Public Care in Public Law: Structure, Procedure, and Purpose

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This Article responds to recent mobilization around the "politics of care" by articulating a legal principle of public care within U.S. constitutional, statutory, and administrative law. Public care requires executive officials to attend to the needs and values of those who have a stake in law's administration. This principle has three components. The regulatory purpose *of public care, which is recognized in various statutory authorities of the welfare state, requires government to provide those goods and services that are necessary for people to exercise moral and political agency. The* administrative procedure *of public care, which is recognized by the Administrative Procedure Act of 1946, requires that federal agencies act with due regard for the interests and input of affected parties. The* constitutional structure *of public care, recognized by the Take Care Clause, requires that the President listen to subordinate officials who have specific legal, professional, and expert authority. These three dimensions of care together offer an attractive picture of what the administrative state ought to do and how it ought to do it. The principle of public care, which is informed by Progressive political thought and feminist social theory, emphasizes social solidarity, deliberative policymaking, and official collaboration, rather than executive unilateralism, instrumental-reasoning, and isolated individualism.*

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Introduction

As the vote tallies turned in his favor, then-Vice President Biden appeared in Wilmington, Delaware to address an anxious, divided, and afflicted nation. He described his upcoming "responsibility as President" as a "duty of care for all Americans."[1] It was a brief but important moment. Biden's invocation of "care" resonated with some lasting features of the American constitutional order as well as with the crises of the present moment. The concept of care is recognized in the Constitution, which provides that the President "shall take Care that the Laws be faithfully executed."[2] He must ensure that the officers and agencies who carry out the law do so diligently and responsibly. But Biden spoke of a duty to the people themselves, to "all Americans." Here his understanding of care went beyond attention to what the legal rules require and toward the ultimate beneficiaries and addressees of the law.

This understanding of the presidency as a caregiving role was a central theme of the Biden campaign, which not only portrayed Biden as personally caring but also focused on policy reforms in health, child, and elder care.[3] As the television networks called the election for Biden but President Trump did not concede, Biden said that it was "time to heal"—to heal from the aggression and division of the past four years, yes; but also to heal, in a literal sense, from a deadly pandemic that had stricken and paralyzed the nation for months on end.[4]

In this last aspect, Biden's rhetoric of care overlapped with what Amy Kapczynski and Gregg Gonsalves have called a "politics of care," a bold proposal to respond to the pandemic and rebuild the welfare state on the model of mutual aid and support.[5] Gonsalves and Kapczynski argue that the federal government should employ social workers, health educators, home health aides, and other caregivers to address the pandemic as well as the broader public health crises caused by unemployment and the destruction of the social safety net. Their policy agenda responds to what Nancy Fraser, Emma Dowling, and others have described as the "crisis of care" brought about by

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[1] Lynn Sweet, *Text: Joe Biden, on Verge of Victory Says, "We're Beating Donald Trump,"* Chi. Sun-Times (Nov. 6, 2020), https://chicago.suntimes.com/politics/2020/11/6/21553752/text-joe-biden-verge-victory-says-we-are-beating-donald-trump [https://perma.cc/EV3N-WK4U].

[2] U.S. Const. art. II, § 3.

[3] Anne Linskey & Matt Viser, *Biden Unveils $775 Billion Plan for Universal Preschool, Child Care and Elder Care*, Wash. Post (July 21, 2020), https://www.washingtonpost.com/politics/biden-to-unveil-775-billion-plan-for-universal-preschool-child-care-and-elder-care/2020/07/20/e273dabc-cae7-11ea-91f1-28aca4d833a0_story.html [https://perma.cc/Y4K4-MA3L] ("Throughout most of his campaign, Joe Biden has sought to put forward a singular idea: I care.").

[4] Amber Phillip, *Joe Biden's Victory Speech, Annotated*, Wash. Post (Nov. 7, 2020), https://www.washingtonpost.com/politics/2020/11/07/annotated-biden-victory-speech/ [https://perma.cc/D7GG-SK8U].

[5] Amy Kapczynski & Gregg Gonsalves, *The New Politics of Care*, Bos. Rev. (Apr. 27, 2020), http://bostonreview.net/politics/gregg-gonsalves-amy-kapczynski-new-politics-care [https://perma.cc/Y33L-R5Q9].

aging populations, women's increasing workforce participation, the persistently gendered maldistribution of childcare responsibilities, the privatization of welfare-state functions, and a global capitalist economy that drafts low-wage workers into underpaid caregiving services.[6] Fraser sees this constellation of forces triggering political demands "for social arrangements that could enable people of every class, gender, sexuality, and colour to combine social-reproductive activities with safe, interesting, and remunerative work."[7]

Biden's care proposals envision more conventional—if quite expansive—programs such as universal preschool, funding for childcare facilities, and tax credits for child and elder care.[8] The significantly expanded childcare tax credits in the American Rescue Plan Act have begun to put this agenda into action.[9] Such programs build on decades of efforts to theorize "care as a public value" and thus fairly compensate and equitably distribute those caregiving services that enable people to survive, grow, and flourish.[10]

The politics of care also circulates far beyond the immediate context of health and childcare. It provides a lens for non-reformist criminal-legal reform.[11] Care also frames the Working Families Party platform to address

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[6] Nancy Fraser, *Contradictions of Capital and Care*, 100 New Left Rev. 99, 99 (2016); *see also* Emma Dowling, The Care Crisis: What Caused It and How Can We End It? 203-5 (2021) (envisioning a political community centering on care that would work to "maintain, contain, and repair the world we live in and the physical, emotional, and intellectual capacity to do so."); Steven Klein, The Work of Politics: Making a Democratic Welfare State 162-71 (2020) (describing "caregiving" supports in Swedish welfare state as an example of how the such institutions can "shape the possibilities for democratic action"). *See generally* Andreas Chatzidakis, Jamie Hakim, Joe Littler, Catherine Rottenberg, & Lynne Segal, The Care Collective, The Care Manifesto: The Politics of Interdependence (2020) (arguing for a collective, interdependent, and public politics of care).

