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The Statutory President

Kevin M. Stack

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The Statutory President

Kevin M. Stack*

ABSTRACT: American public law has no answer to the question of how a court should evaluate the president's assertion of statutory authority. In this Article, I develop an answer by making two arguments. First, the same framework of judicial review should apply to claims of statutory authority made by the president and federal administrative agencies. This argument rejects the position that the president's constitutional powers should shape the question of statutory interpretation presented when the president claims that a statute authorizes his actions. Once statutory review is separated from consideration of the president's constitutional powers, the courts should insist, as they do for agencies, that the president's actions be justified by an identifiable statutory authorization. The statutory president, I suggest, is subject to administrative law.

Second, within the framework of judicial review applicable to agencies, the president's claims of statutory authority should receive deference under the rule of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. The president's accountability, visibility, and the transparency of presidential orders provide strong grounds for applying Chevron deference to the president's assertions of statutory authority. This theory thus emphasizes the role of Congress in defining the boundaries of presidential power, while according deference to the president's interpretations of ambiguities within those boundaries. In this way, it structures the judicial role to demand that political accountability be the basis for political power.

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INTRODUCTION

Presidents shape our national life. In executive orders and other written directives, presidents have declared a nationwide freeze on wages and prices; established major agencies such as the EPA, the Peace Corps, and the Office (now Department) of Homeland Security; mandated nondiscrimination and affirmative action programs for the vast portions of the economy engaged in government contracting; suspended private legal claims against foreign governments in domestic courts; established military tribunals; ordered that an American citizen captured in Chicago be subject to military jurisdiction; and initiated federal funding for faith-based organizations.¹

As a legal basis for these orders, presidents have asserted statutory as well as constitutional authority.² American public law, however, has no answer to the question of how a court should evaluate the president's assertions of statutory authority. Although judicial review of whether a president's action exceeds the authority granted by statute is available,³ the Supreme Court has not developed a framework determining how a court should review a president's claim of statutory authority. Justice Jackson's familiar three-part categorization of presidential power in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*⁴ offers a framework for constitutional review of presidential action but is silent on how a court is to judge when a president acts "pursuant to" a statute.⁵ Subsequent decisions have provided no resolution.

This uncertainty has high costs. The absence of a framework for review of presidential assertions of statutory authority does nothing to check the incentives of the president and his counsel to seek the widest possible construction of the president's authority. While wide constructions are not in themselves objectionable, without oversight from other actors, they pose the risks associated with the concentration of power. Moreover, Congress—

1. The citations for these orders appear in note 26 *infra*.

2. See *infra* note 26 (providing examples of executive orders that asserted statutory and constitutional authority).

3. The Supreme Court has held that judicial review of the president's statutory actions for abuse of discretion is not available under the Administrative Procedure Act, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992), or more generally when a statute commits a decision to the president's discretion. *Dalton v. Specter*, 511 U.S. 462, 474–76 (1994). But, as discussed below, *infra* text accompanying notes 59–72, judicial review of whether the president's actions have statutory authorization is available. See *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981) (reviewing whether the president's actions were beyond his statutory and constitutional powers); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327–32 (D.C. Cir. 1995) (holding that review of the legality of presidential action is available); cf. *Dalton*, 511 U.S. at 474 (assuming review of some claims that the president violated a statutory mandate is available, and citing *Dames & Moore*).

4. 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring).

5. *Id.* at 635–36.

one potential source of constraint and oversight—has been a less than robust monitor of the president's assertions of statutory authority. The incentives for Congress to delegate authority broadly have been well documented.⁶ But despite the breadth of congressional delegations generally, and delegations to the president in particular, Congress has provided scant formal policing of the president's own assertions of authority under those delegations. Between 1945 and 1998, Congress legislatively overturned only four of the more than 3,500 executive orders issued.⁷ For a wide range of institutional reasons, from constituent-driven pressures to the costs attendant to coordinated action, Congress is a poor source of constraint on presidential action.⁸ The judiciary thus has a critical role to play in monitoring presidential compliance with statutory authority and requires a theory of review to do so.

This Article aims to develop such a theory. Specifically, this Article argues that the same framework of judicial review should apply to assertions of statutory authority by the president and federal agencies. It challenges the idea judicial review of the president's claims of statutory authorization should be influenced by whether the Constitution independently authorizes the president's actions. The president as a statutory actor—what I call the statutory president—is subject to administrative law on the same terms as agencies. Next, this Article argues that within the agency framework, courts should grant deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁹ to the president's claims of statutory authorization.

6. See, e.g., DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 101 (1990) (arguing that legislators delegate to insulate themselves from political accountability); DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATED POWERS* 29–33, 48–85 (1999) (summarizing empirical literature on congressional incentives to delegate broad powers, and developing a transaction-cost model to explain incentives to delegate); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 80–87 (1991) (summarizing empirical and public choice explanations of congressional incentives to delegate); Morris Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 43–46 (1986) (providing a model of the legislative choice to delegate to the judiciary or administration as a function in part of the strength of legislators' policy positions in the legislature and beliefs about the administrative process); Morris Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 49 (1982) (arguing that delegation resolves legislative conflicts between dispersed and concentrated special interest groups by mollifying the dispersed groups with the appearance of a policy solution while allowing the concentrated groups to sway the outcome of decisions at the regulatory level); cf. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 140–57 (1997) (defending broad delegations against public choice critique).

7. See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 113–16 (2003) (reporting statistics on congressional overrides as part of an empirical study of legislative action on executive orders from 1945 to 1998).

8. See *infra* Part III.B.2 (arguing that structural and institutional limitations make Congress a poor monitor of presidential action).

9. 467 U.S. 837 (1984).

This approach maintains that when the asserted basis for the president's actions is statutory, Congress is the ultimate source of power; its delegation is the basis of the president's authority, and courts should insist, as they do for agencies, on an identifiable source of statutory authorization. But within that basic structure, the president's accountability, visibility, and ability to coordinate policy provide strong reasons for presuming that Congress would prefer that the president's assertions of statutory authority be reviewed deferentially. This position thus grants the president an advantage over agencies. The president's orders based on statutory authority, unlike many agency actions, are assured *Chevron* deference.¹⁰

The range of actions the Constitution authorizes the president to take is the subject of vigorous debate.¹¹ This Article does not directly engage or defend a position on that debate because it concludes that courts should not alter their analysis of whether the president's assertion of statutory power is valid based on their view of whether the Constitution independently authorizes the president's action. The argument I develop for that conclusion does not depend on any particular construction of the president's independent constitutional powers. It does assume, however, that the president's constitutional powers and status do not require the judiciary to grant his interpretations of statutes special interpretive deference, or at least that the basis for such interpretive authority is sufficiently weak or uncertain that it must yield to the institutional and structural considerations that I highlight.¹²

10. Agency action may receive *Chevron* deference or the lesser deference of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (holding that *Skidmore*, not *Chevron*, deference is applicable to a United States Customs Service tariff ruling). Under *Skidmore*, agency decisions may merit some variable amount of persuasive deference in view of the "experience and informed judgment" of the agency, depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. at 140.

11. The literature is too vast to capture in a single citation. A few treatments that I have found particularly helpful are: Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (challenging the thesis that the Vesting Clause, U.S. CONST. art. II, § 1, cl. 1, grants the president broad residual powers not specified in Article II); Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 887-95 (1983) (arguing that courts should evaluate challenges to presidential acts that lack express statutory or constitutional authorization by determining whether they infringe on legislative or judicial powers); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (arguing that the president has lawmaking power only over protection of "personnel, property, and instrumentalities of the United States"); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529, 545-49, 554-76 (1999) (defending the president's primary constitutional authority over foreign affairs).

12. This assumption does not imply that I view the president's position as the elected head of the executive branch as irrelevant to the character of judicial deference the president's claims of statutory authority should receive. On the contrary, as noted above, I argue that the

The president also has figured prominently in debates in administrative law. But those debates have focused on the president's role in directing the actions of others, not on judicial review of the president's assertions of delegated statutory authority in his own name.¹³ In view of the fact that courts should assess the statutory basis for a presidential order before

president's accountability, visibility, and ability to coordinate policy justify applying *Chevron* deference to his assertions of statutory power. This claim that the president's accountability and powers-in-fact justify judicial deference is distinct from the idea that the president's constitutional status endowed by the Vesting Clause, U.S. CONST. art. II, § 1, as a co-ordinate branch of government, or the Constitution's grant of specific powers, such as the duty to take care that the laws are faithfully executed, U.S. CONST. art. II, § 3, require the judiciary to grant special deference to the president's interpretations of statutes. The validity of the assumption I make may depend upon the resolution of the contested question of the extent to which the judiciary is or should be the authoritative interpreter of the Constitution and other federal laws. I do not engage that wide-ranging debate in this Article.

13. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 466 (2003) (arguing that the presidential control model of administrative law is not sufficient to legitimize agency action); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 989 (1997) (arguing against the idea that the president's elected status is sufficient to solve the legitimacy problem of the administrative state); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219 (1993) (defending presidential oversight of agency action and its implications for judicial review, focusing on the president's own assertions of statutory authority); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246–52, 2281–2314, 2331–46, 2376–78 (2001) (documenting and defending increased presidential control over agency action, and proposing that *Chevron* deference to agency action should turn on presidential involvement); Thomas O. McGarity, *Presidential Control over Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 450–51, 454–55 (1987) (arguing that White House involvement in regulation may have undesirable consequences and does not increase accountability); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967 (1997) (recognizing and criticizing President Clinton's direction and public appropriation of rulemakings). The one focused and helpful treatment of the topic, Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1 (1982), is more than twenty years old. It was completed prior to the Supreme Court's decision in *Chevron*, prior to the Supreme Court's decision that the Administrative Procedure Act does not apply to the president, see text accompanying *infra* notes 59–62 (discussing the availability of judicial review of presidential action), and prior to recent empirical work on the president's assertion of directive authority. See *infra* text accompanying notes 33–38 (discussing recent empirical studies). Bruff takes the view that when the president's independent constitutional powers are present, the courts should be more deferential to the president's assertions of statutory authority and more willing to “draw some support for the decision from the penumbras of statutes.” Bruff, *supra*, at 38. I challenge the idea that the president's constitutional powers to act should shape the character of judicial review of his statutory assertions of authority. See *infra* Part III.B. Others have examined the application of *Chevron*, on different grounds than I defend, with regard to specific aspects of the president's activity, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000) (examining the application of *Chevron* to foreign affairs law), or as a constraint on presidential power. See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 185–87 (1994) (arguing that the *Chevron* doctrine, even strictly applied, would not be adequate to check presidential lawmaking, and proposing a concurrent congressional resolution mechanism to check presidential action).

considering the president's constitutional authority,¹⁴ a framework for review of the president's own assertions of statutory power is critical.

This Article proceeds in four Parts. Part I provides a brief primer on executive orders and presidential orders more generally. Part II shows that, while the Supreme Court has embraced a background principle that the president's constitutional status provides grounds for limiting judicial review of presidential actions and for some form of judicial deference, neither the Supreme Court nor the lower courts have developed a conception of the character and scope of deference the president's claims of statutory authorization should receive. I illustrate this incoherence by describing three different stances that courts have taken in assessing the statutory basis for presidential orders, ranging from granting the president virtually no deference to giving the president's assertions of statutory authority *substantial deference*, and even to *implying authority for the president* by aggregating powers delegated in a variety of related statutory provisions.

Part III argues that the same framework of judicial review should apply to claims of statutory authorization by agencies and the president. This framework provides an attractive principle of review of the president's actions because it insists upon a basis to conclude that the president's statutory assertions are grounded in an executive-legislative agreement. I argue that the agency framework accomplishes this through a fundamental principle that statutory authority may not be implied by aggregation from a collection of delegations, none of which individually authorizes the action. Instead, delegation of authority must be traceable to some identifiable statutory authorization. I call this the *principle of nonaggregation* and defend its difference from other, now-accepted forms of implication of authority. Part III then argues that this principle should apply not only to agency action, but also to the president's assertion of statutory authority. I contend that the president's independent constitutional powers—that is, authority to act granted directly by the Constitution—do not justify aggregating statutory authority on the president's behalf, and that in fact the president's independent constitutional powers do not bear on how a court should determine what can count as *statutory authorization*. Building on recent empirical work in political science and public choice theory, I also suggest that the fact that Congress is poorly structured to monitor the president's

14. See *Dalton v. Specter*, 511 U.S. 462, 472 (1994) (affirming the principle of judicial review that courts address the statutory basis for executive action before examining the constitutional basis for authority with the aim of avoiding constitutional decisions); *Harmon v. Brucker*, 355 U.S. 579, 581 (1958) ("In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' non-constitutional claim that respondent [Secretary of the Army] acted in excess of powers granted him by Congress."); Bruff, *supra* note 13, at 1 (noting that courts will review statutory questions before constitutional questions to avoid making a constitutional decision).

compliance with statutory delegations justifies requiring some identifiable statutory source as a basis for the president's actions.

Part IV argues that *Chevron* deference should apply to the president's assertion of a qualifying statutory source of authority. In view of the president's status, visibility, and accountability, as well as the transparency of presidential orders, I suggest that the grounds that support the application of *Chevron* to the president's orders are even stronger than the grounds that support *Chevron's* application to agency action. This argument also demonstrates a problem with the Supreme Court's decision in *United States v. Mead Corp.*,¹⁵ the Court's most important decision on the scope of *Chevron's* application. The *Mead* Court focused on whether the agency was required to act with procedural formality, such as notice-and-comment rulemaking, as the primary trigger for *Chevron* deference.¹⁶ Delegations to the president, however, do not require the president to act with procedural formality. The application of *Chevron* to the president requires adjustment of the *Mead* principle, and suggests grounds for revision that dovetail with recent critical commentary on *Mead*. In this way, the statutory president is not only subject to, but also helps to clarify the demands of administrative law.

By distinguishing the president's constitutional powers from the question of his statutory authority, this conception of judicial review insists that courts validate a president's assertion of statutory power only if there are good grounds to believe that it reflects the agreement of the legislature and the executive. In this way, the theory emphasizes Congress's political accountability as the source of the statutory president's power. At the same time, the theory acknowledges that the president's superior political accountability to the judiciary justifies according deference to his interpretations of ambiguous statutory provisions. Thus, at each level, the theory structures the judicial role to require that political accountability be the basis for political power.

I. PRESIDENTIAL ORDERS: A BRIEF OVERVIEW

Before turning to these arguments, this Part provides a brief primer on presidential orders: what they are, their scope of use, their legal status, the legal requirements the president must satisfy before issuing them, and the availability of judicial review.

What are executive and other presidential orders? American law provides no definition of executive orders.¹⁷ Nor are there legal requirements on the

15. 533 U.S. 218 (2001).

16. *Id.* at 229–31.

17. There is no current statutory definition of executive orders. The Federal Register Act of 1935, 44 U.S.C. § 1505 (2000), establishes publication requirements for executive orders and proclamations, but provides no definition of what an executive order or proclamation is.

types of directives that the president must issue as an executive order, as opposed to other headings, such as a proclamation, memorandum, directive, or determination. Further, the particular form in which a directive is conveyed does not determine its legal effect, and may reflect nothing more than a bureaucratic choice.¹⁸ For these reasons, I refer to executive orders along with these other forms of written presidential directives as “presidential orders” and define each simply as written directives that the president designates as such.¹⁹

Several executive orders have established procedures for issuing executive orders, *see infra* note 55, but none include a definition. In 1999, a bill introduced before a House committee included the following definition of a “presidential order”: “(1) any executive order, Presidential proclamation, or Presidential directive or (2) any other Presidential or Executive action whatever name described purporting to have prescriptive effect that is issued under the authority of the President or any other officer or employee of the executive branch.” Presidential Order Limitation Act of 1999, H.R. 3131, 106th Cong. After a hearing before the House Subcommittee on Commercial and Administrative Law, no further action was taken on the bill. *See Congressional Limitation of Executive Orders: Hearing on H.R. 3131, H. Con. Res. 30, and H.R. 2655 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 106th Cong. 8–67 (1999) (hearing testimony on the Presidential Order Limitation Act of 1999).

18. In response to a request for a legal opinion from President Clinton, the Department of Justice’s Office of Legal Counsel concluded that there is no difference between the legal effect of a presidential directive and an executive order. *See* Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, to the President, Legal Effectiveness of a Presidential Directive, As Compared to an Executive Order (Jan. 29, 2000) (stating that the substance of the directive or order determines its legal effect, not the form or caption of the written document through which that action is conveyed), <http://www.usdoj.gov/olc/predirective.htm> (on file with the Iowa Law Review); *see also* *Wolsey v. Chapman*, 101 U.S. 755, 769–70 (1879) (holding that an administrative order by the Secretary of Interior had the legal effect of a presidential proclamation and rejecting the suggestion that any “particular form of such announcement is necessary”). Harold Bruff also takes the view that the form in which a directive is conveyed may reflect nothing more than bureaucratic tradition. Bruff, *supra* note 13, at 14.

19. Attempts by legal scholars and political scientists to classify these different forms of orders have been unavailing. The most widely noted general characterization is that executive orders are typically directed to, and govern the actions of, federal government officials, whereas proclamations address private citizens or the public generally. *E.g.*, HOUSE COMM. ON GOV’T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF PRESIDENTIAL POWERS 1 (Comm. Print 1957) [hereinafter HOUSE STUDY]; William D. Neighbors, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 106 (1964). But such a classification tends to obscure the fact that even orders formally directed at other government officials can have practical effects on private parties. For instance, President Franklin Roosevelt formally imposed nondiscrimination requirements on “contracting agencies of the government,” Exec. Order No. 8802, 3 C.F.R. 957 (1938–1943), but in practical effect established principles of nondiscrimination for the significant portion of the nation’s economy that was engaged in government contracting. In response to these and other difficulties of categorization, other commentators have embraced the formal definition of executive orders that I adopt—i.e., written directives the president designates as such. *See, e.g.*, PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 16–17 (2002) (defining executive orders as written directives the president designates as such); KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 34–35 (2001) (same); Joel L.

Modern presidents have used presidential orders to initiate many of their most important policies.²⁰ The president may issue or repeal prior presidential orders on his own initiative, and in almost all cases, may do so without having to satisfy any procedural requirements.²¹ Moreover, with appropriate constitutional or statutory authorization, these orders may have the force and effect of law.²² As a result, presidential orders often leave other institutions, such as Congress, administrative agencies and the courts, as well as the public in the position of responding to or implementing the policy and law they embody.

