THE TWEET TEST: ATTRIBUTING PRESIDENTIAL INTENT TO AGENCY ACTION

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When a plaintiff alleges a statute is unconstitutionally tainted by racial animus, courts attribute the president's intent to the statute. By contrast, when reviewing a racial-animus claim against agency action, most courts sever the president's intent from the action. These disparate approaches are troublesome, given that presidents sign into "law" exponentially more agency actions than statutes. This lack of consistent review has increased the risk of racial animus in agency action and led to countless federal regulations tainted with impermissible intent.

To resolve inconsistent review of presidential intent, this Article provides the novel "Tweet Test," an apolitical standard for determining when courts should attribute the president's intent to agency action: courts should attribute the president's intent from postinaugural predecisional statements to executive-agency action when at least one public statement is (1) made by the sitting president, (2) dated before the challenged action, and (3) substantially similar to the challenged action in intent, impact, or explanation. The Tweet Test applies by analogy to any impermissible intent.

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INTRODUCTION

> *My use of social media is not Presidential - it's MODERN DAY PRESIDENTIAL.*
>
> – President Donald John Trump[1]

President Trump used Twitter to do everything from nominating Supreme Court justices[2] to taunting the Supreme Leader of North Korea.[3]

1. Samantha Briggs, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 COLUM. J.L. & SOC. PROBS. 1, 38 n.27 (2018).

2. *See, e.g.*, President Donald J. Trump (@realdonaldtrump), TWITTER (Sept. 26, 2020), available at https://www.thetrumparchive.com/?results=1&searchbox=%22my+honor+amy%22 [https://perma.cc/E4MM-MPVV] ("Today, it was my great honor to nominate . . . . Judge Amy Coney Barrett.").

3. *See* Bret Kenwell, *How Investors Could Play Donald Trump's Big Nuclear Button*, THESTREET (Jan. 3, 2018, 2:54 PM), https://www.thestreet.com/investing/stocks/donald-trump-wants-you-to-know-he-has-a-nuke-button-14435647 [https://perma.cc/NFC6-E8F2] ("Will someone from [Kim Jong Un's] depleted and food starved regime please inform him that I too

Federal agencies genuflected to his tweeted commands, following many with a substantially conforming final or attempted agency action.[4] His unprecedented 26,000-plus presidential tweets led to numerous lawsuits, making presidential intent a reemergent legal concern.[5]

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have a Nuclear Button, but it is a much bigger & more powerful one than his, and my Button works!").

4. To be sure, it might not be the case that *all* presidential tweets suggesting agency action will *always* compel substantially similar agency action, but they did during the Trump Administration. Although there is not enough room in this Article to list every single example found, I found none to the contrary. For an action of the Department of Homeland Security, compare Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 412 (2020) ("I have instructed the Secretary of Homeland Security not to let these large Caravans of people into our Country."), with Press Release, Department of Homeland Security, *Secretary Kirstjen M. Nielsen Statement on Central American 'Caravan,'* DHS.gov (Apr. 23, 2018), https://www.dhs.gov/news/2018/04/23/secretary-kirstjen-m-nielsen-statement-central-american-caravan [https://perma.cc/H36M-T6D6] ("If members of the 'caravan' enter the country illegally, they will be referred for prosecution for illegal entry in accordance with existing law."). For an action of the Department of the Treasury, compare Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1119 n.347 (2020) ("It was announced today by the U.S. Treasury that additional large scale Sanctions would be added to those already existing Sanctions on North Korea. I have today ordered the withdrawal of those additional Sanctions!"), with Andrew Restuccia & Caitlin Oprysko, *Trump Surprises His Own Aides by Reversing North Korea Sanctions*, POLITICO (Mar. 22, 2019, 3:22 PM), https://www.politico.com/story/2019/03/22/trump-north-korea-sanctions-remove-1232586 [https://perma.cc/A9U5-ZXDY] ("I'm the national security advisor. I'm not the national security decision maker."). For an action of the Office of the U.S. Trade Representative, compare Cameron Keen, Note, *Academic Espionage: How International Trade Law Can Protect Higher Education*, 49 GA. J. INT'L & COMP. L. 211, 233–34 (2021) ("The WTO is BROKEN . . . ! Today I directed the U.S. Trade Representative to take action so that countries stop CHEATING the system at the expense of the USA!"), with Off. of the U.S. Trade Representative, *USTR Robert Lighthizer Statement on the President's Memorandum on Reforming Developing-Country Status in the WTO*, USTR.gov (July 26, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-robert-lighthizer-statement [https://perma.cc/BC8E-BEXJ] ("I look forward to implementing the President's directive."). For an action of the Department of Agriculture (USDA), compare Lane Nordlund, *Trump Urges USDA to Expedite Farm Relief*, KRTV (Apr. 10, 2020, 6:50 PM), https://www.krtv.com/news/montana-ag-network/president-urges-usda-to-expedite-farm-relief ("I have directed [the Secretary of Agriculture] to expedite help to our farmers, especially to the smaller farmers who are hurting right now."), with Press Release, Department of Agriculture, *WTAS: Trump Administration Provides Additional Direct Assistance to Farmers and Ranchers Impacted by the Coronavirus*, USDA.gov (Sept. 18, 2020), https://www.usda.gov/media/press-releases/2020/09/18/wtas-trump-administration-provides-additional-direct-assistance [https://perma.cc/G9CY-G9RX] ("U.S. Secretary of Agriculture Sonny Perdue announced up to an additional $14 billion dollars for agricultural producers who continue to face market disruptions and associated costs because of COVID-19.").

5. *See* Dave Roos, *How US Presidents Have Communicated with the Public—From the Telegraph to Twitter*, HISTORY.COM, (Feb. 24, 2020), https://www.history.com/news/us-presidents-communication-radio-tv-twitter [https://perma.cc/U76K-4WFS] (detailing the evolution of presidential communication); Brendan Brown, TRUMP TWITTER ARCHIVE V2, https://www.thetrumparchive.com/?dates=%5B%222017-01-20%22%2C%222021-01-20%22%5D&results=1 (last visited July 17, 2022) [https://perma.cc/2J59-Y9UA] (filtering from Jan. 20, 2017–Jan. 20, 2021); discussion *infra* Part IV.

President Trump's tweets triggered two Supreme Court cases involving presidential intent. The first, *Trump v. Hawaii*, arose from a direct challenge to a presidential action—specifically Executive Order 13780 (i.e., the "Travel Ban").[6] More relevant to this Article is *Department of Homeland Security v. Regents of the University of California*, a case involving a challenge to an agency action—specifically the Department of Homeland Security's rescission of Deferred Action for Childhood Arrivals (DACA).[7] *Regents* is the first case in which the Supreme Court discussed invalidating agency action based on a sitting president's invidious discriminatory intent.[8]

Since Congress enacted the Administrative Procedure Act (APA) in 1946, presidents have signed *significantly* more agency actions than laws.[9] As of September 13, 2022, President Biden signed roughly *323% more* executive actions than bills.[10] And, like Trump, President Biden uses Twitter to announce agency action.[11] Thus, the risk remains that public presidential statements will reveal discriminatory intent in agency action.[12]

Yet *Regents* has strangled the likelihood of presidential statements invalidating agency action.[13] The *Regents* Court held that, even if the

6. 138 S. Ct. 2392 (2018).

7. 140 S. Ct. 1891 (2020).

8. *See id.* at 1915–16 (plurality opinion) (discussing the President as part of the agency action's "decisionmaking body").

9. Semantically, presidents do not sign agency actions but rather sign executive orders, presidential memoranda, proclamations, and notices, some of which direct agencies to take agency action. John C. Duncan, *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 VT. L. REV. 333, 336 (2010) (noting that president's "undertake different actions according to their respective formats, including proclamations, presidential memoranda, directives, and signing statements"). Similarly, presidents do not sign laws; they sign bills, which then become laws. *See* Tom Carper, *How a Bill Becomes a Law*, TOM CARPER, U.S. SENATOR FOR DELAWARE, https://www.carper.senate.gov/public/index.cfm/how-a-bill-becomes-a-law [https://perma.cc/SV2W-LUJ4]; *see also Schoolhouse Rock!: I'm Just a Bill* (ABC television broadcast Mar. 13, 1976).

10. *Compare Joe Biden's Executive Orders and Actions*, BALLOTPEDIA, https://ballotpedia.org/Joe_Biden%27s_executive_orders_and_actions [https://perma.cc/4DU6-3ACE] ("As of September 13, 2022, President Joe Biden (D) had signed 98 executive orders, 98 presidential memoranda, 306 proclamations, and 60 notices."), *with Public Laws*, CONGRESS.GOV, https://www.congress.gov/public-laws/117th-congress (last visited September 15, 2022) (showing 174 public laws).

11. *See, e.g.*, Joe Biden (@JoeBiden), TWITTER (Sept. 9, 2021, 10:32 PM), available at https://twitter.com/joebiden/status/1436155670978568196 (last visited July 16, 2022) ("The Department of Labor is developing an emergency rule to require that all employers with 100 or more employees ensure their workforces are fully vaccinated or show a negative test at least once a week."); President Biden (@POTUS), TWITTER (May 26, 2021, 3:23 PM), https://twitter.com/potus/status/1397634620687101957 (last visited July 16, 2022) ("Shortly after taking office, I instructed our Intelligence Agencies to investigate the origins of the COVID-19 virus. Today, I've asked the Intelligence Community to redouble those efforts and send me a report in 90 days.").

12. *See* Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1338 (2019) (opining that President Trump changed the way that presidents communicate with the public in a way that "will reverberate for years to come").

13. *See id.*

President's public statements were discriminatory, they were nonetheless "unilluminating" because they were "remote in time and made in unrelated contexts."[14] Those nine words created three new divisions in equal-protection doctrine: (1) preinaugural from postinaugural statements, (2) predecisional from postdecisional statements, and (3) related from unrelated statements.[15] These divisions have led to inconsistent review of presidential intent.[16]

Inconsistent review of presidential intent has, as Justice Thomas feared, "devolve[d] into an endless morass of discovery and policy disputes."[17] As a result, though many executive-branch policies have intentionally caused disparate impacts on racial minorities,[18] judicial review of presidential intent is failing to foster racial equality.[19] Thus, when it comes to presidential intent, courts "should not let politically divided times affect [their] choices or decisions"[20]—regardless of who occupies the Oval Office.[21]

The problem is that presidential intent is among the most difficult evidence to admit in APA challenges.[22] And claims of discriminatory intent are not properly brought under the aegis of the APA.[23] So plaintiffs have only the Constitution to joust agency action infected by a sitting president's discriminatory intent.[24] How district courts review presidential intent, then, begets far-reaching consequences for racial equality.[25]

Two caveats should be made before proceeding further. First, though some courts have pondered the impact of *private* communications,[26] this Article is concerned with only *public* presidential statements, the increasing

14. *Id.* at 1916.

15. *See id.*

16. *See* discussion *infra* Sections IV.A, IV.B., IV.C.

17. Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (Thomas, J., concurring in part and dissenting in part).

18. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (detailing policies that intentionally created today's segregated cities).

19. *See id.*

20. Erwin Chemerinsky, *The Court Should Not Let Politically Divided Times Affect Its Choices and Decisions*, 61 WM. & MARY L. REV. 971, 976 (2020) (arguing that the courts' "preeminent role should be the exact same at all times: enforcing the Constitution").

21. *See id.* at 983.

22. *See infra* Section II.B.

23. In APA challenges, reviewing courts may examine official intent only if a plaintiff presents a "strong showing of bad faith or improper behavior," but the courts will not set aside agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Dep't of Com. v. New York, 139 S. Ct. 2551, 2567, 2573–74 (2019) (majority opinion). In practice, however, even when plaintiffs challenge agency action under both the APA and the Constitution, courts examine presidential intent in only analyses of constitutional challenges. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) (plurality opinion).

24. *See infra* Section II.A.

25. *See id.*

26. Private communications are formally known as *ex parte* contacts. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981).

number of which has arguably thrust presidential intent onto court dockets. Reviewing private communications could impede the president's ability to experiment with policy. By contrast, reviewing public presidential statements has no impact on executive privilege.

Second, this Article discusses presidential intent as relevant to the actions of only *executive* agencies. Courts disagree on the distinction between independent and executive agencies but never attribute presidential intent to independent-agency action.[27] This practice makes sense because Congress insulated independent agencies by giving their heads more protection from presidential removal.[28] That insulation means the president's influence is unlikely to compel an independent agency to act. So attributing presidential intent to independent-agency action risks unreliable attribution of the president's intent.

This Article offers a novel solution to an age-old problem. Indeed, as Professor Katherine Shaw notes, courts probed the intent of "legislators and executive-branch officials" years before the start of the Trump Administration.[29] Yet President Trump sparked scholarly opinions on what they characterized as a "new question" regarding the intent of government actors.[30] Among those discussions, scholars have "examine[d] how *Regents* deployed the Court's discriminatory intent jurisprudence."[31] To that same end, others have observed that courts "inconsistent[ly] . . . consider political statements in equal protection analysis."[32] Although these scholars "raise questions regarding the relevance of speech by the President" to agency action, no one has attempted to "directly tackle the question."[33]

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27. *See, e.g.*, Kravitz v. U.S. Dep't of Com., 366 F. Supp. 3d 681, 712 (D. Md. 2019) (attributing intent from a presidential tweet to an executive-agency action); Washington v. U.S. Dep't of State, 318 F. Supp. 3d 1247, 1254 n.5 (W.D. Wash. 2018) (same); S.A. v. Trump, 363 F. Supp. 3d 1048, 1060 (N.D. Cal. 2018) (same); *In re* Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5943 (2015) (ignoring President's YouTube video as unrelated to the independent-agency action).

28. *See In re* Aiken Cnty., 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("Because the power to remove is the power to control, the President lacks control over an independent agency—that is, the President lacks the power to direct or supervise an agency such as the Nuclear Regulatory Commission.").

29. *See* Shaw, *supra* note 12, at 1351–58.

30. *See, e.g.*, *Fifth Amendment—Due Process Clause—Equal Protection*—Department of Homeland Security v. Regents of the University of California, 134 HARV. L. REV. 510 (2020) ("The Trump Administration's hostility to immigration has raised new questions about whether and how far courts should look past government actors' stated intentions.").

31. *See generally* William D. Araiza, Regents*: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983 (2021).

