PRESIDENTIAL CONTROL ACROSS POLICYMAKING TOOLS

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ABSTRACT

Over the past quarter century, administrative law scholars have observed the President's growing control over agency policymaking and the separation-of-powers concerns implicated by such unilateral exercises of power. The paradigmatic form of agency policymaking—notice-and-comment rulemaking—mitigates these concerns by ensuring considerable oversight by the courts, Congress, and the public at large. Agencies, however, typically have at their disposal a variety of policymaking tools with which to implement White House goals, including the issuance of guidance documents and the strategic exercise of enforcement discretion. While commentators have drawn attention to the risk that agencies will circumvent the extensive checks associated with rulemaking by issuing a guidance document instead, this Article argues that the potential for an agency to forego both rulemaking and guidance documents in favor of the strategic exercise of enforcement discretion poses a greater threat of unchecked unilateral power. It presents a case study of the use of these different policymaking tools in the Department of Education's Office for Civil Rights (OCR), finding that while agencies are able to weaken external checks on presidential policy preferences by employing guidance documents instead of rulemaking, they can virtually eliminate such checks by implementing White House goals through the strategic exercise of enforcement discretion. This Article closes by evaluating potential reforms to temper politically motivated exercises of enforcement discretion, focusing not only on external mechanisms of oversight, but also on the role of the civil service bureaucracy within the agency itself.

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I. INTRODUCTION

For the past quarter century, administrative law scholars have raised separation-of-powers concerns regarding the White House's steady expansion of control over agency policymaking, or "presidential administration."[1] Left unchecked, such exercises of unilateral power challenge fundamental norms of administrative legitimacy, including those resting on legislative supremacy, democratic accountability, and technocratic expertise.[2] They may undermine rule-of-law values by permitting the President to develop policies contrary to congressional will. They may compromise norms of democratic decision-making by potentially excluding public input from the development of policy. Finally, they may subordinate objective, expert-driven decision-making to the President's raw political calculus.

Administrative law seeks to mitigate these concerns by empowering external institutions—including the courts, Congress, and the public at large—to constrain presidential policymaking discretion.[3] Courts exercise legal checks by scrutinizing agency decisions for fidelity to congressional goals and policing against arbitrary or biased decision-making.[4] Congress and the public also play important

1. Then-professor Elena Kagan famously coined the term "presidential administration" to describe the "recent and dramatic" transformation rendering "regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246, 2248 (2001). Presidential control has since become the dominant model for understanding decision-making in the administrative state. *See, e.g.*, David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. (forthcoming 2016).

2. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461 (2003); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Mendelson, *supra* note 1; Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. Rev. (forthcoming 2016); Watts, *supra* note 1.

3. *See* Metzger, *supra* note 2 (arguing that "ordinary" administrative law addresses constitutional concerns, particularly those related to separation-of-powers).

4. Scholars have long emphasized the importance of such legal constraints, with some suggesting that the very legitimacy of the administrative state hinges on the availability of judicial review. *See* Louis L. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 401 (1958) ("The availability of judicial review is the necessary condition, psychologi-

roles.[5] Congress disciplines agency policymaking through funding mechanisms, oversight hearings, and the threat of legislative reversal.[6] Finally, the public disciplines agency policymaking by mobilizing political pressure on the agency, the White House, or Congress to intervene.

Importantly, however, the operation of these checks varies considerably, depending on the particular policymaking tool employed by the agency.[7] Agencies may implement White House goals through a variety of policymaking tools. The paradigmatic tool, *notice-and-comment rulemaking*, exposes presidential policies to extensive external oversight.[8] Courts exercise both procedural and substantive review over rulemaking decisions, ensuring that such policies comply with legislative directives and are sufficiently rationalized. Congress and the public likewise discipline agency rulemaking by exercising political pressure.[9]

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cally if not logically, of a system of administrative power which purports to be legitimate, or legally valid.").

The drafters of the Administrative Procedure Act were well aware of the importance of these legal constraints, Heckler v. Chaney, 470 U.S. 821, 848 (1985) (Marshall, J., concurring) (maintaining that the "*sine qua non* of the APA was to alter inherited judicial reluctance to constrain the exercise of discretionary administrative power—to rationalize and make fairer the exercise of such discretion"), and consciously designed expansive provisions for judicial review. *See* Administrative Procedure Act, 5 U.S.C. § 702 (2012) (originally enacted as Pub. L. No. 79-404, 60 Stat. 237 (1946)) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); § 551(13) (defining "agency action" broadly to encompass "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); § 706(1) (requiring courts to "compel agency action unlawfully withheld or unreasonably delayed").

5. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 15 (2010) (arguing that politics, rather than law, provide the primary mechanism for constraining executive decision-making today).

6. Congress's ability to reverse agency decisions is not absolute, however. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 928 (1983) (reversing one-house legislative veto).

7. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383 (2004) (discussing breadth of policymaking forms available to agencies).

8. The vast majority of scholarship on presidential administration focuses on White House control over this policymaking tool. *See, e.g.*, Criddle, *supra* note 2, at 449-56 (analyzing presidential control over agency rulemaking); Freeman & Vermeule, *supra* note 2, at 78-83 (discussing constraints on presidential control over agency refusals to engage in rulemaking); Mendelson, *supra* note 1, at 1131-46 (focusing on presidential influence over rulemaking); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1402 n.30 (2013) (justifying focus on rulemaking as central mode of agency policymaking); Watts, *supra* note 1 (focusing on presidential control over rulemaking while acknowledging that policies made through adjudication and enforcement decisions sometimes overlap with rulemaking).

9. The extensiveness of constraints on rulemaking has generated widespread complaints of policy "ossification." *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995); Mark Seidenfeld, *Demystifying Deossification*, 75 Tex. L. Rev. 483 (1997); Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995).

Alternatively, agencies may pursue the President's agenda by issuing an informal *guidance document* simply announcing the new policy in a memorandum, circular, bulletin, or manual, for example.[10] Guidance documents are subject to weaker external constraints than rulemaking, as they generally evade judicial review and attract less legislative and public attention than rulemaking.

Finally, agencies may implement White House goals through the *strategic exercise of enforcement discretion*, targeting particular issues for compliance investigation and aggressively negotiating settlements to require adherence to particular policy goals. Although strategic exercises of discretion typically are accompanied by a guidance document directing street-level enforcement decisions, it is at least conceivable that the President's goals can be achieved through this mechanism without being memorialized in a written directive. If so, the resulting policy could potentially evade external oversight altogether. Compliance investigations rarely reach the formal agency adjudication necessary for judicial review and may be undisclosed to both Congress and the public.

Commentators have expressed much concern that agencies employ guidance documents opportunistically to circumvent the more extensive checks imposed on rulemaking.[11] The Supreme Court noted this concern in its recent decision in *Mortgage Bankers' Ass'n v. Perez*, frankly acknowledging that "[t]here may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions."[12] It is likely to revisit the issue again in the current Term, having granted certiorari in *Texas v. United States*, in which the Fifth Circuit rejected the administration's attempt to characterize its program granting relief to undocumented immigrants as a mere policy statement exempt from notice-and-comment rulemaking requirements.[13] These cases have drawn increased attention to the concern

10. The Office of Management and Budget (OMB) defines a "guidance document" as an "agency statement of general applicability and future effect, other than a regulatory action . . . that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES 6 (2007). It notes that such documents may describe an agency's interpretation of existing law or how it "will treat or enforce a governing legal norm." *Id.* at 2.

11. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312-19, 1318 n.23 (1992); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 420-33 (2007); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011).

12. 135 S. Ct. 1199, 1209 (2015).

13. Texas v. United States, 809 F.3d 134, 171-76 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016) (mem.).

that agencies abuse guidance documents to weaken external checks on their discretion.

Yet few have examined the potential for agencies to circumvent external checks altogether by pursuing presidential goals through the strategic exercise of enforcement discretion in lieu of either rulemaking or guidance documents.[14] The virtual absence of constraints on exercises of enforcement discretion suggests that White House policies implemented through this tool pose an even greater threat of unchecked power than the use of guidance documents.

This Article evaluates the extent to which agencies employ different policymaking tools to advance presidential goals, and the extent to which such policymaking is subject to external oversight, through a case study of policymaking in the Department of Education's Office for Civil Rights (OCR). With an annual budget of approximately $100 million[15] and a staff of over 500 officials,[16] OCR is responsible for enforcing federal prohibitions against discrimination across our nation's primary, secondary, and post-secondary schools.[17] While the importance of OCR's mission renders this agency worthy of study in its

14. Although a number of scholars have begun examining the use of enforcement discretion as a policymaking tool, they have focused on instances in which such policies were memorialized in a guidance document directing street-level officers on how their discretion should be exercised. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013); Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014). The administration's policy of non-enforcement in the marijuana, Affordable Care Act, and immigration contexts reflect this pattern.

15. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FISCAL YEAR 2014 BUDGET REQUEST 1 (2014) [hereinafter OFFICE FOR CIVIL RIGHTS, BUDGET REQUEST], http://www2.ed.gov/about/overview/budget/budget14/justifications/bb-ocr.pdf.

16. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., HELPING TO ENSURE EQUAL ACCESS TO EDUCATION: REPORT TO THE PRESIDENT AND THE SECRETARY OF EDUCATION FY 2009-12, at 3 (2012) [hereinafter OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2009-12], http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., PROTECTING CIVIL RIGHTS, ADVANCING EQUITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION FY 13-14, at 8 (2015) [hereinafter OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2013-14], http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf.

17. OCR enforces a number of statutory mandates. *See* Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (2012) (prohibiting sex discrimination by educational institutions); Age Discrimination Act of 1975, 29 U.S.C. § 621 (2012) (prohibiting discrimination on the basis of age); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2012) (prohibiting discrimination on the basis of disability); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012) (prohibiting discrimination on the basis of race, color or national origin by recipients of federal financial assistance). In addition, OCR possesses authority to enforce the Boy Scouts of American Equal Access Act of 2001 and Title II of the Americans with Disabilities Act of 1990. *See* Boy Scouts with Disabilities Act of 1990, 20 U.S.C. § 7905 (2012) (mandating public schools to provide equal access to school facilities); Title II of the American with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012) (prohibiting discrimination the basis of disability by any public entity, regardless of receipt of federal funds).

own right, it suggests broader lessons about constraints on presidential control across the administrative state. The case study confirms that agencies regularly implement White House goals through guidance documents, thereby avoiding the more robust constraints on rulemaking; crucially, however, it also suggests that agencies implement presidential policy preferences through the strategic exercise of enforcement discretion and, in doing so, evade even the modest checks associated with guidance documents. This evidence suggests that proposals to limit an agency's ability to weaken external checks on presidential policies by relying on guidance documents may be counterproductive, as the agency could simply respond by channeling policymaking through the strategic exercise of enforcement discretion, potentially eliminating such oversight altogether.

Part I explores mechanisms of presidential control over different forms of agency policymaking and the incentives for politically motivated agencies to employ certain forms opportunistically to minimize external constraints. It then sets forth the contours of the empirical debate over the extent to which agencies engage in such opportunism. Part II assesses this empirical question, presenting a case study of policymaking in the Office for Civil Rights. It detects significant policy shifts in OCR's exercise of enforcement discretion, shifts that have evaded meaningful external oversight. Part III explores potential reforms to temper politically motivated exercises of enforcement discretion. It concludes that prospects for strengthening external oversight are limited, counseling in favor of a turn inward to empower the civil service bureaucracy within the agency itself.[18]

II. CONSTRAINTS ON PRESIDENTIAL ADMINISTRATION

Agencies typically possess at their disposal a variety of policymaking tools, including rulemaking, the issuance of guidance documents,

18. A growing body of literature on "internal separation of powers" explores the potential for institutional design reforms focusing on agency structures and processes to discipline agency policymaking. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 688-89 (2000) (proposing bureaucratic reforms to enhance functional specialization and cabin politicization of agencies); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013) (examining effects of institutional design on executive branch legal decision-making); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (outlining structural mechanisms to cabin executive branch policymaking discretion); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011) (exploring the impact of agency structure and design on substantive decision-making); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009) [hereinafter Metzger, *Interdependent Relationship*]; Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015) (examining the impact of interagency structures on executive branch policymaking).

and the strategic exercise of enforcement discretion.[19] First, agencies may engage in notice-and-comment rulemaking to produce legally binding "legislative rules."[20] Second, they may issue a "guidance document," defined by the Office of Management and Budget as "an agency statement of general applicability and future effect, other than a regulatory action . . . that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue."[21] These documents appear in a variety of formats, including memoranda, circulars, bulletins, and manuals,[22] and are exempt from the APA's notice-and-comment requirements.[23] A third policymaking tool frequently available to agencies is the strategic exercise of enforcement discretion. Decisions regarding which cases to investigate and how to resolve them provide a powerful tool to shape behavior and achieve policy goals. This policymaking tool often overlaps with the second policymaking tool, for example when a guidance document instructs officials how they should exercise their discretion in individual cases. It is at least conceivable, however, that individual enforcement decisions reflect larger policy goals even without being memorialized in a guidance document.

