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1058 (2018). As the title suggests, Driesen's proposal for reasonableness review, unlike my own, is limited to executive orders.

316. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (noting that "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public" (footnote omitted)).

317. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

to generate hundreds of pages of records in response to comments that they are under no obligation to consider in the first place.

What kind of record, then, would be sufficient to justify presidential decisions? Driesen takes inspiration from *Panama Refining Co. v. Ryan*,<sup>318</sup> primarily known as one of the three cases in which the Court held a statute unconstitutional on the ground that Congress had delegated its lawmaking power to the Executive Branch.<sup>319</sup> The Court first concluded that section 9(c) of the National Industrial Recovery Act was unconstitutional because it authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum but “laid down no rule” by which transportation was to be allowed or prohibited.<sup>320</sup> The Court then added that the President’s executive order implementing the statutory provision was objectionable because it “contain[ed] no finding, no statement of the grounds of the President’s action in enacting the prohibition.”<sup>321</sup> Chief Justice Charles Evans Hughes wrote:

Both § 9(c) and the Executive Order are in notable contrast with historic practice . . . by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority.<sup>322</sup>

Hughes’s language points toward a standard. The President must compile a record in which he identifies some “facts and conditions” that support his decisions, and those facts and conditions must be sufficiently related to the statutory framework that he is executing as to warrant confidence that he is not acting opportunistically. The President’s decisions may not be, as Justice Elena Kagan wrote for the Court in *Judulang v. Holder*, “unmoored from the purposes and concerns” of the laws that he is executing.<sup>323</sup>

Of course, identifying a single function that a particular text is designed to achieve may be extremely difficult—indeed, it may sometimes be impossible. A statute that has been amended over the course of many years may contain provisions that are designed to perform conflicting functions, or a discernible statutory function may be sufficiently general that it does not point decisively in the direction of any particular decision. Congress might expressly provide that a statute has no function that is not embodied in its text and that no textually unspecified purpose should be understood to constrain executive statutory discretion. In such cases, the President should have recourse to one or more of the functions of the Take Care Clause itself, and judges should determine whether the President’s

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318. 293 U.S. 388 (1935).

319. The other two cases are *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

320. *Panama Refining Co.*, 293 U.S. at 430.

321. *Id.* at 431.

322. *Id.*

323. 565 U.S. 42, 64 (2011).

decision is calculated to ensure accountability, promote bounded discretion, secure the rule of law, or thwart opportunism. If it is so calculated, the decision should be upheld, even if the function or functions of the statute at hand do not point in any particular direction. Again, this standard of review should be deferential but not toothless. The rebuttable presumption of validity that ordinarily attaches to the exercise of administrative discretion under hard-look arbitrary and capricious review should be applied.<sup>324</sup>

A word about the interaction between the modified rule suggested here and doctrines of deference to agency interpretations of law: pursuant to the rules associated with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council (Chevron)*<sup>325</sup> and *Auer v. Robbins*,<sup>326</sup> judges defer to reasonable agency interpretations of ambiguous statutes and regulations, respectively. Suppose the President provides enough input into the agency's decisionmaking process to trigger the Take Care Clause. How does that input bear upon the question of whether an agency's interpretation ought to be upheld under *Chevron* or *Auer*?

The question of whether presidential input should increase or decrease the amount of deference an agency interpretation receives from the courts is the subject of continuing debate.<sup>327</sup> How it ought to be answered must turn in some respect upon what values *Chevron* and *Auer* are best understood to serve. If, for instance, *Chevron* is justified by agency officials' accountability to the President and the President's accountability to the electorate, the involvement of the President in a given decision might contribute to the case for deference to that decision. If *Chevron* is instead justified by agencies' comparative technocratic advantages in making complex policy choices in their area of expertise, the involvement of the President in a given decision might undermine the case for deference to that decision.

It is beyond the scope of this Article to commit to a theory of what values either *Chevron* or *Auer* are best understood to serve. The conclusions that I have

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324. This presumption, in turn, should be easier to displace than the nearly irrebuttable presumption of constitutionality that is often deployed under rational basis review. See *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (rejecting an invitation to "view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate"). I say "often" because it has long been acknowledged that the stringency of rational basis review is somewhat unpredictable. For an overview of recent examples of "rational basis with bite," see generally Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court since Romer v. Evans*, 14 GEO. J.L. & PUB. POL'Y 441 (2016).

325. 467 U.S. 837, 843–44 (1984).

326. 519 U.S. 452, 461 (1997).

327. Compare Kagan, *supra* note 307, at 2373–78 (arguing that because *Chevron* "had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public," courts should "give increased deference to agency actions linked to the President") with Daniel A. Farber, *Presidential Administration Under Trump* 36 (UC Berkeley Pub. Law Research Paper, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591) [<https://perma.cc/FW88-M2TB>] (arguing that Kagan's argument rests upon "assumptions about the operation of the White House and its relationship to agencies that have proved with time to be at best shaky").



reached about the Take Care Clause do not, however, require incorporating the Clause into the analysis of whether particular presidential contributions to regulatory decisionmaking counsel in favor of or against deference to an agency's decision. Suffice it to say that, if the President's contribution is significant enough to trigger the Take Care Clause, it ought to be evaluated under the Take Care Clause. Whether it makes sense to perform *Chevron* or *Auer* analysis on an agency interpretation that ought to be treated as the President's decision under the Take Care Clause is a question that merits more exploration than is possible here.

#### IV. APPLYING FAITHFUL EXECUTION

We have seen that administrative law offers three doctrines that are both ready-to-hand and consistent with the spirit of the Take Care Clause. With slight modifications, these doctrines could equip judges to enforce presidential compliance with the Take Care Clause. I will now illustrate how the faithful execution framework would operate in practice by applying it to the two controversies discussed in Part I—President Obama's DAPA program and President Trump's travel bans.

