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ARTICLES

THE PRESIDENT'S STATUTORY POWERS TO ADMINISTER THE LAWS

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When does a statute grant powers to the President as opposed to other officials? Prominent theories of presidential power argue or assume that any statute granting authority to an executive officer also implicitly confers that authority upon the President. This Article challenges that statutory construction. It argues that the President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name. Congress's enduring practice of granting power to executive officers subject to express conditions of presidential control supports a strong negative inference that the President has no directive authority when a statute grants authority to an executive officer without any mention of presidential control. Such a construction also has significant institutional advantages: Not only is Congress generally ill equipped to police the validity of the President's assertions of statutory authority, but the President has strong incentives to claim that his actions are authorized by existing statutes. Limiting the occasions for the President to claim statutory power to those statutes in which Congress has expressly granted him authority helps to restrict the President's adventurous assertions of statutory power and provides a check on the President internal to the executive branch, while still recognizing Congress's important interests in placing certain matters in the President's own hands.

This statutory conclusion further implies—contrary to the suggestion of Dean Elena Kagan—that presidential direction of administrative agency action may not qualify for judicial deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. *unless the statute expressly grants authority to the President. It also provides an account of the legal status of executive orders and other presidential directives that lack independent constitutional authorization: Those directives may legally bind the discretion of executive officials and the public only if the President acts under a statute granting power to the President in name.*

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INTRODUCTION

Presidents do not live by constitutional authority alone. Many of the most important presidential initiatives involve claims of statutory authorization.[1] In our constitutional system, the significance of the President's assertions of statutory powers should come as no surprise. The Constitution grants the President relatively few independent powers, at least in comparison to Congress.[2] Yet presidents are held politically accountable for how the federal government as a whole functions, and in particular for how administrative agencies exercise their vast delegated powers.[3] That combination—a dearth of independent constitutional powers and political pressure to utilize the bureaucracy effectively—provides strong incentives for presidents to claim that already-existing statutes authorize them to implement policy. Moreover, locating an existing statutory power as a basis for action saves the President the potentially costly and slow process of assembling a majority in Congress to enact legislation. Thus to understand the scope of the President's powers we must understand the President's statutory powers. That, in turn, requires interpreting statutes.

With any grant of statutory authority, two different questions arise: First, what powers are given, and second, to whom? On this second question, a persisting strain of thought endorses the view that statutes grant-

1. See, e.g., Military Order of Nov. 13, 2001, 3 C.F.R. 918, 918 (2001), reprinted in 10 U.S.C. § 801 note (Supp. I 2001) (establishing military tribunals, claiming authority "as Commander in Chief of tbe Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution and sections 821 and 836 of title 10, United States Code" (citation omitted)); Exec. Order No. 12,294, 3 C.F.R. 139, 139 (1982), reprinted in 50 U.S.C. § 1701 note (2000) (suspending legal claims against Iran under authority of "the Constitution and statutes of the United States, including [specified sections of several Acts]"); Reorganization Plan No. 3 of 1970, 3 C.F.R. 199, 199 (1970), reprinted as amended in 42 U.S.C. § 4321 note (2000) (establishing Environmental Protection Agency "pursuant to the provisions of chapter 9 of title 5 of the United States Code"); Exec. Order No. 10,924, 26 Fed. Reg. 1789, 1789 (Mar. 1, 1961) (establishing Peace Corps, claiming authority under Mutual Security Act of 1954); Exec. Order No. 11,615, 3 C.F.R. 602, 602 (1971–1975) (repealed 1982) (establishing wage and price freeze, claiming authority under "the Constitution and statutes of the United States, including the Economic Stabilization Act of 1970").

2. E.g., Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545, 549 (2004) ("[T]he specific grants of power [to the President] in Article II are few and limited, especially when compared with Congress's extensive list of powers in Article I . . . ."); H. Jefferson Powell, The President's Authority over Foreign Affairs: An Executive Branch Perspective, 67 Geo. Wash. L. Rev. 527, 540 & n.65 (1999) [hereinafter Powell, President's Authority] ("Other than issuing pardons and making state of the union addresses, the President can do very little domestically without congressional authorization."); see also Charles L. Black, Jr., The Working Balance of the American Political Departments, 1 Hastings Const. L.Q. 13, 14–17 (1974) (providing compact taxonomy of President's constitutional powers).

3. E.g., David E. Lewis, Presidents and the Politics of Agency Design 4, 25–27 (2003) (noting that presidents are held accountable for "the success or failure of the entire government" and for their performance as managers of federal bureaucracy).

ing powers to executive officials should be read to include the President as an implied recipient of those powers. Attorney General Caleb Cushing's opinion arguing that no Head of Department granted authority by statute "can lawfully perform an *official* act against the will of the President"[4] is an early and prominent touchstone for this view. This reading of the President's statutory powers found supporters among subsequent attorneys general in the nineteenth century.[5] Its basic premises were embraced by the Supreme Court in *Myers v. United States*,[6] and it was expressly and forcefully endorsed in Department of Justice legal opinions during the 1980s.[7]

This broad construction of the scope of the President's statutory powers has prominent contemporary defenders. Dean Elena Kagan of the Harvard Law School argues that delegations to executive agency officials should be read as granting the President authority to direct agency

4. Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 469–70 (1855).

5. See, e.g., Approval of Court-Martial Sentence, 15 Op. Att'y Gen. 290, 296 (1877) ("[T]he direction of the President is to be presumed in all orders or instructions issuing from the proper Department, which, to be operative, require such direction." (citation omitted)); Relation of the President to the Executive Departments, 10 Op. Att'y Gen. 527, 527 (1863) ("[T]he true theory of departmental administration is, that heads of the Executive Departments shall discharge their administrative duties in such manner as the President may direct; they being, as one of my predecessors terms them 'executors of the will of the President.'" (quoting 7 Op. Att'y Gen. 453, 463 (1855))).

6. 272 U.S. 52 (1926). *Myers* addressed the scope of the President's removal powers over executive officers. See id. at 106. Chief Justice Taft's opinion endorses the position that the President has directive powers over the ordinary duties of executive officers, with the exception of only those duties "so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation . . . in a particular instance." Id. at 134–35. This Article, as noted below, argues that such duties are not merely exceptions, but the norm when Congress grants authority to executive officials. See infra Part II. Chief Justice Taft's 1916 lectures on presidential power provide some indication of the types of delegations to officials that he viewed as beyond the scope of presidential revision. In these lectures, Chief Justice Taft suggests that the President may remove the Comptroller of the Treasury and, with the consent of the Senate, seek appointment of another; "but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer." William Howard Taft, Our Chief Magistrate and His Powers 79–81, 125–26 (H. Jefferson Powell ed., photo. reprint 2002) (1924).

7. See, e.g., Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, 12 Op. Off. Legal Counsel 47, 48 (1988) (arguing that Constitution vests executive power in President alone, President is "solely responsible for supervising and directing the activities of his subordinates in carrying out executive functions," and "[a]ny attempt by Congress to constrain the President's authority to supervise and direct his subordinates in this respect, violates the Constitution"); Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. Off. Legal Counsel 632, 633 (1982) (defending view that President's constitutional authority includes "the right to supervise and review the work of such subordinate officials, including reports issued either to the public or to Congress").

action under those statutes.[8] Steven Calabresi and Saikrishna Prakash contend that statutes delegating power to an executive official, such as the Secretary of Labor, should be construed to permit the President to exercise the delegated powers directly—for instance, by personally promulgating workplace safety standards.[9] Further, scholars and officials implicitly endorse the same generous statutory constructions when they argue that the President's executive orders legally bind executive branch agencies.

The claim of implied statutory authorization has critical implications for constitutional theories of executive power as well as for administrative law. On the one hand, defenders of a strongly "unitary" executive argue that the Constitution requires that all executive power be vested in the President, and therefore that any agency action should be subject to presidential revision.[10] But that constitutional commitment does not eliminate the need for statutory interpretation. Even proponents of a strongly unitary executive must ask whether statutes delegating power to an agency can be fairly read to grant authority to the President. The answer to that question determines the practical outcome of their view. Specifically, it determines whether they may rely—as they implicitly have—on the principles of constitutional avoidance to accommodate their constitutional commitments through saving constructions of statutes,[11] or whether their constitutional commitments lead to the conclusion that

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8. Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2326–31 (2001).

9. Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 596 & n.210 (1994); see also Saikrishna B. Prakash, Hail to the Chief Administrator: The Framers and the President's Administrative Powers, 102 Yale L.J. 991, 991–94 (1993) (defending view that President retains constitutional authority to substitute his judgment for judgment of executive official delegated authority by Congress, even when Congress prohibits presidential intervention).

10. See, e.g., Calabresi & Prakash, supra note 9, at 594–96 (defending constitutional requirement of presidential power to act in place of agency officials and to nullify their actions); see also Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1166 (1992) (identifying, as mechanisms of presidential control over executive officers, power to supplant decisions of subordinate, to nullify subordinate's decisions even when statute purports to grant subordinate executive discretion, and to remove subordinate).

11. The doctrine of constitutional avoidance includes at least two distinct principles that could be invoked by strong unitarians. The "classical" principle of avoidance states that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring); see also Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1948–49 (1997) (defining classical avoidance). The "modern" principle of avoidance is triggered when a statute may be construed to avoid a construction that raises serious constitutional questions (even without determining that the construction would be unconstitutional). See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating that where there is more than one acceptable construction of statute courts should construe it to avoid raising serious constitutional problems); Vermeule, supra, at 1949 (describing modern principle of avoidance).

statutes delegating power to officials other than the President are unconstitutional.

On the other hand, the view that delegations to executive officials should be read to grant power to the President goes to fundamental questions of administrative law. At a basic level, these broad statutory constructions imply that delegations to executive officials—one of the basic building blocks of the administrative state—vest officials with a duty to the President that overrides their independent legal discretion. In other words, so read, these delegations do not empower an officer to make his or her own determinations in which the President's directions weigh as a significant factor; rather, they create a duty of compliance with the President's will. In addition, these broad readings of the President's statutory powers bear on the scope of judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[12] *Chevron* requires that courts accept reasonable agency constructions of statutes the agency administers as long as the statute does not clearly address the matter.[13] If delegations of power to officials are read as delegations to the President, then it is only a half-step further to conclude, as Kagan does, that judicial deference under *Chevron* to executive agencies should be a function of whether the agency action follows from the President's involvement.[14]

This Article challenges the recurring claim that statutes conferring power on executive officials should be read to include the President as an implied recipient of authority. The initial thrust of the argument is to show that as a matter of statutory construction the President has directive authority—that is, the power to act directly under the statute or to bind the discretion of lower level officials—only when the statute expressly grants power to the President in name. It then traces the implications of this emphasis on express delegation for the treatment of the President by the courts, executive branch officials, and Congress, and defends the following claims: First, the President's constructions of delegated authority should be eligible for *Chevron* deference, but only when they follow from statutes that expressly grant power to the President; second, absent an independent source of constitutional authority, executive orders and other presidential directives legally bind lower level officials only when they are based on express delegations to the President; third, in view of the structural advantages the President as a unilateral actor has over Congress, these narrow constructions of the President's statutory powers provide an important constraint, internal to the executive branch, on presidential authority.

Part I frames the question of whether a statute grants the President directive authority within the debate concerning the scope of the President's constitutionally granted powers and describes Kagan's argument

12. 467 U.S. 837 (1984).

13. Id. at 842–44; see also infra Part III.B.

14. See Kagan, supra note 8, at 2376–79.

that implying directive authority from statutory delegations to executive officials best reflects Congress's intentions.

Part II defends the core statutory interpretation conclusion that only grants of authority to the President by name confer directive authority to the President. It makes this statutory argument on the grounds of a long-standing and active congressional practice of granting authority to officials expressly subject to the control of the President. From the time of the Founding through today, Congress has expressly conditioned grants of authority to executive officials "with the approval of the President,"[15] "with the approbation of the President,"[16] "under the direction of the President,"[17] or words to similar effect. These statutes, which I call "mixed agency-President delegations," have been largely overlooked by contemporary proponents of broad readings of the President's directive authority. Once in view, they provide strong support for the conclusion that statutory grants of authority to agency officials alone, absent such conditions, do not authorize the President to act or to bind the discretion of lower-level officials. Rather, the statutory grants of authority to an official (alone) should be read as vesting the official with an independent duty and discretion, not a legal duty to the President. Part II also responds to the familiar objection that the fact that the President has removal power over executive officials implies that the President has, either as a matter of principle or in practice, directive authority over these officials.

Parts III, IV, and V pursue the implications of rejecting the broad readings of the President's statutory powers for the courts, executive actors, and Congress, respectively. Part III examines judicial review. Based on broad constructions of the President's directive powers, Kagan and others argue that deference under *Chevron* should apply only when the agency's action is the product of presidential direction.[18] But rejecting that broad construction also prohibits making *Chevron* deference a function of presidential direction. Rather, even in the context of presidential involvement, *Chevron* deference should track Congress's express choice of delegate, not the President's influence. Thus the President's statutory constructions are eligible for *Chevron* deference only with regard to statutes that expressly grant authority to the President; the President "administers" only those statutes. Part III also argues that proponents of a unitary conception of the executive should accept this view because the

15. E.g., 7 U.S.C. § 610(c) (2000); 16 U.S.C § 459r (2000); 40 U.S.C.A. § 17302(a) (West 2005).

16. E.g., Act of July 21, 1848, ch. 108, § 3, 9 Stat. 249, 250.

17. E.g., Act of May 19, 1828, ch. 55, § 10, 4 Stat. 270, 274. Congress also has a practice of delegating authority directly to the President but specifying the agency or official through whom the President must act. See, e.g., 50 U.S.C. § 197 (2000) (empowering President, through Secretary of Transportation, to purchase or charter merchant vessels under specified circumstances); 50 U.S.C. app. § 468(h) (empowering President, through Secretary of Defense, to control steel production for national defense).

18. See Kagan, supra note 8, at 2376.

framework of judicial review of the President's claims of statutory authority is within Congress's control.

Part IV shows how the denial of the President's implied directive authority under statutory delegations clarifies the allocation of power to interpret statutes within the contemporary executive branch and the legal status of executive orders. Presidents frequently direct agency officials to exercise their delegated powers in particular ways. But absent an independent constitutional power, the statutory limits on the President's directive authority suggest that executive orders may legally bind agency officials or third parties only when the President has been granted authority in name. In this respect, the Article aims to define the scope of the conventional assumption that executive orders and other presidential directives bind executive officials. Moreover, restricting their binding authority to express statutory delegations exposes the intriguing and important question of agency statutory interpretation: How should agency officials treat presidential directives that do not legally bind their discretion?

Part V addresses how these statutory conclusions in turn influence Congress's choice of delegate and defends the appeal of these constructions. Whenever Congress grants authority, it faces a choice: Should it grant authority to the agency alone, to the President, to the agency subject to the President's control, or to some other institutional arrangement? That question of institutional design requires an understanding of the legal implications of Congress's choice of delegate.

The narrower statutory constructions this Article defends bolster both democratic and rule-of-law values. These constructions emphasize that the scope of the President's statutory authority (as well as of judicial deference) is in Congress's control by way of its choice of delegate.[19] The implication that a delegation to an executive branch official creates a duty under the law, not to the President, enforces a check, internal to the executive branch, on the President's power. Structural advantages of the President over Congress—such as the capacity to act unilaterally and poor congressional incentives to monitor expansions of presidential power—provide grounds to embrace such constraints on executive power.

19. This emphasis on Congress's power to establish the boundaries of the President's statutory authority may bolster the argument against courts implying incidental powers from the President's constitutional status. It is at least consistent with the view that Congress's power under the Necessary and Proper Clause to determine the authority of the executive and the judiciary beyond the enumerated powers of Articles II and III (and others clearly incident to those provisions) defeats the implication of presidential powers. See William W. Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, Law & Contemp. Probs., Spring 1976, at 102, 107, 118.

I. THE PRESIDENT'S DIRECTIVE AUTHORITY: THE STATUTORY QUESTION

The threshold inquiry is a question of statutory interpretation: When does a statute grant the President directive authority—that is, the authority to act directly under the statute or to bind legally lower-level officials? From the time of the Founding, Congress has granted authority directly to the President.[20] In those cases, the President, as the named statutory delegate, obviously has authority to act under the statute. Thus the central statutory interpretation question is whether delegations to other officials should be read as granting the President directive authority. Should a delegation to the Secretary of Labor be read as authorizing the President to direct the Secretary's exercise of discretion?

A. *A Nineteenth-Century Controversy Alive and Well*

The question of whether the President possesses directive authority when a statute grants power to an executive officer was a recurring point of disagreement during the nineteenth century among attorneys general, but has never been squarely addressed by the Supreme Court. A brief overview of these early interpretations helps to frame the basis for the contemporary debate.[21]

Throughout the nineteenth century, presidents repeatedly sought the advice of their Attorneys General regarding the scope of presidential powers and their duties to intervene and direct specific outcomes in the absence of a grant of authority to the President in name. In these opinions, the attorneys general proceed from opposed assumptions about what powers the Constitution grants the President to execute the law and how statutory delegations should be construed. The sparring opinions of attorneys general William Wirt and Caleb Cushing illustrate two contrasting visions of the President's statutory powers.

1. *Attorney General Wirt's View.* — In an early and influential opinion, Attorney General William Wirt argues that when a statute grants authority to a particular officer, it is that officer who has discretion under it, and the President lacks the power to substitute his judgment for that of the statutory delegate:

> If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and

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20. John Preston Comer, Legislative Functions of National Administrative Authorities 52–64 (1927) (documenting early delegations).

21. For helpful treatments of these early debates, see Edward S. Corwin, The President: Office and Powers 1787–1984, at 94–100 (5th rev. ed. 1984); H. Jefferson Powell, The Constitution and the Attorneys General 33–34, 95–96, 148 (1999) [hereinafter Powell, Constitution]; Morton Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291, 80 Mich. L. Rev. 193, 204–07 (1981); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 605–08 (1984) [hereinafter Strauss, Place of Agencies].

> were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.[22]

Wirt argues that the Constitution's Take Care Clause[23] obliges the President with a supervisory duty, but does not grant the power to act directly under a grant of authority to an executive official.[24] Thus, when a statute grants authority to an officer, Wirt writes that the Take Care Clause does not authorize the President "to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*."[25] For Wirt, that limitation on the President's powers occurs even when the exercise of the duty involves some discretion, such as the appointment of a local postmaster.[26] Based on this constitutional premise, Wirt treats the question as one of statutory interpretation—when has Congress granted the President authority to intervene? On that question, Wirt reasoned that a statutory grant of authority to an officer alone did not itself provide the President with directive powers due largely to Congress's practice of granting authority that expressly mentions the President.[27] For Wirt, a statutory delegation to an executive official vests independent discretion and duties in that official.

