THE TWEET TEST: ATTRIBUTING PRESIDENTIAL INTENT TO AGENCY ACTION

MATTHEW N. PRESTON II*

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.

* Senior Law Clerk to the Honorable Thomas L. Ludington in the United States District Court for the Eastern District of Michigan; B.A.s, 2017, Indiana University School of Liberal Arts; J.D., 2021, University of Michigan Law School; proud Latino and veteran of the United States Army and Air Force.

My sincere gratitude to the Honorable Raymond M. Kethledge and Professors Daniel Deacon, Nina Mendelson, and Rebecca Eisenberg for mentoring me through the writing process. Many thanks to Mac Bank, Will Case, Zakary Drabczyk, Jackson Erpenbach, Rose Lapp, Ingrid Yin, and the editors of the Belmont Law Review for their candid feedback. Mil gracias a mi familia, especially my father, for their steadfast support. And thanks be to God, with whom all things are possible. Dedico este artículo a mi amor, Francy—I love you back.
INTRODUCTION

My use of social media is not Presidential - it’s MODERN DAY PRESIDENTIAL.

– President Donald John Trump

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

---

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


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”). 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). Regents is the first case in which the Supreme Court discussed invalidating agency action based on a sitting president’s invidious discriminatory intent. Since Congress enacted the Administrative Procedure Act (APA) in 1946, presidents have signed significantly more agency actions than laws. As of September 13, 2022, President Biden signed roughly 323% more executive actions than bills. And, like Trump, President Biden uses Twitter to announce agency action. Thus, the risk remains that public presidential statements will reveal discriminatory intent in agency action.

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

8. See id. at 1915–16 (plurality opinion) (discussing the President as part of the agency action’s “decisionmaking body”).
11. See, e.g., Joe Biden (@JoeBiden), TWITTER (Sept. 9, 2021, 10:32 PM), available at https://twitter.com/joebiden/status/1436155670768568196 (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/1397634620687104957 (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.” 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. These divisions have led to inconsistent review of presidential intent.

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

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

Two caveats should be made before proceeding further. First, though some courts have pondered the impact of private communications, 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.
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.
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


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.


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. 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,
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. 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. In other words, constitutional challenges and APA challenges are legally distinct.

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. 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”).
under the APA’s arbitrary-and-capricious standard. Although plaintiffs could conceivably allege invidious discrimination is arbitrary and capricious, the arbitrary-and-capricious standard is not a good fit for such claims. Rather, claims that allege constitutional violations based on the intent of government actors fit more neatly into distinct constitutional provisions. 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.

Plaintiffs could challenge agency action by simultaneously suing the president and the agency. But the president is not an “agency” subject to suit under the APA. So the president’s intent is not at issue in nonconstitutional APA challenges. By contrast, courts will consider the president’s intent in constitutional challenges brought under the APA. Consequently, plaintiffs generally identify the agency as a defendant when alleging that the president’s discriminatory intent taints an agency action.

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.

---

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).
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.
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.” But the APA does not define the term “whole record.” Thus, judges have been left to mold the contours, leading to inconsistency and unpredictability.

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

The Supreme Court has not yet clarified the “record rule.” Despite legislative history urging uniformity, the Court’s lack of guidance has muddied the waters in judicial review of agency action, creating a slough filled with inconsistent interpretations and exceptions.

Judicial review of agency action should be thorough and based on an adequate record. 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).
55. Id. at 420.
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.”).
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. But, as the Supreme Court has recognized, that assumption is unrealistic.

Agencies often exclude problematic presidential statements, leaving courts to review thinned-out records that support false rationales. For example, a presidential tweet demonstrating animus toward transgender people is likely to undermine the legitimacy of a transgender-related agency action. 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.” Such direction is especially worrisome when the president’s statements suggest that an agency action was motivated by discriminatory intent or racial animus.

If agencies exclude relevant statements from administrative records, plaintiffs may request that the court add the statements into the record. 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.

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

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.”).


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).


69. Id.
by district\textsuperscript{70} and circuit courts.\textsuperscript{71} Yet, courts place high hurdles before both paths, which are therefore unlikely to lead to introduction of presidential statements in APA challenges.\textsuperscript{72}

Courts may take “judicial notice of an adjudicative fact” under Federal Rule of Evidence 201(b)(2).\textsuperscript{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.”\textsuperscript{74} Thus, at best, judicial notice preserves the status quo—uncertainty—when applying the “record rule” to presidential statements.\textsuperscript{75}

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

\textsuperscript{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”).

\textsuperscript{71} 1 GEORGE 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.


\textsuperscript{73} FED. R. EVID. 201(b)(2).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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))).

\textsuperscript{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)).

\textsuperscript{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. That likelihood is even lower regarding presidential statements because courts overwhelmingly resist judicial inquiry into “executive motivation.” As a result, the “record rule” and its progeny have led to a systematic tilt favoring agencies.