32. *See, e.g.*, Rachael E. Savage, Note, Department of Homeland Security v. Regents of the University of California*: The Supreme Court's Disinterest in Reliance Interests*, 80 MD. L. REV. ONLINE 113, 129 n.150 (2021) ("[T]he Court considered important Governor Cuomo's comments on religion in the context of COVID-19 restrictions but did not consider important then-President Trump's comments on religion in the context of immigration restrictions in Trump v. Hawaii." (citing Roman Cath. Diocese of Brooklyn v. Cuomo 141 S. Ct. 63, 80 (2020) (Sotomayor, J., dissenting) (per curiam))).

33. Shaw, *supra* note 12, at 1343–44.

Through five Parts, this Article resolves the courts' inconsistent application of *Regents* to cases involving presidential intent. Part I illustrates a novel solution, the Tweet Test, which courts can use to distinguish between proper and improper use of presidential intent. Part II tracks the evolution of challenges to agency action. Part III introduces *Regents* and its progeny as a foundation for later discussion. Part IV distills a novel set of distinctions that district courts have applied when determining whether to attribute presidential intent to agency action. Finally, Part V justifies the Tweet Test and snubs out relevant counterarguments.

I. APPLYING THE TWEET TEST TO PRESIDENTIAL STATEMENTS

This Part illustrates the intended contours of the Tweet Test. To that end, it provides a hypothetical fact pattern accompanied by several statements and then explains how a reviewing court should consider each one. Courts should apply the Tweet Test to any statement in any agency-action challenge that alleges any impermissible intent. It works in two steps.

Step one: Any party must submit one public statement that is (1) made by the sitting president; (2) older than the challenged action; and (3) substantially similar to the challenged action's (a) intent, (b) impact, or (c) explanation. If satisfied, then the court should presume that the president's intent provoked the challenged action. At this point, the government may submit additional statements to rebut the inference that the president first proposed the policy. If the earliest statement came from the sitting president of the administration that finalized the challenged action, then the government has not rebutted the inference. The court should then proceed to step two and determine which of the president's statements it should attribute to the challenged action.

Step two: Any party may submit any of the president's statements that are public, postinaugural, and predecisional.[34] If any such statement contains relevant discriminatory animus, then the court should invalidate the challenged action—even if one or more statements contain permissible considerations.

A. Hypothetical 1

Imagine the following five statements: (1) On January 1, 2024, president-elect Nacerima Dream says in a public speech, "Mexican Immigrants bring drugs, crime. They join the military, and we pay for them to reproduce--for their fertility treatments. Unnecessary. Taxpayers suffer. You suffer." (2) On January 30, 2025, President Dream tweets, "Tired of paying for immigrants kids…Latino Soldiers should be paying for their own fertility treatments. THE TIME IS NOW." (3) On January 30, 2025,

34. Presumably, the agency would submit any decisionmakers' statements into the administrative record, as the agency wants the court to uphold the challenged action.

President Dream says in a private caucus meeting, "I don't really hate Latins, but I need to get this policy passed." (4) On February 1, 2025, the Secretary of Defense issues a memorandum reading, "As of today, all immigrants in the military must pay out-of-pocket for fertility treatment due to high expenses." (5) On March 1, 2025, President Dream tweets, "Making immigrants pay was my idea! SecDef does what I say!!!!! I'm the BOSS 💪💪💪."

In Hypothetical 1, only the second statement would satisfy step one of the Tweet Test. President Dream's January 30, 2025 tweet is public, predecisional, and postinaugural. And it suggests a policy that is substantially similar to the challenged action's impact and intent: bearing on Latino servicemembers by ceasing payment of their fertility treatments. So it would be reasonable for a reviewing court to presume that the challenged action spawns from the President's policy preference and, therefore, to attribute her intent to the challenged action.

The other four statements would fail step one. The January 1, 2024 public statement was preinaugural and thus not empowered by the president's constitutional authority. President Dream's January 30, 2025 caucus statement, though predecisional and postinaugural, was made in a private setting; relying on it might hinder her ability to experiment with policy. And her March 1, 2025 tweet was postdecisional; it might not demonstrate her intent before she encouraged the challenged action. Finally, the Secretary's February 1, 2025 memorandum is not from a sitting president.

Because the President's January 30, 2025 tweet satisfies step one, the government may submit additional statements to rebut the inference that the President's intent gave rise to the challenged action; the plaintiff would submit for the opposite effect. If the government does not rebut the inference, then the court should proceed to step two and attribute the President's intent from any of her public, postinaugural, predecisional statements to the challenged action.

B. Hypothetical 2

Imagine Hypothetical 1 with one more fact. On January 29, 2025, the Secretary of Defense writes in a memorandum to the Chief of Space Operations, "I noticed that the soldiers who utilize fertility treatments the most are Latino immigrants. It is a great cost to our defense budget, and I think it should be adjusted. I'd like to hear your input on this."

With this additional statement, the court should not consider President Dream's intent. The Secretary's statement is postinaugural, predecisional, and dated before all the President's statements that are postinaugural and predecisional. Thus, it would be more reasonable for the court to find that the policy was the Secretary's idea and to disregard the President's intent.

C. Hypothetical 3

Imagine Hypotheticals 1 and 2 with one more fact. In its brief to the court, the Department of Defense states, "Our new policy was a derivation of the President's. We were acting in direct response to her command."

Considering this final statement, the court should attribute President Dream's intent to the challenged action. The Agency followed the President's constitutionally empowered command. Thus, it would be reasonable for the court to infer that the President's intent is "contemporary" with and "related" to the challenged action. With this statement in hand, the court should take the President's intent from any of her statements that are public, postinaugural, and predecisional and attribute it to the challenged action. If any such intent is impermissible, then the court should invalidate the action under the APA.

II. BACKGROUND: THE "RECORD RULE(S)"

This Part details the development of modern presidential-intent analysis, ending with *Regents*'s "remote in time and . . . unrelated contexts" standard.[35] Section II.A explains challenges to agency action, emphasizing the relevant distinction between APA challenges and constitutional challenges. Section II.B describes administrative records in APA challenges. Section II.C discusses records in constitutional challenges. Finally, Section II.D explores the *Regents* standard for reviewing presidential statements and highlights its persistent ambiguities.

A. Challenging Agency Action

Plaintiffs wield two swords when challenging federal agency action: the APA and the Constitution. Plaintiffs may challenge agency action under either or both. Although the APA authorizes constitutional challenges to agency action, courts analyze them separately.[36] In other words, constitutional challenges and APA challenges are legally distinct.[37]

The primary way to challenge agency action is under the APA, which prescribes the overarching procedural framework for agency action and authorizes judicial review of it.[38] Most plaintiffs challenge agency action

35. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (plurality opinion).

36. *See, e.g.*, *id.* at 1897 (plurality opinion) (reviewing constitutional claim separately from APA claim and rendering separate holdings accordingly); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) (recognizing that a regulatory action's "lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge").

37. Dep't of Com. v. New York, 139 S. Ct. 2551, 2605–06 (2019) (Alito, J., concurring in part and dissenting in part) (distinguishing APA challenges from constitutional challenges to agency action).

38. 5 U.S.C. §§ 552, 701–706.

under the APA's arbitrary-and-capricious standard.[39] Although plaintiffs could conceivably allege invidious discrimination is arbitrary and capricious,[40] the arbitrary-and-capricious standard is not a good fit for such claims.[41] Rather, claims that allege constitutional violations based on the intent of government actors fit more neatly into distinct constitutional provisions.[42] Thus, claims alleging invidious discrimination are more properly brought under the APA's contrary-to-law provision, which authorizes judicial review of claims alleging an agency action violates a specific constitutional provision.[43]

Plaintiffs could challenge agency action by simultaneously suing the president and the agency.[44] But the president is not an "agency" subject to suit under the APA.[45] So the president's intent is not at issue in nonconstitutional APA challenges.[46] By contrast, courts will consider the president's intent in *constitutional* challenges brought under the APA.[47] Consequently, plaintiffs generally identify the *agency* as a defendant when alleging that the *president's* discriminatory intent taints an agency action.[48] The problem with this strategy is that, in constitutional challenges brought under the APA, courts differ on whether to use the "record rule" that applies to either APA challenges or constitutional challenges.[49]

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39. *See id.* § 706(2)(A); William F. Pedersen Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 40 (1975). Many plaintiffs also challenge agency action for statutory issues under the APA as "not in accordance with law." *See* 5 U.S.C. § 706(2)(A). In contrary-to-law challenges, courts interpret statutes and invalidate agency actions that contravene the statute's legal mandates. *See id.*

40. *See* 5 U.S.C. § 706(2)(A).

41. Arbitrary and capricious review is an inquiry into whether the agency decisionmaker "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 30–31 (1983).

42. Such claims fit neatly into the Due Process Clause, the Equal Protection Clause, the Establishment Clause, the Free Exercise Clause, the Dormant Commerce Clause, and the prohibition on cruel and unusual punishment. *See* Shaw, *supra* note 12, at 1340, 1351–55 ("[I]ntent requirements are a familiar feature of the constitutional landscape.").

43. *See* 5 U.S.C. § 706(2)(B) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity . . . . "); *supra* text accompanying note 39.

44. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1896 (2020) (plurality opinion).

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

46. Challenges to agency action can be brought against both the agency and its decisionmaker, but that distinction does not matter for this Article's purposes. *See id.* at 800.

47. *See, e.g.*, *Regents*, 140 S. Ct. 1891 (2020) (plurality opinion).

48. *See, e.g.*, *id.*

49. Chang v. U.S. Citizenship & Immigr. Servs., 254 F. Supp. 3d 160, 161–62 (D.D.C. 2017).

B. Reviewing the "Whole Record" in APA Challenges

The APA dictates that "the court shall review the *whole record* or those parts of it cited by a party."[50] But the APA does not define the term "whole record."[51] Thus, judges have been left to mold the contours, leading to inconsistency and unpredictability.[52]

Courts reviewing agency action use the "record rule" to determine which documents to consider.[53] The "record rule" comes from *Citizens to Preserve Overton Park, Inc. v. Volpe*,[54] and it limits judicial review to the "administrative record that was before the [decisionmaker] at the time he made his decision."[55]

The Supreme Court has not yet clarified the "record rule."[56] Despite legislative history urging uniformity,[57] the Court's lack of guidance has muddied the waters in judicial review of agency action, creating a slough filled with 80 years of inconsistent interpretations and exceptions.[58]

Judicial review of agency action should be thorough and based on an adequate record.[59] Because agencies create and submit administrative records, the "record rule" rests on the assumption that agency decisionmakers will submit every document, internet search, and transcript relevant to the challenged action—including every relevant communication with the

50. 5 U.S.C. § 706 (emphasis added).

51. Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CALIF. L. REV. 929, 938 (1993).

52. *See* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 18–21 (2016) (demonstrating more than 20 different interpretations of "whole record").

53. II RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.6 (4th ed. 2002).

54. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

55. *Id.* at 420.

56. *See* James N. Saul, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENV'T L. 1301, 1313 (2008).

57. *See Appeal of Administrative Agency Decisions: Hearing on H.R. 6682 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 1 (1956) (statement of True D. Morse, Acting Secretary, Office of the General Counsel, Department of Commerce) ("The preamble of the [APA] states that its purpose is to make 'uniform' the law relating to the record on review.").

58. Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 76 (2018).

59. *Overton Park*, 401 U.S. at 415; *see* KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01–6 (1976). For example, in judicial review of military agency actions, courts apply the "narrowest standard known to judicial review," which is the most deferential to the agency. Major Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135, 157–58 (1985). But even in the military context courts are willing to pierce the veil of national security and foreign affairs to ensure adequate judicial review. *See, e.g.*, Karlin v. Reed, 584 F.2d 365, 367 (10th Cir. 1978).

president.[60] But, as the Supreme Court has recognized, that assumption is unrealistic.[61]

Agencies often exclude problematic presidential statements, leaving courts to review thinned-out records that support false rationales.[62] For example, a presidential tweet demonstrating animus toward transgender people is likely to undermine the legitimacy of a transgender-related agency action.[63] So the agency might offer a different rationale than the president in response to a litigation demand. Indeed, presidents can direct agency officials to "present particular arguments to the courts."[64] Such direction is especially worrisome when the president's statements suggest that an agency action was motivated by discriminatory intent or racial animus.[65]

If agencies exclude relevant statements from administrative records, plaintiffs may request that the court add the statements into the record.[66] There are four methods of introducing new evidence: (1) completing the record, (2) supplementing the record, (3) taking judicial notice of new evidence, and (4) reviewing extra-record evidence.[67]

Completing the record means including evidence that the agency considered but did not submit.[68] Supplementing the record means introducing evidence that the agency did not consider but is "necessary for the court to conduct a substantial inquiry."[69] This distinction is sometimes misunderstood

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60. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."); Pedersen, *supra* note 39, at 62–63.

61. An agency generally need not "create" the administrative record before it acts; it need only produce the record in response to a litigation demand. And some critical documents are neither placed "before" the decisionmaker nor passed through the agency's formal internal procedures. *See* Pedersen, *supra* note 39, at 63; *see also* Saul, *supra* note 56, at 1311 ("Courts have consistently rejected attempts by agencies to look only to that record compiled and submitted by the agency, to the exclusion of other documents that were clearly considered . . . . This important exception has been widely accepted in most circuits.").

62. *E.g.*, *Dep't of Com.*, 139 S. Ct. 2551; Newman v. State *ex rel.* Wyo. Workers' Safety & Comp. Div., 2002 WY 91, ¶ 23, 49 P.3d 163, 172 (Wyo. 2002) ("[T]he agency may have willfully discounted credible evidence, refused to admit certain testimony or documentary exhibits, or failed to provide findings of fact or conclusions of law."), *holding modified by* Dale v. S & S Builders, LLC, 2008 WY 84, ¶ 23, 188 P.3d 554 (Wyo. 2008).

63. *See* Shaw, *supra* note 12, at 1387.

64. *See id.* at 1398.

65. The author believes that we need a definite standard to facilitate consideration of discriminatory animus in all official, public statements from the president—regardless of the medium of communication. So the Tweet Test should extend to speeches, executive orders, and any other "official" public communications.

66. *See infra* Part II.

67. *See* Colo. Wild v. Vilsack, 713 F. Supp. 2d 1235, 1238 (D. Colo. 2010) (defining completion and supplementation of the record); FED. R. EVID. 201(b)(2) (providing for judicial notice of new evidence); Ramos v. Wolf, 975 F.3d 872, 901 (9th Cir. 2020) (describing when extra-record discovery might be appropriate).