Scope of Use. Presidents have asserted power unilaterally through presidential orders since the time of the Founding.²³ In 1793, Washington issued the Neutrality Proclamation, which proclaimed the neutrality of the United States in the conflict between Britain and France, without statutory authority to do so.²⁴ *Marbury v. Madison* itself arose from a challenge to the validity of an order from President Jefferson to his Secretary of State, James Madison, to withhold William Marbury's judicial commission.²⁵ Executive and other presidential orders have been the source of a wide range of significant moments in national life.²⁶ Executive orders or proclamations

Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, LAW & CONTEMP. PROBS., Summer 1976, at 1, 7 (same); John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 (1981) (same).

20. See HOWELL, *supra* note 7, at 6-7 (summarizing significant presidential actions implemented by presidential orders); MAYER, *supra* note 19, at 4-11 (summarizing the significant presidential policies implemented by executive order, including nondiscrimination, regulatory review, and creation or expansion of agencies); PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER* 88 (1988) (noting the importance of executive orders as policy-initiation tools); see also *infra* note 26, and text accompanying notes 27-32 (providing examples of important policies initiated through presidential orders).

21. See *infra* text accompanying note 54 (noting a few statutes that impose consultation and reporting requirements on the president).

22. See *infra* notes 42-45 and accompanying text.

23. For brief and helpful histories of executive orders, see Hugh C. Keenan, *Executive Orders: A Brief History of Their Use and the President's Power to Issue Them*, in SENATE SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS 93D CONG., EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY, (Comm. Print 1974); Robert B. Cash, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME L. REV. 44, 44-51 (1963); HOUSE STUDY, *supra* note 19, at 7-37; JAMES HART, *THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES* 69-119 (1925).

24. This provoked the famous Pacificus-Helvidius exchange between Hamilton and Madison over the scope of executive power. See Alexander Hamilton, First Pacificus Letter (June 29, 1793) reprinted in 1 W. GOLDSMITH, *THE GROWTH OF PRESIDENTIAL POWER* 398-404 (1974); James Madison, First Helvidius Letter (Aug.-Sept. 1793), reprinted in 1 W. GOLDSMITH, *supra*, at 405-11; see also HOUSE STUDY, *supra* note 19, at 16-18 (discussing the significance of Washington's Proclamation of Neutrality and the subsequent debate); COOPER, *supra* note 19, at 122-25 (same).

25. 5 U.S. (1 Cranch) 137, 138 (1803).

26. These orders are cited in the order in which they appear in the first paragraph of this Article. See, e.g., Exec. Order No. 11,615, 3 C.F.R. 602 (1971-1975) (establishing a wage and

declared the emancipation of slaves in confederate states,²⁷ the suspension of the writ of habeas corpus during the Civil War,²⁸ the internment of the Japanese-Americans during World War II,²⁹ the desegregation of the military,³⁰ the establishment of the government's security classification system,³¹ and the imposition of centralized executive review of agency regulations.³² Presidential orders are clearly a significant source of law and policy.

price freeze, and claiming authority under "the Constitution and statutes of the United States, including the Economic Stabilization Act of 1970 (P.L. 91-379, 84 Stat. 799), as amended"); Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970), *reprinted in* 42 U.S.C. § 4321 (1994), and *in* 84 Stat. 2086 (1970) (establishing the EPA); Exec. Order No. 10,924, 26 Fed. Reg. 1789 (Mar. 1, 1961) (establishing the Peace Corps, and claiming authority under "the Mutual Security Act of 1954, 68 Stat. 832, as amended 22 U.S.C. § 1750 et seq."); Exec. Order No. 13,228, 3 C.F.R. 796 (2001) (establishing the Office of Homeland Security, and claiming authority under "the Constitution and the laws of the United States of America"); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965) (establishing nondiscrimination policy for government contractors and subcontractors, and claiming authority under "the Constitution and statutes of the United States"); Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963) (extending nondiscrimination policy to all federally-assisted construction projects, and claiming authority under "the Constitution and statutes of the United States"); *see also* Padilla v. Rumsfeld, 352 F.3d 695, 724-25 (2d Cir. 2003) (providing redacted version of June 9, 2002 order from President George W. Bush to the Secretary of Defense regarding the detention of Jose Padilla and claiming authority under the "Authorization for the Use of Military Force Joint Resolution (Public Law 107-40" and the Constitution), *rev'd*, 124 S. Ct. 2711 (2004); Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2001) (establishing military tribunals, and claiming authority as "Commander in Chief of the Armed Forces of the United States [under] the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code"); Exec. Order No. 13,198, 3 C.F.R. 750 (2001), *reprinted in* 5 U.S.C.A. § 601 (2004) (establishing faith-based initiatives, and claiming authority under "the Constitution and the laws of the United States of America"); Exec. Order No. 12,294, 3 C.F.R. 139 (1982) (suspending legal claims against Iran, and claiming authority under "the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act . . . , Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act"); MAYER, *supra* note 19, at 182-217 (2001) (examining the role of executive orders in civil rights policy).

27. Abraham Lincoln, The Emancipation Proclamation (Jan. 1, 1863), *reprinted in* 8A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3358-59 (James D. Richardson ed., 1897).

28. Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863), *reprinted in* 6 COLLECTED WORKS OF ABRAHAM LINCOLN 451 (Roy P. Basler ed., 1953).

29. Exec. Order No. 9066, 3 C.F.R. 1092 (1943-1948).

30. Exec. Order No. 9981, 3 C.F.R. 772 (1943-1948).

31. Exec. Order No. 8381, 3 C.F.R. 634 (1938-1943).

32. Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *amended by* Exec. Order No. 13,258, 3 C.F.R. 204 (2004), *reprinted in* 5 U.S.C.A. § 601 (2004).

The patterns of presidents' use of executive orders have been the subject of recent empirical studies.³³ The sheer number of executive orders issued per year has declined from the peak it reached during the New Deal and World War II.³⁴ This decline in the gross number of orders does not, however, correspond to a diminution in the importance of executive orders as a policymaking tool. On the contrary, the significance of the president's assertions of authority through executive and other presidential orders has increased in the twentieth century. "Whereas at the turn of the century presidents issued only a handful of important executive orders in their entire term," Terry Moe and William Howell report, "now presidents can be expected to issue between 15 and 20 important orders every year."³⁵ Likewise, using slightly different criteria to judge significance, Kenneth Mayer concludes that since the 1970s, on average, presidents have issued about fourteen significant executive orders per year.³⁶ Moreover, the percentage of presidential orders that apply to the general public has increased dramatically.³⁷ Nor are there indications that the perceived importance of presidential orders to the president is declining.³⁸

Legal Status. As a statement of black letter law, presidential orders must have either constitutional or statutory authorization.³⁹ The simplicity of the statement of this rule cloaks the enduring uncertainty about the scope of the

33. Those comprehensive treatments are provided by HOWELL, *supra* note 7, at 76–100 (charting the number of significant and insignificant executive orders issued between 1900 and 1998); MAYER, *supra* note 19, at 66–108 (charting the use of executive orders in five subject matter areas: defense/foreign policy, domestic policy, executive branch management, creation of board/commissions, and war/emergency); George A. Krause & David B. Cohen, *Presidential Use of Executive Orders, 1953–1994*, 25 AM. POL. SCI. Q. 458 (1997) (providing a quantitative model of the president's willingness to use executive orders).

34. See HOWELL, *supra* note 7, at 83–84 (chart of overall number of executive orders issued between 1900 and 1998 showing highest number of orders issued per year during World War II and the New Deal era); MAYER, *supra* note 19, at 71 (noting that between July 1932 and June 1942 President Franklin Roosevelt issued 286 executive orders); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 156 (1999) (summarizing trends in the number of executive orders issued by modern presidents).

35. Moe & Howell, *supra* note 34, at 156. Kenneth Mayer's independent study comes to a similar conclusion. See *infra* note 36 and accompanying text.

36. MAYER, *supra* note 19, at 86.

37. See Lyn Ragsdale & John J. Theis, III, *The Institutionalization of the American Presidency, 1924–92*, 41 AM. J. POL. SCI. 1280, 1288–89 (1997) (documenting that the percentage of executive orders setting policy that affected private entities increased from single digits in the 1920s to over 60% since the 1960s).

38. See MAYER, *supra* note 19, at 87 (noting that executive orders are useful political tools of the president); Moe & Howell, *supra* note 34, at 160 (noting the use of executive orders to bypass Congress).

39. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188–89 (1999) (noting same as statement of "black letter law"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself.").

president's powers under Article II and what counts as a statutory authorization of power.

The Constitution does not mention the president's authority to issue orders, though the president's power to do so is by now beyond dispute. As to the scope of the president's powers under Article II or of any inherent or prerogative powers, over 200 years of constitutional history have furnished only broad outlines.⁴⁰ These uncertainties have generated extensive literature on the scope of the president's constitutional powers.⁴¹ The courts also have not developed, as I show in Part II, a settled understanding of how to determine whether the assertion of statutory authority in an executive order is valid.

Putting aside the president's authority to act pursuant to a constitutional power, for a presidential order to have the force and effect of law, it must have statutory authorization.⁴² When a presidential order has statutory authorization, it can be enforced by the government against private parties⁴³ and may preempt conflicting state law.⁴⁴ Such an order also may create rights enforceable by private parties.⁴⁵

40. See *Youngstown*, 343 U.S. at 634–35 (Jackson, J., concurring) (noting that a century and a half of debate on the scope of the president's powers had yielded no net results); Moe & Howell, *supra* note 34, at 134 (arguing that the president's powers of unilateral action are an important force in American politics in part because of the ambiguity of the constitutional basis of the president's power); Monaghan, *supra* note 11, at 3 (noting that time has only confirmed the difficulty, recognized by Justice Story, of discerning the powers of the executive department).

41. For a sampling of this literature, see *supra* note 11.

42. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 307 (1979) (holding that where congressional authorization for an executive order was not clearly identifiable, regulations issued based on the order did not have the force and effect of law); *Youngstown*, 343 U.S. at 587–89 (holding that the constitutional framework refutes the idea that, absent congressional authorization, the president has lawmaking power); *Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996) (holding that the “[e]xecutive [o]rder lacked the force and effect of law because it was never grounded in a statutory mandate or congressional delegation of authority”); see also Monaghan, *supra* note 11, at 10 (arguing that *Youngstown* establishes that the president may invade private rights pursuant only to a specific constitutional power or an affirmative legislative authorization); cf. *Zhang v. Slattery*, 55 F.3d 732, 747 (2d Cir. 1995) (holding that executive orders are only judicially enforceable in private suits where they have a “specific foundation in Congressional action”) (quoting *Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980)); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995) (“An executive order is privately enforceable only if it is issued pursuant to a statutory mandate or delegation of congressional authority.”).

43. See, e.g., *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 366–67 (D.C. Cir. 2003) (holding that an executive order requiring government contracts to include a requirement that the contractor post rights not to participate in unions was valid because it had statutory authorization); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993) (upholding a criminal conviction for violation of an executive order authorized by statute); *Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964) (concluding that executive orders requiring non-discrimination provisions in government contracts had statutory authorization and the force of law).

But even statutorily authorized executive orders often create no private rights. Contemporary executive orders routinely disclaim any intention to create any right of enforcement either against the government or against private individuals.⁴⁶ Courts generally treat such express limitations as a bar to judicial enforcement and decline to infer a private right of enforcement when the executive order is simply silent as to judicial review.⁴⁷ Indeed, the inquiry into the judicial enforceability of executive orders has largely focused on the intention, in the order itself, to create a private right of action.⁴⁸

In sum, as long as presidential orders have statutory authorization, then, like agency regulations, they bind with the force of law, may preempt state law, and when they expressly so provide, can create rights of private enforcement.

Process and Publication. In contrast to legislation or agency regulation, there are almost no legally enforceable procedural requirements that the president must satisfy before issuing (or repealing) an executive order or other presidential directive. That, no doubt, is central to their appeal to

44. See, e.g., *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 n.5 (1974) (stating that as to an executive order authorized by statute that "we have no difficulty concluding that the Executive Order is valid and may create rights protected against inconsistent state laws through the Supremacy Clause"); *Jenkins v. Collard*, 145 U.S. 557, 560-61 (1891) (holding that executive orders are equivalent to laws when based upon legitimate constitutional or statutory authority). Indeed, an executive order with statutory authorization has also been held to provide a statutory basis for withholding information under the Freedom of Information Act. *Times Publ'g Co. v. United States Dep't of Commerce*, 236 F.3d 1286, 1291-92 (11th Cir. 2001). The D.C. Circuit has upheld the retroactive application of an executive order so long as the order itself made clear that it applied retroactively. *Sea-Land Serv., Inc. v. ICC*, 738 F.2d 1311, 1314 (D.C. Cir. 1984).

45. See, e.g., *Chambers v. United States*, 451 F.2d 1045, 1050, 1053 (Ct. Cl. 1971) (awarding the plaintiff backpay for the government's violation of an executive order regarding nondiscriminatory employment practices).

46. A statement to the following effect regarding judicial review is typical: "This order does not create any right or benefit, substantive or procedural, enforceable at law or equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person." E.g., Exec. Order No. 13,284, 3 C.F.R. 161 (2004), reprinted in 6 U.S.C.A. § 121 (2004) (including provision); Exec. Order No. 13,329, 69 Fed. Reg. 9181 (Feb. 24, 2004) (same); Exec. Order No. 13,328, 69 Fed. Reg. 6901 (Feb. 6, 2004) (same).

47. *Facchiano Constr. Co. v. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993) (declining to infer private enforceability under an executive order); *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975) (denying the private right of enforcement of an executive order where the executive order "does not expressly grant such a right"); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965) (declining to find an executive order privately enforceable where the order did not provide for any role for judicial enforcement); *Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964) (declining to provide private cause of action to enforce nondiscrimination provisions in government contracts required by an executive order where the order did not expressly provide for such enforcement).

48. See John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 838-39, 852-78 (1981) (arguing that private enforceability should turn on congressional intention, not the intention in the order itself).

presidents.⁴⁹ They rid the president of the need to assemble majorities in both houses of Congress, or to wait through administrative processes, such as notice-and-comment rulemaking, to initiate policy.

The only potential constitutional source of procedural constraint on presidential orders is the Fifth Amendment's Due Process Clause. In principle, if an executive order were to implicate an individual's interest in life, liberty, or property protected by the Due Process Clause, the basic hearing requirements of *Matthews v. Eldridge*⁵⁰ would apply. Due process arguments have not, however, been a successful strategy for challenging executive orders.⁵¹

As to statutory requirements, in *Franklin v. Massachusetts*,⁵² the Supreme Court held that the Administrative Procedure Act ("APA") does not apply to the president.⁵³ Outside of a few statutes that impose consultation and reporting requirements on the president, generally in the areas of foreign affairs and government efficiency,⁵⁴ there are no general procedural requirements for issuing executive orders imposed by statute.⁵⁵

49. See HOWELL, *supra* note 7, at 14 (noting the first-mover advantage of the president).

50. 424 U.S. 319, 334–35 (1976).

51. See, e.g., *Holy Land Found. v. Ashcroft*, 333 F.3d 156, 163–64 (D.C. Cir. 2003) (holding that the plaintiff was not denied procedural due process when its assets were blocked pursuant to Exec. Order No. 13,224, 3 C.F.R. 786 (2002), *reprinted in* 50 U.S.C.A. § 1901 (2002), and Exec. Order No. 12,947, 3 C.F.R. 319 (1996), *reprinted in* 50 U.S.C. § 1701 (2000), based on alleged ties to terrorist groups); see also *W. States Meat Packers Ass'n v. Dunlop*, 482 F.2d 1401, 1404–05 (T.E.C.A 1973) (holding that Exec. Order No. 11,723, 38 Fed. Reg. 15,765 (June 13, 1973), and 11,730, 38 Fed. Reg. 19,345 (June 18, 1973), freezing commodities prices did not violate plaintiff's procedural due process rights). *But cf.* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 142–43 (1951) (Black, J., concurring) (suggesting that even if the Attorney General had authority under Exec. Order No. 9835, 3 C.F.R. 129 (1947), to name defendants on a list of communists, such action would violate their procedural due process rights to a fair hearing). Of course, assertions of executive power more generally have been found to violate procedural due process. For instance, in the Supreme Court's recent decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), a plurality concluded that the government's continued detention of an American citizen without granting him the opportunity to challenge the grounds of his detention violated the detainee's procedural due process rights. *Id.* at 2650.

52. 505 U.S. 788 (1992).

53. *Id.* at 800–01; see also *infra* text accompanying notes 59 and 92–96 (discussing *Franklin*).

54. Reporting and consulting requirements are present in some statutes. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (2000) (requiring all federal agencies, including the president, to publish certain items in the Federal Register and make certain items available for public inspection); Privacy Act of 1974, 5 U.S.C. § 552a(s) (2000) (requiring the president to provide biennial reports to Congress on the Director of the Office of Management and Budget's activities); Federal Advisory Committee Act of 1972, 5 U.S.C. app. 2 § 6 (2000) (requiring the president to make an annual report to Congress on the status of advisory committees); Agricultural Trade Development and Assistance Enterprise Act, 7 U.S.C. § 1738f (2000) (requiring the president to consult with the Enterprise for the Americas Board when entering into environmental framework agreements with the countries of Latin America and the Caribbean); U.S.A. PATRIOT Act, 8 U.S.C. §§ 1721(c), 1722(a)(3) (2000) (requiring the president to consult with various congressional committees in preparing and implementing a coordination plan among federal law enforcement and intelligence agencies); 19 U.S.C. § 2155

Executive orders and proclamations that have “general applicability and legal effect” for entities other than federal officials must be published in the Federal Register.⁵⁶ But because the Federal Register Act does not itself attempt any definition of executive orders or proclamations,⁵⁷ a president may avoid this publication requirement simply by calling the directive

(2000) (requiring the president to consult with private and non-governmental actors on trade policy and take those consultations into account in trade objectives and negotiations); Trade Agreements Act of 1979, 19 U.S.C. § 2504(c)(1) (2000) (requiring the president to consult with the House Ways and Means Committee, Senate Finance Committee, and other House and Senate committees with jurisdiction prior to proposing any legislation to implement a trade agreement); Foreign Assistance Act of 1961, 22 U.S.C. §§ 2364(a)(3), 2371(d) (2000) (requiring the president to consult with and provide written policy justification to House and Senate committees before furnishing assistance and arms export sales, credits and guarantees under the Act); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4344, 4342 (requiring the president receive and incorporate advice on the state of the environment from the Counsel on Environmental Quality into the preparation of the Environmental Quality Report); War Powers Resolution Act, 50 U.S.C. §§ 1542–1543 (2000) (requiring the president to consult with Congress prior to introducing armed forces into hostilities and, in the absence of a declaration of war, to report to Congress after the introduction of armed forces into hostilities); North American Free Trade Agreement Implementation Act, Pub L. No. 103-182, § 341, 107 Stat. 2057, 2117 (1993) (codified as amended in 8 U.S.C. § 11811(e)(4) (2000) (requiring the president to obtain advice from and consult with advisory committees prior to increasing or waiving the numerical limit on nonimmigrant workers allowed into the United States).