The precise mechanisms of presidential influence over each of these policymaking tools differ, and mechanisms of external oversight of such presidential influence likewise vary based on the policymaking tool employed. This variability creates incentives for agencies to employ certain tools opportunistically to minimize checks on their discretion, although practical and doctrinal considerations may counterbalance these incentives. Consequently, the extent to which agencies engage in such opportunistic behavior remains an open empirical question.

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19. Congress sometimes limits the policymaking tools available to an agency. For example, Title VII of the Civil Rights Act of 1964 vested the Equal Employment Opportunity Commission with the authority to investigate complaints alleging employment discrimination but denied it the authority to develop substantive regulations interpreting the statute or to initiate judicial or administrative enforcement proceedings. Pub. L. No. 88-352, 78 Stat. 252 (1964). The EEOC's powers have since been amended. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-12, 123 Stat. 5.

20. 5 U.S.C. § 553 (2012); *see* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (noting that rules promulgated pursuant to notice-and-comment rulemaking are entitled to binding force of law).

21. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10, at 6.

22. *Id.* at 2.

23. 5 U.S.C. § 553 (exempting "interpretive guidance" and "general statements of policy" from notice-and-comment requirements).

A. *Mechanisms of Presidential Control Across Policymaking Tools*

Few today contest that agency policymaking is subject to an unprecedented degree of control by the President. The precise mechanisms of such control may vary, however, depending on which policymaking tool is employed.

The mechanisms of presidential influence over agency rulemaking have been well documented.[24] First, the appointment power allows the White House to install ideological allies in the agency leadership positions to which rulemaking authority is delegated.[25] Second, the emergence of centralized regulatory review has facilitated presidential control over rulemaking. Since the 1970s, presidents have issued a series of Executive Orders requiring agencies to submit all "significant" rulemaking proposals for pre-clearance by the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget (OMB).[26] While OIRA does not claim formal authority to reject proposals, the White House routinely negotiates changes and may quash proposals by delaying approval indefinitely.[27] These two developments—the expansion of political ap-

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24. *See* sources cited *supra* note 8.

25. *See* Barron, *supra* note 1, at 1121-33 (discussing increased politicization of administrative agencies due to growing number of presidential appointments and aggressive White House screening of candidates); *see also* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008). The Constitution provides little guidance for the appointment of administrative officials, stating only that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2. It does not define "non-inferior" officers, nor does it specify appointment procedures for administrative officials below non-inferior officers.

26. *See* Exec. Order No. 13,497, 3 C.F.R. 218 (2010); Exec. Order No. 13,422, 3 C.F.R. 191 (2008), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010); Exec. Order 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 12,291, 3 C.F.R. 127, 128-30 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. at 649; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-19, LEGISLATIVE COORDINATION AND CLEARANCE (1972), *revised* Sept. 20, 1979.

27. Professor Mendelson's empirical study shows that OIRA under President Clinton allowed fewer than forty percent of proposed regulations to proceed without change, while the Bush Administration permitted only seventeen percent of such proposals to proceed unaltered. Mendelson, *supra* note 1, at 1150. Of course, the President does not personally scrutinize every policy proposal subject to regulatory review. As Professors Bressman and Vandenbergh note, "[p]residential control is a 'they,' not an 'it,' " as various White House offices work in conjunction with OIRA to influence agencies' policy development. Bressman & Vandenbergh, *supra* note 1, at 49-50. Even with this limitation, however, the process of regulatory review undoubtedly provides the White House with a powerful tool to shape agency policymaking.

pointments and the emergence of centralized policy review—ensure that agency rulemaking conforms to the White House's political agenda.

These two mechanisms similarly enhance the President's influence over agency guidance documents. Unlike rulemaking decisions, which typically are made by an agency's presidentially appointed leader, guidance documents frequently are issued by lower-level officials. Nonetheless, the steady expansion of the President's appointment power increases the likelihood that these lower-level officials have been screened for allegiance to White House policy preferences.[28] The number and percentage of presidentially appointed agency positions has nearly doubled over the past fifty years, and the vast majority of these positions serve at the pleasure of the President with no protections from removal.[29] Moreover, Congress has eliminated civil service protections for large segments of the bureaucracy, rendering a growing number of agency officials vulnerable to removal on ideological grounds rather than for cause.[30] As then-Professor David Barron observed, "Agencies are now staffed in ways that make them increasingly likely to speak the White House line as if it were their own, even if they have not been ordered to do so by the President."[31] Moreover, the Bush and Obama administrations have extended centralized regulatory review to "significant guidance documents," enabling the White House to influence the use of this tool

28. Notwithstanding social science literature characterizing the relationship between Congress and the President as one of competition over agency control, *see* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989); Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 L. & CONTEMP. PROBS. 91 (1994); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989), Congress has tended to exercise its discretion to *expand* the President's appointment power. Even more puzzling, Congress has limited its *own* ability to check the President's choice of appointee, expanding the number of administrative positions appointed by the President without Senate approval. *See, e.g.*, Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (codified in scattered sections of the U.S.C.).

29. DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 70, 82-83 (2012). To be sure, the power to appoint and remove does not grant the President unfettered control over the officials serving under him. As Professor Peter Strauss notes, while the Constitution undoubtedly confers on the President the power to exercise oversight over his appointee, it does not grant him the right to legally compel the appointee to take a particular action. Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704-05 (2007). If the President is unable to persuade the appointee to adopt his preferred position, the only recourse available is removing the officer, which incurs political costs.

30. *See* LEWIS & SELIN, *supra* note 29, at 72-81 (describing growth of federal employment exempted from Title 5 civil service protections).

31. Barron, *supra* note 1, at 1121.

just as it influences rulemaking, providing a mechanism for the White House to stymie disfavored policies.[32]

The mechanisms of presidential control over agency exercises of enforcement discretion in the absence of a guidance document are less apparent. Unlike both rulemaking and guidance documents, individual enforcement decisions typically are made, at least in the first instance, by street-level civil service bureaucrats insulated from political influence.[33] Additionally, the system of centralized OIRA review does not apply to individual enforcement decisions.

Notwithstanding these limitations, one can readily imagine means by which an agency's political leadership controls enforcement decisions. It might influence those decisions ex ante by instructing lower-level officers on how they should exercise their enforcement discretion orally or through some other means than a guidance document. Political operatives within the agency also may control those decisions ex post by requiring their personal approval for each and every enforcement decision. Moreover, even where agency appointees lack the capacity to review all decisions, they could identify a subset of cases of particular interest for review. In fact, agency leadership might be able to shape the tone and culture of the agency so effectively as to influence staff behavior without any explicit commands or personal review at all. While career officers may not be formally bound by the implicit policy preferences of the political leadership, the desire to routinize decisions and avoid conflict with organizational superiors may be sufficient to achieve compliance.[34]

B. External Oversight Across Policymaking Tools

Just as the mechanisms of presidential control differ across agency policymaking tools, the strength of external constraints to presidential power varies across policymaking tools.

1. Checks on Rulemaking

Rulemaking presents the most salient and publicly accessible form of agency policymaking, ensuring robust external constraints on White House preferences and affording the broadest protections against unilateral decision-making.

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32. Exec. Order No. 13,422, 3 C.F.R. 191 (2008), *revoked by* Exec. Order No. 13,497,3 C.F.R. 218 (2010); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEM. No. 09-13, GUIDANCE FOR REGULATORY REVIEW (2009).

33. *See* LEWIS & SELIN, *supra* note 29, at 66.

34. *See, e.g.*, Anthony, *supra* note 11, at 1363 (discussing the need for a more nuanced assessment of the relationship between the political appointees at agency headquarters and civil service staff in field offices).

The judiciary imposes strong legal constraints on presidential control over rulemaking by requiring agencies to provide a contemporaneous, reasoned justification[35] and exercising "hard-look review"[36] over rulemaking decisions. In *Massachusetts v. Environmental Protection Agency*,[37] the Supreme Court was even willing to closely scrutinize an agency's decision *not* to engage in rulemaking, ultimately rejecting what was widely viewed as a presidentially directed decision not to regulate greenhouse gases.[38]

Congress and the public at large also play important roles in disciplining agency rulemaking, paying considerable attention to their proposals and passage.[39] Specifically, the APA's procedural requirements—which mandate that agencies provide the public with the "opportunity to participate in the rule making through submission of written data, views, or arguments," take these public comments into consideration, and publicly explain its reasons for ultimately adopting the policy[40]—empower the public to exercise significant checks on such decisions. Taken together, these mechanisms ensure that presidentially directed rulemaking decisions are subject to political accountability, consistent with congressional intent, and not biased or arbitrary.

2. *Checks on Guidance Documents*

Presidential policies announced through the issuance of guidance documents are subject to comparatively weaker external constraints. Although guidance documents theoretically are subject to closer judi-

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35. *See* SEC. v. Chenery Corp. (Chenery I), 318 U.S. 80, 87, 95 (1943); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 958 (2007) (noting that *Chenery I* "operates both to bolster the political accountability of the agency's action and to prevent arbitrariness in the agency's exercise of discretion").

36. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see* Metzger, *supra* note 2, at 491 (describing hard-look review announced in *State Farm* as a judicial effort to mitigate the "risk of unaccountable and arbitrary exercises of administrative power").

37. 549 U.S. 497, 527-28 (2007).

38. *Id.* at 533-35; *see* Freeman & Vermeule, *supra* note 2, at 83-87 (discussing strictness of review applied in *Massachusetts v. EPA*); *see also* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 799-803 (2007) (same).

39. For discussions of congressional control over agency rulemaking decisions, see MORTON ROSENBERG, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE (2008); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 68 (2006); Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 740, 742 (2009); Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 485-86 (2011). Congress has also created an expedited legislative process to review agency rules before they take effect. *See* Congressional Review Act, Pub. L. No. 104-121, §§ 251-253, 110 Stat. 868 (codified as amended at 5 U.S.C. §§ 801-808 (2012)) (enacting procedures for congressional review of agency rulemaking).

40. 5 U.S.C. § 553(c). The process of OIRA regulatory review exposes rulemaking to further public scrutiny, requiring public disclosure of cost-benefit analyses for all significant rules. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

cial scrutiny than rulemaking,[41] ripeness and finality doctrines typically preclude any judicial review at all. In *National Park Hospitality Ass'n v. Department of the Interior*,[42] the Supreme Court held that an agency's general statement of policy is not ripe for judicial review where:

> [It] does not create adverse effects of a strictly legal kind, . . . does not command anyone to do anything or to refrain from doing anything; . . . does not grant, withhold, or modify any formal legal license, power, or authority; . . . does not subject anyone to any civil or criminal liability; and . . . creates no legal rights or obligations.[43]

The Court of Appeals for the District of Columbia explains, "In terms of reviewability, legislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review, but general statements of policy are not."[44]

Guidance documents also are subject to less congressional and public oversight than rulemaking. Because they are exempted from APA notice-and-comment requirements,[45] guidance documents need not be subject to public comment or even publicly disclosed. It is worth noting that since 2007, the White House has imposed upon itself an obligation to publicly disclose "significant guidance documents."[46] This obligation, however, lacks any enforcement mechanism and may be rescinded at any time. Even when publicly disclosed, guidance documents typically attract less congressional and public attention than rulemaking, thereby limiting mechanisms of political accountability.