[7] Fraser, *supra* note 6, at 116.

[8] *See* Linskey & Viser, *supra* note 3. The recently enacted American Rescue Plan follows through on parts of this vision with expansive child tax credits among other income supports. *See generally* Tony Romm, *Congress Adopts $1.9 Trillion Stimulus, Securing First Major Win for Biden*, Wash. Post (Mar. 10, 2020), https://www.washingtonpost.com/us-policy/2021/03/10/house-stimulus-biden-covid-relief-checks/ [https://perma.cc/D5SL-A7RV].

[9] *See* Kelly Anne Smith, *President Biden Signs Stimulus Package into Law – Here's How It'll Affect You*, Forbes (Mar. 11, 2021), https://www.forbes.com/advisor/personal-finance/biden-signs-third-stimulus-package/ [https://perma.cc/2QFJ-EZ6J].

[10] Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 Chi.-Kent. L. Rev. 1673, 1677 (2001); *see also* Deborah Stone, *Welfare Policy and the Transformation of Care, in* Remaking America: Democracy and Public Policy in an Age of Inequality 183 (Joe Soss, Jacob S. Hacker & Suzanne Mettle eds., 2007); Joan Tronto, Caring Democracy: Markets, Equality, and Justice (2013).

[11] *See* Amna Akbar, *Demands for a Democratic Political Economy*, 134 Harv. L. Rev. F. 90, 110 (2020) ("The calls to divest from the carceral state are often accompanied by demands to build infrastructures of care. . . ."); L. A. Cnty. Alts. to Incarceration Work Grp., Final Report: Care First, Jail Last: Health and Racial Justice Strategies for Safer Communities 10 (2020), https://lacalternatives.org/wp-content/uploads/2020/03/ATI_Full_Report_single_pages.pdf [https://perma.cc/9CUU-4LAA] ("We can commit to no longer rely on our law enforcement agencies, courts and jails to function as our social safety net, and instead reinvest in our communities to build a robust system of care—led and actively informed by our health systems, social service agencies, community and faith-based organizations, and formerly incarcerated individuals and their loved ones—to provide the housing, social services, medical and mental health care that will allow our communities to thrive."). On

systemic racism, rebuild public infrastructure, provide good jobs and universal healthcare, and generally meet the demands of social solidarity.[12] Across these various contexts, the theory and practice of care recognize social interdependency and collective responsibility for individual well-being.

The concept of care has been deployed in these ways to diagnose and to remedy some of the ailments and injustices of our present moment. The term has been used to describe and promote multiple kinds of relationships and programs ranging from literal health or childcare services to figurative care for institutions and values. This Article, written for the *Harvard Law & Policy Review's* issue on The Progressive Administrative State, develops a legal principle of public care that is responsive to and overlaps with these various social and political understandings. This principle should allow the discourse of care to move within and transform the framework of governance in the United States.

The principle of public care I have in mind already exists—but ought to be more deeply institutionalized—within the American administrative state. It governs the conduct of officials who implement the law, ranging from the President to other executive and administrative officers.[13] Public care requires these officials to attend to the needs and values of those who have a stake in law's administration. Public care precludes purely hierarchical, unilateral, or instrumental forms of action, in which one leader dictates to followers or subjects what they must do. It instead requires that the President and administrative officials listen to one another and respond to the input of the private parties their acts and policies touch.

Public care is more than a structural and procedural principle, however. Care is a purpose that statutory law advances, providing a reason that guides the exercise of official discretion. As a regulatory purpose, care requires that the government invest in the welfare of individuals. It directs the state to provide those institutions, services, and protections that are necessary to people's moral and political agency but which they cannot obtain on their own initiative.

While recognized in key aspects of American public law, the principle of public care departs from some currently dominant practices of administration. First, we are in a period of what now-Justice Elena Kagan famously dubbed "presidential administration."[14] A close cousin of the "unitary theory" of the executive,[15] presidential administration maintains that the President generally can and should direct executive agencies, take ownership of their regulatory decisions, and be held politically accountable for those decisions.

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the challenge of disentangling care from carceral logics, see Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. Rev. (forthcoming 2022).

[12] Working Families Party, *Read the Charter*, People's Charter, https://www.peoplescharter.us/read-the-charter [https://perma.cc/H8KM-HG85].

[13] Public care might also be extended to cover obligations of legislators and judges, but these are beyond the scope of this Article.

[14] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2246 (2001).

[15] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994).

Public care instead insists on dialogue within the executive between the President and subordinate officials, rather than subjecting those officials to the President's political dictates.

Second, we are in the midst of a conservative reaction that privileges the rights of certain individuals, corporations, and religious groups against government interference.[16] This negative conception of rights, as a sphere of independence from the political community, ignores the fact that many, if not most, individual interests can only be satisfied in and through a system of social support.[17] Public care recognizes that we can only become and remain effective rights-bearers insofar as civil society and the state equip us to exercise such rights.

Third, we are on the other side of a "cost-benefit revolution," in which regulatory programs are assessed primarily by the metric of economic efficiency.[18] In executive branch practice, this approach has often skewed regulatory analysis towards monetary valuations that fail to capture not only net utility but also the distinct values of fair distribution, public deliberation, and social solidarity.[19] Public care centers the interests and voice of the disempowered and the least well off, as well as the plurality of social and moral concerns that regulation implicates, rather than net economic gains alone.

Public care is not strictly opposed to utilitarian reasoning, or to the language of rights, or to the use of executive power in the public interest. Public care, rather, provides a way of and a reason for administrative action that is separate from the weighing of costs and benefits, from the protection of private discretion against public interference, and from the President's policymaking authority. Public care broadly requires that government officials facilitate the agency of other people—both of other public officers and of private persons—rather than command them. That commitment has formal dimensions—care as a "way of" acting—that guide and constrain the

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[16] *See, e.g.*, Burwell v. Hobby Lobby, 573 U.S. 682, 689 (2014) (holding that the application of the Affordable Care Act's contraceptive coverage mandate to closely held for-profit corporations with religious objections to such contraception violated the Religious Freedom Restoration Act). For discussion, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1495–1507 (2015).