55. Indeed, the only procedural requirements applicable generally to executive orders are themselves established in a sequence of executive orders issued by Presidents Kennedy and Johnson. These orders require review of executive orders by the Director of the Office of Management and Budget and by the Attorney General for “form and legality” prior to their issuance. Exec. Order No. 11,030, 3 C.F.R. 610 (1959–1963); Exec. Order No. 11,354, 3 C.F.R. 652 (1966–1970). The Attorney General has delegated this task to the Office of Legal Counsel. 28 C.F.R. 0.25(b) (2000). Important orders have been issued without complying with this procedure, and there is no legal consequence to noncompliance. For instance, President Reagan’s regulatory review order, Exec. Order No. 12,291, 3 C.F.R. 127 (1982), and President Eisenhower’s executive order placing the Arkansas National Guard on active duty, Exec. Order No. 10,730, 3 C.F.R. 389 (1954–1958), *reprinted in* 10 U.S.C. § 332 (2000), were issued without first receiving an opinion as to legality from the Department of Justice. *See* MAYER, *supra* note 19, at 61 (providing examples of important executive orders issued without formal review).

56. 44 U.S.C. § 1505 (2000). Such executive orders are printed in chronological order in Part 3 of the Code of Federal Regulations. While the Federal Register Act requires executive orders to be compiled in the Code of Federal Regulations, it explicitly excepts them from codification. *See id.* § 1510(g) (asserting that presidential documents must not be codified, even if they appear in supplements to Title III of the Code of Federal Regulations). This Act, which also imposes publication requirements on administrative agencies, was the product of the avalanche of executive orders during the early years of the New Deal and the lack of a system for keeping track of these orders and the orders of the National Recovery Administration. COOPER, *supra* note 19, at 18; Moe & Howell, *supra* note 34, at 155. As a matter of executive practice, contemporary presidents have chosen to publish all executive orders that do not raise some national security concerns in the Federal Register. *See* Exec. Order No. 11,345, 3 C.F.R. 652 (1966–1970) (providing for copies of executive orders to be sent to the Office of the Federal Register for purposes of publication).

57. *See* 44 U.S.C. § 1505(a) (requiring publication of certain executive orders and proclamations in the Federal Register, but not defining these instruments); *cf. supra* note 17 (noting a recent legislative attempt to define presidential orders).

something other than an executive order or proclamation.⁵⁸ In short, presidents may issue executive and other presidential orders with virtually no procedural constraints.

Availability of Judicial Review. As noted above, in *Franklin v. Massachusetts*,⁵⁹ the Supreme Court held that the APA does not apply to the president, and therefore it does not provide a basis for courts to review the president's statutory actions for abuse of discretion.⁶⁰ Shortly thereafter, in *Dalton v. Specter*,⁶¹ the Court held that if a statute commits a decision to the president's discretion, judicial review outside the APA is not available.⁶² But just because review for abuse of discretion is not available does not mean that there is no review. Rather, courts still may review a president's assertion of statutory power to determine whether it is authorized by statute. While there has been continued scholarly interest in the prospect of a lawsuit naming the president as a defendant and seeking injunctive relief against the president himself outside the APA,⁶³ there is a less exciting but firmly established avenue to obtain review of whether the president's actions exceed statutory authorization. Review of the validity of a presidential order can typically be obtained by suing a federal officer to enjoin implementation of the order. In almost all cases of presidential orders, it will be possible to identify a defendant other than the president himself that acts upon the order.⁶⁴ Indeed, this mode of review has a long history: it was the basis for review of the validity of executive action in *Marbury v. Madison*,⁶⁵ *Youngstown*

58. COOPER, *supra* note 19, at 19.

59. 505 U.S. 788 (1992).

60. *Id.* at 800–01.

61. 511 U.S. 462 (1994).

62. *Id.* at 474.

63. See Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613–16, 1622–1709 (1997) (examining the prospect for suits against the president in proper persona).

64. Indeed, even Siegel concedes that the principal circumstance in which another defendant may not be available is when the president's action is to remove an executive officer. *Id.* at 1703. Justice Scalia makes this point in his concurring opinion in *Franklin v. Massachusetts*:

Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, . . . just as unlawful legislative action can be reviewed, not by suing Members of Congress for performance of their legislative duties, . . . but by enjoining those congressional (or executive) agents who carry out Congress's directive.

505 U.S. at 828–29 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

65. 5 U.S. (1 Cranch) 137, 138 (1803). Recall that *Marbury* brought his suit against Madison, then Secretary of State. *Id.* at 137. *Marbury* sued to require Madison to show cause why a writ of mandamus should not issue to direct Madison to deliver the commission. *Id.* Madison withheld the commission following a change of presidential administration. *Id.* at 163. Despite Madison's decision not to appear, the Court proceeded to review the legality of the refusal to deliver the commission, an action taken based on the orders of the new president,

Sheet & Tube Co. v. Sawyer,⁶⁶ and *Dames & Moore v. Regan*,⁶⁷ as well as the other decisions discussed in Part II. In such a suit, the cause of action may be based either on the APA⁶⁸ or on so-called nonstatutory review;⁶⁹ alternatively, the validity of the order may be reviewed as a defense to a criminal or habeas corpus proceeding.⁷⁰ Thus, as long as review is not precluded by statute,⁷¹ and justiciability and prudential doctrines are satisfied,⁷² judicial review of the validity of a presidential order is available.

Thomas Jefferson, in a suit against a subordinate federal officer, Secretary Madison. *Id.* at 154. The Court concluded that Marbury had a legal right to the commission, opining on the validity of the executive's directive to withhold the commission, despite the fact that the Court lacked the power to order its delivery. *Id.* at 172-76.

66. 343 U.S. 579, 582 (1952) (reviewing the validity of an executive order in a suit naming the Secretary of Commerce as a defendant).

67. 453 U.S. 654, 654 (1981) (reviewing the validity of executive orders in a suit naming the Secretary of Treasury as the defendant).

68. See 5 U.S.C. § 702 (2000) (providing that a person having suffered "a legal wrong because of agency action . . . is entitled to judicial review thereof"). The fact that the president himself is not subject to judicial review under the APA, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), does not insulate his actions from review in an APA action properly brought against a subordinate official. See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324-27 (D.C. Cir. 1996) (reviewing the validity of an executive order in a suit brought against the Secretary of Labor).

69. Prior to the enactment of the APA in 1946, federal courts obtained review of federal administrative action through their equitable powers. See *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) (upholding judicial review of an official's act based on grant of jurisdiction without a statute specifically authorizing review); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 121-26 (1998) (discussing nonstatutory review). Commentators have suggested that while the APA provided an avenue of review, it did not preclude other avenues of judicial review, and as a result, nonstatutory review is still available today. See Duffy, *supra*, at 148-49 (arguing that nonstatutory review was not destroyed with the enactment of the APA). The vitality of this form of review was reaffirmed in the D.C. Circuit's 1997 decision striking down an executive order of President Clinton's that prohibited government contractors from hiring permanent replacement workers for striking employees. See *Reich*, 74 F.3d at 1327-28 (holding that nonstatutory review is available for courts to review claims that executive acts are *ultra vires*).

70. For instance, in *Padilla v. Rumsfeld*, 352 F.3d 695, 710-24 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004), the Second Circuit reviewed the validity of the President's order to detain an American citizen detained by military authorities in a habeas corpus proceeding. The Supreme Court reversed the Second Circuit's decision on the ground that the district court did not have personal jurisdiction over the proper respondent to the habeas petition, 124 S. Ct. at 2721-24, 2722, and therefore did not reach the question of the reviewability of the President's order. See also LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 364-66 (1965) (defending the availability of judicial review of the president's actions, including through a "declaration of invalidity" and as a "defense to a criminal action").

71. See 5 U.S.C. § 701(a)(1) & (2) (precluding review where a statute precludes review or the action is committed by law to the agency's discretion); *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (holding that a statute granting the president discretion to approve or disapprove a commission's recommendation precluded review of the president's decision).

72. These include standing, ripeness, mootness, finality, exhaustion, immunity, and the political-question doctrine.

The picture that emerges from this capsule summary is straightforward: presidential orders provide the president with the capacity to initiate a wide range of policy objectives, as well as to create rules with the force of law, virtually unconstrained by procedure, and without clear standards of statutory or constitutional authorization.

II. THE COURTS' TREATMENT OF THE PRESIDENT'S STATUTORY ORDERS

In contrast to the settled framework of review of federal agencies' assertions of statutory authority, there is no accepted framework for review of the president's claims of statutory authority. When faced with reviewing a presidential order, many courts turn reflexively to *Youngstown Sheet & Tube Co. v. Sawyer*⁷³ and the three categories developed in Justice Jackson's concurring opinion in *Youngstown*. In this Part, I show first that *Youngstown* and Justice Jackson's concurring opinion have nothing to say about how to determine whether the president has statutory authority. I then show that the courts have not developed a coherent approach to fill the gap that *Youngstown* left open.

A. YOUNGSTOWN'S SILENCE ON WHAT COUNTS AS STATUTORY AUTHORIZATION

The Supreme Court's decision in *Youngstown*, and in particular Justice Jackson's concurring opinion in the case, is the routine starting point in decisions dealing with challenges to presidential power. In *Youngstown*, the Court struck down President Truman's executive order directing the Secretary of Commerce to take possession of American steel mills to avert a strike in the midst of the Korean War.⁷⁴ The government defended President Truman's executive order solely on the basis of the President's constitutional powers; it did not argue that President Truman's order had statutory authorization.⁷⁵ Justice Black's majority opinion briskly rejected the government's constitutional argument,⁷⁶ and with no claim of statutory authority before the Court, Justice Black did not address the issue.

In Justice Jackson's concurring opinion, he proposed the now-familiar three-part framework for review of presidential action. In this framework, the question of whether the president acted with statutory authority is a critical trigger, but Justice Jackson's opinion offers no guidance as to how that determination should be made. Justice Jackson's first category is when "the President acts pursuant to an express or implied authorization of

73. 343 U.S. 579 (1952).

74. *Id.* at 587–89.

75. *Id.* at 585 ("We do not understand the Government to rely on statutory authorization for this seizure."). The Supreme Court confirmed this reading of *Youngstown* in *Dalton*, commenting that, "[i]n *Youngstown*, the Government disclaimed any statutory authority for the President's seizure of the steel mills." 511 U.S. at 473.

76. *Youngstown*, 343 U.S. at 587–88.

Congress.”⁷⁷ If a president’s action was taken “pursuant to an Act of Congress,” the action would be supported by “the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”⁷⁸ The second category—the “zone of twilight”—arises when the president acts in the absence of a congressional grant or denial of authority. In this domain, Congress may have concurrent authority with the president. When it does, Justice Jackson suggests that “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”⁷⁹ The third category concerns presidential action that is incompatible with the “expressed or implied will of Congress.”⁸⁰ In this mode, the president’s power is “at its lowest ebb,” because the courts can sustain the president’s action “only by disabling the Congress from acting upon the subject.”⁸¹

Whether the presidential action is authorized by statute distinguishes actions that fall into Justice Jackson’s first and second categories. But Justice Jackson’s opinion is silent on the question of how to judge whether a presidential act fits within the scope of an express or implied statutory authorization. What level of deference should the president’s reading of a statutory authorization receive? How are implied authorizations distinguished from acts without statutory authorization, which fall into Justice Jackson’s second category? Justice Jackson’s opinion has no answers.

This has led to confusion about the role of Justice Jackson’s categories in judicial review.⁸² Justice Jackson’s categories articulate a framework for *constitutional*, not statutory, review of presidential action. For instance, as to actions for which the president has statutory authority, Justice Jackson writes, as noted above, “[i]f his act is held *unconstitutional* under these circumstances,” then the federal government as a whole lacks this power.⁸³ This position makes perfect sense assuming that the president’s action does in fact have statutory authorization; in that case, striking down the president’s action would ordinarily be a statement that the federal government lacked the power asserted by the president. Thus Justice Jackson’s comment that the president’s action “pursuant to” a statute should be accorded “the strongest of presumptions and the widest latitude of judicial interpretation” is a standard for determining whether the

77. *Id.* at 635 (Jackson, J., concurring).

78. *Id.* at 637.

79. *Id.*

80. *Id.*

81. *Id.*

82. See, e.g., *Contractors Ass’n. v. Sec’y of Labor*, 442 F.2d 159, 167–69 (3d Cir. 1971) (invoking *Youngstown* in reviewing the statutory basis of executive orders establishing affirmative action programs for government contractors).

83. *Youngstown*, 343 U.S. at 636–37 (emphasis added).

president's statutorily authorized actions are consistent with the Constitution. Justice Jackson's opinion says nothing about whether these "strongest of presumptions" also apply to the question of *whether* a president has statutory authorization.

B. INCOHERENCE IN REVIEW

Neither the Supreme Court nor the lower courts have developed a framework for answering the question that *Youngstown* and Justice Jackson left untouched. The Supreme Court's decisions assessing when judicial review of presidential action is available articulate a strong principle that in view of the president's constitutional status, judicial review of presidential action is not the same as review of actions by other officials. But these decisions, while embracing a principle that the president is an exceptional actor, do not themselves articulate a standard of review for his statutory assertions of power. In decisions in which the courts actually review the president's claims of statutory authority, the background presumption of the president's exceptional status is frequently at work, but no accepted conception of its character or scope has emerged.

1. The Background Presumption of Presidential Exceptionalism

The Supreme Court has long held that the president's unique constitutional status has implications for judicial review of the president's actions. In decisions construing the scope of the president's immunity from suit, and in decisions denying the application of the APA to the president, the Court has limited the availability of judicial review of the president's actions in deference to his constitutional status.

In *Nixon v. Fitzgerald*, the Court held that the president is entitled to absolute immunity from claims for civil damages arising out of his official conduct.⁸⁴ The president's "unique position in the constitutional scheme" was central to the Court's holding.⁸⁵ The president, the Court remarked, is charged with "supervisory and policy responsibilities of the utmost discretion and sensitivity," including the "management of the Executive Branch," the "enforcement of federal law," and the "conduct of foreign affairs."⁸⁶ In virtue of the president's constitutional position, the Court straightforwardly rejected the suggestion that the president, like other government officials, should receive only qualified immunity. "The President's unique status under the Constitution distinguishes him from other executive officials."⁸⁷ Rather, the scope of the president's immunity from suit is "rooted in the

84. 457 U.S. 731, 749 (1982).

85. *Id.*

86. *Id.* at 750.

87. *Id.*

separation of powers under the Constitution,”⁸⁸ and the balance of his public duties and the danger of intrusion from private civil suits justifies according the president absolute immunity from civil suit for claims arising out of his official conduct.⁸⁹ In contrast, in a companion suit, *Harlow v. Fitzgerald*, the Court held that the president’s aides, like other executive officials, were entitled only to qualified immunity.⁹⁰ The Court explicitly distinguished the concerns implicated by a suit against the president and those implicated by suits against other executive officials: “Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.”⁹¹

The principle that the president’s constitutional status “counsels judicial deference and restraint” that emerged from these immunity decisions also formed the basis of the Court’s decision that the APA does not apply to the president.⁹² The APA includes a broad definition of its reach, extending coverage to “each authority” of the federal government and expressly excluding only a handful of bodies, such as Congress, the United States courts, the government of the District of Columbia, the governments of the territories, and courts martial.⁹³ Despite the fact that the president is an authority of the federal government, and does not fall within one of the express exceptions to the APA’s coverage, the Court concluded that the APA is silent with regard to the application of the Act to the president.⁹⁴ It then reasoned that constitutional principles warranted applying a clear-statement presumption. “Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.”⁹⁵ Thus, the

88. *Id.* at 753 (quoting *United States v. Nixon*, 418 U.S. 683, 708 (1974)).

89. *See Nixon*, 457 U.S. at 754 (holding that the president is immune from damages suits “based on [his] official acts”).

90. 457 U.S. 800, 813 (1982).

91. *Id.* at 811 n.17. These same principles also figured prominently, though not decisively, in the Court’s consideration of the president’s immunity from civil suit arising out of actions prior to his term as president, *see Clinton v. Jones*, 520 U.S. 681, 684, 698–99 (1997) (noting the unique position of the president in the constitutional scheme, but denying the president immunity from civil suits based on actions prior to the beginning of the president’s term), as well as in the Court’s consideration of the scope of the vice president’s discovery obligations with regard to his official business. *See Cheney v. United States Dist. Ct.*, 124 S. Ct. 2576, 2587–93 (2004) (considering the vice president’s constitutional status in evaluating his discovery obligations).

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

93. 5 U.S.C. § 701(b)(1) (2000).

94. *Franklin*, 505 U.S. at 800–01.

95. *Id.*

president's actions, unlike those of an agency or executive branch official, may not be reviewed for abuse of discretion.⁹⁶

In decisions that review the president's actions to determine whether they exceed the authority granted by statute,⁹⁷ courts generally have treated the president's assertions of statutory authority with "deference and restraint."⁹⁸ But they have not settled on the character or scope of this deference. Rather, I identify court decisions that reflect three different approaches to the standard of review, which range from granting the president virtually no deference to upholding the president's action without being able to identify which statute provides the congressional authorization. My descriptive claim here is not that any of these decisions articulates a theory of review, but rather that their divergence reflects the incoherence of current law on this question.