##### A. DAPA

As Gillian Metzger has pointed out, the alternative to the “prospective and categorical articulation of immigration enforcement policy and priorities” set forth in the DACA and DAPA memos was “case-by-case discretionary decisions by low-level officials over which meaningful supervision is very hard to exercise.”<sup>328</sup> The promulgation of generally applicable enforcement policies and priorities in clear terms reduces the costs associated with supervising line-level officials. Both DACA and DAPA might be defended as efforts on the part of President Obama to discharge what Metzger calls the “constitutional duty to supervise.”<sup>329</sup>

Of course, the President's decision to adopt these generally applicable enforcement policies and priorities over alternate policies was not accidental. Defenders and critics of DACA and DAPA agreed that these decisions were calculated to achieve substantive goals; the dispute concerned the identity of those substantive goals and whether those goals were contextually legitimate.<sup>330</sup> Was President Obama faithfully following the letter and the spirit of existing immigration laws, or was he taking advantage of his discretion under the letter of the laws to undermine their spirit?

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328. Metzger, *supra* note 241, at 1929.

329. *See Id.*

330. Compare Delahunty & Yoo, *supra* note 18, at 845–51 (arguing that “the [Obama] Administration's true purpose was not that of economizing or prioritizing [ICE resources]” but was that of covertly enacting the DREAM Act), with Prakash, *supra* note 82, at 118 (defending a resource-based rationale as non-pretexual).

DAPA was not the product of an executive order.<sup>331</sup> But it is clear that President Obama had significant input into the decisionmaking process that produced DAPA. Within hours of learning that comprehensive immigration reform was dead in June of 2014, the President announced that he would “fix as much of our immigration system as [he] c[ould] on [his] own, without Congress” and that he was “direct[ing] Secretary [Jeh] Johnson and Attorney General [Eric] Holder to identify additional actions [his] administration [could] take on [its] own within [his] existing legal authorities.”<sup>332</sup> DHS and the White House were in constant contact prior to the announcement of DAPA in November of 2014, with White House Counsel Neil Eggleston and domestic policy adviser Cecilia Munoz examining and revising iterations of what would become DAPA—iterations that were produced by Secretary Johnson’s aides.<sup>333</sup> The President publicly adopted DAPA as his policy in his address to the nation in November.<sup>334</sup>

Was the President implementing the INA in good faith? Josh Blackman has documented how the President “consistently stated that he lacked the power to defer deportations” of the parents of American citizens between 2012 and 2014.<sup>335</sup> Although Blackman acknowledges the possibility that the President subsequently “discovered” that he was wrong, some skepticism is certainly understandable.<sup>336</sup> Further, even if—as Prakash, Cox, and Rodríguez argued—the immigration laws left more than enough space for DAPA, the President’s actual reasons are constitutionally relevant. Suppose President Obama honestly but erroneously believed that DAPA was inconsistent with the INA. Although Prakash points out that presidents “are not above making choices that conduce to their future political fortunes,” if Obama made his decision solely “to satisfy a part of the Democratic coalition,” in defiance of what he understood to be existing laws, he could certainly not be described as faithfully executing those laws.<sup>337</sup>

In evaluating the constitutionality of President Obama’s actions, however, we must start with the letter of the INA. In a Fifth Circuit panel opinion holding that DAPA violated the APA, Judge Jerry Smith drew attention to the “specific and

331. See *Texas v. United States*, 86 F. Supp. 3d 591, 607 (S.D. Tex. 2015) (noting that “there are no executive orders or other presidential proclamations or communiques that exist regarding DAPA”).

332. Office of the Press Sec’y, *Remarks by the President on Border Security and Immigration Reform*, WHITE HOUSE (June 30, 2014, 3:04 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform> [<https://perma.cc/WLQ4-LFCR>].

333. Anna Palmer, Seung Min Kim, & Carrie Budoff Brown, *How Obama Got Here*, POLITICO (Nov. 20, 2014, 9:02 PM), <https://www.politico.com/story/2014/11/how-obama-got-here-113077>.

334. See Office of the Press Sec’y, *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/3KJR-VZ83>] (describing the program as actions “I have the legal authority to take” and which “I’m taking”).

335. Blackman, *supra* note 18, at 218.

336. See *Id.* at 278 (internal quotation marks omitted).

337. Prakash, *supra* note 82, at 121. At no point did Obama suggest that existing immigration laws were unconstitutional. Delahunty & Yoo, *supra* note 18, at 837.

detailed” provisions in the INA that delineate who can receive lawful permanent resident (LPR) status, who can be eligible for deferred action, and who can receive LPR status by having a citizen family member.<sup>338</sup> He further described the INA’s “intricate process for [enabling] illegal aliens to derive a lawful immigration classification from their children’s immigration status,” which includes “(i) hav[ing] a U.S. citizen child who is at least twenty-one years old, (ii) leav[ing] the United States, (iii) wait[ing] ten years, and then (iv) obtain[ing] one of the limited number of family-preference visas from a United States consulate.”<sup>339</sup> Judge Smith also observed that, although the INA accords the DHS Secretary “discretion to make immigration decisions based on humanitarian grounds, that discretion is conferred only for particular family relationships and specific forms of relief—none of which includes granting lawful presence, on the basis of a child’s immigration status, to the class of aliens that would be eligible for DAPA.”<sup>340</sup> From these features of the INA, Judge Smith inferred that DAPA was “foreclosed by Congress’s careful plan”—that plan included deferred action, the derivation of lawful immigration classification from the immigration status of one’s children, and discretionary relief based on humanitarian grounds, but only under certain conditions that were not met in the case of DAPA recipients.<sup>341</sup>

Upon careful examination, Judge Smith’s inferences from the statutory text appear questionable. Cox and Rodríguez explain that, because “DAPA simply defers a parent’s deportation” rather than “provide[s] any lawful immigration status,” one cannot leap from “the mere fact that U.S. citizen children cannot file green card petitions for their parents until age twenty-one” to the conclusion that “the Code prohibits their parents from being provided with some lesser form of relief from deportation.”<sup>342</sup> Similarly, the INA’s inclusion of “specific and detailed” provisions delineating requirements for lawful status does not mean that deferred action that does not confer lawful status has to be limited to those grounds.