2. *Attorney General Cushing's View.* — Attorney General Caleb Cushing defends a sharply opposed view of the President's power over statutory delegations to executive officials. Cushing posits that the Constitution places all executive officers under the direction of the President, even where the statute places authority with the officer.[28] With regard to legislation in which "an executive act is, by law, required to be performed by a given Head of Department," Cushing writes that "the Head of the Department is subject to the direction of the President."[29] That direction implies that the President can control how the executive official performs his or her duties: "[N]o Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts."[30] For Cushing, the Constitution's vesting of executive power in the President and its Take Care Clause requires that statutory authorization be "implied" where Congress has not "expressly recognize[d] the direction of the President."[31] Were it otherwise, Cushing goes on to argne, Congress "might by statute so divide and transfer the executive power as utterly to subvert the Government,

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22. The President and Accounting Officers, 1 Op. Att'y Gen. 624, 625 (1823).

23. U.S. Const. art. II, § 3.

24. 1 Op. Att'y Gen. at 626.

25. Id.

26. Id.

27. Id. at 626–28.

28. Relation of the President to Executive Departments, 7 Op. Att'y Gen. 453, 469–70 (1855).

29. Id. at 469.

30. Id. at 469–70.

31. Id. at 463.

and to change it into a parliamentary despotism" with a "nominal executive chief utterly powerless."[32]

Still, Cushing notes a difference between statutes that designate a particular executive officer as the agent of administration and those that grant authority to the President in name. Where the statute designates an officer, the President's choice of agent to implement the law is "fixed," and the President's order will be given to the particular officer designated.[33] Thus, for Cushing, the Constitution itself requires that all discretionary authority granted by Congress to the executive branch official conform to the will of the President; on this view, a grant of power to an executive official specifies the agent through whom the President must act, but does not, as Wirt argues, grant independent legal discretion to the official himself.

These contrasting visions of the President's statutory powers reverberated in the opinions of subsequent attorneys general.[34] But, as noted above, the full scope of their disagreement has not been resolved by the Supreme Court. *Marbury v. Madison* allows for a narrow class of duties granted to executive officials with which the President may not interfere.[35] These duties fall on one side of the sharp distinction *Marbury* forges between executive acts that may be examined by courts and those that may not. On the one hand, where the executive officer "possesses a constitutional or legal discretion," the officer "is to conform precisely to the will of the President."[36] "[N]othing can be more perfectly clear," Chief Justice Marshall intones, than that duties falling into that bundle "are only politically examinable."[37] On the other hand are ministerial duties, involving no discretion, upon which individual rights depend. *Marbury* grants that where a "specific duty is assigned by law" directing an officer "to perform certain acts," that person, as "an officer of the law," can be held legally accountable for his actions if individuals' rights depend upon the performance of that duty.[38]

The Supreme Court confirmed in *Kendall v. United States* that when a statute imposes a nondiscretionary duty of performance upon an officer, the President lacks authority to order the officer not to perform the

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32. Id. at 470.

33. Id. at 468.

34. See, e.g., Appeal of Illinois to the President, 11 Op. Att'y Gen. 14, 16 (1864) (relying on Wirt's previous opinion at 1 Op. Att'y Gen. 624 (1823)); Charwin Land Grant, 18 Op. Att'y Gen. 31, 33 (1884) (relying on 11 Op. Att'y Gen. 14 (1864) and sources cited therein); Relation of the President to the Executive Departments, 10 Op. Att'y Gen. 527, 527 (1863) (relying on Cushing's view that President may direct executive officers as they are "executors of the will of the President"); see also Powell, Constitution, supra note 21, at 33–34, 148 (discussing Wirt's and Cushing's opinions, their relation, and providing references to their opinions in later opinions of attorneys general).

35. 5 U.S. (1 Cranch) 137, 166 (1803).

36. Id.

37. Id.

38. Id.

duty.[39] Congress had enacted a statute that required the Postmaster General to grant a financial credit to particular parties in the amount determined by a government solicitor. The performance of this duty was "mere[ly] ministerial"; under the act, the Postmaster General was "vested with no discretion or control over the decisions of the solicitor."[40] In *Kendall*, the Court rejected the suggestion that based on the Take Care Clause the President possessed an authority to direct the Postmaster General's conduct. Such a construction "would be clothing the President with a power entirely to control the legislation of congress."[41] Rather, where the duty imposed by statute upon the officer is of a merely ministerial character, "the duty and responsibility grow out of and are subject to control of the law, not to the direction of the President."[42]

Together *Kendall* and *Marbury* support the view that when a statute grants authority to an official to perform a merely ministerial, nondiscretionary act, the President may not order the official to withhold the action. But what of a statute that grants an executive official legal discretion? Such statutes, we know, make up the critical core of delegations in the administrative state. *Kendall* clearly concerned the exercise of ministerial duties, so it does not define the scope of the President's authority over an official with delegated discretion.[43] *Marbury* also provides little guidance.[44] Administrative law has overcome *Marbury*'s sharp distinction between, on the one side, actions that are political, where conforming to the will of the President is required and judicial review is unavailable, and, on the other, actions involving no discretion, where compliance with the statutory mandate cannot be disturbed by the President and judicial enforcement is available. As Peter Strauss has pointed out, that distinction obscures "the vast middle ground that is the home of administrative law."[45] A fundamental premise of contemporary administrative law is that agency officials are legally accountable for their decisionmaking, even when it involves the exercise of discretion.[46] But if discretion no

39. 37 U.S. (12 Pet.) 524, 610 (1838).

40. Id. at 610–11.

41. Id. at 613.

42. Id. at 610.

43. Indeed, it is on precisely these grounds that Cushing distinguished *Kendall* to support his view that the President controls all executive officials' discretion: "As the law now stands expounded by the Supreme Court," Cushing writes, "it is conceded that a head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. . . . In general, his duties are not merely ministerial." Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 345–46 (1854).

44. For a discussion of *Marbury*'s contribution to the foundations of administrative law, see Thomas W. Merrill, *Marbury v. Madison* as the First Great Administrative Law Decision, 37 J. Marshall L. Rev. 481 (2004).

45. Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965, 977 (1997) [hereinafter Strauss, Presidential Rulemaking].

46. See, e.g., Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (2000) ("[R]eviewing court shall . . . hold unlawful . . . agency action, findings, and conclusions

longer excludes judicial review, does it still require that the official granted the authority "conform precisely to the will of the President"?

B. *The Ineluctable Question of Statutory Authorization*

It is that open question—that is, the authority of the President to direct the discretionary powers delegated to officials—the contemporary debate pursues. The question involves both a constitutional and statutory component. The constitutional component asks whether (and when) the Constitution requires that the President have the power to direct the discretion of executive officials granted authority by statute. The statutory question asks when a statute can be construed to grant directive authority to the President. But regardless of the position taken on the constitutional issue, one must address the statutory question.

The unavoidability of the statutory question is obvious for those, in company with Wirt, who take the view that neither the Take Care Clause nor the Vesting Clause grants the President broad directive authority. On that view, the President's directive authority is resolved through statutory interpretation.

But, as noted at the outset, even proponents of the strongly unitary conception of the executive cannot avoid this question of statutory interpretation. On the strongly unitary view of the executive, the Constitution requires that all executive power be vested in the President, and as a result, "executive officers can act only in the President's stead."[47] But a constitutional requirement of course does not itself imply that the legislation complies with it. Thus strong unitarians must ask what is the most natural reading of delegations to executive officials, and whether it is permissible based on the doctrine of constitutional avoidance to imply authority to the President from delegations to executive officials. Part II.D below addresses the unitarian's reliance on constitutional avoidance.

C. *Statutory Powers Implied by Presidential Influence*

Dean Elena Kagan's article, *Presidential Administration*,[48] provides the most developed statutory argument that the President's directive authority extends to all grants of authority to executive officials.[49] The statutory question, as Kagan frames it, is a matter of choice between two different interpretive principles or presumptions: one in which delegations to the agencies are read to grant authority to the agency official alone, and an-

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found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (stating that APA § 702 established presumption of judicial review for one adversely affected by agency action).

47. Calabresi & Prakash, supra note 9, at 595.

48. Kagan, supra note 8.

49. For an argument that the scope of the President's implied statutory powers depends on a functional analysis of the power at issue, see Harold H. Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 495–506 (1979).

other in which these delegations are read to authorize the official specified, rather than other agency officials, but also the President.[50]

Kagan's own answer is that reading delegations to agency officials as authorizing the President's directive authority "reflect[s], more accurately than any other [interpretive principle], the general intent and understanding of Congress,"[51] and has greater policy justification.[52] Kagan's argument for this position on Congress's intentions is based on a comparison between delegations to independent and executive agencies. When Congress delegates authority to an independent agency, Kagan writes, Congress aims "to insulate agency decisionmaking from the President's influence."[53] The limits on the President's removal power over independent agency officials mean that these officials are not subordinate to the President, and thus Kagan suggests it would be odd for Congress to have made these officials subject to the President's directive authority.[54]

In contrast, when Congress grants power to an executive branch official, Kagan notes that it delegates to an official that the President nominates, may remove at will, and may subject to extensive procedural requirements.[55] In view of these controls and the norms of deference executive branch officials give to the President's views, Kagan reasons that "when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President."[56] The difficulty in distinguishing between the President's ability to influence agency officials and actually directing their exercise of delegated authority "provides reason to doubt any congressional intent to disaggregate them, in the absence of specific evidence of that desire."[57]

Kagan contends that the fact that Congress does delegate power directly to the President poses no objection to her view. For Kagan—as for Cushing—delegations to the President grant something that delegations to agency officials do not: These delegations grant the President the au-

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50. See Kagan, supra note 8, at 2326–27.

51. Id. at 2328.

52. Id. at 2330–46.

53. Id. at 2327. Kagan proceeds from the assumption, reflected in current law, that Congress has the constitutional authority to impose for-cause restrictions on the President's removal powers. See id. at 2326; see also Morrison v. Olson, 487 U.S. 654, 691–93 (1988) (upholding constitutionality of statute providing good cause standard for removal of independent counsel); Humphrey's Ex'r v. United States, 295 U.S. 602, 626–29 (1935) (upholding constitutionality of statute permitting President to remove Federal Trade Commission members only for cause). Independent agencies are agencies whose heads or members the President may not remove at will. See Kagan, supra note 8, at 2247.

54. Kagan, supra note 8, at 2327.

55. Id. For examples of executive orders that impose procedural requirements on executive branch officials, see Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 note (2000); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 note (1988) (repealed 1993).

56. Kagan, supra note 8, at 2327.

57. Id. at 2328.

thority to choose which lower-level official the President wishes to implement the delegated authority, whereas a delegation to executive officials "deprives the President of this choice."[58] In view of that distinction, Kagan suggests that the negative implication from delegations to the President alone does not undermine the interpretive presumption that "the President has ultimate control over all executive agency decisions."[59]

Kagan then acknowledges what would count as a basis for departure from her position:

> Only if Congress sometimes stipulated that a delegation of power to an agency official was subject to the ultimate control of the President—which Congress has not, to my knowledge—would a claim of this kind (that is, a claim relying on the negative implication of other statutes) succeed in defeating my argument.[60]

II. MIXED DELEGATIONS AND THE CASE AGAINST IMPLIED STATUTORY AUTHORIZATION OF THE PRESIDENT

If Congress's legislative practice were to name only an agency official or the President alone as the statutory delegate, then the difference between a delegation to an independent agency and an executive agency would provide a basis to embrace the view that the President has directive authority under delegations to executive officers. Congress, however, has a more varied practice in selecting the officers to whom it delegates authority than Kagan acknowledges. As this Part shows, many statutes condition the grant of authority to either the President or the agency on the approval, direction, control, findings, or involvement of the other. I refer to these as "mixed agency-President delegations." Congress has several different varieties of these delegations. From the earliest days of the republic, it has delegated authority to an agency to act subject to the President's control.[61] Congress also has delegated authority to the President to act though a specified agent,[62] and to the President to act upon the recommendation of a cabinet secretary[63] or the joint recommendation of cabinet secretaries.[64]

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58. Id. at 2329; see also Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 468 (1855).

59. Kagan, supra note 8, at 2329.

60. Id. at 2329–30.

61. See infra Part II.A.1.

62. See infra Part II.A.2.

63. See, e.g., 16 U.S.C. § 111a (2000) ("[T]he President of the United States is authorized, upon the recommendation of the Secretary of the Interior, to add to the said Mesa Verde National Park, Colorado, by executive proclamation."); 16 U.S.C. § 693 ("[T]he President of the United States is authorized, upon the recommendation of the Secretary of Agriculture, to establish by public proclamation certain specified areas within Ouachita National Forest as game sanctuaries and refuges."); 43 U.S.C. § 121 (2000) ("Upon the recommendation of the Secretary of the Interior, the President may order the discontinuance of any land office and the transfer of any of its business and archives.").

64. For example, 16 U.S.C. § 192b provides:

This Part argues that in view of these express provisions of presidential control in delegations to executive officials, delegations to executive officials alone—"simple delegations"—should not be read to grant directive authority to the President.[65] Part V offers a defense of the underlying appeal of this more narrow construction of the scope of the President's authority in view of the President's institutional advantages over Congress.[66]

> The President of the United States is authorized, upon the recommendation of the Secretary of the Interior, and with respect to lands located in a national forest upon the joint recommendation of the Secretaries of Interior and of Agriculture, to add to the Rocky Mountain National Park, in the State of Colorado . . . .

And 16 U.S.C. § 552a provides:

> The President, upon recommendation of the Secretaries of the Interior and Agriculture, may, by Executive order, when in his judgment the public interest would be best served thereby and after reasonable notice has been given through the Department of the Interior, restore any reserved national-forest lands covered by a cooperative agreement with the Secretary of Agriculture . . . .

65. Nor should simple delegations be read to grant authority to the President but foreclose the agent through whom those powers must be implemented.

66. Scholars have defended the view that the President lacks directive authority under statutes that delegate power to other officers, but have not focused on the extent to which mixed agency-President delegations strengthen this position. Rather, to the extent that these delegations surface, scholarly focus has been largely on Congress's early statutes granting authority to Secretaries subject to the President's control (and their implications for the unitary executive debate). Pildes and Sunstein, for instance, take the position that the President lacks directive authority under statutes delegating to agencies. With regard to mixed agency-President delegation, they comment without elaboration that "[s]ome support for this understanding is provided . . . by early opinions of the Attorney General." Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 25 n.97 (1995). Harold Bruff also takes the position that the President lacks directive authority. Bruff cites Wirt's opinion in support of this view, but does not elaborate on the implications of mixed agency-President delegations for the interpretation of simple delegations to agencies. See Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533, 539 & n.37 (1989). For additional examples of scholarly exploration of Congress's early authority-granting statutes, see Calabresi & Prakash, supra note 9, at 647–63 (describing Congress's early practice of granting authority to Secretaries subject to President's control and its bearing on unitary executive debate); Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211, 239–42 (1989) (same); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 27–30 (1994) (same); Peter M. Shane, Independent Policymaking and Presidential Power: A Constitutional Analysis, 57 Geo. Wash. L. Rev. 596, 615–16 (1989) (same); Charles Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U. L. Rev. 59, 71–75 (1983) (same); see also Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive During the First Half-Century, 47 Case W. Res. L. Rev. 1451, 1480 (1997) (noting that early Congress did not initially make Treasury subject to presidential control). Peter Strauss concludes that the agencies to whom Congress assigns responsibility, and not the President, have ultimate decisionmaking power, and notes that attorneys general "vacillated" on the President's directive power, but does not focus on Congress's practice of granting delegations to agencies subject to presidential control. See Strauss, Place of Agencies, supra note 21, at 605 & n.124, 649–50.

Robert Percival is the notable contemporary exception. He notes the existence of one mixed agency-President delegation of recent vintage as a basis to argue against a broad

A. *Mixed Agency-President Delegations*

1. *Conditional Delegations: Authorizing Agents Subject to the President's Control.* — From Congress's earliest years, it has enacted statutes that expressly condition the grant of authority to an official on the oversight of the President. In the statute that first established the Department of the Navy in 1789, for instance, the Secretary of the Navy's authority was granted expressly conditioned upon presidential direction. That delegation reads:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be an executive department under the denomination of the Department of the Navy, the chief officer of which shall be called the Secretary of the Navy, whose duty it shall be to execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States.[67]

Similarly, a statute enacted in 1789 directed the Secretary of War to "conduct the business of the said department in such manner, as the President of the United States shall from time to time order and instruct."[68] Likewise, the Secretary for the Department of Foreign Affairs (later renamed the Secretary of State) was ordered to perform duties "intrusted to him by the President" relative to foreign affairs "in such manner as the President of the United States shall from time to time order or instruct."[69] In contrast, the early statute granting power to the Secretary of the Treasury did not condition the Secretary's authority on the President's direction,[70] and the later statute permanently establishing the Post

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construction of the President's directive authority. See Robert V. Percival, Presidential Management of the Administrative State: The Not-So-Unitary Executive, 51 Duke L.J. 963, 1008 & n.258 (2001). Congress's practice of enacting mixed delegations also caught the attention of commentators in the 1920s.

Going back further, James Hart posited that these delegations did not support an inference that the President could not bind the discretion of agencies where the delegation made no mention of the President. See James Hart, The Ordinance Making Powers of the President of the United States 194–95 & n.30 (1924). I respond to this argument in Part II.C. John Preston Comer also noticed these early delegations (as well as some later ones) as part of his survey of delegated authority. See Comer, supra note 20, at 51–67.

67. Act of Apr. 30, 1789, ch. 35, § 1, 1 Stat. 553, 553.

68. Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (codified as amended at 5 U.S.C. § 301 (2000)). In 1798, the Secretary of War was also directed to "provide, at the public expense, under the direction of the President of the United States, all necessary books, instruments and apparatus, for the use and benefit of said regiment." Act of Apr. 27, 1798, ch. 33, § 3, 1 Stat. 552, 553 (repealed 1802).

69. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28–29 (codified as amended at 22 U.S.C. § 2651 (2000)).

70. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65–66 (codified as amended in scattered sections of 31 U.S.C. (2000)); see also Corwin, supra note 21, at 96 (noting that

Office and the position of the Postmaster General did not condition the vested authority on the President's involvement.[71]

Congress continued to condition grants of authority to executive officers on the President's oversight throughout the 1800s. In 1825, Congress authorized the Secretary of the Treasury "under the direction of the President" to adopt a measure for calculating the proof of liquors.[72] In 1828, Congress ordered the Secretary of the Treasury, "under the direction of the President," to establish rules and regulations "as the President . . . shall think proper" to establish fair appraisals of goods imported into the United States.[73] In 1848, Congress prescribed that military pen-

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unlike Secretaries of State and War, Secretary of Treasury was granted power to act under directions of Congress, not President). In a statute enacted nine days later that established salaries for executive officials, Congress referred to the Secretary and Comptroller of the Treasury as "Executive Officers of Government." Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67. Scholars dispute whether the latter act supports or contradicts the view that the early Congress had a unitary conception of the executive. Compare, e.g., Calabresi & Yoo, supra note 66, at 1480 n.92 (arguing that Act of Sept. 11, 1789 belies claim that Act of Sept. 2, 1789 did not establish Treasury as under President's control), with, e.g., Casper, supra note 66, at 240 (arguing that Act does not establish that Treasury was viewed as executive department), and Lessig & Sunstein, supra note 66, at 27 & n.123, 28 (same). But regardless of one's position on that question and the more general one whether the Constitution establishes a unitary executive, the interpretation question regarding the Act expressly granting authority to the Treasury remains.