68. *Colo. Wild*, 713 F. Supp. 2d at 1238.

69. *Id.*

by district[70] and circuit courts.[71] Yet, courts place high hurdles before both paths, which are therefore unlikely to lead to introduction of presidential statements in APA challenges.[72]

Courts may take "judicial notice of an adjudicative fact" under Federal Rule of Evidence 201(b)(2).[73] Even when notice *is* warranted, however, courts may still refuse to take judicial notice of presidential statements if they are "subject to reasonable dispute," are not "generally known" within the court's jurisdiction, or have source material that can "reasonably be questioned."[74] Thus, at best, judicial notice preserves the status quo—uncertainty—when applying the "record rule" to presidential statements.[75]

Plaintiffs may also ask a court to consider extra-record evidence of a decisionmaker's intent.[76] Courts will review such evidence upon only a "*strong* showing of [the agency's] bad faith or improper behavior,"[77] which courts determine by reviewing the extra-record evidence.[78] But courts consider extra-record evidence even less often than they admit new evidence

70. Pac. Shores Subdivision v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (acknowledging confusion regarding supplementing the record and defining it as "adding to the volume of the administrative record with documents the agency considered").

71. 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 8:50 (2d ed. 2022) (collecting cases illustrating points of divergence in the circuit courts), Westlaw PUBNRL.

72. *See* Fund for Animals v. Williams, 391 F. Supp. 2d 191, 197 (D.D.C. 2005); Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting U.S. and Israeli Approaches*, 64 AM. J. COMPAR. L. 521, 534–37 (2016).

73. FED. R. EVID. 201(b)(2).

74. *See Ex parte* Barton, 586 S.W.3d 573, 585 (Tex. App. 2019) ("[W]hether the President's tweets . . . are annoying or offensive is a highly subjective inquiry . . . . "); *see also* Nicholas Bagley, *Rise of the Know-Nothing Judge*, ATLANTIC (July 15, 2019), https://www.theatlantic.com/ideas/archive/2019/07/texas-v-us-rise-know-nothing-judge/593959/ [https://perma.cc/Y4XK-SHFB] (discussing judges who willfully ignore facts that exist in the real world for partisan ends). *Compare* Casa De Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 774 (D. Md. 2018) (omitting presidential tweets that were unfavorable to the government's position from the administrative record), *aff'd in part, vacated in part, rev'd in part*, 924 F.3d 684 (4th Cir. 2019), *with id.* at 775 (relying on third-party quotes from an online CNN news article of the President's statements that were favorable to the government's position) (citation omitted).

75. *Cf.* KP Trucking LLC v. U.S. Dep't of Transp., 850 F. App'x 604, 609 (10th Cir. 2021) (expressing uncertainty as to whether Federal Rule of Appellate Procedure 16(b) applies to records that were not submitted by the agency); Martinez v. Acting Comm'r of Soc. Sec., 660 F. App'x 787, 794–95 (11th Cir. 2016) (same).

76. *See* Ramos v. Wolf, 975 F.3d 872, 901 (9th Cir. 2020) ("[A]ny such extra-record discovery should only be ordered after the government produces the administrative record." (citing Dep't of Com. v. New York, 139 S. Ct. 2551, 2574 (2019))).

77. *Dep't of Com.*, 139 S. Ct. at 2573–74 (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (emphasis added)).

78. Rueda Vidal v. U.S. Dep't of Homeland Sec., 536 F. Supp. 3d 604, 612 (C.D. Cal. 2021) (citing *Dep't of Com.*, 139 S. Ct. at 2574).

into the record.[79] That likelihood is even lower regarding presidential statements because courts overwhelmingly resist judicial inquiry into "executive motivation."[80] As a result, the "record rule" and its progeny have led to a systematic tilt favoring agencies.[81]

C. Reviewing the Administrative Record in Constitutional Challenges

Courts disagree about whether the APA's "record rule" applies to constitutional challenges to agency action.[82] No federal court of appeals has decided the question yet, and the Supreme Court recently denied a petition for a writ of certiorari on it.[83] Without that answer, most courts "decline to draw a bright line or categorical rule" and instead engage in a fact-specific inquiry of the claims at issue and the requested discovery.[84]

Many courts that apply the "record rule" to constitutional challenges base their reasoning on the APA's edict that courts set aside any action that is "contrary to constitutional right, power, privilege, or immunity."[85] Some courts rely on statutory interpretation when the claims overlap.[86] Other courts worry that plaintiffs might bring constitutional challenges to agency action under only the Constitution, rendering the APA's "record rule" superfluous.[87] Yet, even when the plaintiff brings only a constitutional challenge, some courts still apply the "record rule" for fear of running "afoul of Congress's intent."[88]

Courts that do not apply the "record rule" in constitutional challenges also invoke varying rationales.[89] For example, some courts discern a duty to assess constitutional claims independent of the agency's proffered

79. The bad-faith inquiry is at the district court's discretion. *See Overton Park*, 401 U.S. at 420 ("The District Court is not, however, *required* to make such an inquiry." (emphasis added)); *see also* Bagley, *supra* note 74.

80. *See Dep't of Com.*, 139 S. Ct. at 2573.

81. *See* Clark Byse, *Scope of Judicial Review in Informal Rulemaking*, 33 ADMIN. L. REV. 183, 187 (1981) (questioning whether courts can justifiably fashion "a rule of law concerning scope of review").

82. Chang v. U.S. Citizenship & Immigr. Servs., 254 F. Supp. 3d 160, 161 (D.D.C. 2017).

83. *See* Stahl York Ave. Co. v. City of New York, 140 S. Ct. 117 (2019).

84. California v. U.S. Dep't of Homeland Sec., No. 19-CV-04975-PJH, 2020 WL 1557424, at *14 (N.D. Cal. Apr. 1, 2020).

85. 5 U.S.C. § 706(2)(B); *see Chang*, 254 F. Supp. 3d at 161; *see also* text accompanying *supra* note 43.

86. *See, e.g.*, *Chang*, 254 F. Supp. 3d at 162.

87. *See, e.g.*, Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv., 58 F. Supp. 3d 1191, 1237–38 (D.N.M. 2014); Harvard Pilgrim Health Care of New Eng. v. Thompson, 318 F. Supp. 2d 1, 10 (D.R.I. 2004).

88. *See, e.g.*, Ketcham v. U.S. Nat'l Park Serv., No. 16-CV-00017-SWS, 2016 WL 4268346, at *1–2 (D. Wyo. Mar. 29, 2016).

89. *See* California v. U.S. Dep't of Homeland Sec., 2020 WL 1557424, at *14.

evidence.[90] Other courts permit evidence that an agency would not ordinarily include in an administrative record created for litigation.[91] In addition, some courts permit additional discovery when the constitutional claim diverges from or exists outside any APA claims.[92] And other courts allow extra-record discovery if a decisionmaker's intent[93] or illicit animus[94] is at issue. In the most recent constitutional challenge, a court looked outside the record simply because others have.[95]

Federal courts have an extensive history of examining governmental intent in constitutional law.[96] For example, courts have explored legislative intent in statutory-interpretation questions for nearly 120 years.[97] Similarly, the Supreme Court has long inquired into the intent of states' executive officials in constitutional challenges.[98] The Court has also opined that federal executive officials' intent can be relevant to agency action.[99] In one constitutional challenge, the Court set aside a Department of Justice action based on the Attorney General's public statements demonstrating impermissible bias.[100]

The Supreme Court has examined presidential intent in challenges to actions of the president, most notably in *Trump v. Hawaii*.[101] And President

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90. *See, e.g.*, Rydeen v. Quigg, 748 F. Supp. 900, 905–06 (D.D.C. 1990), *aff'd,* 937 F.2d 623 (Fed. Cir. 1991).

91. *See, e.g.*, Carlsson v. U.S. Citizenship & Immigr. Servs., No. 2:12-CV-07893-CAS, 2015 WL 1467174, at *12 (C.D. Cal. Mar. 23, 2015).

92. *See, e.g.*, Rueda Vidal v. U.S. Dep't of Homeland Sec., 536 F. Supp. 3d 604, 612 (C.D. Cal. 2021) (allowing additional discovery because constitutional claim existed "outside of the APA"); California v. U.S. Dep't of Homeland Sec., 2020 WL 155724, at *15 (same because the claims did not overlap).

93. *See, e.g.*, Grill v. Quinn, No. CIV S-10-0757 GEB, 2012 WL 174873, at *5 (E.D. Cal. Jan. 20, 2012).

94. *See, e.g.*, Cook Cnty. v. Wolf, 461 F. Supp. 3d 779, 794–95 (N.D. Ill. 2020).

95. *See* Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., 557 F. Supp. 3d 224, 245 (D. Mass. 2021).

96. Shaw, *supra* note 12, at 1339.

97. *See* Johnson v. S. Pac. Co., 196 U.S. 1, 14–15 (1904).

98. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1730–31 (2018) (examining the intent of executive officials in a case alleging religious animus); McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 845–46 (2005) (same in a case alleging violation of the Free Exercise Clause); Lee v. Weisman, 505 U.S. 577, 587 (1992) (same in a case alleging violation of the Establishment Clause).

99. *See* Shaw, *supra* note 12, at 1366–67; *see also* Fed. Trade Comm'n v. Cement Inst., 333 U.S. 683, 700–01 (1948); United States v. Morgan, 313 U.S. 409, 421 (1941).

100. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954).

101. Trump v. Hawaii, 138 S. Ct. 2392, 2401–02 (2018) (examining presidential intent in presidential tweets); *e.g.*, Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 274–75 (1974) (same in public presidential statements); Cappaert v. United States, 426 U.S. 128, 139 (1976) (same in a presidential proclamation); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999) (same in an executive order); *see also* United States v. Ehsan, 163 F.3d 855, 859 (4th Cir. 1998) (same in presidential statements to Congress); Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387, 1419 (10th Cir. 1990) (same in executive orders); Indep. Meat Packers Ass'n v. Butz,

Trump's plethora of public statements began a trend of plaintiffs attempting to attribute presidential intent to agency action in constitutional challenges brought under the APA.[102] That trend climaxed when the Supreme Court formally extended *Hawaii* to challenges against agency action in *Regents*.[103]

In constitutional challenges, courts are more flexible with evidentiary standards, even when applying the "record rule."[104] That increased flexibility accords with constitutional jurisprudence, as the decisionmaker's intent is often an element of the claim itself.[105] Yet when attempting to invalidate agency action, plaintiffs who convince a court to look at presidential statements outside the administrative record must still prove that the statements are "contemporary" and not "unrelated" to the action.[106]

III. *REGENTS* AND THE "CONTEMPORARY STATEMENTS" STANDARD OF REVIEW

Presidential-intent inquiries are confusing in the context of APA challenges.[107] Even though the president might direct the challenged action, plaintiffs may not sue the president under the APA.[108] Rather, plaintiffs in APA challenges must sue the agency decisionmaker.[109] Yet *Arlington Heights*'s "contemporary statements" standard governs constitutional

526 F.2d 228, 235–36 (8th Cir. 1975) (same); Mobley v. CIA, 924 F. Supp. 2d 24, 58 (D.D.C. 2013) (same); Traylor v. Safeway Stores, Inc., 402 F. Supp. 871, 876 (N.D. Cal. 1975) (same).

102. *E.g.*, Karnoski v. Trump, 926 F.3d 1180, 1195 (9th Cir. 2019); Pataud v. U.S. Citizenship & Immigr. Servs., Bos. Field Off., 501 F. Supp. 3d 22, 29 (D. Mass. 2020); California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d 994, 1025 (N.D. Cal. 2020); New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d 208, 222 (S.D.N.Y. 2020); Make the Rd. N.Y. v. Pompeo, 475 F. Supp. 3d 232, 266 (S.D.N.Y. 2020); Mayor of Balt. v. Trump, 416 F. Supp. 3d 452, 515 (D. Md. 2019); Kravitz v. U.S. Dep't of Com., 366 F. Supp. 3d 681, 712 (D. Md. 2019); S.A. v. Trump, 363 F. Supp. 3d 1048, 1059–61 (N.D. Cal. 2018).

103. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) (plurality opinion).

104. *See* discussion *supra* notes 85–88.

105. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (plurality opinion).

106. *Regents*, 140 S. Ct. at 1916 (plurality opinion) (quoting *Arlington Heights*, 429 U.S. at 268).

107. *See* Shaw, *supra* note 12, at 1372–73 ("[T]he quest for intent . . . [is] both hotly debated and controversial.").

108. Dalton v. Specter, 511 U.S. 462, 469 (1994) ("[T]he President's actions [a]re not reviewable under the APA, because the President is not an 'agency' within the meaning of the APA."); Franklin v. Massachusetts, 505 U.S. 788, 801 (1992).

109. *See Franklin*, 505 U.S. at 796–800 (explaining that the APA provides for judicial review of the final action of an *agency*, which is defined as any "authority of the Government of the United States," not including Congress, the courts, territorial governments, the government of the District of Columbia, or the president).

challenges alleging invidious discriminatory intent—whether brought under the APA or the Constitution.[110]

For constitutional challenges, Justice Powell's opinion in *Arlington Heights* provides the modern "framework for analyzing 'whether invidious discriminatory purpose was a motivating factor' in a governmental body's decisionmaking."[111] Relevant evidence includes (1) the impact of the action, (2) the historical background of the decision, (3) the specific series of events leading up to the action, and (4) the legislative or administrative history.[112] Although presidential statements could conceivably fall into any of those categories, *Arlington Heights* extends the fourth category to "contemporary statements by members of the decisionmaking body."[113]

The *Regents* Court picked up where *Arlington Heights* left off, giving "contemporary statements" independent meaning.[114] In *Regents*, the plaintiffs brought an APA and a constitutional challenge against a DHS order that rescinded DACA.[115] DACA provided work authorization, benefit eligibility, and removal protection for some "unauthorized aliens who had entered the United States as children."[116]

The *Regents* plaintiffs submitted one preinaugural statement, one postinaugural statement that was predecisional, and two postinaugural statements that were postdecisional.[117] In the preinaugural statement, the President said Mexican immigrants are "rapists."[118] In the postinaugural statement that was predecisional, made *two weeks before the agency action*, the President allegedly characterized Latinos as "animals."[119] And in the postinaugural statements that were postdecisional, the President said Latinos are responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking,"[120] and he tweeted that Latinos might "pour into and infest

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110. *See Regents*, 140 S. Ct. at 1915–16 (plurality opinion).

111. Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 488 (1997).

112. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

113. *Id.* at 268.

114. *See Regents*, 140 S. Ct. at 1916 (plurality opinion).

115. *Id.* at 1891 (majority opinion).

116. *Id.*

117. *Id.* at 1915 (plurality opinion); *see also* Brief for the States of New York, Massachusetts, Washington, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, & Virginia, & the District of Columbia, Respondents in No. 18-589 at 55, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (No. 18-589), 2019 WL 4748382.

118. Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017, 1:43 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/ [https://perma.cc/WX6S-CHZN].

119. Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants 'Animals' in Rant*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html [https://perma.cc/MU6B-ZFG8].

120. Ian Schwartz, *Trump: We Are "Liberating" Our Towns of Illegal Immigrants, Gangs*, REALCLEARPOLITICS (Aug. 22, 2017), https://www.realclearpolitics.com/video/2017/

our Country."[121] In what appears to be common practice, the DHS failed to offer a single statement made by the President.[122]

In the APA challenge, the Court did not address the President's statements when it invalidated the DHS's action as arbitrary and capricious for failing to address "important aspects of the problem before the agency."[123] By contrast, in the constitutional challenge, the Court probed the President's intent from all four statements.[124] Referring to the preinaugural, postinaugural, predecisional, and postdecisional statements collectively, the plurality called the President's statements about "illegal immigrants" "unilluminating" with respect to the immigration policy's intent—they were "remote in time and made in unrelated contexts" and, therefore, were not "contemporary statements."[125]

Although Justice Sotomayor joined the majority with respect to the APA challenge, she argued in her dissent from the constitutional challenge that dismissing the equal-protection claim was "unwarranted."[126] In her view, no precedent supported the plurality's "blinkered approach" of disregarding the President's campaign statements as remote in time.[127] She asserted the President's statements were relevant because they "bear on unlawful migration from Mexico" and because the DHS admitted that the President's statements were an "animating force" of the rescission.[128] She added that the Court should have placed the rescission's disproportionate impact on Latinos in context with the President's preinaugural statements and postinaugural statements.[129] Taken together, she concluded, the statements and impact established a "reasonable inference" that the President's discriminatory intent infected the agency action.[130]

The *Regents* plurality did not specify why any statement was unrelated or remote in time.[131] But, at least for challenges alleging discriminatory intent, *Regents* placed presidential statements into *Arlington Heights*'s fourth category: "statements by members of the decisionmaking body."[132] Consequently, in constitutional challenges to agency action, courts

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08/22/trump_we_are_liberating_our_towns_of_illegal_immigrant_gangs.html [https://perma.cc/ES9E-GZEX].

121. La Unión del Pueblo Entero v. Ross, 353 F. Supp. 3d 381, 387 (D. Md. 2018).

122. *See Regents*, 140 S. Ct. at 1907–08 (majority opinion) (explaining that the DHS relied on two different memorandums containing only the Agency's reasoning for the rescission).

123. *See id.* at 1896–99.

124. *Id.* at 1915–16 (plurality opinion).

125. *Id.* at 1916.

126. *Id.* at 1916–17 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

127. *Id.* at 1917.

128. *Id.*

129. *Id.* at 1917–18.

130. *See id.*

131. *See id.* at 1916 (plurality opinion).

132. *See id.* at 1915.

may inquire whether the sitting president's intent impermissibly infects the challenged action.[133]

But the *Regents* Court's "remote in time and made in unrelated contexts" language led to three points of divergence from *Arlington Heights*'s "contemporary statements" standard: (1) postinaugural versus preinaugural statements, (2) predecisional versus postdecisional statements, and (3) related versus unrelated statements.[134] Although some stability exists for the first two distinctions, district courts have not adopted a consistent methodology for determining whether a presidential statement is *related* to an agency action.[135]

IV. THREE NEW TENSIONS WHEN REVIEWING PRESIDENTIAL STATEMENTS

Divergent lower-court outcomes demonstrate *Regents*'s three distinctions. Ambiguity beclouds not only whether courts may attribute a president's intent to agency action from (1) preinaugural statements and (2) postdecisional statements, but also (3) under which circumstances presidents' statements are "related" to agency action.[136] This Part explores those three issues and proposes a reliable test for courts to determine whether the president's intent satisfies the *Regents* standard and is therefore attributable to the challenged action.

A. Postinaugural Versus Preinaugural Statements

Before *Regents*, some courts relied on preinaugural statements in evaluating equal-protection claims.[137] Then the *Regents* plurality ignored the

133. *E.g.*, Pataud v. U.S. Citizenship & Immigr. Servs., Bos. Field Off., 501 F. Supp. 3d 22, 29 (D. Mass. 2020) (discussing whether presidential statements are "contemporary statements by members of the decisionmaking body").

134. *Compare Regents*, 140 S. Ct. at 1916 (plurality opinion) (holding that the preinaugural, predecisional, and postdecisional statements submitted were "remote in time and made in unrelated contexts"), *with id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that preinaugural statements and postdecisional statements are neither remote in time nor unrelated).

135. *Compare* La Clinica de la Raza v. Trump, No. 19-CV-04980-PJH, 2020 WL 6940934, at *20 (N.D. Cal. Nov 25, 2020) (holding that presidential statements are "unrelated" if they are "not connected to the [challenged] Rule"), *with* Mayor of Balt. v. Trump, 416 F. Supp. 3d 452, 513–515 (D. Md. 2019) (holding that presidential statements need not "relate specifically to the decision" if the president "was personally involved in the decision").

136. *See* discussion *infra* Sections IV.A (discussing postinaugural statements and preinaugural statements), IV.B (discussing predecisional statements and postdecisional statements), IV.C (discussing related statements and unrelated statements); *see also* discussion *infra* Section IV.D (discussing official statements and unofficial statements).

137. *See, e.g.*, Casa De Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 775 (D. Md. 2018) (considering preinaugural statements to determine the President's intent), *aff'd in part, vacated in part, rev'd in part*, 924 F.3d 684 (4th Cir. 2019).

preinaugural–postinaugural distinction.[138] Justice Sotomayor, however, dissented that the Court should have considered the preinaugural statements with the postinaugural statements.[139] But, as explained below, none of those methods are reliable.

After *Regents*, some courts relied on only postinaugural statements.[140] For example, in the Southern District of New York, plaintiffs in two post-*Regents* equal-protection challenges against agency actions provided preinaugural and postinaugural statements: *New York v. United States Department of Homeland Security*[141] and *Make the Road New York v. Pompeo*.[142] In both cases, the district court considered only the postinaugural statements.[143] More recently, in *California v. United States Department of Homeland Security*[144] and its sister case *La Clinica de la Raza v. Trump*,[145] the Northern District of California illustrated the preinaugural-postinaugural distinction. In both cases, the district court disregarded preinaugural statements and considered only postinaugural statements after assuming that the President was a "relevant actor in the rulemaking process."[146] These courts rest on sounder principles.

Formally, statements made by a presidential candidate or president-elect are not dispositive evidence of the president's influence over federal agencies. President Biden signed more executive orders in his first week than any president *ever*.[147] No doubt, he had some intent brewing before he finally sat behind the Resolute Desk.[148] But as a candidate he could not "influence"

138. *Regents*, 140 S. Ct. at 1916 (plurality opinion).

139. *See id.* at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

140. *See, e.g.*, Make the Rd. N.Y. v. Pompeo, 475 F. Supp. 3d 232, 266 (S.D.N.Y. 2020); New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d 208, 222 (S.D.N.Y. 2020); California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d 994, 1025–26 (N.D. Cal. 2020); La Clinica de la Raza v. Trump, No. 19-CV-04980-PJH, 2020 WL 6940934, at *19–20 (N.D. Cal. Nov. 25, 2020).

141. *See* New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d at 222.

142. *See Make the Rd.*, 475 F. Supp. 3d at 266.

143. *See id.*; New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d at 222.

144. *See* 476 F. Supp. 3d at 1025.

145. *See* 2020 WL 6940934, at *20.

146. *See id.*; California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d at 1025.

147. *See* Evan Koslof, *Verify: Yes, President Biden Signed More Executive Orders in His First Week than Any Past President*, WUSA (Jan. 28, 2021, 2:04 PM), https://www.wusa9.com/article/news/verify/verify-yes-biden-signed-more-executive-orders-in-his-first-week-than-any-past-president/65-06d6cad9-3027-41ef-96be-654216ad81e3 [https://perma.cc/9ED2-JL5G].

148. *See* Adrienne Dunn, *Fact Check: Posts about Biden's Executive Orders, Quote about Dictators Needs Context*, USA TODAY (Feb. 9, 2021 10:10 PM, updated Feb. 14, 2021 3:03 PM), https://www.usatoday.com/story/news/factcheck/2021/02/09/fact-check-joe-biden-misquoted-executive-orders-dictators/4312016001/ [https://perma.cc/H5FT-C8PJ] ("It's worth noting that Biden explicitly campaigned on a promise to sign executive orders—both targeted at reversing Trump policies and addressing the coronavirus—if he was elected.").

or be "personally" or "directly" involved in agency decisionmaking.[149] Likewise, as president-elect he could not "modify or overturn" the prior Administration's "actions or decisions" until he was "sworn into office."[150] Until President Biden took the oath of office, his statements were not rooted in the president's constitutional authority.[151] So his preinaugural statements had no constitutional force. But once he took the oath of office, the Constitution exclusively vested President Biden with the executive power,[152] giving him the sole authority to control the executive agencies.[153] Simply put, executive agencies and their actions are attributable to only sitting presidents.[154]

Similarly, both presidential candidates and presidents-elect lack the confidential information that comes with the presidency.[155] Courts would contravene the president's constitutional powers and duties by assuming that the president compelled an agency action while the agency was not accountable to the president and the president was not accountable for the agency.[156] Indeed, the Founders explicitly rejected a plural executive in favor of accountability fixed solely on the president.[157] In other words, it is reasonable to attribute the president's intent to an agency action only if the president directed the action.

Functionally, too, statements made by a candidate or president-elect are not dispositive of a sitting president's intent. Such statements should not be attributed to an agency action, even if the action aligns with the president's intent. Although preinaugural policy preferences might align with postinaugural preferences, preinaugural statements do not necessarily

149. California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d at 1025; Mayor of Balt. v. Trump, 416 F. Supp. 3d 452, 515 (D. Md. 2019).

150. L. ELAINE HALCHIN, CONG. RSCH. SERV., RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 5 (2008).

151. *See* U.S. CONST. art. II, § 1.

152. *See id.* ("[Sh]e shall take Care that the Laws be faithfully executed . . . .").

153. *See* Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) ("The authority of the President to control and supervise executive policymaking is derived from the Constitution."); *see also* U.S. CONST. art. II, § 3 ("[S]he shall take Care that the Laws be faithfully executed . . . .").

154. *See In re Aiken Cnty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("Because the power to remove is the power to control, the President lacks control over an independent agency . . . ."); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 114 (5th ed. 2010) ("Agencies are politically accountable because the President is accountable for the actions of agencies.").

155. *See generally* DAVID PRIESS, THE PRESIDENT'S BOOK OF SECRETS: THE UNTOLD STORY OF INTELLIGENCE BRIEFINGS TO AMERICA'S PRESIDENTS (2017) (providing examples of the sorts of secret information to which the president becomes exclusively privy in the intelligence context).

156. *See* PIERCE, *supra* note 154, at 114 ("Agencies are politically accountable because the President is accountable for the actions of agencies."); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251–52 (2001) ("[A]ccountability" is one of the two "principal values that all models of administration must attempt to further.").

157. *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

demonstrate the president's intent to direct agency action. As some courts recognize, preinaugural statements could be mere political musings that a nonincumbent or a campaign official spouted off to appeal to some voter base or political group.[158] Thus, there is no way to know dispositively which preinaugural statements a sitting president made to influence an agency decisionmaker. Once the court decides to attribute the president's intent to an agency action, it is only reasonable to distill intent from her postinaugural statements.

For these reasons, only a postinaugural statement can satisfy step one of the Tweet Test, and only postinaugural statements are attributable to the challenged action during step two.[159]

B. Predecisional Versus Postdecisional Statements

Before and after *Regents*, courts have generally relied on postdecisional statements when evaluating equal-protection claims.[160] But the more reasonable approach is to rely on only predecisional statements because postdecisional statements cannot be "firmly tether[ed]" to prior agency action.[161]

In four post-*Regents* cases, courts in the Northern District of California and the Southern District of New York considered only postdecisional statements.[162] Even though the plaintiffs cited predecisional statements and postdecisional statements,[163] those courts did not explain why they considered only the postdecisional statements.[164] In contrast to those

158. *See, e.g.*, Kravitz v. U.S. Dep't of Com., 366 F. Supp. 3d 681, 711–12 (D. Md. 2019) (refusing to give weight to a reelection campaign email for fear of relying on statements made by "a low-level campaign staffer seeking to assign direct credit to the President for an agency action").

159. *See* discussion *supra* Section I.A.

160. *See, e.g.*, Make the Rd. N.Y. v. Pompeo, 475 F. Supp. 3d 232, 266 (S.D.N.Y. 2020); New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d 208, 222 (S.D.N.Y. 2020); California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d 994, 1025–26 (N.D. Cal. 2020); La Clinica de la Raza v. Trump, No. 19-CV-04980-PJH, 2020 WL 6940934, at *19–20 (N.D. Cal. Nov. 25, 2020); Casa De Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 775 (D. Md. 2018), *aff'd in part, vacated in part, rev'd in part*, 924 F.3d 684 (4th Cir. 2019).

161. Kravitz v. U.S. Dep't of Com., 366 F. Supp. 3d 681, 712 (D. Md. 2019).

162. *Make the Rd.*, 475 F. Supp. 3d at 243, 266; New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d at 222; California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d at 1025–26; *La Clinica*, 2020 WL 6940934, at *19–20.

163. *See* Compl. at 229–34, *Make the Rd.*, 475 F. Supp. 232 (S.D.N.Y. Dec. 19, 2019) (No. 1:19-CV-11633), 2019 WL 7020680; New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d at 222; Compl. at 284–89, California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d 994 (E.D. Cal. Aug. 16, 2019) (No. 4:19-CV-04975), 2019 WL 3926611; First Am. Compl. at 126–29, *La Clinica*, No. 4:19-CV-04980 (N.D. Cal. May 20, 2020), 2020 WL 6938212.