[17] *See, e.g.*, John Dewey, *Outlines of a Critical Theory of Ethics*, *in* 3 JOHN DEWEY, THE EARLY WORKS, 1882–1892 at 322 (Jo Ann Boyston, ed., 1969) ("In the realization of individual there is found also the needed realization of some community of persons of which the individual is a member."); DOWLING, THE CRISIS OF CARE, *supra* note 6, at 30 ("Against the idea of the autonomous individual whose concerns revolve around himself and is always hailed as the epitome of social progress and individual freedom, we can ask what this celebration of individual autonomy obfuscates: who does the work to allow for that individual to emerge and thrive?"). On the Progressive understanding of the social constitution of rights, see BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 67 (2019) ("The rise of the administrative state is . . . not simply a story of public power curtailing individual rights but also of the simultaneous production of rights by the state itself."); *see also* DERRICK DARBY, RACE, RIGHTS, AND RECOGNITION 74 (2009) ("[T]here are no rights that exist prior to and independent of some form of formal or informal social recognition of ways of acting and being treated by a community of persons.").

[18] CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION (2020).

[19] *See infra* Part II.B.

substantive concern with providing care services—care as a "reason to" act. As a way of acting, public care requires officials to entertain and respond to the viewpoints and values of the persons their acts affect. As a policy reason that guides official action, public care requires government to support materially the moral and political capacities of the people over whom it exercises jurisdiction. As a matter of both form and substance, practices of public care invariably recognize the interdependence of actors and the need for joint action in pursuing common projects.

This Article will show that public care is recognized by specific legal authorities, including Article II of the Constitution, the Administrative Procedure Act of 1946 and its case law, as well as various programmatic statutes of the American welfare state, such as the Patient Protection and Affordable Care Act. The connections amongst these discrete legal provisions would be difficult to make out were it not for the insights of social and political theory. In particular, the implicit legal principle of public care becomes visible in light of Progressive political thought and its intersections with feminist theory. In the late nineteenth and early twentieth century, the Progressives advanced a distinctive understanding of the role of government in public life.[20] They focused not on protecting isolated private rights but rather on supporting individuals' capacity to become equal and active members of the democratic community.[21] Progressives constructed a "maternalist welfare state" that extended the caregiving role of the family to public life, requiring the government to provide for education, health, and other basic material needs.[22] This historical background provides promising models—and some notes of caution—for the reconstruction of the welfare state in the present.

Though public care is a general legal obligation, applicable to officials regardless of their gender or sex,[23] it is informed by the insights of feminist theory. Feminists have variously understood "care" as a moral psychology centered on social interdependence rather than individual rights,[24] as a political obligation to provide for basic human needs and development,[25] as a social responsibility to provide for both the vulnerable and their direct

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[20] *See* EMERSON, *supra* note 17, at 61–111.

[21] *See infra* Part I.A.

[22] THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 2 (1992).

[23] *See* Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605, 1606 (2001) ("[C]are is no longer framed as an attribute supporting an essentialist characterization of women. It is now recognized as a complex set of practices that are structured, supported, and incentivized."); Ruth Rubio-Marín, *The (Dis)establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter*, 13 INT'L J. CON. L. 788 (2015) (describing and arguing for constitutional support for care-giving responsibilities in a way that would destabilize the inequitably gendered distribution of such responsibilities).

[24] *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 74, 43 (1982).

[25] *See* Daniel Engster, *Care Ethics and Natural Law Theory: Toward an Institutional Political Theory of Caring*, 66 J. POL. 113, 131–32 (2004).

caretakers,[26] as a component of democratic equality,[27] and as an un- or under-compensated labor that undergirds the capitalist economy.[28] These diverse perspectives share an understanding that dependency is a defining feature of social life, and that the proper structure and distribution of the relationships among caregivers, those who are cared-for, and the political community as a whole pose central questions of justice.[29]

This feminist viewpoint is useful for conceptualizing and critiquing the administrative state today. Agencies exercise power, provide services, and distribute benefits on behalf of the people in cases where private initiative is insufficient to secure either individual rights or the common interest. They care for the public. Like many other caregiving institutions, however, government bureaucracies' capacity to further the interests of those subject to their authority is accompanied by the risk of arbitrariness, coercion, and abuse. And yet, administrative law scholarship usually does not theorize regulatory actions in terms of care, focusing instead on formal questions statutory authorization, on procedural fairness, or on constitutional concerns such as the separation of powers.[30]

The failure to theorize and meet the obligation of public care within administrative law may be a symptom of the false, arguably patriarchal dichotomy between a supposedly rational language of law, right, and authority, on the one hand, and merely affective capacities of empathy, concern, and attachment, on the other.[31] This Article rejects this binary, identifying already existing but underappreciated care obligations within administrative

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[26] *See generally* THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY (Eva Feder Kittay & Ellen K. Feder eds., 2002); *see also* Joan Tronto, *Care as a Basis for Radical Political Judgments*, 10 HYPATIA 141 (1995); Eva Feder Kittay, *A Feminist Public Care Ethic Meets the New Communitarianism*, 11 ETHICS 523, 533 (2001).

[27] *See* TRONTO, *supra* note 10, at 107–08.