71. Act of May 8, 1794, ch. 23, § 3, 1 Stat. 354, 357.

72. Act of Jan. 12, 1825, ch. 4, 4 Stat. 79, 79–80 (repealed 1956).

73. Act of May 19, 1828, ch. 55, § 10, 4 Stat. 270, 274 (codified as amended at 31 U.S.C. § 331). Congress enacted other grants of authority to the Secretary of the Treasury subject to the President's control in the same period:

> That it shall be the duty of the Secretary of the Treasury, under the direction of the President of the United States, from time to time, to establish such rules and regulations, not inconsistent with the laws of the United States, as the President . . . shall think proper, to secure a just, faithful, and impartial appraisal of all goods, wares, and merchandise . . . imported into the United States . . . .

Act of July 14, 1832, ch. 227, § 9, 4 Stat. 583, 592, and

> [T]he Secretary of the Treasury . . . is . . . authorized, with the approbation of the President of the United States, to cause to be issued . . . treasury notes as the President may think expedient in payment of supplies, or debts . . . and the Secretary of the Treasury is further authorized, with the approbation of the President of the United States, to borrow . . . such sums as the President may think expedient, on the credit of such notes.

Act of June 30, 1812, ch. 111, § 4, 2 Stat. 766, 767. For additional examples of delegations to Secretaries subject to presidential control, see Act of Mar. 2, 1827, ch. 57, 4 Stat. 236, 236–37 ("[T]he surveyor general, under the direction of the President . . . is hereby, authorized and required to cause to be surveyed, marked, and designated, the northern boundary line of the state of Indiana . . . ."); Act of Mar. 3, 1819, ch. 102, § 1, 3 Stat. 534, 534 ("[I]t shall be the duty of the Secretary of the Treasury to provide, by contract, which shall be approved by the President . . . for building lighthouses, erecting beacons or land marks . . . ."); Act of Mar. 3, 1819, ch. 88, 3 Stat. 520, 520 ("[T]he Secretary of War . . . is hereby, authorized, under the direction of the President . . . to cause to be sold such military sites . . . as may have been found, or become useless for military purposes."); Act of Mar. 2, 1812, ch. 34, § 1, 2 Stat. 691, 691 ("[T]he Secretary of the Treasury . . . is hereby authorized and empowered, under the directions of the President . . . to purchase of

sions would be granted under rules and regulations "as the Secretary of War, with the approbation of the President of the United States, may prescribe."[74] In 1851, Congress granted authority to the Postmaster General to set rates for international postage "by and with the advice and consent of the President."[75] In 1861, Congress delegated authority to the Secretary of Treasury, "with the approbation of the President," both to issue regulations for the shipboard enforcement of the revenue laws[76] and for the appointment of inspectors and appraisers at ports.[77] And in 1862, Congress provided that regulations of the Secretary of the Navy would be recognized as regulations of the Navy Department, subject to alterations that the "Secretary of the Navy may adopt, with the approbation of the President of the United States."[78]

Congress maintained this practice from the late nineteenth century through the contemporary period. For instance, following the Civil War, Congress granted the Secretary of the Treasury, "with the approval of the President," the power to suspend commerce with states under the control of insurgents,[79] and later granted the Secretary of the Treasury, "subject to the approval of the President," authority to regulate the printing of reproductions of U.S. postage stamps for philatelic purposes in articles, books, and advertisements.[80]

The current statutes contain numerous examples of this sort of mixed agency-President delegation. To give a sampling, Congress grants the Secretary of Agriculture authority to make regulations with the force and effect of law to carry out the provisions regarding agricultural production "with the approval of the President";[81] grants the Secretary of the Interior, upon the same condition, the authority to convey recreational lands;[82] grants the Secretary of the Interior, "in such manner as the President may direct," authority to utilize property and resources of the fed-

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Winslow Lewis, his patent right . . . ."); Act of May 3, 1802, ch. 52, § 10, 2 Stat. 193, 195 ("[T]he marshal of the district of Columbia . . . is authorized and directed, with the approbation of the President . . . to cause a good and sufficient jail to be built . . . ."); Act of May 1, 1802, ch. 45, § 6, 2 Stat. 181, 182 ("[T]he Secretary of the Treasury, with the approbation of the President, is hereby authorized to prescribe and establish such forms and regulations, and the same from time to time, with like approbation, to alter and amend . . . .").

74. Act of July 21, 1848, ch. 108, § 3, 9 Stat. 249, 250.

75. Act of Mar. 3, 1851, ch. 20, § 2, 9 Stat. 587, 589.

76. Act of July 13, 1861, ch. 3, § 2, 12 Stat. 255, 256 (codified as amended at 50 U.S.C. § 219 (2000)).

77. Id. § 1, 12 Stat. at 256 (repealed 1966).

78. Act of July 14, 1862, ch. 164, § 5, 12 Stat. 561, 565 (codified as amended at 10 U.S.C. § 6011 (2000)).

79. Act of July 2, 1864, ch. 225, § 5, 13 Stat. 375, 376–77 (codified as amended at 50 U.S.C. § 206).

80. Act of June 25, 1948, ch. 25, § 504, 62 Stat. 683, 713–14 (codified as amended at 18 U.S.C. § 504 (2000)).

81. 7 U.S.C. § 610(c) (2000).

82. 16 U.S.C. § 459r (2000).

eral government in constructing water conservation projects;[83] grants the Secretary of Transportation the authority to issue rules and regulations, "subject to the approval of the President," regarding the anchorage of vessels in times of emergency;[84] grants the Secretary of Transportation the authority, without a hearing, "but subject to the approval of the President," to suspend the permits of foreign air carriers;[85] and grants the Secretary of Treasury and the United States Postal Service joint authority, "[w]ith the approval of the President," to issue regulations regarding the shipment of valuables by the government.[86]

In the last two decades, Congress has enacted many mixed agency-President delegations to the Secretaries of Defense and State. Congress has granted the Secretary of Defense, "under the direction of the President," responsibility for procurement of military equipment and supervision of military personnel[87] and has stipulated that the Secretary of Defense should, subject to the President's approval, report annually to the Chairman of the Joint Chiefs of Staff with policy guidance.[88] Likewise, Congress has authorized the Secretary of State, "[u]nder the direction of the President," to administer the Department of State[89] and to supervise leasing, financing, and cooperative projects with a foreign country.[90]

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83. Id. § 590z.

84. 50 U.S.C. § 191.

85. 49 U.S.C. § 41304(b) (2000); see also id. § 44302(c) (granting Secretary of Transportation authority "with the approval of the President" to provide insurance against any risk arising from operation of civilian aircraft).

86. 40 U.S.C. § 17302(a) (Supp. II 2002).

87. Foreign Military Sales Act, Pub. L. No. 90-629, § 42(c)(1), 82 Stat. 1320, 1327 (1968) (codified as amended at 22 U.S.C. § 2791(d)(1) (2000)).

88. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, sec. 102, § 113(g)(2), 100 Stat. 992, 996 (codified as amended at 10 U.S.C. § 113(g)(2) (2000)).

89. Foreign Service Act of 1980, Pub. L. No. 96-465, § 201(a), 94 Stat. 2071, 2078 (codified as amended at 22 U.S.C. § 3921(a)).

90. Id. § 2752(b). For additional examples, see E-Government Act of 2002, Pub. L. No. 107-347, sec. 302(a), § 11331(d), 116 Stat. 2899, 2956 (current version at 40 U.S.C. § 11331 and codified at 40 U.S.C. § 11331 note) ("To ensure fiscal and policy consistency, the Secretary shall exercise the authority conferred by this section subject to direction by the President and in coordination with the Director of the Office of Management and Budget."); Act of Aug. 21, 2002, Pub. L. No. 107-217, sec. 1, § 501(a)(2), 116 Stat. 1062, 1079 (codified as amended at 40 U.S.C. § 501(a)(2)) ("The Secretary of Defense may exempt the Department of Defense from an action taken by the Administrator of General Services under this subchapter, unless the President directs otherwise, whenever the Secretary determines that an exemption is in the best interests of national security."); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 836(b), 115 Stat. 1012, 1192 (2001) (codified at 10 U.S.C. § 2302 note (Supp. II 2002)) ("[T]be Secretary of Defense shall submit to the Committees on Armed Services . . . a report containing the Secretary's recommendations for . . . authority that the Secretary (subject to the direction of the President) determines necessary to support operations carried out to combat terrorism."); International Religious Freedom Act of 1998, Pub. L. No. 105-292, § 101(c)(3), 112 Stat. 2787, 2792 (codified at 22 U.S.C. § 6411(c)(3)) ("Subject to the direction of the President and the Secretary of State, the Ambassador at Large is

2. *Agency-Specified Delegations: Authorizing the President to Act Through Specified Agents.* — Congress also has an active contemporary practice of delegating authority to the President with a specification of the agent through whom the President must act.

In the current laws, for instance, Congress authorizes the President to establish policies regarding the creation of employment opportunities for the unemployed through the Secretary of Labor:

> [T]o promote achievement of full employment under this chapter and the Employment Act of 1946, the President, through the Secretary of Labor, shall develop policies and procedures and, as necessary, recommend programs for providing employment opportunities to individuals aged 16 and over in the civilian labor force who are able, willing, and seeking to work but who, despite serious efforts to obtain employment, remain unemployed.[91]

This same basic structure of granting power to the President to act through a specified official appears in numerous current laws. Current law provides that the President "shall, through the Secretary of State," promulgate rules to carry out powers regarding international agreements of the United States;[92] it grants the President the power to direct the Secretary of State to terminate air service agreements between the United States and a foreign country when a determination of dangerousness is made;[93] it stipulates that the President "should direct the Secretary of State" regarding initiating global research on climate change;[94] it grants

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authorized to represent the United States . . . ."); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1605(a), 103 Stat. 1352, 1598 (1989) ("[T]be Secretary of Defense may transfer to the Department of Energy, from funds appropriated to the Department of Defense, sucb sums . . . as the Secretary of Defense and the Secretary of Energy, with the approval of the President, determine are necessary for Atomic Energy Defense Activities.").

91. 15 U.S.C. § 3116(a) (2000) (citation omitted).

92. 1 U.S.C. § 112b(e) (2000); see also Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497, § 4(b)(6), 118 Stat. 4012, 4015 (to be codified at 50 U.S.C. § 1701 note) (authorizing President "acting through the Secretary of State and the Permanent Representative of the United States to the United Nations" to take actions against Sudanese Government for crimes committed in Darfur region); Arms Control and Disarmament Amendments Act of 1989 § 103, 22 U.S.C. § 2567 (amending section 27 of Arms Control and Disarmament Act to require that "two Special Representatives shall perform their duties and exercise their powers under the direction of the President and the Secretary of State, acting through the Director").

93. 22 U.S.C. § 5605(b)(2)(F)(ii)(I).

94. 15 U.S.C. § 2952(a). For other research and awareness legislation, see Victims of Trafficking and Violence Protection Act of 2000 § 106(b), 22 U.S.C. § 7104(b) (granting President authority "through the Secretary of Labor, the Secretary of Health and Human Services, the Attorney General, and the Secretary of State," to "carry out programs to increase public awareness" about trafficking); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 6(g)(1), § 112A, 117 Stat. 2875, 2884 (to be codified at 22 U.S.C. § 7109) (empowering President "througb the Council of Economic Advisors, the National Research Council of the National Academies, the Secretary of Labor, the Secretary of Health and Human Services, the Attorney General, the

the President, "through the Secretary of Defense," power to take possession of our system of transportation to transport troops in times of war;[95] and it empowers the President, "through the Secretary of Defense," to take possession of steel plants to ensure the availability of steel products required by the military.[96]

Current law also grants the President the authority, "through the Secretary of Transportation," to acquire foreign merchant vessels by agreement,[97] and the power to "direct the Secretary of Treasury" to carry out agreements entered into with Canada regarding the potato trade.[98] The President is further vested with the power "acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency" and the heads of other agencies, to promulgate regulations regarding natural resource assessments following discharges of oil.[99] Congress also has authorized the President "through the Secretary of Commerce" and other officials designated in the act, to carry out the United States' proposal for participation in international expositions.[100] In a 2002 Act regarding border security and visas, Congress defined the President as "the President of the United States, acting through the Assistant to the President for Homeland Security, in coordination with the Secretary of State, the Commissioner of Immigration and Naturalization, the Attorney General," and several other executive officials.[101]

Secretary of State, the Administrator of the United States Agency for International Development, and the Director of Central Intelligence" to promote research issues related to human trafficking); cf. Money Laundering and Financial Crimes Strategy Act of 1998 § 2(a), 31 U.S.C. § 5341 (2000) (requiring that President "acting through the Secretary and in consultation with the Attorney General" develop a national strategy to combat money laundering that shall address "any area the President, acting through the Secretary and in consultation with the Attorney General, considers appropriate").

95. 10 U.S.C. § 2644 (2000).

96. 50 U.S.C. app. § 468(h) (2000); cf. Defense Production Act Amendments of 1992 § 111, 50 U.S.C. app. § 2077(b)(1)(A) (requiring President "acting through the Secretary of Defense" to "identify critical components and critical technology items for each item on the Critical Items List of the Commanders-in-Chief of the Unified and Specified Commands and other items within the inventory of weapon systems and defense equipment").

97. 50 U.S.C. § 196.

98. United States-Canada Free-Trade Agreement Implementation Act of 1988 § 304(d)(3)(A), 19 U.S.C. § 2112 note (2000).

99. 33 U.S.C. § 2706(e)(1) (2000).

100. Act of Sept. 8, 1982, Pub. L. No. 97-254, § 2(a), 96 Stat. 808, 808; Act of Dec. 29, 1979, Puh. L. No. 96-169, § 2(a), 93 Stat. 1281, 1281.

101. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 2(6), 116 Stat. 543, 544 (codified at 8 U.S.C. § 1701(6) (Supp. II 2002)). In President Bush's signing statement, he specifically objected on constitutional grounds to this and other provisions requiring the President to coordinate with executive officials and Congress:

> The President's constitutional authority to supervise the unitary executive branch and take care that the laws be faithfully executed cannot be made by law subject to requirements to exercise those constitutional authorities through a particular

B. *Negative Implications from Mixed Agency-President Delegations*

Turning to the core question of how to construe discretionary delegations to executive officials, it should be clear that proponents of the broad view of the President's directive authority are arguing for a statutory implication in favor of the President. They contend that "Secretary of Labor" includes the President. If it does, it can do so only by an implied extension.

Congress's practice of enacting these two types of mixed agency-President delegations provides strong grounds to resist that implied extension. First, these statutes support the negative inference that when Congress simply delegates to an agency, without conditioning the delegation on the President's approval, the statute denies the President directive authority (contrary to Kagan's and Cushing's suggestions). Second, Congress's practice of granting authority to the President to act through a particular executive official calls into question the reading of delegations to agency officials as granting the President directive authority but fixing the agency through whom he or she must act (again *pace* Kagan and Cushing).

1. *The Negative Inference from Mixed to Simple Delegations Within the Same Act.* — The strongest and most obvious case against Kagan's and Cushing's position relies on the principle of statutory interpretation that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[102] This principle is a specific application of the general idea that the meaning conveyed by a statutory provision depends upon the social, linguistic, and legal context of its enactment.[103] Drawing

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member of the President's staff or in coordination or consultation with specified officers or elements of the Government.

Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 1 Pub. Papers 795 (May 14, 2002). "Accordingly," the President wrote, "the executive branch shall treat the purported requirements as precatory." Id. This statement suggests that the current administration views the statutory construction of these provisions as clear and in accordance with the interpretations defended below.

102. Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)); see also Barnhart v. Sigmon Coal Co., 534 U.S. 438, 454–62 (2002) (relying on same principle). The negative inferences for the meaning of one statutory provision drawn from another are stronger "[t]he more apparently deliberate the contrast . . . as applied, for example, to contrasting statutory sections originally enacted simultaneously." Field v. Mans, 516 U.S. 59, 75 (1995); see also Lindh v. Murphy, 521 U.S. 320, 330 (1997) (quoting *Field*, 516 U.S. at 75).

103. See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation 55–61 (1994) (argning that context is central to statutory interpretation); John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2456–70 (2003) (describing role of linguistic context and social context in modern statutory textualism); see also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

inferences from the inclusion or exclusion of language within the same act relies on the idea that the whole act is a central part of the context for its specific provisions. That idea assumes that it is appropriate for an interpreter to attach some level of coherence to a statute as a whole, and not merely to particular provisions. The basis for that presumption could be, as classical intentionalist theories maintain, that members of Congress have actual shared intentions when enacting a piece of legislation.[104] Alternatively, the basis could be the ascription of a collective intent, as modern statutory textualist theories posit, based on the public meaning conveyed by the final legislative product—the statutory text itself.[105] In any event, the meaning of a statutory provision is a function in part of the whole act in which it is included.[106]

For statutes that include both a mixed agency-President delegation and a delegation to an official without conditions of presidential control (a simple delegation), as many do,[107] this principle provides strong sup-

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104. See Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967, 968 n.1, 972–82 (2004) (describing intentionalism as view that meaning of text is determined by author's actual intent); John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419, 429–30 (2005) [hereinafter Manning, Textualism] (describing presumptions of classical intentionalism in statutory interpretation).

105. As Manning explains:

> Ascribing that sort of objectified intent to legislators [based on how a reasonable person conversant in applicable social conventions would read the statutory text] offers an intelligible way for textualists to hold them accountable for whatever law they have passed, whether or not they have any actual intent, singly or collectively, respecting its details.

Manning, Textualism, supra note 104, at 433 (emphasis omitted).

106. Based on these principles, the Supreme Court has concluded that some statutory provisions are in fact unambiguous even though they might be subject to several interpretations if viewed in isolation. The Court's recent decision in *Barnhart* provides an example, as John Manning notes. See id. at 445–47 (citing *Barnhart*, 534 U.S. at 445–46). The statute in question established a scheme for the payments of health care benefits for retired workers in the coal industry. The statute assigned retirees seeking payment of benefits either to existing companies that had signed prior benefits plans (signatories) and had employed the retiree, or to related companies of the signatory companies. Id. at 452 (citing 26 U.S.C. § 9701(c)(2) (2000)). The statute further provided that successors in interest to related companies were subject to liability, but did not make any provision concerning liability for successors in interest to signatories. See id. at 446 (citing 26 U.S.C. § 9701(c)(2)(A)). In view of the inclusion of successor in interest liability for one class of company and not for another, the Court refused to infer that successors in interest to signatories were liable. See *Barnhart*, 534 U.S. at 452–53. "Where Congress wanted to provide for successor liability in the Coal Act," the Court reasoned, "it did so explicitly, as demonstrated by the other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest.'" Id. In view of these statutory interpretation principles, the Court concluded that the statute was "unambiguous," and that there was therefore no occasion to defer to the Social Security Commissioner's contrary interpretation. Id. at 461–62.