Last, as Judge Carolyn King highlighted in dissent, in identifying specific categories of deferred action on humanitarian grounds, “Congress was legislating against a backdrop of longstanding practice of federal immigration officials exercising *ad hoc* deferred action.”<sup>343</sup> Inferring a prohibition against *ad hoc* deferred action from such specification is dicey, given that Congress has expressly limited the President’s discretion under the INA when its members are dissatisfied with his exercise of it.<sup>344</sup> The point is not that political context warrants an inference of

338. *Texas v. United States*, 809 F.3d 134, 179 & n.162 (5th Cir. 2015), *as revised* (Nov. 25, 2015).

339. *Id.* at 179–80.

340. *Id.* at 180.

341. *Id.* at 179–80, 186.

342. Cox & Rodríguez, *supra* note 83, at 158.

343. *Texas v. United States*, 809 F.3d at 216 (King, J., dissenting).

344. See Arnold H. Leibowitz, *The Refugee Act of 1980: Problems and Congressional Concerns*, 467 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 163, 165 (1983) (describing how Congress responded to perceived presidential abuses of parole authority under § 212(d)(5) of the INA—the authority to allow otherwise inadmissible noncitizens to enter the U.S.—by “ban[ning] the use of the parole authority for

congressional approval of ad hoc deferred action—it is that political context does not warrant an inference of either approval or disapproval.

Because the letter of the law is unclear, we must turn to the spirit. Alas, the spirit of the INA does not provide much guidance either. Cox and Rodríguez detail how “[e]ach addition to the [Immigration] Code reflects a complicated mix of conflicting priorities either balanced against one another by a single Congress or across Congresses.”<sup>345</sup> Although one can imagine “fanciful examples in which enforcement judgments would clearly contradict congressional purposes”—for example, a presidential announcement that “no enforcement resources would be directed toward immigrants with criminal convictions”<sup>346</sup>—no substantive goal that the text was designed to accomplish provides enough guidance to be useful to a reviewing court that is seeking to determine whether DAPA was faithful to the INA.

Does it follow that DAPA was therefore lawful? No. The President still had to exercise the considerable discretion he enjoyed in a manner consistent with the Take Care Clause itself. A reviewing court could ask: Given that the INA neither requires nor prohibits DAPA, does the President’s decision cohere with the spirit of the Take Care Clause? Does it promote accountability, bounded discretion, the rule of law, or non-opportunism?

DAPA was well-tailored to promote accountability—specifically, by enabling supervision of line-level immigration officials for compliance with what were identifiably the President’s priorities. Anil Kalhan explains that, because Congress has never micromanaged enforcement priorities, the Immigration and Naturalization Service (INS) and (later) Immigration and Customs Enforcement (ICE) had developed their own priorities for years prior to DAPA through policy statements and guidance documents.<sup>347</sup> Enforcement patterns, however, remained inconsistent, and the discretion exercised by line-level officials increased, owing to—among other factors—“broad expansions in the categories of individuals potentially subject to removal proceedings, significant constrictions on eligibility for relief from removal, and tremendous growth in the resources available for enforcement activities.”<sup>348</sup> Agency heads struggled to supervise enforcement to ensure consistency with the priorities they set.<sup>349</sup> The problem was not that the policy statements and guidance documents were insufficiently detailed—it was that line-level officials substantively disagreed with the policies issued by their superiors.<sup>350</sup>

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mass admittance” and providing for the parole of individual aliens only for “compelling reasons in the public interest” (internal quotations omitted)).

345. Cox & Rodríguez, *supra* note 83, at 159.

346. *Id.* at 154.

347. Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 85–87 (2015).

348. *Id.* at 88.

349. *See Id.* at 88–89.

350. *See* Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 L. & SOC. INQUIRY 666, 677–79 (2014).

DACA and DAPA changed the status quo. They clarified the hierarchy of enforcement priorities set forth in prior memos and established new procedures for making discretionary decisions to deviate from those priorities. They also allocated enforcement discretion to top officials at a particular agency—DHS—and gave the responsibility for the process of individual adjudication to the United States Citizenship and Immigration Service (USCIS) rather than line-level ICE officials.<sup>351</sup> As Elizabeth Magill and Adrian Vermeule have hypothesized, the assignment of responsibility to top officials whose views are consistent with those of the President can facilitate supervision because such officials are more likely to exert tight control over the bureaucracy.<sup>352</sup> USCIS, which, unlike ICE, is primarily responsible for distributing benefits rather than pursuing lawbreakers, could also be expected to be more amenable to supervision than ICE.<sup>353</sup> Finally, DACA and DAPA made plain that the ultimate source of enforcement priorities was the President, who stood accountable for his decision.<sup>354</sup>

All of this is not to say that the President is constitutionally required to instruct agency heads to adopt general, prospective immigration enforcement programs that are identifiably *his* programs. It is to say that the arguments for and against DAPA's consistency with the INA's substantive ends wash out, and DAPA is consistent with one of the original functions of the Take Care Clause. That is enough to justify DAPA under the faithful execution framework.