3. Checks on Strategic Exercises of Enforcement Discretion

Among the policymaking tools available to agencies, the strategic exercise of enforcement discretion is subject to the weakest external constraints. Courts play a minimal role in disciplining such policies because enforcement decisions do not constitute "final agency action" subject to judicial review under the APA[47] unless and until the agency completes its investigation, files an administrative complaint, and

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41. *See* United States v. Mead Corp., 533 U.S. 218, 254 (2001) (stating that "policy statements, agency manuals, and . . . enforcement guidelines" lie "beyond the *Chevron* pale" and instead are subject to the less deferential standard set forth in *Skidmore* (first citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); then citing Skidmore v. Swift & Co., 323 U.S. 134 (1944))).

42. 538 U.S. 803 (2003).

43. *Id.* at 809 (alterations omitted) (citations omitted).

44. Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).

45. 5 U.S.C. § 553(b) (2012).

46. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 10, at 21.

47. 5 U.S.C. § 704.

enters a formal adjudicative finding of noncompliance.[48] The vast majority of agency enforcement decisions never reach a formal finding of noncompliance susceptible to judicial review.[49]

Perhaps more importantly, an agency's decision *not to* initiate enforcement proceedings generally is insulated from any review at all. In *Heckler v. Chaney,* death row inmates sued the Federal Drug Administration for failing to prevent state prisons from using certain drugs in lethal injections in violation of the Federal Food, Drug, and Cosmetic Act.[50] Rejecting the challenge, the Supreme Court held that an agency's refusal to initiate investigative or enforcement proceedings is a decision "committed to agency discretion" and thus presumptively immune from judicial review.[51] *Heckler* provided, however, that the presumption of non-reviewability might be reversed in certain narrow circumstances.[52]

Political constraints to agency exercises of enforcement discretion are similarly weak.[53] Neither Congress nor the public at large can discipline enforcement decisions unless they are made aware of them. Strategic exercises of enforcement discretion, however, may not be

48. *See* Fed. Trade Comm'n v. Standard Oil Co. of Cal., 449 U.S. 232, 239-41 (1980) (concluding initiation of administrative adjudication proceedings does not constitute "final agency action" subject to review); Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n, 324 F.3d 726, 731-32 (D.C. Cir. 2003) (concluding that agency investigation and request for voluntary corrective action does not constitute "final agency action" subject to judicial review).

49. *See* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs,* 52 ADMIN. L. REV. 1345, 1368-69 (2000) (noting that the "huge majority of administrative enforcement proceedings settle; in these cases, there is no formal hearing and no possibility of judicial review") (footnote omitted).

50. 470 U.S. 821 (1985).

51. *Id.* at 838 (citing 5 U.S.C. § 701(a)(2)). The Court set forth three rationales for rejecting judicial review over agency "[r]efusals to take enforcement steps." *Id.* at 831. First, it reasoned that enforcement decisions require a "complicated balancing of a number of factors which are peculiarly within [an agency's] expertise," including an assessment of "whether a violation [actually] occurred," the likelihood of success of an enforcement action, the overall resources available to an agency, as well as the "agency's overall policies." *Id.* Second, it contended "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Third, it relied on a "tradition" of judicial deference over enforcement decisions, analogizing them to absolute prosecutorial discretion in the criminal context. *Id.*

52. *Id.* at 832-33, 833 n.4 (allowing that presumption might be rebutted where Congress establishes "substantive priorities, or . . . circumscrib[es] an agency's power to discriminate among issues or cases it will pursue" or where an agency " 'consciously and expressly adopt[s] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilit[y]" (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973))). *See generally* Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction,* 26 VA. ENVTL. L.J. 461 (2008) (proposing a theoretical framework for understanding judicial review over agency inaction).

53. *See* Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on* Marbury v. Madison, *Executive Inaction, and the Duty of the Courts to Enforce the Law,* 72 GEO. WASH. L. REV. 253, 286-87 (2003) (noting that retail enforcement typically flies under public radar); *see also* Andrias, *supra* note 14, at 1063, 1083-90 (discussing absence of transparency in enforcement priority shifts).

exposed unless accompanied by a guidance document. While Congress sometimes requires agencies to report their enforcement efforts, it generally does not mandate any particular level of specificity. As a result, statutory reporting requirements may fail to expose shifts in enforcement policy, precluding both Congress and the public from assessing existing enforcement policies, identifying gaps in enforcement, or exercising political pressure to shift priorities.

Here, too, the White House has directed agencies to make enforcement data publicly available.[54] Again, however, this commitment lacks any enforcement mechanism and is subject to rescission, enabling presidential policies pursued through enforcement discretion to evade meaningful external constraint.

C. *Circumvention Incentives*

The variability of external oversight across policymaking tools would appear to create incentives for politically motivated agencies to employ certain tools opportunistically to minimize constraints on executive discretion. Practical and doctrinal considerations, however, may counterbalance the incentives to evade more rigorous constraints,[55] leaving the extent to which agencies actually engage in such opportunistic behavior a subject of debate.

Current doctrine generally grants an agency the freedom to choose any policymaking tool in its arsenal to effectuate a given policy. Pursuant to *SEC v. Chenery Corp. (Chenery II)*, courts will not exercise judicial review over an agency's decision to promulgate a new policy through an enforcement proceeding rather than rulemaking.[56] By contrast, an agency decision to announce a new policy through a guidance document rather than rulemaking is subject to judicial review,[57] but even here the considerable doctrinal confusion over the distinction between these policymaking forms grants agencies wide

54. Memorandum on Regulatory Compliance, 2011 DAILY COMP. PRES. DOC. 1, 1 (Jan. 18, 2011), *reprinted in* 76 Fed. Reg. 3825, 3825 (Jan. 21, 2011) (explaining that "[g]reater disclosure of regulatory compliance information fosters fair and consistent enforcement . . . [and] is a critical step in encouraging the public to hold the Government and regulated entities accountable . . . provid[ing] Americans with information they need to make informed decisions").

55. *See infra* Sections II.D.1, II.D.2.

56. 332 U.S. 194, 203, 207 (1947); *see also* NLRB v. Bell Aerospace Co. Div. of Textron Inc., 416 U.S. 267, 294-95 (1974).

57. *See* Texas v. United States, No. 15-40238, 2015 WL 6873190, at *19 (5th Cir. Nov. 9, 2015) (finding substantial likelihood of success on merits of argument that Obama administration policy granting deferred action to undocumented immigrants does not constitute policy statement exempt from notice-and-comment rulemaking requirements because it "imposes rights and obligations" and does not leave room for agency discretion); General Elec. Co. v. EPA, 290 F.3d 377, 382, 385 (D.C. Cir. 2002) (holding that agency may not issue informal Guidance Document to promulgate policy with "binding effect" but must instead undergo notice-and-comment rulemaking).

latitude to choose between the two.[58] An agency seeking to implement a presidential policy preference thus may choose to do so by engaging in rulemaking, issuing a guidance document, or exercising its enforcement discretion, and courts generally do not second-guess that choice.

A number of commentators have expressed concern that agencies will exercise this choice to circumvent the more onerous constraints associated with rulemaking, focusing in particular on the use of guidance documents. Observing "widespread" abuse in this area, former Chair of the Administrative Conference of the United States Robert Anthony states:

> Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, it eases its work greatly in several undesirable ways. It escapes the delay and the challenge of allowing public participation in the development of its rule. It probably escapes the toil and the discipline of building a strong rulemaking record. It escapes the discipline of preparing a statement of the basis and purpose justifying the rule. It may also escape APA publication requirements and Office of Management and Budget regulatory review. And if the agency can show that its informal document is not final or ripe, it will escape immediate judicial review. Indeed, for practical reasons it may escape judicial review altogether.[59]

Professor Mark Seidenfeld likewise suggests that agencies "exploit" policy statements to implement policies that likely would "succumb to political or legal opposition were [they] adopted using notice-and-comment procedures."[60] The Supreme Court's recent decision in *Mortgage Bankers Association v. Perez* frankly acknowledges this risk: "There may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions."[61]

Although most of the commentary in this area focuses on the use of guidance documents, it would appear that agency exercises of enforcement discretion present the greater risk of circumvention, as this policymaking tool potentially evades any external oversight. As long as an enforcement decision does not result in final adjudication, and most do not, it is unlikely to be scrutinized by the courts, Con-

58. *See* Anthony, *supra* note 11, at 1359; Seidenfeld, *supra* note 11, at 334-35.

59. Anthony, *supra* note 11, at 1317-18 (footnotes omitted); *see also* Mendelson, *supra* note 11, at 408 ("[B]y issuing a guidance document, an agency can obtain a rule-like effect while minimizing political oversight and avoiding the procedural discipline, public participation, and judicial accountability required by the APA.").

60. Seidenfeld, *supra* note 11, at 343.

61. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015); *see also* Texas v. United States, No. 15-40238, 2015 WL 6873190 (5th Cir. Nov. 9, 2015) (rejecting Obama administration's use of guidance document rather than notice-and-comment rulemaking to implement deferred action policy).

gress, or the general public. While the use of policy guidance may weaken external constraints, the exercise of enforcement discretion potentially eliminates them altogether.

A number of practical and doctrinal considerations, however, arguably counterbalance an agency's motivation to exercise its choice of policymaking tool in a manner that evades more rigorous oversight mechanisms.

1. Practical Factors

A number of practical factors may limit the extent to which presidential goals are achieved through exercises of enforcement discretion.

As suggested above, political operatives may lack the capacity to influence individual enforcement decisions. Individual enforcement decisions typically are made by street-level bureaucrats who are protected by civil service laws designed to insulate them from political manipulation.[62] Without a guidance document, an agency's political leadership may be unable to communicate a policy on how those decisions should be made. Nor is it clear that agency leadership can control enforcement decisions by exercising ex post review over them, given the sheer volume of enforcement decisions.[63] In fact, Professor Strauss has suggested that lower-level bureaucrats channel policymaking through enforcement proceedings precisely to avoid political supervision.[64]

Yet one can readily imagine that in at least some cases, an agency's political leadership is able to communicate policy preferences to street-level enforcement officers without a guidance document; it might issue a policy directive orally, for example.[65] Moreover, it might exercise ex post control notwithstanding time and resource limitations by limiting its review to certain types of cases. It is worth noting in this respect that at least one study finds that exercises of

62. *See, e.g.*, Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1482 (1992) ("The usual interface between a member of the public and an agency does not involve the agency head, but a relatively low-level member of staff[.]").

63. *See* Andrias, *supra* note 14, at 1071 (noting that time and resource limitations preclude systemic political review over all significant enforcement decisions).

64. Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1253-54 (1974).

65. Magill & Vermeule, *supra* note 18, at 1076 ("[T]he structure of adjudication allows adjudicators to operate fairly independently on matters that are within their purview, thus allocating authority down within the agency. But senior agency policymakers retain a fair amount of freedom to craft rules that remove matters from the purview of case-by-case adjudication.").

agency enforcement discretion have been *more* susceptible to presidential influence than guidance documents.[66]

Even if political operatives have the capacity to influence individual enforcement decisions without guidance documents, commentators argue that other practical considerations, nonetheless, encourage them to use guidance documents to announce the policies pursued through exercises of enforcement discretion.[67] Among these, the desire to claim political credit for a policy decision may motivate such disclosure. Additionally, disclosure allows regulated entities to comply before an investigation is initiated, thereby conserving agency resources, protecting against due process objections, and promoting positive relationships with regulated entities.[68]

Whether these considerations ultimately lead to public disclosure of enforcement decisions is unclear. The desire to allow regulated entities to conform prior to the initiation of an enforcement action encourages an agency to disclose new policies to regulated entities, but provides no incentives to disclose to regulatory beneficiaries or the general public. This informational asymmetry favors deregulatory initiatives because only regulated entities will mobilize political pressure to challenge policy choices. Moreover, although agencies may be motivated to publicly disclose an enforcement policy in order to claim political credit for it, this dynamic may not apply to all enforcement policies. For a politically motivated policy made for the benefit of a small minority or faction, incentives for public disclosure disappear entirely. These are the very cases, of course, where the need for public disclosure is greatest.