2. Statutory Interpretation Without Deference

The first approach is the most demanding. It treats the president with no deference, as though he were a private litigant advocating for a particular construction of a statute. On this view, the Court understands its task as determining whether the president's order falls within the Court's preferred reading of the statute. *Cole v. Young*⁹⁹ exemplifies this approach (and does so surprisingly in the context of the president's determination of a national security interest).

In *Cole*, the question before the Court was the meaning of the term "in the interest of national security" under a recently enacted national security act.¹⁰⁰ The Act authorized the heads of certain departments to summarily dismiss civil servants as they "deem necessary in the interests of national security."¹⁰¹ The Act also granted the president the power to extend these removal procedures to other departments and agencies as he "deem[ed] necessary in the best interest of national security."¹⁰²

96. *Id.* at 801; *see also* *Dalton v. Specter*, 511 U.S. 462, 476 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review.").

97. *See supra* text accompanying notes 59–72 (discussing the availability of judicial review of presidential action); *see also* *Dalton*, 511 U.S. at 474 (assuming "for sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside" the APA); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996) (concluding that the President's claim that the Procurement Act authorized his executive order prohibiting government contractors from hiring permanent replacement workers following lawful strikes was reviewable).

98. *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1983).

99. 351 U.S. 536 (1956).

100. *Id.* at 538 (citing the Act of Aug. 26, 1950, ch. 803, 64 Stat. 476 (codified as amended at 5 U.S.C. §§ 7312, 7331 (2000))).

101. *Id.* at 538 n.1.

102. *Id.* at 539–40 n.1. The full text of the authorization to the president is:

The Court invalidated a dismissal of an employee of the Food and Drug Administration taken pursuant to an executive order that extended the summary dismissal procedures to all departments of government.¹⁰³ The executive order tracked the language of the statute, requiring a determination that the employee's retention was not "clearly consistent with the interests of national security" to apply the summary dismissal procedures.¹⁰⁴ But, according to the Court, that was not enough: the statute required a determination that the employee's position affected interests in national security.¹⁰⁵

The fact that the central term "national security" was not defined in the Act did not signal to the Court that this was an occasion for deference to the president's view.¹⁰⁶ Rather, the Court supported its construction with a variety of tools of statutory interpretation, including the language of the Act,¹⁰⁷ its legislative purpose,¹⁰⁸ and its legislative history.¹⁰⁹ For instance, the Court found "virtually conclusive" the fact that the Act initially did not expressly apply to all agencies, but only to eleven agencies concerned with national defense.¹¹⁰ This limitation, the Court inferred, signaled Congress's intention to provide the summary procedure only for employees engaged in sensitive positions.¹¹¹ In addition, the Court reasoned that there is an "obvious" justification for summary suspension when the employee occupies a "sensitive" position, but no justification where the employee does not occupy such a position.¹¹² The Court thus read the statute to require an express determination that the employee's job affected interests in national security, which the executive order lacked.

The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

Id. (quoting the Act).

103. *See id.* at 542-43.

104. *Cole*, 351 U.S. at 551-52 (quoting Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953), *reprinted in* 5 U.S.C. § 7311 (2000), *as amended by* Exec. Order No. 10,491, 3 C.F.R. 973 (1949-1953), *reprinted in* 5 U.S.C. §7311 (2000)).

105. *See id.* at 556.

106. *See id.* at 544.

107. *Id.*

108. *See id.* at 544-45 (arguing that Congress's specification of eleven named agencies precluded an inclusive definition of "national security" applicable to all agencies); *see also id.* at 545 (concluding that the statutory limit was especially significant given that President Eisenhower had already established a loyalty program applicable to all employees).

109. *See Cole*, 351 U.S. at 550-51 (citing legislative history that Congress intended to authorize dismissal only for those employees with access to confidential material).

110. *Id.* at 544.

111. *See id.* at 544-45.

112. *Id.* at 546.

What is important about *Cole* is not the answer it reached, but the question the Court took itself to be asking. The Court's analysis reveals that it was asking itself what was the best reading of the Act. The possibility of deference to the president's construction of that Act simply did not arise. The Court placed the president's interpretive position on par with that of a private litigant, but did not articulate a basis for doing so.

3. Unstructured Deference

Most decisions are not so demanding. In fact, the most common approach insists upon a statutory basis for the president's action, but generously construes grants of authority in the president's favor. Some of these decisions adopt lenient tests, and others have adopted generous interpretations without articulating the character of deference to be accorded to the president. Although these decisions are deferential, these decisions provide no general framework for evaluating the president's assertions of statutory powers.

a. Express Statute-Specific Deference

One of the best examples of a deferential statutory test is the courts' interpretation of the president's power under the Federal Property and Administrative Services Act of 1949 ("Procurement Act").¹¹³ The Act includes a broad authorization of power to the president, providing that the president "may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of Act."¹¹⁴ Presidents have invoked this authorization to initiate a wide range of policies, from imposing wage and price controls¹¹⁵ to requiring government contractors to post a statement of workers' rights not to participate in a union.¹¹⁶ In a line of decisions spanning three decades, the courts of appeals have sustained presidential orders under the Procurement Act so long as the president could point to some "nexus" between the order and the values of economy and efficiency, the broad purposes of the Procurement Act.¹¹⁷ In these decisions, this "nexus" test has functioned as a deferential form of rationality review.

113. Pub. L. No. 81-152, 63 Stat. 377 (1949) (codified as amended in scattered sections of 40 and 41 U.S.C.).

114. *Id.* § 205(a) (codified as amended at 40 U.S.C.A. § 121(a) (2004)).

115. Exec. Order No. 12,092, 3 C.F.R. 249 (1978).

116. Exec. Order No. 13,201, 3 C.F.R. 754 (2001), *reprinted in* 41 U.S.C.A. § 254 (2004).

117. *See* 40 U.S.C. § 501 (formerly codified at 40 U.S.C. § 481) (directing the Administrator of General Services to act to the extent his or her actions are "advantageous to the Federal Government in terms of economy, efficiency, or service"); *see also* *AFL-CIO v. Kahn*, 618 F.2d 784, 788 n.22 (D.C. Cir. 1979) (noting that the words "economy" and "efficiency" recur throughout the legislative history of the act).

The leading case, *AFL-CIO v. Kahn*,¹¹⁸ upheld an executive order that required certain federal contractors to comply with wage and price controls by applying what amounted to a rational basis test to the executive order.¹¹⁹ The district court had balked at the suggestion that the executive order promoted economy and efficiency, noting that the order would require diverting government contracts away from low bidders who were not in compliance with the order's wage and price standards.¹²⁰ The D.C. Circuit reversed, finding a connection between the executive order and the purposes of efficiency and economy in the Act.¹²¹ The court acknowledged that the executive order would lead occasionally to a low bidder being denied a government contract.¹²² But, the court reasoned, there was a rational basis for the order. If "compliance with the wage and price standards is widespread," the court suggested, "a corresponding reduction (or more gentle increase) in the Government's expenses should take place."¹²³ The court found "every reason to anticipate" that general compliance with these standards "throughout the economy" (not just with federal contractors) would take hold.¹²⁴ The court's reasoning was one step more general. If the wage and price restraint program "is effective in slowing down inflation in the economy as a whole," the court posited, the government will face lower costs in the future than it would have without the program.¹²⁵ On this basis, the court concluded that there was a "sufficiently close nexus" between the executive order and the values of economy and efficiency to find that the order was authorized by the Act.¹²⁶

The D.C. Circuit recently demonstrated the breadth of *Kahn's* deferential approach in *UAW-Labor Employment & Training Corp. v. Chao*.¹²⁷ In *Chao*, the court upheld an executive order of President George W. Bush under the Procurement Act that required all government contractors and subcontractors to post notices in all of their facilities informing employees of

118. 618 F.2d 784 (D.C. Cir. 1979).

119. *Id.* at 786–87 (overruling the district court's order enjoining the enforcement of Exec. Order No. 12,092, 3 C.F.R. 249 (1978)).

120. *See Kahn*, 618 F.2d at 792 (noting the district court's alarm at the prospect of government contracts being diverted from low bidders); *see also AFL-CIO v. Kahn*, 472 F. Supp. 88, 95 (D.D.C. 1979) ("[T]he government, in the name of 'economy,' will be forced to pass over the low bidder in order to do business with an adherent to the wage guidelines.").

121. *Kahn*, 618 F.2d at 792.

122. *See id.* (noting that such a result "could be an unwarranted drain on the public fisc").

123. *Id.*

124. *Id.*

125. *Id.* at 793.

126. *Kahn*, 618 F.2d at 792; *see also id.* at 793 (concluding that the executive order is "in accord with the 'economy and efficiency' touchstone of the FPASA").

127. 325 F.3d 360 (D.C. Cir. 2003).

their rights not to join a union or pay dues unrelated to their employment representation.¹²⁸

In defense of the order, the government argued that when workers are better informed of their rights, including their rights under the labor laws, “their productivity is enhanced.”¹²⁹ The “availability of such a workforce,” the government suggested, “facilitates the efficient and economical competition of its procurement contracts.”¹³⁰ The court was not impressed by this argument, but upheld the order nonetheless. The connection between the order and the values of efficiency and economy, the court suggested, “may seem attenuated” and, indeed, “one can with a straight face advance an argument claiming opposite effects or no effects at all.”¹³¹ But that was not sufficient to invalidate the order. “[I]n *Kahn*, too, there was a rather obvious case that the order might in fact increase procurement costs (as it plainly did in the short run); under *Kahn*’s lenient standards, there is enough of a nexus.”¹³²

Like *Cole*, these decisions reflect the courts’ understanding of their task as one of interpreting a statutory authorization. But they depart from *Cole* in that they articulate and apply a test that gives substantial leeway to the president’s claims of authorization. These decisions strain to find a rational basis that could connect the president’s order and the purposes of the Act. If the Court in *Cole* had adopted a similar approach, surely it could have found some rational connection between national security and the job of a food and drug inspector. That connection hardly seems more attenuated than the inferences supporting *Kahn* or *UAW v. Chao*.

b. *Unarticulated Deference*

In other lines of decision, courts have generously interpreted express statutory authorizations, but have done so without explicit acknowledgment or discussion of whether deference to the President was part of the analysis.

The courts’ treatment of the president’s powers under the Antiquities Act illustrates this approach.¹³³ The Act grants the president power to create

128. *Id.* at 366–67 (upholding Exec. Order No. 13,201, 3 C.F.R. 754 (2001), *reprinted in* U.S.C.A. § 254 (2004)).

129. *Id.* at 366 (quoting Exec. Order No. 13,201, 3 C.F.R. 754 (2001), *reprinted in* U.S.C.A. § 254 (2004)).

130. *Id.*

131. *Id.* at 366–67.

132. *Chao*, 325 F.3d at 367. *But cf.* *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330–31 (D.C. Cir. 1996) (holding that there is not a sufficient nexus between the requirements of an executive order that federal contractors refuse to hire permanent replacement workers during strikes and values of efficiency and economy to uphold the executive order); *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170–71 (4th Cir. 1981) (holding that there is not a sufficient nexus with efficiency and economy to apply affirmative action programs established by executive order to providers of workers compensation insurance to the government).

133. Antiquities Act of 1906, 16 U.S.C. §§ 431–33 (2000).

national monuments on federally-owned land by proclamation.¹³⁴ Specifically, the Act authorizes the president to declare “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” as national monuments, reserving the smallest “parcels of land” compatible with management of “the objects to be protected.”¹³⁵ Based on this grant of authority, the Supreme Court has upheld presidential orders reserving as part of a national monument waters and submerged lands underlying portions of the Pacific Ocean,¹³⁶ as well as unappropriated groundwater underlying a national monument.¹³⁷ In these decisions, the Court furnished a broad construction of the statutory authorization—including submerged lands and waters within the reservation of “parcels of land”—but did not acknowledge or suggest that the broad interpretation stems from a principle of deference to the president.

These decisions, as well as those articulating statute-specific tests, treat the president’s assertion of statutory authority as an occasion for deference. But they provide no general conception of the scope of that deference. In this regard, they reflect a variability that is similar to the Court’s approach to deference to agencies prior to its decision in *Chevron*.

4. Statutory Authority Implied by Aggregation

Whereas the first two approaches share the idea that the president’s statutory authority must be traceable to some identifiable statutory enactment, the Court also has upheld a presidential assertion of statutory power in the conceded absence of any particular statute authorizing the president’s action. *Dames & Moore v. Regan* is the most famous example.¹³⁸

Dames & Moore arose from Presidents Carter’s and Reagan’s resolution of the Iranian hostage crisis of 1979. As part of an executive agreement with Iran, President Reagan issued an executive order that suspended all legal claims pending against the government of Iran in domestic courts.¹³⁹ The

134. *Id.* § 431.

135. *Id.*

136. *United States v. California*, 332 U.S. 19, 33–34 (1947); *see also* *United States v. California*, 436 U.S. 32, 36 n.9 (1978) (noting that the Court had extended the Antiquities Act to submerged lands, even though the Act refers to “lands”).

137. *Cappaert v. United States*, 426 U.S. 128, 143 (1976).

138. 453 U.S. 654 (1981); *see also* *Contractors Ass’n v. Sec’y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971) (concluding that the president’s executive orders were authorized unless they were prohibited by statute).

139. *Dames & Moore*, 453 U.S. at 665–66; Exec. Order No. 12,294, 3 C.F.R. 139 (1982). As part of the agreement with Iran, President Carter also issued several executive orders that nullified all attachments of Iranian government assets. *Dames & Moore*, 453 U.S. at 669. In *Dames & Moore*, the Court found express statutory authorization for these orders under the International Emergency Economic Powers Act § 202, 50 U.S.C. §§ 1701–1706 (1977). *Id.* at 675. That conclusion has also been the subject of criticism. *See* Lee R. Marks & John C. Grabow, *The President’s Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*,

order claimed authority under the International Emergency Economic Powers Act (“IEEPA”) and the Hostage Act.¹⁴⁰ The Court specifically concluded that neither the IEEPA nor the Hostage Act authorized the president to suspend claims pending in American courts.¹⁴¹ But the Court rejected the suggestion that these statutes were therefore irrelevant to determining whether the president’s assertion of statutory power was authorized. The Court reasoned that “the enactment of legislation closely related to the question of the President’s authority in a particular case”¹⁴² may indicate “congressional acceptance of a broad scope of presidential action.”¹⁴³ In other words, the Court took the “general tenor” of legislation in the area of law as a basis to imply congressional acceptance of the president’s actions.¹⁴⁴ The Court also found a history of congressional acquiescence in similar presidential actions, and concluded that this was an indication of Congress’s acceptance of the president’s assertion of power.¹⁴⁵ Finally, the Court noted that the president’s orders pertained to foreign affairs, an area of policy in which the Court grants the president particularly deferential review.¹⁴⁶

The most startling aspect of *Dames & Moore* is that the Court aggregated delegations of statutory authority to find a power that it could not trace to any individual authorization, or even to any interlocking set of authorizations. The Court held that these delegations in related areas, in combination with Congress’s past acceptance of similar executive practice, amounted to a “congressional authorization” of the president’s action.¹⁴⁷

This mode of review effectively applies “the strongest of presumptions and the widest latitude of judicial interpretation,” which Justice Jackson proposes for *constitutional review* of the president’s actions authorized by statute¹⁴⁸ to the question of whether the president’s claim of *statutory authorization* is valid. This approach does more than simply evaluate deferentially a president’s claim that his order falls within an arguable

68 CORNELL L. REV. 68, 76–83 (1982) (arguing that the Court’s interpretation of IEEPA allows the president to transfer assets without any statutory safeguards to American creditors contrary to the purposes of the Act).

140. See Exec. Order No. 12,294, 3 C.F.R. 139 (1982) (claiming authority under IEEPA § 202, 50 U.S.C. § 12702 (1977), and the Hostage Act § 9, 22 U.S.C. § 1732 (1989)).

141. *Dames & Moore*, 453 U.S. at 677.

142. *Id.* at 678.

143. *Id.* at 677.

144. *Id.* at 678.

145. See *id.* at 678–83 (noting several instances of congressional acquiescence in the president’s assertion of settlement authority in the foreign affairs context).

146. See *Dames & Moore*, 453 U.S. at 678 (stating that congressional failure to delegate authority does not necessarily indicate disapproval “in the areas of foreign policy and national security”).

147. See *id.* at 686.

148. See *supra* text accompanying notes 78–83.

statutory authorization. It aggregates statutory delegations, none of which individually provide support for the president's action. Far from asking what is the best reading of express statutory provisions, as the Court did in *Cole*, or even generously construing identifiable statutory delegations, as the court did in *Kahn*, this approach treats indications of likely congressional consent as statutory authorization.¹⁴⁹

Together these decisions show that though courts generally embrace a background presumption that the president's constitutional status makes judicial review of his statutory actions exceptional, they have not adopted a coherent approach for assessing how to evaluate the president's claims that his orders have statutory authorization.

C. CONSEQUENCES OF INCOHERENCE

There are clear costs to the absence of any overarching framework of review. First and most practically, the absence of a framework erodes stability and predictability in review and gives the president no clear guidance on the scope of his own statutory powers. That uncertainty does nothing to limit adventurous assertions of statutory power by presidents. Without adequate checks from other institutions, wide constructions pose the risks associated with concentration of power. Second, without a general framework, Congress has no baseline around which to legislate and specifically to indicate when it seeks to grant broad deference to the president and when it does not. Because Congress is generally a poor monitor of the president's direct action, there are especially strong reasons to provide it with a clear default framework for judicial review against which it can legislate in the first instance.¹⁵⁰

149. This approach may not be far from the conception of statutory construction in cases of ambiguity theorized by Einer Elhauge. See, e.g., Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2040–49 (2002) (arguing that default rules of statutory interpretation should be structured to maximize the satisfaction of current political preferences). Under this mode of review, the statutory sources of authority are regarded so generously to the president that the distinction between Justice Jackson's first two categories is eroded. An action within the zone of twilight—that is based on congressional silence—is elevated to Jackson's first category through judicial implication. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1310 (1988) (explaining that, in view of the Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), the Court's decision in *Dames & Moore* creates a “one-way ‘ratchet effect’”). Whereas Koh emphasizes the effect of relying on congressional acquiescence, in Part III, I focus on the implications of implying authority by aggregation.

