Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking

Evan J. Criddle

William & Mary Law School, ejcriddle@wm.edu
HeinOnline -- 88 Tex. L. Rev. 441 2009-2010

Texas Law Review

Volume 88, Number 3, February 2010

Articles

Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking

Evan J. Criddle

Do administrative agencies undermine popular sovereignty when they make federal law? Over the last several decades, some scholars have argued that rulemaking by unelected agency officials imperils popular sovereignty and that federal law should resolve the apparent tension between regulatory practice and democratic principle by allowing the President to serve as a proxy for the “will of the people” in the administrative state. According to this view, placing federal rulemaking power firmly within the President’s managerial control would advance popular preferences throughout the federal system.

This conventional wisdom is misguided. As political scientists have long recognized, the electorate’s relative disengagement from the federal regulatory process prevents voters from developing coherent preferences about most questions of regulatory policy. Moreover, even if discrete preferences could be attributed to the people as a whole, the American presidency does not in practice serve as a reliable proxy for majoritarian preferences in the administrative state.

As an alternative to presidential “proxy representation,” this Article argues that federal administrative law should seek to promote popular representation in agency rulemaking through “fiduciary representation.” Like fiduciaries in private law, all federal officers exercise discretionary administrative authority for the benefit of those subject to their power, and all are bound by duties of purposefulness, fairness, integrity, solicitude,
reasonableness, and transparency. Rather than focus on a representative's obedience to the ephemeral public will, fiduciary representation emphasizes agencies' responsibilities to act deliberatively and reasonably in promoting the public welfare. On this account, presidential administration is one plausible strategy for reconciling administrative lawmaking with popular sovereignty, but it is not necessarily the most promising strategy. Congress may counterintuitively promote popular representation in the administrative state by vesting final rulemaking authority in unelected agency administrators rather than the popularly elected President.

I. Introduction .................................................................................................................. 443
II. Presidential Administration .......................................................................................... 449
   A. Three Models of Popular Representation .................................................................. 450
   B. Operationalizing Presidential Administration ......................................................... 453
III. Proxy Representation ................................................................................................... 456
   A. Three Fictions of Presidential Administration .......................................................... 457
      1. The Fiction of Popular Authorization ................................................................. 457
      2. The Fiction of Presidential Accountability ............................................................ 461
      3. The Fiction of Presidential Management ............................................................... 462
   B. The Pathologies of Presidential Administration .......................................................... 464
IV. Fiduciary Representation ............................................................................................... 465
   A. Conceptualizing Fiduciary Representation .................................................................. 466
   B. Fiduciary Representation in the Administrative State .................................................. 472
   C. Fiduciary Representation in Agency Rulemaking: Six Principles ...476
   D. Fiduciary Representation in Agency Rulemaking: Three Applications ...................... 479
      1. Eliminate the APA's Categorical Exemptions for Informal Rulemaking .................. 480
      2. Expand Judicial Review of Agency Inaction ......................................................... 482
      3. Include White House Communications in the Administrative Record .................. 484
   E. Fiduciary Representation and Popular Sovereignty ...................................................... 487
V. Fiduciary Administration ............................................................................................... 491
   A. Presidents and Administrators as Fiduciary Representatives .................................... 492
   B. Fiduciary Representation and Interbranch Deliberation .............................................. 498
   C. The Passive Virtues of Fiduciary Administration ....................................................... 500
VI. Conclusion ..................................................................................................................... 503
I. Introduction

Ever since Alexander Bickel published *The Least Dangerous Branch* in 1962, American constitutional theorists have agonized over the supposedly "countermajoritarian" character of judicial review. Bickel's quandary can be summarized succinctly: judicial review empowers federal judges to strike down legislation in defiance of congressional majorities and the popularly elected President; yet unlike Congress and the President, federal judges are arguably poor proxies for the popular will because they are appointed for life, do not derive their authority directly from any particular constituency, and are not called to account for their decisions outside the four corners of their published decisions. Explaining why judicial interpretations of the Constitution should trump executive and legislative interpretations, and under what circumstances, has occupied legal theorists for a generation. At the heart of these debates lies Bickel's faith in popular representation as the keystone of American constitutional democracy.

Curiously, while Bickel singled out judicial review for censure as "a deviant institution in the American democracy," he casually dismissed the notion that administrative lawmaking might also undermine popular representation.
representation. Bickel believed that federal agencies posed little danger to the popular will because their lawmaking authority was merely "interstitial or technical" and could be exercised only pursuant to congressional authorization. Such sentiments reflected the conventional wisdom of the early 1960s, a time when agency rulemaking had yet to emerge as the dynamic and pervasive force it is today. When Bickel composed The Least Dangerous Branch, federal agencies still operate primarily through adjudicatory proceedings, devoting scant attention and few resources to rulemaking initiatives. Over the next several years, however, a chorus of criticism over perceived regulatory torpor prompted the Kennedy and Johnson Administrations to emphasize agency rulemaking as a device for reinvigorating administrative governance. Congress followed suit, creating new agencies with rulemaking authority and expanding existing agencies' rulemaking jurisdiction. As a result of these developments, federal rulemaking experienced explosive growth during the 1960s and 1970s, with the annual number of federal rulemaking initiatives increasing almost 500% between 1960 and 1974. By the 1970s, the dawning "age of rulemaking" posed an existential challenge to Bickel's democratic faith, which Bickel failed to anticipate—namely, how to reconcile agency lawmaking with the republic's constitutional commitments to popular sovereignty and representative democracy.

If anything, subsequent developments have only enhanced this question's salience. Federal agencies today generate roughly 4,000 regulations per year, far outpacing Congress's annual output of fewer than

5. Id. at 16–18.
6. Id. at 19.
8. Id.
9. See id. (discussing the expansion of agency rulemaking throughout the 1960s and 1970s).
10. Id. at 1148–49.
13. See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.7, at 16–19 (4th ed. 2002) (chronicling the courts' struggle to situate agencies in our governmental system as well as to determine the proper role for each of our three branches of government with regard to agency policy making).
400 bills. The rising tide of federal regulation over the last four decades cannot easily be dismissed as merely “interstitial and technical” because federal regulators increasingly claim primary responsibility for resolving portentous policy questions in fields such as the environment, energy, and occupational health and safety. Agency regulations commonly have the force of law, subject to the same sanctions as federal legislation. Although most agency rulemaking initiatives are subject to judicial review for compliance with congressional standards, federal statutes often provide vague or ambiguous instructions, and federal courts routinely defer to agencies’ statutory interpretations under the *Chevron* and *Mead/Skidmore* doctrines. As a result of these and other developments, the scope of agency rulemaking powers has expanded dramatically since Bickel’s era.

Concerns about the perceived countermajoritarian character of administrative rulemaking have prompted some legal scholars and Executive Branch officials to suggest that federal administrative law should enhance popular representation through “presidential administration.” They argue that agencies should recognize the President’s legal authority to direct agency rulemaking initiatives toward policies that best reflect the “will of the


15. See Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81, 90 (2007) (characterizing rulemaking as “the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide”).

16. See *PIERCE*, supra note 11, at 34 (listing the agencies formed to address these policy questions).


19. See *PIERCE*, supra note 13, § 1.5, at 10–14 (tracing the historical expansion of the regulatory state especially in the 1960s–1990s after Bickel’s original publishing date).

20. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) (arguing that the President’s national constituency, desire for reelection, and desire for a strong and favorable legacy create incentives that make administrative rulemaking through presidential administration more majoritarian); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994) (“But because the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration.”); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193–95 (1994) (“[T]he President ... is less vulnerable [than Congress] to targeted appeals by interest groups ... . Significantly, the President sits atop the regulatory system as the leader of the federal bureaucracy. If anyone is positioned to coordinate diffuse regulatory policy, it is the President, as leader of the executive branch.”).
people. As the only federal official elected by and accountable to a national constituency, the President (with the Vice President) arguably receives a unique popular mandate in matters of national policy. This mandate, combined with continuing political pressures to honor public opinion, supposedly ensures that the President will ordinarily resolve regulatory disputes in conformity with majoritarian preferences. Supporters of presidential administration argue further that enhanced presidential control over agency regulation would improve the transparency of agency rulemaking, facilitate interagency cooperation, and ultimately make agencies more effective and accountable instruments for advancing the public interest. Acting through the President, the American people would be better able to craft regulations responsive to their own collective perception of the common good.

This vision of the President as a proxy for majoritarian preferences has profoundly influenced public discourse about the administrative state for the past quarter century. As I will explain more fully in Part II, every president since Richard Nixon has taken steps to strengthen and formalize White House influence over agency rulemaking proceedings, from Ronald Reagan’s introduction of rigorous regulatory review by the Office of Management and Budget (OMB) to Bill Clinton’s issuance of formal presidential directives to spur agency rulemaking. In INS v. Chadha, the Supreme Court famously invoked the rhetoric of presidential popular representation, emphasizing the President’s unique electoral mandate as a prophylaxis against regional factionalism and special-interest capture. Although the
case for presidential administration has been challenged on constitutional and statutory grounds, the underlying normative vision of presidential administration as a formula for strengthening popular representation in agency rulemaking has gained widespread acceptance and continues to attract adherents today.

This Article accepts Bickel’s assertion that popular representation is foundational to political legitimacy in a democratic republic, but it challenges the thesis that presidential administration is an effective strategy for advancing majoritarian preferences in agency rulemaking. Part III demonstrates that none of the leading arguments for equating the President’s preferences on questions of regulatory policy with the will of the people can withstand close scrutiny. Over the years, political scientists have assembled a wealth of empirical evidence that national elections do not confer mandates upon presidents to pursue specific regulatory policies. Nor does the postelection threat of a future electoral defeat or the disapproving judgment of future historians ensure that presidents will adopt policies consistent with majority opinion. In practice, there are simply no guarantees that particular presidential regulatory policies will be more closely correlated with public of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all . . . .” (quoting Myers v. United States, 272 U.S. 52, 123 (1926)).

29. See, e.g., A. Michael Froomkin, The Imperial Presidency’s New Vestments, 88 NW. U. L. REV. 1346, 1346 (1994) (“[A] proper structural analysis of the Constitution undermines the constitutional case for an executive branch with a chain of command organized along military lines and instead emphasizes the existence of a discernible balance between Congress’s role in structuring the executive and the President’s inherent and default powers.”); Robert V. Percival, Presidential Management of the Administrative State: The Not-So-Unitary Executive, 51 DUKE L.J. 963, 966 (2001) (“[A]lthough the president’s ability to remove agency heads gives him enormous power to influence their decisions, it does not give him the authority to dictate substantive decisions entrusted to them by law.”).

30. See Kevin M. Stack, The President’s Statutory Powers to Administer the Laws, 106 COLUM. L. REV. 263, 263 (2006) (asserting that “the President has statutory authority to direct the administration of the laws only under statutes that grant to the President in name,” contrary to other prevalent theories of presidential power, which suggest that a statutory grant of power to an executive officer “implicitly confers that authority upon the President,” as well).

31. See, e.g., Calabresi, supra note 21, at 35 (“Representing as he does a national electoral college majority, the President at least has an incentive to steer national resources towards the 51% of the nation that last supported him (and that might support him again) . . . .”).

32. See generally MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 2–4 (1996) (arguing that varying levels of political knowledge within a democratic electorate make it difficult to discern specific policy positions held by the public); STANLEY KELLEY, JR., INTERPRETING ELECTIONS 135–37 (1983) (presenting different critics’ skepticism of claims of mandate due to the difficulty of isolating voters’ intentions regarding a single issue); Robert A. Dahl, Myth of the Presidential Mandate, 105 POL. SCI. Q. 355, 355–72 (1990) (characterizing the theory of mandates as a myth that has contributed to a pseudo-democratization of the presidency); John A. Ferejohn, Information and the Electoral Process, in INFORMATION AND DEMOCRATIC PROCESSES 3, 6–19 (John A. Ferejohn & James H. Kuklinski eds., 1990) (indicating that voters’ lack of information and lack of sufficient tools to communicate their will to officeholders leaves those officeholders with no clear way to decipher the public’s will).
than policies developed through ordinary agency rulemaking proceedings. Moreover, the argument for presidential administration founders on a more basic problem: the public's pervasive ignorance about regulatory governance. The notion that presidents (or any other public officials) might serve as reliable proxies for majoritarian preferences in agency rulemaking becomes indefensible once one acknowledges that the American public generally knows little about even those regulatory initiatives that most directly affect their interests. For the vast preponderance of agency rulemaking proposals, the public simply does not have any coherent opinion. As such, the notion that presidents act as proxies for majoritarian preferences does not furnish a credible account of popular representation in agency rulemaking.

In Part IV, I argue that American administrative law should abandon the misguided search for a unitary oracle of the public will and instead safeguard popular sovereignty in agency rulemaking by adopting a fiduciary model of popular representation. Administrative agencies, like private-law fiduciaries, exercise discretionary power of an administrative nature over the legal or practical interests of their beneficiaries, the people subject to state power. To promote popular representation under the fiduciary model of the state, administrative agencies must exercise their rulemaking powers in a manner that satisfies six core principles: purposefulness, integrity, solicitude, fairness, reasonableness, and transparency. At a minimum, these principles obligate federal agencies to act deliberately (not reflexively) and deliberatively (not arbitrarily or unilaterally) when considering potential rulemaking actions, taking appropriate care to investigate reasonable alternatives and to provide rational explanations for their decisions on the public record. I argue that Congress should operationalize the fiduciary model in federal rulemaking by amending the federal Administrative Procedure Act.

33. See, e.g., Delli Carpini & Keeter, supra note 32, at 79–82 (demonstrating through poll-response results the general public's lack of knowledge regarding current events and politics).

34. I recognize, of course, that "popular sovereignty" is itself a contested concept, and this is not the place for a detailed explication or defense of the idea. For purposes of this Article, I use the term "sovereignty" not in the classical Blackstonian sense of "absolute despotic power" but rather to capture the general idea that the state must respond to the legitimate interests of its subjects, however defined. See Christopher Morris, The Very Idea of Popular Sovereignty, in DEMOCRACY 1, 5, 12 (Ellen Frankel Paul et al. eds., 2000) ("Government has authority (i.e., is permitted or has the right) to act only insofar as it is so authorized, and this authorization must come from the People governed.").


(APA) to eliminate the categorical exceptions to notice-and-comment rulemaking, expand judicial review of agency inaction, and include White House communications concerning pending agency rulemaking actions on the public record. The common thread that connects these three proposals is a vision of agency rulemaking as a locus of other-regarding, purposive, and deliberative administration.

I conclude in Part V with an exploration of the fiduciary model’s implications for presidential administration. Although presidential administration is not inconsistent with the fiduciary model on its face, I argue that a comparison of presidents and agency heads under the six principles of fiduciary administration supports the view that agency heads are, by and large, better positioned to serve as fiduciary representatives in administrative lawmaking. For example, agency administrators tend to possess greater expertise in their fields of labor and are better positioned than the President to engage in detailed, deliberative consideration of particular regulatory proposals. Agency administrators are also more likely to engage diverse perspectives and provide reasoned justifications for their decisions. As a result, Congress may promote popular representation by entrusting final rulemaking authority to unelected agency administrators rather than the popularly elected President, provided it does so in the right way.

The fiduciary model of popular representation does not ensure that federal regulations will always embody the will of the people, but neither does presidential administration in a pluralistic society plagued by pervasive knowledge gaps about federal regulation. What the fiduciary model does offer is a vision of administrative lawmaking that promotes the public welfare by honoring congressional delegations of authority to agency heads, facilitating reasoned justification and deliberative accountability, utilizing agency experience and expertise, promoting transparency, and minimizing the dangers of clandestine interest-group influence. By reframing the concept of popular representation as emanating from reasoned deliberation among government institutions and between administrative agencies and the body politic, the fiduciary model furnishes a promising new framework for rethinking popular representation in agency rulemaking.

II. Presidential Administration

This Part offers a brief introduction to presidential administration in federal administrative law. I begin by explaining how the movement to centralize agency rulemaking under the President’s managerial control reflects a pro-majoritarian vision of popular representation in the administrative state. I then review the last four decades of presidential administration, from Richard Nixon to Barack Obama, summarizing each president’s efforts to enhance the White House’s managerial control over agency rulemaking through ever-intensifying levels of regulatory oversight.
A. Three Models of Popular Representation

For generations, American legal scholars have tended to take for granted that the administrative state’s political legitimacy depends, at least in part, upon its congeniality to popular representation.37 If popular sovereignty expresses itself through popular representation, and if administrative lawmaking frustrates popular representation, then the entire enterprise of administrative lawmaking could be called into question as a violation of popular sovereignty. Thus, an enduring challenge for defenders of the administrative state has been to construct a model of agency rulemaking that would reconcile discretionary agency lawmaking with mainstream democratic theory.

Several models of popular representation have emerged over the years to fill this gap in administrative law’s theoretical foundations.38 Each of these models frames the concept of representation in a different way.39 However, none furnishes a satisfying account of the relationship between popular sovereignty and administrative lawmaking.