These competing practical considerations render the extent to which agencies rely on individual exercises of enforcement discretion to implement presidential policy goals an open question.

2. *Doctrinal Factors*

In addition to the practical considerations that might impede an agency's capacity or willingness to exercise its enforcement discretion in pursuit of presidential policy goals, commentators have identified doctrinal considerations that might counterbalance the agency's incentives to circumvent constraints in this manner.[69] They argue that

66. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 415-17 (2010) (conducting empirical study of decisionmaking by the Equal Employment Opportunity Commission).

67. *See* Mendelson, *supra* note 11, at 435-36 (contending that risk of "secret law" or nondisclosure of agency policies is overstated).

68. *Id.*

69. Magill, *supra* note 7, at 1423; *see also* Raso, *supra* note 8 (evaluating empirical evidence suggesting agencies do not channel policies through policy guidance to evade constraints on discretion).

because only formalized decisions—such as those made pursuant to rulemaking and formal agency adjudication—are entitled to the "binding force of law"[70] and *Chevron* deference,[71] agencies will be inclined to engage in these forms of policymaking notwithstanding the costs associated with them. That is, while an agency might be tempted to rely on policy guidance or exercises of enforcement discretion to avoid the rigorous constraints on rulemaking, it might nonetheless submit to those constraints in order to legally bind regulated entities and obtain a more deferential standard of judicial review. Justice Sotomayor's opinion in the *Mortgage Bankers* case articulates this view. While acknowledging that non-formalized policies are comparatively easier to promulgate than rulemaking, she concludes "that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.' "[72] In these ways, a number of commentators argue that concerns regarding administrative evasion of rulemaking protections are overblown.

Others, however, suggest that neither the binding force of law nor a more deferential standard of review may suffice to outweigh the incentives to evade external oversight. An agency that is able to obtain voluntary compliance with its policy preferences has little

70. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001) ("It 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."); *see also* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 511-13 (2013).

71. *Mead Corp.*, 533 U.S. at 221, 234; *see also* Skidmore v. Swift & Co., 323 U.S. 134 (1944); Magill, *supra* note 7, at 1441 ("The *Mead* decision has been, and should be, read to force the agency to give something up—namely, *Chevron* deference—if it chooses to announce its interpretation of a statute or regulation through a guidance document.").

72. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015) (citation omitted) (reversing D.C. Circuit's *Paralyzed Veterans* doctrine, which required agencies to undergo rulemaking in order to change its interpretation of its own regulation).

need to legally bind regulated entities.[73] It also benefits little from deferential judicial review unless it is likely to be challenged in litigation.[74]

In these ways, existing scholarly accounts dispute the extent to which agencies rely on enforcement discretion to promote presidential policy goals.

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Agencies seeking to implement a presidential policy goal possess a range of policymaking tools at their disposal—including rulemaking, the issuance of guidance documents, and the strategic exercise of enforcement discretion—each of which is subject to varying degrees of external oversight. This variability creates incentives for an agency to advance policy goals—especially controversial ones—through particular policymaking tools to evade stronger checks on its discretion. While commentators have identified factors that might counterbalance these incentives, the extent to which agencies actually engage in such opportunistic behavior remains an open empirical question. The next Part engages in this empirical inquiry, presenting a case study of the use of different policymaking tools at one agency—the Department of Education's Office for Civil Rights.

III. CASE STUDY OF THE OFFICE FOR CIVIL RIGHTS

This Part presents a case study of policymaking in the Department of Education's Office for Civil Rights (OCR). After introducing some of the more salient characteristics of this agency, it examines OCR's use of different policymaking tools to pursue White House goals. The study finds that OCR rarely pursues the President's agenda through rulemaking, frequently relying instead on guidance documents. More alarmingly, it suggests significant political influence over the agency's exercise of enforcement discretion, generating policies that have evaded meaningful external oversight. This Part closes by considering the generalizability of these findings.

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73. *See* Mendelson, *supra* note 11, at 407 (noting that regulated entities may prefer to comply with a non-mandatory policy where the cost of compliance is low but the sanctions for noncompliance are high or where they need to maintain a long-term relationship with the agency); *see also* Anthony, *supra* note 11, at 1327-30 (noting that many policies lacking legally binding effect have practically binding effect).

74. *See* Anthony, *supra* note 11, at 1316-17 (noting unlikelihood of legal challenge to agency policy where "the affected private parties cannot afford the cost or the delay of litigation, or because for other practical reasons they must accept a needed agency approval or benefit on whatever terms the agency sets"); *see also* Mendelson, *supra* note 11, at 411-13, 420-24; Seidenfeld, *supra* note 11, at 364-72. Additionally, empirical evidence suggests that the imposition of *Skidmore* standard of review rather than the more deferential *Chevron* standard has negligible results on the outcome of cases. *See* William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008).

A. Overview of the Office for Civil Rights

The Office for Civil Rights (OCR)[75] initially was created to implement Title VI of the Civil Rights Act of 1964, prohibiting recipients of federal financial assistance from discriminating on the basis of race, color or national origin.[76] Today, it is situated within the Department of Education[77] and maintains primary responsibility for enforcing federal protections against discrimination—on the basis of not only race, ethnicity and national origin, but also sex and disability—across our nation's primary, secondary, and post-secondary schools.[78] With an annual operating budget of approximately $100 million and over 500 staff members across twelve regional offices,[79] the importance, breadth, and depth of OCR operations render this agency worthy of study in its own right.

At the same time, the case study of OCR suggests broader lessons concerning presidential control over the administrative state more generally. First, like many agencies, OCR maintains an array of policymaking tools at its disposal. It engages in notice-and-comment rulemaking[80] and issues guidance documents.[81] It also possesses statutory authority to conduct administrative enforcement proceedings.[82] The breadth of policymaking tools available to OCR enables a comparative analysis of presidential influence across tools.

Second, aspects of OCR's institutional design are representative of a great number of agencies across the administrative state. Unlike independent agencies or those led by multi-member commissions, which are specifically designed to be insulated from presidential influence, OCR's structure and composition adhere to the traditional model of federal administrative agencies. Firmly ensconced within the President's executive branch hierarchy, OCR is located within the

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75. 32 Fed. Reg. 15,190, 15,190 (Nov. 7, 1967) (establishing Office for Civil Rights within Department of Health, Education and Welfare, predecessor to the Department of Education).

76. 42 U.S.C. § 2000d (2012) (originally enacted as Pub. L. No. 88-352, 78 Stat. 252 (1964)).

77. In 1979, Congress reorganized the Department of Health, Education and Welfare to create a separate cabinet department for education. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 671 (1979) (codified at 20 U.S.C. § 3411 (2012)).

78. *See* provisions of the U.S. Code cited *supra* note 17 and accompanying text (listing statutes enforced by OCR).

79. OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2013-14, *supra* note 16, at 8; OFFICE FOR CIVIL RIGHTS, BUDGET REQUEST, *supra* note 15, at 1.

80. *See, e.g.*, 42 U.S.C. § 2000d-1 (delegating authority to "issu[e] rules, regulations, or orders of general applicability").

81. *See* Magill, *supra* note 7, at 1390 & n.14 (describing inherent agency authority to issue policy guidance (first citing Skidmore v. Swift & Co., 323 U.S. 134 (1944); then citing Richard J. Pierce, Jr., 1 *Administrative Law Treatise* § 6.4 at 325 (Aspen, 4th ed. 2002))).

82. *See, e.g.*, 42 U.S.C. § 2000d-1 (delegating authority to conduct enforcement proceedings to terminate federal funds for noncompliance).

Department of Education, requiring OCR leadership to report to a higher level within the executive branch: the Secretary for Education.

Moreover, OCR leadership is subject to White House appointment. The Assistant Secretary for Civil Rights is nominated by the President with the advice and consent of the Senate and enjoys no protections from removal.[83] The White House has exercised this appointment power to install ideological allies to lead the agency. For example, President Clinton appointed Norma Cantu to the position, who had litigated school desegregation and funding inequities with the Mexican American Legal Defense Fund,[84] while President Obama appointed Catherine Lhamon, who had litigated the landmark *Williams v. California* case challenging unequal access to school resources while at the American Civil Liberties Union of Southern California.[85] President W. Bush, by contrast, appointed Gerald Reynolds, whose work with the Center for New Black Leadership and Center for Equal Opportunity made his opposition to race-conscious diversity policies and the disparate impact theory of liability well known.[86]

At the same time, OCR's large cadre of professional staff and attorneys, like most federal agency officials below the politically appointed leadership, are insulated from partisan pressures through civil service rules protecting them from being hired, fired, or punished on the basis of ideology or political affiliation.[87] Staff at each of the twelve regional OCR enforcement offices enjoy such protections, and there are no political appointees in these offices. In these ways,

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83. 20 U.S.C. § 3412(b)(2) (2012). A series of senior agency positions serving below the Assistant Secretary at D.C. headquarters—eleven in total—likewise are subject to political appointment. The U.S. Government Printing Office publishes the "Plum Book" every four years, listing all administrative positions within the executive and legislative branches subject to political appointment. It explains, "The duties of many such positions may involve advocacy of Administration policies and programs and the incumbents usually have a close and confidential working relationship with the agency head or other key officials." H. COMM. ON OVERSIGHT AND GOV'T REFORM, 112TH CONG., POLICY AND SUPPORTING POSITIONS iii (Comm. Print 2012).

84. 139 CONG. REC. 10,351 (1993) (recording appointment of Norma V. Cantu).

85. 159 CONG. REC. S6261, S6263 (daily ed. Aug. 1, 2013) (confirming the nomination of Catherine Lhamon).

86. *Nomination of Gerald A. Reynolds, of Missouri, to be Assistant Secretary for Civil Rights: Hearing Before Comm. on Health, Educ., Labor, and Pensions*, 107th Cong. 1 (2002); *see also* Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 749 & n.152, 751 n.170 (2010) (discussing opposition by the civil rights community to nomination and eventual recess appointment of Reynolds). For three of the eight years of the W. Bush administration, no Assistant Secretary was appointed, leaving the agency without leadership.

87. 20 U.S.C. § 3413(c) (authorizing the Assistant Secretary to "select, appoint, and employ such officers and employees, including staff attorneys, as may be necessary to carry out the functions of the Office" but providing that they be subject to civil service protections of Title 5 governing appointments in competitive service, chapter 51, and subchapter III of chapter 53 relating to classification and General Schedule pay rates).

the central aspects of OCR's leadership and staffing structure are representative of most federal agencies across the administrative state.

Finally, OCR's substantive charge—civil rights enforcement—presents a particularly contentious issue politically. Accusations of presidential subversion of civil rights mandates are nearly as old as the civil rights statutes themselves. Leon Panetta, former head of OCR, claimed the Nixon administration dismissed him from this position for rigorously enforcing federal civil rights laws in contravention of the President's political agenda.[88] The Reagan administration similarly fell under critical fire for focusing exclusively on claims of intentional discrimination and rejecting more structural or systematic reforms.[89] More recently, a series of reports accused the George W. Bush administration of manipulating civil rights enforcement for partisan ends.[90] Targeting presidential interference with OCR in particular, Professor Lia Epperson argues that this "federal administrative agency historically tasked with protecting civil rights, effectively subverted its enforcement power to help eliminate the very policies and programs that sought to achieve racial inclusion in public education."[91] While the political salience of civil rights enforcement may distinguish OCR from agencies charged with enforcing less contentious areas of the law, this salience ensures consistent White House involvement, thereby providing a valuable opportunity to evaluate the external constraints on such influence. For these reasons, the case study of OCR offers important lessons for the larger administrative state.

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88. *See* LEON E. PANETTA & PETER GALL, BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT 357 (1971) (recounting President Nixon's hostility to civil rights enforcement and consequent removal of Panetta as the head of OCR).

89. *See* Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1008-13 (1989) (describing presidential civil rights agenda under Reagan administration); *see also* Le, *supra* note 86, at 742-44 (describing critiques of civil rights enforcement under Reagan administration); Lemos, *supra* note 66, at 404-17 (same).