This conclusion may be unsatisfying to those who suspect that DAPA was primarily designed to give effect to President Obama's policy preferences rather than to institutionalize enforcement discretion in a way that promotes uncontested constitutional values. But, as hard-look arbitrary and capricious review affords administrative decisionmakers a wide berth in view of the benefits of energetic governance and the risk that judges may err in identifying bad-faith behavior, so, too, does the faithful execution framework. Reviewing courts would undermine the Take Care Clause by allowing suspicion of bad faith to carry the day when neither the text nor the spirit of the statute that the President is executing dictates any particular decision and the President's actions are otherwise consistent with one of the original functions of the Take Care Clause.

#### B. THE TRAVEL BANS

Inquiries into whether presidential orders or proclamations—like President Trump's travel bans—are the product of opportunism rather than good-faith

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351. See Cox & Rodríguez, *supra* note 83, at 192–93.

352. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1040 (2011).

353. See Cox & Rodríguez, *supra* note 83, at 193–94.

354. It is true that President Obama was then serving his second term in office and thus could not be held accountable at the polls for his decision. We have good reason to believe, however, that incumbent presidents care about their legacy and are to that extent constrained by public opinion. See Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 854 (1999) (noting that “most presidents have put great emphasis on their legacies and, in particular, on being regarded in the eyes of history as strong and effective leaders”).

statutory implementation find a comfortable constitutional home in the Take Care Clause.

Consider the Ninth Circuit's decision in *Hawaii v. Trump*, enjoining EO-2 on the ground that the ban "exceeded the scope of the authority delegated to [the President] by Congress."<sup>355</sup> The per curiam opinion explained that the President had failed to make a "sufficient finding" that the entry of the identified classes of people "would be detrimental to the interests of the United States."<sup>356</sup> Specifically, although section 2(c) of EO-2 declared that "the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States,"<sup>357</sup> the panel held that EO-2 presented "no finding that present vetting standards are inadequate" or that there "will be harm to our national interests" absent its issuance.<sup>358</sup>

Similarly, the panel found that the scope of EO-2 was insufficiently connected to the Government's purported, concededly legitimate statutory interest in protecting national security. EO-2 contained "no finding that nationality alone renders entry of [a] broad class of individuals a heightened security risk" or that "current screening processes are inadequate."<sup>359</sup> The court did not explain how it arrived at its criteria for sufficiency, given that the relevant text—section 1182(f) of the INA—does not specify any such criteria.

Had the court relied upon the Take Care Clause, it could have rested its inquiry on solid constitutional ground. The Ninth Circuit was correct to reject the proposition that national security is a "talismanic incantation" that, once invoked, can support any and all exercise of executive power under [section] 1182(f),<sup>360</sup> because ensuring that the President does not use his authority under section 1182 (f) to pursue contextually illegitimate goals on the pretext of pursuing legitimate national security interests requires more searching inquiry. Inquiry that resembles hard-look arbitrary and capricious review can hold the President to his constitutional duty to execute the laws in good faith.

Determining whether the President's actions are calculated to achieve contextually legitimate ends does not necessarily require judicial parsing of the President's public statements.<sup>361</sup> It is true that, as Judge James Wynn, Jr. observed in a separate concurrence in the Fourth Circuit's decision enjoining the Proclamation, "contemporary statements by a *unitary* decisionmaker" can "provide particularly strong evidence of the decisionmaker's intent in taking a challenged action."<sup>362</sup> But the decision costs associated with judicial investigation of

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355. 859 F.3d 741, 755 (9th Cir. 2017) (per curiam).

356. *Id.* at 770.

357. Exec. Order. No. 13,780, 82 Fed. Reg. 13,209, 13,213 (Mar. 6, 2017).

358. *Hawaii v. Trump*, 859 F.3d at 771.

359. *Id.* at 772–73.

360. *Id.* at 774.

361. Doing so might, however, be necessary to determine whether he has actually adopted an action taken by an agency as his own, thus triggering the Take Care Clause.

362. *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 343 (4th Cir. 2018) (Wynn, J., concurring).

such evidence—including those borne by judges and litigants—together with any error costs imposed through any mistaken decisions brought about by such investigation, might not outweigh the epistemic benefits.<sup>363</sup> Insisting upon a reasonable fit between the ordinary meaning<sup>364</sup> of the text of executive orders and the facts and reasons cited and articulated in support of them may in most cases be sufficient to thwart bad-faith presidential decisionmaking.

The panel opinion in *Hawaii v. Trump*<sup>365</sup> contained no extended discussion of then-candidate Trump’s campaign promises<sup>366</sup> or the statements from his advisors<sup>367</sup> from which other courts inferred a goal of discriminating against Muslims.<sup>368</sup> And yet, the court was able to thwart the accomplishment of any discriminatory goals by examining the connection between means and purported ends and finding that connection to be insufficient. The panel stuck primarily to the text of the INA, the ordinary meaning of the text of the most recent executive order, and the factual findings made by the President at the time of the decision.<sup>369</sup> The panel did not have to speculate about what the President was truly seeking to accomplish—it was enough that the order he signed was not reasonably calculated to accomplish the concededly legitimate goals that he *did* identify.