150. Moreover, when no structure of deference is acknowledged, the difference between a judicial decision that construes the meaning of the statute, and thus is entitled to stare decisis effect, and a decision upholding a construction of a statute based on a standard of deference to the president may be lost. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 916–17 (2001) (arguing that judicial decisions upholding agency action based on judicial deference to the agency under *Chevron* step two should be accorded stare decisis effect only for the proposition that the statute is ambiguous, not treated as precedent that otherwise fixes the meaning of the statute). When that distinction is lost, there is the potential for all

More generally, such a framework plays a critical role in process-based accounts of judicial review. In recent work, Samuel Issacharoff and Richard Pildes identify a deep and persisting pattern in judicial review of the executive's assertions of emergency authority in times of war.¹⁵¹ They argue that in emergency contexts, courts have taken a process-based approach that focuses on ensuring that the legislature has endorsed executive actions that interfere with individual liberties.¹⁵² With this approach, as Issacharoff and Pildes explain, the judiciary steps back from the task of defining in the first instance the permissible scope of individual liberties¹⁵³ and instead focuses on whether Congress has authorized the executive's incursions, thus insisting on bilateral agreement between the executive and the legislature as to rights-balancing.¹⁵⁴

But if this approach is characteristic of judicial review of the president's assertion of emergency powers, and Issacharoff and Pildes make a strong case that it is, then the question of how to judge what counts as congressional endorsement of executive action becomes critical.¹⁵⁵ Indeed, within the general structure of judicial review that Issacharoff and Pildes sketch, the most significant determinant of whether the executive action will be upheld or struck down, with consequences for individual liberty, is how courts judge what counts as statutory authorization. Whether specifically concerned with emergency powers or not,¹⁵⁶ a conception of judicial review

judicial decisions upholding the president's action to create binding constructions of those statutes, constraining future presidential flexibility and ossifying the statutory framework. Cf. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1275–76, 1302–05 (2002) (challenging the application of traditional stare decisis principles to judicial constructions of statutes that delegate authority to an agency where the agency has not yet interpreted the statute on the grounds that the stare decisis effects of these decisions lead to ossification of statutory law, potential incoherence in national policy based on the timing of judicial review, and general restriction of agency discretion).

151. See Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296 (2004).

152. See *id.* at 297, 324.

153. See *id.* at 299.

154. See *id.* at 324. Specifically, they write,

This view, rooted in the democratic process, emphasizes that the judicial role in reviewing assertions of power during existent circumstances should focus on ensuring that there has been bilateral institutional endorsement for the exercise of such powers. . . . [This] is the characteristic way in which American courts have approached their role of reviewing the exercise of power by political branches during wartime.

Id.

155. See *id.* at 327 (noting this general feature of process-based judicial review, and indicating that it is not their project to evaluate what should count as congressional authorization).

156. I am not specifically concerned, as Issacharoff and Pildes are, with emergency powers. Still, the answer to the question of how courts should judge a president's assertion of statutory authority that I provide could function within their process-based conception of judicial review.

of executive power that puts at its center a search for bilateral, executive-legislative agreement requires a framework to address the president's claims of statutory authorization. I now turn to that task.

III. JUDICIAL REVIEW OF PRESIDENTIAL ORDERS WITHIN THE AGENCY FRAMEWORK

In this Part, I argue that the framework of judicial review that governs agencies' assertions of statutory authority also should apply to judicial review of the president's claims of statutory authority. This framework is appealing, I argue, because it structures the judicial role to validate the president's statutory assertions only when there is a basis to conclude that the action reflects agreement between the president and Congress.

I begin this argument by suggesting that an administrative agency's action is valid only if it can be traced to a statutory grant of authority, as opposed to implied by aggregation from several related statutes. I then contend that the same principle should apply to the president's statutory assertions of authority, even when the president has an arguable source of independent constitutional power. I thus argue against presidential exceptionalism with respect to the basic framework of review of assertions of delegated statutory authority. This argument excludes the third approach sketched above—statutory interpretation implied by aggregation—as a viable framework for review of the president's claims of statutory authority. Part IV then builds on the conclusion that the same basic framework of review applies to assertions of statutory authority by agencies and the president, and addresses the deference to be accorded the president's assertion of statutory authority within the agency framework.

A. *THE NONAGGREGATION PRINCIPLE OF JUDICIAL REVIEW*

Judicial review of agency action is defined by a fundamental requirement that statutory authorization be traceable to an identifiable statutory source. This requirement excludes the possibility of implying statutory authority by aggregation, which occurs when the court is unable to identify which statutory provision, or interlocking set of statutory provisions, authorize the action but nonetheless upholds the action as authorized by statute. This *principle of nonaggregation* finds doctrinal support in the nondelegation doctrine, but rests on broader rule-of-law foundations. Though this requirement is not frequently articulated, it should not be controversial.

Any federal agent, whether legislative, executive, or judicial, has power to act only insofar as that agent's actions are authorized by the Constitution

or a statute.¹⁵⁷ Because federal administrative agencies have no independent constitutional authority, their authority must proceed from some statutory authorization. As a result, “an agency literally has no power to act . . . unless and until Congress confers power upon it.”¹⁵⁸

The question, then, is what can count as statutory authorization for an agency’s action. The Supreme Court has long since repudiated the idea that an agency’s actions must fall within an expressly granted power. The Supreme Court’s decision in *FTC v. Eastman Kodak Co.*¹⁵⁹ exemplifies the formerly enforced demand for an express grant of power. There the Court held that the FTC’s authority to issue cease and desist letters to prevent methods of “unfair competition” in commerce did not authorize the FTC to order a company to sell its assets.¹⁶⁰ The FTC, the Court concluded, had “not been delegated the authority of a court of equity.”¹⁶¹

The modern view embraces the idea that agency authority may be implied from its enabling statute. For instance, as to the same statutory delegation at issue in *Eastman Kodak*, the Court more recently commented that “[a]uthority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees [T]he power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority.”¹⁶² Rather, the modern test for grants of legislative authority to an agency is that “the reviewing court [must] reasonably be able to conclude that the grant of authority contemplates the regulations issued,”¹⁶³ without extending the scope of an authorizing statute

157. See generally Larry Alexander & Evan Tsen Lee, *Is There Such a Thing as Extraconstitutional?: The Puzzling Case of Dalton v. Specter*, 27 ARIZ. ST. L.J. 845 (1995) (examining the “limited powers doctrine”).

158. 1 a. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986); see also *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power [to act] is limited to the authority delegated by Congress.”). The APA reflects this principle. It authorizes judicial review of agency actions “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(C) (2000).

159. 274 U.S. 619 (1927).

160. See *id.* at 625 (holding that the FTC “had no authority to require that the Company divest itself of the ownership of the laboratories which it had acquired prior to any action of the Commission”).

161. *Id.* at 623.

162. *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 312 n.17 (1963) (emphasis added); see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239, 244 (1972) (holding that the statutory grant of authority to the FTC to define and proscribe unfair practices is not limited to violations of the anti-trust laws).

163. *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979). Other decisions employ different formulations of this test, but the basic point—that implications of delegated authority must be closely tied to the statute—remains. See, e.g., *Interstate Commerce Comm’n v. Am. Trucking Ass’n*, 467 U.S. 354, 364–71 (1984) (upholding the ICC’s power to reject certain tariff filings on the grounds that it furthered a “specific statutory mandate” and was “directly and closely tied to that mandate,” even though authority to do so was not expressly granted by statute); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 654–57 (1978) (upholding the ICC’s power to fix

“beyond the point where Congress indicated it would stop.”¹⁶⁴ Contemporary doctrines of judicial review, principally the *Chevron* doctrine, have specified a framework in which the court is to apply this broad standard.

But despite the fact that authority for agency action, within those broad limits, may be implied, the framework of judicial review of agency action does not allow authority to be implied by aggregation from related statutory delegations, none of which include the authority asserted either expressly or by implication. To uphold an agency's assertion of delegated statutory authority, the court must be able to identify the statutory provision, or a set of interlocking provisions, that authorizes the action. This is what I call the *principle of nonaggregation*.

It is important to be clear about the difference between this principle and the now-accepted form of implications of authority. The fact that courts permit some implication of authority does not abandon all limitations on the scope of agencies' authority. Courts regularly strike down agency actions that go beyond the authority that is reasonably contemplated by a statutory delegation.¹⁶⁵ How a court determines when an assertion of authority is reasonably contemplated by the statute will depend on the particulars of the statutory scheme and the court's approach to statutory interpretation. On different conceptions of statutory interpretation, this question will have a different complexion: for textualists, the focus will be on determining what powers the text of the statute fairly imports; for purposivists, the inquiry will emphasize the connection to the legislative purpose, and so on. Difficult questions of statutory interpretation arise in determining the scope of implied authority, but the problems it poses are distinct from those involved in the implication of authority by aggregation. First, regardless of one's method of statutory interpretation, implied authority may extend only to the limits of what Congress contemplated in the statute. As a result, if a court

maximum interim rates and refund conditions for carriers with suspended rates on the grounds that the conditions are a “legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power,” despite the fact that the ICC lacked express authorization).

164. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

165. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 708–09 (1979) (holding that the FCC did not have authority, ancillary or otherwise, to require cable television systems to make channels available for third-party access); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 325–29 (1961) (holding that the Civil Aeronautics Board lacked the implied authority to change the terms of a certificate of public convenience and necessity after its effective date without notice or hearing); *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 396 (D.C. Cir. 2004) (holding that FERC lacked the authority to order the replacement of the governing board of the California public benefit corporation); *AT&T Corp. v. FCC*, 323 F.3d 1081, 1082 (D.C. Cir. 2003) (holding that the FCC lacked statutory authority to promulgate rules fining telecommunications carriers for changing subscribers' telephone service without customer authorization); *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 798–99 (D.C. Cir. 2002) (holding that the FCC lacked the authority to require video descriptions of television action for the visually impaired).

reaches the conclusion that the authority asserted is reasonably contemplated by a given statute or set of interlocking statutory provisions, it will not reach the question of implying authority by aggregation. Authority implied by aggregation is thus authority that is not reasonably contemplated by any identifiable statutory delegation. Second, and more broadly, implication of authority focuses on a single statute or a group of interlocking statutory provisions that reflect a congressional action to be interpreted. In contrast, when a court is engaging in implication by aggregation, it is not interpreting a single congressional action, but rather lacing together several disparate actions. In a sense, aggregation allows the court to make inferences from the public laws as a whole, or from Congress's underlying and enduring policy preferences. Unless one adopts very strong assumptions about the coherence of the statutory corpus as a whole,¹⁶⁶ the implication of statutory authority by aggregation invites courts into a more expansive range of inference, and one that lacks a connection to the Congress's statutory delegations, or interlocking statutory delegations, that other valid implications have.

It also should be clear that the principle of nonaggregation does not contradict the frequent occurrence that two different statutes must be combined to validate the agency's action. For instance, for some agencies, the scope of the conduct that the agency has authority to regulate and the agency's enforcement powers are defined in different statutes. The Federal Trade Commission is such an agency. The FTC's organic statute provides the agency enforcement authority to enjoin conduct that violates § 7 of the Clayton Act.¹⁶⁷ Together, these two statutes authorize the FTC to seek injunctions to prevent corporate mergers that the FTC believes violate § 7 of the Clayton Act.¹⁶⁸ The National Environmental Policy Act ("NEPA") also illustrates this point.¹⁶⁹ NEPA authorizes and requires federal agencies to take into account a wide range of environmental values not identified in the

166. Compare *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88–92 (1991) (construing a provision for "attorney's fees" in view of other statutory usages that distinguish attorney and expert fees), with *id.* at 103–105, 115–116 (Stevens, J., dissenting) (arguing that the omission of a provision for expert fees and inclusion of it elsewhere cannot justify excluding expert fees from attorney's fees).

167. See 15 U.S.C. § 53(b) (2000) (granting the FTC authority to seek preliminary injunctions to enjoin mergers in violation of § 7 of the Clayton Act); *Id.* § 18 (prohibiting acquisitions, including mergers, where the "effect of such acquisition [will] substantially lessen competition or tend to create a monopoly").

168. See *FTC v. Staples, Inc.* 970 F. Supp. 1066, 1070 (D.D.C. 1997) ("Whenever the Commission has reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act, the FTC may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality." (citing 15 U.S.C. § 53(b)) (internal quotation omitted)).

169. National Environmental Policy Act §§ 101–207, 42 U.S.C. §§ 4321–4347 (1994).

agency's organic statute.¹⁷⁰ Thus, the combination of NEPA and the agency's organic statute authorizes the agency to impose environmental conditions on the licenses it issues, where it would have lacked the authority to impose those conditions without NEPA.¹⁷¹ But in these cases, the reviewing court can still trace the grant of authority to specific authorizing provisions. What the nonaggregation principle prohibits is a court's concluding that an agency's action is valid despite the fact that the court cannot trace the action to any identifiable statutory sources; it disallows finding that the general tenor of statutory delegations authorize the action, even though the court cannot find any delegation or interlocking set of delegations that do so. The principle of nonaggregation excludes the possibility of review of administrative agency action according to the approach exemplified in *Dames & Moore*.

At the most general level, the principle of nonaggregation is grounded in rule-of-law ideas. The rule of law requires a level of publicity and transparency. In general, both publicity and transparency require that, if a delegatee has authority by virtue of a delegation of power, the legislative acts which delegated the power asserted should be identifiable. Without that, neither government actors nor private parties would have a basis for notice of the scope or source of an agent's authority.

The principle of nonaggregation has its most clear doctrinal reflection in the nondelegation doctrine. The nondelegation doctrine concerns the scope of Congress's power to delegate the authority to make policy decisions. The Court has repeatedly construed the doctrine so generously that it has effectively denied its judicial enforcement.¹⁷² But in principle, the doctrine requires that "when Congress confers decisionmaking authority upon agencies, Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"¹⁷³

170. See *id.* §§ 4331–4332 (requiring all agencies to consider the environmental impact of their actions); *Natural Res. Def. Council, Inc. v. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) ("NEPA authorizes the agency to make decisions based on environmental factors not expressly identified in the agency's underlying statute."); *Calvert Cliffs' Coordinating Comm'n v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (holding that the Atomic Energy Commission is not only permitted, but required by NEPA to take environmental values into account); see also Thomas J. Schoonenbaum & Richard B. Stewart, *The Role of Mitigation and Conservation Measures in Achieving Compliance with Environmental Regulatory Statutes: Lessons from Section 316 of the Clean Water Act*, 8 N.Y.U. ENVTL. L.J. 237, 285 (2000) (commenting on the authority that NEPA grants agencies to consider environmental impact).

171. See *Natural Res. Def. Council*, 859 F.2d at 169–70 (suggesting that the EPA could impose "NEPA-inspired conditions" on a discharge permit).

172. See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472–76 (2001) (denying a nondelegation challenge to the Clean Air Act); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 330–35 (1999) (describing the history of the doctrine).

173. *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (alteration in original).

A prerequisite for determining whether Congress has delegated a sufficient standard is that the court be able to trace the authority asserted to a statutory source. How could Congress have delegated authority to an agency with an “intelligible principle” to guide the agency’s action if the court cannot locate a statute delegating the particular power asserted (either expressly or by implication in a statutory provision)? Where an agency’s authority to take an action is based solely on the implication of authority aggregated from several related statutory provisions, none of which can be said to authorize the action, the court cannot identify *the delegation* and therefore cannot determine whether the delegation furnishes an intelligible principle. In that case, the claimed authority cannot be said to be the product of any delegation that itself includes an intelligible principle. In short, the nondelegation doctrine requires the principle of nonaggregation.

One might object that because the nondelegation doctrine applies only to Congress’s delegation of “legislative” (or “quasi-legislative”) power, the nondelegation doctrine cannot justify the principle of nonaggregation where Congress has delegated non-legislative powers. My suggestion, however, is not that the nondelegation doctrine is the sole ground for the principle of nonaggregation, but rather that the principle of nonaggregation derives from more fundamental principles as to what can count as a delegation, and so applies beyond the doctrinal limits of the nondelegation doctrine.¹⁷⁴

B. AGAINST PRESIDENTIAL EXCEPTIONALISM

The argument for treating the president no differently than an agency as to what can count as statutory authorization has two parts. First, I contend that the president’s independent constitutional powers provide no reason to imply statutory authority by aggregation. In other words, I defend separating the president’s independent constitutional powers from statutory review. Second, I suggest that Congress’s structural inadequacies as a monitor of presidential action establish the need for the judiciary to require that the president’s action be based on an identifiable source of authority.

1. Separating Constitutional Powers from Statutory Review

One argument for implying statutory authority by aggregation from several statutes, as the Court did in *Dames & Moore*, is the presence of the president’s independent constitutional powers in an area.¹⁷⁵ The idea is that

174. The principle of nonaggregation is arguably implicit in the *Chevron* doctrine. Within the *Chevron* framework, the court first asks whether Congress’s intent is clear, and if not, the court must defer to the agency’s construction. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). It only makes sense to ask whether a statute is clear if there is a statutory source from which to determine whether Congress has clearly resolved the issue.

175. See also *Loving v. United States*, 517 U.S. 748, 769–72 (1996) (upholding the president’s power to prescribe aggravating factors in capital trials, an area in which the

where the president arguably has constitutional powers to authorize the presidential order, those powers permit the courts to engage in a form of statutory interpretation that is foreign to administrative law—namely, to imply authority by aggregation of related statutory sources. This approach, however, effectively eliminates political consideration of the president's assertion of power.

First, consider the asymmetry between a court decision upholding a presidential order and one that invalidates the order. When a court decides that a statute authorizes the president to act, that decision is extraordinarily difficult for the political process to reverse, even if the court is wrong in its construction of the statute. In order to overturn a decision upholding a sitting president's order, Congress must either convince the president to sign legislation stripping him of the power—an unlikely prospect—or override a presidential veto, which requires a two-thirds majority in both houses of Congress.¹⁷⁶ In contrast, when a court invalidates a presidential order, that decision is much easier for Congress to reverse, even (indeed, especially) if the court decision is wrong about whether the statute authorized the president's action. In that case, Congress's and the president's interests are aligned; they have an incentive to overturn the court's decision, and no supermajority requirements stand in the way.¹⁷⁷

Thus, whenever a court upholds the president's statutory authority it effectively insulates the president's assertion of statutory authority from Congress legislatively overturning the order. This result is warranted if the president's assertion of power is reasonably contemplated by the delegation. Indeed, in that case, the decision upholding the president's assertion of power gives effect to Congress's prior political judgment to delegate power to the president. The insulation of the president's assertion of power from effective reconsideration (at least during the president's own term) is justified by Congress's past political judgment in which it delegated the authority.