164. *See Make the Rd.*, 475 F. Supp. 3d at 243, 266; New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d at 222; California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d at 1025–26; *La Clinica*, 2020 WL 6940934, at *19–20.

courts' practices, considering statements made only *before* the challenged action would have been a more reliable criterion.

For *postdecisional* statements, courts must draw the illogical inference that the president held the same intent before the agency action became final.[165] That reasoning is the exact sort of "magical thinking" that courts should avoid.[166] Although postdecisional statements do not necessarily reflect predecisional thinking,[167] a president's predecisional and postdecisional intent might align. But that possibility should not change the analysis because considering postdecisional statements in some circumstances but not others would blur the lines that the Tweet Test refines. And postdecisional statements would be cumulative evidence under the Tweet Test, as it can warrant invalidation based on one public, postinaugural, predecisional statement.

By contrast, *predecisional* statements logically connect the president's intent to the agency action. And executive-agency officials "serve[] at the pleasure of the President."[168] So it is always reasonable to assume that executive-agency decisionmakers are at least aware of the president's public statements.[169] Thus, once a public, predecisional statement is in the record, the logical next step is to connect the president's intent directly to the agency action.[170]

Yet the *Regents* Court conflated predecisional tweets and postdecisional tweets—referring to them collectively as not "contemporary" with the agency action.[171] A postdecisional statement might suggest predecisional intent or predecisional pressure on an agency. But postdecisional statements can truly demonstrate only postdecisional intent. Thus, it would be neither reasonable nor logical to assume that a

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165. *See* Liberty Ins. v. LSP Prods. Grp., Inc., 582 F. Supp. 3d 496, 507 (E.D. Mich. 2022) (holding that it was "magical thinking" to infer preaction conduct from postaction evidence).

166. *See id.*; *see also* Cynthia R. Farina, Mary J. Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENV'T & ADMIN. L. 123, 124 (2012) ("Open government enthusiasts (among which we certainly count ourselves) seem prone to magical thinking: the building of if-then causal links that are not objectively justifiable.").

167. *See* Kravitz v. U.S. Dep't of Com., 366 F. Supp. 3d 681, 712 (D. Md. 2019).

168. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1380–81 (2018) (Gorsuch, J., dissenting); *see Kravitz*, 366 F. Supp. 3d at 712.

169. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982) ("[A] reasonably competent public official should know the law governing his conduct.").

170. *See* Kagan, *supra* note 156, at 2372 ("A sounder version of . . . judicial review would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled."); LELAND E. BECK, AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING 15 (2013) ("If an [announcement of a rule] is followed by a proposed and final rule on the same subject, it would seem logical that the material considered in formulating the [proposed rule] would constitute part of the rulemaking record.").

171. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (plurality opinion).

postdecisional statement was "before" the agency decisionmaker when she made her decision.[172] For that reason, courts should not try to infer predecisional intent from postdecisional statements.[173]

The intent analysis should be based on reasonable factual assumptions about which statements most likely played a role in the agency's decisionmaking process. If the earliest suggestion came from a public, predecisional, presidential statement, then any impermissible presidential intent should be attributed to the agency action—regardless of the agency's rationale. The orders of sitting presidents are constitutionally empowered.[174] Thus, when evaluating equal-protection challenges to agency action, district courts can—and should—reasonably assume that the agency acted while aware of the president's predecisional statements. Indeed, at least one district court and one circuit court have applied *Regents* to consider only predecisional statements.[175]

For these reasons, the Tweet Test attributes intent from only predecisional statements.[176]

C. Related Versus Unrelated Statements

The *Regents* plurality held that presidential statements are not attributable to agency action if made in "unrelated contexts."[177] District courts have generally found predecisional presidential statements to be related to agency actions.[178] Their considerations fall within three categories:

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172. *See* Ramos v. Wolf, 975 F.3d 872, 898 (9th Cir. 2020) ("[T]he influence of the[President's] remarks on the [agency action] is belied by the fact that the meeting occurred three days after the [agency action] issued . . . . [T]he [postdecisional] statements alone do not demonstrate that the President's purported racial animus was a motivating factor for the TPS terminations.").

173. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

174. *See* U.S. CONST. art. II, § 1.

175. *See Ramos*, 975 F.3d at 898; Washington v. U.S. Dep't of Homeland Sec., No. 4:19-CV-5210-RMP, 2020 WL 12834440, at *16 (E.D. Wash. Sept. 14, 2020) (considering only the President's predecisional public statements).

176. *See supra* Section I.A.

177. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (plurality opinion).

178. *See, e.g.*, Stockman v. Trump, 331 F. Supp. 3d 990, 999 (C.D. Cal. 2018), *vacated and remanded*, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019).

(1) the same-class rationale,[179] (2) the same-policy rationale,[180] and (3) the same-official rationale.[181] The first two categories are appropriate considerations, and the third category sets up a rebuttable presumption that the president's statements are related to the challenged action.

1. The "Same Class" Rationale

The same-class rationale attributes the president's intent to a challenged agency action if the president's statements demonstrate animus toward the "same class" of people disproportionately impacted by the challenged action.[182] This approach is best illustrated by three presidential tweets from July 26, 2017, which together comprise the "Twitter Announcement":

> After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.][183]

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179. *See, e.g.*, *id.*; Doe 2 v. Trump, 315 F. Supp. 3d 474, 481–82 (D.D.C. 2018), *rev'd sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019); Make the Rd. N.Y. v. Pompeo, 475 F. Supp. 3d 232, 266 (S.D.N.Y. 2020) ("Plaintiffs] do[] not need to demonstrate a tight nexus between words and actions" bearing on "immigrants of color"); Mayor of Balt. v. Trump, 416 F. Supp. 3d 452, 491 (D. Md. 2019) ("[I]f President Trump harbors animus towards immigrants of color, and if he encouraged the State Department to revise [a policy affecting immigrants of color], then the amendments violate equal protection . . . ."); Casa De Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 775 (D. Md. 2018) (inferring the President's statements regarding "the Dreamers" to the challenged action), *aff'd in part, vacated in part, rev'd in part*, 924 F.3d 684 (4th Cir. 2019).

180. *See, e.g.*, *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (asserting that the President's statements were relevant to the challenged action because they "bear on unlawful migration from Mexico"); *Mayor of Balt.*, 416 F. Supp. 3d at 512–13 (finding that the DHS and the State Department implemented agency actions "nearly identical" to an earlier executive order).

181. *See, e.g.*, *Regents*, 140 S. Ct. 1891, 1916 (2020) (plurality opinion) ("The relevant actors were most directly Acting Secretary Duke and the Attorney General."); Pataud v. U.S. Citizenship & Immigr. Servs., Bos. Field Off., 501 F. Supp. 3d 22, 29 (D. Mass. 2020) (holding that discriminatory presidential statements are unrelated because the President did not have "direct control" over the challenged action); California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d 994, 1025 (N.D. Cal. 2020) (holding the same because he was not "directly involved in the Rule's promulgation"); *see also* La Clinica de la Raza v. Trump, No. 19-CV-04980-PJH, 2020 WL 6940934, at *19–20 (N.D. Cal. Nov. 25, 2020) (assuming that the President was "involved in the rulemaking process").

182. *See, e.g.*, *Doe 2*, 315 F. Supp. 3d at 493.

183. W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. FORUM 825, 832 (2018).

The Twitter Announcement banned all transgender people from the military.[184] On August 25, 2017, the President issued a memorandum purporting to effectuate the policy from the Twitter Announcement.[185] Nineteen days later, the Secretary of Defense issued a memorandum also purporting to effectuate the President's policy.[186] On February 22, 2018, in response to some protest, the Secretary issued a memorandum that proposed a variation of the President's policy that would instead ban the subset of transgender people diagnosed with gender dysphoria.[187] The February 22, 2018 memorandum also requested that the President officially revoke his August 25, 2017 memorandum and allow the military to implement the Secretary's version of the policy.[188] Twenty-nine days later, the President revoked his old policy and ordered the Secretary to implement the Secretary's version, which he then implemented.[189]

The Twitter Announcement spawned four agency-action challenges.[190] Those challenges were filed either preenforcement or postenforcement. As is the case in other postenforcement challenges, the courts in *Doe 2 v. Trump*[191] and *Stockman v. Trump*[192] compared the president's suggested policy to the impact of the agency's final, effectuated policy.[193]

The *Doe 2* court found that the Secretary derived his policy from the President's policy.[194] To that end, the court attributed the President's animus to the challenged action by comparing his *intent* from the Twitter Announcement with the discriminatory *impact* of the agency action.[195] The court held that, though the Secretary's policy and the President's policy took different approaches, both accomplished the same goal: disproportionately impact transgender people.[196]

Similarly, the *Stockman* court reasoned that the Twitter Announcement had the same intent, or "essence," as the challenged version of the policy.[197] The court found that the President's policy discriminated against all transgender people.[198] The Agency argued that the Secretary's

184. *See id.*
185. *See* Karnoski v. Trump, 926 F.3d 1180, 1188–89 (9th Cir. 2019).
186. *See Doe 2*, 315 F. Supp. 3d at 493.
187. *See Karnoski*, 926 F.3d at 1191.
188. *See id.* at 1192.
189. *Id.*
190. *See generally id.* at 1180; Stockman v. Trump, 331 F. Supp. 3d 990, 999 (C.D. Cal. 2018), *vacated and remanded*, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019); *Doe 2*, 315 F. Supp. 3d 474; Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017).
191. *See generally Doe 2*, 315 F. Supp. 3d at 474.
192. *See generally Stockman*, 331 F. Supp. 3d at 999.
193. *See Stockman*, 331 F. Supp. 3d at 999; *see also Doe 2*, 315 F. Supp. 3d at 474.
194. *See generally Doe 2*, 315 F. Supp. 3d 474.
195. *See id.* at 481–82.
196. *Id.* at 494.
197. *Stockman*, 331 F. Supp. 3d at 999.
198. *Id.*

policy was different because it distinguished transgender people under the guise of "gender dysphoria."[199] But the court saw through the Agency's façade and sustained the injunction against the Secretary's policy because it was "fundamentally the same" as the President's and disadvantaged transgender servicemembers "in the same fundamental way."[200] Since *Regents*, several other courts have taken similar approaches.[201]

Arlington Heights held that impact and intent are both relevant considerations in equal-protection analyses.[202] So it makes sense that courts compare the impact of presidential policies to the impact of final agency actions. It is thus reasonable to assume, especially when a policy might disproportionately impact a protected class, that the president's discriminatory intent had a casual effect on the action's discriminatory impact.[203] Accordingly, courts should attribute the president's intent to the challenged action if the sitting president's proposed policy intends to affect the "same class" impacted by the challenged action.

For these reasons, the Tweet Test attributes the intent of presidential statements that affect the same class that the challenged action impacts.[204]

2. The "Same Policy" Rationale

The same-policy rationale attributes the president's intent to the challenged action if the president's proposed policy is substantially similar to the challenged action.[205] Justice Sotomayor's partial dissent in *Regents* best illustrates this approach:

> Nor did any of the statements arise in unrelated contexts. They bear on unlawful migration from Mexico—a keystone of President Trump's campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA.[206]

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199. *Id.* at 999–1000.

200. *Id.* at 999–1000, 1004.

201. *See supra* note 179.

202. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977) ("A racially discriminatory intent, as evidenced by such factors as disproportionate impact . . . must be shown.").

203. *See generally* The Leadership Conf. on Civ. & Hum. Rts., *Trump Administration Civil and Human Rights Rollbacks*, CIVILRIGHTS.ORG (2022*)* https://civilrights.org/trump-rollbacks/ [https://perma.cc/V3CZ-QNQL] ("Since Trump took office in January 2017, his administration has worked aggressively to turn back the clock on our nation's civil and human rights progress. Here's how.").

204. *See supra* Section I.A.

205. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1917–18 (2020) (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

206. *Id.* at 1917.

Justice Sotomayor gave three reasons supporting her conclusion that the President's statements were "related": the effectuated policy was the same type as what the President proposed (1) during his campaign and (2) during his presidency, and (3) the agency conceded that the President's policy animated the effectuated policy.[207] As discussed earlier, her first approach regarding campaign statements is not grounded in the President's constitutional authority to direct agency action.[208] But her second and third approaches of tying the challenged action to the President's proposed policy are reasonable.

According to Justice Sotomayor, the President's statements were contextually related to the agency action because they both "bear on unlawful migration from Mexico," and also because the Agency admitted that the President's statements were an animating force.[209] Similarly, the President's statements were contextually related to the challenged action in *Doe 2* and *Stockman* because they all bore on the military service of transgender people.[210] Bearing on the same subject matter, they were substantially similar.

In the postenforcement context, courts apply a greater degree of scrutiny to agency action that "arrives at substantially the same conclusion" as one previously remanded.[211] That greater degree of scrutiny works best as a presumption that the president's intent is a part of the agency action if they have a substantially or fundamentally similar goal,[212] have "nearly identical regulatory changes,"[213] or bear on the same subject matter.[214] The same presumption should apply if the agency followed the president's directive.[215] In these situations, it is reasonable to assume that the president's intent is part of the challenged agency action.

Courts should therefore presumptively infer the president's intent into the challenged action if the president's proposed policy is the "same policy" as the challenged action. The policies are the same if (1) the president's proposed policy and the challenged action bear on the same subject matter or (2) the court finds, or the agency concedes, that the agency acted according to the president's directive.[216]

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207. *Id.* at 1917–18.

208. *See supra* text accompanying notes 149–54.

209. *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

210. *See supra* notes 195–200 and accompanying text.

211. Level the Playing Field v. Fed. Election Comm'n, 381 F. Supp. 3d 78, 88 (D.D.C. 2019) (quoting Greyhound Corp. v. ICC, 668 F.2d 1354, 1358 (D.C. Cir. 1981)), *aff'd*, 961 F.3d 462 (D.C. Cir. 2020)).

212. *See supra* notes 196–200 and accompanying text.

213. *See* Mayor of Balt. v. Trump, 416 F. Supp. 3d 452, 512 (D. Md. 2019).

214. *See supra* note 209 and accompanying text.

215. The same presumption should apply regardless of whether the court determines or the agency concedes that the agency was acting according to the president's directive.

216. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1917 (2020) (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting

For these reasons, the Tweet Test attributes the intent of presidential statements that propose the same policy as the challenged action.[217]

3. The "Same Official" Rationale

The same-official rationale attributes the president's intent to the challenged action if the president was the first agency decisionmaker to suggest it.[218] In this circumstance, a rebuttable presumption arises that the president was the "same official" who proposed the version of the agency action at issue. This presumption is overcome with evidence that another agency decisionmaker first proposed the challenged action.

The plurality opinion in *Regents* best illustrates this approach:

> [T]he cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. . . . [R]espondents did not "identif[y] statements by [either] that would give rise to an inference of discriminatory motive." Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as "contemporary statements" probative of the decision at issue.[219]

Although the *Regents* plurality considered the President to be a "member[] of the decisionmaking body,"[220] it found that his statements were "unrelated" to the challenged action because he was not one of the "most directly" involved actors.[221] But that reasoning disregarded the President's power over executive agencies. As an agency decisionmaker, if the President was the first to suggest that the Agency rescind DACA, then it would have made more sense to attribute his intent to the Agency's decision to rescind DACA.[222]

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in part); *see also USTR Robert Lighthizer Statement on the President's Memorandum on Reforming Developing-Country Status in the WTO*, USTR.GOV (July 26, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-robert-lighthizer-statement [https://perma.cc/GUS4-AN49] ("I look forward to implementing the President's directive.").

217. *See supra* Section I.A.

218. *See Regents*, 140 S. Ct. at 1916 (2020) (plurality opinion).

219. *Id.* (citations omitted).

220. *Id.*

221. *See id.* at 1915–16.

222. *See id.* at 1908 ("When an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam))).

Even so, the President was not the first decisionmaker to suggest rescinding DACA.[223] On September 4, 2017, Attorney General Sessions sent a letter to Acting Secretary of Homeland Security Duke, advising that "the Department of Homeland Security . . . should rescind" DACA because the DHS lacked implementation authority.[224] The next day, Secretary Duke issued a memorandum rescinding DACA.[225] Missing from the record was, among other things, the President's public statement from later the same day announcing that he supervised DACA's rescission.[226] Yet that statement would not have mattered under the Tweet Test because it was postdecisional and not the first public statement to suggest rescinding DACA.[227]

So, applying the same-official rationale, the *Regents* Court would have more soundly reached the same conclusion while preventing "discriminatory motivation" from being "laundered through the Secretary."[228] The Departments of Justice and Homeland Security are both executive agencies because presidents can remove the Attorney General and the Secretary of Homeland Security at will.[229] Although the President's postdecisional statement was grounded in his constitutional authority to supervise both agencies, he might have just been taking credit for the rescission of DACA.[230] The record did not demonstrate otherwise.[231] Nor did it contain any postinaugural, predecisional statements.[232] Therefore, the Court would still have properly found that the President's statements were unrelated to the intent of the agency action because "[t]he relevant actors were most directly Acting Secretary Duke and the Attorney General."[233]

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223. *See id.* at 1903.

224. Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 475, 491–92 (9th Cir. 2018), *rev'd in part, vacated in part sub nom.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

225. *Id.* at 492.

226. Press Release, White House Office of the Press Secretary, Statement from President Donald J. Trump (Sept. 5, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-donald-j-trump-7/ **[**https://perma.cc/69CW-F2KW**]** ("I have advised the [DHS] that DACA recipients are not enforcement priorities unless they are criminals, are involved in criminal activity, or are members of a gang."); *see also* Charles Fendrych, DHS v. Regents of the University of California*: Administrative Law Concerns in Repealing DACA*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 99, 112 n.144 (2020) (noting two postdecisional presidential tweets demonstrating that DACA was rescinded as a response to not receiving the Democrats' support to build a wall along the Mexico–United States border).

227. *See Regents*, 908 F.3d at 491–92.

228. CASA de Md., Inc. v. Trump, 355 F. Supp. 3d 307, 326 (D. Md. 2018).

229. *See generally* Myers v. United States, 272 U.S. 52 (1926) (holding that "under the Constitution the President has the exclusive power of removing executive officers of the United States").

230. *See supra* text accompanying notes 149–54.

231. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020) (plurality opinion) (explaining that the record did not demonstrate that the President influenced the challenged policy).

232. *Id.*

233. *Id.* at 1916.

The same-official rationale would also ease agencies' litigation burdens—a huge benefit if, for example, the president has a history of disparaging protected classes. Consider for context *Department of Commerce v. New York*,[234] in which the Department of Commerce excluded a pretextual statement, demonstrating it was the Secretary's idea to reinstate the citizenship question on the 2020 census questionnaire.[235] In the district court, the plaintiffs' equal-protection claim survived a motion to dismiss based on three presidential statements that "could [have] be[en] construed to reveal a general animus toward immigrants of color."[236] After a bench trial, however, the district court found that there was not "a sufficient nexus between President Trump['s] and Secretary Ross's decision."[237] Because judicial review was limited to the Agency's administrative record,[238] the Agency's incentive to exclude the Secretary's pretextual rationale was even higher. But the same-official rationale would have encouraged the Agency to include the Secretary's excluded statement to defeat the equal-protection claim at the pleading stage. In sum, the same-official rationale would encourage agencies to submit one more piece of relevant evidence, instead of omitting potentially damning evidence, making judicial review more "adequate."[239] Obviously, the burden of submitting one piece of evidence is not outweighed by the risk of allowing animus-tainted policies.

Other district courts have also relied on a lack of connection between predecisional presidential statements and the challenged action.[240] For example, the District Court for the District of Maryland wanted proof that the Secretary "considered or adopted" the President's public, predecisional statements.[241] Similarly, the District Court for the Northern District of California has twice severed presidential statements from executive-agency actions for lacking a "direct connection."[242] But if a predecisional presidential statement publicly discusses a policy, then any relevant agency decisionmakers have likely considered the president's statements. It is thus unreasonable to require plaintiffs to demonstrate that the agency decisionmaker saw a relevant public presidential statement.

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234. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

235. *Id.* at 2574.

236. New York v. United States Dep't of Com., 315 F. Supp. 3d 766, 810 (S.D.N.Y. 2018).

237. New York v. United States Dep't of Com., 351 F. Supp. 3d 502, 670 (S.D.N.Y.), *aff'd in part, rev'd in part, and remanded sub nom.* Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

238. *See supra* text accompanying note 60.

239. *See supra* notes 57–65 and accompanying text.

240. *But see* Pataud v. U.S. Citizenship & Immigr. Servs., Bos. Field Off., 501 F.3d 22, 29 (D. Mass. 2020) (holding that the president's statements were unrelated to an action because the president had no "direct control" over it).

241. Kravitz v. U.S. Dep't of Com., 366 F. Supp. 3d 681, 712 (D. Md. 2019).

242. La Clinica de la Raza v. Trump, No. 19-cv-04980-PJH, 2020 WL 6940934, at *19–20 (N.D. Cal. Nov. 25, 2020); California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d 994, 1025–26 (N.D. Cal. 2020).

Some post-*Regents* courts did not require such a "tight nexus" between the President's statements and the challenged action at the pleading stage.[243] And other courts have adopted a similar line of reasoning, though not explicitly. For example, in *New York v. United States Department of Homeland Security*, the district court assumed that the President's statements were related to the challenged action because they were predecisional and postinaugural.[244] Even before *Regents*, the district court in *Kravitz v. United States Department of Commerce* found that the President's statements were "relevant because Secretary Ross serves at the pleasure of the President."[245] These findings are presumably based on the president's supervisory power over executive agencies.[246]

Those inconsistencies would be resolved by a rebuttable presumption that the president's intent is related to the challenged action. Under the status quo, the relatedness of presidential statements could depend on the way the wind blows. One direction might lead to irrelevant presidential intent if, for example, a president often promotes or criticizes the proposed ideas of agency decisionmakers. In the other direction, presidential intent might never be attributable to agency action. For APA purposes, an agency's secretary is the "decisionmaker" who heads the agency that effectuated the challenged action.[247] So a secretary, who heads one agency, will almost always have been more "directly" involved in the challenged action than the president, who directs hundreds of agencies.[248] The same-official rational steadies the sails.

Courts should therefore presumptively infer the president's intent into the challenged action if a predecisional, postinaugural statement shows that the sitting president's proposed policy and the challenged action were both initiated by the president: the "same official."

For these reasons, the Tweet Test attributes the intent of presidential statements only if the first statement to propose the challenged version of the policy came from the sitting president.[249]

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243. *See, e.g.*, Make the Rd. N.Y. v. Pompeo, 475 F. Supp. 3d 232, 266 (S.D.N.Y. 2020) (quoting Mayor of Balt. v. Trump, 416 F. Supp. 3d 452, 515 (D. Md. 2019)).

244. *See* New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d 208, 222 (S.D.N.Y. 2020) (providing dates to demonstrate that the statements were predecisional and postinaugural).

245. Kravitz v. U.S. Dep't of Com., 366 F. Supp. 3d 681, 712 (D. Md. 2019).

246. *See Mayor of Balt.*, 416 F. Supp. 3d at 515.

247. *See supra* note 45 and accompanying text.

248. *See* Clyde Wayne Crews Jr., *How Many Federal Agencies Exist? We Can't Drain the Swamp Until We Know*, FORBES (July 5, 2017, 4:03 PM), https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/?sh=e245e331aa28 [https://perma.cc/R47N-5YF3].

249. *See* discussion *supra* Section I.B.

D. One Additional Tension: Verified Statements

Some courts attribute presidential intent to a challenged action from statements that did not necessarily come from the president. For example, in *Saget v. Trump*,[250] plaintiffs brought an APA challenge to the DHS's termination of Temporary Protected Status for Haiti. The plaintiffs submitted three allegedly presidential statements.[251] The district court evaluated all three statements and found evidence of discriminatory animus.[252] The court attributed the president's discriminatory intent directly to the executive-agency action, reasoning that "[o]ur Constitution vests 'executive Power' in the President, not in the Secretary of DHS, who reports to the President and is removable by him at will."[253] But the three statements in *Saget* were not presidential—they were merely comments purportedly made in the presence of "several U.S. Senators."[254]

In *Saget*, nothing in the record demonstrated that the President made the discriminatory statements.[255] There was no video, executive order, or tweet in the record—only newspaper articles.[256] If courts rely on statements like those, then nearly any media outlet can publish an uncorroborated article about something that the president said and create standing for plaintiffs to strike down agency action as arbitrary, capricious, contrary to law, or unconstitutional.[257]

Courts should not consider uncorroborated statements in equal-protection challenges. That is, courts should not infer presidential intent from statements that are not verifiably from the president—unlike executive orders, proclamations, tweets, videos, and press releases.

For these reasons, the Tweet Test attributes the intent of only verified statements.[258]

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250. Saget v. Trump, 345 F. Supp. 3d 287 (E.D.N.Y. 2018).

251. *E.g.*, *id.* at 303 ("Why do we need more Haitians?").

252. *Id.*

253. *Id.*

254. *Id.*

255. There was also no testimonial evidence of the alleged statements in the administrative record. *See id.* Even if such testimonial evidence existed, the Tweet Test would not have required admission of the related presidential statements because they were not public.

256. *See id.*; *see also* Saget v. Trump, 375 F. Supp. 3d 280, 371 (E.D.N.Y. 2019) (discerning the President's intent from his "alleged[] react[ion] to a draft" agency action).

257. *See, e.g.*, Joe Concha, *BuzzFeed's Publication of Trump Report Violated Journalistic Ethics*, THE HILL, (Jan. 11, 2017, 11:40 AM) https://thehill.com/blogs/pundits-blog/media/313740-buzzfeeds-publication-of-trump-report-violated-journalistic-ethics/ [https://perma.cc/A7L7-7TKE].

258. *See* discussion *supra* Section I.A.

V. PROVING THE TWEET TEST

The Tweet Test equips courts to attribute discriminatory presidential intent to agency action.[259] Section V.A justifies the Tweet Test, explaining how and why it strikes the best balance for everyone. Finally, Section V.B addresses relevant counterarguments.

A. Justifications for the Tweet Test

One of the president's constitutionally sworn duties is "[t]ak[ing] care that the laws be faithfully executed."[260] To that end, presidents have directed federal agency action using nearly every medium of communication—from private parleys in smoke-filled rooms[261] to public posts in the Twitterverse.[262] Public statements often express the underlying intent of an agency action that the president directed.[263] Yet some court still sever the connection between the president's intent and the agency action.[264] But severing that connection frustrates the purpose of the APA and judicial review.[265]

The Tweet Test upholds the APA's purpose by mitigating unreasonable omissions, uncertainty for agencies, and procedural hurdles for plaintiffs.[266] The APA was designed not only to ensure that "federal agencies

259. *See* discussion *supra* Part I.

260. U.S. CONST. art. II, § 3 ("[S]he shall take Care that the Laws be faithfully executed . . . . "); Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) ("The authority of the President to control and supervise executive policymaking is derived from the Constitution.").

261. *See Sierra Club*, 657 F.2d at 408 ("[U]ndisclosed Presidential prodding may direct an outcome . . . . In such a case, it would be true that the political process did affect the outcome in a way the courts could not police.").

262. *E.g.*, Eggleston & Elbogen, *supra* note 183, at 831–32; *see also* discussion *supra* Section IV.C.1.

263. *See* Trump v. Hawaii 138 S. Ct. 2392, 2435, 2438 (2018) (Sotomayor, J., dissenting).

264. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J 2, 6 (2009) ("[A]gencies, courts, and scholars alike generally seem to have accepted the view that influences coming from one political branch or another cannot be allowed to explain administrative decisionmaking, even if such factors are influencing agency decisionmaking."); discussion *supra* Part IV.

265. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 352 (3d ed. 2014) ("Judicial review thus serves as an important check on the legality of the actions that agencies may undertake. It also serves as an important check on Congress."); *supra* note 58 and accompanying text; *see also* Bagley, *supra* note 74; *cf.* Honorable Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323–24 ("When judges engage in that kind of analysis, we call it judicial activism. And most observers condemn judicial activism as an arrogation of legislative power to the judiciary.").