[28] *See generally* Fraser, *supra* note 6; DOWLING, *supra* note 6. This perspective has been elaborated within feminist social reproduction theory. *See, e.g.*, Ellie Gore & Genevieve LeBaron, *Using Social Reproduction Theory to Understand Unfree Labor*, 43 CAPITAL AND CLASS 561, 564 (2019) (social reproduction theory "challenges the analytical separation of reproduction and production, and the so-called private and public realms of the economy. It foregrounds forms of work and social provisioning that have been historically viewed as non- or 'extra' economic, such as unwaged care and domestic work."); Silvia Federici, *Social Reproduction Theory: History, Issues, and Present Challenges* 2 RADICAL PHIL. 55, 55 (2019) ("Placing the spotlight on the work that produces the work-force has made possible a new understanding of the mechanisms by which capitalist society has been reproduced."). For a summary of the historical development of relations of social reproduction and its study in sociology, see Barbara Laslett & Johanna Brenner, *Gender and Social Reproduction: Historical Perspectives* 1989 ANN. REV. SOC. 381 (1989).

[29] *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition,* 20 YALE J.L. & FEMINISM 1 (2008). Fineman's understanding of vulnerability and call for a responsive state that addresses it overlaps with public care. But her theory seems to reject individual independence as a valid norm, whereas public care aims to create the material and social preconditions for such agency.

[30] A notable exception is Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010). For discussion of his fiduciary view, see Part II.A, infra.

[31] On the masculinist characteristics of bureaucracy and the welfare state, see Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 12 (1992).

law's reason-giving requirements. It argues that mutuality, collaboration, and concern are at least as important ingredients to good governance as are hierarchy, efficiency, and impartiality.

The argument proceeds in three parts. Part I describes care as a regulatory purpose animating the American welfare state, particularly in health law. I suggest ways in which this purpose should motivate the Biden Administration's implementation of the Affordable Care Act and related federal health services. Part II shows that the concept of care has bearing on agencies' obligation to exercise their authority in a reasonable manner. Core administrative law requirements of reason-giving, respect for reliance interests, and provision of notice and opportunity for comment institutionalize administrative-procedural care. A public care approach to administrative law, however, cautions against exclusive reliance on cost-benefit analysis and instead would promote equality of public participation and influence in the administrative process. Part III examines the structural-constitutional norms that flow from the President's duty of faithful execution. Contrary to the unitary theory of the executive, I argue that the "take care" obligation implies that the President's executive role is indirect and deliberative, rather than a matter of hierarchical command. This argument has implications for the future of agency independence and the civil service. It requires greater legislative, executive, and judicial respect for the professional judgment of civil servants, including the maintenance of for-cause removal protections and increased procedural rights for career staff to participate in policymaking decisions.

I. Public Care as a Regulatory Purpose

This Part examines public care as a purpose that the American administrative state has pursued and ought to pursue further. Considered as a regulatory purpose, public care is the *goal* of providing goods, services, and protections that enable private parties to advance their interests and exercise their rights. It establishes background conditions that make formal legal entitlements socially real. This regulatory purpose is recognized by particular statutory authorities and guides the exercise of administrative discretion within the bounds of law.[32] It gives executive officials a lens through which to understand and properly apply the statutes they implement. Administrators who are committed, as a matter of law or policy, to the goal of public care will use governmental power to enable the moral and political agency of statutory beneficiaries. They will avoid regulatory regimes that reduce the level or quality of material support for people's agency in service of other policy objectives. This Part will first show how the purpose of public care has been partially institutionalized over the historical development of American

[32] *See* Kevin M. Stack, *Purposivism in Executive Branch Interpretation: How Administrative Agencies Interpret Statutes*, 109 Nw. U. L. Rev. 871, 875 (2015) ("[S]tatutory delegations . . . impose obligations to exercise . . . authority in accordance with the purposes or principles that Congress has established in statute.").

welfare state since the Progressive Era. It will then describe how that purpose has been advanced in statutory health law, particularly in the Affordable Care Act. Finally, it will suggest how this purpose of care could be better advanced through administrative policy changes concerning contraceptive coverage and Medicaid work requirements.

A. A Brief History of Public Care from Progressive Maternalism to the Subordinate Welfare State

Public care is rooted in the history of the regulatory state. In the Progressive Era, reformers militated for the dramatic expansion of administrative capacity to address the social needs and problems generated by industrial capitalism. They argued that nineteenth century ideologies of isolated individualism and laissez-faire were inadequate to meet people's material and spiritual interests.[33] Jane Addams, for instance, argued that the government had to "minister to genuine social needs, through the political machinery, and at the same time to remodel that machinery so that it shall be adequate to its new task" by combining good-government professionalism with a sense of social sympathy.[34] The task was to broaden the horizons of citizens from their own parochial concerns and towards generalizable interests. "If we believe that the individual struggle for life may widen into a struggle for the lives of all, surely the demand of an individual for decency and comfort, for a chance to work and obtain the fullness of life may be widened until it gradually embraces all members of the community, and rises to a sense of common weal."[35] Mary Follett, similarly, argued for a "new state" in which individuals would understand their own freedom in relation to their participation in social groups, the nation, and ultimately humanity as a whole.[36] Beyond voting and representative government, Follett argued that democracy must make "every man and his basic needs the basis and substance of politics."[37] She understood the legitimate exercise of political authority not to be "power-over," in which one person commanded others what to do, but rather a "jointly developed, a co-active, not a coercive power."[38] She accordingly understood public law, and administrative agencies in particular, as attempting to "interweave" conflicting social interests.[39]

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[33] *See* EMERSON, *supra* note 17, at 61–66; *see also* JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN POLITICAL THOUGHT, 1870-1920 298–394 (1986).

[34] JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS 272 (1905).

[35] *Id.* at 269.

[36] MARY PARKER FOLLETT, THE NEW STATE: GROUP ORGANIZATION THE SOLUTION TO POPULAR GOVERNMENT 333 (1st ed., Longman's, Green & Co. 1918).

[37] *Id.* at 185.

[38] Mary Parker Follett, *Power*, *in* DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT 95, 101 (Henry D. Metcalf & L. Urwick eds., 1940).

[39] MARY PARKER FOLLETT, CREATIVE EXPERIENCE 292 (Longmans, Green & Co. 1924).