107. Compare, e.g., Act of Aug. 21, 2002, Pub. L. No. 107-217, sec. 1, § 501(a)(2), 116 Stat. 1062, 1079 (codified at 40 U.S.C. § 501(a)(2) (Supp. II 2002)) (allowing Secretary of Defense to exempt Department of Defense from certain actions of Act "unless the

port for the conclusion that these two types of delegation have distinct meanings.

A 1994 Act providing for a comprehensive reorganization of the transportation laws provides a nice illustration.[108] The Act includes mixed agency-President delegations, delegations to the Secretary of Transportation alone, and delegations to the President alone. The Act grants, for instance, the Secretary of Transportation authority to suspend,

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President directs otherwise"), with id. § 549(d)(1), 116 Stat. at 1091 (codified at 40 U.S.C. § 549(d)(1)) (explaining that Secretary of Defense can determine whether to use surplus personal property for educational activities); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 836(b), 115 Stat. 1012, 1192 (2001) (codified at 10 U.S.C. § 2302 note (Supp. II 2002)) (granting Secretary of Defense authority to secure emergency procurements to combat terrorism "subject to the direction of the President"), with id. § 312(2), 115 Stat. at 1051 (codified at 10 U.S.C. § 2703(b)) (granting Secretary power to set up program to take care of "unexploded ordnance [and] discarded military munitions"); International Religious Freedom Act of 1998, Pub. L. No. 105-292, § 101(c)(3), 112 Stat. 2787, 2792 (codified at 22 U.S.C. § 6411(c)(3) (2000)) (granting authority to Ambassador at large to represent United States in religious freedom matters "[s]ubject to the direction of the President and the Secretary of State"), with id. § 101(d), 112 Stat. at 2792 (codified at 22 U.S.C. § 6411(d)) (directing Secretary of State to provide funding for Ambassador at large); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1605(a), 103 Stat. 1352, 1598 (1989) (codified as amended at 31 U.S.C. § 1531 note (2000)) (granting authority for Secretary of Defense to transfer funds to the Department of Energy for atomic energy defense "with the approval of the President"), with id. § 131(a)(1), 103 Stat. at 1381 (codified as amended at 10 U.S.C. § 221 (2000)) (ordering Secretary of Defense to cease production of F-14 aircraft); Foreign Service Act of 1980, Pub. L. No. 96-465, § 201(a), 94 Stat. 2071, 2078 (codified as amended at 22 U.S.C. § 3921(a)) (directing Secretary of State to run foreign service "under the direction of the President"), with id. § 105(d)(1), 94 Stat. at 2078 (codified as amended at 22 U.S.C. § 3905(d)(1)) (directing Secretary to establish minority recruitment program); Arms Control and Disarmament Act Amendments of 1977, Pub. L. No. 95-108, sec. 2(a), § 27, 91 Stat. 871, 871 (codified as amended at 22 U.S.C. § 2567) (granting Special Representative for Arms Control and Disarmament Negotiations powers to act "under the direction of the President and the Secretary of State, acting through the Director"), with id. sec. 4, § 37(a)(1), 91 Stat. at 871–72 (codified as amended at 22 U.S.C. § 2577) (requiring Director to report to Congress on arms control proposals); Foreign Military Sales Act of 1968, Pub. L. No. 90-629, § 2(b), 82 Stat. 1320, 1322 (codified as amended at 22 U.S.C. § 2752) (making Secretary of State responsible "under the direction of the President" for supervision of sales under Act), with id. § 36(a), 82 Stat. at 1326 (codified as amended at 22 U.S.C. § 2776) (directing Secretary of State to transmit to Congress semiannual reports on all exports under Act); Act of June 6, 1942, ch. 380, § 1, 56 Stat. 326, 326–27 (codified as amended at 16 U.S.C. § 459r (2000)) (authorizing Secretary of Interior with "the approval of the President" to convey or lease "recreational demonstration projects"), with id. § 2, 56 Stat. at 327 (codified as amended at 16 U.S.C. § 459s) (authorizing Secretary of Interior to file map with National Archives for each project enumerated in section); Agricultural Adjustment Act, ch. 25, § 10(c), 48 Stat. 31, 37 (1933) (codified as amended at 7 U.S.C. § 610(c) (2000)) (authorizing Secretary of Agriculture, with "approval of the President" to make regulations to carry out its provision), with id. § 6(b), 48 Stat. at 33 (repealed 1935) (authorizing Secretary to make contracts with cotton producers to sell cotton).

108. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 (codified as amended in scattered sections of U.S.C. (2000)).

without a hearing "but subject to the approval of the President,"[109] the operation of foreign air carriers in the United States based on certain findings. A neighboring provision separately authorizes the Secretary alone to issue permits to provide foreign air transportation.[110] In a separate provision, the Act grants the President sole emergency powers to determine if a foreign government is acting inconsistently with an international convention on unlawful aircraft and to suspend operations of air carriers to and from that country.[111] Moreover, the Act separately authorizes the President and several Secretaries to stop an air carrier from traveling between a foreign airport and the United States but imposes different conditions on the President and Secretaries for doing so.[112]

The proximity of these provisions to one another within a single act of Congress, as well as the distinct powers granted by these delegations, suggests that delegations to specified officials convey powers distinct from those delegated to officials subject to conditions of presidential approval or oversight. Indeed, for these statutes, if the simple delegation to the official were construed to grant the President directive authority, the express provision of presidential control in mixed agency-President delegations would be doing little work.[113] The natural construction to avoid that implication is that simple and mixed delegations do not both grant authority to an agency conditioned on the President's directive control.

2. *The Negative Implication from Mixed Delegations to Simple Delegations Generally.* — More general considerations suggest that these same nega-

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109. Id. sec. 1, § 41304(b), 108 Stat. at 1127 (codified as amended at 49 U.S.C. § 41304(b) (2000)); see also id. sec. 1, § 44302(b), 108 Stat. at 1168 (codified as amended at 49 U.S.C. § 44302(b)) (allowing Secretary of Transportation to provide insurance to aircraft operator "only with the approval of the President").

110. Id. sec. 1, § 41302, 108 Stat. at 1126 (codified as amended at 49 U.S.C. § 41302).

111. Id. sec. 1, § 40106(b), 108 Stat. at 1103 (codified as amended at 49 U.S.C. § 40106(b)).

112. Compare id. sec. 1, § 44907(d)(1)(D), 108 Stat. at 1210–11 (codified as amended at 49 U.S.C. § 44907(d)(1)(D)) (authorizing President to "prohibit an air carrier or foreign air carrier from providing transportation between the United States and any other foreign airport" if that air carrier also serves airport which Secretary of Transportation has decided does not maintain adequate security), with id. sec. 1, § 44907(e), 108 Stat. at 1210 (codified as amended at 49 U.S.C. § 44907(e)) (mandating Secretary of Transportation, with approval of Secretary of State, to suspend right of air carrier to provide air transportation to foreign airport based on specified findings of Secretary of Transportation).

113. One objection to this view is that express provisions for presidential involvement in mixed agency-President delegations could be read to create an affirmative obligation on behalf of the agency to confer with the President, but that simple delegations do not preclude presidential direction. On this view, express provisions for presidential control serve to emphasize the agency's need to consult with the President and the President's accountability for the decision. The difficulty with this objection, however, is that it requires interpreting statutory grants of authority in a way that separates the President's statutory authority and accountability. It requires accepting the view that Congress sought to grant authority to the President without express accountability. The importance of transparency as a basis for political accountability counsels against such a separation.

tive implications attach to simple delegations to executive officials even when the statute granting authority to an executive official does not also include a mixed agency-President delegation. The relevant legal context for construing statutory language extends beyond the four corners of the act in which the language was enacted. As the Supreme Court has frequently noted, "courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later enacted statutes."[114] As we have seen, mixed agency-President delegations have been used since the earliest days of the republic and are still used frequently in current statutes. They thus provide a form of statutory usage and congressional practice that informs the interpretation of simple delegations to executive officials.[115] The wide-ranging practice of enacting mixed delegations alongside simple delegations suggests that in this legal context simple and mixed delegations have distinct meanings, and that a reasonable legislator would have used a mixed agency-President delegation if he or she sought to grant the President directive control.[116]

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114. Branch v. Smith, 538 U.S. 254, 281 (2003) (Scalia, J.); see also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989))).

115. A widely noted contemporary Supreme Court application of these principles is in *West Virginia University Hospitals, Inc. v. Casey*, in which the Court concluded that the provision for "a reasonable attorney's fee" within a civil rights statute did not include recovery of a plaintiff's expert fees. 499 U.S. 83, 92 (1991) (interpreting 42 U.S.C. § 1988(b) (2000)). The Court's principal ground for doing so was that numerous other statutes explicitly provided for expert fees in addition to attorney's fees. Id. at 88. The Court concluded that this broad range of "statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense," and that interpreting attorney's fees to include expert fees would render the separate provision of expert fees in numerous statutes a redundancy. Id. at 92. For a discussion of *West Virginia University Hospitals* as an application of textualist principles, see Manning, Textualism, supra note 104, at 441–44. But see T. Alexander Aleinikoff & Theodore M. Shaw, The Costs of Incoherence: A Comment on Plain Meaning, *West Virginia University Hospitals, Inc. v. Casey*, and Due Process of Statutory Interpretation, 45 Vand. L. Rev. 687, 691–98 (1992) (criticizing *West Virginia University Hospitals* as ignoring civil rights context of fee provision and specifically prior practice of awarding expert fees in civil rights cases); William W. Buzbee, The One-Congress Fiction in Statutory Interpretation, 149 U. Pa. L. Rev. 171, 189–93, 225–29 (2000) (criticizing inferences across statutes and distinguishing them from application of expressio unius canon within single statute).

116. One objection to this broader negative implication arises from Congress's practice of specifying that a power is to be exercised "in the judgment" of a particular official. For instance, amidst a general authorization to the Secretary of Housing and Urban Development to regulate insurance for financial institutions involved in the housing market, Title 12 provides:

> The Secretary is authorized to waive compliance with regulations heretofore and hereafter prescribed by him with respect to the interest and maturity of the terms, conditions, and restrictions under which loans, advances of credit, and purchases may be insured under this section and section 1706(a) of this title, if *in his judgment* the enforcement of such regulations would impose an injustice upon an insured institution [and meets other specified conditions].

While the same provisions in different statutes need not carry the same meaning and arguments from statutory usage are sometimes controversial,[117] the grounds for applying a negative implication here are particularly strong. Where, for instance, one statute grants powers to an official subject to presidential control and another statute grants powers to the same official without those conditions, it would be a strain to suggest a reasonable official or other interpreter would not view these statutes as conveying distinct duties: Under X statute my discretion is conditioned on express presidential direction, and under Y statute it is not.

Moreover, the statutory question here is both recurrent and structural. The question of to whom Congress should delegate authority is not an obscure or technical question; it arises whenever Congress enacts a statute that grants powers. As we have seen, Congress has been making textual distinctions between delegations to officials alone and delegations conditioned on the President's oversight since its earliest days.[118] Indeed, when Congress delegates authority, the choice of the recipient of

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12 U.S.C. § 1703(d) (2000) (emphasis added). The specification that particular powers are granted "in the judgment" of an official, the objection runs, suggests that a simple delegation should not be read as vesting independent discretion and authority in the official. This objection thus aims to deploy a similar negative implication to that advanced here against the position I defend.

There are, however, at least two different responses to this objection. First, the "in the judgment" of the official language frequently appears in the context of provisions that grant a broader range of discretion—close to a totality-of-the-circumstances determination under the statute—such as that involved in decisions to waive compliance with regulations and settle claims. See, e.g., id.; see also 7 U.S.C. § 603(b)(2) (2000) (granting settlement power to Secretary of Agriculture as "in his judgment may be deemed advisable, and to carry out the provisions of this section"); 10 U.S.C. § 3038(b)(4) (2000) (providing Secretary of Defense authority to waive specified requirements for appointment of Chief Army Reserve if "in the judgment of the Secretary of Defense" officer is qualified and waiver "is necessary for the good of the service"); 25 U.S.C. § 161c (2000) (providing that funds held in tribal fund accounts which "in the judgment of the Secretary of the Interior, [are] not required for the purpose for which the fund was created" may be transferred to the Treasury); 30 U.S.C. § 209 (2000) (granting Secretary of Interior power to waive and suspend royalties on leases "whenever in his judgment" it is necessary "to promote development" or the leases "cannot be successfully operated under the terms provided"). Second and more generally, the negative implication invoked by this objection is not as strong as the implication from mixed agency-President delegations to simple delegations. Specifically, the negative implication defended here is based on the difference between a statute granting authority to one officer, such as an executive official, and granting authority to an officer subject to the control of the President. In contrast, a simple delegation to an executive official and a delegation to the official to act "in [his or her] judgment" are relatively more similar and appear to be nearly cognate ways of granting discretion and authority to the official, neither of which mention the President. The negative implication advanced by the objection thus requires taking the view that when Congress uses generally similar but not identical formulations to grant power to an official, each formulation must be read to be mutually exclusive.

117. See supra note 115.

118. See supra Part II.A.

the authority is a "crucial threshold decision[ ]."[119] The structural choice whether to delegate to the President, cabinet secretary, independent agency or commission, government corporation, or some combination of these actors affects how policy is made, which institutional actors will influence that policy, and the cost of monitoring the chosen delegate.[120] It also can determine which default procedures apply to implement the power.[121] As a result, "[a]ny notion that political actors might confine their attention to policymaking and turn organizational design over to neutral criteria or efficiency experts denies the realities of politics."[122]

Empirical work confirms that Congress's choice of delegate matters and matters *to Congress*. David Epstein and Sharyn O'Halloran demonstrate empirically that when there is divided government—when the majority in Congress and the President are from different parties—Congress delegates relatively more frequently to actors with greater insulation from the President's control.[123] Likewise, David Lewis shows that in periods of unified government, the probability that agencies created will be insulated from presidential control decreased with the strength of the congressional majority; in periods of divided government, the probability that agencies created will be insulated from presidential control increased with the size of the congressional majority.[124]

Congress's preferences for who receives power presumably would not shift based on its relationship with the President if the choice of delegate were of little significance. From Congress's perspective, the difference between delegation to an executive or independent agency is likely to be more significant than the distinction between delegating authority to a cabinet secretary alone or to also make that secretary subject to direct presidential control. But the choice between mixed and simple delegations must have some significance to Congress, especially in view of its

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119. David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers 153 (1999).

120. Id.

121. In the absence of another statutory provision, Congress's choice of delegate determines whether the Administrative Procedure Act applies. The Supreme Court has held that the APA does not apply to the President. See Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992). But the Act does apply generally to agency action. See 5 U.S.C. § 551(1) (2000) (defining agency broadly to include any authority of government except for certain specified institutions). Kagan argues that the Court's decision in *Franklin* should not bar judicial review under the APA when the President directs an agency action under a statute that grants power to the agency. See Kagan, supra note 8, at 2351. Based on that reading of *Franklin*, Kagan avoids the implication that the APA's application depends on whether the President has directed the agency's action. Though Kagan notes that the Court's decision in *Franklin* concerned a statute that committed the issue to the President's discretion, she does not appear to dispute that under *Franklin* Congress can avoid the application of the APA by delegating authority directly to the President. See id.

122. Terry M. Moe, The Politics of Bureaucratic Structure, *in* Can the Government Govern? 267, 268 (John E. Chubb & Paul E. Peterson eds., 1989) [hereinafter Moe, Bureaucratic Structure].

123. See Epstein & O'Halloran, supra note 119, at 154–62.

124. See Lewis, supra note 3, at 58–69.

enduring practice of enacting mixed agency-President delegations. Finally, how we construe to whom a statute grants power does not directly define the statute's substantive scope or remedies. As a result, abiding by the vocabulary of delegation established by congressional practice seems less likely to allow a form of statutory usage to obscure more salient features of the statute's context than invoking statutory usage to construe its substantive scope or remedial provisions.

3. *The Analogy to the Determination of Which Agency "Administers" a Statute.* — A further source of support for courts not reading delegations to executive officials as including implied authorizations for the President comes from an analogous question presented by the *Chevron* doctrine. Within the context of defining the boundaries of the application of the *Chevron* doctrine, courts must determine whether an agency "administers" a particular statute.[125] *Chevron* deference applies only to an agency's construction of a statute that the agency administers.[126] Under this doctrine, courts must make agency-statute pairings. The basis for these pairings is whether the statute grants exclusive policymaking power to the agency invoking deference under *Chevron*; courts routinely deny *Chevron* deference when an agency interprets a statute administered by another agency,[127] when the agency interprets a statute that does not delegate authority to the agency,[128] or when the power to

125. See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (framing standard of review applicable to "an agency's construction of the statute which it administers").

126. See Adams Fruit Co. v. Barrett, 494 U.S. 638, 649–50 (1990) (denying *Chevron* deference to agency's interpretation of statute it did not administer); Dep't of Treasury v. FLRA, 837 F.2d 1163, 1167 (D.C. Cir. 1988) (same). The discussion of judicial review in Part III aims to define the set of statutes, if any, that the President "administers." See infra Part III.D.

127. See, e.g., Gen. Servs. Admin. v. FLRA, 86 F.3d 1185, 1187 (D.C. Cir. 1996) (granting deference to General Services Administration (GSA), not FLRA, because GSA administers statute); Div. of Military & Naval Affairs v. FLRA, 683 F.2d 45, 48 (2d Cir. 1982) (refusing deference to FLRA because GSA administers statute); Whaley v. Schweiker, 663 F.2d 871, 873 (9th Cir. 1981) (holding that Secretary of Health and Human Services' interpretation of regulations administered by Veterans Administrator did not qualify for deference).

128. See, e.g., Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (denying *Chevron* deference for agency's interpretation of APA because agency is not charged with administering Act); Arango Marquez v. INS, 346 F.3d 892, 902 (9th Cir. 2003) (denying deference for INS interpretation of Illegal Immigration Reform and Immigrant Responsibility Act of 1996); Chrzanoski v. Ashcroft, 327 F.3d 188, 191 (2d Cir. 2003) (denying deference for Bureau of Immigration Appeals interpretation of criminal statutes, but granting deference to Bureau's construction of Immigration and Nationality Act); Kuhali v. Reno, 266 F.3d 93, 102 (2d Cir. 2001) (same); Ass'n of Civilian Technicians, Silver Barons Chapter v. FLRA, 200 F.3d 590, 592 (9th Cir. 2000) (denying deference to FLRA's interpretations of Department of Defense Appropriations Act because FLRA does not administer Act); Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory Comm'n, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (denying deference for agency's interpretation of APA); Ill. Nat'l Guard v. FLRA, 854 F.2d 1396, 1400 (D.C. Cir. 1988) (denying deference

implement a statute has not been granted exclusively to a single agency.[129]

The manner in which the courts determine whether a particular agency has been granted exclusive policymaking authority under the statute is revealing: They determine whether the agency is the express and exclusive recipient of statutory authority. Thus, in circumstances in which there is a conflict between the interpretation of the statutory delegate and a lower-level official within the department, courts apply deference to the statutory delegate's construction.[130] Likewise, where there is no express delegation of authority to the agency, there is no basis for deference.[131]

The denial of *Chevron* deference makes a crucial statutory point: For agencies that are not the express and exclusive recipients of statutory authority, courts take the view that it is not permissible to construe these statutes as implying authority for unmentioned officials. The General Services Administration does not include the Federal Labor Relations Authority.[132] Indeed, if implications in favor of other agencies were permissible, then these decisions denying *Chevron* deference would require the courts to engage in the standard *Chevron* two-step inquiry.[133] But these decisions do not reach that second step.