In *Trump v. Hawaii*, a 5–4 majority of the Supreme Court upheld the third iteration of the travel ban—the Proclamation.<sup>370</sup> By the time President Trump issued the Proclamation, the Government had completed its worldwide review and concluded that eight countries—including five of the original seven Muslim-majority countries, as well as Chad, North Korea, and Venezuela—failed to meet a “baseline” standard. DHS, in consultation with the State Department and several intelligence agencies, used this standard to determine whether foreign governments’ information-sharing practices were sufficient to enable DHS to gauge the security threat their nationals presented.<sup>371</sup>

First, the Proclamation suspended the entry of all Iranian, North Korean, and Syrian nationals, except for Iranians seeking student and exchange visitor visas, on the ground that these countries did not cooperate with the United States in

363. See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 84 (2000) (raising this possibility in discussing judicial investigation of legislative history).

364. See BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* 1–2 (2015) (explaining that ordinary meaning is “determined by general principles of language usage that apply equally outside the law”). The prioritization of ordinary meaning does not require a commitment to textualism—judges of a variety of first-order interpretive-theoretical commitments consider ordinary meaning when such meaning is clear. *Id.* at 4 (“[T]hat language in legal texts should be interpreted in accordance with its ordinary meaning is a uniformly accepted presumption among judges.”).

365. 859 F.3d 741 (9th Cir. 2017).

366. See *Aziz v. Trump*, 234 F. Supp. 3d 724, 730 (E.D. Va. 2017) (discussing statements made by President Trump during his candidacy).

367. See *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1127 (D. Haw. 2017) (discussing statements made by Rudy Giuliani, Sean Spicer, and Steven Miller regarding the travel ban).

368. *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 558 (D. Md. 2017).

369. *Hawaii v. Trump*, 859 F.3d at 768–89.

370. 138 S. Ct. 2392, 2423 (2018).

371. See Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,162–63 (Sept. 24, 2017).

identifying security risks.<sup>372</sup> Second, it restricted the entry of nationals from Chad, Libya, and Yemen seeking immigrant visas and business or tourist visas, on the ground that these countries were “valuable counterterrorism partner[s]” but had serious information-sharing deficiencies.<sup>373</sup> Third, it suspended the entry of Somali nationals seeking immigrant visas and required additional scrutiny of Somali nationals seeking nonimmigrant visas on the ground that Somalia presented special risk factors despite meeting the baseline standard.<sup>374</sup> Finally, it limited the entry of Venezuelan government officials and their families on business or tourist visas on the ground that though Venezuela does not share information, Venezuelan nationals could be identified by other means.<sup>375</sup> The Proclamation exempted from its restrictions lawful permanent residents and foreign nationals who were granted asylum, and it provided for individualized waivers in cases where “a foreign national [has] demonstrate[d] . . . that . . . denying entry [during the suspension period] would cause . . . undue hardship . . . [and that his or her entry] would not pose a threat to . . . national security . . . [and] would be in the national interest.”<sup>376</sup> Finally, entry restrictions were made subject to reassessment by DHS on a continuing basis, and DHS was directed to report to the President every 180 days.<sup>377</sup> After the first such review period, the restrictions on Chad were removed pursuant to DHS’s recommendation.<sup>378</sup>

The *Trump v. Hawaii* majority seemed to be impressed with the findings set forth in the Proclamation. Chief Justice Roberts wrote that: the Proclamation “thoroughly describe[d] the process, agency evaluations, and recommendations underlying the President’s chosen restrictions”;<sup>379</sup> it was “more detailed than any prior order a President has issued under [section] 1182(f)”;<sup>380</sup> and, accordingly, it was more than sufficient to constitute a “find[ing]” for the purposes of section 1182(f).<sup>381</sup> He added that the “broad statutory text and the deference traditionally accorded the President in this sphere” did not counsel in favor of any “searching inquiry into the persuasiveness of the President’s justifications.”<sup>382</sup>

But was such searching scrutiny required by the Constitution? In evaluating the plaintiffs’ claims that the Proclamation violated the Establishment Clause because it was primarily designed to express religious animus, Roberts relied first upon *Mandel*.<sup>383</sup> He wrote that the Court has “reaffirmed and applied [the *Mandel* standard] . . . across different contexts and constitutional claims” arising from the

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372. *Id.* at 45,165–66.

373. *Id.* at 45,165–67.

374. *Id.* at 45,167.

375. *Id.* at 45,166.

376. *Id.* at 45,167–68.

377. *Id.* at 45,169.

378. See Proclamation No. 9723, 83 Fed. Reg. 15,937, 15,938–39 (April 10, 2018). DHS found that Chad improved its identity-management and information-sharing practices. *Id.* at 15,938.

379. *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018).

380. *Id.*

381. *Id.* at 2408 (internal quotation marks omitted).

382. *Id.* at 2409.

383. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).



denial of admission into the United States.<sup>384</sup> He further stated that a “conventional application” of *Mandel*’s holding that courts will not “look behind the exercise of [executive] discretion” concerning admission if that discretion is exercised “on the basis of . . . facially legitimate and bona fide reason[s]” would “put an end to [the Court’s] review” of the ban.<sup>385</sup> The Proclamation was, after all, facially neutral concerning religion—like EO-1 and EO-2, its text said nothing about religion.

Roberts assumed, however, that the Court could “look behind the face of the Proclamation to the extent of applying rational basis review,” which he described as entailing “consider[ation of] whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes.”<sup>386</sup> Importantly, Roberts explained that the Court would “uphold the policy so long as it *can reasonably be understood* to result from a justification independent of unconstitutional grounds”<sup>387</sup>—that is to say, even if the Government’s policy was most likely designed to accomplish unconstitutional ends.