Prior to World War II, the conventional view among judges and legal academics was that the legislative process satisfied the demand for popular representation in the administrative state.40 Congress, acting as popular representative, would resolve any disputed policy matters in statutory directives to federal agencies, and agencies, in turn, would translate and implement those generalist directives in specific contexts.41 This vision of agencies as dispassionate transmission belts for congressional policy decisions became untenable, however, once Legal Realists turned their sights to the ubiquity of agency policy-making discretion.42 In practice, vague legislative directives left too many critical policy questions to be resolved at the level of agency implementation.43 Far from acting as mere technocratic

---

40. See Stewart, supra note 37, at 1671–76 (describing the traditional model of American administrative law).
41. Id. at 1673–75; see also Garland, supra note 38, at 577–78 (describing the primary theoretical models used by scholars to describe administrative agency decision making); Reich, supra note 38, at 1618 (discussing the history of models of administrative decision making).
42. See Werhan, supra note 39, at 574–76 (discussing the influence of legal realism on the theory of administrative law).
43. Stewart, supra note 37, at 1677; see also Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461, 471 (2003) (suggesting that the transmission-belt theory proved inadequate in practice due to the vagueness of legislative directives).
servants of congressional directives, federal agencies frequently had to resolve fundamental policy questions with little direction from Congress.44

One response to the transmission-belt model’s collapse was the emergence of an “interest-group representation” model rooted in public-choice theory.45 Rather than focus on Congress’s statutory instructions as a source of democratic legitimacy, the interest-group representation model characterized the public’s direct participation in notice-and-comment rulemaking proceedings under the APA as a form of popular representation.46 “The job of the public administrator, according to this vision, was to accommodate—to the extent possible—the varying demands placed upon government by competing groups,” explained Robert Reich.47 “The public administrator was a referee, a skillful practitioner of negotiation and compromise.”48 Agency administrators, like legislators, would seek to maximize popular preferences as revealed during the public comment phase of informal notice-and-comment rulemaking.49 In contrast, judicial review was viewed with suspicion as a potentially deviant intrusion into majoritarian rulemaking processes.50

As Richard Stewart and others have observed, the interest-group representation model could not withstand scrutiny as a theory of popular representation.51 In practice, agencies did not always seek to maximize popular preferences when selecting between policy alternatives.52 All too often, agencies were perceived as catering to narrow interest-group preferences to the neglect of broader public interests.53 More troubling still, federal courts rendered only limited assistance as agents of interest-group “representation reinforcement.” Even under so-called “hard look” review of agency regulations, federal courts did not compel agencies to accept interest-group comments as binding referenda on regulatory policy; rather, proposed

44. See James O. Freedman, Expertise and the Administrative Process, 28 ADMIN. L. REV. 363, 372 (1976) (indicating that Congress regularly delegates questions to agencies yet gives the agency “no more guidance than a statutory standard of vaguely-defined breadth”).
45. Stewart, supra note 37, at 1760; see also Garland, supra note 38, at 579 (“The interest representation model evolved in response to widespread disillusionment with both the ‘transmission belt’ and ‘expertise’ models of administrative action.”).
46. See Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 346–48 (revealing that it is common for agencies to allow interested persons to present oral comments to the agency itself or for agencies to employ public panel discussions to explore issues).
47. Reich, supra note 38, at 1620.
48. Id. at 1619–20.
51. Stewart, supra note 37, at 1775–81.
52. See Garland, supra note 38, at 583 (remarking that procedural requirements appeared to offer little protection when an agency had already determined what course to undertake before the period of public participation began).
rules could satisfy judicial review as long as agencies provided a rational explanation for rejecting interest-group preferences. \(^{54}\) Viewed in this light, the interest-group representation model was far less persuasive. Critics began calling into question the value of notice-and-comment procedures, contending that public participation dramatically increased the administrative costs of regulation without yielding the desired benefit: popular control over regulatory policy. \(^{55}\)

As the interest-group representation model fell into disfavor, the late 1970s and 1980s witnessed a return to Bickel’s majoritarian paradigm as the starting point for understanding popular representation in the administrative state. \(^{56}\) Influential public officials and scholars embraced Woodrow Wilson’s vision of the President as the only “national voice” for the American people as a whole \(^{57}\) and argued that administrative law could promote majoritarian preferences more effectively by committing all discretionary rulemaking decisions to the President’s managerial control. \(^{58}\)

The President, by virtue of his or her national election and accountability to a national constituency, would be better equipped to represent national majoritarian preferences than any political appointee or career civil servant. \(^{59}\)

Therefore, by accepting direction from the White House on questions of regulatory policy, agencies could supposedly become more responsive to the

---


57. See Dahl, supra note 32, at 360 (“There is no national party choice except that of President. No one else represents the people as a whole, exercising a national choice. . . . The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs.” (quoting WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 70, 200–03 (1908))); Jedediah Purdy, Presidential Popular Constitutionalism, 77 FORDHAM L. REV. 1837, 1849 (2009) (describing Wilson as crafting a “twentieth-century picture of the President as the unique voice of democratic self-rule, interpreter-in-chief of the electoral tumult that carried him into office”).

58. See, e.g., Calabresi, supra note 21, at 59 (mentioning that the President is accountable to a nationwide electorate); Lloyd N. Cutler & David R. Johnson, Regulation and the Political Process, 84 YALE L.J. 1395, 1410–11 (1975) (reviewing arguments for why the President should have a broader role in regulatory decision making); Rodriguez, supra note 20, at 1180–81 (remarking on the growing consensus that the President is the party best equipped to break regulatory gridlock).

59. See Brown, supra note 3, at 549 (claiming that independent agencies are independent from voters); Cutler & Johnson, supra note 58, at 1409 (arguing that elected officials are needed for efficacious economic regulation); id. at 1411 (arguing that the President is the most accountable elected official).
public will, while also energizing their administration, sparking innovation, improving interagency coordination, and rendering the administrative state as a whole more transparent to public scrutiny. As this Bickelian conception of presidential popular representation attracted supporters across the political spectrum, some commentators claimed “a growing degree of consensus for the proposition that all roads to regulatory reform lead to (or, perhaps more accurately, from) the President.”

B. Operationalizing Presidential Administration

Over time, presidents have taken proactive steps to operationalize presidential administration, pressing beyond their traditional oversight and advisory roles toward more robust managerial control over agency rulemaking. The modern history of presidential administration arguably begins in 1970, with President Nixon’s creation of the OMB to coordinate interagency review of rulemaking proposals involving environmental protection, consumer protection, and public health and safety. Drawing on Nixon’s example, Gerald Ford later created a Council on Wage and Price Stability to combat inflation by studying the fiscal impact of proposed regulations. Similarly, Jimmy Carter unveiled his own Regulatory Analysis Review Group to evaluate proposed regulations that were likely to have an

60. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (arguing that a “unitary Executive” is “essential” to energize government decision making in a national-security context (citing THE FEDERALIST No. 23, at 146–47 (Alexander Hamilton) (Clinton Rossiter ed., 1961))); Morrison v. Olson, 487 U.S. 654, 727–32 (1988) (Scalia, J., dissenting) (arguing that a “unitary Executive” promotes individual liberty and uniform application of the law); BICKEL, supra note 1, at 186 (arguing that the President should have the ability to dismiss subordinate Executive Branch officials at will because this would improve their responsiveness to the exigencies of his political responsibilities).

61. Rodriguez, supra note 20, at 1180.

62. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY PRESIDENT 304 (2008) (noting that some commentators argue “that the increase in discretionary, policymaking authority wielded by administrative agencies has strengthened the case in favor of the unitary executive”); Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. CHI. L. REV. 1, 11–16 (1995) (“Almost since the birth of the modern administrative agency, American presidents have struggled to assert more centralized control over the regulatory state.”); Peter L. Strauss, Overseer, or “the Decider”? The President in Administrative Law, 75 GEO. WASH. L. REV. 696, 702 (2007) (“Our most recent Presidents, if not their predecessors, seem to have been at pains to convey the impression that they are personally responsible for the conduct of domestic governance, to a degree that extends to the resolution or decision of particular administrative issues . . . .”).


64. Percival, supra note 29, at 987; Pildes & Sunstein, supra note 62, at 14.
economic impact equal to or exceeding $100 million\textsuperscript{65} and created the Office of Information Review and Analysis (OIRA), the OMB office now primarily responsible for White House regulatory review.\textsuperscript{66} Seeking to minimize burdensome federal regulations and facilitate interagency coordination, Presidents Ronald Reagan and George H.W. Bush expanded executive oversight through more rigorous OMB review,\textsuperscript{67} Reagan’s Presidential Task Force on Regulatory Relief, and Vice President Dan Quayle’s Council on Competitiveness.\textsuperscript{68} Although President Clinton relaxed OMB review somewhat during his tenure, in many respects he claimed even greater oversight authority than his predecessors. For instance, Clinton famously issued over one hundred presidential orders directing agencies to adopt regulations targeting social ills such as youth smoking and gun violence—no doubt seeking to compensate for his inability to advance his legislative agenda in an increasingly hostile Congress.\textsuperscript{69} Throughout these three decades of intensifying White House regulatory management, proponents of these changes argued that presidential participation was vital to safeguard the political legitimacy of federal regulation.\textsuperscript{70} Critics, on the other hand, warned that OMB review and the White House’s “hidden-hand” influence undermined agency legitimacy by enabling interest-group capture and subverting congressionally mandated programs.\textsuperscript{71}

Upon taking office in 2001, President Bush employed a similarly multifaceted strategy for influencing agency rulemaking, drawing on precedents set in previous administrations.\textsuperscript{72} What was truly remarkable

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{65} Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979), reprinted in 5 U.S.C. § 553 (1994); see also Percival, supra note 29, at 987 (describing the creation of the Regulatory Analysis Review Group).
\item \textsuperscript{67} See Exec. Order No. 12,291, 3 C.F.R. 127, 127 (1982) (declaring goals to increase agency accountability for and presidential oversight of the regulatory process).
\item \textsuperscript{68} See JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 294–95 (5th ed. 2003) (discussing the apex of the “hidden-hand” approach to executive oversight of administrative agencies).
\item \textsuperscript{69} See Kagan, supra note 20, at 2304–07 (arguing that President Clinton displaced administrative agency heads with a wide array of agency directives). As Dean Kagan has noted, Clinton’s efforts to pursue his policy agenda through the administrative process began in earnest following the 1994 congressional elections, when Republicans gained a majority of seats in the House of Representatives, and accelerated in 1998, during the waning days of his postimpeachment tenure. \textit{Id.} at 2283–84.
\item \textsuperscript{70} See, e.g., Bressman, supra note 43, at 490 (noting that the administrative state is purportedly legitimized by the recent increase in presidential control because agency decisions are brought under political and, therefore, popular control).
\item \textsuperscript{71} See, e.g., Symposium, \textit{The Council on Competitiveness: Executive Oversight of Agency Rulemaking}, 7 ADMIN. L.J. AM. U. 297, 298 (1993–1994) (recommending that the public be given greater access to the review of agency rulemaking in order to further regulate independent-agency and executive-agency actions).
\item \textsuperscript{72} See Jo Becker & Barton Gellman, \textit{Leaving No Tracks}, WASH. POST, June 27, 2007, at A1 (chronicling the Bush Administration’s efforts to persuade and pressure agency officials behind the scenes).
\end{itemize}
\end{footnotesize}
about Bush's second term, however, was his Administration's effort to formalize White House control over agency rulemaking policy. In January 2007, Bush issued Executive Order No. 13,422, amending a previous Clinton directive, which had required all agencies to designate an agency employee to serve as the agency's liaison, or "regulatory policy officer" (RPO), for OIRA review. 73 Bush's executive order proclaimed that all RPOs must be political appointees, required agencies to obtain OMB approval of their RPOs, and thereby made RPOs de facto political gatekeepers for agency rulemaking actions. 74 Executive Order No. 13,422 also removed language from the previous Clinton directive, which had provided that RPOs "shall report to the agency head" 75 and that the agency's regulatory plan "shall be approved personally by the agency head." 76 While the practical import of these developments has been disputed, many critics argued that in Executive Order No. 13,422, Bush crossed the Rubicon dividing agency rulemaking discretion from presidential administration by formally supplanting administrators' statutory authority. 77

While the Obama Administration is still in its infancy, the President's first weeks in office sent mixed messages about his commitment to presidential administration. On the one hand, the President drew praise from critics of presidential administration when he promptly revoked Executive Order No. 13,422 and directed the OMB to develop recommendations for redesigning White House regulatory review. 78 On the other hand, President

---

74. Id.
75. Compare id. § 5(b) ("[E]ach agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer, advise OMB of such designation, and annually update OMB on the status of this designation."). with Exec. Order No. 12,866 § 6(a)(2), 3 C.F.R. 638, 645 (1994), reprinted in 5 U.S.C. § 601 (1994) ("[E]ach agency head shall designate a Regulatory Policy Officer who shall report to the agency head.").
76. Compare Exec. Order No. 13,422 § 4(b), 3 C.F.R. at 191 ("Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Officer."), with Exec. Order No. 12,866 § 4(c)(1), 3 C.F.R. at 642 ("[E]ach agency shall prepare a Regulatory Plan[ which shall be approved personally by the agency head.").
77. See Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part I and Part II: Hearing Before the Subcomm. on Investigation and Oversight of the Comm. on Science and Technology, 110th Cong. 142 (2007) (statement of Brad Miller, Subcommittee Chairman) (noting that the order creates a new requirement of "market failure" for any agency to promulgate a rule, a requirement which follows an argument that Congress explicitly rejected); Amending Executive Order 12,866: Good Governance or Regulatory Usurpation? Part II: Hearing Before the Subcomm. on Investigation and Oversight of the H. Comm. on Science and Technology, 110th Cong. 129 (2007) (statement of Peter L. Strauss) (asserting that Executive Order 13,422 "diffuses political authority within the agency that [is generally] entrusted[ed] to the head")

---

Obama has emphasized his commitment to ongoing centralized review of agency regulation, and there are strong signs that he might seek even greater managerial control over the administrative state than his predecessors. For example, Obama has selected several leading proponents of presidential administration for prominent positions in his administration, including Dean Elena Kagan to serve as Solicitor General and Professor Cass Sunstein to head OIRA. He has also endeavored to centralize agency policy making by appointing White House policy “czars” over critical policy areas such as health-care reform, urban-affairs policy, energy, and climate change. These powerful administration officials have been tasked with directing agency rulemaking from their White House offices without undergoing congressional confirmation and while operating behind the veil of executive privilege. As the White House continues to grapple with the current economic crisis, additional moves toward centralized administrative lawmaking are likely to follow. Thus, while it remains to be seen how far the Obama Administration will ultimately go in its efforts to operationalize presidential administration, the early returns portend a significant shift toward White House management of agency rulemaking.

III. Proxy Representation

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

82. See Peter Baker, And Now Let the Jockeying Begin, N.Y. TIMES, Feb. 1, 2009, § WK, at 1 (“More than any president in years, Mr. Obama came into office creating new White House czars and special envoys to supervise various hot-button issues at home and abroad, overlaying an additional set of actors upon a bureaucracy already scratchy about who’s in charge.”); Jonathan Martin, West Wing on Steroids in Obama W.H., POLITICO, Jan. 26, 2009, http://www.politico.com/news/stories/0109/17908.html (“Obama is moving to create perhaps the most powerful staff in modern history—a sort of West Wing on steroids that places no less than a half-dozen of his top initiatives into the hands of advisers outside the Cabinet.”).
majoritarian preferences and thereby advance the will of the people in agency
rulemaking. 84

Setting aside for the moment whether Bickelian majoritarianism offers a
normatively attractive paradigm for conceptualizing the will of the people, it
is apparent in any event that the majoritarian argument for presidential ad-
ministration fails on its own terms. Specifically, the majoritarian argument
assumes that the general public possesses coherent preferences on particular
questions of federal regulatory policy when this is plainly not the case. Nor
is it self-evident that federal regulations would more likely satisfy majori-
tarian preferences (to the extent such preferences exist at all) when developed
and refined under White House management. Sadly, the case for viewing the
American presidency as a reliable proxy for the will of the people collapses
all too quickly once its assumptions are exposed to close scrutiny.

A. Three Fictions of Presidential Administration

The idea that presidential administration promotes majoritarian
preferences rests on three misconceptions about the President’s relationships
to voters and to the federal bureaucracy: the fiction of popular authorization,
the fiction of popular accountability, and the fiction of presidential
management.

1. The Fiction of Popular Authorization.—Americans have become
accustomed to hearing such appeals to election returns as reflecting popular
authorization for their policy agendas. President John F. Kennedy famously
declared that even a single-vote margin of victory would represent a decisive
“mandate” for change. 85 During the height of the Watergate scandal,
President Richard Nixon likewise attempted to parry criticism by invoking
his own electoral “mandate” from the 1972 presidential election. 86 More
recently, news media have hailed the decisive electoral victories of
George W. Bush in 2004 and Barack Obama in 2008 as representing “solid
mandate[s]” for their respective policy agendas. 87 For better or worse, this
recurrent idea of the presidential mandate has become a central trope of our

84. Id.
86. KELLEY, supra note 32, at 99.
87. See John F. Harris, For Bush and GOP, a Validation, WASH. POST, Nov. 3, 2004, at A1
(“[President Bush] seemed to win validation for a campaign that unabashedly stressed conservative
themes and reveled in partisan combat . . . .”); Doyle McManus & Janis Hook, Majority Win Could
mandate . . . .”); Brian Knowlton, Obama Vows to Cut Budget Waste, N.Y. TIMES, Nov. 25, 2008, at
A4 (quoting then President-elect Obama: “I don’t think that there’s any question that we have a
mandate to move the country in a new direction.”).
At least with respect to questions of regulatory policy, however, the reality of modern electoral politics tells a very different story.

Political scientists have long recognized that presidential elections can rarely, if ever, be construed as conferring genuine mandates for presidents to pursue particular regulatory policies. Perhaps the most obvious difficulty with interpreting election-night victories as mandate-conferring constitutional moments is the nebulous relationship between presidential elections and majoritarian preferences. Presidents Kennedy, Clinton, and George W. Bush each reached the White House without winning a majority of the popular vote. Woodrow Wilson, the presidential mandate’s intellectual champion, prevailed in 1912 with only 41.9% of the popular vote. Abraham Lincoln won in 1860 with only 39.8%. If Americans truly desired to elect faithful proxies for popular preferences, the Electoral College system established in Article II, Section 1 and the Twelfth Amendment would hardly seem the most promising design. Indeed, the historical record suggests that the framers of the Constitution designed the indirect Electoral College system for presidential succession precisely to combat fears that popular elections might fall prey to tyrannical majoritarianism or demagoguery.