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for FLRA's interpretation of Technician Act and Schedules Act because FLRA does not administer either).

129. See, e.g., Rapaport v. U.S. Dep't of Treasury, 59 F.3d 212, 216–17 (D.C. Cir. 1995) (stating that *Chevron* deference is not owed to Office of Thrift Supervision's interpretation of statute because agency shares responsibility for administration with three other agencies); 1185 Ave. of the Ams. Assocs. v. Resolution Trust Corp., 22 F.3d 494, 497 (2d Cir. 1994) ("'[W]here . . . Congress has entrusted more than one federal agency with the administration of a statute . . . a reviewing court does not . . . owe as much deference as it might otherwise give if the interpretation were made by a single agency similarly entrusted with powers of interpretation.'" (quoting Lieberman v. FTC, 771 F.2d 32, 37 (2d Cir. 1985))); Wachtel v. Office of Thrift Supervision, 982 F.2d 581, 585 (D.C. Cir. 1993) (suggesting that where statutory provision is administered by multiple agencies, *Chevron* deference does not apply).

130. See, e.g., Elliot Coal Mining Co. v. Dir., Office of Workers' Comp. Programs, 17 F.3d 616, 626–27 (3rd Cir. 1994) (granting deference to Secretary of Labor's interpretation, not Director of Office of Workers' Compensation Programs, because Director was merely delegate of Secretary); see also Energy W. Mining Co. v. Fed. Mine Safety & Health Comm'n, 40 F.3d 457, 463–64 (D.C. Cir. 1994) (holding that Secretary of Labor's interpretation of Mine Act is entitled to deference where grants of authority to Commission concerned only review of ALJ decisions, not grant of rulemaking power).

131. See, e.g., decisions cited supra note 128.

132. See supra note 127.

133. The canon of constitutional avoidance may take precedence over *Chevron* deference in the sense that a court will construe an ambiguous statute to avoid a constitutional question even if the agency has adopted a different construction. See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–75 (1988) (invoking avoidance and reversing agency interpretation generally entitled to *Chevron* deference); Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1340–41 (D.C. Cir. 2002) ("[C]onstitutional avoidance canon of statutory interpretation trumps *Chevron* deference."). The argument here, in contrast, relies on the idea that operation of the

Because the core question at issue in this *Chevron* context is about the identity of the recipient of statutory authority, the manner in which courts make that determination provides a useful analogy to our question: If implications are not allowed with regard to agencies in the *Chevron* context, then why would it be permissible, as a matter of statutory interpretation, to imply an authorization of power to the President in delegations to executive officials? The only response would have to be that the President is different. The President, of course, has constitutional status and sits in a hierarchically superior position to executive agencies, not merely a horizontal one. But should the President's hierarchical position exempt him from the norm, visible in the *Chevron* context, that directive authority resides where Congress has expressly placed it?

Congress's frequent delegations to the President alone or to the President in mixed agency-President delegations, as well as the structural importance of the recipient of delegated authority, suggest that these provisions convey distinct meanings within American public law, and support the view that the most natural reading of delegations to executive officials is that they do not by implication grant power to the President.

Kagan suggests that it ultimately may be impossible to determine whether or not Congress sought to authorize presidential directive authority via its delegations to executive officials, and argues as a result that the inquiry should turn on policy considerations—indeed the very policy considerations that should guide congressional choice about whether to grant or withhold directive authority to the President.[134] With Congress's practice of enacting mixed agency-President delegations in view, this movement to policy may be less rapid. Still, Part V offers a defense of the appeal of this narrower construction and the view of administrative law it implies.

C. *The Distinction Between Removal and Directive Authority*

Perhaps the strongest objection to denying implied statutory authority to the President stems from the President's power to remove executive officials. The core of this objection is that, at least with regard to officers that the President may fire at will, the President can ensure that they follow his will such that there is little practical difference between removal and directive authority, and therefore little reason to presume a "congressional intent to disaggregate them."[135]

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canon of constitutional avoidance is barred if a Court concludes that a statute is unambiguous for *Chevron* purposes.

134. See Kagan, supra note 8, at 2330.

135. Id. at 2328; see also Proposed Executive Order Entitled "Federal Regulation," 5 Op. Off. Legal Counsel 59, 61 (1981) (suggesting it would be anomalous to attribute to Congress intention to insulate officers subject to presidential removal from presidential supervision); Pildes & Sunstein, supra note 66, at 24–25. Notice that the objection addressed here is to statutory constructions this Article defends, not to arguments that the

To be sure, the President has a wide variety of means to influence executive officials. The President may shape the agencies' agendas through appointments, may communicate informally and ex parte with them,[136] and may exercise control over the vetting of their high-level staff. Presidential regulatory review provides a mechanism for monitoring executive agency activities,[137] and agency heads generally have a sense of loyalty to the President or commitment to the President's policies.[138] The President may exert control over agency litigation through the Department of Justice, may fire the executive branch officials if they do not fall in line, and may seek reappointment of other officers. All of this authority means that the President is likely to be able to implement his policy through executive branch agencies, and it will be difficult for a court to police the line between presidential influence, on the one hand, and presidential direction of agency action, on the other.[139]

More than one generation of commentators have argued that these considerations support presuming a congressional intention to grant the President authority to bind the exercise of discretion of agency heads subject to removal. In the 1920s, James Hart, an early scholar of the American administrative state and professor at Columbia Law School, specifically addressed the significance of congressional delegation to agency officials subject to the President's control.[140] Hart contended that these delegations do not support the inference that the President lacked authority to bind an agency's discretion when the delegation ran only to the agency.[141] With regard to statutes that simply confer authority on an agency head without conditions of the President's control, Hart argued that the President has the power to "control the exercise of their discretion, for that control is implied in his power of removal."[142] More than eighty years later, Kagan also embraces this view.[143]

Constitution requires that the President have directive authority under any grant of power to an executive official or otherwise.

136. See, e.g., Sierra Club v. Costle, 657 F.2d 298, 404–08 (D.C. Cir. 1981) (embracing broad permissibility of ex parte contacts between White House and agencies during informal rulemaking); see also Paul R. Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943, 969, 987 (1980) (defending cautious approach to limiting White House ex parte contacts in informal rulemaking).

137. See generally Pildes & Sunstein, supra note 66, at 11–33 (describing background and effect of regulatory review orders).

138. See Harold J. Krent, Presidential Powers 25 (2005) (noting that presidents can generally ensure that their priorities will be implemented by selecting individuals who carry out those responsibilities).

139. Pildes & Sunstein, supra note 66, at 25–26.

140. Hart, supra note 66, at 195 n.30.

141. Id.

142. Id.

143. Recall that Kagan suggests there are reasons to doubt that Congress seeks to disaggregate removal and directive authority when it delegates to executive branch officers because of the scope of influence the President has when he may remove the agency head at will. See supra text accompanying notes 55–57.

But the fact that the President has removal authority need not imply that any statutory grant of authority to the official also gives the President directive authority. The power to remove certainly does not logically require directive authority; it is in principle possible to vest independent legal discretion in an official, even though the official is subject to removal by the President.[144] Rather, the thrust of the objection is practical: In view of the influence that removal power carries with it, what purpose is there in making a distinction?

Consider a conflict between an executive officer and the President. Whenever an executive officer refuses to carry out an action that the President directs (and does not choose to resign over the issue), the President may either accommodate the official in some way or fire the official and seek appointment of one more congenial to the President's policies. Firing typically has a much higher political cost to the President than (successfully) directing an official's exercise of discretion.[145] President Nixon's efforts to remove Archibald Cox as special prosecutor made apparent the political costs of firing an officer that refuses to heed the President's policies.[146]

But that vivid moment of conflict is not the only circumstance in which there is a practical difference between these powers. Rather, who is granted express authority under the statute likely influences the relative bargaining positions of the agency and the President.[147] Where the agency official's exercise of discretion is explicitly conditioned on the President's direction, as in many mixed agency-President delegations, the statute provides the agency official no grounds to resist an otherwise lawful presidential directive.[148] In contrast, where the relevant delegation

144. See Thomas O. McGarity, Presidential Oversight of Regulatory Decisionmaking, 36 Am. U. L. Rev. 443, 465 (1987) (noting formal distinction between President's power to substitute his judgment for that of agency and power to fire after the fact).

145. See, e.g., Michael Herz, *United States v. United States*: When Can the Federal Government Sue Itself?, 32 Wm. & Mary L. Rev. 893, 928–29 (1991) [hereinafter Herz, Sue] (noting that removal is disruptive, slow, uncertain, and politically costly way to reverse agency's decision); Percival, supra note 66, at 1003–04 (noting political cost to President of firing officials); Pildes & Sunstein, supra note 66, at 25 (same).

146. See, e.g., Percival, supra note 66, at 1004 (describing political costs of Watergate "Saturday Night Massacre"); see also Ken Gormley, Archibald Cox: Conscience of a Nation 361–71 (1997) (describing aftermath of Cox's firing).

147. See Percival, supra note 66, at 1005 (noting effect on bargaining that assignment of delegation may make); see also Herz, Sue, supra note 145, at 928–29 (arguing that assignment of authority to agency head rather than President grants less-than-functional control over agency official).

148. All mixed agency-President delegations of course do not grant the President the same powers over agency officials. For instance, as noted above, some mixed agency-President delegations grant the official power to act "under the direction of the President," and others condition the official's actions on "the approval of the President." See supra Part II.A.1. The "under the direction of the President" formulation appears to give the official no ground to resist a lawful presidential directive, whereas the "with the approval of the President" formulation effectively gives the President a veto over the agency official's action but does not itself require that the official follow a presidential direction to act in a

runs to the agency official alone, the agency official may resist the President's direction on the ground that the statute delegates an independent legal duty and discretion to the official, not the President. If we assume that officials are more likely to resist the President's directions when they have a statutory basis to view themselves as vested with independent discretion, then the choice of statutory delegate has practical effects. The choice to delegate authority to an official increases the chances of an executive official's resistance, and thus the prospect that the agency official will force the President to accommodate the official (to avoid the higher political cost of a firing). Moreover, there is reason to presume that such dynamics matter to Congress because they affect the range of the President's practical powers.

Thus the principled distinction between the power to remove and the power to direct makes a practical difference if we assume that perceived legal allocations influence how officials behave. Despite the fact that the President will (and should) have tremendous influence over executive officials, that influence alone does not imply directive authority from the President's removal power.

D. *Constitutional Avoidance and Statutory Delegations*

Suppose, then, that these arguments—ultimately in company with the defense of the normative appeal of the vision of the administrative law they produce, discussed in Part V—show that delegations to executive officials do not grant the President directive authority. That conclusion is important for proponents of a strongly unitary conception of the executive: If the best construction of simple delegations to officials (on statutory grounds alone) excludes the President's directive authority, then unitarians must rely on principles of constitutional avoidance to accommodate their constitutional commitments.[149]

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particular way. Thus the extent to which a mixed agency-President delegation grants independent discretion to a particular official and provides grounds to alter the relative bargaining positions of the President and the agency official ultimately depends on the particulars of the mixed agency-President delegation itself. See generally supra Part II.B.

149. See Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71, 89 (noting that avoidance doctrines apply only when there is difference between court's "preconstitutional" construction of statute and how statute is construed to avoid posing constitutional question). Prominent defenders of a strongly unitary executive do not elaborate this reliance on principles of constitutional avoidance. See, e.g., Calabresi & Prakash, supra note 9, at 595–96 & n.210, 661–62 (stating that President may personally act under delegation to executive official and suggesting that background constitutional understandings make these statutory readings clear); Calabresi & Yoo, supra note 66, at 1480 n.92 ("It is also far from clear that the absence of a specific provision authorizing presidential direction of the Treasury Secretary supports any negatively-implied limits on presidential control. Such silence is more properly viewed as ambiguous . . . ." (citing Calabresi & Prakash, supra note 9, at 559–99)). In practice, it is sometimes difficult to distinguish the invocation of avoidance canons from clear statement rules. See, e.g., INS v. St. Cyr, 533 U.S. 289, 299–30 (2001) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341, 345–48 (1936) (Brandeis, J., concurring)) (suggesting that clear statement rule draws

Defenders of a strongly unitary executive might invoke the classical avoidance principle that as between two possible interpretations of a statute, one of which would be unconstitutional, a court's duty is to adopt the construction that saves the act. Alternatively, they might turn to the modern avoidance principle that where there is more than one acceptable reading of the statute, the court should adopt the reading that avoids a serious question about the act's constitutionality, even without determining the constitutionality of the alternative construction.[150] It is worth considering the basis for this reliance.

1. *Are Simple Delegations Ambiguous?* — For constitutional avoidance to apply, the strong unitarian must show that, as a matter of preconstitutional statutory interpretation,[151] there is ambiguity as to whether delegations to executive officials grant directive power to the President such that it would be "fairly possible"[152] to construe simple delegations that way.

The statutory arguments presented thus far could support the conclusion that simple delegations to agency officials cannot be fairly construed to grant the President power. The specific statutory text, for example, "Secretary of Labor," refers to that official, not the President. The congressional practice of enacting mixed agency-President delegations strengthens the negative implication that simple delegations do not grant powers to the President. Negative implications of this sort have been a basis for the Supreme Court to find statutes unambiguous.[153] Moreover, as noted above, within the application of the *Chevron* context, courts routinely find delegations to specific officials unambiguous.

2. *A Serious Constitutional Question?* — Constitutional avoidance principles of course do not apply at all if a statutory construction does not even raise a serious constitutional question.[154] It is beyond the scope of this Article to address the merits of the unitary executive reading of the

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support from principles of constitutional avoidance). In this regard, a proponent of a strongly unitary executive might argue that in view of the constitutional commitment to the President's control over administration, a clear statement rule should apply to require Congress to affirmatively bar presidential direction. See, e.g., Calabresi & Prakash, supra note 9, at 661 (arguing that constitutional commitments to unitary executive suggest that silence in early statutes about President's power to act directly under statute should not be construed to exclude presidential directive powers).

150. See supra note 11 (defining classical and modern avoidance principles).

151. See Schauer, supra note 149, at 89 (identifying preconstitutional statutory interpretation as step prior to application of avoidance).

152. See *Ashwander*, 297 U.S. at 348 ("'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))).

153. See supra notes 102, 106 and accompanying text.

154. See supra note 11.

Constitution as a matter of original intention or structural principle;[155] the focus here is on how to read statutes that Congress has enacted. It is still worth noting, however, that the more restrictive reading of the scope of the President's directive authority defended here does not entail taking a position on the removal debate. In particular, one could embrace the view that the President has directive authority only under express delegations, but still take the position that the restrictions on the President's removal authority, such as the "for cause" removal provisions that apply to independent agencies, are unconstitutional. Based on that possibility, proponents of the strongly unitary executive would have to show that the powers granted to the President by unimpeded removal authority over all federal law-implementing officials is not sufficient to satisfy the Constitution's requirement of a unitary executive if the President does not in addition have directive authority over all those officials.

Presidents, as noted, have extensive tools of control over executive agencies other than directive authority.[156] Moreover, empirical studies show that presidents have significant influence over policy in executive and independent agencies.[157] Based on those premises, the case that restricted directive authority alone violates the Constitution would be harder to justify as a matter of structural principle. A unitary argument for implied directive authority could be made, but the grounds for doing so may not be as broad as they might initially appear.

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155. Compare Calabresi & Prakash, supra note 9, at 546–47 (providing originalist defense of strongly unitary reading of executive), with Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1729–30 (1996) (challenging originalist argument for strongly unitary executive position), Lessig & Sunstein, supra note 66, at 2–3 (rejecting originalist argument for strongly unitary executive position, but defending unitary position on other grounds), and Morton Rosenberg, Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627, 634 (1989) (defending Congress's "virtually plenary power" to structure administrative bureaucracy, including establishing tenure of officers).

156. See supra text accompanying notes 136–139 (listing principal tools for presidential control over agencies).

157. See, e.g., Terry M. Moe, The Politicized Presidency, *in* The New Direction in American Politics 235, 269–71 (John E. Chubb & Paul E. Peterson eds., 1985) (finding greater presidential than congressional control over federal bureaucracy); Terry M. Moe, Regulatory Performance and Presidential Administration, 26 Am. J. Pol. Sci. 197, 207–18 (1982) (documenting correspondence between shifts in presidential administration and policy shifts in several independent agencies); Steven D. Stehr, Top Bureaucrats and the Distribution of Influence in Reagan's Executive Branch, 57 Pub. Admin. Rev. 75, 80 (1997) (study finding that career bureaucrats in Reagan administration perceived political appointees and OMB officials as having most influence over policy); B. Dan Wood & James E. Anderson, The Politics of U.S. Antitrust Regulation, 37 Am. J. Pol. Sci. 1, 1 (1993) (documenting influence of President and Congress on antitrust enforcement activity); B. Dan Wood & Richard W. Waterman, The Dynamics of Political Control of the Bureaucracy, 85 Am. Pol. Sci. Rev. 801, 812–23 (1991) (documenting influence of political appointments on policy in several executive and independent agencies).

In sum, this Part has argued that the best construction of simple delegations to agency officials does not read these as extending directive authority to the President by implication. This conclusion forces proponents of a strongly unitary executive to invoke constitutional avoidance principles.[158] One could conclude that constitutional avoidance principles are simply not available because simple delegations to executive officials are not ambiguous. Even if such statutes are open to multiple possible interpretations, defenders of the strongly unitary executive are burdened with a difficult argument that the defended narrower constructions of simple delegations violate principles of constitutional structure. Either way, these statutory constructions have consequences for judicial review and the structure of the executive branch. Parts III and IV examine those implications.

III. Statutory Delegations and Judicial Review

Based on the view that a grant of authority to an executive officer authorizes the President to act in his own name or to bind executive officials, proponents of broad readings of the President's statutory powers also argue that judicial deference to agency action should be a function of the President's involvement. For instance, as noted at the outset, Kagan argues that the deferential rule of *Chevron* should apply to agency action only when it follows from presidential involvement.[159] Others have suggested that *Chevron* should apply to agencies by virtue of their being the President's agents.[160] The fundamental idea underlying these views is that the President "administers" all statutes delegating power to executive officials in the sense that it is the President's, not the agency's, exercise of discretion under the statute that is eligible for *Chevron* deference.