90. *See Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 139-68 (2007); U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. DEP'T OF JUSTICE: INFORMATION ON EMPLOYMENT LITIGATION, HOUSING AND CIVIL ENFORCEMENT, VOTING, AND SPECIAL LITIGATION SECTIONS' ENFORCEMENT EFFORTS FROM FISCAL YEARS 2001 THROUGH 2007 (2009), http://www.gao.gov/new.items/d1075.pdf; *see also* CITIZENS' COMM'N ON CIVIL RIGHTS, THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION (William L. Taylor et al. eds., 2007); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 77, 85 (2009) (criticizing DOJ under the W. Bush administration for "a worrisome erosion of institutional norms of impartiality, professionalism, and nonpartisanship in civil rights enforcement" and "a broader pattern of undue and, in some cases, unlawful political influence in civil rights matters").

91. Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 146, 166 (2008).

B. *OCR's Use of Different Policymaking Tools*

A comparative analysis of OCR's use of different policymaking tools supports the scholarly concern that agencies channel controversial presidential goals through guidance documents rather than rulemaking. It further suggests, however, that OCR implements significant policy shifts through the exercise of enforcement discretion.

1. Rulemaking

OCR's use of rulemaking to implement presidential goals has been exceedingly rare. In the past twenty-five years, the agency has promulgated new regulations to advance a presidential agenda only once.[92] In 2006, OCR under the Bush administration published final rules interpreting Title IX's prohibition against sex discrimination to permit the operation of single-sex schools and programs.[93] In its notice of proposed rulemaking, the agency expressly tied the reform to the President's school choice initiative, which sought to expand the types of educational opportunities available to students.[94]

In light of the robust legal and political constraints on rulemaking, one might ask why OCR would employ this policymaking tool at all. Although other factors such as the availability of the binding force of law and *Chevron* deference may have influenced the decision to pursue this policymaking form, it is worth noting that in this instance, the agency had no choice but to engage in rulemaking because it sought to reverse a prior regulation, which expressly prohibited single-sex schools and programs.[95] Had OCR been free to employ another policymaking tool, it is not at all clear that it would have chosen to engage in rulemaking.

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92. OCR amended or issued new regulations on two additional occasions over this time period, but these instances were spurred not by the White House, but rather by congressional enactments. In 2000, OCR amended its regulations defining the term "program or activity" to conform to the definition mandated by the Civil Rights Restoration Act. 65 Fed. Reg. 68,050, 68,050 (Nov. 13, 2000) (codified at 34 C.F.R. pts. 100, 104, 106, 110 (2015)). Six years later, it promulgated new regulations to ensure equal access to public school facilities in response to congressional enactment of the Boy Scouts of America Equal Access Act in 2002. 67 Fed. Reg. 69,456, 69,456 (Nov. 15, 2002) (codified at 34 C.F.R. §§ 108.1-.9 (2015)). Agencies have little choice but to engage in rulemaking under these circumstances. *See* Strauss, *supra* note 64, at 1247 ("A new statute which requires implementation does not present a choice between rulemaking and other forms of policy formulation: rules are required, although they are not always speedily forthcoming.").

93. 71 Fed. Reg. 62,530, 62,530 (Oct. 25, 2006) (codified at 34 C.F.R. § 106.34 (2015)).

94. 69 Fed. Reg. 11,276 (Mar. 9, 2004).

95. 40 Fed. Reg. 24,128 (June 4, 1975) (prohibiting single-sex classes with limited exceptions for sex education, physical education, and similar classes); *see* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (noting agencies must undergo notice-and-comment rulemaking to amend or reverse prior regulations).

2. *Guidance Documents*

OCR relies extensively on guidance documents to implement White House goals. Typically appearing in the form of a "Dear Colleague Letter" (DCL) to recipients of federal funding,[96] OCR has issued more than fifty guidance documents over the past twenty-five years.[97] For example, OCR implemented the Bush administration's commitment to religious freedom by issuing a DCL stating it would use Title VI and Title IX, which address race- and sex-discrimination respectively, to "aggressively prosecute harassment of religious students."[98] It promoted the Obama administration's policy on racial equity by issuing DCLs announcing it would aggressively investigate schools exhibiting racial disparities in rates of discipline[99] and allocation of resources.[100]

Perhaps most striking, both the Bush and Obama administrations used this policymaking tool to implement opposing positions on race-conscious diversity policies. OCR under the Bush administration issued policy guidance "strongly encourag[ing] the use of race-neutral methods for assigning students to . . . schools."[101] Only three years later, new leadership under the Obama administration withdrew

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96. Other forms of policy guidance issued by OCR include "Guidance" documents and "Policy Updates." *See* OFFICE FOR CIVIL RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf; OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf; Office for Civil Rights, *Policy Update on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency*, U.S. DEP'T OF EDUC. (Sept. 27, 1991), http://www2.ed.gov/about/offices/list/ocr/docs/lau1991.html.

97. OCR makes all policy guidance currently in effect available on its website. Office for Civil Rights, *Reading Room*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html (last visited Feb. 27, 2016).

98. Kenneth Marcus, Office of the Assistant Secretary, Office for Civil Rights, *Title VI and Title IX Religious Discrimination in Schools and Colleges* (Sept. 13, 2004), http://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html. By way of example, it cited a case in which a "white male undergraduate student was harassed by a professor for expressing conservative Christian views" on homosexuality. *Id.*

99. CATHERINE E. LHAMON & JOCELYN SAMUELS, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (Jan. 8, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf. The DCL characterizes as unlawful discrimination any discipline policy that has an adverse impact on students of a particular race unless the policy is "necessary to meet an important educational goal" and no "comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact." *Id.* at 11.

100. CATHERINE E. LHAMON, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: RESOURCE COMPARABILITY (Oct. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf.

101. STEPHANIE MONROE, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: ADDRESSING TITLE VI AND HOW OCR ASSESSES THE USE OF RACE IN ASSIGNING STUDENTS TO ELEMENTARY AND SECONDARY SCHOOLS (Aug. 28, 2008) (on file with author).

that guidance and replaced it with a series of DCLs expressly endorsing the use of race-conscious policies to promote diversity.[102] These examples demonstrate OCR's reliance on guidance documents to further politicized policy priorities.

3. Exercises of Enforcement Discretion

An analysis of OCR exercises of enforcement discretion suggests reliance on this tool to implement politicized policy initiatives as well. Although the vast majority of OCR investigations are initiated in response to an individual complaint filed with the agency,[103] OCR also proactively launches broad-scale, system-wide "compliance reviews," designed to address "issues of strategic significance."[104] OCR distinguishes compliance reviews from individual complaint investigations as follows: "Complaints often affect one or a small group of students, whereas compliance reviews target issues of discrimination that are acute, regional, national in scope, or are newly emerging. They are designed to affect significant change at the target institution and provide widely applicable solutions."[105]

This analysis of OCR's exercise of enforcement discretion relies on data obtained pursuant to a Freedom of Information Act (FOIA) request for documents relating to OCR compliance reviews.[106] For each compliance review initiated by OCR, the FOIA response provided: a docket number, the name of the educational entity targeted for investigation; dates on which the review was initiated, resolved, and closed; a list of the specific issues investigated in the review; and a

102. The current administration issued guidance documents endorsing race-conscious policies on no fewer than four occasions. RUSSLYNN ALI & THOMAS E. PEREZ, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (Dec. 2, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.pdf (discussing the issuance of guidance documents by the U.S. Department of Education and the U.S. Department of Justice regarding the voluntary use of race in student assignment); JOCELYN SAMUELS, & CATHERINE E. LHAMON, OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: FISHER V. UNIVERSITY OF TEXAS AT AUSTIN (Sept. 27, 2013), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.pdf; CATHERINE E. LHAMON ET AL., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (May 6, 2014) (discussing *Schuette v. Coalition to Defend Affirmative Action* and its implications for institutions of higher education and elementary schools and their use of methods to achieve diversity).

103. OCR investigates every individual complaint filed with it. 34 C.F.R. § 100.7(b)-(c) (2015). The number of individual complaints filed with OCR per year varies considerably, ranging over the past ten years from a low of 5533 in 2005 to a high of 9989 in 2014. OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2013-14, *supra* note 16, at 8.

104. OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2009-12, *supra* note 16, at 4.

105. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FISCAL YEAR 2015 BUDGET REQUEST 11 (2015) [hereinafter OFFICE FOR CIVIL RIGHTS, BUDGET REQUEST], http://www2.ed.gov/about/overview/budget/budget15/justifications/bb-ocr.pdf.

106. The Freedom of Information Act request sought from the Department of Education's Office for Civil Rights all "[d]ocuments relating to proactive compliance reviews, including resolution agreements, termination letters, and records of monitoring efforts from FY 1990 to present." Freedom of Information Act Request to U.S. Dep't of Educ. (Feb. 25, 2014) (on file with author).

description of how each of these issues was resolved.[107] A comparison of compliance reviews initiated and resolved during the eight years of the Bill Clinton administration and the eight years of the George W. Bush administration shows significant shifts in the exercise of enforcement discretion.

First, these administrations differed drastically in the overall number of compliance reviews initiated, suggesting a difference in the aggressiveness of their systemic reform efforts. Table 1 sets forth these data. During the Clinton years, OCR initiated a total of 889 compliance reviews, or an average of 111 per year. The Bush administration, by contrast, initiated only 311 compliance reviews over eight years, yielding an average of 39 per year. This difference cannot be attributed to the complexity of reviews initiated. On the contrary, each compliance review initiated during the Clinton administration investigated on average 6.3 discrete issues, as compared to an average of only 3.4 issues per review in the subsequent administration. Nor can the difference be attributed to changes in funding, as the average annual appropriation to OCR during the Bush administration was more than forty percent greater than for the Clinton administration.[108] The disparity may, however, be due to differences in how the agency defines "compliance review." OCR sometimes defines the term to encompass any systemic investigation, including those that originally stemmed from an individual complaint.[109] Other times, OCR appears to use the term narrowly to refer to systemic investigations only if they did not originate with an individual complaint.[110]

More tellingly, the issues targeted in compliance reviews show significant shifts in policy priorities. Eighty-six percent (86%) of the compliance reviews initiated during the Clinton administration related to Title VI enforcement, investigating discrimination on the ba-

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107. Letter from Christie D. Swafford, United States Dep't of Educ., Office of Mgmt., Privacy, Information, and Records Management Services, to author regarding FOIA Request No. 14-00765-F (July 14, 2014) (on file with author); Email from Robert M. Carey, U.S. Dep't of Ed., Office for Civil Rights, to author regarding FOIA Request 14-00765-F, Excel Spreadsheet (Aug. 27, 2014) (on file with author).

108. The average annual appropriation to OCR under the Clinton administration was $60 million, while the average annual appropriation under the W. Bush administration was $86 million. The number of staff employed by OCR fell, however, from an annual average of 752 full-time equivalent employees during Clinton's two terms to an annual average of 658 full-time equivalent employees during Bush's two terms. *See* OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2003, at 2 (listing OCR budget requests, appropriations, and staffing levels from 1993 through 2003); OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2007-08, at 3 (listing OCR budget requests, appropriations, and staffing from 1997 to 2008).

109. *See* OFFICE FOR CIVIL RIGHTS, CASE PROCESSING MANUAL art. I, § 110(*l*), at 13 (2015), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf (providing that an individual complaint may be treated as a compliance review where it involves systemic issues).

110. *See* OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2013-14, *supra* note 16, at 44 (noting that resolution agreements addressing systemic issues result from both compliance reviews and individual complaints).

sis of race, color, or national origin, while only forty-five percent (45%) of the compliance reviews initiated during the Bush administration involved Title VI enforcement. By contrast, the Bush administration initiated far more compliance reviews to enforce protections against discrimination on the basis of disability than the preceding administration. Forty-five percent (45%) of compliance reviews initiated under Bush investigated such issues, as compared to only eight percent (8%) under Clinton.

Table 1
Compliance Reviews Initiated

	Clinton Administration	Bush Administration
Total Number	889	311
Race	86% (767)	45% (140)
Sex	13% (120)	38% (118)
Disability	8% (69)	46% (141)

Note: A single compliance review may investigate multiple forms of discrimination, such as race- as well as sex-discrimination. Consequently, the sum of reviews relating to race-, sex-, and disability-discrimination exceeds the total number of compliance reviews.