Polling data from past presidential elections further undermine the mandate theory of popular authorization. Political scientists have found that most voters cast their votes based primarily upon “candidate centered” factors such as experience and temperament rather than “issue centered” factors such as a candidate’s specific views on Social Security reform, tax...
cuts, or foreign policy. Indeed, even the most decisive electoral victories are difficult to construe as conferring issue-centered popular mandates. As Robert Dahl has observed, the two presidential elections that most closely resembled landslide victories during the last half-century were President Lyndon B. Johnson’s victory in 1964 and President Nixon’s in 1972, in each case, however, only one in five voters cited issue-centered factors—as opposed to candidate-centered factors—as their primary reason for supporting their chosen candidates. It would be difficult, therefore, to dispute Dahl’s conclusion that “no elected leader, including the president, is uniquely privileged to say what an election means—nor to claim that the election has conferred on the president a mandate to enact the particular policies the president supports.”

Even if Americans did cast their votes based solely on candidates’ policy positions, presidents still would not be entitled to interpret national election returns as a sweeping popular mandate to direct agency rulemaking. The Constitution’s framers generally viewed Congress—not the President—as the best representative of popular opinion, believing that the collective wisdom of individual legislators would enable that body to “think, feel, reason, and act like” the people at large. In contrast, the presidency was never well suited to serve as a “national voice” in the administrative state because no single public officer could reasonably be expected to reflect popular opinion in all matters of regulatory policy. As Peter Shane and others have observed, presidential candidates pose a classic “bundled preferences” problem: elections require an up-or-down vote on candidates’ aggregate platform, forcing voters to compromise some personal preferences in order to advance other deeply held commitments. When undertaking this calculus of compromise, particular questions of regulatory policy tend to have low salience for voters; indeed, polls suggest that even issue-minded voters are likely to cast their votes based on candidates’ perceived “competence,” “experience, record in public life, [or] strength of leadership”

94. See Francis Rourke, Presidentializing the Bureaucracy: From Kennedy to Reagan, in THE MANAGERIAL PRESIDENCY 123, 126 (James P. Pfiffner ed., 1991) (suggesting that the “candidate centered” nature of presidential elections limits the ability of the president to claim a mandate).

95. Dahl, supra note 32, at 364.

96. Id.

97. Id. at 366; see also Kelley, supra note 32, at 4 ("The count of votes tells no one how far voters will follow the victorious candidate, or for how long, or in what direction.").

98. IV JOHN ADAMS, Letter to John Penn, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 195, 205 (1851); see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 141 (Max Farrand ed., 1911) (asserting that the Legislature ought to be the “exact transcript” of society).

rather than their views on particular policies. 100 Most voters know far too little about American government generally—let alone the inner workings of the administrative state—to make informed decisions regarding presidential candidates’ views on specific questions of regulatory policy. 101 As Barry Friedman has noted, the premise that the President will represent the will of the people “assumes there is such a thing as an identifiable majority will, when there is not.” 102 Political scientist John Ferejohn concurs: “Nothing strikes the student of public opinion and democracy more forcefully than the paucity of information most people possess about politics.” 103 Considered against this backdrop, the notion that national elections give the President a popular mandate to use particular means or pursue particular ends in administrative rulemaking is problematic, at best.

My purpose in critiquing the fiction of presidential authorization is not to suggest that there is no correlation between candidates’ campaign platforms and voter behavior in national elections. Clearly voters are not wholly indifferent to candidates’ substantive views on the issues of the day, and these views in turn shape voter perceptions of candidates’ wisdom and character. What the empirical record does suggest, however, is that presidential elections communicate far less information about majoritarian preferences than the proxy model of the American presidency assumes: although the voting public decides which candidate will be vested with presidential powers, they almost never communicate coherent directives regarding specific policy choices in specific regulatory fields. 104


101. See Benjamin I. Page & Robert Y. Shapiro, The Rational Public: Fifty Years of Trends in Americans’ Policy Preferences 9 (1992) (“Survey research has continued to confirm that Americans . . . do not know very much about politics.”); Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty, 89 Iowa L. Rev. 1287, 1291 (2004) (reviewing evidence of massive voter ignorance about politics); cf. Glen Staszewski, Reason-Giving and Accountability, 93 Minn. L. Rev. 1253, 1267 (2009) (“If citizens do not know about the existence of a policy issue, they will probably not have formed any meaningful preferences on its most desirable resolution.”).


103. Ferejohn, supra note 32, at 3; see also B. Dan Wood & Richard W. Waterman, Bureaucratic Dynamics: The Role of Bureaucracy in a Democracy 146 (1994) (“On the vast majority of issues dealt with by the bureaucracy, citizens have no specific demands or needs; they operate in a vague, impressionistic world, which leaves politicians with a wide zone of acceptance.”); Somin, supra note 101, at 1304 (“The most important point established in some five decades of political knowledge research is that the majority of American citizens lack even basic political knowledge.”).

104. By 1975, Bickel himself acknowledged the inadequacy of national elections as barometers for actual popular preferences:

Elections, even if they are referenda, do not establish consent, or do not establish it for long . . . . Masses of people do not make clear-cut, long-range decisions. They do not know enough about the issues, about themselves, their needs and wishes, or about what those needs and wishes will appear to them to be two months hence.

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

Over the last few years, this argument for presidential administration has been hotly contested across the legal academy. Glen Staszewski has characterized electoral accountability as “wildly unrealistic” because it requires a degree of public engagement with federal administration that far exceeds actual practice. Heidi Kitrosser and Peter Shane have shown that presidential control over information flow within the administrative state can obscure the President’s influence, impeding public monitoring and thereby diluting political accountability. Perhaps the greatest obstacle to the proxy model of popular representation, however, is the electorate’s relative disengagement from federal administrative governance. By all accounts, the vast majority of agency rulemaking actions simply fly under the public radar, eluding the attention of all but the most well-informed members of the electorate. One cannot readily assume, therefore, that the public as a whole has any discernable majoritarian “will” about particular regulatory policy questions, much less that the President could readily discern and implement that “will” in agency rulemaking proceedings.

Even in cases where a president’s actions attract intense public scrutiny, the problem of bundled preferences resurfaces to frustrate proxy

105. See, e.g., Philip J. Harter, Executive Oversight of Rulemaking: The President Is No Stranger, 36 AM. U. L. REV. 557, 568 (1987) (“White House oversight places accountability precisely where it should be, namely, where the electorate can do something about it.”).
106. Calabresi, supra note 21, at 35.
108. Staszewski, supra note 101, at 1266.
109. Kitrosser, supra note 107, at 1770; Shane, supra note 99, at 204–09.
110. See Delli Carpini & Keeter, supra note 32, at 79–82 (reporting statistics from the authors’ own surveys showing that the American public is generally unaware of significant details of current and historical domestic policy).
representation. Voters may disapprove of a president’s efforts to manage agency entitlement programs but reelect the president nonetheless based on sympathy for the president’s views on foreign policy or social issues. Moreover, between elections the electorate has few effective tools to hold presidents accountable for even the most disastrous regulatory failures, as illustrated vividly by the disastrous credit crisis of 2008 and the Federal Emergency Management Agency’s inept response to Hurricane Katrina. For all intents and purposes, Sandy Levinson’s assessment would seem to be correct that a “noncriminal president” receives “an unbreakable four-year lease on the White House.”

Other political constraints fail to bridge the gap between presidential preferences and the popular will. Presidents Carter and George W. Bush famously took pride in bucking popular opinion, reasoning that the presidency must provide visionary leadership, not adhere slavishly to the latest polling data. While President Clinton reportedly sought to adhere more closely to public opinion, he also openly defied public opinion in several high-profile decisions. Rifts between White House policy and public opinion are likely to multiply and expand during a president’s second term, when he or she no longer needs to campaign for reelection and may more safely discharge political debts to ideological allies. The political constraints on presidential policy making are hardly sufficient, therefore, to qualify the President as a reliable proxy for majoritarian preferences in agency rulemaking.

3. The Fiction of Presidential Management.—The notion that presidents serve as reliable proxies for the body politic fails for yet another


112. See LEVINSON, supra note 90, at 116 (noting the difficulties in removing a president who is not criminal but merely incompetent, with reference to observations by William Schuerman).

113. Id. at 117.


116. See Jacobs & Shapiro, supra note 114, at 98 (discussing Clinton’s “don’t ask, don’t tell” policy).

117. See, e.g., R. Jeffrey Smith, A Last Push to Deregulate: White House to Ease Many Rules, WASH. POST, Oct. 31, 2008, at A1 (noting that “[t]he doors at the New Executive Office Building had been whirling with corporate officials and advisers pleading for relief or, in many cases, for hastened decision making” from the outgoing Bush Administration).
reason: centralizing policy-making authority in the presidency does not ensure that the President will personally manage agency rulemaking. In most cases, presidential management of agency rulemaking is a fiction that merely disguises a different kind of bureaucratic management. The President cannot feasibly review or respond to every agency rulemaking proposal personally; instead, he or she necessarily relies on the White House’s ever-expanding internal bureaucracy—including, but not limited to, OIRA—to oversee rulemaking proceedings across the administrative state. Indeed, the more assertive presidents have been in seeking managerial control over the federal bureaucracy, the more they have been forced to bureaucratize the presidency itself. The notion that presidential administration facilitates popular representation becomes far too attenuated as the President increasingly delegates critical management functions to unelected White House staff.

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

118. See Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 COLUM. L. REV. 1260, 1308 (2006) (noting that the President’s limited ability to invest time into regulatory oversight gives agencies like OIRA free rein to make many regulatory decisions).

119. See CRAIG A. RIMMERMAN, PRESIDENCY BY PLEBISCITE: THE REAGAN–BUSH ERA IN INSTITUTIONAL PERSPECTIVE 85–86 (1993) (arguing that any Executive Branch administrative strategy must accept the reality that “no president can be expected to fully control the executive bureaucracy”); Bagley & Revesz, supra note 118, at 1277–80 (discussing the inefficacy of OIRA’s prompt letters as a means of regulatory reform); Thomas O. Sargentich, Normative Tensions in the Theory of Presidential Oversight of Agency Rulemaking, 7 ADMIN. L.J. AM. U. 325, 326 (1993) (“[A]ny notion of national political accountability needs to be tempered by the reality that the president is generally not the person doing the overseeing.”).

120. See PAUL R. VERKUIJL, OUTSOURCING SOVEREIGNTY 164 (2007) (discussing the Volcker Commission’s concern with the rapid increase in numbers of politically appointed bureaucrats in the federal government); James P. Pfiffner, Can the President Manage the Government?, in THE MANAGERIAL PRESIDENCY, supra note 94, at 3, 17 (arguing that effective control over the expanding responsibilities of the Executive Branch increasingly requires delegation to cabinet appointees).


122. Id. at 93.

123. Id. at 49–50, 68.

124. Id. at 68.
White House review of agency rulemaking tended to be “unsystematic” and “selective,” depending primarily on “the interest of the particular officials involved” rather than the rigorous, systemic oversight that would ensure adequate representation across the administrative state under a proxy model of presidential administration. For this reason alone, the prevailing theory of presidential administration as a form of proxy representation remains unpersuasive in practice.

B. The Pathologies of Presidential Administration

Far from advancing majoritarian preferences in agency rulemaking, we might expect presidential administration to frustrate these preferences (to the extent they exist at all) in many contexts. One need look no further than public-opinion polls from the waning hours of George W. Bush’s presidency to appreciate the profound disconnect that may develop between presidents and their constituents on general policy values and objectives. Centralizing rulemaking authority in the White House may facilitate countermajoritarian lawmaking by enabling presidents to cater to “narrow, sub-national political interests, including those playing major roles in [their] national campaigns.” This threat of White House capture is far from merely hypothetical: one influential study found that 56% of the meetings that OIRA held to discuss proposed or final agency rulemakings from 1981 to 2000 involved only “narrow interests” (i.e., industry groups), as compared to just 10% that involved only “broad interests” (i.e., nonprofit public interest groups). Thus, the available evidence suggests that presidential administration does not reliably reduce the threat of countermajoritarian agency rulemaking and may, in fact, greatly exacerbate the problem.

Presidential administration also raises the specter of regulatory entrenchment. If agencies were to adopt countermajoritarian regulations pursuant to presidential directives, these regulations would become cemented into federal law and would not be easily dislodged. To overturn unpopular

125. Id. at 49.
federal regulations, Congress would have to override the president’s veto—a daunting proposition—or wait for a new president with different views to take office. Federal courts are ill-equipped to provide an alternative check on countermajoritarian presidential administration because White House directives are not ordinarily subject to judicial review and the mere unpopularity of proposed regulations is not, in and of itself, a basis for relief under the APA.\textsuperscript{129} Thus, committing rulemaking authority to the President’s formal control could entrench putatively countermajoritarian regulations against Congress’s legislative override.\textsuperscript{130}

To be fair, Bickel’s distinction between majoritarian and countermajoritarian lawmaking may be too crude a standard for evaluating the performance of judges, legislators, presidents, agency administrators, and other state actors.\textsuperscript{131} As Bickel himself conceded, the will of the people is best understood as a conceptually convenient “abstraction,” not a readily ascertainable empirical reality.\textsuperscript{132} Relatively few questions that arise in agency rulemaking—or in federal governance generally—attract sufficient public attention to generate coherent majoritarian preferences. Yet to the extent that it is ever possible to draw conclusions about public preferences from public-opinion polls or other indicators, it appears that there are many good reasons to abandon the notion that presidents are reliable proxies for the public will in agency rulemaking.

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

IV. Fiduciary Representation

If plebiscitary presidential administration is descriptively and prescriptively implausible, what consequences follow for the otherwise uncertain relationship between popular sovereignty and administrative

\textsuperscript{129} Bagley & Revesz, supra note 118, at 1309.

\textsuperscript{130} Of course, the credibility of a presidential-veto threat will depend upon contextual factors such as the regulation’s relative visibility and political salience.

\textsuperscript{131} See, e.g., Friedman, supra note 102, at 582 (arguing that courts are not systematically less majoritarian than other branches of government).

\textsuperscript{132} BICKEL, supra note 1, at 16.
governance? In what sense might federal regulators represent the people in rulemaking proceedings, if not as proxies for majoritarian preferences?

In this Part, I explore these questions from a new perspective by developing a theory of popular representation in administrative lawmaking based on the idea that government regulators serve as fiduciaries for the people subject to their power. This model of popular representation draws on arguments first advanced in my recent article, *Fiduciary Foundations of Administrative Law*, 133 but extends these insights about the legal architecture of administrative law generally to further illuminate the fiduciary character of agency rulemaking authority in particular. To promote popular representation under the fiduciary model, agency regulators must respect the state’s subjects as free and equal autonomous agents, and act to promote the public welfare, not necessarily the public will.

To set the stage for this argument, this Part begins with a brief history of the fiduciary concept. I then explain how administrative governance may be conceptualized as a fiduciary relation between public institutions and the legal beneficiaries of government action, and I identify six general principles that define and structure the state-subject fiduciary relation. Lastly, I consider how the fiduciary character of public administration might inform federal administrative law today by setting out three applications of the fiduciary model to agency rulemaking.

A. Conceptualizing Fiduciary Representation

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

The fiduciary model of popular representation hearkens back to a tradition in political theory that predates Wilson’s now-ascendant view of the presidency as the people’s singular “voice” in national affairs. 134 Centuries before Wilson, the concept of state institutions and officials as “agents” or “trustees” for the people shaped the thought of luminaries such as Cicero, 135 John Locke, 136 Edmund Burke, 137 James Madison, 138 and Alexander

133. Criddle, supra note 35.

134. See Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1140 (1996) (noting that the origin of the English trust, or use, has been traced to four possible ancient sources). For Wilson’s view, see Dahl, supra note 57 and accompanying text.

135. See Cicero, *Moral Goodness, in De Officiis*, 1.XXV.85, at 87 (Walter Miller trans., 1997) (1913) (“[T]he administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one’s care, not of those to whom it is entrusted.”).

136. See John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), in *Social Contract: Essays by Locke, Hume and Rousseau* 87, 87 (Ernest Barker ed., 1947) (asserting that legislative power is “only a fiduciary power to act for certain ends” and that “there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them”).

137. James Madison, supra note 82.

138. See Edmund Burke, supra note 33.
Hamilton. The fiduciary model was deeply influential among the American political elite during the founding period and throughout the early republic, as reflected in the republican vision “that each American had an equal part in forming the sovereignty of the United States, the body of political power.” Leading intellectuals of the late nineteenth century such as John Stuart Mill and Frederick Maitland likewise characterized public powers as being held in “trust” by the state for the benefit of the nation as a whole. Although the fiduciary concept of state legal authority is perhaps somewhat less pervasive in public discourse today than in times past, it

137. See, e.g., EDMUND BURKE, Discontents in the Kingdom, in BURKE’S POLITICS: SELECTED WRITINGS AND SPEECHES OF EDMUND BURKE ON REFORM, REVOLUTION, AND WAR 3, 28 (Ross J.S. Hoffman & Paul Levack eds., 1949) (1770) (“The king is the representative of the people; so are the lords; so are the judges. They are all trustees for the people . . . .”).

138. See, e.g., THE FEDERALIST NO. 46 (James Madison), supra note 60, at 294 (“The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes.”).

139. See, e.g., THE FEDERALIST NO. 65 (Alexander Hamilton), supra note 60, at 397 (“The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves.”).

140. JEDEDDAH PURDY, A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM 59 (2009); see also PA. CONST. of 1776, art. IV (“[A]ll power [is] . . . derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”); PURDY, supra, at 10 (“[T]his idea that power flowed from the whole political community to the government, which held it in ‘trust,’ was central to American political language in the nineteenth century.”); Andrew Jackson, Second Inaugural Address (Mar. 4, 1833) (referring to the office as a “sacred trust” that he “receive[d] from the people”); James Madison, First Inaugural Address (Mar. 4, 1809) (referring to his “awful sense of the trust to be assumed”); James Madison, Second Inaugural Address (Mar. 4, 1813) (invoking “the momentous period at which the trust has been renewed”); James Monroe, First Inaugural Address (Mar. 4, 1817) (referring to the need for a President to hold “a just estimate of the importance of the trust and of the nature and extent of its duties” and to American government officials as “the faithful and able depositaries of their trust” that of the American people).