266. *See* Sanjai Bhagat & Roberta Romano, *Empirical Studies of Corporate Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 945, 963 (A. Mitchell Polinsky & Steven Shavell eds., 2007); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 362 (2019).

are accountable to the public" but also to invalidate agency action that is based on impermissible considerations.[267] The Tweet Test balances the scales between agencies and plaintiffs by encouraging agencies to add one more document into administrative records to rebut a reasonable presumption of discriminatory animus.[268] The evidence admissible under the Tweet Test is easily accessible because it is publicly available. The Tweet Test will also help courts to invalidate agency action that is based on impermissible considerations.[269] And the Tweet Test does not affect judicial review of independent-agency action, which requires a basis outside the president's influence. Finally, the Tweet Test will allow agencies to consistently rely on presidential influence as a factor in agency decisionmaking.

The Tweet Test also furthers the purpose of judicial review of agency action.[270] The Tweet Test accords not only with Supreme Court precedent[271] and the general practice of district courts,[272] but also with Congress's intent[273] and the views of numerous scholars.[274] In addition, the Tweet Test is not a subterfuge around the courts' other means of adding evidence into administrative records; it merely clarifies how a preexisting analysis applies to a discreet set of evidence.[275] The Tweet Test is also easy to administer because it has two simple steps.[276] And the Tweet Test is reliable because it

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267. 5 U.S.C. § 706(2); Dep't Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (majority opinion) (quoting Franklin v. Massachusetts, 505 U.S. 788, 796 (1992)); *accord* 73A C.J.S. *Public Administrative Law and Procedure* § 381 (2022) (noting that the "essential purpose" of "[a]n administrative procedure review statute" "is to preserve and effectuate the rights to judicial review" (citing Smith's Cycles, Inc. v. Alexander, 219 S.E.2d 282, 285 (N.C. Ct. App. 1975))).

268. *See supra* notes 234–39 and accompanying text.

269. *See, e.g.*, Al Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168, 1206–08 (S.D. Cal. 2019) (admitting the president's tweets into the administrative record and citing them to establish the finality of an agency action "based on false claims").

270. *See In re* United States, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting from grant of stay) ("Indeed, judicial review cannot function if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record."); Pedersen, *supra* note 39, at 39 ("If rules, like formal adjudications, were based on clearly defined records, the efficiency of both rulemaking and judicial review would be increased."); *supra* text accompanying note 265; *infra* text accompanying notes 306–07, 325–32; *supra* notes 59, 170 and accompanying text; *see also* 5 U.S.C. § 706(2); *Regents*, 140 S. Ct. at 1905 (majority opinion).

271. *See* discussion *supra* Section IV.C.3.

272. *See generally* discussion *supra* Section IV.C.

273. *See, e.g.*, 10 U.S.C. § 113(b) ("The Secretary is the principal assistant to the President in all matters relating to the Department of Defense.").

274. *See, e.g.*, Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131 (2010) ("Commentators and courts largely agree that the President can legally be involved in agency decisions such as rulemaking.").

275. Indeed, in each of the cases discussed, though the plaintiffs often submitted anywhere from 5 to 20 statements, approximately 1 to 5 of them met the Tweet Test's criteria. *See, e.g.*, n.116 and accompanying text.

276. *See* discussion *supra* Part I.

avoids logical fallacies[277] and attributes presidential intent to agency action only if reasonable to do so.[278] Finally, the Tweet Test mitigates potential oversight and misuse of the Federal Rules of Evidence.[279]

The Tweet Test is supported by constitutional principles.[280] It attributes intent to agency action from only presidential statements made under color of the president's constitutional duty to direct federal executive agencies.[281] And it delivers upon the central purpose of the Equal Protection Clause by mitigating impermissible animus.[282] Moreover, the Tweet Test avoids intruding upon executive deliberations because it only scrutinizes public statements.[283] When a president's policy and a later agency action are substantially similar, courts can reasonably assume that the action stems from the president's constitutional authority. Thus, when plaintiffs satisfy the Tweet Test, rejecting the inference that the president's intent is part of the agency action not only ignores relevant facts that exist in the real world but also contravenes constitutional principles.[284] Such a rejection would likely be an abuse of discretion.

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277. *See, e.g.*, Frank Snare, *The Argument from Motivation*, 84 MIND 1 (1975) (explaining the "Argument from Motivation" as rooted in David Hume). It is a long-accepted maxim that legal ideology is based on logical principles. *See* Morris R. Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622 (1916) (discussing the root and role of logic in the law).

278. *See supra* notes 130, 159, 174–78, 203–04, 215–17 and accompanying text. Indeed, scholars, presidents, Congress, and some courts have already acknowledged the president's influence over executive agencies. *See, e.g.*, 10 U.S.C. § 113(b) ("The Secretary is the principal assistant to the President in all matters relating to the Department of Defense."); Mendelson, *supra* note 274, at 1131 ("Commentators and courts largely agree that the President can legally be involved in agency decisions such as rulemaking."); Nikol Oydanich, Note, *Chief Justice Roberts's Hard Look Review*, 89 FORDHAM L. REV. 1635, 1657 (2021) (noting that "both [Chief Justices Rehnquist and Roberts] explicitly acknowledge[d] the role a president's political agenda plays in agency policymaking" (first citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part); and then citing Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019))).

279. *See supra* text accompanying notes 73–81.

280. *See supra* text accompanying notes 156, 174–76, 260–65; discussion *supra* Parts II.A, II.C; *infra* text accompanying notes 304, 327–28.

281. *See supra* text accompanying notes 27–28, 149–54; *see also* text accompanying note 99.

282. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."); Washington v. Davis, 426 U.S. 229, 239 (1976) ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." (citing Bolling v. Sharpe, 347 U.S. 497 (1954))).

283. *See supra* text accompanying notes 26–27; *see also supra* text accompanying note 80.

284. *See* Travis J. Tritten, *Top Army General Says He Learned of Trump Transgender Ban Through News Reports*, WASH. EXAMINER (July 27, 2017), http://www.washingtonexaminer.com/top-army-general-says-he-learned-of-trump-transgender-ban-through-news-reports/article/2629893 [https://perma.cc/8K2P-P8W8].

The Tweet Test also helps courts to invalidate invidious discriminatory intent. Historically, courts hesitated to probe into the subjective intent of executive officials.[285] But contemporary courts generally admit evidence of even private presidential communications into administrative records when entertaining allegations of impermissible bias, because "the potential for unfair advantage outweighs the practical burdens."[286] Moreover, modern technology virtually eliminates practical burdens in the context of public presidential statements.[287]

And the Tweet Test reinforces the principles of federalism. Although this Article has provided many examples of courts finding discriminatory animus in presidential statements, the Supreme Court has yet to decide whether presidential animus can invalidate executive-agency action.[288] Consequently, factual determinations about whether presidential statements contain impermissible intent—like racism—continue to vary in federal courts.[289] Meanwhile, though "direct evidence of intent to discriminate is almost never available,"[290] every state court presented with the opportunity has opined on its governor's intent.[291] Thus, leaving questions of racial

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285. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 196–98 (6th ed. 2012) (discussing the courts' historical hesitation in addressing evidence of bias).

286. Action For Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977); *see, e.g.*, James v. Indep. Sch. Dist. No. I-050 of Osage Cnty., 448 F. App'x 792, 796 (10th Cir. 2011) ("Impartiality may be affected by a 'personal or financial stake' in the outcome or 'personal animosity.'" (quoting Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 491–92 (1976))).

287. *See supra* notes 5–6 and accompanying text; *infra* notes 329–30 and accompanying text.

288. *See generally* Araiza, *supra* note 31, at 983 (discussing how "[t]he connection *Regents* has drawn between animus and intent raises the prospect of renewing both concepts" (emphasis inverted)).

289. *See* Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1 (2016) ("Americans disagree profoundly on questions of moral principle."). 290 Godfrey v. State, 962 N.W.2d 84, 123–24 (Iowa 2021) (Appel, J., concurring in part and dissenting in part) (collecting cases).

291. Although the following is not an exhaustive list, the author found no examples to the contrary. *See, e.g.*, *id.* at 123 ("[S]ocial media posts by a politician's constituency may demonstrate the politician's intent to engage in a particular act."); SRI Eleven 1407 Broadway Operator LLC v. Mega Wear Inc., 144 N.Y.S.3d 289, 302 (N.Y. Civ. Ct. 2021); Edwards v. Commonwealth, 174 N.E.3d 1153, 1156–57 (Mass. 2021); Snell v. Walz, No. A21-0626, 2021 WL 5764234, at *1 (Minn. Ct. App. Dec. 6, 2021) (unpublished); F.F. *ex rel.* Y.F. v. State, 114 N.Y.S.3d 852, 863, 866 (N.Y. Sup. Ct. 2019), *aff'd sub nom.* F.F. v. State, 143 N.Y.S.3d 734 (N.Y. App. Div. 2021); Carter v. State, 192 A.3d 695, 739 (Md. 2018) (Barbera, C.J., concurring in part and dissenting in part) ("The Majority relies on the laudable intent of the Executive Order and the Commission's regulation rather than on their respective texts."); City of Galt v. Cohen, 218 Cal. Rptr. 3d 779, 789 (Cal. Ct. App. 2017); Cannabis Action Coal. v. City of Kent, 322 P.3d 1246, 1249 (Wash. Ct. App. 2014), *aff'd*, 351 P.3d 151 (Wash. 2015) (en banc); State *ex rel.* Lute v. Mo. Bd. of Prob. & Parole, 218 S.W.3d 431, 435 (Mo. 2007) (en banc) ("In interpreting the Governor's commutations, this Court must give effect to the Governor's intent."); Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 670–71 (Mass. 2006) (Ireland, J., dissenting), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015); People v. Morris, 848 N.E.2d 1000, 1007 (Ill. 2006) ("The cardinal rule of construction when

animus in nationally applicable policies to local determination undermines the principles of federalism and the legitimacy of the judiciary.[292] And racism is not a partisan issue.[293] So invalidating a *nationally applicable* agency action based on inherent racial animus should not vary by jurisdiction. This same principle should apply to any impermissible consideration that Congress establishes for agency action.

It is not within the province of the federal judiciary to avoid such questions.[294] Empowered by Article III, Congress explicitly assigned that duty to the federal courts through the APA.[295] Perhaps a racist rationale for an agency action would fall outside the definition of arbitrary-and-capricious review; perhaps it would not be contrary to law.[296] But surely a postinaugural, predecisional statement that demonstrates racial animus in an agency action

interpreting a clemency order is to ascertain and give effect to the intent of the Governor." (citing People *ex rel.* Madigan v. Snyder, 804 N.E.2d 546, 558 (Ill. 2004))); Dep't of Pub. Safety & Corr. Servs. v. Beard, 142 Md. App. 283, 306, 790 A.2d 57, 70 (Md. Ct. Spec. App. 2002); Alaska Legis. Council v. Knowles, 21 P.3d 367, 375 (Alaska 2001); Wash. Dep't of Ecology v. Theodoratus, 957 P.2d 1241, 1247 (Wash. 1998) (en banc); Alexander v. Adjutant Gen.'s Off., 858 P.2d 1222, 1226 (Kan. Ct. App. 1993) (holding that courts should give effect to the intent of an executive order as expressed by the governor); Terry v. Wilder, 29 Va. Cir. 418 (Va. Cir. Ct. 1992); *Ex parte* Traylor Nursing Home, Inc., 543 So. 2d 1179, 1186 (Ala. 1988); NCR Corp. v. Dep't of Revenue, 384 N.W.2d 355, 361 n.6 (Wis. Ct. App. 1986); Soap & Detergent Ass'n v. Nat. Res. Comm'n, 330 N.W.2d 346, 359 (Mich. 1982) ("The use of the same rules of construction for both statutes and executive orders or administrative regulations is not illogical because executive orders and administrative regulations are both quasi-legislative in nature."); Clark v. Bd. of Comm'rs, Port of New Orleans, 422 So. 2d 247, 251 (La. Ct. App. 1982) (citing People v. Nickel, 100 P. 1075 (Cal. Dist. Ct. App. 1909)); Monier v. Gallen, 414 A.2d 1297, 1299 (N.H. 1980); Myers v. Hawkins, 362 So. 2d 926, 931 (Fla. 1978); Kenny v. Byrne, 365 A.2d 211, 217 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 383 A.2d 428 (N.J. 1978) (per curiam). *But see* Serv. Emps. Int'l Union, Loc. 1 v. Vos, 946 N.W.2d 35, 86 (Wis. 2020) (Roggensack, C.J., concurring in part and dissenting in part) ("I would not conflate administrative agencies with the governor as [the majority opinion] does.").

292. *See* ROBERT MILES & MALCOLM BROWN, RACISM 13 (Peter Hamilton ed., 2d ed. 2003) ("[R]acism undermines the basis of relativism: the equality of different cultural values, and the benefits of cultures exchanging moral ideas to produce a still greater plurality of values and truths.").

293. *Id.*

294. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) ("[W]e cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977))).

295. U.S. CONST. art. III, §§ 1–2.

296. *See* Shaw, *supra* note 12, at 1399 ("Arbitrary and capricious review demands a fit between government action and proffered rationale, and manufactured justifications along these lines likely would and should fail such review." (footnote omitted)).

warrants invalidation under the Equal Protection Clause.[297] Yet all three questions are unanswered.[298]

Consistent and reliable review of presidential statements, like tweets, will provide answers. Presidential tweets are thoroughly deliberated public policies, statutorily preserved in the National Archives, and recognized as official statements to some extent by officials in every branch of the federal government.[299] Unsurprisingly, the same is true of all public presidential statements.[300] The only real risk is that an agency action might be invalidated for impermissible considerations. But, again, that is the point of the APA.

B. Counterarguments

This Section addresses three major counterarguments and some minor criticisms.

First, courts are tasked with reviewing decisions of *agencies*.[301] Many agency decisions are made by civil-servant technocrats who have job security and must follow legislative standards yet are savvy enough to avoid or to deflect what they consider to be illegal presidential directives.[302] Although presidential animus was most prominently illuminated under a president who arguably did not tolerate dissent from agency officials, even he could not fire every agency official solely for refusing to effectuate one of his suggested policies.[303] So presidential intent should not be attributed to

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297. *See* cases cited *supra* note 282 (noting that both the Fifth and Fourteenth Amendment warrant eliminating governmental action that is based on racial discrimination). *But see* Araiza, *supra* note 31, at 1002 ("[R]eaching the animus issue required the Court to brush past a preliminary question of how to characterize the plaintiffs' claim, which again might have allowed the Court to ignore the animus issue." (citing Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (plurality opinion))).

298. *See* discussion *supra* Parts II, III.