The same does not hold true when the court invokes the president's constitutional authority as a basis for implying statutory authority by aggregation. In this mode of review, the court effectively insulates the president's action from political reconsideration, but does so without being able to locate any statute that authorized the action. Statutory authority is created, not by congressional action, but by virtue of the court's

president has arguable constitutional authority). The *Loving* Court concluded that "whether or not Article 36," a statutory provision, "would stand on its own as the source of the delegated power, we hold that Articles 18, 36, and 56 together give clear authority to the President." *Id.* at 770.

176. U.S. CONST. art. I, § 7.

177. The same holds true for judicial decisions striking down or upholding regulations issued by executive agencies.

unwillingness to conclude that the president lacks authority for the action.¹⁷⁸ This result is intolerable because Congress is effectively prevented from reversing the president's action, even though there is neither a past political judgment that authorizes the action, nor a judicial determination that the action falls within the scope of the president's independent constitutional powers.¹⁷⁹ This same unacceptable result would occur if the courts upheld a tenuous implication of authority without aggregation. But the mere permissibility of finding authority by implication does not itself generate this difficulty. It is only tenuous implications, such as implications of authority by aggregation, that do.

The problem of aggregation goes deeper still. Implying authority by aggregation allows a court to find statutory authority that Congress could not have contemplated. (Indeed, if the authority had been contemplated by the statute, then the court could have implied it in the statute without any need for aggregation.) This form of review denies Congress the occasion to consider and impose limits on the powers delegated in the statutes that the court concludes justify the president's action. Where authority is found beyond what Congress could have contemplated, judicial review undermines Congress's role in determining the scope of the delegation. Thus, implying authority by aggregation effectively eliminates Congress's capacity to overturn the president's action, but does so without a basis to conclude that Congress contemplated the power asserted in enacted legislation. It affirms the president's political power beyond the scope of congressional authorization.

In contrast, separating the president's constitutional powers from statutory review creates an opportunity for political consideration of the presidential action that is occluded when the courts treat a constitutional power of the president as a basis for implying statutory authority by aggregation.¹⁸⁰ When a court separates the president's constitutional powers

178. Cf. *Dames & Moore v. Regan*, 453 U.S. 654, 686, 688 (1981) (noting that the Court was not prepared to conclude that the president lacked the power asserted).

179. When a court upholds the president's assertion of statutory authority by aggregation, the best that can be said is that the president's action may have the general favor of Congress, or of past Congresses, though it lacks statutory authorization. Unless one takes the view that the aim of statutory interpretation in cases of ambiguity is to estimate and satisfy Congress's policy preferences, and perhaps even on that view, that best case should not be enough to overcome the problems created by validating the president's assertion of statutory authority by aggregation.

180. Moreover, a judicial determination that the president lacks statutory authority places that question squarely on the congressional agenda. In that way, a court's judgment may provide the president's claim of statutory authority political saliency that it otherwise would lack. An illustration of the way in which a judicial decision that an agency lacked statutory authority can spark congressional action is Congress's response to a district court judgment that the FTC lacked statutory authority to implement its do-not-call registry. The district court made its decision on September 23, 2003, *United States Sec. v. FTC*, 282 F. Supp. 2d 1285 (W.D. Okla. 2003), and six days later, on September 29, 2003, Congress enacted and the President signed

from statutory review, it either will find that the president's action lacked statutory authorization, thereby effectively remanding the issues to the political process, or will locate a statute in which Congress contemplated the authority the president asserts. In either case, separating constitutional powers from statutory review ensures that the scope of the president's statutory powers follows from congressional judgment. If we believe that government is better and liberty more secure when the exercise of political power reflects the agreement of both the legislature and the executive, we have reason to prefer a standard of judicial review that enhances the prospects for identifying such an agreement and creating opportunities for it to form. The framework of judicial review that applies to presidential orders thus should disentangle the president's constitutional powers from the moment of statutory review.¹⁸¹ The existence of an arguable constitutional power for a presidential order provides no reason to endorse the implication of statutory authority by aggregation.

Further, this analysis is not changed by the fact that a court finding no statutory authorization may then reach the question of whether the president's independent constitutional powers sustain his action.¹⁸² The judiciary only rarely upholds the president's actions on the basis of the

legislation expressly granting the FTC this authority. See *An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry*, Pub. L. No. 108-82, 117 Stat. 1006 (2003) (authorizing the FTC to establish a do-not-call list). The judicial judgment that the president lacked statutory authority has similar prospects for focusing congressional attention on the scope of the president's powers.

181. My argument for separation of constitutional and statutory review addresses only the determination of the validity of the president's assertions of statutory power. I make no claim that constitutional and statutory interpretation should always be isolated. For instance, in many areas, there may be grounds to embrace a theory of statutory interpretation that is inspired by constitutional principles. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 160-92 (1990) (arguing for the role in statutory interpretation of underenforced constitutional norms, such as federalism, political deliberation, political accountability, and protection of disadvantaged groups); Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281, 1283 (2003) (arguing for a conception of statutory interpretation in which statutory evolution is a function of change in constitutional doctrine); John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997) (defending textualism as an implementation of the constitutional prohibition on legislative self-delegation); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 412 (1989) (arguing for the development "of norms of statutory interpretation that grow out of . . . the basic purposes of the constitutional framework"). For a discussion of the relationship between interpretive commitments in the constitutional and statutory domains, see generally Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1 (2004).

182. Alternatively, a court may decline to reach the constitutional issues. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-89 (2d ed. 1986) (examining the methods for the Supreme Court to decline decision); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 319-21 (1980) (arguing that if the Supreme Court finds that the president's action lacks statutory authorization and the president defends the action as directly authorized by the Constitution, the Court should treat the issue as nonjusticiable).

president's constitutional authority alone.¹⁸³ As a result, reaching the question of whether the president has constitutional authority will generally result in invalidating the order, effectively returning it to the political process for consideration. In either case, the president's independent constitutional powers do not justify implying statutory authority by aggregation.¹⁸⁴

2. The Principle of Nonaggregation and the President

With the suggestion that the president's constitutional authority provides a reason to imply authority by aggregation cleared away, the positive grounds for courts to apply the nonaggregation doctrine to the president can come into view. The structural and institutional limitations on Congress's ability to monitor the president's assertions of statutory authority justify courts' requiring that the president's statutory authority derive from identifiable statutes, and not be implied by aggregation.

Several institutional impediments make Congress a poor monitor of presidential action. First, as public choice theory shows, the transaction costs of congressional action are much higher than those the president faces in asserting power in a presidential order. To act, Congress must coordinate and negotiate with hundreds of members, "each with their own constituencies, interests, and schedules."¹⁸⁵ In contrast, the president may issue an executive order entirely on his own initiative, in the virtual absence

183. See Issacharoff & Pildes, *supra* note 151, at 333 (showing that American courts have insisted upon a showing of congressional authority to uphold executive action, even in times of emergency); Monaghan, *supra* note 11, at 10–11 (arguing that, absent congressional authorization, the president's lawmaking authority is "virtually nonexistent," with several narrow exceptions); see also *supra* note 42 (citing cases requiring congressional authorization for the president's orders to have the force of law); cf. CHOPER, *supra* note 182, at 324 (noting that in almost all recorded instances of challenged executive action, constitutionality was not put in issue).

184. It is also clear that constitutional and statutory review can be distinguished. That possibility is a basic presumption of public law, underlying core doctrines such as the doctrine that the courts should address the statutory grounds for decision prior to the constitutional issues. See *supra* note 14 (providing examples of the Supreme Court's articulation of the principle that statutory review should precede constitutional review). It is also consistent with the constitutional doctrine of limited powers. The limited powers doctrine requires that federal government action be authorized either by statute or the Constitution. See Alexander & Lee, *supra* note 157, at 851 (noting that the power of a federal government official to act must be based on the Constitution or a valid statutory delegation). Thus if a federal officer acts without statutory authorization, and no constitutional authority is present, the officer's acts are *ultra vires* and a violation of the limited powers doctrine. This fact may have implications for the availability of judicial review. See *id.* at 851–63 (examining implications of the limited powers doctrine for judicial review). But the mere fact that the absence of statutory and constitutional authority amounts to a violation of a doctrine of constitutional law does not imply that the question of whether the action is authorized by statute cannot itself be distinguished from constitutional review.

185. HOWELL, *supra* note 7, at 107.

of procedure,¹⁸⁶ and without any need to obtain agreement from others.¹⁸⁷ Presidents can initiate and respond to policies without the coordination demands of congressional action.

Second, if we assume that members of Congress generally aim to gain reelection, they will focus their efforts on legislation that may have electoral benefits with their constituents.¹⁸⁸ The breadth of the president's assertions of statutory authority is not likely to be of great importance to congressional constituencies. Presidents, in contrast, represent a national constituency.¹⁸⁹ The result is that presidents have greater interest in protecting and expanding their institutional power than do members of Congress on behalf of their institution. As Terry Moe observes, members of Congress "are unlikely to oppose incremental increases in the relative power of presidents unless the issue in question directly harms the special interests of their constituents—which, if presidents play their cards right, can be avoided."¹⁹⁰ Moreover, acting to defend Congress's institutional power also tends to require centralized and bipartisan cooperation, and less member autonomy, which is also unattractive to members of Congress.¹⁹¹

Third, the president often has informational advantages over Congress. The president frequently has more direct sources of information about the activities of the executive branch than does Congress, which must often rely on the president or relatively formal proceedings in order to keep up to date about executive branch activities.¹⁹² Further, while Congress has a wide variety of formal and informal ways of making its position clear to an agency without enacting legislation, it does not have the same ability to do so with the president. For example, Congress can subject an agency to extensive appropriations hearings, frequent reports, and intensive testimony from agency officials.¹⁹³ These ways of policing agency compliance with congressional policy are either unavailable to Congress with regard to the president, or are available only at high political cost. Finally, as noted above,

186. See *supra* text accompanying notes 49–58 (discussing the dearth of enforceable procedural requirements for the issuance of an executive order).

187. See HOWELL, *supra* note 7, at 107 (noting that, unlike Congress, the president is "free to set policy on his own").

188. See *id.* at 108 (arguing that when members of Congress decide to challenge the president on an issue they "must always weigh the attendant electoral costs and benefits").

189. For a compact judicial expression of this, see *Myers v. United States*, 272 U.S. 52, 123 (1926), and *INS v. Chadha*, 462 U.S. 919, 948 (1983).

190. Terry M. Moe, *The Presidency and the Bureaucracy: The Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 443, 454 (Michael Nelson ed., 6th ed. 2000).

191. See *id.* (noting that members of Congress have strong incentives to defend their constituents' concerns and to maintain member autonomy).

192. HOWELL, *supra* note 7, at 101.

193. See PETER L. STRAUSS, ET AL., *GELLHORN & BYSE'S ADMINISTRATIVE LAW* 211, 234–36 (rev. 10th ed. 2003) (discussing congressional oversight of agency action, particularly through the use of the appropriations power).

legislation to overrule an order of a sitting president would likely require a veto-proof supermajority.

These related institutional difficulties make the possibility of Congress actively policing the president's assertion of statutory authority unlikely. Contemporary history, as noted at the outset, bears this out.¹⁹⁴ If the prospect of Congress overturning executive orders is slim and the costs of more informal monitoring of presidential action high, then the judiciary has a vital role to play in reviewing the statutory basis of the president's orders. By requiring that the statutory authority of a presidential order be identifiable in at least one statute or set of interlocking statutory provisions, the judiciary constrains the scope of presidential assertions of statutory authority. It ensures that the president's claims of statutory power are reasonably contemplated by the delegations the president invokes. This ensures that the statutory president's power follows from congressional consideration. Of course, if Congress wishes to grant the president broader statutory authority, it is always free to do so. And if Congress wishes to preclude judicial review of the statutory basis for the president's power, it may do that as well.¹⁹⁵ But because Congress itself is poorly situated to monitor actively the president's assertions of power, the task rests fundamentally with the judiciary.¹⁹⁶

Requiring that delegated authority be reducible to an identifiable act of delegation or interlocking authorizing provisions does not impose unnecessary inflexibility on the president. In a genuine emergency, the president is likely to act without detailed consideration of the legal basis for his action. In such cases, Congress may always pass legislation that explicitly and retroactively authorizes the action. At least then, more than one institution of government has endorsed the course of action. Moreover, compliance with the nonaggregation principle could hardly be said to hamstring the executive. It rather insists that judicial validation depends upon an arguable basis from which the court could conclude that both the

194. See text accompanying *supra* note 7 (noting the infrequency of congressional override of executive orders).

195. See text accompanying *supra* note 71 (discussing preclusion of judicial review).

196. Further, the rule-of-law commitments of transparency and publicity that are part of the basis of the principle of nonaggregation apply with equal force to the delegations to the president. The president's constitutional status does not provide a general exception to these basic requirements of transparency and publicity. Of course, there may be areas, such as questions of national security, in which we will tolerate sacrifices of the values of transparency and publicity. But the fact that there are exceptions does not undermine the application of transparency and publicity values generally to presidential action. The president, like all other federal officials, has only limited powers. In order to discern and police the limits of those powers, publicity and transparency require that there be some identifiable statutory basis for the assertion of statutory powers. Such a requirement is fundamental, but hardly a demanding one.

legislative and executive branches have embraced the exercise of political power.¹⁹⁷

A further benefit of this requirement is that it provides a principle to mark the boundary between the first and second categories of presidential action within Justice Jackson's three-part classification for constitutional review. Justice Jackson's first category is presidential action taken pursuant to an "express or implied" statutory authorization.¹⁹⁸ The principle of nonaggregation sets a limit on what can count as a basis for statutory authorization. If the court cannot conclude that the presidential action has a statutory source without implying authority by aggregation, then the action does not fit within Justice Jackson's first category. In view of the generous presumption of validity for any presidential act that falls into this first category, the way in which the courts mark the distinction between the first and second of Justice Jackson's categories in practice may determine whether the president's action is sustained. Further, assessing the president's claim of statutory authority separately from whether the Constitution independently authorizes the action does not contradict the underlying grounds for Justice Jackson's tripartite division of presidential power. Rather, it provides one way to take seriously Justice Jackson's view that the presence of statutory authorization makes a difference to constitutional review. Only if statutory authority can be found without making recourse to the president's constitutional authority (or more specifically by implying authority by aggregation) should the presumption of constitutional validity of Justice Jackson's first category apply.

In sum, structural and institutional limitations on Congress's ability to monitor the president's assertions of statutory power require the judiciary to take that role. Insisting on an identifiable statutory authorization, or an interlocking set of authorizations, grounds the president's action in a congressional political judgment. The president's independent constitutional powers provide no reason to depart from this position. Indeed, allowing the courts' unease about striking down the president's action to justify implication of statutory authority by aggregation effectively insulates the president's orders from political consideration without a basis to conclude that the authority asserted was within the contemplation of Congress.

197. See Issacharoff & Pildes, *supra* note 151, at 333 (arguing that the courts have limited their role to checking to ensure that executive action in time of emergency is legislatively endorsed). Further, applying the nonaggregation principle to the president does not contradict the idea that as a matter of statutory interpretation certain statutes, such as those in the areas of foreign affairs, may be interpreted more generously to the president.

198. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

C. THE UNITARY EXECUTIVE AND THE AGENCY FRAMEWORK

The stance that the president's assertions of statutory authority should be treated no differently than an administrative agency's—at least with regard to what can count as a basis for statutory authority—may raise some eyebrows among proponents of a unitary executive. But the stance on judicial review that I defend is consistent with the strongest versions of the unitary position, as well as non-unitary conceptions of the executive. In view of the prominence of this debate on presidential power, it is worth pausing to explain this consistency.

The scope of the president's power over federal officials who implement the laws is one of the oldest constitutional questions. Proponents of a unitary executive position argue that the president has constitutional authority to control all or almost all of the implementation of federal laws.¹⁹⁹ Steven Calabresi, Kevin Rhodes, and Saikrishna Prakash defend a strong version of the unitary view. They argue that the president's constitutional authority to execute the law includes three mechanisms of control over inferior officers: removal power, the directive power to act in their stead, and the power to nullify their actions.²⁰⁰ On this view, the president's removal power is the power to discharge any officer or revoke the officer's executive authority at will;²⁰¹ the president has directive authority over inferior officers in the sense that he has a “constitutional right to take action in the place of an inferior officer to whom a statute purports to give discretionary executive power;”²⁰² and as a corollary, the president retains the authority to nullify actions of inferior officers, even when a statute expressly delegates power to that officer.²⁰³

None of these powers contradicts the nonaggregation doctrine. First, nothing about applying the agency framework of judicial review to the president requires taking a position on the removal debate. The precise scope of the president's removal power will be resolved by contested constitutional and policy arguments. Those arguments, whether based on constitutional text and history, changed circumstances, or policy, maintain

199. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994) (arguing that the president has the authority to control all implementation); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992) (same); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242–46 (1994) (arguing that the president has the authority to control almost all law implementation); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (same).

200. Calabresi & Prakash, *supra* note 199, at 595; Calabresi & Rhodes, *supra* note 199, at 1166.

201. Calabresi & Prakash, *supra* note 199, at 598.

202. *Id.* at 595.

203. See *id.* at 596 (“If the President may make a decision that a statute purports to reserve for an inferior executive officer, by the same logic, the President must be able to nullify an action taken by an inferior executive officer.”).

that the president has expansive power over inferior officers. But that power over subordinate officials neither prohibits nor requires embracing the nonaggregation principle as to what can count as statutory authorization in judicial review of presidential orders.

The central question, then, concerns the consistency of the nonaggregation principle with the claims of the president's directive and nullification authority. Here too, there is no conflict. On the strong unitary executive view, directive authority follows from the exclusive power of the president to execute the laws. For instance, Calabresi and Prakash posit: "[b]ecause the President alone has the constitutional power to execute federal law, it would seem to follow that, notwithstanding the text of any given statute, the President must be able to execute that statute, interpreting it and applying it in concrete circumstances."²⁰⁴

This conception of executive power requires that the courts adopt a principle of statutory construction under which statutory delegations to named officials are read as delegations to the president.²⁰⁵ This position requires an implication of statutory authority to the president—for instance, that a delegation to the Secretary of Labor authorizes the president to act.²⁰⁶ This view thus expands the range of statutes under which the president may assert direct statutory power. But reading a delegation to the Secretary of Labor to include the president does not imply that the president has *any more* statutory authority under the delegation than the Secretary of Labor possesses, or that the president could aggregate the statutory delegations to the Secretary to find statutory authority to act in a way that the Secretary could not. The unitary position is concerned with the question of *who* controls the implementation of the law. It is a theory of control over executive power, not of the scope of delegated authority itself.