141. See Frederick William Maitland, Trust and Corporation, in SELECTED ESSAYS 151, 220 (H.D. Hazeltine et al. eds., 1936) (“[W]hen new organs of local government are being developed, . . . it is natural . . . that their governmental powers should be regarded as being held in trust. Those powers are, we say, ‘intrusted to them,’ or they are ‘intrusted with’ those powers.”); John Stuart Mill, Representative Government, in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 230, 321 (1947) (describing public power as a “trust” that must be “fulfilled”); see also Taylor v. Beckham, 178 U.S. 548, 577 (1900) (describing administrative agencies as “mere agencies or trusts”); Stone v. Mississippi, 101 U.S. 814, 820 (1879) (“The power of governing is a trust committed by the people to the government. . . . The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.”); ERNEST BARKER, ESSAYS ON GOVERNMENT 53 (1945) (describing the representative parliament as “the trustee which the nation has authorized to act on its behalf; and it exercises sovereign power, under the terms of the trust, for the nation”); HENRY J. FORD, REPRESENTATIVE GOVERNMENT 146 (1924) (describing representative government as “[b]y its essential nature . . . a system of trusteeship”); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 128 (1967) (“Representation certainly is, as many writers have pointed out, a fiduciary relationship, involving trust and obligation on both sides.”).
continues to shape how federal and state courts conceptualize the role of public officers in our government.  

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

What distinguishes fiduciary relations such as these from other legal or extra-legal relationships? At their most basic level, all fiduciary relations share a common structure: the law entrusts a party (the fiduciary) with discretionary administrative authority to manage the legal or practical interests of another party (the beneficiary). Within the fiduciary relation, the beneficiary becomes dependent upon the fiduciary to pursue her interests, and she is unable, either legally or practically, to protect herself fully against the abuse of fiduciary power. The law therefore obligates the fiduciary to exercise entrusted discretionary power in furtherance of legally authorized purposes and with due care for the beneficiary’s interests. In cases

---


143. See Avini, supra note 134, at 1143-47 (describing the creation and employment of the use in England prior to the enactment of the Statute of Uses in 1535, which aimed to convert all equitable uses into legal estates); id. at 1150 (referencing postmortem transfers of land in twelfth-century England).

144. See id. at 1143-47 (reviewing the early applications of the use in England, including by individuals to convey land to the clergy; by tenants to avoid burdens imposed by the lord or by the law; and by individuals to circumscribe constraints imposed on the conveyance of legal estates).

145. See Jerry W. Markham, Fiduciary Duties Under the Commodity Exchange Act, 68 NOTRE DAME L. REV. 199, 216-18 (1992) (explaining that the fiduciary duty applies to doctors and lawyers and has been incorporated into the law of agency, partnerships, and business organizations, as well as regulation of confidential relationships such as doctor-patient and lawyer-client).

146. See Paul Baron Miller, Essays Toward a Theory of Fiduciary Law 146 (unpublished manuscript, on file with the author) (defining the fiduciary relationship as “one in which one person—the fiduciary—enjoys discretionary power to set or pursue the practical interests of another—the beneficiary”).

147. See id. at 178 (describing the “core structural qualities” of fiduciary relations as “inequality of power, dependence, and vulnerability”).

where fiduciaries have multiple beneficiaries, the duty of loyalty requires even-handed treatment among beneficiaries.\textsuperscript{150}

To facilitate adherence to these duties, fiduciary law also contains prophylactic, information-forcing rules, which promote transparency and facilitate monitoring and enforcement.\textsuperscript{151} Fiduciaries are required to “keep clear and accurate” records\textsuperscript{152} and give beneficiaries a complete account of their performance upon request.\textsuperscript{153} Fiduciaries must comply with these requirements whether or not beneficiaries are able to show they have suffered a distinct injury.\textsuperscript{154} These ancillary duties of disclosure are necessary to ensure fiduciaries’ adherence to their primary fiduciary duties.\textsuperscript{155}

Evan Fox-Decent and I have argued that the fiduciary relation’s legal basis is best perceived through Immanuel Kant’s conception of parent–child fiduciary relations in The Doctrine of Right.\textsuperscript{156} According to Kant, legal rights reflect a person’s moral capacity to place others under legal obligations.\textsuperscript{157} Each person has an innate right to as much freedom as can reasonably coexist with the freedom of others.\textsuperscript{158} The function of law on this account is to enshrine rights within a regime of equal freedom in which persons cannot unilaterally impose the terms of interaction on others.\textsuperscript{159}

Turning to the parent–child relationship, Kant explains the moral basis of parents’ fiduciary obligation to their children as a consequence of parents’ unilateral creation of a person “endowed with freedom” who cannot survive fiduciary’s discretion is demarcated, and the fiduciary obligation is imposed in order to compel a proper exercise of that discretion within the scope of the authority thus delineated.”).\textsuperscript{149}

\textsuperscript{149.} See Nagel v. Todd, 45 A.2d 326, 327 (Md. 1946) (stating that a fiduciary must “‘act primarily for the benefit of [his beneficiaries], in matters connected with his undertaking’” (quoting \textsc{Restatement of Agency} \textsect{13} cmt. a (1928)); Cristallina, S.A. v. Christie, Manson & Woods Int’l, 117 A.D.2d 284, 293 (N.Y. App. Div. 1986) (indicating that agents have an implied duty to use their best efforts for their principals); \textsc{Restatement (Second) of Trusts} \textsect{174} (1959) (“The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.”).

\textsuperscript{150.} Meinhard v. Salmon, 164 N.E. 545, 548 (N.Y. 1928) (describing this “rule of undivided loyalty” as “relentless and supreme”).

\textsuperscript{151.} \textit{See. e.g.,} 2A \textsc{Austin Wakeman Scott, The Law of Trusts} \sect{172}, at 452–54 (William Franklin Fratcher ed., 4th ed. 1987) (describing the openness and diligence of trustees that courts require with regard to accounts of beneficiaries).

\textsuperscript{152.} \textsc{Id.}

\textsuperscript{153.} \textsc{Id.}

\textsuperscript{154.} \textit{Cf.} Hillary A. Sale, \textit{Delaware’s Good Faith}, 89 \textsc{Cornell L. Rev.} 456, 495 (2004) (suggesting that compliance with the requirements of common law and statutory schemes such as Sarbanes-Oxley is integral to meeting the good faith standard independent of actionable harm).

\textsuperscript{155.} \textit{See} 2A \textsc{Scott, supra} note 151, \sect{172}, at 452–56 (noting that one of the reasons for requiring proper records is to prevent the trustee from hiding misconduct).

\textsuperscript{156.} Criddle & Fox-Decent, \textsc{supra} note 36, at 352–54; Fox-Decent, \textsc{supra} note 36, at 276–81.

\textsuperscript{157.} \textsc{Id.}

\textsuperscript{158.} \textsc{Id.}

\textsuperscript{159.} \textsc{Id.}
without their support.\textsuperscript{160} Once parents in the exercise of their freedom bring
a child into the world, recognition of the child's equal freedom as a "citizen
of the world," coupled with the child's practical or legal inability to consent
to the relationship of dependence, places parents under a fiduciary obligation
to provide for the child's basic security by making "the child content with his
condition so far as they can."\textsuperscript{161} Parents' fiduciary obligations to their chil-
dren thus reflect the constraints that a child's innate dignity as a free and
autonomous moral agent places on parents' equal freedom.\textsuperscript{162}

Extending Kant's theory of innate right beyond familial relations, the
same demands of rightful conduct vis-à-vis children extend likewise to other
fiduciary relationships such as trustee–beneficiary, agent–principal,
corporation–shareholder, and lawyer–client.\textsuperscript{163} Although most beneficiaries
are not children or incompetents and ought not to be treated as such, all bene­
ficiaries are vulnerable to the fiduciary's abuse of legally entrusted
administrative power over their legal and practical interests.\textsuperscript{164} Absent the
law intervening to mediate fiduciary relations, beneficiaries would be subject
to intolerable domination—the fiduciary's capacity to exercise administrative
power arbitrarily.\textsuperscript{165} The law therefore authorizes fiduciaries to exercise ad­
ministrative powers on behalf of their beneficiaries, but subject to the strict
limitations that arise from beneficiaries' vulnerability and moral capacity to
place the fiduciary under legal obligations.\textsuperscript{166}

As in any form of representation, fiduciaries are bound to act
deliberately, not reflexively. "When we act for someone else we may not act
on impulse," observes Hannah Pitkin.\textsuperscript{167} Instead, "we ought to have reasons
for what we do, and be prepared to justify our actions to those we act for,
even if this accounting or justification never actually takes place."\textsuperscript{168} The
deliberate character of representation thus involves a formal principle of
justifiability, which informs both proxy representation and fiduciary
representation, albeit in different ways. In proxy representation, the proxy is

\textsuperscript{160} IMMANUEL KANT, THE METAPHYSICS OF MORALS 98–99 (Mary Gregor trans., 1991)
(1797).
\textsuperscript{161} Id.
\textsuperscript{162} Criddle & Fox-Decent, supra note 36, at 354.
\textsuperscript{163} Id. at 349.
\textsuperscript{164} Id.
\textsuperscript{165} See HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE
ENDS OF POLICY 34 (2002) ("Domination is the capacity to make people's lives or situations worse
by arbitrarily imposing duties on them, or by arbitrarily purporting to impose duties on them."). See
generally PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51 (1997)
developing a republican theory of freedom as "non-domination").
\textsuperscript{166} See Criddle & Fox-Decent, supra note 36, at 352 (describing the administrative power of a
state as being within the confines of a fiduciary obligation due to the vulnerability of its subjects).
\textsuperscript{167} PITKIN, supra note 141, at 119.
\textsuperscript{168} Id.; see also Jerry L. Mashaw, Reasoned Administration: The European Union, the United
be subject to administrative authority that is unreasoned is to be treated as a mere object of the law
or political power, not a subject with independent rational capacities.").
expected to identify and implement the principal's actual preferences. A fiduciary representative, on the other hand, need not always conform her actions to her beneficiaries' preferences. Indeed, it is precisely the discretionary character of a fiduciary's administrative power (due typically to the beneficiary's absence, incompetence, or abdication of authority) that distinguishes fiduciary relations from other forms of representation. When exercising these discretionary powers, a fiduciary must independently assess what course of action will best promote her beneficiaries' welfare. While beneficiaries' actual preferences are germane to this assessment and must not be dismissed arbitrarily, they are not always dispositive for the fiduciary as they would be for a proxy. This is so, in part, because the fiduciary is often expected to draw on superior information, experience, or expertise. The fiduciary may also have multiple beneficiaries with competing perceptions of the common good. To honor beneficiaries' equal dignity as free and autonomous agents and thereby to avoid domination, the law directs that a fiduciary must be prepared to explain how her actions are reasonably calculated to promote her beneficiaries' welfare, not merely her own. Thus, unlike a proxy, the fiduciary's signature duty is one of loyalty to her beneficiaries' legitimate interests.

Fiduciary relations' other-regarding purpose distinguishes fiduciary representation from proxy representation in another important sense: fiduciary representation is not only deliberate but also deliberative. To satisfy the duty of care, a fiduciary representative must exercise her administrative discretion through a deliberative process, which includes, at a minimum, clarifying the nature of the problem or opportunity, discerning the range of permissible actions, evaluating the pros and cons of each alternative, and developing an objectively reasonable rationale for the action taken.
The fiduciary representative must give consideration to relevant experience or expertise, be it the fiduciary's own expert judgment or the consultation of other specialists. She may not arbitrarily neglect or ignore readily accessible sources of information that may be important to her decision. Above all, the principle of formal justifiability dictates that a fiduciary's exercise of discretionary power must follow prudent and rational deliberation, and the fiduciary must provide a complete and satisfactory accounting of her stewardship upon request. Reasoned deliberation addresses the threat of administrative domination and serves the purpose of all fiduciary relations—the pursuit of the beneficiary's welfare. Fiduciary representation thus offers a robust alternative to proxy representation, reframing representation as the exercise of lawfully entrusted administrative authority to manage another person's legal or practical interests for their benefit.

B. Fiduciary Representation in the Administrative State

Against this background, the traditional republican conception of state officers and institutions as agents and trustees for the people comes into sharper focus. The idea that public officials serve as fiduciary representatives for persons subject to their power comports with the constitutive features of fiduciary relationships generally. All agents and instrumentalities of the state—including the primary legislative, executive, and judicial institutions—are vested by law with discretionary administrative powers to

(Del. 1985) ("Under the business judgment rule there is no protection for directors who have made 'an unintelligent or unadvised judgment.'" (quoting Mitchell v. Highland-W. Glass Co., 167 A. 831, 833 (Del. Ch. 1933))).


180. See Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 371 (Del. 1993) (holding that directors violated their duty of care because they did not "adequately inform" themselves of all reasonably available material information before approving a merger agreement). There is some debate among legal scholars over whether the duty of care is properly characterized as a fiduciary duty or a tort duty. Compare Steven Elliot, Fiduciary Liability for Client Mortgage Fraud, 13 TK. L. INT'L 74, 76 (1999) (arguing that even those who stand in a fiduciary relationship with another may be liable for tort duties), with Bristol & W. Bldg. Soc'y v. Mothew, [1998] EWHC (Ch) 1, [16C]-[17F] (Eng.) (endorsing the view that the duty of care owed by a fiduciary is not unique to the fiduciary relationship), and Peter Birks, The Content of the Fiduciary Obligation, 34 ISR. L. REV. 3, 33-37 (2000) (arguing that there is not a separate fiduciary duty of care).

181. See AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 n.9 (Del. Ch. 1986) ("[A] decision by disinterested directors following a deliberative process may still be the basis for liability if such decision cannot be 'attributed to any rational business purpose,' or is 'egregious.'" (citations omitted); Vlahakis, supra note 179, at 1119 ("The core of the duty of care may be characterized as the directors' obligation to act on an informed basis after due consideration of the relevant materials and appropriate deliberation.").

182. See, e.g., THE FEDERALIST NO. 46 (James Madison), supra note 60, at 239 (describing governments as "agents" and "trustees" for the public).

183. See Criddle, supra note 35, at 135 (drawing comparisons between the features of fiduciary law and administrative law).
make, interpret, or enforce laws for the citizenry. These powers relate primarily to objectives that, in Lincoln’s words, private parties “need to have done, but can not do, at all, or can not, so well do, for themselves—in their separate, and individual capacities.” Because public powers are entrusted solely to the state by law and cannot be exercised by private parties without legal authorization, the public depends upon government officers to exercise their powers in the public interest, and the public is uniquely vulnerable to officers’ inept or unreasonable misuse of administrative power. All agents and instrumentalities of the state are therefore subject to fiduciary duties in discharging their responsibilities.

Popular representation under the fiduciary model does not depend upon electoral authorization or accountability, nor does it seek to guarantee that public officials satisfy the will of the people. Instead, fiduciary representation acknowledges that the will of the people is usually an abstraction without a reliable referent in the real world. As such, the fiduciary model focuses on public officers’ fidelity to their legal mandates and the public welfare, as well as satisfaction of the basic duties of care and loyalty. For example, a police officer may be said to represent the people when making an arrest if the arrest serves a lawfully authorized purpose, is not an abuse of discretion under the particular circumstances, and is not tainted by a self-interested motive or discriminatory intent. A federal district judge likewise represents the people when sentencing a criminal defendant if she demonstrates that the sentence is fundamentally fair and reasonable in light of the evidence before the court. Similarly, under the fiduciary model, a member of Congress may represent the people if she supports controversial legislation based on her rational assessment of the public interest—even if she is unable to divine any coherent public will concerning the legislation. In each of these contexts, popular representation rests on the fiduciary’s satisfaction of her basic obligations as fiduciary for the people subject to her administrative powers. Whether public officials are elected by, or directly accountable to, the electorate might strengthen or weaken the case for popular representation, but neither of these considerations is a necessary criterion for fiduciary representation as long as the fiduciary faithfully exercises her entrusted powers.