This Progressive project aimed to establish care as an official governmental obligation.[40] John Dewey and James Tufts turned away from the conflictual models of social order expressed by Social Darwinists and towards "the method of mutual protection and care" supported by both moral sympathy and scientific knowledge.[41] They urged a new public philosophy of collective democratic responsibility and administrative social provision. This philosophy would not abandon the value of individual freedom, but rather furnish the material, social, and political foundations that would make freedom a lived reality for all, achieving the "effective—not merely formal—freedom of every social member."[42] They advocated for a welfare state that would give individuals "equal opportunity" to develop their capacities to the fullest, including by providing "education as a public interest and care" and the provision of "proper food, hygiene, and medical care."[43]

The focus on governance as care in the Progressive Era had a gendered dimension. Women took a prominent role in the social and moral reform movements of the time, including for settlement houses, juvenile justice, temperance, sanitation, fair labor conditions, pure food and drugs, as well as suffrage.[44] The United States developed what Theda Skocpol has called a "maternalist welfare state," as women expanded the discourse and practice of family and household management to social policy.[45] As Paula Baker puts it, Progressive women "sought to bring the benefits of motherhood to the public sphere" by making social reproduction a matter of political concern.[46] The United States Children's Bureau, established in 1912 under the impetus of women's clubs, was a landmark in American state-building, investigating and supporting maternal and child welfare in coordination with state-level

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[40] Care was hardly the sole concern of Progressive political thought, which was also concerned with values such as democracy, positive freedom, moral reform, good-government, and administrative efficiency. *See* EMERSON, *supra* note 17 at 60–112; *see also* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. PA. L. REV. 1823, 1831–47 (2019); Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. IN AM. HISTORY 113 (1982).

[41] JOHN DEWEY & JAMES TUFTS, ETHICS 372 (1908).

[42] *Id.* at 472.

[43] *Id.* at 449, 549.

[44] *See* Elisabeth Israels Perry, *Men Are from the Gilded Age, Women Are from the Progressive Era*, 1 J. GILDED AGE AND THE PROGRESSIVE ERA 25, 41 (2002); On the links between feminist political mobilization around women's suffrage and welfare state supports, see Wendy Sarvasy, *Beyond the Difference Versus Equality Policy Debate: Post-suffrage Feminism, Citizenship, and the Quest for a Feminist Welfare State*, 17 SIGNS 329 (1992).

[45] SKOCPOL, *supra* note 22, at 2, 317–20 (1992). *But see* Kathyryn Kish Sklar, *The Historical Foundations of Women's Power in the Creation of the American Welfare State, in* MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES 43, 45 (Seth Koven & Sonya Mitchell, eds. 1993) (arguing that middle class women's reform movements were not merely modeled on motherhood and familial relations but more broadly served as a "surrogate for working class social-welfare activism").

[46] Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780–1920*, 89 AM. HIST. REV. 620, 640 (1984).

agencies.[47] Governmental subsidization, regulation, and supplementation of familial care recast the state itself as a caretaking institution.[48]

The moral maternalism of the Progressive state could be invasive and coercive, however. Whereas workmen's compensation programs offered rule-based, adjudicatory resolution of workplace injury claims, mother's aid programs involved intensive supervision and surveillance of indigent women to ensure that they met the moral requirements of reformers' Protestant ethic.[49] In their juvenile justice reform efforts, middle class women sought to police, regulate, and reform the sexual mores of young, working class, often minority women.[50] Women in the Indian Service likewise took on the role of "federal mothers" to Indian "wards," infantilizing them and attempting through education to assimilate them into white culture.[51] The risk of disciplinary domination remained acute throughout the subsequent development of the welfare state in the twentieth century, as caseworkers have exercised significant, morally judgmental, discretionary control over the lives of claimants.[52] Because of care's intimacy, and the unequal position of the cared-for and the care-giver, its practice could involve disempowerment, abuse, and even violence, particularly where overlaid on preexisting forms of social, political, and racial subordination.[53]

Those injustices, while real and profound, do not disqualify public care as a potentially valuable practice. Any and every framework for the exercise of governmental coercion can be misused. Nonetheless, these examples highlight the specific pathologies toward which public care is prone, and against which its sound administration must guard. Public care carries the risk that officials with greater social, political, or economic power will pressure those with less to lead the lives the powerful think are morally appropriate. That kind of oppressive "care" is to be distinguished from the normatively desirable practice, identified by Dewey, Tufts, and Follett, of providing the resources for people to realize their own potential as engaged participants in the democratic community. The procedural and structural dimensions of public care described in Parts II and III serve as checks against substantive

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[47] *See* SKOCPOL, *supra* note 22, at 483–512.

[48] *See* Carol Nackenoff, *Toward a More Inclusive Community: The Legacy of Female Reformers in the Progressive State*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 219, 219–20 (Stephen Skowronek, Stephen M. Engel, & Bruce Ackerman eds., 2016); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 37–64 (1994).

[49] *See* Barbara J. Nelson, *The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid, in* WOMEN, THE STATE, AND WELFARE 123, 123–24 (Linda Gordon ed., 1990).

[50] *See* MARY E. ODEM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT SEXUALITY IN THE UNITED STATES, 1885–1920, at 129–32 (1995).

[51] *See* CATHLEEN D. CAHILL, FEDERAL FATHER & MOTHERS: A SOCIAL HISTORY OF THE UNITED STATES INDIAN SERVICE, 1869–1933, at 6, 63–81 (2011).

[52] *See* Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law,* 92 YALE L.J. 1270, 1272 (1983).

[53] *See* Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia,* 57 VA. L. REV. 818, 818–19 (1971).

caregiving practices that disregard the self-understandings and interests of purported beneficiaries.