C. Reviewing the Administrative Record in Constitutional Challenges

Courts disagree about whether the APA’s “record rule” applies to constitutional challenges to agency action. 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. 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.

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.” Some courts rely on statutory interpretation when the claims overlap. Other courts worry that plaintiffs might bring constitutional challenges to agency action under only the Constitution, rendering the APA’s “record rule” superfluous. 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.”

Courts that do not apply the “record rule” in constitutional challenges also invoke varying rationales. 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.
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.
Other courts permit evidence that an agency would not ordinarily include in an administrative record created for litigation.\textsuperscript{91} In addition, some courts permit additional discovery when the constitutional claim diverges from or exists outside any APA claims.\textsuperscript{92} And other courts allow extra-record discovery if a decisionmaker’s intent\textsuperscript{93} or illicit animus\textsuperscript{94} is at issue. In the most recent constitutional challenge, a court looked outside the record simply because others have.\textsuperscript{95}

Federal courts have an extensive history of examining governmental intent in constitutional law.\textsuperscript{96} For example, courts have explored legislative intent in statutory-interpretation questions for nearly 120 years.\textsuperscript{97} Similarly, the Supreme Court has long inquired into the intent of states’ executive officials in constitutional challenges.\textsuperscript{98} The Court has also opined that federal executive officials’ intent can be relevant to agency action.\textsuperscript{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.\textsuperscript{100}

The Supreme Court has examined presidential intent in challenges to actions of the president, most notably in \textit{Trump v. Hawaii}.\textsuperscript{101} And President

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{94} See, e.g., Cook Cnty. v. Wolf, 461 F. Supp. 3d 779, 794–95 (N.D. Ill. 2020).
\item \textsuperscript{96} Shaw, supra note 12, at 1339.
\item \textsuperscript{97} See Johnson v. S. Pac. Co., 196 U.S. 1, 14–15 (1904).
\item \textsuperscript{100} United States \textit{ex rel. Accardi} v. Shaughnessy, 347 U.S. 260, 267 (1954).
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. That trend climaxed when the Supreme Court formally extended *Hawaii* to challenges against agency action in *Regents*. In constitutional challenges, courts are more flexible with evidentiary standards, even when applying the “record rule.” That increased flexibility accords with constitutional jurisprudence, as the decisionmaker’s intent is often an element of the claim itself. 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.

**III. Regents and the “Contemporary Statements” Standard of Review**

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

---


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.


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 are 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.\footnote{110}{See Regents, 140 S. Ct. at 1915–16 (plurality opinion).}

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.”\footnote{111}{Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 488 (1997).} 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.\footnote{112}{Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).} 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.”\footnote{113}{Id. at 268.}

The Regents Court picked up where Arlington Heights left off, giving “contemporary statements” independent meaning.\footnote{114}{Id. at 1916 (plurality opinion).} In Regents, the plaintiffs brought an APA and a constitutional challenge against a DHS order that rescinded DACA.\footnote{115}{Id. at 1891 (majority opinion).} DACA provided work authorization, benefit eligibility, and removal protection for some “unauthorized aliens who had entered the United States as children.”\footnote{116}{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.}

The Regents plaintiffs submitted one preinaugural statement, one postinaugural statement that was predecisional, and two postinaugural statements that were postdecisional.\footnote{117}{Id. at 1891 (plurality opinion).} In the preinaugural statement, the President said Mexican immigrants are “rapists.”\footnote{118}{Id. at 1915 (plurality opinion).} In the postinaugural statement that was predecisional, made two weeks before the agency action, the President allegedly characterized Latinos as “animals.”\footnote{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].} 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,”\footnote{120}{Ian Schwartz, Trump: We Are “Liberating” Our Towns of Illegal Immigrants, Gangs, REACLEARPOLITICS (Aug. 22, 2017), https://www.realclearpolitics.com/video/2017/} and he tweeted that Latinos might “pour into and infest
our Country.”\textsuperscript{121} In what appears to be common practice, the DHS failed to offer a single statement made by the President.\textsuperscript{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.”\textsuperscript{123} By contrast, in the constitutional challenge, the Court probed the President’s intent from all four statements.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{126} In her view, no precedent supported the plurality’s “blinker approach” of disregarding the President’s campaign statements as remote in time.\textsuperscript{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.\textsuperscript{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.\textsuperscript{129} Taken together, she concluded, the statements and impact established a “reasonable inference” that the President’s discriminatory intent infected the agency action.\textsuperscript{130}

The \textit{Regents} plurality did not specify why any statement was unrelated or remote in time.\textsuperscript{131} But, at least for challenges alleging discriminatory intent, \textit{Regents} placed presidential statements into \textit{Arlington Heights}’s fourth category: “statements by members of the decisionmaking body.”\textsuperscript{132} Consequently, in constitutional challenges to agency action, courts

\begin{footnotesize}
08/22/trump\_we\_are\_liberating\_our\_towns\_of\_illegal\_immigrant\_gangs.html [https://perma.cc/ES9E-GZEX].