The principle of nonaggregation, by contrast, is concerned with the conditions of delegation. It demands that statutory assertions of authority be traceable to some statutory source. There is thus no necessary connection between the unitary executive position (even in its strong form discussed here) and applying the principle of nonaggregation in judicial review of the president's direct assertions of statutory authority. The unitary position expands the range of statutes under the president's control, but it neither requires nor prohibits the underlying principle of judicial review that executive assertions of authority be traceable to some identifiable statutory source.

204. *Id.* at 595.

205. *See id.* 595–96.

206. *See* Calabresi & Prakash, *supra* note 199, at 596 n.210 (arguing that because members of the executive branch exist only to assist the president, the president could personally order workplace safety standards under a statute that delegated authority to the Secretary of Labor).

IV. CHEVRON AND THE PRESIDENT'S ORDERS

Once we conclude that the president should be treated no differently than agencies with regard to what may qualify as a source of statutory authority—and thus that the president's claims of statutory authority fall within the framework of judicial review of agency action—the question becomes the extent of deference to accord the president. In this Part, I turn to doctrines of deference in administrative law and argue that the familiar *Chevron* framework should apply to judicial review of the assertions of statutory authority in presidential orders.

I first provide a brief discussion of the *Chevron* doctrine, noting, as others have, that the scope of its application is a matter of Congress's intentions. I then examine the application of *United States v. Mead Corp.*²⁰⁷ to presidential orders. *Mead* is the Supreme Court's most important recent statement on *Chevron*'s scope. I contend that *Mead* does not bar the application of *Chevron* to presidential orders, but does not provide an argument for doing so. Under *Mead*, applying *Chevron* to presidential orders involves fitting the president into an exception that *Mead* allows, but does not elaborate, for actions conducted without procedural formality. In view of the president's accountability, visibility, and transparency in issuing presidential orders, however, there are more general reasons for applying *Chevron* deference to the president's assertions of statutory authority in these orders. The argument I develop for applying *Chevron* deference to the president's assertions of statutory authority in presidential orders thus also provides a point of critique of *Mead*'s emphasis on procedural formality as the chief indication of *Chevron*'s application.

A. CHEVRON AND CONGRESSIONAL INTENT

The basic facts of *Chevron* are too familiar to merit detailed recitation here.²⁰⁸ It is enough to recall that Congress had delegated to the Environmental Protection Agency ("EPA") rulemaking power in implementing the Clean Air Act.²⁰⁹ Pursuant to that grant of authority, the EPA issued a rule that defined a "stationary source" of pollutants to encompass all emissions within a single industrial plant.²¹⁰ Environmental groups challenged this rule as an impermissible construction of the statute.

In determining whether the EPA's rule was consistent with the statute, the Court announced the now-familiar two-part framework for examining an

207. 533 U.S. 218 (2001).

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

209. See Clean Air Act § 301(a)(1), 42 U.S.C. § 7601(a)(1) (1994) (authorizing the EPA "to prescribe such regulations as are necessary to carry out [its] functions under this [Act]"); Duffy, *supra* note 69, at 199–200 (highlighting the importance of the Clean Air Act's express delegation of rulemaking power).

210. *Chevron*, 467 U.S. at 840–41.

agency's construction of a statute that the agency administers. The first step is whether Congress "has spoken directly to the precise question at issue."²¹¹ If the intent of Congress on the particular interpretive question at issue is "clear," then that clear intention governs.²¹² If the statute's requirements are ambiguous, or the statute is silent on the specific issue, the court does not simply "impose" its own interpretation of the statute (as it would in the absence of an administrative construction); rather, the court must accept the agency's interpretation of the statute as long as it is "permissible."²¹³

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

The *Chevron* decision itself nicely illustrates this point. The Supreme Court reversed a detailed decision by the D.C. Circuit.^{213a} The court of appeals observed that the term "stationary source" was not defined by the Act nor squarely addressed in the legislative history.²¹⁴ The court concluded that its construction of the Act was controlled by the D.C. Circuit's prior decisions under the Clean Air Act, one of which held that the entire-plant definition of stationary source adopted by the EPA was not consistent with the Act's purpose to improve air quality.²¹⁵ This is a typical exercise of statutory interpretation: the lower court took a careful look at the statute and its legislative history and reached a conclusion based on its own precedents. The Supreme Court effectively responded by saying that the lower court was asking the wrong question. In the case of ambiguity, the second step of *Chevron* makes clear that the issue is not how the court would construe the statute, but whether the agency's construction is a permissible one.^{213a} Thus, *Chevron* does not merely create a lenient interpretation of a specific statute, as the "nexus" test of *Kahn* did for the Procurement Act; it provides a general framework that in principle could apply to review of any agency action taken pursuant to a statute that the agency administers.

211. *Id.* at 842.

212. *Id.*

213. *Id.* at 843.

213a. *Id.* at 882.

214. *Natural Res. Def. Council v. Gorsuch*, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev'd sub nom.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

215. *See id.* at 725-26.

215a. *Chevron*, 467 U.S. at 843.

The basis and scope of the Court's decision in *Chevron* have been the source of lively exchange among commentators and the Court.²¹⁶ Following the Supreme Court's decision in *Mead*, it is clear, if it was not already, that *Chevron* rests not on separation of powers doctrine, nor on a common-law canon of construction, but on a presumption about Congress's own intentions about the allocation of interpretive authority between agencies and the courts.²¹⁷

The question in *Mead* was whether a tariff ruling letter issued by one of the Customs Service's regional offices was entitled to *Chevron* deference.^{217a} The Court held that agency action would qualify for *Chevron* deference if it satisfied two steps: first, Congress must have "delegated authority to the agency to make rules carrying the force of law," and second, the agency must have acted pursuant to that authority.²¹⁸ The tariff ruling letters failed to meet this standard, the Court reasoned, because the statute did not delegate authority to the agency to issue tariff letters with the force of law, and the agency did not purport to bind with that force in its tariff ruling letters.²¹⁹ Instead, the Court concluded that tariff ruling letters would qualify for the lesser deference accorded an agency under *Skidmore v. Swift & Co.*²²⁰

The Court's clarification in *Mead* that *Chevron*'s scope of application turns on congressional intent makes clear that there is no doctrinal barrier to applying *Chevron* deference to the president's assertions of statutory authority in presidential orders. The court can just as easily ask whether Congress's delegation to the president implies a delegation of interpretive authority as it can ask this question of delegations to administrative agencies.²²¹

216. See, e.g., Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 190–93 (1992) (arguing that *Chevron* applies only to rules with the force and effect of law); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 277–78 (1988) (arguing that *Chevron* is constitutionally required); Merrill & Hickman, *supra* note 150, at 837 (arguing that the scope of *Chevron* deference turns on whether Congress delegated to the agency the power to bind with the force of law).

217. See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (discussing what Congress "contemplates"); *id.* at 229 (discussing what Congress would expect); *id.* at 236 (discussing Congress's intentions); see also Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002) (noting that *Mead* ends speculation that *Chevron*'s basis is something other than congressional intent).

217a. *Mead*, 533 U.S. at 221.

218. *Id.* at 226–27.

219. *Id.* at 232–33.

220. *Id.* at 234–35 (discussing the application of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). *Skidmore* deference accords to reasonable agency interpretations some added persuasive force or weight in view of the agency's specialized expertise and the value of uniformity in agency and judicial understandings of what the law requires. *Id.*; see *supra* note 10.

221. This clarification forecloses an objection that might have arisen if *Chevron* were understood to be an elaboration of the APA's § 706 requirements on the scope of judicial

B. PRESIDENTIAL ORDERS UNDER MEAD

Mead specified that the primary indication of congressional intent to delegate interpretive authority to the agency is whether Congress has delegated authority to bind “with the force of law.”²²² This, of course, opens up the further question of what constitutes the “force of law.” *Mead*’s answer does not provide an argument for applying *Chevron* to the president (although it does not bar this conclusion either).

As to what constitutes a delegation to bind with legal force, *Mead* did not provide a straightforward test, but rather identified several factors. The Court wrote that “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”²²³ The Court made clear that notice-and-comment rulemaking and formal adjudication satisfy this standard.²²⁴ Other factors that suggest a delegation with the power to bind with the force of law are whether the agency action binds third parties (the tariff regulations in *Mead* did not),²²⁵ or is subject to some centralized review and monitoring (again, the tariff regulations in *Mead*, issued by forty-six different offices at a rate of more than 10,000 a year, failed to qualify).²²⁶

Delegations to the president, however, do not fit within *Mead*’s safe haven of delegations that impose procedural formalities. Recall, as noted at the outset, that Congress almost never imposes procedural constraints on the president, and the few procedural constraints it does impose are merely consulting and reporting requirements.²²⁷ None of these procedural constraints come close to approaching the formality of notice-and-comment rulemaking or formal adjudication.²²⁸ From the perspective of the president,

review. See 5 U.S.C. § 706 (2000) (requiring the reviewing court to “decide all relevant questions of law [and] interpret constitutional and statutory provisions”); Duffy, *supra* note 69, at 193–99 (reconciling *Chevron* and APA § 706). On the reading of *Chevron* as specifying § 706, the Supreme Court would have to reverse its holding that the APA does not apply to the president, see *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that absent an express statement by Congress, the APA does not apply to the president), to apply *Chevron* to presidential orders. But once *Chevron* is firmly rooted in a presumption about Congress’s intent, *Franklin* imposes no doctrinal impediment to applying *Chevron* to review the statutory basis for presidential orders.

222. *Mead*, 533 U.S. at 226–27.

223. *Id.* at 230.

224. *Id.* at 227, 230–31.

225. *Id.* at 232.

226. *Id.* at 233–34.

227. See *supra* note 54 and accompanying text (providing a sampling of statutes that impose reporting and consulting requirements on the president).

228. Indeed, the unease about imposing procedural constraints on the president’s own actions no doubt figured into the Court’s decision that the APA does not apply to the president.

a central virtue of executive orders is that they may be issued without any procedure other than that which the president chooses to impose. Thus, if requirements to act with procedural formality were necessary for presuming a congressional intent to apply *Chevron* deference, delegations to the president would not pass the test.

The *Mead* Court allows that procedural formality is not required to qualify for *Chevron* deference.²²⁹ “[T]he want of procedure here does not decide the case,” the Court wrote, “for we have sometimes found reasons for *Chevron* deference when no such administrative formality was required and none was afforded.”²³⁰ In support of this possibility, the Court offered no discussion; instead, it cited one decision, *NationsBank of North Carolina v. Variable Annuity Life Insurance Co.*,²³¹ devoting only a single parenthetical to explain its relevance. In *NationsBank*, the Court granted *Chevron* deference to a position the Comptroller of Currency set forth in a letter granting a national bank’s application to sell annuities.²³² The letter was issued without any formal process, but the Court deferred in light of the “longstanding precedent” that “[t]he Comptroller of the Currency is charged with the enforcement of banking laws[,] and to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusion with regard to the meaning of these laws.”²³³

Thus, although the lack of formal procedural requirements in delegations to the president does not bar the application of *Chevron*, *Mead* provides scant material for an argument that *Chevron* applies to the president. Presidential orders are forced into the space that *Mead* carves out for actions, like that of the Comptroller of Currency in *NationsBank*, that qualify for *Chevron* deference without procedural formality. If the Comptroller of Currency’s statutory charge can grant him or her deference with regard to the banking laws, it would seem that when Congress decides to delegate powers to the president, the embodiment of executive power, the president should also warrant some deference. The president may not have the particular expertise in a regulatory area that the Comptroller has, but surely his political accountability and importance provide other grounds for deference. It is these broader grounds for applying *Chevron* deference to the president’s statutory actions that need elaboration.

See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (declining to subject the president to the APA without an express statement from Congress).

229. *Mead*, 533 U.S. at 230–31.

230. *Id.* at 231.

231. 513 U.S. 251 (1995).

232. *Id.* at 257–59.

233. *Mead*, 533 U.S. at 231 n.13 (citing *NationsBank*, 513 U.S. at 256–57).

C. DELEGATION OF INTERPRETIVE AUTHORITY TO THE PRESIDENT

At the most basic level, according *Chevron* deference to the president's assertions of statutory authority in presidential orders would provide the president the same deference that is granted to the authoritative actions of members of the executive agencies and departments. But the reasons for according *Chevron* deference to the president are even stronger than those for applying it to agency action.

Basic political values of accountability and coordination counsel in favor of applying (or presuming a congressional intent to apply)²³⁴ *Chevron* to presidential assertions of statutory authority. With the exception of classified documents, the president's direct action in presidential orders is visible to the public.²³⁵ Presidential orders are transparent assertions of power. They leave no doubt as to who is responsible for the policies that they embody, and the president is directly politically accountable for those policies. The visibility and transparency of presidential orders also carries with it "an increased attentiveness to the political and public reaction"²³⁶ that may make for good policy. In contrast, when the president merely urges administrators to pursue a course of action, or to interpret a statutory ambiguity in view of certain policies, the same direct political accountability and transparency is lacking. Further, the president is in a better position than other agency actors to see the relationship between his actions and other regulatory and interpretive positions, and to coordinate a variety of substantive goals.²³⁷

These virtues of political accountability were central to the justification for the presumption of deference in *Chevron*. "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy

234. The arguments I make for applying *Chevron* deference to the president could be regarded as providing reasons of policy and principle for applying *Chevron* to presidential orders, or as grounds for presuming Congress's intention to delegate interpretive authority to the president. I do not make a firm distinction between these two possibilities. It is broadly acknowledged that Congress rarely has an actual intention with regard to the delegation of interpretive authority. See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (stating that Congress's interpretive intention is "fictional"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (taking the same view). As a result, the task of determining Congress's intention involves determining when a court should presume such an intention. Reasons of policy and principle provide as good a basis as any for determining the parameters of that constructive intention. Accordingly, my arguments of policy and principle for applying *Chevron* deference to the president are also grounds to presume a congressional intention to do so. In this way, my arguments are consistent with *Mead's* clarification that the scope of *Chevron* is determined by congressional intent. I am suggesting reasons why such a congressional intent should be presumed with regard to the president.

235. See COOPER, *supra* note 19, at 48 (documenting publicity attendant to executive orders).

236. Barron & Kagan, *supra* note 234, at 244.

237. *Id.* at 245.

choices”²³⁸ If the agencies are entitled to a presumption of a congressional intent to grant their interpretations deference by virtue of their connection to the chief executive, then, *a fortiori*, the chief executive acting on his own qualifies for such deference.

Of course, the Court in *Chevron* also justified deference in virtue of the administrative agency’s “greater expertise” in the field of regulation.²³⁹ It might be objected that a generalist president does not have the same expertise as an agency. At some level, this is of course true. Presidents themselves and presidential staffs cannot be as experienced in a particular regulatory area as an agency. But because the president sits atop the administration, he is in a position to demand the informational and policy expertise of agencies as a basis for the actions taken in his own name.²⁴⁰ Nothing prevents a president from requiring the work of members of an agency in drafting a detailed executive order. As a result, even if we concede that the president may have less expertise than an agency—although how much is not clear—that deficit does not unseat the strong grounds for applying *Chevron* to presidential orders based on the president’s heightened accountability, visibility, and ability to coordinate policy.

One might also object that, because the president has more power than any given agency, the absence of procedural formality is more grave. For instance, in *A.L.A. Schechter Poultry Corp. v. United States*,²⁴¹ the fact that the National Industrial Recovery Act imposed no procedural requirements on the president contributed to the Court’s conclusion that the Act exceeded the bounds of permissible delegation.²⁴² And since *Schechter*, the Supreme Court’s tolerance of broad congressional delegations may be attributable, at least in part, to the greater procedural constraints imposed on statutory delegates.²⁴³ Procedure provides a check on the potential abuses of statutory delegations, and its absence, particularly when the president is involved, may raise a concern about the arbitrary exercise of power.

The question, then, is whether the president’s political accountability, visibility, ability to coordinate policy, and the transparency of presidential orders can justify judicial deference to the president despite the lack of

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

239. *Id.*

240. *Indeed, the Constitution specifically grants the president the authority “to require the Opinion, in writing, of the principal Officer in each of the executive Departments.”* U.S. CONST. art. II, § 2, cl. 1.

241. 295 U.S. 495 (1935).

242. *Id.* at 530–34.

243. For a recent examination of this familiar theme, see Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1402, 1416–19 (2000) (suggesting that the emergence of a new delegation doctrine that focuses on how law is made and specifically ensures that agencies act in a manner that the rule of law promotes accountability, public responsiveness, and individual liberty).

procedural constraints on his statutory actions. As a matter of policy or principle, the answer depends on the relative efficacy of political checks, such as electoral accountability and media scrutiny, as opposed to formal procedural constraints, such as those imposed by the APA. This question poses one of the central issues of public law. The balance may be struck differently with regard to different executive actors. But with regard to the president, there are grounds to maintain that the president's political position warrants applying *Chevron* deference to his statutory determinations. First, even in *Mead*, the absence of procedural formality of agency action (or rather, the absence of statutory requirements to act through formal procedure)²⁴⁴ did not imply the absence of deference.²⁴⁵ The fact that the president has greater political accountability and visibility than agency actors should register in this analysis. Second, in many cases, Congress could choose to delegate the authority to an actor other than the president whose actions would receive *Chevron* deference. At a basic level, it is not clear why the choice to delegate to the president should defeat the presumption of statutory deference. When Congress delegates to the president, it knows that it is authorizing action by an actor of greater political visibility, though one that acts with fewer procedural constraints than most agencies. Moreover, if the president's greater power than agency actors is a concern to Congress,²⁴⁶ Congress can negotiate to constrict the substantive scope of statutory delegations, legislate with greater specificity, expressly impose greater procedural requirements on the president, or even legislate as to whether the *Chevron* presumption should apply.²⁴⁷ In the absence of some such indications from Congress, the mere prospect of congressional jealousy about presidential power should not itself warrant a default presumption that the president's assertions of statutory authority should receive less deference than those of an agency.