Roberts then sought to determine whether the Proclamation could reasonably be understood as a good-faith effort to protect national security. He began by denying that the inclusion of five Muslim-majority countries in the Proclamation “support[ed] an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.”<sup>388</sup> He then highlighted the “worldwide review process undertaken by multiple Cabinet officials and their agencies” and denied that the final DHS report of the results of that process being “a mere 17 pages” warranted skepticism of its thoroughness.<sup>389</sup> Roberts also noted the removal of Iraq, Sudan, and Chad from the list of covered countries, which he took to be consistent with the Proclamation’s emphasis on the conditional nature of the travel restrictions and its provision for ongoing review of their necessity.<sup>390</sup> Roberts also considered the inclusion of “substantial” exceptions for various categories of foreign nationals and exemptions for permanent residents and people granted asylum.<sup>391</sup> He noted the creation of a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants, together with a direction to DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.<sup>392</sup>

As Justice Sonia Sotomayor pointed out in the principal dissent, however, the Government still could not “articulate any credible national-security interest that

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384. *Trump v. Hawaii*, 138 S. Ct. at 2419.

385. *Id.* at 2419–20, 2440.

386. *Id.* at 2420.

387. *Id.* (emphasis added).

388. *Id.* at 2421.

389. *Id.* (internal quotation marks omitted).

390. *Id.* at 2422.

391. *Id.*

392. *Id.* at 2422–23.

would go unaddressed by the current statutory scheme absent the Proclamation.”<sup>393</sup> In rejecting the “suggest[ion] that . . . entry restrictions are unnecessary because consular officers can simply deny visas in individual cases when an alien fails to carry his burden of proving admissibility,” the majority pointed to the Proclamation’s “finding” that “the failure of certain countries to provide reliable information prevents the Government from accurately determining whether an alien is inadmissible or poses a threat.”<sup>394</sup> But the Proclamation contained no finding that any inaccurate determinations had actually taken place because of “fraudulent or unreliable documentation.”<sup>395</sup> The majority’s deference to “the Executive’s evaluation of the underlying facts” thus included deference to hypothesized facts that were not part of the record.<sup>396</sup>

Deference to hypothesized facts is not unusual under rational basis review—indeed, the Court has expressly endorsed such deference in rational basis cases.<sup>397</sup> But this type of deference would be unacceptable under the faithful execution framework. This is not to say that a majority might plausibly have adopted the faithful execution framework, given that Take Care issues were not litigated and were not raised by amici. Nor is it to say that the faithful execution framework would certainly have produced the correct conclusion—namely, that the Proclamation was more likely than not the product of unconstitutional opportunism. But certain moves that the majority made in *Trump v. Hawaii*, which effectively guaranteed that the Proclamation would be upheld, would have been foreclosed by the faithful execution framework.

## V. OBJECTIONS

The above analysis might be criticized on the grounds that: (1) the theory of fiduciary government does not map well to the modern Executive Branch; (2) the application of ordinary administrative law doctrines to presidential decisionmaking is not only foreclosed by *Franklin* but is normatively undesirable; or (3) the faithful execution framework will lead the judiciary to be insufficiently deferential to the Executive Branch during emergencies, when the costs of any judicial error are likely to be particularly high and the Executive Branch’s institutional advantages are particularly pronounced. This section will address each criticism.

### A. FIDUCIARY PRESIDENTIAL ADMINISTRATION IS UNWORKABLE

Certain differences between private-law fiduciary relationships and relationships between government officials and ordinary members of the public are difficult to deny.<sup>398</sup> Examples include the following: although private fiduciary

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393. *Id.* at 2444 (Sotomayor, J., dissenting).

394. *Id.* at 2411 (majority opinion).

395. *See Id.*

396. *Id.* at 2422.

397. *See, e.g.,* FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); Flemming v. Nestor, 363 U.S. 603, 612 (1960).

398. For an extended critique of the theory of fiduciary government, see generally Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014).

agreements are inevitably incomplete, the transaction costs associated with them are lower, and the specification of the terms of such agreements is easier than in the context of legislation; private-sector beneficiaries can rely on financial incentives to reduce agency costs and use profitability to measure fiduciary performance, whereas it is difficult to even define what constitutes “good performance” for government officials; and it is comparatively much less costly for beneficiaries to switch private fiduciaries by, say, selling their shares, whereas members of the public are typically stuck with certain officials at least until the next election, and other officials are unlikely to be removed at all.

These differences, though real, should not be overstated. Even private fiduciary relationships are not identical in all respects. Nonetheless, they share common features that are also common to relationships between government officials and ordinary members of the public. The normative case is strong in both public and private contexts for the imposition of duties that align the incentives of power-exercising parties with the interests of vulnerable parties in contexts where agency costs would otherwise be too high to make a delegation of limited discretionary powers beneficial to both parties. Administrative law has already produced doctrines that effectively impose fiduciary duties on agencies. This Article has shown that those doctrines can be adapted so as to better align presidential incentives with the public’s interest in faithful execution of the laws.

Focusing attention directly on the President simplifies what might otherwise be an overwhelmingly complex inquiry into how to hold agency heads, supervisors, line-level officials, and agency lawyers to their fiduciary duties. Think of the President as the sole director of a particularly large corporation in which every American holds shares. We the shareholders can remove the President if we are unsatisfied with his performance, but monitoring his performance is extremely difficult,<sup>399</sup> removal is practically impossible between elections, and members of the public are—in general—rationally ignorant of much of the information that would be relevant to voting against a shirking or opportunistic president, given that such information is costly to acquire and is of little perceived benefit.<sup>400</sup>

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399. See AVINASH K. DIXIT, *THE MAKING OF ECONOMIC POLICY: A TRANSACTION-COST POLITICS PERSPECTIVE* 56 (First MIT Press Paperback ed. 1998); DOUGLASS C. NORTH, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE* 53–54 (2005); Shapiro & Steinzor, *supra* note 10, at 110–13 (highlighting the costs associated with monitoring government officials).