184. Cridde & Fox-Decent, supra note 36, at 352.
185. Abraham Lincoln, To Do for the People What Needs to Be Done (July 1, 1854), in LINCOLN ON DEMOCRACY 63, 64 (Mario M. Cuomo & Harold Hozer eds., 1990).
186. See Cridde & Fox-Decent, supra note 36, at 352 (arguing that because private parties cannot exercise public powers “legal subjects are peculiarly vulnerable to public authority” and therefore are owed a fiduciary obligation).
187. See Malcolm Thorburn, Justifications, Powers, and Authority, 117 YALE L.J. 1070, 1103–07 (2008) (comparing private fiduciaries and public officials, and explaining that public officials must be prepared to justify their actions according to legal authorization).
188. See Dimitrios Kyritsis, Representation and Waldron’s Objection to Judicial Review, 26 OXFORD J. LEGAL STUD. 733, 743 (2006) (arguing that legislators ought to “reconstruct from [public preferences] the best possible vision of the just and well-governed polity”).
Dimitrios Kyritsis has argued that the fiduciary model of state legal authority is preferable to proxy representation in the legislative process because it “more accurately reflects...the practice of political representation, as we know it,” and thus “better captures our conception of representation.”¹⁸⁹ Public preferences in republican democracies “[are] neither immutable nor inviolable,” he observes.¹⁹⁰ Instead, voters rely on legislators to clarify what is at stake in proposed legislation, and legislators in turn shape public preferences.¹⁹¹ The dynamic “relationship between the representative and the constituents he represents is not one of identity between the acts and decisions of the former and the wishes and views of the latter,” as would be the case in proxy representation.¹⁹² Rather, legislators necessarily exercise a degree of discretion independent of their constituents’ actual preferences:

What is important for the legitimacy of legislative decisions is that legislators reconstruct from [the public’s] wishes and convictions the best possible vision of the just and well-governed polity, in which the interests of individuals deserve a place. . . . Even where their actions in their official capacity are in line with what their constituents happen to believe and want, the ground for [legislators’] actions is not that their constituents want them so to act. Rather, the ground is the more complex idea that they think that certain wishes and convictions of their constituents fit into a morally attractive vision of the just and well-ordered polity.¹⁹³

According to Kyritsis, the legitimacy of the legislative process depends upon legislators deliberating collectively and with the public to develop laws that promote the public interest.¹⁹⁴ This fiduciary conception of the legislator–constituent relationship captures how legislators actually behave, and ought to behave, in a polity characterized by malleable preferences and pervasive disengagement from the political process.¹⁹⁵

¹⁸⁹. Id.; see also Adler, supra note 23, at 879 n.334 (noting the tension in democratic theory between the president as “trustee” and “delegate”).
¹⁹⁰. Kyritsis, supra note 188, at 743.
¹⁹¹. Id. at 744–45.
¹⁹². Id.; see also Staszewski, supra note 101, at 1272 (observing that in one study “less than twenty percent of survey respondents could identify a single vote by their representative in the House over the preceding two years”).
¹⁹⁴. See Kyritsis, supra note 188, at 743 (explaining that the legitimacy of legislative decisions stems from both the public’s wants and the legislator’s personal interpretation of how those wants will best be satisfied).
¹⁹⁵. The fiduciary account helps to explain how elected representatives may be understood to represent the public as a whole rather than simply the plurality of voters who elected them. Elections respect individuals’ moral dignity as free and equal beneficiaries of state power by offering an opportunity to participate in the constitutive process of governance, but elections are not
The fiduciary conception of popular representation is particularly well-suited to agency lawmaking in the modern administrative state. When Congress entrusts administrative authority to administrative agencies, it tasks federal regulators with serving the interests of their designated statutory beneficiaries. Agencies necessarily exercise discretion in rulemaking because Congress lacks the time and resources to explore all of the potential ramifications of its general delegations. The entrustment of discretionary lawmaking power to administrative agencies therefore engenders a relationship in which the public depends upon federal regulators to employ their discretionary powers in the public interest and stands in a position of acute vulnerability to the abuse of administrative power. Moreover, as in the legislative process, most voters do not monitor agency activities closely and lack coherent, informed preferences concerning administrative lawmaking. Just as constituents rely on their legislative representatives to educate them about lawmaking initiatives and act in their interest, the electorate likewise relies on administrative agencies to bring their expertise to bear in studying regulatory problems, to educate the public on the stakes of regulation, and ultimately to employ their rulemaking powers fairly and reasonably in furtherance of the general public welfare.

To ensure that administrative lawmaking honors the moral dignity of individual subjects, the fiduciary principle demands that agencies employ a decision-making process that respects all persons as free and equal autonomous agents. In this respect, the fiduciary model closely resembles Henry Richardson’s idea of democratic autonomy, which emphasizes public participation in “collective reasoning about public ends, the ends of

---

196. See generally Criddle, supra note 35, at 135-72 (“Fiduciary law’s core elements of entrustment, residual control, and fiduciary duty increasingly capture the ‘deep structure’ of administrative law.”); ABA Comm. on Gov’t Standards, Keeping Faith: Government Ethics & Government Ethics Regulation, 45 ADMIN. L. REV. 287, 291-92 (1993) (characterizing government as a “fiduciary, or steward, . . . to whom power is given in order that his knowledge and skill can be brought to bear for the benefit of another” and emphasizing “the entrusting of power by ‘We, the People’ to those who govern for us”).

197. See David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 GEO. L.J. 97, 109 (2000) (explaining that the public delegates power to legislators because members of the public generally lack the time or expertise to make informed policy choices, and legislators likewise delegate decision-making power to administrative agencies due to a lack of time and insufficient knowledge of particular areas of law).

198. See id. at 106—07 (developing a public-choice theory of administrative lawmaking based upon similar premises).

199. See id. at 118 (“[W]hat counts is not agency adherence to congressional wishes; rather, the agency has an incentive to do a good job in order to please the principal’s principal—the public.”); cf. Richardson, supra note 165, at 41 (noting that reliance on another’s superior knowledge or experience can itself constitute domination).
policy." Both models of the administrative state emphasize the liberal ideals of freedom and equality, the rationalist ideal of reasoned deliberation, and the republican ideal of inclusive deliberation as a safeguard against domination. The primary distinction between fiduciary administration and "democratic autonomy" lies in Richardson's assertion that it is "necessary" for "individuals [to] participate sufficiently in the political process for them to count as deciding, together, what ought to be done." While the fiduciary model supports affording the public an opportunity to participate in agency deliberation, the absence of actual public participation does not ipso facto delegitimize agency lawmaking as impermissible domination. Indeed, it is precisely the public's disengagement from the rulemaking process—coupled with its incapacity to wield public regulatory powers and its vulnerability to regulators' abuse of discretion—that triggers the fiduciary principle. The question then becomes whether administrative law adequately mediates the state-subject fiduciary relation by channeling administrative discretion through principles or procedures that ensure that individual subjects are treated as free and equal autonomous persons.

C. Fiduciary Representation in Agency Rulemaking: Six Principles

To safeguard beneficiaries against domination, six principles define and structure fiduciary representation: purposefulness, integrity, solicitude, fairness, reasonableness, and transparency. These six principles are common to all fiduciary relations, but they have particular salience as relational constraints on federal rulemaking powers.

200. Richardson, supra note 165, at 19.
201. See id. at 242-46 (reviewing the four component ideals of democratic autonomy and analyzing existing democracies' realization of these ideals).
202. Id. at 66.
203. See id. at 247 (arguing that the populist ideal of democracy requires that citizens participate in all lawmaking, including agency rulemaking).
204. See Russell Hardin, Deliberation: Method, Not Theory, in DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 103, 116 (Stephen Macedo ed., 1999) ("Because of the sheer size of the polity, citizens have little interest in participating and, given this fact, even less interest in being well enough informed to participate well [in politics]. . . . [T]o hope, expect, or wish for citizens to do much deliberating is unreasonable and forlorn.").
205. See ABA Comm. on Gov't Standards, supra note 196, at 292 (describing citizens as increasingly "dependent upon public employees for help in understanding, and effectively communicating with, their government" and characterizing those entrusted with public power as being under a duty of "Scrupulous Integrity" in order to "avoid circumstances that create the opportunity for interest or bias to exert their corrosive influence" in discussing the requisite qualities of ethical government service).
206. See generally Cridde & Fox-Decent, supra note 36, at 360-68 (discussing these principles of fiduciary representation in the context of human rights law); Robert G. Natelson, The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan, 35 U. RICH. L. REV. 191, 211-32 (2001) (comparing the Roman Emperor Trajan's form of government to what is now thought of as a fiduciary concept of government through the lens of four "central trust obligations").
First, to satisfy the fiduciary model of popular representation, federal regulators must ensure that all exercises of rulemaking authority are consistent with Congress's statutorily designated public-regarding purpose. Although congressional legislative directives are often extremely broad, expressing only vague "intelligible principles" to guide agency action, these directives are binding on federal regulators in rulemaking proceedings. When specifying the directives embodied in congressional legislation, federal regulators may not substitute their own preferred purposes for those authoritatively designated by Congress.

The second and third principles of fiduciary representation—integrity and solicitude—arise from the paradigmatic fiduciary duty of loyalty. The principle of integrity dictates that federal regulators must refrain from exploiting their entrusted authority and the public's dependence and vulnerability for personal or institutional self-aggrandizement. They may not, for example, use their regulatory powers to appropriate public resources for personal gain or expand an agency's jurisdiction without congressional authorization. Instead, regulators must act with due solicitude toward the legitimate interests of their statutory beneficiaries, treating them as ends in themselves and never as mere means. Since public preferences are relevant to the public interest, solicitude obligates regulators to give reasonable consideration to public preferences alongside other factors relevant to the public interest. Agencies must also avoid any arbitrary delay or inaction that could result in the squandering of valuable public resources or opportunities.

Fourth, fiduciary representation obligates agencies to exercise their rulemaking powers in a manner that is consistent with the principles of fairness. Under the fiduciary duty of loyalty, all private parties whose legal or practical interests are dependent upon and vulnerable to federal

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


209. See Chrysler, 441 U.S. at 302 (noting that quasi-legislative authority is subject to the limitations that Congress imposes).

210. See id. at 306-08 (holding that in order for a regulation to have the force of law, it must be reasonably contemplated by the statutory grant of authority).


213. Cf. RESTATEMENT (THIRD) OF TRUSTS § 92 (2007) (describing the initial duty of a trustee to review and revise investments within a "reasonable time"); id. at cmt. b ("[A] trustee may be held liable for losses resulted from imprudently retaining trust property or from unreasonably delaying its sale.").
rulemaking powers are co-equal beneficiaries of state legal authority. As such, federal regulators may not disregard the interests of any person whose interests may be affected by a proposed rulemaking action, and their final rule must treat similarly situated persons alike. Fiduciaries must accord "due regard" to each and every beneficiary's respective interests.214

Fifth, federal regulators as fiduciaries must accord their beneficiaries due respect by exercising their rulemaking powers reasonably. As in private fiduciary law, federal regulators must employ "proper safeguards and internal procedures" and consider "the advice of specialists or experts where necessary to make informed decisions."215 Fiduciary representation requires a thorough investigation of regulatory problems, obligating regulators to gather relevant information, consider advice and criticism from interested parties, solicit input from experts, and rationally assess the merits of alternative policies. Once regulators settle upon a proposed course of action, they must provide a reasoned justification for their chosen policy. In short, the fiduciary model dictates that federal regulation must bear the same hallmarks of deliberative rationality that characterize fiduciary representation in ordinary private law settings.

Sixth, the fiduciary model of popular representation requires federal regulators to act transparently, opening records and communications to public inspection upon request in order to facilitate effective monitoring of the principles of purposefulness, integrity, solicitude, fairness, and reasonableness. It is conceivable, of course, that federal regulators could satisfy their primary fiduciary obligations of purposefulness, integrity, solicitude, fairness, and reasonableness without transparency. In the absence of transparency, however, the beneficiaries of federal regulation would be unable to discover many breaches of duty, rendering the other principles of fiduciary representation ineffectual and thereby subjecting beneficiaries to intolerable vulnerability. Transparency is ordinarily necessary, therefore, to ensure that administrative agencies perform their fiduciary role faithfully. Where agencies seek to deviate from the transparency norm, they must furnish reasoned justifications that are consistent with their other fiduciary obligations of purposefulness, integrity, solicitude, fairness, and reasonableness.

Few if any of these six principles of fiduciary representation would play a central role in the majoritarian proxy model of popular representation. As long as a federal regulation enjoyed the support of a public majority, it would make little difference under the proxy model whether the regulation conformed with Congress's purposes, whether it arbitrarily discriminated against rival classes of beneficiaries, or whether it reflected rational deliberation conducive to informed decision making. In contrast, the fiduciary model

214. Id. § 79.
215. BOGERT & BOGERT, supra note 212, § 541, at 171.
insists that each of these principles is critical to achieve meaningful popular representation in the modern administrative state. These six principles of public fiduciary obligation are relational constraints that the rule of law places on public officials’ exercise of administrative powers.\footnote{216. See Fox-Decent, supra note 36, at 271–72 (characterizing the “fiduciary duty” of the government as simultaneously justifying and defining the boundaries of governmental action).}

D. Fiduciary Representation in Agency Rulemaking: Three Applications

To what extent does federal administrative law currently promote fiduciary representation in agency rulemaking? The results are mixed, to be sure. The APA’s notice-and-comment procedures for informal rulemaking arguably advance fiduciary representation by encouraging federal agencies to act fairly, reasonably, and transparently.\footnote{217. See 5 U.S.C. § 553(b)–(c) (2006) (specifying, respectively, requirements for notice to and participation of interested parties in proposed rules).} So, too, do the APA’s requirements for formal rulemaking, which permit agencies to promulgate regulations only at the close of a trial-type evidentiary hearing.\footnote{218. Id. §§ 556–557.} The Freedom of Information Act (FOIA)\footnote{219. Id. § 552.} and Federal Advisory Committee Act (FACA)\footnote{220. Id. app. §§ 1–16.} likewise promote transparency by facilitating public access to a range of documents and communications relevant to agency rulemaking.\footnote{221. See id. § 552(a)(2) (mandating agency publication of decisions made in adjudication, certain “statements of policy and interpretations,” and “manuals and instructions to staff that affect a member of the public”); id. app. §§ 10–11 (requiring advisory committee meetings be open to the public and that certain written records, including transcripts, of such meetings be made available to the public).} These procedural requirements are steps in the right direction, though they are hardly sufficient to realize fiduciary representation in federal rulemaking.

While an exhaustive discussion of the fiduciary model’s implications for federal rulemaking lies beyond the scope of this Article, a few examples of the fiduciary model’s potential applications to administrative rulemaking may help to illustrate the model’s practical value. Specifically, Congress could harmonize the APA’s general rulemaking procedures with the fiduciary model of the administrative state by: (1) recalibrating the APA’s exceptions for informal notice-and-comment rulemaking, (2) expanding judicial review of agency inaction in rulemaking, and (3) mandating disclosure of communications between agencies and the White House related to agency rulemaking.\footnote{222. Versions of these proposals have been articulated elsewhere in the literature on federal rulemaking, and it is not my purpose to elaborate the policy arguments for and against these proposals with all of the nuance and sophistication that others have devoted to them. Instead, my aim is simply to illustrate how the fiduciary model illuminates a new path toward popular representation in agency rulemaking.}
1. Eliminate the APA's Categorical Exemptions for Informal Rulemaking.—An important first step in reforming federal rulemaking procedure would be to extend the fiduciary model's general principles of deliberative decision making to all forms of agency rulemaking.

Currently, the APA divides agency rulemaking into three broad categories: substantive rules (or "legislative rules"), interpretive rules, and procedural rules. Substantive rules generate legal obligations, altering people's existing rights and obligations pursuant to statutory authority. Procedural rules also command the force of law, prescribing the procedures an agency will employ in carrying out its administrative functions. Interpretive rules, which "express an agency's intended course of action or its view of the meaning of a statute or regulation," are not formally binding. The classification of a particular rule as substantive, interpretive, or procedural has important consequences: while the APA requires agencies to publish all three types of rules, only the first category—legislative rules—are subject to the APA's full notice-and-comment procedural requirements.

The problem with exempting interpretive and procedural rules from the APA notice-and-comment procedures is that both categories can have a significant impact on private interests and obligations. Interpretive rules, for example, may profoundly influence agency enforcement practices and judicial statutory interpretation. Similarly, procedural rules may restrict the opportunities for regulated parties or beneficiaries to defend their interests in agency adjudicatory proceedings. No matter what type of rules an agency adopts, the fiduciary model dictates that the agency should be prepared to

---

224. SCHWARTZ, supra note 17, § 4.8, at 181.
225. Id. at 180.
226. Id. at 181.
228. Id. § 553(b)(3)(A).

229. See United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (holding that customs-revenue letters, while not having the force of law, "may merit some deference whatever its form"); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (affirming the Court's historic recognition of Treasury interpretative decisions as having "considerable and in some cases decisive weight"); Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 CORNELL L. REV. 397, 400–01 (2007) (noting that agency-guidance documents are often treated as having the force of law by parties subject to the regulation, since to behave otherwise would require parties to accept the expense and risks of challenging the interpretation in court).
230. See 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 5.13 (2d ed. 1997) (discussing administrative agencies' wide discretion in structuring hearings including, in some cases, the authority to issue rules dispensing with formal adjudication of any kind).
explain how its rules are fair, reasonable, purposive, and public regarding.\(^{231}\) In its current form, the APA does not satisfy these basic principles.

Equally disconcerting, the APA does not even require deliberative decision making for many categories of legislative rules. The APA expressly excludes from its coverage any legislative rules that address military or foreign affairs functions,\(^ {232}\) rules governing agency management or personnel,\(^ {233}\) and rules related to "public property, loans, grants, benefits, or contracts."\(^ {234}\) These exceptions to the APA's ordinary rulemaking categories have been widely criticized as overinclusive\(^ {235}\)—relics of an earlier era's misguided commitment to the rights/privileges distinction\(^ {236}\)—yet Congress has not fully implemented recommendations for reform.\(^ {237}\) Agencies are always free to employ more robust deliberative procedures than those required under the APA,\(^ {238}\) but in practice they do not always engage in open public deliberation over rules that fall within these categories.\(^ {239}\) As a result, the APA does not ensure that agencies satisfy their fiduciary obligations in these contexts. Agencies may decline to employ notice-and-comment procedures even when these procedures are self-evidently necessary, practicable, and in the public interest.\(^ {240}\) These loopholes in agency notice-and-comment rulemaking should be closed to promote purposeful, reasonable, and transparent rulemaking.

\(^{231}\) Jessica Mantel has employed a similar "trustee" theory to advocate enhanced procedural requirements for agency guidance statements. See Mantel, supra note 56, at 364–65 (arguing that administrative procedures should "promote adherence" to the fiduciary duties of care, loyalty, and obedience to the law).


\(^{233}\) Id. § 553(a)(2).

\(^{234}\) Id.

\(^{235}\) See Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69–8 (1974) (detailing § 553(a)(2) rules pertaining to "public property, loans, grants, benefits, or contracts"); Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.73–5 (1975) (detailing § 553(a)(1)). The Administrative Conference of the United States (ACUS) adopted recommendations, which were published in the Federal Register, then compiled in § 305 of the C.F.R. The ACUS was terminated in 1996, and § 305 was accordingly removed from the C.F.R. See Arthur Earl Bonfield, Military and Foreign Affairs Function Rulemaking Under the APA, 71 Mich. L. Rev. 221, 238 (1972) (arguing that while a narrow construction would be preferable, the language of the "military or foreign affairs function" exemption is nevertheless "very broad").

\(^{236}\) See SCHWARTZ, supra note 17, § 4.12, at 197 (contending that there is no justification to maintain the exclusions).

\(^{237}\) See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 48–49 (3d ed. 1998) (discussing Congress's piecemeal efforts to broaden notice-and-comment procedures for particular agencies).


\(^{239}\) Bonfield, supra note 235, at 232.