In view of direct political accountability and powers of coordination of the president, the general case for applying *Chevron* deference to presidential orders is strong. As the next two subsections show, the precise range of statutes to which *Chevron* applies depends on one's position on two recurring questions about the *Chevron* doctrine.

244. Merrill, *supra* note 217, at 814 (noting that it is Congress's command, not merely an agency's choice, to adopt formal procedures that is relevant to determining whether the delegation is to bind with the force of law).

245. See *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) ("The want of that procedure does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

246. See Strauss, *supra* note 13, at 983 (suggesting that the president is more hazardous as a rulemaker than administrative agencies).

247. See, e.g., Gramm-Leach-Bliley Act, 15 U.S.C. § 6714(e) (2000) (providing that a court shall decide the preemptive effect of a federal statute "without unequal deference"); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637 (2004) (proposing a statutory mechanism for more active legislation on the scope of *Chevron*).

1. What Statutes Does the President Administer?

As a matter of current doctrine, *Chevron* deference applies only to agency interpretations of a statute that the agency itself administers.²⁴⁸ Thus, the agency obtains no special deference for its interpretation of non-organic statutes, like the APA,²⁴⁹ or of other statutes not committed to the administration of the agency.²⁵⁰ In applying *Chevron* to the president, we face the question of what statutes the president administers (in the specific sense of being the actor whose exercise of discretion under the statute qualifies for deference). Several different answers might be offered.

At one extreme, under the strong unitary conception of the executive discussed above, the president is taken to have the power to execute any statute, "interpreting it and applying it in concrete circumstances,"²⁵¹ notwithstanding the fact that the statute may delegate authority to other federal officials. Because this view rejects the constitutionality of independent agencies, its proponents might argue that the president administers all statutes that delegate power, including to independent agencies.²⁵²

A weaker version of the unitary position accepts the distinction between independent and executive agencies as an aspect of current constitutional doctrine. On this view, only statutory delegations to non-independent agencies or to the president himself should be read to authorize the president to act directly under the statute. From this perspective, the

248. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (framing the standard of review applicable to "an agency's construction of a statute which it administers"); see also *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990) (denying *Chevron* deference to an agency's interpretation of a statute that it did not administer); *Dep't of Treasury v. Fed. Labor Relations Auth.*, 837 F.2d 1163, 1167 (D.C. Cir. 1988) (same).

249. See, e.g., *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (denying *Chevron* deference to an agency's interpretation of the APA because the agency is not charged with administering the APA); *Prof'l Reactor Operator Soc'y v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (same); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1016 (1999) (noting that *Chevron* does not apply to an agency's interpretations of non-organic statutes).

250. *Contractor's Sand & Gravel, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 199 F.3d 1335, 1339 (D.C. Cir. 2000) (denying application of *Chevron* deference to an agency's interpretation of the Equal Access to Justice Act); *Prof'l Airways Sys. Specialists v. FLRA*, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987) (denying application of *Chevron* deference to an agency's interpretation of the Back Pay Act).

251. Calabresi & Prakash, *supra* note 199, at 595.

252. Michael Stokes Paulsen's position may fall into this view. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221, 334 n.406 (1994) (suggesting that under a unitary conception of the executive it is the president's interpretation that merits deference, and provides a basis for applying *Chevron* to his actions and the actions of his subordinates).

president may be presumed to administer all those statutes that delegate powers to executive branch officials.²⁵³

At the opposite extreme from the strong unitary position, the president is understood to have directive authority only under statutes that expressly grant power to the president. On this view, only those statutes that expressly name and delegate authority to the president could potentially qualify as statutes the president administers.²⁵⁴

The argument for each of these accounts of what statutes the president administers depends upon contested constitutional and policy questions about the scope of the president's control over the implementation of federal law, as well as upon the link between presidential control and judicial deference. Without attempting here to resolve those questions, there is nothing about that underlying debate that undermines the grounds for applying *Chevron* deference to the president's assertions of statutory authority in presidential orders. For each position, the reasons for applying *Chevron* deference identified above still apply; they just apply to a different set of statutes.

2. *Chevron* and the President's Jurisdictional Authority

A second persisting source of debate is whether and how *Chevron* applies "to an agency's interpretation of a statute designed to confine its authority."²⁵⁵ Statutes that delegate authority to the president, whether expressly or by implication, also impose limits on the president's directive authority. Therefore, the same question of whether *Chevron* should apply to jurisdictional limits also arises with presidential orders, and there is a good argument that it should.

The common point of reference in the debate over whether *Chevron* deference should apply to agency interpretations of their jurisdictional authority is Justice Scalia's concurring opinion in *Mississippi Power & Light*

253. Elena Kagan's position may fall into this view. See Kagan, *supra* note 13, at 2251, 2376–83 (arguing that a delegation to an executive agency official, but not to an independent agency, generally should be read as allowing the president to assert directive authority, and suggesting a reading of *Chevron* under which it would apply only to agency actions that reflected substantial presidential input).

254. This view finds some support in the statement of some courts that an executive order must have a "specific" statutory authorization to bind with the force of law. See, e.g., Zhang v. Slatery, 55 F.3d 732, 747–48 (2d Cir. 1995) (holding that "[o]nly when executive orders have 'specific foundation in Congressional action' are they 'judicially enforceable in private civil suits'" (quoting *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980))); *In re Surface Mining Regulation Litig.*, 627 F.2d at 1357 ("This court has also declared that executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits."); see also text accompanying *supra* notes 39 to 48.

255. *Miss. Power & Light Co. v. Mississippi, ex rel. Moore*, 487 U.S. 354, 380 (1988); see Gellhorn & Verkuil, *supra* note 249, at 1006–17 (arguing that *Chevron* should not apply to an agency's determination of its own jurisdictional authority outside its core areas of regulation).

Co. v. Mississippi ex rel. Moore.²⁵⁶ There, Scalia defends as established law the proposition that *Chevron's* rule of deference applies to the agency's interpretation of its statutory or jurisdictional authority.²⁵⁷ Scalia argues that this conclusion is "necessary because there is no discernable line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."²⁵⁸ Scalia also reasons that such deference is appropriate because Congress would expect that the agency would be responsible for resolving ambiguities about its statutory authority.²⁵⁹

There is little room for disagreement with Justice Scalia on either count. Any substantive agency decision can be characterized as concerning the scope of the agency's power and vice-versa. For instance, defining what is a "stationary source" of emissions²⁶⁰ or what is a "drug"²⁶¹ could be characterized both as a substantive decision or a question about the scope of the agency's jurisdiction. Therefore, if the *Chevron* framework did not apply to jurisdictional questions, it would have virtually no application.²⁶² Moreover, "the agency's expertise and accountability are as relevant to jurisdictional issues as they are to substantive ones."²⁶³ Both of these points hold for the president.

Some have argued, however, that a variety of practical considerations counsel against applying *Chevron* in this way. For example, Ernest Gellhorn and Paul Verkuil suggest that this approach is too simple and argue that this question should be resolved with a focus on the agency's core responsibilities.²⁶⁴ They advocate a multi-factor analysis in which the court considers the relationship between the questioned authority and the agency's central regulatory tasks, taking into account the distance between the authority asserted and those central responsibilities, as well as the importance of the issue and the operational effect of the statutory construction.²⁶⁵

256. 487 U.S. at 380-82 (Scalia, J., concurring in the judgment).

257. *Id.* at 381.

258. *Id.*

259. *Id.* at 381-82.

260. See *Chevron*, 467 U.S. at 840-45 (deferring to the EPA's construction of the statutory term "stationary source").

261. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 124-26 (2000) (holding that the FDA lacked authority under its organic statute to regulate nicotine as a "drug").

262. See *Miss. Power*, 487 U.S. at 381 (Scalia, J., concurring in the judgment) (explaining that almost any agency action could be characterized as jurisdictional); cf. Gellhorn & Verkuil, *supra* note 249, at 1006-07 (criticizing Scalia's view that there is no line between an agency's assertion of authority and "authorized application" of its authority as grouping all assertions of authority into a single category).

263. Herz, *supra* note 216, at 218.

264. See Gellhorn & Verkuil, *supra* note 249, at 1013.

265. See *id.*

Whatever one may decide about the merits of the application of this view with regard to federal agencies, these considerations have a different import with regard to the president's own actions. First, one of the principal risks of agency overreaching is irrational mission creep—that is, asserting a particular regulatory interest across a widening range of private conduct. No doubt the president, like an agency, has strong incentives to increase the scope of his institutional authority. But because of the president's position at the top of the federal bureaucracy, he has much stronger incentives to assert power in ways that coordinate the actions of disparate agencies to achieve a consistent and uniform policy. The risk of presidential overreaching is not the risk associated with mission creep. Second, it is not clear whether one could develop a classification of the president's core competencies in the same way that one could for agencies. The president's constitutional powers might be a starting point, but only that. Because of the president's ability to command information and expertise from executive agencies, the president's core competency could be viewed as wide ranging.

Third and most important, as noted above, presidential orders generally have a much higher degree of visibility and accountability than agency action. That visibility will bring the president's adventurous assertions of statutory authority under greater public scrutiny than agency actions would receive, and as a result, provides a greater political check on the president's actions.²⁶⁶ Thus even if questions of substantive and jurisdictional powers can be distinguished—which is far from clear—the arguments against applying *Chevron* to an agency's assertion of jurisdictional authority do not have the same force when applied to the president.

To summarize, there are strong reasons to apply (or presume a congressional intention to apply) *Chevron* deference to the president's assertion of statutory authority under statutes the president administers. Precisely which statutes the president administers will depend on contested constitutional and policy debates concerning the scope of the president's control over law implementation, and the relationship between that control and judicial deference. But debate as to the set of statutes under which the president's claims of authority may receive *Chevron* deference does not undermine the reasons for applying *Chevron*; those reasons just apply to a different set of statutes depending which statutes one views the president as administering.

266. Cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982) (noting that scrutiny from the press and the president's visibility generally provide a check on presidential action that does not apply with equal force to lower level executive officers).

3. The Difference the President's Status Makes

One feature of this analysis is that it grants the president an advantage over agencies: the president's orders, unlike agency actions, are assured *Chevron* deference. The reason is that the president's statutorily authorized actions bind with the force of law, whereas not all agency action does.

Recall that *Mead* required not only that the statute delegate authority to the agency to bind with the force of law, but also that the agency act in the exercise of that authority. In *Mead*, the Court held that the tariff classification letters at issue did not qualify for *Chevron* deference under this second step. The Court noted that the Customs Service issues 10,000 to 15,000 such letters per year, from forty-six different offices, and that the Custom Service's own regulations expressly disclaimed any intentions for the classifications to bind third parties.²⁶⁷ These facts, the Court held, refute the suggestion that the Customs Service issued the letter classifications with a "lawmaking pretense."²⁶⁸ Thus, under *Mead*, even when an agency has been delegated authority to bind with the force of law, agency action that is not an exercise of that authority will not qualify for *Chevron* deference.

In the argument for applying *Chevron* to executive orders, this second question fades away. The fact that the president decides to put his command in the form of an executive order indicates the order's authoritative quality.²⁶⁹ As a result, there is no occasion to ask the second *Mead* question: whether the act is an exercise of the delegated authority to bind. Executive orders purport to bind those to whom they apply with the force of law. This does not imply that executive orders are necessarily judicially enforceable. As noted above, most are not.²⁷⁰ But judicial enforceability is not necessary to the existence of a norm having the status of law.

This point exposes an interesting implication for the allocation of decisions between the president and agencies. On this view, as long as executive orders make a claim of statutory authorization, they will qualify for *Chevron* deference. This means that if, in an executive order, a president issues policy guidance, something substantively similar to an "interpretative rule,"²⁷¹ that guidance will qualify for *Chevron* deference. In contrast, if the agency itself had issued the same guidance in an interpretative rule or general policy statement, it may not qualify for *Chevron* deference because the agency would not be acting with the intention to create a binding legal

267. *United States v. Mead*, 533 U.S. 218, 233–34 (2001).

268. *Id.* at 233.

269. This may suggest grounds for making a distinction between executive orders and proclamations, on the one hand, and less formal directives, such as memoranda, on the other.

270. See text accompanying *supra* notes 46–48 (noting that executive orders often create no private right of enforcement).

271. See 5 U.S.C. § 553(b)(3)(A) (2000) (providing that interpretative rules and general statements of policy are exempt from notice-and-comment requirements).

norm, failing the second part of *Mead*.²⁷² Simply put, the argument that *Chevron* applies to executive orders creates a formal loophole: interpretative or enforcement instructions embodied in an executive order will receive *Chevron* deference, whereas the same instruction, if contained in an agency interpretative rule or policy statement, may not.

But this possibility for disparate treatment may not be a bad thing. If the president is willing to take the kind of visible personal responsibility for the action that accompanies an executive order, then there are reasons for greater deference than if the agency had reached the same set of interpretive conclusions.²⁷³ In this sense, the fact that it is the president, as opposed to an agency, who acts pursuant to statute may make a difference to the character of judicial review, but does so *within* the framework applicable to agencies. The president, unlike an agency, is assured the application of the *Chevron* framework.

D. MEAD REVISITED

If, as I have been suggesting, the argument for applying *Chevron* deference to the president's claims of statutory powers in presidential orders is strong, it also ends up providing a point of critique of the *Mead* Court's focus on procedural formality as the chief trigger for *Chevron* deference. *Mead*'s turn to procedural formality has come under broad attack from commentators.²⁷⁴ As Thomas Merrill has noted, the Court in *Mead* provided no explanation for why "formal procedure should—or should not—be regarded as relevant to whether there has been the right kind of delegation."²⁷⁵ Formality of procedure, Merrill continues, is at best a good empirical generalization about when Congress would want the delegation to

272. I say "may" because the distinction between legislative rules, on the one hand, and interpretive rules and general policy statements, on the other, *see id.* § 553(b) (excepting interpretive rules and general statements of policy from the general notice requirements for proposed rulemaking), is notoriously difficult. Under current doctrine, the distinction does not turn solely on the agency's own characterization of its action, or choice of procedure. *See, e.g., Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382–85 (D.C. Cir. 2002) (holding that a document styled as a "Guidance Document" was a legislative rule and therefore invalid because it was issued without proceeding through notice and comment, despite the EPA's contention that the document does not purport to bind). Thus, even though the agency maintains that its issuance does not purport to bind, a court may find that it does.

273. Moreover, this loophole has practical limits. President Franklin Roosevelt notwithstanding, even at the most industrious pace, the president may issue several hundred executive orders a year. *Cf. HOWELL, supra* note 7, at 84 (compiling the total number of executive orders issued from 1900 to 1998).

274. *See, e.g., Barron & Kagan, supra* note 234, at 212–21 (arguing that neither procedural formality nor generality are relevant to discerning Congress's intent for *Chevron* to apply); Merrill, *supra* note 217, at 814–16 (arguing that congressional requirements for an agency to use formal procedure is neither necessary nor sufficient for a delegation to bind with the force of law).

275. Merrill, *supra* note 217, at 815.

merit *Chevron* deference.²⁷⁶ Presidential orders, we now see, provide an example of where that empirical generalization runs out.

The application of *Chevron* to the statutory president also suggests two different directions for a more general revision of the *Mead* principle. On the one hand, the fact that presidential orders bind with the force of law, even though they are not the products of formal procedure, invites reconsideration of *Mead's* association of delegations to bind with legal force and procedural formality. On the other hand, the benefits gained by granting *Chevron* deference to a politically accountable agent with the power to coordinate policy suggests that the identity of the agency actor may bear on whether *Chevron* deference should apply. These different lines of inquiry—the manner in which Congress may signal its intention for the agency's action to bind with the force of law, or the identity of the actor within the agency—are taken in the two dominant, opposed revisions of *Mead*.²⁷⁷ Which of these lines of inquiry provides the best general account of *Chevron's* scope is a question for another day. But we now know that any general account must explain *Chevron's* application to the statutory president as well as to administrative agencies.

CONCLUSION

This Article develops an answer to the question that Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*²⁷⁸ leaves open—how a court is to determine when the president acts “pursuant to” a statute. The answer has two parts. First, the same framework of judicial review should apply to claims of statutory authority by the president and administrative agencies. That framework prohibits the implication of statutory authority by aggregating related statutory sources; the action must be authorized by some identifiable statutory provision (or set of interlocking provisions). The president's independent constitutional powers do not justify departing from this basic principle of review. When the Court finds statutory authorization in virtue of a sitting president's constitutional powers, it effectively requires Congress to assemble a supermajority to overturn the judicial validation, and does so where the basis for the president's action in statute is most strained. Further, structural conditions and historical fact confirm that Congress is a poor active monitor of the

276. See *id.* at 817.

277. Compare Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 494–95 (2002) (uncovering and examining a congressional drafting convention in which the delegation to bind with the force of law was accompanied and signaled by a delegation to impose sanctions) with Barron & Kagan, *supra* note 234, at 264 (arguing that the application of *Chevron* deference should depend on whether the agency decision was adopted by the statutory delegatee, as opposed to being made by a lower-level agency official).

278. 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring).

president's assertions of statutory authority. These conditions provide strong grounds for the judiciary to require that the president's action be authorized by some identifiable statutory authorization. That casts the judiciary in the role of ensuring congressional authorization for the president's actions.

Second, within that basic framework of review, the president's claims of statutory authority should receive *Chevron* deference. The president's accountability, visibility, and the transparency of presidential orders provide strong grounds for applying (or presuming a congressional intention to apply) *Chevron* deference to the president's construction of ambiguities or gaps in statutory delegations. This framework of review thus requires that the exercise of political power extend from political accountability at a second level; not only must there be a basis for finding congressional agreement with the president's action, but also, when ambiguities arise as to the scope of that agreement, the president's political accountability justifies deferring to his interpretations.

When the president claims to act as a statutory actor—that is, as the statutory president—his orders are subject to administrative law. Through administrative law, the judiciary imposes costs on the president: Congress is in charge, and the courts will insist that the president's orders be justified by some identifiable statutory authorization. It also grants the president some benefits: where there are ambiguities as to what Congress has authorized, the president's reasonable interpretations are owed deference. Those allocations structure the judicial role and the boundaries of the president's statutory authority to accord with our deepest democratic commitments.