\textsuperscript{122} See \textit{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).

\textsuperscript{123} See \textit{id.} at 1896–99.

\textsuperscript{124} \textit{id.} at 1915–16 (plurality opinion).

\textsuperscript{125} \textit{id.} at 1916.

\textsuperscript{126} \textit{id.} at 1916–17 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part).

\textsuperscript{127} \textit{id.} at 1917.

\textsuperscript{128} \textit{id.}

\textsuperscript{129} \textit{id.} at 1917–18.

\textsuperscript{130} See \textit{id.}

\textsuperscript{131} See \textit{id.} at 1916 (plurality opinion).

\textsuperscript{132} See \textit{id.} at 1915.
\end{footnotesize}
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. Postinaural Versus Preinaural Statements

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

---


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).

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

After Regents, some courts relied on only postinaugural statements. 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 and Make the Road New York v. Pompeo. In both cases, the district court considered only the postinaugural statements. More recently, in California v. United States Department of Homeland Security and its sister case La Clinica de la Raza v. Trump, 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.” 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. No doubt, he had some intent brewing before he finally sat behind the Resolute Desk. 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).
142. See Make the Rd., 475 F. Supp. 3d at 266.
144. See 476 F. Supp. 3d at 1025.
146. See id.; California v. U.S. Dep’t of Homeland Sec., 476 F. Supp. 3d at 1025.
or be “personally” or “directly” involved in agency decisionmaking.\textsuperscript{149} Likewise, as president-elect he could not “modify or overturn” the prior Administration’s “actions or decisions” until he was “sworn into office.”

\textsuperscript{150} Until President Biden took the oath of office, his statements were not rooted in the president’s constitutional authority.\textsuperscript{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,\textsuperscript{152} giving him the sole authority to control the executive agencies.\textsuperscript{153} Simply put, executive agencies and their actions are attributable to only sitting presidents.\textsuperscript{154}

Similarly, both presidential candidates and presidents-elect lack the confidential information that comes with the presidency.\textsuperscript{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.\textsuperscript{156} Indeed, the Founders explicitly rejected a plural executive in favor of accountability fixed solely on the president.\textsuperscript{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


\textsuperscript{151}. See U.S. CONST. art. II, § 1.

\textsuperscript{152}. See id. (“[S]he shall take Care that the Laws be faithfully executed . . . .”).

\textsuperscript{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 . . . .”).

\textsuperscript{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.”).

\textsuperscript{155}. See generally DAVID PRIESE, 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).

\textsuperscript{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.”).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{159}

B. Predecisional Versus Postdecisional Statements

Before and after \textit{Regents}, courts have generally relied on postdecisional statements when evaluating equal-protection claims.\textsuperscript{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.\textsuperscript{161}

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

\textsuperscript{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”).

\textsuperscript{159} See discussion supra Section I.A.


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. That reasoning is the exact sort of “magical thinking” that courts should avoid. Although postdecisional statements do not necessarily reflect predecisional thinking, 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.” So it is always reasonable to assume that executive-agency decisionmakers are at least aware of the president’s public statements. 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.

Yet the Regents Court conflated predecisional tweets and postdecisional tweets—referring to them collectively as not “contemporary” with the agency action. 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

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.”).
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.\textsuperscript{172} For that reason, courts should not try to infer predecisional intent from postdecisional statements.\textsuperscript{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.\textsuperscript{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 \textit{Regents} to consider only predecisional statements.\textsuperscript{175} For these reasons, the Tweet Test attributes intent from only predecisional statements.\textsuperscript{176}

\textbf{C. Related Versus Unrelated Statements}

The \textit{Regents} plurality held that presidential statements are not attributable to agency action if made in “unrelated contexts.”\textsuperscript{177} District courts have generally found predecisional presidential statements to be related to agency actions.\textsuperscript{178} Their considerations fall within three categories:

\begin{itemize}
\item \textsuperscript{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.").
\item \textsuperscript{174} See U.S. CONST. art. II, § 1. 
\item \textsuperscript{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).
\item \textsuperscript{176} See supra Section I.A.
\item \textsuperscript{177} Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (plurality opinion).
\item \textsuperscript{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).
\end{itemize}
(1) the same-class rationale,\textsuperscript{179} (2) the same-policy rationale,\textsuperscript{180} and (3) the same-official rationale.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{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”).
\item \textsuperscript{182} See, e.g., Doe 2, 315 F. Supp. 3d at 493.
\end{itemize}
The Twitter Announcement banned all transgender people from the military. On August 25, 2017, the President issued a memorandum purporting to effectuate the policy from the Twitter Announcement. Nineteen days later, the Secretary of Defense issued a memorandum also purporting to effectuate the President’s policy. 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. 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. Twenty-nine days later, the President revoked his old policy and ordered the Secretary to implement the Secretary’s version, which he then implemented.