\(^{240}\) See LUBBERS, supra note 237, at 46–47 (discussing the § 553 exemptions and noting that, because they involve important governmental functions, they have been strongly criticized).
To be sure, the fiduciary model does not necessarily require notice-and-comment procedures for all rulemaking initiatives. To borrow Justice Robert H. Jackson’s colorful expression, fiduciary representation is not a “suicide pact,” nor need it be a prescription for paralysis by analysis. Federal agencies might reasonably dispense with notice-and-comment procedures where the cost, inconvenience, or delay attending such procedures would be “unnecessary” or “impracticable.” On the other hand, the fiduciary model cannot approve agencies adopting regulations that would materially impact the public interest without satisfying the fundamental principles of fairness, reasonableness, and solicitude. Whatever form agency rulemaking might take, agencies must employ a robust deliberative process supported by rational reason giving.

2. Expand Judicial Review of Agency Inaction.—Second, Congress should expand judicial review of agency inaction to ensure agencies’ fidelity to congressional purposes. For many critics, the most frustrating characteristic of presidential administration is its perceived tendency to enervate agency rulemaking. Rather than spurring agencies to action, White House officials have been accused of exploiting their political influence behind the scenes to delay or block disfavored rulemaking initiatives. Such criticisms dogged the Bush Administration, for instance, in fields such as environmental protection and occupational health and safety.

Whether agency inaction and delay should be viewed as cause for alarm will depend, of course, upon whether one accepts the proxy model or the fiduciary model of popular representation. Under the proxy model, the White House’s decision to stay an agency rulemaking proposal could be perceived as a pro-majoritarian check on countermajoritarian bureaucratic decision making. Conversely, under the fiduciary model, agency delay and inaction

242. 5 U.S.C. § 553(b)(B) (2006). Indeed, the fiduciary model arguably militates against notice-and-comment rulemaking where the resources required would be so grossly disproportionate to the particular issue presented as to be “contrary to the public interest.” Id. Under the fiduciary model, however, an agency’s determination that there is “good cause” to depart from notice-and-comment procedures would itself be subject to judicial review. See LUBBERS, supra note 237, at 76 & n.174 (suggesting that courts may apply even heavier scrutiny to such departures).
243. See, e.g., Bagley & Revesz, supra note 118, at 1274 (“Agencies’ decisions not to regulate can be every bit as costly to society as overly expensive regulations . . . .”).
unaccompanied by a reasoned justification would pose precisely the same risks of unfairness, unreasonableness, opportunism, and waste that arise in proactive agency action, and both types of arbitrary agency decision making violate agencies’ basic fiduciary duties.

The APA already specifies that agencies must “conclude a matter presented to” them “within a reasonable time,” and it authorizes courts to “compel agency action unlawfully withheld or unreasonably delayed.” In practice, however, federal courts have been reluctant to set aside the President’s assessment of the “reasonableness” of agency inaction or the “reasonable” timeline for rulemaking in favor of their own independent assessment. Some courts have held that agency decisions to withhold or delay rulemaking action are simply unreviewable. Others have agreed to consider claims based on agency inaction but have deferred all too quickly to agencies’ reasonableness assessments.

While some judicial deference to agency agenda setting and resource allocation might be appropriate, the fiduciary model supports more robust judicial review of agency inaction in the rulemaking context—whether it be an agency’s failure to initiate rulemaking, delay of ongoing rulemaking proceedings, or the unreasonable termination of rulemaking without issuance of a rule. The best way to make agency fiduciary duties credible in these contexts would be to strengthen judicial review by loosening (1) the doctrine of nonreviewability, which limits the types of claims that may be raised against agency inaction, and (2) the doctrine of standing, which limits the types of parties who may bring claims based on agency inaction.

Professor seeks to “reconcile agency decisionmaking with the ultimate form of majority rule . . . by relocating agencies from the headless fourth branch to the executive branch”); Nzelibe, supra note 23, at 1265 (replacing the assertion “that presidential input in agency decisionmake constitutes a good proxy for majoritarianism because the president is in some sense accountable to the people”).

247. 5 U.S.C. § 555(b).
248. 5 U.S.C. § 706(1).
249. Bressman, supra note 246, at 1680–82.
250. See, e.g., Riverkeeper, Inc. v. Collins, 359 F.3d 156, 171 (2d Cir. 2004) (holding that the Nuclear Regulatory Commission’s refusal to take steps to protect a nuclear plant from terrorist attack was unreviewable); Nat’l Cong. of Hispanic Am. Citizens v. Marshall, 626 F.2d 882, 891 (D.C. Cir. 1979) (declining to review OSHA’s refusal to issue field sanitation standards).
251. See, e.g., In re Mine Workers of Am. Int’l Union, 190 F.3d 545, 553–56 (D.C. Cir. 1999) (declining to issue a writ of mandamus to compel the Mine Safety and Health Administration to comply with statutory timelines for rulemaking); Sierra Club v. Thomas, 828 F.2d 783, 797 (D.C. Cir. 1987) (“[W]e are properly hesitant to upset an agency’s priorities by ordering it to expedite one specific action, and thus to give it precedence over others.”); Am. Horse Prot. Ass’n v. Lyng, 812 F.2d 1, 4–5 (D.C. Cir. 1987) (“An agency’s refusal to institute a rulemaking proceeding is at the high end of the [deference] range.”). But see In re Int’l Chem. Workers Union, 958 F.2d 1144, 1149–50 (D.C. Cir. 1992) (determining that OSHA’s six-year delay in issuing health standards on workers’ exposure to cadmium was unreasonable and imposing a deadline for completion).
252. See Bressman, supra note 246, at 1665 (arguing that the doctrines prevent parties from challenging agency inaction). See generally Criddle, supra note 35, at 172–78 (comparing standing doctrine in administrative law and private fiduciary law and arguing for broader private-citizen standing in administrative law).
Bressman has argued persuasively that these doctrines “relieve agencies of the obligation to engage in reason-giving and standard-setting” by “immuniz[ing] agency inaction from judicial review.”253 In the absence of judicial review, it becomes “more likely that agencies will respond to private or political pressure rather than public welfare by giving those typically harmed by agency action (i.e., regulated entities) more power to protest than those typically harmed by agency inaction (i.e., regulatory beneficiaries).”254 The solution to these factionalist pressures, she asserts, is to impose a requirement of deliberative reason giving for agency inaction comparable to the reason-giving requirements for agency action.255 Protracted delays in rulemaking proceedings should be accompanied by a “reasoned explanation” of the grounds and purpose for delaying promulgation of an anticipated rule, and this statement should be subject to some form of judicial review, however deferential.256 As Bressman observes, “enforcing the requirements of reason-giving and standard-setting . . . will promote the conditions that prevent, or at least minimize, corrupting influences from pervading administrative . . . decision-making.”257 The fiduciary model thus favors promoting deliberative rationality in agency rulemaking through mandatory reason-giving requirements backed by judicial review.

Fiduciary administration does not necessarily require more extensive federal regulation. What is essential, as the Supreme Court recognized in *Massachusetts v. EPA*, 258 is for agencies to provide rational justifications for inaction that are consistent with their statutory mandates and the factual record before the agency.259 At present, the absence of statutory reason-giving requirements for agency inaction, coupled with the federal judiciary’s traditionally begrudging nonreviewability and standing doctrines, allows federal agencies to deny rulemaking requests without providing any rational justification whatsoever.260 Such arbitrary behavior is inconsistent with the fiduciary character of public administrative power.

3. Include White House Communications in the Administrative Record.—To ensure that White House policy guidance enhances fiduciary administration, Congress should require agencies to disclose communications

253. Bressman, supra note 246, at 1691.
256. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007); see also id. at 527–28 (“Refusals to promulgate rules are . . . susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential.’” (quoting Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989))).
257. Bressman, supra note 246, at 1693.
259. Id. at 534.
260. Bressman, supra note 246, at 1665.
between the White House and agency personnel regarding pending rulemaking proceedings. 261 Currently, the APA forbids ex parte communications only in formal rulemaking proceedings, turning a blind eye to ex parte communications arising in ordinary notice-and-comment rulemaking. 262 President Clinton’s Executive Order No. 12,866 mandates some public disclosure of documents exchanged between agencies and OIRA, but it does not address communications between agencies and other White House offices. 263 Justice Scalia and various other commentators have defended the exclusion of White House communications from the public record in whole or in part, arguing that this approach facilitates candid dialogue on important policy questions. 264

Fiduciary administration, in contrast, favors mandatory disclosure for nearly all White House communications with agencies related to pending rulemaking actions—irrespective of whether the communications convey factual information or policy advice. While a rulemaking proposal is pending, all ex parte contacts related to the proposal—including communications with the White House—should be prohibited. 265 If the President, his staff, or other federal agencies wish to offer guidance on a pending rulemaking proposal, Congress should require that they do so on the record during the agency’s public comment period. 266 These reforms would channel the White House’s policy guidance into the public sphere where it could bolster, rather than undermine, fiduciary administration.


264. See, e.g., Intragovernmental Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.80-6 (1981) (recommending a distinction between factual information and policy advice, and arguing for disclosure only of the former); see also, e.g., Antonin Scalia, Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking, REG., July-Aug. 1977, 38, at 40-41 (discussing the benefits of frank and informal conversation off the record in the rulemaking process).

265. See 1 PIERCE, supra note 13, § 7.9, at 356 (arguing that Congress could forbid agencies from engaging in ex parte contacts with the White House during rulemaking). Exceptions might be warranted for communications in highly sensitive fields such as national security, but in such cases the fiduciary model would support a requirement that agencies furnish a reasonable justification for withholding disclosure.

266. See Presidential Review of Agency Rulemaking, 1 C.F.R. § 305.88-9 (1991) (recommending disclosure of conduit communications); LUBBERS, supra note 237, at 27 n.130 (discussing the ABA’s endorsement of “Recommendation 88-9 in its entirety”); NAT’L ACAD. OF PUB. ADMIN., PRESIDENTIAL MANAGEMENT OF RULEMAKING IN REGULATORY AGENCIES 35 (1987) (arguing that maintenance of a written record will provide precedent and reduce the need for judicial review); McGarity, supra note 261, at 462 (acknowledging that the President has a legitimate role in establishing policy but stressing that presidential participation, nonetheless, should be open to public scrutiny).
At the close of agency rulemaking proceedings, White House communications should be included in the administrative record for judicial review. Requiring full disclosure and judicial review of communications between White House officials and agency officials would serve several salutary purposes. First, this approach would render the White House's influence over agency rulemaking more accessible to public scrutiny, reinforcing the President's electoral accountability. Second, setting aside its proverbial disinfectant properties, transparency would promote greater policy coordination among the White House's internal offices, ameliorating the internal conflicts reported by Professors Bressman and Vandenbergh. The disclosure of White House communications would also enable federal courts to reinforce agency fiduciary representation more effectively through judicial review of agency rulemaking. If agencies were to rely on White House information or policy guidance, courts conducting hard look review could consider these communications alongside other material in the administrative record such as the agency's own expert reports and comments from private parties. Where agencies unreasonably disregard warnings about potential interagency policy conflicts, courts might strike down agency regulations as "arbitrary" and "capricious" under the APA. Conversely, federal regulations might be considered arbitrary and capricious where agencies rely on White House directives unreasonably to the neglect of important scientific facts or expert judgments. In short, we might reasonably expect greater White House transparency to enhance agency deliberation while reducing the risk of arbitrary political jawboning and interest-group capture.

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

267. See Bressman & Vandenbergh, supra note 121, at 49 (discussing internal conflicts resulting from the influence of multiple offices in the rulemaking process).
268. See McGarity, supra note 261, at 461–62 (arguing that judicial review becomes “an elaborate and expensive charade” if agencies can base their decisions on “secret communications with the President or his staff”).
269. 5 U.S.C. § 706(2)(A) (2006); see also Strauss, supra note 62, at 736 (noting anecdotally that agency administrators would occasionally “tell the President to pound sand” when “the President knew they had the political capital to win”).
270. 295 U.S. 602 (1935).
271. Id. at 629.
272. See, e.g., Portland Audubon Soc’y v. Endangered Species Comm., 984 F.2d 1534, 1546 (9th Cir. 1993) (holding the APA’s ex parte communication prohibition applicable to the Endangered Species Committee, the President, and the White House staff).
Humphrey’s Executor and its progeny, there would seem to be no compelling reason why Congress could not also proscribe ex parte communications between the White House and agency administrators in informal rulemaking.

The Ninth Circuit Court of Appeals endorsed this implication of Humphrey’s Executor in Portland Audubon Society v. Endangered Species Committee. Taking up the banner of presidential administration, the first Bush Administration argued that the APA’s restriction on ex parte communications unconstitutionally undermined the President’s authority to instruct and guide inferior executive officers. The Ninth Circuit “reject[ed] this argument out of hand,” however, emphasizing the “fundamental precept of administrative law that when an agency performs a quasi-judicial (or quasi-legislative) function its independence must be protected.” The court recognized that although executive privilege might protect certain internal White House communications from public disclosure, it did not preclude Congress from proscribing ex parte White House communications with agency officials in the course of informal rulemaking proceedings.

Those who view the President as an effective proxy for popular preferences will likely contest my argument that White House policy guidance merits hard look judicial review. If presidents are better suited than federal judges to determine whether federal regulations comport with majoritarian preferences, a plausible argument could be made that federal law should not authorize judges to second-guess presidential policy guidance. On the other hand, if (as I have argued) majoritarian preferences are largely illusory in the administrative state and White House regulatory review remains an unreliable proxy, hard look judicial review might well be the best available vehicle for promoting fiduciary representation in agency rulemaking.

E. Fiduciary Representation and Popular Sovereignty

As these examples illustrate, the fiduciary model of state legal authority furnishes a credible framework for honoring popular sovereignty and promoting popular representation in the modern administrative state. The fiduciary model responds to Bickel’s basic concern about the need for

273. 984 F.2d 1534 (9th Cir. 1993). But see Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) (holding that in the absence of further congressional action, neither the Clean Air Act nor due process require disclosure of all presidential communications with agencies during informal rulemaking).

274. Portland Audubon Soc’y, 984 F.2d at 1546.

275. Id.

276. See id. (analyzing whether Congress proscribing ex parte White House communications with agency officials interfered with a presidential prerogative).

277. See Mark Seidenfeld, A Big Picture Approach to Presidential Influence on Agency Policy-Making, 80 IOWA L. REV. 1, 24 (1994) (“Judicial review may encourage deliberative decision-making aimed at the public interest by delineating statutory goals in terms of some public-regarding purposes.”).
popular representation in federal lawmaking, but it also confronts and addresses the obvious blind spots in his conception of popular representation. If the public lacks discrete preferences on questions of regulatory policy, and if broader public preferences (to the extent they exist) are malleable and dictated in large part by the public’s dynamic interaction with state institutions, then the majoritarian argument for presidential administration loses much of its force. 278 Shedding Bickel’s dubious preoccupation with majoritarianism, the fiduciary model acknowledges the inevitability and indispensability of administrative discretion in a republican democracy 279 and instead emphasizes institutional fidelity, as measured against the principles of purposefulness, integrity, solicitude, fairness, reasonableness, and transparency. These principles of fiduciary representation circumscribe the outer limits of administrative discretion in agency rulemaking, underscoring the fiduciary responsibilities that the public entrusts to their elected and appointed representatives throughout the administrative state.

Fiduciary representation bears certain affinities to civic-republican and deliberative-democracy theories of the administrative state insofar as its principles of integrity, solicitude, fairness, and reasonableness invite public officials to engage in reflective deliberation on the common good. 280 Each of these theories emphasizes substantive values and processes that should inform state decision making, including whether regulators honor congressional purpose, engage diverse perspectives, and provide rational justifications for their decisions. 281 Fiduciary representation is distinguishable from some strains of deliberative-democracy theory, however, because it does not treat the public’s engagement in agency deliberation as an end in itself, nor does it rely upon the deliberative process to produce a legitimating social consensus. 282 Instead, fiduciary representation views agency

278. See Somin, supra note 101, at 1292 (suggesting that legislative output does not represent majoritarian will if the electorate is ill-informed about politics and government policy).
280. See Pitkin, supra note 141, at 163-65 (arguing that representatives should do what is in their constituents’ best interests and must explain and reconsider their views when they differ from the constituents’ wishes); id. at 193 (noting that Madison believed the purpose of a well-ordered government was to promote deliberation over the common good); Manel, supra note 56, at 369 (reviewing applications of civic-republican theory to administrative governance); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1528 (1992) (linking this deliberative process of agency decision making to the civic-republican tradition, which emphasizes “the public good” rather than “majority rule”); Staszewski, supra note 101, at 1278-94 (developing a deliberative-democracy theory of governmental accountability).
281. See Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? 3-4 (2004) (arguing that the most fundamental purpose of deliberative democracy is to require representatives and citizens to justify their decisions); Seidenfeld, supra note 280, at 1531-32 (“To be legitimate, a decision must respect the positions of all interest groups and respond to their arguments in terms of the good of the community.”).
282. See Gutmann & Thompson, supra note 281, at 21-23 (debating whether deliberative democracy is useful just as a means of arriving at good policies or whether it also manifests mutual respect between citizens and representatives); Seidenfeld, supra note 280, at 1534 (noting that civic
deliberation and transparency as principles that are necessary (albeit not sufficient) to ensure that discretionary agency lawmaking promotes the public welfare. The fiduciary model recognizes that public engagement in agency deliberation may help to clarify the stakes of regulation, but public disengagement and disharmony do not necessarily eviscerate the legitimacy of administrative action. Under the fiduciary model, the process-oriented values of administrative governance are simply "a means to enforce the trust placed in representatives," not a panacea for political discord or regulatory malaise.

To some, the fiduciary model might appear uncomfortably close to Burke's much-maligned theory that all government institutions serve as "trustees for the people." Burke invoked the fiduciary concept as support for the argument that public authority ought to reside in a "natural aristocracy"—namely, men of superior skills and ability who would be best equipped to discern the national interest through reasoned deliberation. This vision of the trusteeship state has been criticized as lending a false veneer of political legitimacy to aristocratic oligarchy and colonial imperialism. "Burke could regard all government as a trusteeship," writes one critic, because under his theory of representation "no democratic implication need be involved, nor are elections necessary."