Data disaggregated by regional office provide further evidence of the politicization of enforcement discretion as set forth in Table 2. Regional offices are staffed exclusively with career officers who enjoy civil service protections. If individual enforcement decisions were not susceptible to political interference, one might expect variance across regional offices in light of the differing demographic makeup of each region, but consistency within each regional office through time. Yet the data, set forth in Table 2, indicate the precise opposite. Every single regional office during the Clinton administration initiated at least one compliance review to enforce Title VI protections relating to racial harassment, resource equity and comparability, or discipline, and ten of the twelve offices investigated these issues in at least ten distinct compliance reviews. The Bush administration, by contrast, rarely investigated these issues. Three of the twelve regional offices did not file a single compliance review involving these issues, and only one office investigated these issues in more than two compliance reviews.

Rather, regional offices during the Bush administration prioritized the enforcement of Title IX procedural requirements. Every single regional office in this time period initiated at least one compliance review involving Title IX enforcement related to grievance procedures, the designation of a responsible employee, or the dissemination of a sex-discrimination policy; and ten of the twelve offices initi-

ated five or more compliance reviews relating to such issues. During the preceding eight years, by contrast, three offices failed to initiate a single compliance review involving Title IX's procedural requirements, and only two offices initiated more than two reviews investigating such issues. The differences in issues investigated through time coupled with the consistency of issues across regional offices suggest that they are not the result of decisions by career staff.

Table 2
Compliance Reviews Initiated by Regional Office

	Title VI: Racial harassment; Resource equity & comparability; Discipline		Title IX: Grievance procedures; Designation of responsible employee; Dissemination of policy	
Region	Clinton	Bush	Clinton	Bush
1	13	1	4	12
2	10	2	1	2
3	6	0	1	7
4	10	1	0	3
5	15	1	1	5
6	1	1	0	14
7	17	0	0	11
8	10	1	0	6
9	28	0	0	7
10	10	2	0	7
11	23	1	1	5
12	19	4	3	7

Perhaps most revealing, the data suggest significant policy shifts in the manner in which investigations are resolved. The vast majority of investigations are closed either because the agency determines there is insufficient evidence to warrant proceeding further or because it negotiates a resolution agreement to remedy the issue of concern.[111] Because an administration is free to alter the legal and factual standards to justify further action for particular types of claims, high rates of insufficient evidence findings may reflect antipathy toward certain issues.[112] Table 3 sets forth the data on the per-

111. *See* OFFICE FOR CIVIL RIGHTS, CASE PROCESSING MANUAL art. III, § 303(a), at 21, § 304, at 22 (2015). OCR occasionally closes a compliance review on other grounds, such as when it refers the case to another agency or because private litigation is pending. *Id.* § 110(m), at 13.

112. A finding of insufficient evidence in any compliance review is noteworthy, as these reviews are initiated at the discretion of the agency, which presumably screens out meritless cases. OFFICE FOR CIVIL RIGHTS, OCR CASE PROCESSING MANUAL, art. III, § 303, at 21 (2015) (reviewing the consequences of an insufficient evidence determination).

centage of investigations that were closed due to insufficient evidence during the Clinton and Bush administrations. Of the total 5699 issues investigated and resolved during the Clinton administration, only thirteen percent (13%) were found to have insufficient evidence; in the subsequent eight years, twenty-two percent (22%) of the 1128 issues resolved were closed due to a finding of insufficient evidence.

Table 3
Findings of Insufficient Evidence

	Clinton Administration	Bush Administration
Enforcement investigations closed due to insufficient evidence	13%	22%
Race investigations closed due to insufficient evidence	11%	25%
Sex investigations closed due to insufficient evidence	27%	16%
Disabilities investigations closed due to insufficient evidence	12%	27%

These disparities become starker when the data are disaggregated by type of case. During the Bush administration, twenty-five percent (25%) of resolved Title VI investigations were closed because of a finding of insufficient evidence, more than twice the rate of such closures (11%) during the Clinton administration. Resolutions of disability-discrimination investigations reflect a similar pattern, with the Bush administration finding insufficient evidence in twenty-seven percent (27%) of these cases, as compared to only twelve percent (12%) during the Clinton administration. The resolution of investigations to enforce sex-discrimination protections exhibit the opposite trend: the Clinton administration closed more than a quarter of its Title IX investigations because of insufficient evidence, as compared to only sixteen percent (16%) during the subsequent administration.

Contrary to suggestions that individual enforcement decisions are too far removed from an agency's political leadership to be subject to presidential control,[113] these data indicate significant shifts in the initiation and resolution of compliance reviews.[114]

113. *See* Mendelson, *supra* note 11, at 435 (arguing that the threat of "hidden law" is overstated).

114. Political scientists have documented similar shifts in other agency enforcement contexts following changes in political leadership. B. DAN WOOD & RICHARD W. WATERMAN, BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY 73 (1994).

C. The Operation of Constraints on OCR Policymaking

The evidence of OCR policymaking supports the contention that agencies implement contentious policy initiatives through guidance documents to evade the more onerous constraints imposed on rulemaking. More alarmingly, however, it also shows that agencies circumvent even the modest checks on guidance documents by channeling policy initiatives through the strategic exercise of enforcement discretion.

Although OCR guidance documents have avoided the extensive constraints imposed on rulemaking, this policymaking tool nonetheless has remained subject to some degree of oversight. While courts have declined to exercise legal checks on OCR guidance documents,[115] OCR's practice of publicly disclosing guidance documents has enabled both Congress and the public at large to exercise political constraints. For example, when OCR issued a guidance document interpreting Title VI to permit colleges and universities to grant minority scholarships,[116] Congress mobilized pressure on the agency by requesting that the General Accountability Office (GAO) conduct a review of the policy; this political pressure ultimately resulted in the agency agreeing to "defer" its policy decision.[117] Similarly, the public has played a role in disciplining policies announced through OCR guidance documents. Public criticism of the Obama administration's guidance document announcing a new standard universities should use in investigating allegations of sexual violence, which appeared in mainstream news outlets including the *Wall Street Journal*, the *Washington Post*, and the *Atlantic Monthly*, has imposed a heavy political cost on this policy decision.[118] In these ways, OCR's pursuit of presidential policy goals through the issuance of guidance documents has been subject to some degree of political oversight.

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115. *See, e.g.*, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 944-45 (D.C. Cir. 2004) (rejecting on standing grounds challenge to OCR guidance document announcing new standard for Title IX compliance in university athletic programs); Wash. Legal Found. v. Alexander, 984 F.2d 483 (D.C. Cir. 1993) (denying judicial review pursuant to Administrative Procedure Act over challenge to OCR guidance document announcing policy on minority scholarships).

116. OCR's shifting policies with respect to minority scholarships are described in *Washington Legal Foundation*, 984 F.2d at 485.

117. *Id.*

118. *See, e.g.*, Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), http://www.wsj.com/articles/SB10001424053111903596904576516232905230642; Opinion, *The Feds' Mad Assault on Campus Sex*, N.Y. POST (July 20, 2011), http://nypost.com/2011/07/20/the-feds-mad-assault-on-campus-sex/; Wendy Kaminer, *The Save Act: Trading Liberty for Security on Campus*, THE ATLANTIC (Apr. 25, 2011), http://www.theatlantic.com/national/archive/2011/04/the-save-act-trading-liberty-for-security-on-campus/237833/; Letter from Gregory F. Sholtz, Assoc. Sec'y & Dir., Dep't of Acad. Freedom, Tenure, & Governance, to Russlynn Ali, Assistant Sec'y for Civil Rights, Office of Civil Rights, (June 27, 2011), http://www.nacua.org/documents/AAUPLetterToOCRReSexualViolenceEvidence.pdf (responding to the Dear Colleague Letter dated Apr. 4, 2011).

OCR has succeeded in avoiding these modest checks, however, by implementing policy goals through the exercise of enforcement discretion. Courts have exercised no legal checks on OCR's use of this policymaking tool. OCR enforcement proceedings do not *usually* result in settlement, but rather they *always* do. In the period for which data were available, OCR issued a letter of impending enforcement action in a compliance review on only two occasions and, in both cases, reached a voluntary resolution before initiating formal agency adjudication. Consequently, there has not been a single instance over the past quarter century in which an enforcement decision resulted in the final agency action necessary for judicial review.[119]

Additionally, Congress has played a minimal role in disciplining OCR's enforcement decisions, convening only four oversight hearings to evaluate OCR enforcement efforts since 1990. Of these, only the first raised a concern about under-enforcement.[120] The second hearing related to OCR's handling of a single complaint of sexual harassment,[121] while the last two examined concerns regarding *over*-enforcement.[122]

Finally, the limited disclosure of OCR enforcement decisions has precluded the public's ability to exercise meaningful checks on them. Pursuant to congressional requirements, OCR periodically issues reports summarizing its compliance and enforcement activities.[123] Although not statutorily required to provide any particular level of specificity, these reports do disclose information including the total number of compliance reviews initiated each year and some of the major issues targeted in such reviews. Yet, because this information is nei-

119. 5 U.S.C. § 704 (2012).

120. *Oversight Hearing: Office for Civil Rights, Department of Education Before the S. Comm. on Labor & Human Res.*, 102d Cong. 3-4 (1991) (addressing concerns of OCR's under-enforcement of Title VI with respect to ability grouping).

121. *Oversight Hearing on the Equal Employment Opportunity Commission Before the Subcomm. on Select Educ. & Civil Rights of the H. Comm. on Educ. & Labor*, 103d Cong. 136-42, 162-64 (1994) (discussing OCR investigation of a single allegation of sexual harassment at Moorhead State University).

122. *Hearing on Title IX of the Education Amendments of 1972 Before the Subcomm. on Postsecondary Educ., Training & Life-Long Learning of the H. Comm. on Econ. & Educ. Opportunities*, 104th Cong. 26 (1995) (assessing whether over-enforcement of sex discrimination in college athletics was "tearing down men's sports"); *see The Review and Oversight of the Department of Education's Office for Civil Rights: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Educ. & the Workforce*, 106th Cong. (1999) (addressing concerns about over-enforcement, particularly on the areas of athletics, English language learners, and standardized testing).

123. 20 U.S.C. § 3413(b)(1) (2012). Notably, although OCR is statutorily required to make these reports annually, it has issued only three reports over the past seven years. *See* OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO CONGRESS OF THE OFFICE FOR CIVIL RIGHTS FISCAL YEARS 2007-08 (2009) [hereinafter OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2007-08], http://www2.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf; OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2009-12, *supra* note 16; OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2013-14, *supra* note 16.

ther exhaustive nor statutorily mandated, it is conceivable that enforcement decisions vulnerable to public reprisal are excised from these reports. Moreover, these reports omit any indication of issues that were not pursued, either because they were closed due to insufficient evidence or because they were not initiated in the first instance.[124] These information gaps limit the public's ability to hold the agency accountable for shifts in enforcement policy.

Of course, further specificity may be disclosed in the manner in which the data for this study were obtained—a Freedom of Information Act request. Even this mechanism is limited, however, as it fails to provide crucial details regarding the conduct of investigations, the level of evidence necessary to proceed with an investigation, or the content and ongoing monitoring of resolution agreements reached. As a result, the agency is free to institute only cosmetic interventions such as the posting of anti-discrimination policies rather than more extensive remedial measures, all without public scrutiny.[125]

Importantly, the current administration has taken steps to improve the transparency of enforcement decisions. OCR now publishes a list of institutions under investigation and has made publicly available all resolution agreements entered since 2014.[126] While OCR should be applauded for these efforts, the lack of a mechanism for enforcement and the possibility of future rescission limit the usefulness of such self-imposed constraints.

The evidence suggests not only that OCR has exercised its enforcement discretion in furtherance of partisan policy goals, but also that in doing so, it has avoided even the modest constraints associated with guidance documents.

D. Generalizing from OCR's Choice of Policymaking Form

OCR's policymaking record suggests that competing practical and doctrinal considerations fail to counterbalance the agency's incentives to employ particular policymaking forms to minimize constraints

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124. *See, e.g.*, OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2007-08, *supra* note 123; OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2009-12, *supra* note 17; OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2013-14, *supra* note 16.

125. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) (endorsing model of "experimentalist regulation" in favor of traditional command-and-control remedies to restructure public institutions).

126. Office for Civil Rights, *Recent Resolutions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html?exp=2 (last visited Feb. 27, 2016); *see also* OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT FY 2013-14, *supra* note 16, at 5 ("To boost transparency, OCR instituted a new policy of publicizing lists of schools under investigation by OCR, including a list of colleges subject to pending sexual violence cases, and of uploading nearly every resolution agreement and letter reached during FY 2014 and beyond onto its website.").

on executive discretion. Several factors likely account for this dynamic, providing important clues as to the generalizability of these findings.

First, the OCR case study suggests that an agency's political leadership is both willing and able to exercise control over individual enforcement decisions. That is, exercises of enforcement discretion are not immune from political influence, even absent a guidance document directing the conduct of lower-level enforcement officers. Importantly, however, the case study focuses on compliance reviews, which are sufficiently limited in number to allow political operatives to exercise review over each and every decision. Enforcement decisions over individual complaints, which number in the thousands annually, may be less susceptible to presidential control. Yet the lack of information regarding individual complaint investigations leaves open the possibility that these decisions are subject to political influence as well. In any case, even without control over more individual complaints, which tend to be of limited practical impact, the ability to influence systemic investigations provides a powerful tool to achieve presidential policy goals without legal or political accountability.

Second, the evidence suggests that the binding force of law does not suffice to counteract the incentives to circumvent the rigorous checks on rulemaking. Three factors likely allow OCR to rely on nonformalized policymaking tools notwithstanding their lack of binding effect: the nature of the entities regulated, the normative weight of the agency's enforcement mission, and the types of sanctions available to the agency.

The entities regulated by OCR are unlikely to resist even nonbinding OCR policy. The costs of compliance for public K-12 schools in particular are low. Overseen by popularly elected school boards and their delegates, their compliance decisions ultimately are political decisions, and the ability to deflect responsibility onto the federal government reduces the political liability that might otherwise be imposed on a decision to comply. In addition, entities regulated by OCR are not driven by profit; while a business entity is likely to challenge an enforcement decision when the costs of compliance outweigh the risk of losing the challenge, the nonprofit and government institutions regulated by OCR do not face such financial incentives.

Moreover, civil rights agencies like OCR arguably carry more normative sway than other regulatory agencies, increasing the likelihood of voluntary compliance with its policies. Regulated entities may be particularly averse to media attention that could result from visible resistance to a federal civil rights agency. Agencies that regulate in more technical fields or those that regulate entities that do not depend on end-use consumers may face more resistance to policy impositions.

The nature of the sanctions available to OCR may also encourage regulated entities to comply with non-binding policy decisions. The potential sanctions for non-compliance of OCR policies are entirely binary; the agency either grants or denies all federal funding. The risk of a total loss of federal financial support, even if remote, creates powerful incentives to comply. Regulated entities facing the risk of more calibrated sanctions, by contrast, may have less to lose in challenging an agency's decision.

These factors eliminate any real cost to OCR's circumvention of checks on presidential power by relying on non-formalized policymaking tools. Even without the binding force of law, OCR's exercises of enforcement discretion and guidance documents produce significant regulatory effects on the ground. Although not all agencies will enjoy this luxury, those that share these characteristics with OCR have few incentives to expose themselves to the rigorous external checks of rulemaking.

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The absence of meaningful checks on OCR's exercise of enforcement discretion raises considerable normative concerns. First, it enables the President to direct agency enforcement in contravention of congressional intent or in abdication of statutory duties. Second, it permits policies to be developed without careful deliberation or public input. Third, the absence of transparency allows OCR to impose policies without political opposition. Finally, naked partisan preferences may override the neutral judgment and expertise of career enforcement officers. These normative concerns necessitate reforms to strengthen checks on agency exercises of enforcement discretion in pursuit of presidential policies. The next Part explores the potential for such reforms.

IV. STRENGTHENING CHECKS ON ENFORCEMENT DISCRETION

This Part explores potential reforms to temper presidentially motivated enforcement decisions. It begins by evaluating strategies to strengthen the role of external institutions to constrain agency enforcement discretion. Concluding that such reforms would be insufficient, it turns to the possibilities for enhancing *internal* constraints. Focusing on structures and processes within the agency itself, it proposes harnessing the civil service bureaucracy and its relationships with external institutions to discipline presidential power.

A. Legal Constraints

One strategy to constrain politicized enforcement decisions would be to strengthen legal checks on them. Such a reform might proceed in one of two ways. First, courts could doctrinally restrict the agen-

cy's ability to promulgate policies through enforcement proceedings rather than through alternative policymaking tools. Alternatively, they might exercise substantive review over enforcement decisions. Neither avenue is likely to find favor, however, and for good reason.

The first strategy would weaken doctrinal protection over the agency's choice of policymaking tool. A number of commentators have endorsed this approach to limit an agency's ability to choose between rulemaking and guidance documents. Professor Bressman, for example, would require agencies to provide a reasoned explanation for a decision to implement a policy through a guidance document in lieu of rulemaking, while Professor Watts argues for a clearer doctrinal distinction between policies that may be implemented through guidance documents and those that must undergo rulemaking.[127] The case study suggests, however, that such reforms would be counterproductive, simply channeling more decisions from guidance documents, which are subject to modest constraints, to enforcement discretion, which is subject to no meaningful oversight.

To avoid this result, this strategy would need to restrict an agency's ability to promote new policies through the exercise of enforcement discretion. Few, however, seriously advocate reversing *Chenery II* to restrict an agency's ability to impose new policies through exercises of enforcement discretion rather than either rulemaking or policy guidance. The reason is clear: any effort to distinguish when a given enforcement decision imposes new policy is destined to fail. As Professor Strauss notes, "Even with the most comprehensive 'legislative' scheme, judicial application inevitably 'makes' new law."[128] Consequently, "[t]he search for mandatory controls over the allocation of the policymaking function between rulemaking and adjudication remains illusory."[129]

Rather than restrict the agency's choice of policymaking form, the second strategy would allow substantive judicial review over the enforcement decisions themselves. Reforms to ripeness and finality doctrines would enable courts to review an enforcement decision before an adjudicatory finding of noncompliance is entered.[130] But even if doctrinal reforms made judicial review available, the targets of enforcement proceedings would be unlikely to take advantage of it.

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127. *See* Bressman, *supra* note 2, at 553 (endorsing requirement that agencies provide reasoned explanation for decision to implement policy through policy guidance rather than rulemaking); Watts, *supra* note 1, at 78 (urging development of clearer doctrinal distinction between legislative rules and nonlegislative rules to limit agencies' ability to impose new policies through policy guidance rather than through rulemaking).

128. *See* Strauss, *supra* note 64, at 1265; *see also* Andrias, *supra* note 14, at 1101 ("[T]he line between individual enforcement actions and enforcement policy is not always so clear . . . .").

129. *See* Strauss, *supra* note 64, at 1274.

130. *Cf.* Seidenfeld, *supra* note 11, at 384-85 (endorsing reforms to ripeness and finality doctrines to strengthen judicial review over policy guidance).

Regulated entities that are likely to voluntarily comply with OCR's non-binding policy preferences are equally unlikely to legally challenge those preferences.[131] The ability to shift political blame for compliance, lack of a profit motive, aversion to negative media attention, and risk of losing all federal funding make it exceedingly unlikely that the target of a compliance review would file suit against OCR rather than comply with its requests.

Others have argued for abandoning the *Heckler* doctrine to allow judicial review over *non*-enforcement decisions.[132] This reform would empower regulatory beneficiaries to legally challenge enforcement decisions. Like most agencies, however, OCR lacks the resources to investigate every potential violation of law and must engage in a "complicated balancing . . . of factors" to allocate these scarce resources.[133] Courts do not have the institutional competence, lacking both political accountability as well as bureaucratic expertise, to determine whether *X* percent of OCR enforcement efforts should be devoted to race discrimination claims, for example, while *Y* percent should be devoted to disability claims. Additionally, as Jeffrey Love and Arpit Garg point out, an agency can always defend its failure to investigate by claiming simply that it has not done so *yet*.[134] For these reasons, proposals to strengthen legal constraints to exercises of agency enforcement discretion are neither practicable nor advisable.

B. Political Constraints

Rather than relying on legal constraints to discipline agencies' exercise of enforcement discretion, another reform strategy might focus on political constraints. Congress could enhance its own ability and that of the public to discipline enforcement decisions by narrowing the scope of the agency's discretion[135] or by requiring more transparency in the agency's exercise of this discretion.[136]

To discipline presidential control over agency enforcement decisions, Congress might statutorily restrict the scope of an agency's enforcement discretion by, for example, earmarking funds for particular enforcement activities. This approach would need to overcome

131. *See supra* Section III.D (discussing such factors).

132. *See, e.g.*, Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461-62 (2008); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1667-68 (2004); Cheh, *supra* note 53, at 279-88; Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 675 (1985) (endorsing narrow reading of *Heckler* to allow judicial review over agency decisions not to enforce).

133. Heckler v. Chaney, 470 U.S. 821, 831 (1985); *see also* Price, *supra* note 14, at 748; Sunstein, *supra* note 132, at 682.

134. Love & Garg, *supra* note 14, at 1228.

135. *See id.* at 1245 (endorsing such reform).

136. *See* Andrias, *supra* note 14, at 1036 (advocating increased transparency of enforcement policy).

the veto-gates of the legislative process,[137] which may be particularly difficult for agencies like OCR, whose constituencies include diffuse regulatory beneficiaries lacking deep pockets. More importantly, even if legislative reforms in this area were achievable, they may not result in better policies. Legislative specificity denies agencies the flexibility to respond to new challenges in a changing environment. It also may undermine the judgment of career enforcement officials, who accumulate expertise in identifying forms of discrimination most damaging to educational achievement and the types of remedies most effective in combating discrimination in schools.[138]

Instead of narrowing the scope of OCR's enforcement discretion, Congress could strengthen political checks by requiring more transparency.[139] As described above, OCR has taken important steps toward this goal by making publicly available a list of all institutions it is investigating and all resolution agreements it has reached since 2014.[140] Congress should applaud this effort and require future administrations to maintain this policy. Additionally, it should require more detailed data to be included in OCR's annual reports, including the steps taken to investigate cases, the number and types of cases closed due to insufficient evidence, the legal and factual standards used to determine whether there is sufficient evidence to proceed with further action, and the steps taken to monitor resolution agreements after they are entered. These data would enable Congress and the public at large to identify shifts in enforcement policy and hold the administration accountable for them.

While political checks in the form of transparency requirements are important, they fail to address all of the concerns raised by exer-

137. *Cf.* Kagan, *supra* note 1, at 2339 (noting that the President can achieve policy goals effectively "without the indecision and inefficiency that so often characterize the behavior of collective entities" such as congressional committees). Legislative inertia is particularly likely during periods of united government, as Congress has few incentives to restrict the policies of a President of its own party. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2338 (2006).

138. Congress's attempt to limit OCR's enforcement discretion in 1990 provides a cautionary tale. That year, a Senate committee proposed earmarking $250,000 of OCR's budget for compliance reviews targeting admissions programs in post-secondary institutions. S. REP. NO. 101-516, at 293 (1990). It is not clear, however, that this proposal would have improved OCR enforcement. There was no evidence that university admissions presented a particularly pressing civil rights concern at the time or that agency officials would have initiated more such reviews if they had the additional funding.

139. Andrias, *supra* note 14, at 1103 (contending that public disclosure of enforcement policy decisions clarifies "lines of command and makes the exercise of power more visible, thereby allowing for easier public evaluation"); *see also* Love & Garg, *supra* note 14, at 1245 (recommending enhanced transparency to strengthen political accountability of executive decision-making).

140. *See supra* note 126 and accompanying text.

cises of enforcement discretion.[141] Exclusive reliance on public pressure to discipline civil rights enforcement is particularly inapt given that the regulatory regime in this area was created precisely to protect minority interests from majoritarian will.[142] Additional mechanisms are necessary to ensure that public preferences do not undermine other regulatory norms of fairness, effectiveness, and efficiency.[143] For such mechanisms, we must shift our attention to the internal workings of the agency.