The American welfare state maintained a practice of public caring throughout the twentieth century, though this orientation has always been partial and precarious. From the advent of Social Security in the New Deal,[54] to the introduction of Medicare and Medicaid in the 1960s,[55] the state has provided an array of supports, benefits, and services that private initiative and the marketplace alone could or would not. It would be inaccurate to describe the twentieth century state as "maternalist" on the whole, however. The gendered social policy of the Progressive Era placed women into a subordinate position vis-à-vis male bread-winners.[56] The welfare state that has developed since the New Deal remained in many respects "patriarchal," in the sense that it prioritized work-based entitlements disproportionately enjoyed by men over caregiving supports that disproportionately went towards women.[57] Women have often been treated as the "conduit" for policies that are aimed not at women's own well-being but rather at the children they care for.[58] Such patriarchal policies have long been contested. As Karen Tani has shown, during the 1930s and 40s civil servants in the Social Security Administration argued for a "general governmental obligation to meet human need"[59] and understood welfare claimants as holding "democratic rights" to such provision.[60] Their vision, however, lost out over agency lawyers' emphasis on formal procedural rights, such as notice and a hearing.[61] The legalistic values of impartiality and procedural fairness took priority over social workers' efforts to institutionalize a public duty to provide adequate care for those in need.

The gendered hierarchy of welfare administration has also been heavily racialized. Welfare programs in the New Deal provided women of color with inferior supports or excluded them entirely.[62] The welfare rights struggle in the 1960s succeeded in improving access and benefits for black claimants in

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[54] *See* Edwin E. Witte, The Development of the Social Security Act: A Memorandum on the History of the Committee on Economic Security and Drafting and Legislative History of the Social Security Act, 111–97 (1962).

[55] *See* Wilbur J. Cohen, *Reflections on the Enactment of Medicare and Medicaid*, Health Care Fin. Rev. 3, 3 (Ann. Supp. 1985).

[56] *See* Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, *in* The Subject of Care: Feminist Perspectives on Dependency 14, 23–26 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

[57] *See generally* Carole Pateman, *The Patriarchal Welfare State*, *in* Democracy and the Welfare State 231 (Amy Gutmann ed., 1998). *But see* Gordon, *supra* note 48, at 7–8 (1994) (the inferior supports of Aid for Dependent Children were "designed by women and indeed feminist women, champions of child welfare.").

[58] Virginia Sapiro, *The Gender Basis of American Social Policy*, *in* Women, the State and Welfare 36, 45 (Linda Gordon ed., 1990).

[59] Karen Tani, States of Dependency: Welfare, Rights, and American Governance 1935–1972, at 57–80 (2016). *See id.* at 276.

[60] *Id.* at 58.

[61] *See id.* at 57–112.

[62] *See* Jill Quadagno, The Color of Welfare: How Racism Undermined the War on Poverty 21–25 (1994).

the short term but precipitated a racist backlash that undermined public support for welfare spending in the years to come.[63] Welfare rights mobilization at the same time worked to shift the institutional structure of the welfare state away from the discretionary practice of Progressive maternalism and towards a more rule-based and routinized regime. In *Goldberg v. Kelley*,[64] claimants won a due process right to a hearing prior to the termination of benefits. But arguments for substantive constitutional entitlements to public support, which would have enshrined the purpose of public care in fundamental law, foundered.[65] The resulting formalization of welfare criteria to meet the demands of administrative due process led to the "bureaucratization" of welfare agencies and the "proletarianization" of their workforces.[66] As I will discuss in Part III, this shift from civil servant professionalism towards bureaucratic hierarchy aligns with a unitary theory of executive power that is inconsistent with the structural demands of public care.

Beginning in the 1970s, fiscal pressures and rightward ideological shifts reduced funding levels and imposed new conditions on welfare recipients, such as work requirements.[67] These trends deepened over the course of the Reagan Administration and continued into the Clinton Administration.[68] The 1996 Personal Responsibility and Work Opportunities Act codified state-level experiments with work requirements and other eligibility barriers.[69] This conceptual change from "welfare" and "dependency" to "personal responsibility" and "work opportunities" captured a normative reorientation from public care towards a paternalistic effort to cultivate rugged individualism amongst the impoverished.

B. Public Care in Healthcare

Despite the subordinate position and subordinating tendencies of the American welfare state, public care's emphasis on satisfying basic human needs has nonetheless taken shallow root in health law. Medicaid provides healthcare benefits to individuals with low incomes, whereas Medicare provides them to the elderly and disabled.[70] These statutes have partially trans-

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[63] *See* Dorothy E. Roberts, *Review: Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1572 (1996).

[64] 397 U.S. 254 (1970).

[65] *See* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 118 (1991); Tani, *supra* note 59, at 260–69.

[66] William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System,* 92 YALE L.J. 1198, 1199 (1983); JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FLORENTINO CUELLAR, & NICHOLAS R. PARRILLO, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 416 (7th ed. 2014).

[67] *See* HANDLER & HASENFELD, *supra* note 65, at 119–22, 132–58.

[68] *See generally* John O'Connor, *US Social Welfare Policy: The Reagan Record and Legacy*, 27 J. SOC. POL. 37 (1998); Yvonne Zylan & Sarah Soule, *Ending Welfare as We Know It (Again): Welfare State Retrenchment*, 1989–1995, 79 SOC. F. 623, 630 (2000).

[69] Zylan & Soule, *supra* note 68, at 630.