While it is true that Burke's trusteeship model and the fiduciary model of the state spring from a common intellectual tradition, the facial similarities between the two conceptions of popular representation run mostly skin deep. Unlike Burkean trusteeship, the fiduciary model of state legal authority is grounded in popular sovereignty and honors the public's prerogative to shape government institutions, participate in government policy formation, require government officials to provide fair, reasonable, and other-regarding justifications for their actions, and seek the removal of incompetent or

republicanism "insist[s] that government actions reflect social consensus about the common good"); cf. Ely, supra note 2, at 87 (arguing that judicial review should be "participation-oriented"). But see Edward L. Glaser & Cass R. Sunstein, Extremism and Social Learning, 1 J. LEGAL ANALYSIS 263, 263–64 (2009) (arguing that deliberation may exacerbate group polarization rather than generate consensus).

283. Were this not so, virtually no state action could be considered legitimate.
285. See Burke, supra note 137, at 28 ("The king is the representative of the people; so are the lords; so are the judges. They all are trustees for the people.").
287. See, e.g., David Bromwich, Introduction to Edmund Burke, On Empire, Liberty, and Reform: Speeches and Letters 1, 35 (David Bromwich ed., 2000) (contending that Burke believed there should be a ruling elite composed of a natural aristocracy); Gutmann & Thompson, supra note 281, at 8 (criticizing Burke's trustee theory as "more aristocratic than democratic"); James Hogan, Election and Representation 157 (1945) (describing Burke as "the last and greatest champion of parliamentary oligarchy...protesting against the notion of a democratic franchise").
288. Pitkin, supra note 141, at 129.
The fiduciary model also provides discrete criteria for evaluating the performance of public officials in their roles as representatives. Moreover, the fiduciary model does not authorize public officials to disregard the general will of the people entirely. Because individual dignity entails freedom to define one’s own ends, public preferences are always a relevant and important factor when public officials consider how best to promote the public welfare, and such preferences merit serious consideration within the deliberative processes of public lawmaking. Whatever path regulators choose, they must be prepared to furnish a reasonable explanation for their decision that responds to opposing viewpoints. Thus, far from undermining democratic governance, the fiduciary conception of popular representation should facilitate transparency, rationality, consensus building, and political accountability.

Others might argue that the concept of fiduciary obligation in administrative law is incoherent because concepts such as the public welfare and the common good are subject to a range of interpretations and may be radically indeterminate at the margins. Even if all could agree that administrative agencies bear a fiduciary obligation to promote the public welfare, this notional consensus might be of little value if the public welfare itself remains a fundamentally contested concept. To be sure, Congress has a role to play in defining the public welfare by providing intelligible principles to guide agency lawmaking. But these principles are often pitched at such a high level of generality that agencies are left with broad discretion to clarify both the nature of the task at hand and the best tools for accomplishing the task. As a result, administrative agencies often enjoy sweeping policy-

289. See Criddle & Fox-Decent, supra note 36, at 351-52 (comparing Burke’s theory of colonial trusteeship, which denies the ability of colonized peoples to govern themselves, with the postcolonial fiduciary theory, which emphasizes popular sovereignty).

290. Id.

291. See Pitkin, supra note 141, at 161 (“Surely sometimes we can promote a person’s welfare even against his wishes; yet we would not want to say in general that people’s wishes are irrelevant to a definition of their welfare.”); cf. Representative Edmund Burke, British Parliament, Speech at the Conclusion of the Poll (Nov. 3, 1774), in 2 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 9, 15 (Henry G. Bohn ed., 1854) (“Your representative owes you ... his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”).

292. See Pitkin, supra note 141, at 163–64 (“[W]hen a representative finds himself in conflict with his constituents’ wishes, this fact must give him pause. It calls for a consideration of the reasons for the discrepancy .... Acting contrary to their wishes is not necessarily wrong, not necessarily bad representation or in violation of a representative’s duty. It may, indeed, be required of him in certain situations. But it is abnormal in the sense that it calls for explanation or justification.”); see also Mashaw, supra note 168, at 118 (“Reason giving ... treats persons as rational moral agents who are entitled to evaluate and participate in a dialogue about official policies on the basis of reasoned discussion. It affirms the individual as subject rather than object of the law.... Authority without reason is literally dehumanizing.”).

293. Staszewski, supra note 101, at 1279–84 (discussing these four virtues of reason giving).

294. See Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 472, 475 (2001) (observing that although “Congress must ‘lay down by legislative act an intelligible principle’” for agencies to follow, the Supreme Court has “never demanded ... that statutes provide a ‘determinate criterion’”
making discretion as they arbitrate between competing public preferences or conceptions of the common good.295

To be clear, fiduciary representation does not aspire to furnish a comprehensive theory of the public welfare, nor does its force depend upon any such theory. The fiduciary model simply recognizes the brute fact that the law necessarily entrusts policy-making discretion to administrative agencies, and it seeks to constrain particular exercises of administrative discretion within acceptable bounds. After satisfying the basic principles of fiduciary administration, regulators may find that they still enjoy substantial discretion to determine what policy alternative will best advance Congress’s general purposes and promote the broader public welfare. Whether particular delegations of lawmaking authority to administrative agencies are appropriate remains a political question for Congress to work out in deliberation with the public, subject only to constitutional constraints. To the extent that Congress chooses to entrust discretionary lawmaking authority to administrative agencies, however, the fiduciary model suggests that such acts of entrustment are not necessarily inconsistent with popular sovereignty, provided that agencies respect the fiduciary character of their entrusted authority.

V. Fiduciary Administration

Viewed from the fiduciary model’s perspective, the administrative state comes into focus as an intricate network of nested fiduciary relations. Presidents, legislators, judges, administrators, and other public officials serve as fiduciary representatives for their beneficiaries, the people subject to their entrusted administrative powers.

Keeping this broad view of the fiduciary character of state legal authority in mind, this Part returns to the problem presented in Part II—the rise of presidential control over agency rulemaking—and considers what, if anything, the fiduciary conception of popular representation might tell us about the President’s representative role in federal administrative lawmaking. While the conclusions presented in this discussion are necessarily provisional and highlight the need for further empirical investigation, the fiduciary model at the very least calls into question the desirability of presidential administration as a strategy for promoting popular representation in agency rulemaking. Rather than staying the current course toward full-fledged presidential administration, I argue that the White House could promote popular representation more effectively by observing certain “passive virtues” of prudential abstention and deference in its interaction with agency regulators.

---

295. See FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND POLITICAL SCIENCE 48 (1998) (describing the “pluralistic assumption that the best political outcomes would arise as a result of group conflict”).
A. Presidents and Administrators as Fiduciary Representatives

On first impression, there would seem to be little reason for the fiduciary model to prefer either presidents or agency administrators as the final decision makers in administrative lawmaking. Both presidents and agency administrators occupy positions of public trust, and both are capable of honoring the fiduciary principles of purposefulness, integrity, solicitude, fairness, reasonableness, and transparency. Upon closer inspection, however, several key factors suggest that presidential administration is less likely to advance fiduciary representation than traditional agency administration.

Consider first the question of legal entrustment, the starting point for all fiduciary representation. Some advocates of presidential administration have advocated presidential administration on constitutional grounds, arguing that the Vesting and Faithful Execution Clauses of Article II establish a "unitary" Executive Branch under the President's undivided managerial control. Others have suggested that the President's authority to direct agency rulemaking initiatives may be inferred from more general constitutional themes such as popular accountability or aversion to factionalism, or from implicit statutory delegations to the President. However, the weight of authority runs against these unitary-executive theories of administrative lawmaking. The Supreme Court refuted the unitarians' theory of unfettered presidential power to manage the Executive Branch during the late 1980s, and most scholarly commentary likewise rejects the argument that the Constitution authorizes the President to direct or veto agency rulemaking in

296. See, e.g., CALABRESI & YOO, supra note 62, at 3-4 ("[T]he theory of the unitary executive holds that the Vesting Clause . . . is a grant to the [P]resident of all the executive power, which includes the power to remove and direct all lower-level executive officials."); Steven G. Calabresi & Saikrishna B. Prakash, The President's Power To Execute the Laws, 104 YALE L.J. 541, 570–82 (1994) (arguing that the Vesting Clause of Article II confers a general and exclusive grant of power to execute federal law); Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1153, 1166 (1992) (describing the mechanisms by which the President may exert the control granted in Article II over the executive department); Saikrishna B. Prakash, Note, Hail to the Chief Administrator: The Framers and the President's Administrative Powers, 102 YALE L.J. 991, 1012–15 (1992) (arguing that the framers designed Article II to provide for a politically accountable unitary executive to whom officers charged with enforcement of the law would be subordinate); David B. Rivkin, Jr., The Unitary Executive and Presidential Control of Executive Branch Rulemaking, 7 ADMIN. L.J. AM. U. 309, 317–20 (1993) (arguing that the Vesting Clause places the totality of the executive power, which includes the power to administrate, in the President); see also, e.g., Sierra Club v. Costle, 657 F.2d 298, 405–06 (D.C. Cir. 1981) ("The authority of the President to control and supervise executive policymaking is derived from the Constitution.").

297. Lessig & Sunstein, supra note 20, at 102–03; Rivkin, supra note 296, at 309.

298. See Kagan, supra note 20, at 2251.

the absence of congressional authorization. Moreover, as Kevin Stack has shown, most agencies' enabling acts expressly commit final rulemaking authority to administrators, not the President. Thus, federal law does not appear to entrust the White House with broad managerial authority over agency rulemaking.

To the extent that the scope of the President's legal authority remains unclear, the six principles of fiduciary representation, which reflect persons' moral capacity to constrain regulators' exercise of administrative discretion, arguably militate against presidential administration. From a comparative institutional perspective, agency administrators are generally more likely than presidents to act purposefully, reasonably, and transparently in rulemaking proceedings—not necessarily because they are more virtuous than presidents but because federal administrative law compels them to do so.

As we have seen, the principle of purposefulness requires regulators to respect their statutorily prescribed purposes. Presidential administration tends to compromise the coherence of agency rulemaking by subjecting agencies to the pressure of conflicting congressional and presidential purposes. Indeed, one reason why Congress entrusts final rulemaking

300. See, e.g., Froomkin, supra note 29, at 1372 (suggesting that Congress can protect some civilian officers and department heads in the Executive Branch "from dismissal and countermand by the President"); Richard J. Pierce, Jr., Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive, by Steven G. Calabresi and Christopher Yoo, U. Pa. J. Const. L. (forthcoming 2009) (manuscript at 6–7, on file with Texas Law Review) (noting an occasion on which the head of OIRA stated that the President could only compel action from agency heads through the removal power); Morton Rosenberg, Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627, 632 (1989) (noting two cases in the late 1980s in which the Supreme Court approved of congressional power over "agency structure, location, and relationships that may properly have as its principal object the desire to limit the President's influence over ... administration policy"); Strauss, supra note 62, at 702 (observing that the "Constitution itself is at best ambivalent" on the question of whether the President may micromanage agency rulemaking); Peter L. Strauss, Presidential Rulemaking, 72 Chi.-Kent L. Rev. 965, 973 (1997) (arguing that an administrator removable only "for cause" has a "right, and in some cases it may be his obligation, to refuse the President's direction, even if he realizes that his disappointed boss may immediately send him out of office").

301. Stack, supra note 30, at 310–12; see also Percival, supra note 29, at 966 ("When Congress enacts regulatory legislation vesting decision-making authority in agency heads, it generally envisions that decisions will be made by persons who possess expertise in the regulatory matters entrusted to them. "). Congress might have different expectations about the President's role in some fields of regulation that fall squarely within his constitutional war powers or foreign relations authority.

302. See Staszewski, supra note 101, at 1306 ("[L]egislative delegations... should be understood as providing final decision-making authority to agency officials rather than to the President, based on their superior deliberative accountability... ").

303. Executive Order No. 12,866 states that one purpose of White House regulatory review is to ensure that "each agency's regulatory actions are consistent with... the President's priorities." Exec. Order No. 12,866 § 2(b), 3 C.F.R. 638, 640 (1994); see also Harold H. Bruff, Balance of Forces: Separation of Powers Law in the Administrative State 465 (2006) (observing that President Clinton had directed the FDA to adopt the tobacco regulation later struck down in FDA v.
authority to agency administrators rather than to the President is to ensure that federal regulation promotes legislative purposes (shaped deliberately through bicameralism and presentment) rather than the President’s unilateral priorities.304

Unlike the White House, administrative agencies are also subject to a variety of procedural requirements that promote reasonable and transparent administration.305 For most agency rulemaking, federal law requires administrators to engage the public in a transparent and inclusive decision-making process, disclosing the records and communications that informed their decisions, and furnishing rational justifications for their rulemaking actions.306 When engaging in informal legislative rulemaking under the APA, for instance, administrative agencies must publish notice of their proposed rule, solicit public comments, and promulgate the final rule with “a concise general statement of [the rule’s] basis and purpose.”307 To satisfy judicial review, an agency must furnish a complete, contemporaneous administrative record, clarify the administrator’s rationale for their decisions, and satisfy courts that their final rule is not inconsistent with the empirical evidence before the agency.308 The administrator’s rationale must address all salient aspects of the problem, including the merits of other reasonable alternatives, and justify any deviation from past rulemaking actions.309 To

Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), despite the fact that FDA lawyers had already concluded the agency lacked the requisite statutory authorization).

304. See Kagan, supra note 20, at 2323–25 (suggesting that Congress can limit the President’s capacity to direct administrators in order to insulate administrative decision making).

305. See Criddle, supra note 35, at 151 (“Agencies are bound to exercise reasonable prudence when exercising delegated powers, and they are forbidden from entering self-interested transactions or arbitrarily discriminating between similarly situated beneficiaries. Courts enforce these fiduciary duties as minimal standards of rationality, consistency, transparency, public deliberation, and thoroughness in investigating alternatives.”).

306. See 5 U.S.C. app. 2 §§ 10–13 (2006) (requiring agency advisory committee meetings to be open to the public and transcribed, and providing for disclosure of virtually all documents used in these meetings); id. § 552 (permitting public access on request to a variety of documents and information, including published descriptions of the agencies’ methods of operations, procedures, substantive rules, and statements of policy); id. § 552b(e)(1) (requiring agencies to give advance public notice “of the time, place, and subject matter” of certain agency meetings).

307. Id. § 553(c).

308. See Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983) (holding that the National Highway Traffic Safety Administration had to reconsider a vehicle safety standard because the agency failed to present an adequate basis for its decision); Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59, 65 (1995) (“To have any realistic chance of upholding a major rule on judicial review, an agency’s statement of basis and purpose now must discuss in detail each of scores of policy disputes, data disputes, and alternatives to the rule adopted by the agency.”); Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 61 (1985) (“Agencies must give detailed explanations for their decisions; justify departures from past practices; allow participation in the regulatory process by a wide range of affected groups; and consider reasonable alternatives, explaining why they were rejected.”).

309. See INS v. Yang, 519 U.S. 26, 32 (1996) (“[A]n irrational departure from [a general] policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of discretion.’”); Greyhound Corp. v. ICC, 551 F.2d 414, 416
the extent that agencies rely on their own expertise in rulemaking, they must be prepared to demonstrate and defend their expert judgment during hard look judicial review.\textsuperscript{310} The APA thus contemplates that administrative agencies, as public fiduciaries, will employ procedures designed to ensure that their regulations are “the product of reasoned decisionmaking.”\textsuperscript{311} No such procedural safeguards apply by law to the President.\textsuperscript{312}

Considerations of comparative expertise also favor vesting agency administrators rather than presidents with final rulemaking authority. Administrators generally possess greater experience in their fields of labor and thus are better positioned to evaluate the public interest reasonably.\textsuperscript{313} Administrators are also more likely to immerse themselves in the technical details of a particular regulatory problem than presidents, whose myriad responsibilities preclude them from developing such specialized knowledge in each and every regulatory field.\textsuperscript{314} Administrators are therefore more likely to act deliberately and deliberatively in approving or disapproving particular rulemaking proposals.\textsuperscript{315}

The principle of transparency also militates strongly against presidential administration. Under current law, the President and his staff (outside OIRA) are not legally bound to reveal their communications with interest groups.\textsuperscript{316} No federal statute requires disclosure of such communications, and the White House has often relied on executive privilege to preserve the secrecy of its internal decision-making processes, denying observers access to records and testimony that would facilitate public monitoring and

\textsuperscript{310}. See Sunstein, supra note 308, at 61 (explaining that the hard look doctrine requires that agencies give explanations for their decisions).

\textsuperscript{311}. State Farm, 463 U.S. at 52; cf. Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 DUKE L.J. 879, 900 (observing that a fiduciary bears the burden to establish that he or she “has dealt candidly and fairly with” beneficiaries).

\textsuperscript{312}. See Franklin v. Massachusetts, 505 U.S. 788, 801 (1991) (holding that the President’s actions are not subject to review under the APA); Stack, supra note 30, at 318 (arguing that because the APA does not apply to the President, implying presidential directive powers into statutes delegating authority to agency officials may frustrate Congress’s occasional interest in insulating agencies from presidential control).


\textsuperscript{314}. See Bressman, supra note 43, at 512–13 (arguing that the President could never effectively micromanage regulatory agencies, both for lack of expertise and time).

\textsuperscript{315}. Cass R. Sunstein, Factions, Self-interest, and the APA: Four Lessons Since 1946, 72 VA. L. REV. 271, 281–87 (1986) (characterizing administrators’ role as experts who use their knowledge of their fields to make deliberative decisions with respect to regulatory decisions).