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

The Doe 2 court found that the Secretary derived his policy from the President’s policy. 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. 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.

Similarly, the Stockman court reasoned that the Twitter Announcement had the same intent, or “essence,” as the challenged version of the policy. The court found that the President’s policy discriminated against all transgender people. 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.
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.” 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.” Since Regents, several other courts have taken similar approaches.

Arlington Heights held that impact and intent are both relevant considerations in equal-protection analyses. 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. 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.

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. 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.

199. Id. at 999–1000.
200. Id. at 999–1000, 1004.
201. See supra note 179.
203. See generally The Leadership Conf. on Civ. & Hum. Rts., Trump Administration Civil and Human Rights Rollbacks, CIVIL RIGHTS.ORG (2022) [https://civilrights.org/trump-rollbacks/ [https://perma.cc/5ZCZ-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.
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.\(^{216}\)

\(^{207}\) 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.
\(^{212}\) See supra notes 196–200 and accompanying text.
\(^{214}\) 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 “identify” 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

217. See supra Section I.A.
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. 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. The next day, Secretary Duke issued a memorandum rescinding DACA. 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. 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.

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.” 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. 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. The record did not demonstrate otherwise. Nor did it contain any postinaugural, predecisional statements. 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.”

223. See id. at 1903.
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’LY 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.
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.

235. Id. at 2574.
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).
Some post-Regents courts did not require such a “tight nexus” between the President’s statements and the challenged action at the pleading stage.\textsuperscript{243} And other courts have adopted a similar line of reasoning, though not explicitly. For example, in \textit{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.\textsuperscript{244} Even before Regents, the district court in \textit{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.”\textsuperscript{245} These findings are presumably based on the president’s supervisory power over executive agencies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{249}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{244} \textit{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).}
\item \textsuperscript{245} \textit{Kravitz v. U.S. Dep’t of Com., 366 F. Supp. 3d 681, 712 (D. Md. 2019).}
\item \textsuperscript{246} \textit{See Mayor of Balt., 416 F. Supp. 3d at 515.}
\item \textsuperscript{247} \textit{See supra note 45 and accompanying text.}
\item \textsuperscript{249} \textit{See discussion supra Section I.B.}
\end{itemize}
\end{footnotesize}
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^]

---

[^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).
[^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.
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.”).
are accountable to the public” but also to invalidate agency action that is based on impermissible considerations. 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. 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. 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. The Tweet Test accords not only with Supreme Court precedent and the general practice of district courts, but also with Congress’s intent and the views of numerous scholars. 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. The Tweet Test is also easy to administer because it has two simple steps. And the Tweet Test is reliable because it

---


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 and attributes presidential intent to agency action only if reasonable to do so. Finally, the Tweet Test mitigates potential oversight and misuse of the Federal Rules of Evidence. The Tweet Test is supported by constitutional principles. It attributes intent to agency action from only presidential statements made under color of the president’s constitutional duty to direct federal executive agencies. And it delivers upon the central purpose of the Equal Protection Clause by mitigating impermissible animus. Moreover, the Tweet Test avoids intruding upon executive deliberations because it only scrutinizes public statements. 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. Such a rejection would likely be an abuse of discretion.

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 26–27; see also supra text accompanying note 99.

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


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


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)).


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.


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))).


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. Yet all three questions are unanswered.

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. Unsurprisingly, the same is true of all public presidential statements. 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. 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. 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. So presidential intent should not be attributed to

---

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”).

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

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.”).


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).


310. See, e.g., Douglas B. McKeechne, 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/M335-UNW6]; supra note 158 and accompanying text.

Executive agencies specifically rely on presidential statements, including tweets, to effectuate policies. And reliability is a trifling concern regarding speeches, videos, and official documents. All federal agencies must maintain social-media accounts, registered on a publicly accessible website that the federal government maintains. 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. 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. 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. So, when evidence of officials’ animus becomes public, the people should be able to challenge it. The very purpose of the APA is for the people to have a voice in the procedural and substantive aspects of agency action. And animus is an impermissible consideration under the APA. Thus, when evidence of a president’s discriminatory


313. See supra text accompanying note 4.


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 . . . .”).


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.

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

\(^{322}\) 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)).


\(^{324}\) See supra text accompanying note 315.


\(^{327}\) See discussion supra Part IV.


\(^{332}\) 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. 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 or fire “principled freethinkers” until a willing 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.”).


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]hen the issue in question is highly scientific and the Corps has unique expertise, we give substantial deference to the Corps’s judgment.”).

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


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.”).