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158. The judicial application of constitutional avoidance principles is the subject of vigorous challenges. See Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law 105 (1997) (arguing that judicial use of avoidance to impose legislative will as far as possible actually "is probably both misconstruing the statute and making its construction uncorrectable"); Schauer, supra note 149, at 87–88, 92 (arguing that application of constitutional avoidance decides constitutional question rather than avoiding it, and falsely presumes Congress would prefer its outcomes). Whether principles of constitutional avoidance properly apply to statutory interpretation within the executive branch is a complex issue in its own right. See Jerry L. Mashaw, Norms, Practices and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation, 57 Admin. L. Rev. 501, 507–08 (2005) [hereinafter Mashaw, Norms] (arguing against use of avoidance canons by agencies); Trevor W. Morrison, Constitutional Avoidance in the Executive Branch 40–44 (July 15, 2005) (unpublished manuscript, on file with the *Columbia Law Review*) (arguing for limited application of avoidance canon within executive branch).

159. See Kagan, supra note 8, at 2376–77 (proposing distinguishing between independent and executive agencies for purposes of granting *Chevron* deference).

160. See, e.g., Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 334 & n.406 (1994).

This Part challenges that conception of judicial review. There is, first, a lurking constitutional question. If judicial deference to the President's statutory construction were constitutionally compelled, then the arguments about the scope of the President's statutory powers in Part II would make no difference to the framework of judicial review. But, as Part III.A aims to show, even according to a strongly unitary conception of the executive, Congress has the power to establish the standards of judicial review for the President's statutory constructions. Thus the framework of judicial review involves a question of statutory interpretation: When, if ever, should courts presume that Congress sought to grant deference to the President's constructions of statutory authority?

Once within the domain of statutory interpretation, Part II's statutory conclusion that delegations to executive branch officials do not grant the President authority implies that the President's constructions of statutes delegating power to other officials are not eligible for *Chevron* deference. Part III.B argues that the President does not "administer" those statutes. But these same considerations also suggest a possible extension of *Chevron*'s application—namely, that *Chevron* deference should apply to the President's own actions when they follow from statutory delegations to the President in name. As Part III.C explains, those are the statutes the President administers.

A. *Congressional Authority over Standards of Statutory Review*

The starting point for the argument that the scope of the President's authority under a statute matters to judicial deference is that judicial deference to the President's assertions of statutory authority is not constitutionally required, but rather is within Congress's powers to prescribe. It is useful to discuss briefly the basis for this premise, because without it statutory arguments have no bearing on the framework of judicial review. The basic claim is that Congress's authority under the Necessary and Proper Clause provides it the power to establish standards of judicial review of the President's actions, and that strongly unitary theories of the executive do not pose an obstacle to this view.

An argument for this position can be built by examining Congress's power to establish the standards of review over agency action. Congressional authority to establish the standard of judicial review for challenges to actions of agency officials to whom Congress has granted authority is a fundamental presumption of contemporary administrative law. Congress has repeatedly legislated as to the standard of judicial review for agency action.[161] For instance, the standards of judicial review in the Adminis-

161. The same presumption of Congress's constitutional authority also underlies a host of specific statutes in which Congress has prescribed a standard of judicial review. Barron and Kagan identify specific legislation in which the courts are directed to determine interpretive questions "without unequal deference" to the agency's position. See David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 216 n.58 (citing Gramm-Leach-Bliley Act, 15 U.S.C. § 6714(e) (2000)). Elizabeth

trative Procedure Act,[162] applied thousands of times in decisions reviewing agency action, rely on this presumption of congressional power, as does the rule of deference of *Chevron*.[163]

The most logical constitutional source for this power is one of the most widely invoked structural provisions of the Constitution: the Necessary and Proper Clause.[164] Congress's provision of standards of review for agency action—standards that allocate decisionmaking authority between the reviewing court and the agency—falls squarely within the traditional broad reading of the clause emanating from *M'Culloch v. Maryland*.[165]

Garrett provides examples of two statutes in which the Supreme Court has held that Congress expressly delegated law interpretive functions to the agency. See Elizabeth Garrett, Legislating *Chevron*, 101 Mich. L. Rev. 2637, 2642 n.19 (2003) (citing Batterton v. Francis, 432 U.S. 416, 425 (1977)) ("Congress in § 407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term."); see also Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 613–14 (1944) (concluding that term "as defined by the Administrator" constituted delegation of primary interpretive power to Administrator).

162. 5 U.S.C. §§ 701–706 (2000).

163. See United States v. Mead Corp., 533 U.S. 218, 230, 236 (2001) (making congressional choice to delegate power to bind with force of law necessary factor for agency action to qualify for *Chevron* deference). But without the constitutional authority to establish the standard for judicial review of agency action in the first place, Congress could not make that choice. The *Chevron* doctrine, as specified by *Mead*, thus presumes that Congress has power to prescribe the standard of judicial review for agency action.

164. The Necessary and Proper Clause grants Congress the power to pass legislation that "shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. 1, § 8, cl. 1. Under this clause, called the Sweeping Clause by the Framers, Congress is vested with the authority to make laws that are necessary and proper for the implementation of powers granted by the Constitution to the judicial (as well as the executive) branch. See Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2130 (2004) [hereinafter Merrill, Rethinking] (noting that Necessary and Proper Clause authorizes Congress to make laws for "carrying into execution" powers vested in executive and judicial branches). Because establishing the standards the judiciary employs in reviewing challenges to administrative agency actions involves regulation of the judicial department, the Sweeping Clause provides a sensible textual basis for this regulation. See Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 Const. Comment. 191, 198 (2001) (concluding that it is "beyond cavil that the Sweeping Clause is the specific textual vehicle for congressional legislation with respect to the operations of the judicial department").

165. 17 U.S. (4 Wheat.) 316, 356 (1819). As is no doubt familiar, Chief Justice Marshall gave the clause a broad construction to encompass all legislation that permits the branches of government to effectively exercise their constitutional powers. "To make a law constitutional," Chief Justice Marshall declared, "nothing more is necessary than that it should be fairly adapted to carry into effect" a power of Congress or a "power[ ] expressly given to the national government." Id. As John Harrison succinctly puts it, "Congress's necessary and proper power is precisely the power to provide those rules that will enable the other two branches to do their jobs more effectively." John Harrison, The Power of

If Congress's authority to legislate for the beneficial execution of the judicial power includes the power to establish standards of review for agency action, then this power also should extend to review of the President's assertions of statutory power. The power to set standards of judicial review for agency action is authority over the execution of the judicial power. As a result, Congress's authority to set these standards does not depend upon the type of statutory provision at issue or the identity of the actor asserting statutory power. The Necessary and Proper Clause, for instance, authorizes Congress to establish different standards for different types of decisions by agency actors. In each case, Congress sets the framework for the federal courts' exercise of their power; the power to establish that framework is not limited to particular types of statutory questions presented. Accordingly, the fact that the construction of authority is the President's, as opposed to that of the head of a department or an independent agency, does not limit Congress's power to prescribe the use of the judicial power. Rather, on this view, the constitutional authority to set standards of judicial review for the President's assertions of statutory power is merely an instance of the broader power to establish the use of the federal courts in reviewing the exercise of delegated discretion.[166]

Even accepting Congress's power to establish standards of review for agency action, the argument that this power includes judicial review of the President's statutory actions confronts a possible separation of powers objection from the unitary executive position. Specifically, it might be objected that allowing Congress to set the standard of judicial review for the President's claims of statutory authority encroaches on the constitutional prerogatives of the President.[167] As noted above, defenders of a

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Congress over the Rules of Precedent, 50 Duke L.J. 503, 532–34 (2000) (defending Congress's necessary and proper power to establish rules of precedent for federal courts). The power of Congress to establish standards of judicial review for agency action is within this traditional reading of the clause. A standard of judicial review allocates decisionmaking authority between the reviewing court and the institution subject to review. Thus, for instance, the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), reflects a judgment that the primary responsibility for a decision lies with the agency, and that federal courts are not to declare unlawful any agency conclusion with which they disagree. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (noting that under arbitrary and capricious review "[t]he court is not empowered to substitute its judgment for that of the agency"). These frameworks and standards for the use of the judicial power are instances, one might say, of Congress's necessary and proper power "to insure, as far as human prudence could insure, their beneficial execution." *M'Culloch*, 17 U.S. (4 Wheat.) at 415.

166. The Necessary and Proper Clause may give Congress alone the authority to establish powers incidental to executive or judicial powers expressly granted by the Constitution. Van Alstyne, supra note 19, at 118.

167. Note that this objection is not an argument that Congress's power to set the standard of review for the President's statutory actions infringes on the constitutional powers of the judiciary. Whether or not there is an encroachment on the judicial power does not depend on the identity of the actor for whom Congress has prescribed a standard of judicial review. Some argue that allowing Congress the power to establish standards of

strongly unitary conception of the executive argue that the Constitution requires that the President control all power vested in the executive branch,[168] and thus that the President have broad directive authority, power to nullify an executive official's actions, and power to remove that official at will.[169] But even this reading of the President's constitutional powers does not require that courts grant the President's statutory constructions deference. The unitary theory allocates control within the executive branch; it does not entail a particular relationship between the President and the courts.

To take the limiting case, there is no inconsistency between a unitary theory of the executive and a congressional prescription of even a de novo standard for judicial review of the President's assertions of statutory authority. Under a de novo standard of review, courts would not take the fact that the President had claimed that a statute authorized his action as a reason to reach that same conclusion.[170] In that way, de novo review may impose restrictions (or at least the Court's preferred construction) on the scope of authority a statutory authorization grants. But judicial review under that standard does not deny or impose a limit on the President's power to control the implementation of the law by lower-level officials. It does not address who within the executive branch is eligible to assert statutory authority. A judicial standard of review does not itself involve any construction of the structure of authority within the executive branch, and therefore even a de novo standard is consistent with the strongly unitary view.[171]

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review encroaches on the judicial power. See, e.g., Lawson, supra note 164, at 223 (arguing that section 706 of APA and all organic statutes that establish judicial standards of review for appeals from agency decisions are unconstitutional encroachments on judicial power). But that view obviously rejects the starting premise that Congress can set the standard of judicial review for agency action.

168. Calabresi & Prakash, supra note 9, at 595.

169. Id. at 596–97.

170. See Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1362–63 (1997) (defining deference as taking someone else's decision as reason to make same decision independent of merits of decision).

171. A second line of separation-of-powers objections could come from a strain of departmentalism. Defenders of departmentalism challenge the view that the executive and legislative branches are bound to follow the Supreme Court's construction of the Constitution. See Dawn E. Johnsen, Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?, Law & Contemp. Probs., Summer 2004, at 105, 106 (defining "departmentalism" as view that "recognizes the authority of each federal branch department to interpret the Constitution independently"). Michael Stokes Paulsen makes the further claim that the executive's independent interpretive powers include not only the Constitution, but also federal law, including statutes and treaties. Paulsen, supra note 160, at 222. It is this further claim of a constitutional basis for interpretive authority *over statutes* from which this second line of objection may arise. One implication of the view that the Constitution grants the President interpretive authority as to statutes is that courts are required to grant the President's statutory interpretations deference. The core justification for Paulsen's departmentalism is

The President's constitutional prerogatives under Article II do not undermine the view that Congress's power over the judiciary extends not only to setting the standard of review of agency action, but also to review of the President's constructions of delegated statutory power.[172] That conclusion, of course, does not imply that Congress could never adopt a standard of review that would be unconstitutional,[173] only that Congress has broad authority to legislate.

B. *The Statutory Grounding of* Chevron

If the Constitution does not require courts to grant deference to the President's constructions of delegated statutory authority, then the question of the level of deference courts should accord the President's assertions of statutory authority becomes a matter of statutory interpretation and policy. The *Chevron* doctrine provides the basic framework of judicial review for agency assertion of statutory authority. Presidential control over agency action poses deep and unavoidable questions for this doctrine. To see why, it is useful to discuss briefly *Chevron*'s basis.

Chevron established that a court must defer to an agency's reasonable construction of an ambiguity or gap in a statute that the agency administers.[174] The Court expressed this standard in two steps. The first step is "whether Congress has directly spoken to the precise question at is-

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a concern that the concentration of interpretive power within a single institution upends the checks and balances among the branches of government. See id. at 222, 228–29 ("The power to interpret the law, including the Constitution, is . . . too important to vest in a single set of hands."). But accepting Congress's power to set standards of review for the President's assertions of statutory authority does not threaten the balance among the branches or concentrate undue authority in "a single set of hands." On the contrary, it allows for Congress's own policy choices to provide the basis for the manner in which the courts exercise their interpretive authority, thereby making review of the President's statutory powers a shared matter, with Congress establishing the standard and the courts implementing it.

172. As noted above, supra note 121, the Court has held that the APA does not apply to the President. See Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992). The Court reached this conclusion based on a clear statement rule—the Court would not construe the APA to apply to the President absent a clear statement of Congress's intention for it to do so. See id. at 801.

173. There may be some standard of review—perhaps a per se presumption against the legality of executive acts—that would violate separation-of-powers principles. But even though there is some limit to Congress's power, the basic point remains that Congress has broad authority to establish the standard of review, including the presumptions defended in Parts III and IV. In this way, the constitutional status of the standards for judicial review of the President's statutory powers is an amalgam of the useful categories proposed by Nicholas Rosenkranz. They are closest to what Rosenkranz calls a constitutional starting-point rule: Congress may change such rules, though sometimes only within "immutable parameters" established by the Constitution. Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2093, 2097 (2002).

174. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842–43 (1984).

sue."[175] If the intent of Congress on the particular interpretive question at issue is "clear," then that intention governs.[176] If the statute's requirements are ambiguous, or the statute is silent on the specific issue, the court takes the second step. It does not simply "impose" its own interpretation of the statute (as it would in the absence of an administrative construction); rather, it must accept the agency's interpretation of the statute as long as it is "permissible."[177]

This two-part test establishes a framework of review that is starkly different from the tools that a court traditionally uses when interpreting a statute. The *Chevron* framework does not direct the court to determine the meaning of ambiguities in a statute; rather, it allocates that interpretive task to the agency. Where there is statutory ambiguity (or silence), the court is to defer to the agency's legal interpretation of the statute[178] as reflected in its rulemaking or adjudication.

The *Chevron* Court justified this shift of interpretive authority from the courts to agencies on two basic grounds. First, it noted that "[j]udges are not experts in the field."[179] Thus where Congress has not specifically decided an issue, it makes sense for generalist federal judges to defer to the agency's choice. Second, the Court noted that agencies are more politically accountable than federal judges.[180] Because agencies do not themselves have an electoral constituency, their accountability and connection to the views of the incumbent administration depends upon presidential control. Consistent with the basic contrast between agencies and federal judges in the *Chevron* opinion itself, subsequent to *Chevron* the Court has required only that agencies be subject to greater presidential control than is the federal judiciary for *Chevron* to apply. For instance, the Court routinely applies *Chevron* deference to the actions of independent agencies.[181] In addition, as noted above, agencies are eligible for *Chevron* deference only for interpretations of statutes that the agency itself "administers."[182]

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175. Id. at 842.

176. Id.

177. Id. at 843.

178. This deference is subject, of course, to the further requirements of eligibility discussed in the next several paragraphs.

179. 467 U.S. at 865.

180. Id.

181. See, e.g., Verizon Commc'ns v. FCC, 535 U.S. 467, 523 (2002) (applying *Chevron* deference to challenge to FCC rules); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 387 (1999) (same).

182. *Chevron*, 467 U.S. at 842 (stating that *Chevron*'s two-step analysis applies "[w]hen a court reviews an agency's construction of the statute which it administers"); see also id. at 843 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy.'" (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))); id. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."); id. at 865–66 (noting that deference applies to agency construction of gaps or ambiguities in statute left to be "resolved by the agency charged

United States v. Mead Corp. clarified that the basis for *Chevron*'s application is congressional delegation of interpretive authority.[183] The specific question in *Mead* was whether a tariff-ruling letter issued by one of the Customs Service's regional offices was entitled to *Chevron* deference.[184] The Court held that agency action would qualify for *Chevron* deference only if it satisfied two steps: First, Congress must have "delegated authority to the agency generally to make rules carrying the force of law," and second, the agency must have acted pursuant to that authority.[185] Because Congress did not delegate to the Customs Service that authority, and the Customs Service failed to act with a lawmaking pretense, its action did not qualify for *Chevron* deference.[186] *Mead* thus specified that, for *Chevron* to apply, the agency must not only "administer" a statute, but also use authority granted it by Congress to bind with the force of law.

C. *Presidential Control and* Chevron *Deference*

A President's assertion of control over agency action poses complex problems for the *Chevron* doctrine. On the one hand, *Chevron*'s political accountability rationale would support finding that any agency action taken pursuant to the President's direction is eligible for *Chevron* deference. On the other hand, the agency-administration requirement suggests that if a statute delegates authority to the agency, and does not mention the President, then the agency, not the President, is the body courts should presume is eligible for *Chevron* deference under the statute.

Kagan defends the former view. She argues that courts should apply *Chevron* to agency action only when such action was the product of the President's involvement.[187] Kagan thus casts aside the limitation that *Chevron* applies only to an agency's interpretation of a statute that the agency itself "administers."[188] If the basis for *Chevron* deference is the President's control or direction of agency action, it makes little sense to restrict *Chevron*'s application to an agency's interpretations to only the specific set of statutes the agency "administers." Presidential influence could be the basis for an agency's construction of virtually any statute that delegates power, not only the specific statutes that delegate authority to a given agency. If the application of *Chevron* deference is a function of presidential control, then it should not matter whether the statute the agency interprets is one that the agency administers, as long as the inter-

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with the administration of the statute in light of everyday realities"); supra notes 126–133 and accompanying text (discussing *Chevron*'s limitation to agency-administered statutes).

183. 533 U.S. 218, 221 (2001).

184. Id. at 221, 224.

185. Id. at 226–27.

186. Id. at 231–34.

187. See Kagan, supra note 8, at 2377–78.

188. Kagan notes that if delegation is the basis for deference, then making deference a function of the President's control makes no sense. See id. at 2378.

pretation stems from presidential direction. Instead of the agency-administration requirement, Kagan ends up with the view that the President effectively "administers" all statutes granting authority to executive branch officials in the sense that it is the President's exercise of discretion that is eligible for *Chevron* deference.

But if, as Part II argues, the President can claim directive authority under statutes only when the statutes grant authority to the President in name, then the President's directions could only be eligible for *Chevron* deference under the same conditions. The reason is straightforward: Directive authority is a necessary condition for *Chevron* deference.[189] As a result, the set of statutes under which the President's directions are eligible for *Chevron* deference can be no larger than those statutes under which the President has such authority. Interpretive deference under *Chevron* requires a grant of directive authority.

This reasoning implies that an agency action could lose *Chevron* deference if it were taken pursuant to a presidential directive where the statutory delegation runs to the agency. Identifying those instances would not be easy.[190] Most agencies will not declare that their action is founded on an executive directive, but rather rationalize the decision in terms of statutory criteria.[191] But the difficulty of identification does not defeat the need for clarification of the background norm. The agency's rationalization of its action in terms of statutory criteria is not merely a prudent course of action when confronted with a presidential directive: The presidential direction is not a sufficient basis for action where the statute runs to the agency, and therefore, an action taken on the basis of presidential direction alone could not be eligible for judicial deference. That norm, if valid, should apply to executive branch statutory interpretation as well. Moreover, even though the motive behind agency action will often be opaque, this limitation on the application of *Chevron* deference provides

189. Cf. Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

190. See Pildes & Sunstein, supra note 66, at 25–26 (noting difficulty of practical enforcement of distinction between presidential influence and command).