\textsuperscript{316}. See Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004) (upholding the application of executive privilege to the Vice President’s communications with members of the energy industry in formulating energy policy).
Similarly, White House communications with administrative agencies are not ordinarily subject to the FOIA’s mandatory disclosure requirements, and the White House has resisted efforts to expose its communications with agencies to public scrutiny on grounds of executive privilege.319 Granted, sunshine provisions adopted during the Clinton Administration do require OIRA to disclose contacts from private parties during formal OIRA review, and OIRA has adopted a similar “informal practice” of disclosing such contacts on draft rules.321 OIRA is also required to disclose its communications with agency officials following publication of a final rule.322 However, these disclosure requirements do not apply to informal OIRA communications prior to the initiation of formal OIRA review, nor do they apply to communications from any other White House offices.324 Hence, if the White House declines to disclose its reasons for initiating, modifying, suspending, or terminating rulemaking initiatives, its preferences and motivations may remain inscrutable to the electorate. From the perspective of transparency, therefore, the fiduciary model strongly


318. See 5 U.S.C. § 552(b)(5) (2006) (exempting “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 n.16 & 150 (1975) (holding that FOIA protects presidential communications generally and materials related to intra-agency deliberative processes); Judicial Watch, Inc. v. Dep’t of Justice, 365 F.3d 1108, 1112 (D.C. Cir. 2004) (“There is [in FOIA] a built-in presidential communications privilege for records in the possession of, or created by, immediate White House advisers . . . .”).


324. See, e.g., Exec. Order No. 12,866 § 6(b)(4)(B), 3 C.F.R. at 648 (limiting disclosure to those communications between OIRA and individuals outside the Executive Branch, thus exempting disclosures from other White House offices); see also Seidenfeld, supra note 277, at 22 n.122 ("[I]n the shadows lest deliberative discussion within the executive be chilled.").
favors entrusting final rulemaking authority to agency administrators rather than the popularly elected president.

Other principles of fiduciary administration—fairness, integrity, and solicitude—pose more difficult questions. For example, are agency administrators or White House officials more likely to succumb to special-interest capture? Which of these decision makers would be more likely to adopt rules promoting their personal or institutional self-interest rather than acting solely for the benefit of their statutory beneficiaries? At present, these questions lack definitive answers. While anecdotal evidence of agency capture abounds, recent studies suggest that agency capture might actually be less widespread and systematic than public-choice theorists once imagined.325 Moreover, for every anecdote involving agency capture, one can point to an equally distressing example of White House capture.326 Pending more definitive comparative empirical findings, it remains unclear whether administrative law would promote the principles of integrity, solicitude, and fairness more effectively by committing final rulemaking authority to the President or agency administrators. What we might say with some confidence, however, is that agencies' mandatory disclosure requirements make it far easier for the public to uncover administrators' breaches of trust and obtain meaningful remedies through the courts. Thus, considerations of comparative procedure—while hardly conclusive—at least cast doubt on the idea that the President is best positioned to satisfy the fiduciary principles of fairness, integrity, and solicitude in federal rulemaking.

In sum, the fiduciary model supports the view that Congress may promote popular representation in the administrative state by entrusting final rulemaking authority to agency administrators rather than the popularly elected President. Federal administrative law promotes fiduciary representation by respecting agency administrators' statutorily entrusted authority and holding them to deliberation-reinforcing legal requirements of purposefulness, integrity, solicitude, fairness, reasonableness, and transparency. In contrast, presidential administration, as it has developed recently under the Bush and Obama Administrations, lacks procedural safeguards sufficient to address the presidency's capacity for arbitrariness.327 Entrusting final rulemaking authority to agency administrators thus would

325. See, e.g., Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 344 (1986) (reporting that agency capture "is not by any means the norm, and where capture occurs, it does not always last"); Spence & Cross, supra note 197, at 121–22 ("[A]gency capture is no longer regarded as a valid descriptive theory of bureaucratic behavior.").
326. Bagley & Revesz, supra note 118, at 1305–06, 1312 (arguing that the President and administrative agencies are similarly vulnerable to pressure from politically influential interest groups).
327. Richardson, supra note 165, at 37 ("[T]he republican ideal of freedom from domination . . . demands that the government not have the capacity to exercise power arbitrarily.").
appear to promote the liberal ideals of fiduciary administration more effectively than presidential administration.328

B. Fiduciary Representation and Interbranch Deliberation

The fact that federal law generally entrusts final rulemaking authority to agency administrators does not mean that the White House, Congress, and the courts ought to remain silent in agency rulemaking proceedings. Administrative agencies are most likely to promote the public welfare if they develop regulations in open public deliberation with other government institutions. As the D.C. Circuit recognized in Sierra Club v. Costle,329 “Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.”330

Advocates of presidential administration have marshaled strong arguments for robust White House participation in the rulemaking process. As the federal government’s chief executive officer, the President has a unique perspective on the administrative state and bears a special responsibility to ensure that federal policy reflects adequate coordination across the administrative state.331 The White House could help federal agencies coordinate their regulatory policies and thereby minimize interagency conflicts. In some instances, White House policy guidance might also highlight important national perspectives that agency officials would otherwise overlook.332 Agency rulemaking might likewise benefit from a regular OIRA audit to ensure that administrators give proper weight to trans-substantive policy concerns such as regulations’ potential impact on the public fisc. None of these communications would be discouraged under the fiduciary model. To the contrary, under the principle of reasonableness, agencies would be obliged to give careful consideration to White House guidance just as they would information or policy guidance from any other source.

328. See Farina, supra note 99, at 1037 (arguing that the Constitution contemplates a “multivoiced representational construct” in response to “the challenges of reflecting, and creating, the consent of the governed”); Shane, supra note 99, at 195 (noting that the alternative to presidential administration is political pluralism).


330. Id. at 406.

331. See, e.g., Cutler & Johnson, supra note 58, at 1410–11 (“[T]he President and his immediate staff have an overview of government management—and a constitutional responsibility for executing all the laws—that is not shared by a single regulatory agency, by any specialized congressional committee or by the Congress as a whole.”); Rodriguez, supra note 20, at 1194–95 (“If anyone is positioned to coordinate diffuse regulatory policy, it is the President, as leader of the executive branch.”); Seidenfeld, supra note 277, at 13 (“[T]he White House may be the only governmental institution capable of successfully coordinating government policy and creating a coherent agenda . . . .”); Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 ADMIN. L. REV. 181, 189 (1986) (“[T]he President is in a good position to centralize and coordinate the regulatory process.”).

332. See Bressman & Vandenbergh, supra note 121, at 89 (repeating the opinion of interview respondents that the President can convey a broader perspective on rulemaking than agencies).
To ensure that agencies do not arbitrarily neglect White House guidance or other public comments, federal courts should buttress fiduciary representation through hard look judicial review. Under the fiduciary model, hard look judicial review serves a representation-reinforcing role analogous to John Hart Ely’s celebrated theory of judicial review. The purpose of judicial review on both accounts is to reinforce popular representation through a “process of government” agreeable to persons of diverse ideological commitments. Unlike Ely’s theory of judicial review, however, the fiduciary model does not embrace process as an alternative to substantive values. As Ely’s critics have observed, “The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values . . . .” Instead, within the fiduciary model of popular representation, the substantive rights and values that should guide judicial review of administrative action are made explicit. The fiduciary model rests agency rulemaking processes on discrete substantive principles that arise from the essential normative foundations of the state–subject fiduciary relationship: purposefulness, integrity, solicitude, fairness, reasonableness, and transparency. Although these principles could conceivably demarcate a domain of social consensus regarding good governance, their legal authority arises from the fiduciary principle itself, not from any actual or notional consensus.

To be clear, the fiduciary model does not purport to furnish a comprehensive account of the administrative state’s political legitimacy. Some might argue, for example, that the political legitimacy of agency rulemaking depends upon not only popular representation or popular sovereignty per se but also consequentialist concerns for government effectiveness. Some delegations of rulemaking power to administrative agencies may be unwise or poorly tailored to meet the public’s needs. Moreover, even if Congress’s delegations are sound, fiduciary administration does not ensure that agency regulations will always yield the best possible outcomes—or even salutary outcomes—for the public welfare. Indeed, for some pressing regulatory problems there may be no consensus or majority view about what would constitute a “positive outcome” in the first place. At

333. See ELY, supra note 2, at 87 (providing a brief overview of Ely’s theory of judicial review).

334. See id. at 100–01 (explaining that the Constitution protects the interests of all by structuring decision processes at all levels to attempt to ensure that everyone’s interests will be actually or virtually represented).

335. See id. at 101 (disavowing any “governing ideology”).

336. Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1064 (1980); see also Mark Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037, 1045 (1980) (“The fundamental difficulty with Ely’s theory is that its basic premise, that obstacles to political participation should be removed, is hardly value-free.”).
most, therefore, fiduciary representation narrows the scope of agency
discretion within minimally acceptable bounds: agencies honor popular
sovereignty as fiduciary representatives if they adopt policies that reflect
appropriate purposefulness, integrity, solicitude, fairness, reasonableness,
and transparency. To the extent that questions of political legitimacy venture
beyond these constitutive principles of fiduciary representation, the fiduciary
model is arguably subject to the classic criticisms of process theory
generally—namely, that it is "fundamentally incomplete" in practice.\footnote{337}

Yet the fiduciary model's very incompleteness may be a virtue.\footnote{338} As
discussed previously, presidential administration tends to stifle agency
deliberation and entrench federal regulations against legislative correction.
The fiduciary model's minimalist conception of popular representation, in
contrast, leaves ample room for continuing public deliberation both inside
and outside the rulemaking process over the best means and ends for federal
regulation. Fiduciary administration fosters public deliberation by obliging
agencies to investigate regulatory problems, engage experts, and educate
other public officials and the citizenry at large about the stakes of agency
regulation. Far from entrenching presidential preferences, fiduciary adminis-
tration facilitates continued dialogue and collaboration between
administrative agencies and Congress, enabling legislators to revisit agency
rulemaking decisions and revise federal regulation through their own delib-
erative lawmaking processes. Federal judges, for their part, may also
reinforce fiduciary representation by correcting deliberation failures in the
rulemaking process, overturning agency regulations that are unfair,
unreasonable, or inconsistent with Congress's statutory objectives.\footnote{339} Where
administrative agencies betray congressional purpose or violate the public
trust in rulemaking, the President and Congress retain a measure of residual
control as public fiduciaries in their own right to enact new legislation or re-
move wayward agency officials.\footnote{340} This dynamic conversation between
the three branches, rather than presidential representation alone, best honors the
Constitution's republican vision of achieving popular representation through
polyphonic, interbranch deliberation.\footnote{341}

C. The Passive Virtues of Fiduciary Administration

Sadly, the prospects of immediate congressional action to strengthen
fiduciary administration are not promising. In the past, Congress has

\footnote{337. Tribe, supra note 336, at 1064.}
\footnote{338. For a general defense of minimalism in judicial decision making, see CASS R. SUNSTEIN,
ONE CASE AT A TIME (1999).}
\footnote{339. See supra text accompanying notes 308-311; cf. ELY, supra note 2, at 88 (arguing that
judicial review serves a representation-reinforcing role by addressing political-process failures in
majoritarian decision making).}
\footnote{340. Criddle, supra note 35, at 129-30.}
\footnote{341. See Farina, supra note 99, at 1019, 1037 (noting that the founders understood that the will
of the people cannot be captured by any single part of the government).}
deflected proposals designed to promote fiduciary administration such as expanding notice-and-comment rulemaking and judicial review of agency inaction.\textsuperscript{342} Congress would likely resist this Article’s proposal to prohibit ex parte White House communications because the proposed change would undermine arguments for exempting similar congressional communications from disclosure.\textsuperscript{343} Until a major scandal erupts, Congress is unlikely to spend its own political capital on a contentious battle with the Executive Branch over administrative procedure, judicial review, or government transparency.

Pending legislative action on these proposals, the Obama Administration should voluntarily promote fiduciary administration in agency rulemaking by observing prudential principles of nonintervention comparable to Bickel’s renowned passive virtues.\textsuperscript{344} In \textit{The Least Dangerous Branch}, Bickel implored the Supreme Court to employ the standing doctrine, the ripeness doctrine, and the political question doctrine to reduce the Court’s institutional footprint on the political process.\textsuperscript{345} Bickel commended these techniques of constitutional avoidance as a last line of defense “mark[ing] the point at which the Court gives the electoral institutions their head and itself stays out of politics.”\textsuperscript{346} In a similar spirit of institutional humility, the incoming Obama Administration should renounce the Bush Administration’s overly aggressive assertions of executive power and observe the prudential principles of deliberative process, transparency, and respect for legally entrusted authority. For example, if Congress declines to revisit the APA’s exemptions to informal rulemaking, federal agencies should still commit themselves to employ notice-and-comment rulemaking in all contexts where these procedures would not be impracticable. If agencies decide to postpone or discontinue rulemaking initiatives, they should take care to provide a reasoned explanation for their decision. President Obama should also promulgate a new executive order directing agencies to place on the public record all communications with White House staff regarding pending informal rulemaking proceedings. Additionally, Obama should disavow the Bush Administration’s more egregious tactics of managerial control such as placing RPOs as White House gatekeepers for agency rulemaking and the arbitrary editing and suppression of expert reports on matters germane to

\textsuperscript{342} Pierce, supra note 11, at 331.
\textsuperscript{343} See Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981) (defending ex parte congressional communications with the EPA on the ground that “Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws”).
\textsuperscript{344} Bickel, supra note 1, at 200.
\textsuperscript{345} Id. at 111–98; see also Alexander M. Bickel, The Passive Virtues, 75 HARV. L. REV. 40, 42–47 (1961) (explaining and proposing the ripeness, standing, and political question doctrines).
\textsuperscript{346} Bickel, supra note 345, at 51.
agency rulemaking. By observing these and other “passive virtues” of fiduciary administration, the Obama Administration could greatly enhance fiduciary representation in administrative lawmaking.

The prudential principles of fiduciary administration may serve as a critical test of character for the new Obama Administration. In his inaugural address, President Obama affirmed the need for responsible government to “restore the vital trust between a people and their government” by ensuring that “those of us who manage the public’s dollars will be held to account, to spend wisely, reform bad habits, and do our business in the light of day.”

Obama has taken several concrete steps to realize this ideal, including instructing all agency heads to “adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government.” Yet the enormity of the ongoing financial crisis and other pressing national and international challenges will surely test the President’s resolve to safeguard the “ideals” of deliberative, transparent government rather than compromise these principles of fiduciary representation “for expediency’s sake.” Care must be taken therefore to safeguard the passive virtues of fiduciary administration, lest enthusiasm for the incoming President lead to broader centralization of administrative lawmaking and lasting setbacks for fiduciary representation in the administrative state.

347. See, e.g., Juliet Eilperin & R. Jeffrey Smith, EPA Won’t Act on Emissions This Year: Instead of New Rules, More Comments Sought, WASH. POST, July 11, 2008, at A1 (“[T]he White House has walked a tortured policy path, editing its officials’ congressional testimony, refusing to read documents prepared by career employees and approved by top appointees, requesting changes in computer models to lower estimates of the benefits of curbing carbon dioxide, and pushing narrowly drafted legislation on fuel-economy standards that officials said was meant to sap public interest in wider regulatory action.”); White House Climate Change Policy—Delay, Delete, and Deny, OMB WATCH, July 27, 2008, http://www.ombwatch.org/node/3741 (criticizing Vice President Dick Cheney’s alteration of a senior CDC official’s congressional testimony on the health risks of climate change).

348. The Address: ‘All This We Will Do,’ N.Y. TIMES, Jan. 21, 2009, at 2; see also Brian Knowlton, After a Day of Crowds and Celebrations, Obama Turns to Sobering Challenges, N.Y. TIMES, Jan. 21, 2009, available at http://www.nytimes.com/2009/01/22/world/americas/22ig malformed.19577085.html (quoting President Obama’s assertion that all executive officers are “keepers of the public trust” and that his Administration would stand not “on the side of those who want to withhold information but those who seek to make it known”).


350. See id. (“reaffirming the commitment to accountability and transparency” by directing the United States “Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies”); see also John Schwartz, Obama Backs Off a Reversal on Secrets, N.Y. TIMES, Feb. 10, 2009, at A12 (quoting Attorney General Eric H. Holder Jr. who stated that “[i]t is the policy of this administration to invoke the state secrets privilege only when necessary and in the most appropriate cases”).
VI. Conclusion

Defenders of presidential administration have characterized the President as "a kind of democratic oracle, tasked with giving voice to the people's power to redefine public life through democratic action." The problem with this Wilsonian conception of the Presidency is that the will of the people is an inscrutable, Delphic guide. Rarely does public opinion crystallize into a clear national consensus on questions of federal regulation. Moreover, it is hardly self-evident that presidential administration would be the best strategy for vindicating public preferences in the administrative state. As Cynthia Farina has observed, any attempt to equate the popular will with the President's will "obscures complex problems...of information, prediction, and risk perception" and "slides over vexed questions...of when leaders should lead rather than follow and of how the act of governing becomes a process in which the collective will is formed, rather than merely implemented." Confronting these complex problems of identification and implementation, no sober-minded president could believe that his or her preferences on matters of regulatory policy would correlate neatly with the ever-elusive will of the people.

A far more constructive concep­tion of popular representation is the idea that public officers serve as fiduciary representatives for the people subject to their power. Under this model, popular representation depends upon whether administrative agencies act purposefully, fairly, reasonably, and transparently with integrity and solicitude to the interests of the people subject to their power. In contrast, the President's fiduciary role in agency rulemaking consists primarily of persuasion, coordination, and general oversight, taking care that administrative agencies exercise their rulemaking powers within the law's limits. Congress and the courts may also reinforce popular representation by correcting agency deliberation failures as they arise in agency rulemaking. Within this intricate network of nested fiduciary relations lies the best hope for meaningful popular representation in agency rulemaking.

351. See Purdy, supra note 57, at 1849 (describing Wilson's view of the presidency).
352. See A. Lawrence Lowell, Public Opinion and Popular Government 73 (1913) (quoting Sir Henry Maine as stating, "[T]he devotee of democracy is much in the same position as the Greeks with their oracles. All agreed that the voice of the oracle was the voice of god; but everybody allowed that when he spoke he was not as intelligible as might be desired.").
353. Farina, supra note 99, at 988.