[70] *See* Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1711–13 (2018). The Clinton-Era welfare reforms also included support for State Children's Health Insurance Programs (SCHIP) which provides health insurance to

formed healthcare provision into a field of public law constituted not by individual aims and private-professional standards but instead by the broad, evolving, and contested purposes of Congress.[71] They provide a positive law foundation for what Lindsay F. Wiley has called "health justice," which draws on communitarian political thought to articulate the collective rather than merely individual interests at issue in healthcare policy.[72] The purpose of Medicaid, for instance, is in part to "to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[73] When Congress provides that the government will provide "assistance on behalf of" particular groups and individuals, it acknowledges and codifies a collective, public responsibility to care for others, to attend to and advance the material interests of certain vulnerable classes of citizens. It lays the legal groundwork for ongoing democratic discourse—within and without the state—concerning which "health capabilities" are necessary for individuals determine and pursue their life plans.[74] With this statutory foundation, care needs have become more than mere political factors that may motivate policy. The purpose of public care now has legal authority, giving guidance to administrative officials on how to interpret and apply a thicket of extant statutory provisions.[75]

The American health regime is far from purely public, however. It also consists in the public subsidy and regulation of private health insurance schemes.[76] As Gabriel Winant has shown, this hybrid system has expanded to fill the central socioeconomic role that industrial production played in the mid twentieth century.[77] The industrial working class, suffering under the strains of work-related ailments and unemployment, became the patient base for a healthcare industry financed initially through collective bargaining of health insurance plans and, increasingly, through the extensive public sup-

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children whose families cannot afford it but do not qualify for Medicaid. *See* Karl Kronebusch & Brian Elbel, *Simplifying Children's Medicaid and SCHIP: What Helps? What Hurts? What's Next for the State?*, 23 HEALTH AFF. 233, 233–34 (2004).

[71] *See* Abbé R. Gluck, *Symposium Issue Introduction: The Law of Medicare and Medicaid at Fifty*, 15 YALE J. HEALTH 1, 1, 5–6 (2015).

[72] Linsday F. Wiley, *From Patient Rights to Health Justice: Securing the Public's Interest in Affordable, High-Quality Healthcare* 37 CARDOZO L. REV. 833, 837, 879 (2016); *see also* Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL'Y 47 (2014).

[73] 42 U.S.C. § 1396–1. *See* Gresham v. Azar, 950 F.3d 93, 104 (D.C. Cir. 2020) (describing this provision as "the primary purpose of Medicaid").

[74] *See* Jennifer Ruger, *The Health Capability Paradigm and the Right to Health Care in the United States*, 37 THEORETICAL MED. AND BIOETHICS 275, 279 (2016).

[75] *See* Michael J. Graetz & Jerry L. Mashaw, *Ethics, Institutional Complexity and Health Care Reform: The Struggle for Normative Balance*, 10 J. CONTEMP. HEALTH L. & POL'Y 93, 103 (1994) (ethical analysis of healthcare system should answer the question, "[w]hat is the balance of normative commitments structured into the system and how does that balance comport with our sense of appropriate resource allocation and internal priority setting?").

[76] *See* JACOB S. HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE BENEFITS IN THE UNITED STATES 7–27 (2002).

[77] *See* Gabriel Winant, *"Hard Times Make for Hard Arteries and Hard Livers": Deindustrialization, Biopolitics, and the Making of a New Working Class*, 53 J. SOC. HIST. 107, 108 (2019).

ports of Medicare and Medicaid.[78] This private-public system at the same time initially excluded healthcare workers from the labor protections industrial workers had won and enjoyed.[79] Today the state heavily subsidizes this work force through Medicaid, but the federalist structure of the system, budgetary austerity, and statutory exclusions from labor protections have made large swaths of this economy a "sweated industry" of underpaid, subordinated workers.[80]

The partial institutionalization of public care in the twentieth century has carried over into twenty-first century healthcare policy. As Nicole Huberfeld observes, the American healthcare system at the close of the twentieth-century remained extraordinarily unequal, fragmented, and partial, "existing in an ordered chaos sustained by a century-long political rejection of collective response to the human need for care through unitary health reform."[81] The Affordable Care Act at once moved the system towards greater comprehensiveness but built on and maintained the complex patchwork of care institutions, systems, and norms that preexisted it.[82] It created what Allison K. Hoffman has called a "weak statutory right to healthcare" for those in "medically vulnerable populations."[83] Among other things,[84] the Act expanded Medicaid,[85] created tax credits for the purchase of health insurance,[86] established government-run insurance exchanges,[87] required insurers to cover customers at roughly equal rates and regardless of preexisting conditions,[88] and imposed penalties on large employers who do not offer insurance to their full-time employees.[89]

The Affordable Care Act as enacted, however, is not the Affordable Care Act we now enjoy. In *NFIB v. Sebelius*,[90] the Supreme Court held that the Act's provisions empowering the Secretary of Health and Human Services to withhold existing Medicaid funding from states that did not agree to expand Medicaid exceeded Congress' powers under the Spending Clause.[91] The Court acknowledged that Congress may and frequently does condition

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[78] *See* Gabriel Winant, The Next Shift: The Fall of Industry and the Rise of Health Care in Rust Belt America 138 (2021).

[79] *See id.* at 135–38, 151–58, 163.

[80] Eileen Boris & Jennifer Klein, Caring for America: Home Health Workers in the Shadow of the Welfare State 10–14 (2012).

[81] Nicole Huberfeld, *The Universality of Medicaid at Fifty*, 15 Yale J. Health Pol'y L. & Ethics 67, 67–68 (2015).

[82] *See* Gluck, *supra* note 71, at 5–14; Abbé Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchmen*t, 108 Geo. L. J. 495, 507 (2020).

[83] Allison K. Hoffman, *A Vision of an Emerging Right to Health Care in the United States: Expanding Health Care Equity Through Legislative Reform*, *in* The Right to Health at the Public/Private Divide: A Global Comparative Study 345, 348 (Colleen M. Flood & Aeyal Gross eds., 2014).

[84] *See* Gluck & Scott-Railton, *supra* note 82, at 508–11 (describing provisions of ACA).

[85] *See* 42 U.S.C. § 1396a.

[86] *See* 26 U.S.C. § 36B.

[87] *See* 42 U.S.C. § 18031.

[88] *See* 42 U.S.C. §§ 300gg, 300gg–4.

[89] *See* 26 U.S.C. § 4980H.

[90] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 520–23 (2012).