400. See Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 147 (1957) (hypothesizing that voters are “rational[ly]” ignorant about important issues of political life because the expected benefits of the relevant information are often too small relative to the costs of acquiring it); Ilya Somin, *Rational Ignorance*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF IGNORANCE STUDIES* 274, 274–79 (Matthias Gross & Linsey McGoey eds., 2015) (providing an overview of the concept of rational ignorance). It should be emphasized that “ignorant” is not a pejorative term in public choice theory—public officials as well as voters are held to be rationally unaware of certain things and aware of other things, owing to the positive costs of acquiring different kinds of information. See Donald J. Boudreaux & Eric Crampton, *Truth and Consequences: Some Economics of False Consciousness*, 8 INDEP. REV. 27, 29 (2003) (“Understanding rational ignorance begins with the recognition that knowledge is not only valuable but also costly . . . . No one ever learns all there is to know about anything.”).

The case for a “political judgment” rule that—like corporate law’s highly deferential business judgment rule—would presumptively insulate caretaking from judicial review, cannot rest on the existence of political-market discipline. Nor can it rest upon the judiciary’s lack of policymaking acumen. Although the decisions that Presidents make are highly complex, they are not appreciably more complex than the agency decisions that courts routinely review under hard-look arbitrary and capricious review.

The President cannot reasonably be expected to defend himself every time one of his subordinates acts carelessly or faithlessly. But he is not required to do so by the Take Care Clause, nor by the faithful execution framework—it is the President’s decisions that must be evaluated. Holding the President to his duties to personally, carefully, and faithfully follow his constitutional and statutory instructions is a judicially manageable enterprise, thanks to administrative law doctrines that are consistent with the functions of the Take Care Clause.

B. ORDINARY ADMINISTRATIVE LAW IS NOT—AND SHOULD NOT BE—APPLICABLE TO THE PRESIDENT

This faithful execution framework might seem incompatible with settled precedent. It requires that modified versions of administrative law doctrines that are associated with the APA be applied to the President, even though the Court in *Franklin* made plain that the APA does not apply to the President.

We have seen that treating the President as an agency for the purposes of the APA could be problematic in ways that the faithful execution framework is not. For instance, executive orders might need to be subjected to the notice-and-comment process, with its attendant data-production and response requirements and delays. Moreover, the Court in *Franklin* cited *Panama Refining Co.* when stressing that the President’s actions remain reviewable for their constitutionality, even if they are not reviewable under the APA.<sup>401</sup> As the standard of review advocated here closely resembles the standard used in *Panama Refining Co.*, *Franklin* does not foreclose the faithful execution framework.

One could argue that hard-look review is tailor-made for agencies because of concerns about opportunism that are peculiar to them. It is generally accepted that hard-look arbitrary and capricious review developed in part because of literature purporting to document agency “capture”—roughly, agency favoritism toward well-organized interest groups, made possible by those groups’ dominance of the regulatory decisionmaking process.<sup>402</sup> Some scholars, drawing upon public choice theory, have touted the President’s national constituency as a reason to

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This should not be taken to imply that it is hopeless to try to hold residents and other public officials politically accountable for abuses of administrative discretion. I do not view the choice between judicial and political implementation of the Take Care Clause as binary—each can serve as an insurance mechanism when the other fails.

401. See *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (citing *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935)).

402. See generally Merrill, *supra* note 298 (explaining the historical pattern of agency capture). For influential capture literature, see, for example, MARVER H. BERNSTEIN, *REGULATING BUSINESS BY*

think that interest groups have more difficulty capturing the President than they have capturing agencies.<sup>403</sup>

But the available evidence suggests that presidential policymaking can be distorted by the same kinds of interest-group influences that can distort agency policymaking. As summarized by Cynthia Farina, that evidence indicates that the White House “attends to some regulatory players more than others, responds to the wishes of groups that have been important to the President’s political success, favors electorally significant interests and areas, and furthers the personal interests of close presidential advisers.”<sup>404</sup> Further, opportunities for participation in the rulemaking process are far more widely distributed than in the context of presidential decisionmaking. Where agencies must listen to, and respond to, significant public comments,<sup>405</sup> the President is under no legal obligation to publicly announce his regulatory decisions, let alone respond to any public commentary.

Another potential criticism of the faithful execution framework is that agency decisionmaking merits more stringent scrutiny than presidential decisionmaking because the former is perceived by the public as being more threatening than the latter, even if in fact it is not. There is indeed an abiding sense of public unease about government by unelected bureaucrats, and heightened judicial review of agency decisionmaking might be defended as meeting a psychological need that is not felt in the context of decisionmaking by elected officials.<sup>406</sup> But an equally

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INDEPENDENT COMMISSION (Princeton Univ. Press reprint ed. 2015) (1955); GABRIEL KOLKO, *RAILROADS AND REGULATION 1877–1916* (1965); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1969); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467 (1952); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971). For overviews of agency capture, see B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* (1994); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 *J.L. ECON. & ORG.* 167 (1990).

403. See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *ARK. L. REV.* 23, 58–59 (1995); Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 *HARV. L. REV.* 1328, 1337–38 (1994); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 *CARDOZO L. REV.* 201, 215 (1993). Public choice theory applies microeconomic and game-theoretic insights to decisionmaking within the political “marketplace.” See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 877 (1975) (public choice theory posits that “legislation is ‘sold’ by the legislature and ‘bought’ by the beneficiaries of the legislation”). For overviews of this idea, see generally DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003), and Robert D. Tollison, *Public Choice and Legislation*, 74 *VA. L. REV.* 339 (1988).

404. See Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 *U. PA. J. CONST. L.* 357, 416 (2010). The “fire alarm” concept is original to Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 *AM. J. POL. SCI.* 165, 166 (1984).

405. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

406. See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 10–11* (1978) (describing a “strong and persisting challenge to the basic legitimacy of the administrative process”); Metzger, *supra* note 2, at 2 (chronicling a recent “resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal”).

pronounced strain of “tyrannophobia”<sup>407</sup>—a fear of dictatorship—can be traced through the Founding Era.<sup>408</sup> The psychological-need argument counsels in favor of extending hard-look review to presidential decisionmaking rather than limiting it to agency decisionmaking.

### C. DESPERATE TIMES REQUIRE JUDICIAL DEFERENCE

Can courts be relied upon to accurately determine whether presidential actions are calculated to achieve legitimate ends when national security is at stake, or a genuine state of emergency exists? Given that judicial errors are inevitable and the costs of judicial error are particularly high in such cases, might not a softer look be optimal? Eric Posner and Adrian Vermeule have so argued, contending on welfarist grounds that there is no reason to believe that the Executive’s error rate increases during emergencies, that judicial competence is particularly strained during emergencies, and that, accordingly, judicial review of executive action during emergencies ought to be more deferential than it is during ordinary times.<sup>409</sup>

The faithful execution framework will not prevent the President from capitalizing upon the Executive Branch’s comparative institutional advantages, either during emergencies or in other contexts where high-stakes decisions must be made under uncertain conditions. In practice, hard-look arbitrary and capricious review under the APA is already context-sensitive. Consider *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, in which the Court upheld a rule requiring licensing boards deciding whether to license nuclear power plants to assume that the permanent storage of certain nuclear waste would have no impact on the environment—the extent of that impact being presently unquantifiable.<sup>410</sup> The Court in *Baltimore Gas* emphasized that when agencies “mak[e] predictions, within [their] area of special expertise, at the frontiers of science,” courts are to be “at [their] most deferential.”<sup>411</sup>

In the national security context, there is a string of post-9/11 decisions by the D.C. Circuit upholding decisions of the Treasury Department’s Office of Foreign Assets Control to block the assets of “Specially Designated Global Terrorist” organizations.<sup>412</sup> Although Vermeule once characterized the latter decisions as examples of “‘soft look’ review, under which courts accept looser reasoning in support of agency policies and looser factfinding than would usually be

407. See Eric A. Posner & Adrian Vermeule, *Tyrannophobia*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 317, 317–18 (Tom Ginsburg ed., 2012) (defining tyrannophobia and observing that “[a]ll major presidents are called a ‘dictator’ or said to have ‘dictatorial powers’ from time to time”).

408. See WOOD, *supra* note 139.

409. See generally ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007) (arguing that the Government should be able to adjust policy and liberties during emergencies).

410. 462 U.S. 87, 104 (1983).

411. *Id.* at 103.

412. See, e.g., *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 739 (D.C. Cir. 2007); *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1184 (D.C. Cir. 2004); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003).

accepted”<sup>413</sup> and contrasted them with *State Farm*, he has subsequently concluded that arbitrary and capricious review is more deferential than it is often thought to be.<sup>414</sup>

The answers to the questions that Vermeule notes are raised by the *State Farm* framework—“How rational is rational? How arbitrary is arbitrary? When has adequate consideration been given to relevant factors, and when is an error of judgment clear?”—cannot be answered in the abstract.<sup>415</sup> In applying hard-look arbitrary and capricious review, judges have been aware that ordinary problems are not reasonably handled the same way as extraordinary problems and have given Executive Branch officials more space to respond to the latter without abdicating their own duties. We can expect judges to be equally aware when applying the faithful execution framework.

### CONCLUSION

Understanding the theory of fiduciary government that informs the Take Care Clause enables us to gain critical insight into the Clause’s meaning that would otherwise escape us. It also enables us to think more clearly about how the Take Care Clause ought to be judicially implemented today. The faithful execution framework will enable the President to enjoy as much discretion as the Constitution delegates to him—no more, no less.

It is of some comfort that modern administrative law has generated doctrines that are consistent with the Take Care Clause’s functions. Still, there is much work to be done. Administrative law provides grounds for confidence that more can be done to ensure that the President not only has “that species of power which is necessary” to execute the laws, but that he exercises that power in a manner consistent with the letter and spirit of the “supreme Law of the Land.” The faithful execution framework provides a means to that end.

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413. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1119–21 (2009). Compare Evan J. Criddle, *Mending Holes in the Rule of (Administrative) Law*, 104 NW. U. L. REV. COLLOQUY 309, 312 (2010) (responding that the courts in these cases “undertook a robust review of agency actions, identifying substantial evidence supporting the agency’s position and articulating a detailed explanation for upholding the agency’s decision” in all of these cases), with Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 512 n.289 (2005) (identifying *Holy Land Foundation* as an instance of hard-look review and emphasizing that the district court conducted a “detailed review of the administrative record”).

414. See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1358 (2016). That is not to say that it has no bite. Although Vermeule and Gersen have documented what they describe as a “remarkable” agency win rate of 92% in arbitrariness challenges that reach the Supreme Court, the authors acknowledge that “[s]election effects . . . [may] throw a fly into the soup.” *Id.* at 1368. Specifically, rational agencies may be more likely to adopt and subsequently defend policies that are amply supported by evidence and calculated to achieve legitimate ends with hard-look review in the backdrop than they would be absent hard-look review. *Id.* at 1367. If indeed they are, it would not be surprising that agencies rarely lose when the policies they do adopt and defend are challenged, and we should not infer that agencies are not discouraged by hard-look review from formulating opportunistic policies, the expected value of which are decreased by the probability of their judicial detection.

415. Vermeule, *supra* note 413, at 1119.