C. Structural Reforms

The limitations to legal and political approaches to disciplining politicized enforcement decisions counsel for a turn inward, to explore the relationship between structures and processes of the agency on the one hand, and effective enforcement on the other.[144] The Administrative Conference of the United States (ACUS) describes the importance of these aspects of agency design as follows:

> [T]he structures of federal agencies, from their location to features of their internal design and reporting requirements, partly determine who has influence over non-statutory policy decisions and how well federal agencies perform in carrying out statutorily mandated responsibilities. . . . Agency structure determines who gets to make decisions and how well those decisions will be implemented. It determines whether agencies will be responsive to the White House, Congress, or key groups and who has access to decisionmakers.[145]

At least three distinct proposals suggest themselves: changing the leadership structure of OCR; encouraging inter-agency competition; and amending procedures for initiating, investigating, and resolving compliance reviews. It concludes that while the first two proposals are likely to be of limited effectiveness, the third approach offers a powerful check on politicized enforcement decisions.

The first structural approach to disciplining presidential control over enforcement decisions focuses on agency leadership. Currently, OCR leadership is vested in a single presidential appointee, who enjoys no protections from removal. An alternative leadership structure

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141. *See* Bressman, *supra* note 2, at 496; *see also* Criddle, *supra* note 2, at 466 (arguing that agency regulators, acting as fiduciaries, must promote the public welfare rather than the public will).

142. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

143. Strauss, *supra* note 8, at 1354 ("The very circumstances that so often effectively require intransitivity in legislation carry with them the implication that political will alone cannot suffice to validate regulations, that acts of reasoned judgment along legislatively prescribed lines are required.").

144. *See* sources cited *supra* note 18.

145. LEWIS & SELIN, *supra* note 29, at 2-3 (footnote omitted).

arguably would be less likely to bend to the President's policy preferences. Yet the records of two other civil rights agencies suggest that attempts to insulate agency leadership from presidential pressure by altering the structure of leadership may be ineffective or even counterproductive.

By statute, leadership over the Equal Employment Opportunity Commission (EEOC)—responsible for investigating and resolving allegations of employment discrimination—is vested in a five-member bipartisan body. No more than three Commissioners may be members of the same political party, and each member's five-year term protects him or her from politically motivated removal.[146] Yet, EEOC enforcement decisions have remained subject to considerable presidential influence despite this leadership structure. Margaret Lemos' empirical study of the EEOC finds that although partisan influence over the agency's policy guidance has been limited, its enforcement decisions have been subject to considerable political control. In particular, she notes that once the majority of Commissioners were Republican, the Reagan administration succeeded in shifting EEOC enforcement policy away from more subtle and systemic forms of discrimination to focus instead on individual complaints of intentional discrimination.[147] This record suggests that a bipartisan committee structure may not be particularly effective in protecting enforcement decisions from presidential influence.

The enforcement record of the U.S. Commission on Civil Rights (USCCR)—charged with monitoring federal enforcement of civil rights laws—suggests that a leadership structure designed to be insulated from presidential influence may not only be ineffective, but indeed may counterproductively result in systematic nonenforcement. Like the EEOC, the USCCR is led by a multi-member commission, where each Commissioner is protected from politicized removal.[148] Unlike the EEOC, however, the USCCR consists of eight Commissioners, no more than four of whom may be members of the same political party.[149] While this structure may safeguard the USCCR from presidential influence, it also has resulted in policy paralysis due to partisan gridlock. For example, when USCCR career staff drafted a report critiquing civil rights enforcement during the Bush administration,[150] Commissioners voted along party lines to bar

146. 42 U.S.C. § 2000e-4 (2012).

147. Lemos, *supra* note 66, at 416.

148. 42 U.S.C. § 1975(a). The President may remove a member only for "neglect of duty or malfeasance in office," not on ideological grounds. *Id.* § 1975(e).

149. *Id.* § 1975(b).

150. U.S. COMM'N ON CIVIL RIGHTS, REDEFINING RIGHTS IN AMERICA: THE CIVIL RIGHTS RECORD OF THE GEORGE W. BUSH ADMINISTRATION, 2001-2004 (Draft Report Sept. 2004), http://health-equity.pitt.edu/57/.

its publication.[151] Similar problems of partisan gridlock have plagued the Commission for decades, undermining the agency's continued credibility and relevance.[152] In this case, the attempt to insulate agency leadership from presidential control has resulted in less enforcement altogether.

A second structural strategy to discipline presidential influence over enforcement decisions would grant overlapping jurisdiction to multiple agencies to generate inter-agency conflict and competition. Professor Neal Katyal argues: "Just as the standard separation-of-powers paradigms (legislature v. courts, executive v. courts, legislature v. executive) overlap to produce friction, so too do their internal variants. When the State and Defense Departments have to convince each other of why their view is right, for example, better decision-making results."[153] Again, however, the existing records suggest the weakness of this strategy: OCR already shares overlapping jurisdiction with two competing agencies, yet neither has imposed a meaningful check on OCR enforcement decisions.

OCR shares jurisdiction over the enforcement of anti-discrimination laws in educational institutions with the Department of Justice's Civil Rights Division. Theoretically, the risk that the Civil Rights Division will initiate an enforcement proceeding against an entity after OCR declines to do so tempers OCR's exercise of enforcement discretion. A series of reports documenting politicized decision-making within the Civil Rights Division, however, suggests this agency is at least as vulnerable to partisan manipulation as OCR.[154] This finding should come as no surprise: like OCR, the Civil Rights Division is led by a single presidential appointee with no protections from removal. As such, its enforcement decisions are subject to the same political pressures as OCR.[155]

The U.S. Commission on Civil Rights also theoretically disciplines OCR enforcement decisions.[156] The fear of public criticism by USCCR arguably deters OCR from straying too far from its mission. Yet, as suggested above, partisan gridlock has precluded USCCR from imposing a meaningful check on sister agencies. The refusal to publish

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151. For an account of the politics relating to the U.S. Commission on Civil Rights, see Le, *supra* note 86, at 754-57.

152. *See id.* at 743-47.

153. Katyal, *supra* note 18, at 2317.

154. *See* U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2008), http://www.justice.gov/oig/special/s0901/final.pdf; *see also* U.S. DEP'T OF JUSTICE, INFORMATION ON EMPLOYMENT LITIGATION, HOUSING & CIVIL ENFORCEMENT, VOTING, AND SPECIAL LITIGATION SECTIONS' ENFORCEMENT EFFORTS FROM FISCAL YEARS 2001 THROUGH 2007 (2009).

155. Professor Katyal concedes, "[A] strong President can stymie two agencies almost as easily as he can stymie one." Katyal, *supra* note 18, at 2326.

156. 42 U.S.C. § 1975a(c)(1) (2012).

the report criticizing civil rights enforcement under the Bush administration exemplifies this impotence.[157] Neither the Civil Rights Division nor the USCCR appears to have played a meaningful role in disciplining OCR enforcement decisions.

A third structural strategy, focusing on the civil service bureaucracy and its relationships with external actors, holds more promise.[158] One approach to insulating enforcement decisions from politicization would be to shift the authority to make these decisions to career enforcement officers. Yet this approach raises its own problems—compromising rule of law norms of uniformity and consistency while at the same time precluding any form of public accountability. Instead, OCR procedures should be amended to require the civil service attorneys and investigators within the agency to develop and make publicly available written recommendations for each decision relating to the initiation, investigation, resolution, and monitoring of compliance reviews, while allowing the agency's political leadership to reject those recommendations. The bureaucratic recommendations would provide crucial information to allow Congress and the public to assess the administration's policy choices, thereby empowering the civil service while at the same time strengthening its relationship with external institutions of constraint. It would also provide valuable information to courts—in the rare event that a challenge were litigated—and might result in reduced judicial deference to administrative decisions departing from professional recommendation. Moreover, this mechanism is unlikely to impose meaningful drag on policymaking because career officials likely develop written recommendations already but simply do not make them publicly available.

In fact, this very mechanism led to public scrutiny over the Bush Administration's approval of pre-clearance submissions under the Voting Rights Act. As Goodwin Liu documents, DOJ maintains an institutional tradition in which career staff, who investigate pre-clearance submissions, provide a written memorandum to the political leadership with their recommendation; the political leadership then is free to accept or reject the recommendation.[159] News organizations obtained copies of these memoranda pursuant to a Freedom of Information Act request. These documents revealed the leadership's rejection of staff recommendations, generating significant public criticism of politicized enforcement of the Voting Rights Act.[160] Effective

157. *See supra* note 151 and accompanying text.

158. *See* Metzger, *Interdependent Relationship*, *supra* note 18, at 442 (observing that internal and external constraints mutually reinforce each other, and harnessing this relationship may provide the most effective method to disciplining presidential policies).

159. Liu, *supra* note 90, at 82-83.

160. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 480 (2006) ("Notwithstanding the unanimous opinion of the staff attorneys in the Voting Section of the

constraints on politicized enforcement decisions are too important to leave to institutional tradition within a single agency. Rather, this practice should be mandated across agencies and enforced externally. Congress could require staff to develop written recommendations and publicly disclose them either through a straightforward mandate or conditional funding. Courts might encourage the development and disclosure of staff recommendations by calibrating the deference to which they afford such decisions.

Additionally, OCR procedures should be amended to formally require career staff to confer with regulatory beneficiaries. Current procedures for the conduct of compliance reviews contemplate constant interaction between the agency and the regulated entity, but no role at all for regulatory beneficiaries.[161] To ensure that enforcement decisions benefit from the input of not only regulated entities but also regulatory beneficiaries, the compliance review process should provide an explicit role for them. At the outset of each compliance review, OCR should be required to identify the intended beneficiaries and convene a group to represent those beneficiaries. It should require periodic consultation with this group during the course of investigation and participation of the group in negotiating any resolution agreement. The beneficiary group should also play a role in subsequent monitoring of compliance with the resolution agreement. These reforms will not only empower regulatory beneficiaries, but also empower career staff, providing them with allies to resist political pressures in individual cases.

Whatever the precise course of reform, the ultimate goal of providing some check to presidential control over enforcement decisions warrants more examination and study. While presidential control may have salutary benefits to the development of agency policy, the expertise of career staff and public accountability need not be sacrificed to achieve these benefits.[162]

V. CONCLUSION

The rise in presidential administration raises a host of thorny questions regarding the appropriate role for the President, Congress, and the courts in the modern administrative state. Even the most

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Justice Department . . . the Attorney General elected to pre-clear the map, thus allowing it to take effect.") (Stevens, J., concurring in part and dissenting in part).

161. Regulatory beneficiaries play a minimal role even in the context of individual complaint investigations where they are the complainant. Although OCR must keep the complainant informed throughout the process, there is no requirement that the complainant participate in the negotiation of the resolution agreement or ongoing monitoring, for example. *See* OCR Case Processing Manual, *supra* note 109, art. I, § 103, at 7; *id.* art. I, § 103, at 11; *id.* art. III, § 302, at 20.

162. *See* Watts, *supra* note 1 (arguing that reforms should preserve positive effects of presidential control while mitigating negative ones).

ardent champions of presidential control agree that such control must be subject to a system of checks and balances. Notwithstanding this consensus, the OCR case study suggests that presidential policy preferences may be implemented through agencies' strategic exercise of enforcement discretion with virtually no external oversight at all. The absence of any constraint on administrative enforcement discretion renders this tool a particularly attractive means for achieving objectives for which the administration may not want to be held legally or politically accountable.

Ultimately, any final assessment of constraints on executive authority requires a normative theory of the presidency and the extent to which agency policy should be shaped by legal norms, political will, or bureaucratic expertise. Important tradeoffs inhere in this decision, and the calculus likely differs across regulatory contexts. The types of constraints appropriate for the enforcement of political minorities' rights may differ from those that should apply in more technical or scientific contexts. Nonetheless, although reasonable minds will differ in assessing the extent to which administrative policies *should* be constrained by legal, political, or structural mechanisms, resolution of the debate is impossible without a concrete understanding of the manner in which these constraints actually operate in the real world.