299. *See* Gabriel M. A. Elorreaga, Comment, *Don't Delete That Tweet: Federal and Presidential Records in the Age of Social Media*, 50 ST. MARY'S L.J. 483, 505–07 (2019); *supra* note 5 and text accompanying notes 5, 26–28; *infra* text accompanying notes 311–16, 318.

300. *See* Elorreaga, *supra* note 299, at 485–502 (discussing the evolution of statutes that govern record preservation, which now encompass all public presidential statements).

301. *See* 5 U.S.C. § 706 (dictating when "[t]he reviewing court shall compel agency action unlawfully withheld or unreasonably delayed and hold unlawful and set aside agency action, findings, and conclusions . . . ." (cleaned up)).

302. *See* Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2251–71 (2016) (discussing numerous accountability-related issues that allow some agency officials to ignore governmental directives); *cf., e.g.*, Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2507 (2011) (explaining that "[m]ost agencies apparently ignored" then-Vice President Quayle's "directive" that "the Council [on Competitiveness] had jurisdiction over an extraordinarily broad range of agency activities including even agency issuances of press releases").

303. *See* Jeannie Suk Gersen, *Trump's Tweeted Transgender Ban Is Not a Law*, NEW YORKER (July 27, 2017), https://www.newyorker.com/news/news-desk/trumps-tweeted-trans

decisions made by agency officials who would seemingly carry out their duties the same way regardless of the president's influence, namely independent-agency officials.

But the Tweet Test applies to only executive-agency action, which is subject to the president's Article II powers.[304] Delineating executive and independent agencies respects the intent of the legislature and judiciary to insulate agency action deemed worthy of deference to technocratic expertise.[305] The APA provides for judicial review of "*the whole or part of* an agency [action]."[306] If an executive-agency action substantially conforms with a president's policy, then the president's intent is at least "part of" the agency action.[307]

Second, some courts, scholars, and commentators have asserted that the president's tweets are unreliable sources for discerning the president's influence or intent.[308] Some have added that courts should ignore the president's tweets because they might be nonsensical or inconsistent.[309] Others argue that reliability might be a concern, as there is always the possibility that presidential tweets might be written by staffers, often without permission.[310]

But the Tweet Test applies to only verified presidential statements—whether thumbed into a smartphone or spoken on a stage.[311] Courts recognize presidential tweets as verified, "official statements by the President of the

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gender-ban-is-not-a-law [https://perma.cc/FM3K-LR7B] ("A tweet by a President is neither a law nor an executive order.").

304. U.S. CONST. art. II, § 3 ("[S]he shall take Care that the Laws be faithfully executed . . . ."); Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) ("The authority of the President to control and supervise executive policymaking is derived from the Constitution.").

305. Aaron Saiger, Chevron *and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 579 & n.183 (2014).

306. Al Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168, 1206 (S.D. Cal. 2019) (quoting 5 U.S.C. § 551(13) (emphasis added)).

307. *See id.* at 1206–07; *supra* Section IV.C.2.

308. *See* Shaw, *supra* note 12, at 1341–43, 1393 (discussing some varying views of scholars and courts on the relevance of presidential speech with respect to intent or influence).

309. *See, e.g.*, Casa De Md. v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 774 (D. Md. 2018) ("The Court rejects Plaintiffs' reliance on the President's misguided, inconsistent, and occasionally irrational comments made to the media to establish an ulterior motive."), *aff'd in part, vacated in part, rev'd in part*, 924 F.3d 684 (4th Cir. 2019).

310. *See, e.g.*, Douglas B. McKechnie, *From Secret White House Recordings to @realdonaldtrump: The Democratic Value of Presidential Tweets*, 40 CAMPBELL L. REV. 611, 632 (2018) ("[I]t is unlikely that each tweet from these accounts is conceived, drafted, and posted by the President."); Kim Zetter, *Weak Password Brings 'Happiness' to Twitter Hacker*, WIRED (Jan. 6, 2009, 4:35 PM), https://www.wired.com/2009/01/professed-twitt/ [https://perma.cc/MD3S-UNW6]; *supra* note 158 and accompanying text.

311. *See* discussion *supra* Section IV.D; *see also* Knight First Amend. Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 552 (S.D.N.Y. 2018) ("[A]ny member of the public can view his tweets without being signed in to Twitter . . . ."), *aff'd*, 928 F.3d 226 (2d Cir. 2019), *vacated sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021).

United States."[312] Executive agencies specifically rely on presidential statements, including tweets, to effectuate policies.[313] And reliability is a trifling concern regarding speeches, videos, and official documents.[314] All federal agencies must maintain social-media accounts, registered on a publicly accessible website that the federal government maintains.[315] Whether the president posts a YouTube video, tweets from a verified Twitter account, or pens an executive order in her office, the statement is signed, sealed, and delivered.[316] The courts should interpret the "record rule" accordingly.

Third, one might wonder whether the Tweet Test will create a perverse incentive for presidents to conceal animus-ridden communications.[317] If the president knows that her statements will consistently face legal scrutiny, then all her deliberations might become private. Under those circumstances, the public would likely not know which policies are motivated by discriminatory animus.

But public presidential statements are relevant to direct challenges to presidential actions, and that has not deterred public presidential statements. In any event, *public* policies are presumably well-reasoned versions of *private* deliberations.[318] So, when evidence of officials' animus becomes public, the people should be able to challenge it.[319] The very purpose of the APA is for the people to have a voice in the procedural and substantive aspects of agency action.[320] And animus is an impermissible consideration under the APA.[321] Thus, when evidence of a president's discriminatory

312. *Knight*, 928 F.3d at 231–32 ("[T]he Account is one of the White House's main vehicles for conducting official business."); Elorreaga, *supra* note 299, at 505–07; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2437 n.1 (2018) (Sotomayor, J., dissenting) ("According to the White House, President Trump's statements on Twitter are 'official statements.'"); Jud. Watch, Inc. v. CIA, No. 17-CV-397 (TSC), 2019 WL 4750245, at *9 n.10 (D.D.C. Sept. 29, 2019) (collecting cases that assessed presidential tweets as official statements).

313. *See supra* text accompanying note 4.

314. *See, e.g.*, *Trump*, 138 S. Ct. at 2435–38.

315. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMORANDUM M-17-06, POLICIES FOR FEDERAL AGENCY PUBLIC WEBSITES AND DIGITAL SERVICES (2016) (directing federal agencies to "register their public-facing digital services such as social media, collaboration accounts, mobile apps and mobile websites, with the U.S. Digital Registry at: http://www.digitalgov.gov/services/u-s-digital-registry/").

316. *See* Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 96 (2017) ("[T]he President actually considers such documents and, importantly, affixes a signature.").

317. *See* McKechnie, *supra* note 310, at 611–12 ("[P]rivate, self-reflective expression might otherwise only serve the needs of an individual . . . .").

318. *See* Sierra Club v. Costle, 657 F.2d 298, 407–08 (D.C. Cir. 1981) ("[U]ndisclosed Presidential prodding may direct an outcome that is factually based on the record . . . .").

319. *See* McKechnie, *supra* note 310, at 611–12 ("[I]t becomes a matter of public concern worthy of democratic value when it is on public display in a President's tweets.").

320. *Supra* notes 266–67 and accompanying text.

321. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (plurality opinion) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

animus becomes public, the courts are the very place to contest it.[322] It should be obvious that the risk of animus-ridden policies does not outweigh the reward of establishing an easily administrable standard to challenge them.

The Tweet Test also dodges other minor criticisms. Some scholars have claimed that the staleness of an administrative record should entirely preclude a challenge.[323] But presidential tweets are dated and preserved by law, so they will not go stale within their four- to eight-year shelf lives.[324] Some worry that an overbroad reading of the "record rule" would render judicial review meaningless with "no rational limit."[325] But presidential statements that satisfy the Tweet Test are not "every scrap of paper that could or might have been created."[326] Rather, they are modest yet sufficient evidence that the agency followed a constitutionally empowered order to take a particular action.[327] This constitutional loyalty is consistent with the Supreme Court's intent to prevent politically biased or intentionally blinded judgments.[328] And presidential tweets, like other official presidential statements, are all preserved[329] as the most succinct federal records in existence.[330] The Tweet Test merely requires courts to consider statements that are inextricably intertwined with agency action.[331] And, as a tool that courts can use to review clearly defined criteria, the Tweet Test increases the efficiency and legitimacy of judicial review.[332] Thus, applying the Tweet Test

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322. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012) ("It is well established that animus can never constitute a legitimate state interest for purposes of equal protection analysis." (emphasis omitted)).

323. *See, e.g.*, Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2239 (2011).

324. *See supra* text accompanying note 315.

325. *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 374 (4th Cir.) (Niemeyer, J., dissenting), *as amended* (Feb. 28, 2018), *vacated*, 138 S. Ct. 2710 (2018).

326. TOMAC v. Norton, 193 F. Supp. 2d 182, 195 (D.D.C. 2002), *aff'd*, 433 F.3d 852 (D.C. Cir. 2006).

327. *See* discussion *supra* Part IV.

328. Chief Justice John Roberts has recently voiced a similar concern. *See* Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent,'* WASH. POST (Nov. 21, 2018), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html [https://perma.cc/TAQ7-DVDC]; *supra* note 294 and accompanying text.

329. *See* Brendan Brown, TRUMP TWITTER ARCHIVE V2, https://www.thetrumparchive.com/insights/frequency [https://perma.cc/4ZRS-EAY8]; *supra* note 315 and accompanying text.

330. *See* Jessica L. Roberts, *#280 Characters of Legal Trouble: Trump, Twitter, and the Presidential Records Act*, 2019 U. ILL. J.L. TECH. & POL'Y 489, 490 (2019) (noting tweets are 280 characters max).

331. *See* Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1865 n.186 (2015) ("[A]gencies and the White House are no longer distinct actors when promulgating rules . . . ." (quoting Rosa Po, *Unorthodox Rulemaking: The New Regulatory Process in Administrative Agencies* 22–26 (June 2015) (unpublished manuscript))).

332. *See In re* United States, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting from grant of stay) (noting that "judicial review cannot function if the agency is permitted to decide

would be like earning tax-free income—bringing all the benefits without the baggage.

CONCLUSION

District courts should attribute presidential intent from public, postinaugural, predecisional statements to agency action when it is reasonable to assume that the sitting president directed the agency to take the action. If a president suggests a policy and an executive agency later takes a substantially similar action, then the president's intent presumably inspired the action. Yet very few courts attribute presidential intent to agency action, even after finding racial animus. The Tweet Test delivers upon the Founders' intent, the APA's purpose, and the Constitution, all while respecting the president's strength in policymaking.

The ease with which modern technology allows presidents to speak publicly heightens the risk that presidential animus will be a significant concern in future presidencies.[333] Without the Tweet Test, presidents can publicly express animus against a protected class, order an agency decisionmaker to implement a policy that disproportionately affects the targeted class, and then either wait for the agency to pay for doctored-up "empirical" evidence[334] or fire "principled freethinkers"[335] until a willing

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unilaterally" what materials the court should review); Pedersen, *supra* note 39, at 39 ("If rules, like formal adjudications, were based on clearly defined records, the efficiency of both rulemaking and judicial review would be increased.").

333. *See* Ramesh Ponnuru, Opinion, *The Two Reasons Trump Is Stronger Than He Looks for 2024*, BLOOMBERG (Dec. 16, 2021, 7:00 AM), https://www.bloomberg.com/opinion/articles/2021-12-16/can-trump-win-in-2024 [https://perma.cc/VQG8-JH4X] (analyzing Donald Trump's "good shot" at winning the 2024 election); Tim Murtaugh, *Biden's History of Getting Away with Racist Remarks*, HERITAGE FOUND. (July 7, 2021), https://www.heritage.org/progressivism/commentary/bidens-history-getting-away-racist-remarks [https://perma.cc/A97S-QQN6]; MSNBC, *Biden Tells Black Trump Supporters 'You Ain't Black' | Hallie Jackson | MSNBC*, 0:14–20, YOUTUBE (May 22, 2020), https://www.youtube.com/watch?v=UzxpjIGOp_w [https://perma.cc/G5MC-3RHC] ("If you have a problem figuring out whether you're for me or Trump, then you ain't black."); President Barack Obama, Remarks by the President in Address to the Nation on Immigration, THE WHITE HOUSE (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/7MGJ-HBYV] (referring to Latinos as "workers who pick our fruit and make our beds" on the same day he enacted DAPA).

334. Agency officials can simply submit a conflicting study to trigger the courts' deference to agencies. *See, e.g.*, Karnoski v. Trump, 926 F.3d 1180, 1201–02 (9th Cir. 2019) (upholding an admittedly animus-driven policy, partially based on a conflicting "empirical" study conducted after the President announced the policy); *see also* Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1177–78 (9th Cir. 2004) ("[W]he[n] the issue in question is highly scientific and the Corps has unique expertise, we give substantial deference to the Corps's judgment.").

335. *E.g.*, Ethan Barton, *Afghanistan Fiasco Shows US Military Encourages Lapdog Generals, Retired Colonel Says: The Last 96*, FOX NEWS (Nov. 21, 2021, 8:37 AM), https://www.foxnews.com/politics/afghanistan-fiasco-shows-us-military-encourages-lapdog-generals-retired-colonel-says-last-96 [https://perma.cc/AJ9B-97FN].

minion accepts the mission.[336] This potential abuse embodies a power that the president should not have over the people "who are supposed to check and balance his power."[337] Once armed with the Tweet Test, the people can consistently challenge, and the courts can reliably invalidate, future animus-ridden agency actions.

336. *See, e.g.*, Knight First Amend. Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 553 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226 (2d Cir. 2019), *vacated sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021); Nicole Lewis, *Here's a List of People Trump Has Fired or Threatened to Fire*, WASH. POST (July 25, 2017, 7:35 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/07/25/heres-a-list-of-people-trump-has-fired-or-threatened-to-fire/ [https://perma.cc/SP9D-DUKN]. For a detailed account of a president's forced resignation of nine United States attorneys in pursuance of a specific outcome, see Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 57–64 (D.D.C. 2008).

337. *See* Shaw, *supra* note 316, at 140; *see also* Mark Seidenfeld, *A Process-Based Approach to Presidential Exit*, 67 DUKE L.J. 1775, 1788 (2018) ("President Trump's tweets . . . have strengthened my conviction that disclosure of the president's position on regulatory matters will not constrain politically motivated decisions that undermine the public interest.").