191. The Supreme Court's decision in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance, 463 U.S. 29 (1983), is a common contemporary shorthand for the requirement that agencies rationalize their decisions in terms of statutory criteria, and that a change of administration is not a sufficient basis for agency action (at least when the delegation runs to the agency). In *State Farm*, the Court found the National Highway Traffic Safety Agency's decision to rescind a rule requiring passive-restraint seat belts was arbitrary and capricious. Id. at 34. The rescission followed a change in presidential administration. Despite that fact, the Court required that the official's decision must be rationalized and justified with reference to the statute and the facts. Id. at 48; see also Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety 226–27 (1990) (describing *State Farm* as establishing that political directions are inadequate to justify regulatory policy).

further reason and incentive for agency officials to ensure that they exercise their own independent discretion.[192]

Revisiting the question of the scope of the President's statutory powers thus clarifies the circumstances under which an executive official or the President satisfies a necessary condition for *Chevron*'s application. This position suggests that the structural guarantees of presidential influence over agency action—appointment to limited terms, at will or for cause removal powers, ex parte communications—are sufficient to satisfy *Chevron*'s demands that agencies be more politically accountable than courts,[193] but still insists on the distinction between these structures of influence and directive authority.

D. *The Statutes the President "Administers"*

This focus on Congress's express choice of delegate suggests not only a limitation of *Chevron*'s application to agency action, but also grounds for extending *Chevron* to the President's own assertions of statutory authority that follow from express delegations. Of course, merely because the President has authority under a statute does not imply that the President's actions under it should receive *Chevron* deference. Authority is a necessary condition for deference, but it may not be a sufficient condition. But, as I have argued elsewhere,[194] there are strong reasons to grant *Chevron* deference when the President acts under an express statutory delegation.

The Supreme Court's decision in *Mead Corp.* makes clear that an agency may be eligible for *Chevron* deference even when Congress did not require that it follow procedural formalities, such as notice-and-comment rulemaking.[195] Delegations to the President rarely require any such formalities, especially not something as formal as notice-and-comment rulemaking.[196] But when Congress has expressly delegated authority to the President, basic political values of accountability and coordination counsel in favor of applying (or presuming a congressional intent to ap-

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192. This position helps to reveal the connection between *Chevron*'s scope of application and the practical principle that emerged from the Supreme Court's decision in *State Farm*. *State Farm* establishes that political influence alone is not a sufficient rationalization for agency action. See 463 U.S. at 34. The argument here shows that principle holds at least when the statutory delegation runs to the agency. Whether the presidential action would require rationalization, even in the absence of the application of statutory requirements, like the APA, is another matter.

193. See supra text accompanying notes 136–139 (discussing President's means of influence over agency policy even without broad directive authority).

194. See Kevin M. Stack, The Statutory President, 90 Iowa L. Rev. 539, 585–99 (2005) (arguing that *Chevron* should apply to President's direct assertions of statutory authority without providing account of range of statutes President "administers").

195. See United States v. Mead Corp., 533 U.S. 218, 227, 230–31 (2001); see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., No. 04-277, slip. op. at 1–2 (U.S. June 27, 2005) (Breyer, J., concurring) (noting that under *Mead* formal process is neither necessary nor sufficient for *Chevron* deference).

196. See Stack, supra note 194, at 552–53.

ply) *Chevron* deference.[197] Presidential directives are, by and large, highly visible and make clear who is responsible for the policies they embody.[198] The President is also uniquely positioned to coordinate the interpretations of a variety of agency actors.[199] Moreover, if the agencies are entitled to a presumption of a congressional intent to grant their interpretations deference in part because of their connection to the Chief Executive, then the Chief Executive acting on his own pursuant to an express statutory delegation should qualify for such deference.

The Court in *Chevron* also justified deference based on the administrative agency's "great[er] expertise" in the field of regulation.[200] Presidents are generalists. But presidents' position at the apex of administration puts them in a good position to demand the expertise of executive branch officers. Even if we concede that the President may have less expertise than an agency—although how much is not clear—that deficit does not unseat the strong grounds for applying *Chevron* to presidential orders based on the President's heightened accountability, visibility, and ability to coordinate policy[201] where Congress has expressly delegated authority to the President, either alone or in a mixed agency-President delegation.[202] Express delegations of authority to the President thus are a necessary but also a sufficient condition for the President's actions to be eligible for *Chevron* deference. Attention to the scope of the President's statutory powers thus supplies an account of the statutes the President "administers" in the sense of being the official whose exercise of direction warrants a presumption of interpretive deference.

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197. See id. at 588–99. The fact that the President occupies a national office does not necessarily imply the President will act based on less parochial incentives than members of the legislature. See Cynthia R. Farina, Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor, 28 Fla. St. U. L. Rev. 109, 125–31 (2000) (criticizing uncritical reliance on assumption that because President faces a national election the President has electoral incentives to be more public-regarding and less parochial than legislature); Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. Rev. (forthcoming 2006) (illustrating prospect for parochial election incentives of President within Electoral College).

198. See Stack, supra note 194, at 588–99.

199. See Michael Herz, Imposing Unified Executive Branch Statutory Interpretation, 15 Cardozo L. Rev. 219, 255–56 (1993) [hereinafter Herz, Imposing] (commenting on President's ability to coordinate policy).

200. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

201. Stack, supra note 194, at 590–92 (suggesting grounds for applying *Chevron* to President).

202. This suggestion is further supported by court decisions that treat as the "administering agency" for *Chevron* purposes those agencies to whom the President has subdelegated authority expressly delegated to him by Congress. See, e.g., Wagner Seed Co. v. Bush, 946 F.2d 918, 920–21 (D.C. Cir. 1991) (granting *Chevron* deference to EPA Administrator as "administering agency" despite fact that Administrator's authority stemmed from subdelegation of powers granted to President). If the President did not qualify as "administering" the statute, then neither should the President's subdelegate.

The more general principle here is that only actions by express recipients of statutory authority are eligible for *Chevron* deference.[203] This account takes the scope of judicial deference to the President's claims of statutory authority to be within Congress's control, and emphasizes that Congress's choice of delegate is central to triggering that deference. Such an approach helps resist the temptations of courts to imply incidental presidential powers under broadly deferential standards that are not grounded in statute. And, as the next Part addresses, it also builds checks into the structure of the executive branch's implementation of statutory powers.

IV. THE PRESIDENT'S STATUTORY POWERS OVER THE EXECUTIVE BRANCH

This account of the scope of the President's statutory powers and according eligibility for judicial deference under *Chevron* has several implications for the allocation of decisionmaking authority within the executive branch. These implications apply, of course, only so long as statutory grants of power to agency officials are constitutionally permissible.[204]

A. *Statutory Interpretation Within the Executive Branch*

The most visible consequence for executive branch officers is that final decisionmaking authority should flow to statutory delegates. It should do so for at least two reasons. First, it is a widely shared principle of public administration that executive branch and agency officials prefer (other things being equal) for their actions to receive greater judicial deference. As a result, if only the actions of express recipients of statutory authority may be eligible for *Chevron* deference, executive branch actors have strong incentives to allocate final decisionmaking authority to those officials whether they be the President or the agency.[205] If a President

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203. This argument suggests that a more general principle underlies the position proposed by Barron and Kagan that the acts of statutory delegates, and not lower-level agency actors, should be eligible for *Chevron* deference. See Barron & Kagan, supra note 161, at 235–36. If the argument here is valid, it suggests that Barron and Kagan's conclusion is one instance of a more general principle that only the actions of statutory delegates are eligible for *Chevron*. Thus neither lower-level officials nor the President may stand in the place of an agency official who was delegated authority (or rather, when they do so, eligibility for *Chevron* deference is lost).

204. For some defenders of a strongly unitary conception of the executive, as noted above, all executive authority must be vested in the President. See Calabresi & Prakash, supra note 9, at 594–96. That position, as suggested in Part I, may imply that, on their constitutional premises, delegations to executive officials are unconstitutional. But because our current legal framework relies heavily upon the constitutionality of delegations to executive and other officials, it makes sense to consider the application of these conclusions for statutory interpretation within the executive branch without assuming the correctness of the constitutional commitments of the strongly unitary view of the executive.

205. Michael Herz examines the analogous proposition that "ultimate interpretive authority *within* the executive branch should lie with whatever person or agency to which the courts would defer on judicial review." Herz, Imposing, supra note 199, at 257. "Such

were to substitute his judgment for that of the statutory delegate, his act would forfeit judicial deference to the agency's action.

Second, even in cases where judicial review of the agency's action is unavailable or unlikely, the underlying limitation on the scope of the President's directive authority remains. Absent an independent or autonomous constitutional power,[206] executive orders or presidential directives may bind agency officials only when they follow from an express delegation to the President. The ultimate legal discretion lies with the express statutory delegate—the official to whom Congress has conferred authority and who has an independent legal duty to exercise that authority.

This framework provides guidance to executive officers who are confronted with presidential orders. Consider the following two examples of assertions of directive authority. First, in a memorandum addressed to the Secretaries of Health and Human Services (HHS) and the Treasury, President Clinton explained that food safety was a high priority, and that further efforts were required to insure the safety of imported food.[207] President Clinton specifically "direct[ed]" these Secretaries "to take all actions available to . . . [p]rohibit the reimportation of food that has been previously refused admission . . . (so called 'port shopping'), and require the marking of shipping containers and/or papers of imported food that is refused admission for safety reasons."[208]

Statutory authority to refuse the importation of food is delegated to the Secretaries of HHS and the Treasury,[209] and the authority to promulgate rules to carry out this provision is granted to the same Secretaries.[210] These delegations make no mention of the President. The Surgeon General, subject to the approval of the Secretary of HHS, is delegated author-

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an approach increases the chances that the interpretation will be upheld on judicial review." Id. My suggestion is that courts should defer to the actions of agents to whom authority is delegated—the agents to whom the statute creates a duty to act—and as a result, so should intra-executive branch actors. Cf. Energy W. Mining Safety Co. v. Fed. Mine Safety & Health Comm'n, 40 F.3d 457, 463–64 (D.C. Cir. 1994) (holding that Commission owes Secretary, as statutory delegate, same deference that court owes Secretary).

206. H. Jefferson Powell suggests the useful terminology of "independent" and "autonomous" powers. Powell, President's Authority, supra note 2, at 543–44. "Autonomous" powers are those the Constitution grants the President exclusively and limits Congress's power to control. Id. "Independent" powers are powers to act without congressional authorization but subject to congressional regulation. Id. I refer to cases in which the President lacks both independent and autonomous powers.

207. Memorandum on the Safety of Imported Foods, 2 Pub. Papers 1129 (July 3, 1999).

208. Id. at 1130. Several months later the Food and Drug Administration (FDA), which is part of HHS, issued proposed regulations to require markings on containers of food that had been refused entry at a U.S. port. Marking Requirements for and Prohibition on the Reimportation of Imported Food Products that Have Been Refused Admission into the United States, 66 Fed. Reg. 6502, 6502–03 (proposed Jan. 22, 2001) (to be codified at 21 C.F.R. pt.1).

209. See 21 U.S.C. § 381(a) (2000).

210. See id. § 371(b).

ity to make regulations necessary to prevent the introduction, transmission, and spread of communicable diseases.[211] Although the President is granted authority to detain individuals upon recommendations from the National Advisory Health Council and in consultation with the Surgeon General, the statute does not grant the President the authority to regulate the importation of goods for health purposes.[212] Thus, President Clinton's directive to the Secretaries to "require" marking of containers of imported food did not have a basis in an express statutory delegation to the President and, as a result, would not legally bind the Secretaries—and their actions taken based on his directions would not qualify for *Chevron* deference.

In contrast, where the President is expressly granted power under a statute, he has legal authority to bind the exercise of discretion of lower-level officials, as well as the public. For instance, under the Federal Property and Administrative Services Act of 1949, the President is expressly granted power to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act."[213] Pursuant to this express grant of power, President George W. Bush issued an executive order requiring that government contractors post a notice regarding the right of workers not to participate in a union.[214] The order specified that it was to be enforced by the Secretary of Labor.[215] In view of the President's express statutory delegation of authority, the Secretary of Labor has a legal duty to comply with the President's executive order, regardless of whether she believes it to be the best construction of the Act. Outside a command that exceeds the scope of power granted to the President, the Secretary's duty is to comply; likewise, a court should grant *Chevron* deference to the President's construction of an express delegation of statutory power.

B. *Agency Statutory Interpretation: The Force of Executive Orders*

If, absent independent constitutional authorization, an executive order is legally binding on agency officials only when the President is expressly authorized by statute to act, the next question is how an agency

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211. 42 U.S.C. § 264(a) (2000).

212. See id. § 264(b). The other sources of statutory authority that the FDA referenced in its proposed rules also did not delegate any authority to the President in name. See 21 U.S.C. § 334 (describing grounds and procedures for seizure of adulterated or misbranded goods); id. § 342 (defining adulterated food and granting Secretary enforcement and rulemaking authority); id. § 344(a) (providing Secretary authority to grant permits for food manufacture as health protection measure); id. § 374(a) (granting Secretary right to enter premises in which food is manufactured); 42 U.S.C. § 241 (granting Secretary authority to investigate causes of disease); cf. 66 Fed. Reg. at 6503, 6505 (invoking these sources of statutory authority in addition to 21 U.S.C. §§ 371, 381).

213. 40 U.S.C. § 486(a) (2000) (current version at 40 U.S.C.A. § 121 (West 2005)).

214. Exec. Order No. 13,201, § 2(a)(1), 3 C.F.R. 754, 755 (2001), reprinted in 41 U.S.C.A. § 254 (West Supp. 2005).

215. See id. § 1(b).

official who is granted authority under a statute should regard a presidential order relating to the exercise of the official's discretion. What legal obligations does President Clinton's port shopping order impose on the Secretaries of HHS and the Treasury? It seems worth sketching out some considerations to inform this inquiry.

The question of how an agency should treat such an executive order depends in part upon how agency officials should engage in statutory interpretation. As several scholars recently have emphasized, the institutional position of executive branch actors is distinct from that of courts, and, as a result, statutory interpretation within the executive branch calls for its own theory, including consideration of the weight of presidential directives.[216] In a provocative article charting out the basic contours of this terrain, Jerry Mashaw suggests that agency statutory interpreters should follow presidential directions unless they are clearly outside the agent's authority, whereas the same deference to presidential constructions does not apply to judicial interpretation.[217] Mashaw writes that "[a]gency recalcitrance in the face of a valid executive order is neither politically prudent nor constitutionally appropriate."[218]

One could easily assent to that position—with a caveat that goes to the central aims of this Article. This Article aims to give an account of the scope of validity—in the sense of legal bindingness—of executive orders or other presidential directives that lack independent or autonomous constitutional authorization. In short, it argues that an express stat-

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216. See, e.g., Mashaw, Norms, supra note 158, at 506–24 (suggesting structural and prudential differences between bow agencies and courts justify development of conception of agency statutory interpretation as autonomous enterprise); Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 Chi.-Kent L. Rev. 321, 329–35 (1990) (examining differences between use of legislative history by courts and agencies); see also Herz, Imposing, supra note 199, at 252–71 (illustrating complex institutional interaction between executive branch actors over questions of statutory interpretation). See generally Morrison, supra note 158 (examining application of avoidance doctrine in executive branch statutory interpretation).

217. Mashaw, Norms, supra note 158, at 522. Mashaw notes that agencies, unlike courts, are not passive interpreters. They do not depend on adversaries to generate occasions for statutory interpretation, but rather "are expected to pick and choose their occasions for interpretation and the forms those interpretive utterances will take." Id. at 513. He suggests, among other things, that this agenda control cuts in favor of modes of statutory interpretation that embrace a wider set of policy considerations and pay more attention to political context than is constitutionally appropriate for courts. Id. Likewise, agency statutory interpreters are differently situated than courts with regard to the Constitution. If agency interpreters were to employ the doctrine of constitutional avoidance in their own statutory interpretations, that might both impede their capacity to carry out their legislative mandates effectively as well as "usurp[ ] the role of the judiciary in harmonizing congressional power and constitutional command." Id. at 508. Similarly, even when it is the agency, not the President, that is the recipient of statutory authority, a President's order to the agency may bear different weight in the agency's interpretive exercise than it would for a court.

218. Id. at 506.

utory delegation to the President is required in order to bind an agency to comply with a presidential directive. Agency recalcitrance in the face of executive orders that stem from express delegations would indeed be constitutionally inappropriate.

But how should an executive official regard an executive order that falls outside of that range of express delegation? Such presidential directives are of course relevant practically to the official because the President has the power to remove the official (or threaten removal). But the directive's relevance extends beyond those prudential considerations. To see this, consider an official who simply ignored the President's executive order. That official has done more than risk shortening his or her tenure. Rather, at the minimum, the official seems to have violated an obligation to carefully consider the President's position.

This apparent obligation to consider the President's position suggests a starting point for a model of the manner in which agency actors should evaluate presidential orders: the canonical standard for court review of agency action set forth in *Skidmore v. Swift & Co.*[219] In *Skidmore*, the Court was asked to decide whether overnight stays in a company fire hall to respond to alarms could constitute working time under the Fair Labor Standards Act.[220] In the course of remanding the case back to the district court, the Supreme Court articulated a standard for the level of deference courts should accord the views of the Administrator as expressed in interpretative bulletins and informal rulings. The Court held that the Administrator's views, while not controlling upon the courts, were entitled to careful consideration: "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[221] Indeed, in *Skidmore*, the Court suggested that the agency's and the court's views should diverge only for "very good reasons."[222]

Several formal features of the broad *Skidmore* standard could provide a baseline for agency consideration of the presidential directives that do not legally bind the agency's discretion. Despite the flexibility of the *Skidmore* standard, it does impose an obligation on the reviewing court to consider the agency's position and its basis. At the least, an obligation of consideration of the President's position and its grounds should apply to agency officials. But *Skidmore* demands more than that. In the context of judicial review of agency action, it creates a rebuttable presumption in

219. 323 U.S. 134 (1944); cf. Herz, Imposing, supra note 199, at 258 (proposing inverse standard under which *Skidmore* agency expertise rationale rather than *Chevron*-like emphasis upon accountability through proximity to President would govern judicial deference to agency discretion).

220. 323 U.S. at 135.

221. Id.

222. Id.

favor of the agency's position. So too agency actors should adopt a rebuttable presumption in favor of the President's preferred statutory constructions such that their views will diverge from the President's only for "very good reasons."

Within this basic framework, the range of considerations that inform the strength of this presumption and when it will be rebutted are likely to be different from those that would lead a court to uphold an agency's action under *Skidmore*. For instance, one could imagine that if the President's order pertains to the coordination of policy among different agencies—something the President is particularly well positioned to do—it may warrant more substantial weight, and thus increase the burden on the agency official seeking to overcome it. Likewise, if the order reflects an issue or policy that had played a role in the President's campaign, or that the President has publicly embraced, it may merit added significance.[223] In contrast, the consistency of the President's position with prior pronouncements would have less weight than consistency might in the context of judicial review of agency action. A framework for agency consideration of executive orders based on a rebuttable presumption in favor of the President's view would require the agency to give serious consideration to the President's directives, but the ultimate judgment about whether to follow the President's position would rest with the agency officials.

In response to this framework, one might object that it would encourage the President to communicate his policies to agencies informally, resulting in less government transparency. In other words, the conclusion that the President's orders are not legally binding on agency officials unless the statute grants express powers to the President will reduce the incentives for presidents to act in ways that allow the public to learn the specific presidential policy behind the agency's actions.

There are several levels of response to this objection. First, the extent to which this framework would decrease the incentives for transparency is not clear. There are already strong incentives for the President to achieve his political platform informally through officers of the administration, and then claim credit for those actions if there are potential sources for political gain.[224] It is also already extraordinarily difficult to distinguish between an agency's motivating reason for action (say, the suggestion of the President or White House staff) and the reasons that

223. See Herz, Imposing, supra note 199, at 259, 262–64 (suggesting reasons why presidential involvement should enhance judicial deference to agency actions); see also supra note 192.

224. See Kagan, supra note 8, at 2299–303 (describing President Clinton's practices of announcing administrative work product as well as exerting influence on agency officials in anticipation of presidential announcements of their actions); Strauss, Presidential Rulemaking, supra note 45, at 965–67 (describing President Clinton's public claims of ownership of agency rulemakings where rulemaking documents themselves give no indication of presidential involvement).

the agency invokes to justify its action.[225] Second, even if transparency may suffer, the cause of good policymaking may be advanced precisely because informal give-and-take between the agency and the President may cause both to rethink their initial policy positions without the political consequences of a public negotiation. Further, this view also reinforces the agency's incentives to justify its action in terms of statutory criteria even in the presence of a presidential position, and perhaps especially then. From the perspective of producing public-regarding regulation, that reinforcement might be applauded.[226]

More generally, this construction of the President's statutory powers results in a conception of the executive branch in which Congress, by vesting authority in an official alone, creates a potential source of temporary resistance to the President. Despite the enormous influence the President has over executive officials, the official could disagree with a President's preferred construction or use of the statute. Certainly any executive official's resistance to presidential policy is likely to be at most temporary—firing and replacement is always a possibility. But the mere possibility of resistance creates a legal check on presidential abuse internal to the executive branch: The President must persuade or fire the official, rather than simply bind that official to his views. As the next Part argues, we have reasons to embrace this allocation of independent discretion to agency officials.

V. PRESIDENTIAL EXCEPTIONALISM AND THE CHOICE OF DELEGATE

Every time Congress seeks to grant authority, it must make a structural choice about institutional design. It must determine to whom to grant power, what organizational structure to create, what administrative processes to require, and how the recipients of statutory authority may be removed. These structural choices are themselves a product of politics, "for all political actors know that structure is the means by which policies are carried out or subverted, and that different structures can have enormously different consequences."[227]

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225. See, e.g., Herz, Imposing, supra note 199, at 229–48 (illustrating executive branch interaction, and back-and-forth, over issuing EPA Rule); Mashaw, Norms, supra note 158, at 505 (noting it is not good argument for agencies to defend their regulations on ground that President "told me to interpret the statute that way").

226. Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 528 n.313 (2003) (describing how requirement of agency rationality tends to "inhibit decisions that evince an impermissibly narrow purpose or fail to evince a properly public purpose").

227. Terry M. Moe & Michael Caldwell, The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems, 150 J. Institutional & Theoretical Econ. 171, 173 (1994); see also Lewis, supra note 3, at 2–3 (2003) (arguing that agency desigu is shaped less by concerns about efficiency and effectiveness than concerns about reelection, political control, and policy outcomes); Moe, Bureaucratic Structure, supra note 122, at 267 (arguing that American public bureaucracy "is not

Those political choices require a default rule as to how delegations to officials are construed, including to whom they grant directive authority. The statutory arguments presented in the previous Parts furnish one such default rule of construction: They provide a clear interpretive presumption as a basis for congressional, judicial, and executive branch actions. They also track Congress's vocabulary of delegation. But are these constructions desirable? This Part briefly suggests how presidential and congressional actors might respond to that question, and then provides the outline of a broader defense of the desirability of these constructions.

Contemporary empirical work provides grounds to suggest that the President and Congress are likely to view these statutory constructions differently. Presidents, this empirical work shows, are under strong political pressures to control the administrative state; they are broadly held accountable for the functioning of government, and they need centralized control to implement policy effectively.[228] As a result, modern presidents have opposed "agency designs that will limit their control or confuse lines of accountability."[229] Based on this general premise, the emphasis on express delegation as a requirement for directive authority would result in less clear control of bureaucracy for presidents; it does not make presidents institutional winners.

Congress's interests in structural design are, in contrast, more diffuse and contingent.[230] Individual members of Congress have fewer incentives than presidents to create an effective or centrally controlled bureaucracy. Their reelection prospects are tied to serving the particular interests of their constituents and organized interest groups. Sometimes those interests are furthered by presidential control of policymaking.[231] But when the President is unlikely to support the policy created, members of Congress will seek to "insulate as much as possible from presidential control."[232] In conditions of uncertainty, Congress deploys a wide variety of tools of insulation, from requiring that the agency officials be appointed for fixed terms through a commission structure, to locating them in executive departments and imposing procedural requirements on their actions.[233] Based on the premise that Congress has an interest in being able to create varying degrees of presidential control over agency actors, Congress's own interest is advanced if simple delegations to executive officials are not extended by implication to include the President, especially

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designed to be effective"; rather, it arises "out of politics, and its design reflects the interest, strategies, and compromises of those who exercise political power").

228. Lewis, supra note 3, at 24–27 (describing President's incentives to control bureaucracy).

229. Id. at 26.

230. See Moe, Bureaucratic Structure, supra note 122, at 277–79.

231. Lewis, supra note 3, at 28–29, 37.

232. Id. at 30.

233. Id. at 30–38 (providing detailed analysis of Congress's tools of insulating agencies from presidential oversight).

when formulations to achieve those purposes, such as mixed agency-President delegations or President-only delegations, are readily available.

Permitting the President to assert implied authority under a delegation to an executive official would short-circuit the administrative process that Congress typically specifies for agency actors. Agency process has been a persistent source of legitimacy for administrative action. And since the enactment of the Administrative Procedure Act, unless the organic statute otherwise provides, executive agencies must comply with the APA's procedural requirements.[234] The APA does not, as noted, apply to the President.[235] Therefore, if the President were permitted to act directly under a statutory delegation, say, by promulgating standards of workplace safety in his own name, the implementation of the delegated powers would fall outside the procedural requirements of the APA, despite the applicability of those requirements to actions by the express delegate.[236] In this way, statutory constructions that imply directive powers disrupt Congress's interest in specifying the procedures through which statutory delegations should be implemented.[237]

The central normative argument for implying statutory powers to the President is that the President's political accountability is an important source of legitimacy for the administrative state,[238] and the President's general control over agency action promotes responsiveness and effi-

234. 5 U.S.C. §§ 551–584 (2000).

235. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

236. While the APA would apply to an agency actor implementing a President's directive, see Stack, supra note 194, at 555; supra note 121, in this circumstance the President acts under the statute in his own name.

237. Reading delegations in this way corresponds to recent interpretations of the scope of Congress's power to delegate. Merrill argues in a recent article that Article 1, Section I of the Constitution does not prohibit Congress from delegating legislative power—that is, it does not embody what has traditionally been called the nondelegation doctrine—but it does require that delegations of lawmaking authority must come from Congress, which he calls the exclusive delegation doctrine. See Merrill, Rethinking, supra note 164, at 2100–01. Merrill argues that one consequence of this exclusive delegation doctrine is that "[r]esponsibility for the exercise of the delegated power must rest where Congress has placed it," unless Congress has authorized its delegates to subdelegate. Id. at 2176. This constitutional conclusion leaves open the statutory interpretation question of how to tell where Congress has placed authority. The substantive statutory interpretations defended above provide a partial answer: The President cannot supplant Congress's express determination of the agent to whom it delegates authority. Abiding by Congress's express choice of delegate supports the underlying values served by the exclusive delegation doctrine. Among other things, it reinforces Congress's political accountability for its choice of delegate, see id. at 2142, as well as provides an easily administrable standard of judicial review, see id. at 2150.

238. See Kagan, supra note 8, at 2331–46. But see Bressman, supra note 226, at 463 (arguing that presidential accountability is not sufficient to legitimate administrative state); Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 988 (1997) (critiquing reliance on presidential accountability as simple answer to problem of legitimacy of administrative state).

ciency of bureaucracy.[239] But those values can be adequately protected without the potential costs invited by use of implied constructions.

Presidents have a wide and effective variety of tools for influencing the behavior of executive agencies.[240] As noted above, empirical work supports the intuition that as a result of the President's ability to influence agency behavior, there is a strong correspondence between presidential priorities and executive agency policy.[241] Indeed, that correspondence is also reflected in policies of independent agencies.[242] If executive agencies closely track presidential priorities, and the President's own political pressures provide strong incentives to make executive agencies effective, taking the additional step of implying presidential directive authority is not necessary to create sufficient political responsiveness and accountability in administrative agencies. Political accountability need not be maximized to be effective. Denying the President's implied statutory powers leaves in place conventional tools of presidential control, such as appointment and removal,[243] that already ensure the loyalty, if not total obedience, of executive officials.

Other structural considerations provide additional grounds for resisting the further step of implying directive authority for the President in delegations to executive officials. Presidents have several institutional advantages over Congress; these advantages provide reasons to adopt narrow constructions of the President's statutory powers. As public choice theory shows, the transaction costs of congressional action are much higher than those the President faces in asserting power in a presidential order.[244] To act, Congress must coordinate and negotiate with hundreds of members, "each with their own constituencies, interests, and schedules."[245] In contrast, the President may act on his own initiative in the virtual absence of procedure[246] and without any need to obtain agreement from others.[247] That allows the President to gain a "first mover" advantage; the President can implement policy on his own and force

239. See, e.g., Kagan, supra note 8, at 2339–46.

240. See supra text accompanying notes 136–139.

241. See supra note 157 and accompanying text.

242. See supra note 157 and accompanying text.

243. See supra text accompanying notes 135–147.

244. See, e.g., William G. Howell, Power Without Persuasion: The Politics of Direct Presidential Action 14–16 (2003) (noting that "the president acts alone" without "need to rally majorities, compromise with adversaries, or wait for some interest group to bring a case to court"); Terry M. Moe & William G. Howell, The Presidential Power of Unilateral Action, 15 J.L. Econ. & Org. 132, 144–45 (1999) (explaining ways in which Congress faces greater collective action problems than President).

245. Howell, supra note 244, at 107.

246. See Stack, supra note 194, at 552–53 (discussing dearth of enforceable procedural requirements for issuance of executive orders).

247. See Howell, supra note 244, at 107 (noting that, unlike Congress, President is "free to set policy on his own").

other institutions to respond to his agenda and policy.[248] If other institutions "are unable to respond effectively, or decide not to, presidents win by default."[249] The President's position as an executive in the federal bureaucracy also grants him a strategic advantage in gaining access to expertise and information.[250]

The President also has greater incentives to expand his power than members of Congress have to constrict it. Based on the modest assumption that members of Congress generally aim to gain reelection, they focus their efforts on legislation that may benefit their constituents.[251] The institutional consequences of permitting a President to assert implied statutory authority are not likely to be of great importance to legislative constituencies—or are likely to be important only if they correspond to a particular policy impact. Presidents, in contrast, represent a national constituency, and "are held accountable for their performance as managers."[252] As a result, presidents have greater interest in protecting and expanding their institutional power than do members of Congress on behalf of their institution. Members of Congress, as Terry Moe observes, "are unlikely to oppose incremental increases in the relative power of presidents unless the issue in question directly harms the special interests of their constituents—which, if presidents play their cards right, can often be avoided."[253] Defending Congress's institutional power also tends to require centralized and bipartisan cooperation and less member autonomy, which is also unattractive and costly to members of Congress.[254] Finally, legislation to overrule executive actions approved by a sitting President will often require a veto-proof supermajority. Recent

248. See id. at 15, 27; Terry M. Moe & William G. Howell, Unilateral Action and Presidential Power: A Theory, 29 Presidential Stud. Q. 850, 855 (1999) [hereinafter Moe & Howell, Unilateral Action].

249. Moe & Howell, Unilateral Action, supra note 248, at 855.

250. See Howell, supra note 244, at 101 (discussing informational advantages of President); Moe & Howell, Unilateral Action, supra note 248, at 855 ("[P]residents . . . have at their disposal a tremendous reservoir of expertise, experience, and information, both in the institutional presidency and in the bureaucracy at large."). For a helpful account of mechanisms for congressional information gathering and oversight of agency action, see Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. (forthcoming 2006).

251. See Howell, supra note 244, at 108 (arguing that when members of Congress decide to challenge President on an issue they "must always weigh the attendant electoral costs and benefits").

252. Lewis, supra note 3, at 4.

253. Terry M. Moe, The Presidency and the Bureaucracy: The Presidential Advantage, *in* The Presidency and the Political System 443, 454 (Michael Nelson ed., 6th ed. 2000) [hereinafter Moe, Presidency and Bureaucracy]; see also Moe & Howell, Unilateral Action, supra note 248, at 861 (noting that congressional response to executive orders will turn on orders' effect on legislative constituencies, not "Congress's power vis-à-vis the president").

254. See Moe, Presidency and Bureaucracy, supra note 253, at 454 (noting that members of Congress have strong incentives to defend constituents' concerns and maintain member autonomy).

empirical work shows that of the thousands of executive orders issued, Congress has overridden only a handful through legislation.[255]

Kagan acknowledges that Congress cannot be relied upon to constrain the President's adventurous assertions of statutory authority.[256] She proposes judicial review and congressional self-help, in the form of drafting more restrictive statutes, as avenues of response.[257] But the extent to which the courts can check the President's assertion of statutory power depends in part upon the very substantive question at issue: whether courts will read delegations to executive officials as granting power to the President.[258] If they do, then judicial review does not itself provide a constraint on the President—at least as to the question of who is the recipient of authority. Indeed, a judicial decision upholding a sitting President's assertion of power, even where that assertion is beyond the enacting and current Congresses' preferences, still requires that Congress assemble a veto-proof supermajority to override the President's action. Judicial review thus provides a viable source of constraint only if it proceeds from a set of interpretations and standards of review that are themselves constraining.

While reading presidential authority into simple delegations to executive officials might provide Congress reason to draft more restrictive statutes in the future, that does not constrain the scope of the statutory power that presidents may claim under existing statutes.[259] Moreover, if it is true that Congress is institutionally less interested in policing the scope of presidential prerogatives than the President is interested in expanding them, Kagan's view may be overly optimistic as to the constraints that Congress will impose in future legislation.

More fundamentally, this broad reading of the President's statutory powers does not come to terms with the scope of the incentive of the President to reach beyond the boundaries of existing statutes. The position of the President in the American constitutional system of separation of powers, as Bruce Ackerman argues, creates numerous structural pathologies.[260] Because Congress and the President are elected independently, Congress may act to frustrate the President's legislative agenda. The more Congress does so, Ackerman suggests, the more the President "will be tempted to achieve his objectives by politicizing the administration of whatever-laws-happen-to-be-on-the-books."[261] That dynamic creates pressure for agency heads to find authority to meet the political plat-

255. See Howell, supra note 244, at 116.

256. See Kagan, supra note 8, at 2350.

257. Id. at 2350–52.

258. It also depends, of course, on how they review what powers are granted.

259. See Kagan, supra note 8, at 2352 (acknowledging this point).

260. See Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 688–715 (2000).

261. Id. at 712.

form of the President. At its worst, it can "create an environment in which loyalty to the President trumps the rule of law."[262]

As a protection against those risks, we are better off with a conception of the agency official's role that emphasizes the official's independent duty under the law, as opposed to its acting in the stead of the President. That emphasis on the independent legal duty and discretion created by statutory delegations, if absorbed by executive branch actors, has the potential to contribute to the protection against presidential abuse of the administrative state. This conception of agencies' role, of course, is at best a partial solution. It proceeds from within the current structure of the administrative state, as opposed to envisioning wide-ranging institutional and constitutional reforms.[263] And like so much in human affairs, it depends on the good judgment of those who exercise authority. But standing from inside our system, we have reason to embrace a conception of the role of statutory delegates that places a duty under the law at its center. That position seems wholly appropriate for a nation committed, as Chief Justice Marshall intoned in the language of his day, to "a government of laws, and not of men."[264] For us, that involves defending an administration of laws, not of the President.

CONCLUSION

The scope of the President's statutory powers fundamentally shapes the range of actions that the President can take unilaterally—that is, without concurrent agreement from Congress. In modern government, important purposes are served by direct congressional authorization of presidential powers. But in view of the significance of the President's assertions of statutory powers, it is a critical question exactly when a statute grants power to the President.

This Article aims to rule out one recurring broad construction of the President's statutory powers—namely that delegations to executive officials should be read to include the President as an implied recipient of statutory authority. It specifically argues that such implied extensions are not the most natural construction of delegations to executive officials, and suggests that there are grounds to conclude that such constructions may not even be "fairly possible." Congress's enduring practice of enacting delegations to executive officials under express conditions of presidential approval supports a negative implication that delegations to executive officials alone do not grant the President directive powers. Moreover, in view of the structural incentives for presidents to make adventurous claims of statutory authorization, and the institutional deficits of Congress to check these assertions, there are strong reasons to em-

262. Id. at 713.

263. Cf. id. at 714 (proposing constitution for administrative state combining features of Administrative Procedure Act and parliamentary system).

264. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

brace statutory constructions that limit the occasions for the President to claim statutory power (and limit judicial deference to the President) to statutes in which Congress has delegated such power expressly to the President.

These statutory conclusions should matter to proponents of a strongly unitary conception of the executive. They reveal that their constitutional commitments require, at the very minimum, reliance on principles of constitutional avoidance to save the unitary position from requiring the wholesale unconstitutionality of delegations to officials other than the President. And depending on where one draws the line between constructions that are not the most natural and those that are not "fairly possible," these commitments may require such a constitutional upheaval. That consequence should give pause.

These statutory constructions also matter to administrative government as it exists today. They define a necessary condition for the President's statutory powers to administer the laws directly—a grant of authority to the President in name—and to bind administrative actors to his views on the implementation of a statute. This construction reinforces a conception of delegation of power as conferring an independent discretion on agency officials subject to the managerial oversight, but not directive authority, of the President. Further, based on these statutory conclusions, presidential oversight is an insufficient condition for *Chevron* deference. Deference under *Chevron* itself requires a grant of authority, so the President's own constructions of statutory authority may qualify for *Chevron* deference only if they follow from an express delegation.

This focus on express delegation reinforces the accountability of Congress for those powers that it seeks to grant the President directly, and emphasizes that every executive officer delegated statutory power has a duty under the law that exceeds his or her duty to the President. This theory still allows for tremendous presidential influence over the administration of laws, but it provides a constraint. The structural and political advantages of the President in our constitutional system make such constraint worth embracing.