[91] *See id.* at 576–84.

receipt of federal funding on various requirements.[92] However, it concluded that the threat that current Medicaid funds might be withheld from a state that did not accept expansion amounted to impermissible "coercion,"[93] in part because of the scale of this withholding power, and in part because the ACA did not merely amend Medicaid but rather "enlist[ed] states in a new spending program."[94]

The Court's conclusion that the Medicaid expansion amounted to a "new"[95] program relied on a stereotyped and indefensible circumscription of the boundaries of public care. The Court noted that, prior to the ACA, Medicaid was "designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children,"[96] whereas the ACA's Medicaid expansion would "meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level."[97] This was a significant expansion of the program, to be sure. But the Court failed to identify a categorical difference between the newly and the previously covered groups that would render the Medicaid expansion a "shift in kind, not merely degree."[98]

The original and the expanded version of Medicaid both express and enact public care, providing the basic material support of health insurance for those who are unlikely to be able to obtain it on their own. The Court had no basis for concluding that adults earning only up to $14,856 per year do not count among "the neediest among us" whereas the previously covered groups do.[99] The claim that the groups covered by original and expanded Medicaid are fundamentally different relies on an unfounded and ideologically freighted distinction between groups the Court seems to regard as the deserving poor and those who the Justices think are or ought to be self-supporting and autonomous.[100] The Court lacked the constitutional authority and institutional competence to determine the boundaries of the population with the greatest care needs.

Even in the truncated form approved by the Supreme Court, the Affordable Care Act combines two conflicting philosophies that Deborah Stone has identified within American health law and policy: on the one hand, an "individual-responsibility model," which allows healthcare consumers, insurers, and providers to make their own "choices" in the marketplace within the constraint of their ability to pay, and a "social-solidarity model,"

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[92] 567 U.S. at 576.
[93] *Id.* at 579.
[94] *Id.* at 584.
[95] *Id.* at 582.
[96] *Id.* at 575.
[97] *Id.* at 583.
[98] *Id.*
[99] *Id.* at 575. Calculation based on Federal Poverty Level in 2012. *See* 2012 HHS Poverty Guidelines, U.S. Dep't of Health & Human Servs., https://aspe.hhs.gov/2012-hhs-poverty-guidelines#thresholds [https://perma.cc/QK4W-BNRZ].
[100] On the historically entrenched categories of the "deserving" and "undeserving" poor, see Handler & Hasenfeld, *supra* note 65, at 44–81.

which provides some health needs as a matter of right.[101] The solidarity model is closely related to the practice of public caring that has been at work in American public law since the Progressive Era. What Stone describes as the "logic of solidarity" in social insurance is premised on responsibilities of "mutual aid amongst a group of people who see themselves as sharing a common interest" and accordingly evince a "willingness to help each other."[102]

This solidaristic understanding of health policy broadly aligns with the "ethic of care" articulated by Carol Gilligan, which treats "self and other as independent" and works to establish and maintain "mutuality of respect and care" between people.[103] But the ACA invites us to rethink the relationship between law and care, even though the forms of care it provides are partial and incremental. Whereas Gilligan portrayed care ethics as broadly opposed to legalistic ways of thinking,[104] the ACA shows how legal rights can in fact help to define and entrench practices of care within society. Friendly amendments to care ethics have recognized that the morality of rights and the morality of care can work hand in hand.[105] The fundamental importance of giving and receiving care may justify conferring positive rights to caregivers, such as parents, nurses, and aides, as well as the cared-for, such as children, the disabled, or the elderly.[106] As Robin West has recognized in the context of childcare, such "rights to supported caregiving" can be justified on the liberal principle that receiving such care is a precondition for moral personhood.[107] We generally can't become functioning, independent adults unless someone provides for us in our youth. Throughout the rest of our lives, we remain, as Seyla Benhabib observes, "embodied beings with needs and vulnerabilities."[108] The effective exercise of our rights depends on meeting these needs and tending to these vulnerabilities. We have great difficulty remaining independent agents when we are in the grip of physical suffering

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[101] Deborah A. Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL., POL'Y & L. 287, 289 (1993); Gluck & Scott-Railton, *supra* note 82, at 511–12.

[102] Stone, *supra* note 101, at 289.

[103] GILLIGAN, *supra* note 24, at 74, 104.

[104] *Id.* at 54.

[105] *See* Monique Deveaux, *Shifting Paradigms: Theorizing Care and Justice in Political Theory*, 10 HYPATIA 115, 118 (1995). (criticizing "dichotomous" understanding of the ethic of care versus rights-based understandings of justice). *See generally* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989) (applying liberal theories of justice to family and gender relations, which centrally concern care responsibilities).

[106] Eva Feder Kittay, *Taking Dependency Seriously: The Family Medical Leave Act Considered in Light of Social Organization of Dependency Work and Gender Equality*, 10 HYPATIA 8 (1995); *see also* Allison Hoffman, *The Reverberating Risk of Long-Term Care*, 15 YALE J. HEALTH POL'Y, L., & ETHICS 57 (2015).

[107] Robin West, *The Right to Care*, *in* THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY 88, 98 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

[108] SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS 189 (1992); *see also* Fineman, *supra* note 29, at 8.

or when we face the risk of crippling financial loss should we become sick or otherwise in need of medical care.[109]

The Affordable Care Act gives legal protection against some of these sorts of risks by, amongst other things: imposing requirements that insurance plans cover certain essential benefits and provide coverage irrespective of preexisting conditions; setting out rights against race, sex, and religious discrimination in healthcare provision; and providing expanded financial support for people who cannot afford health insurance.[110] But these provisions nonetheless stand alongside those that preserve and in some respects extend the individualist model of the private health insurance scheme that is in conflict with the purpose of public care. Recall that the purpose of public care is to provide individuals with the goods and services they need to exercise their agency. Health is one of those basic goods that enables people to define and advance their rights and interests. If individuals lack the resources or information to acquire this good on their own, public care requires that it be provided.

The ACA is in tension with this principle to the extent that it relies in part on the fiction of individual choice over health and healthcare.[111] The employer provided health insurance scheme the Act leaves in place ties insurance to individuals' labor market participation and value. This scheme enhances employers' coercive power over their employees in a way that reduces rather than increases employees' moral agency.[112] All of the difficulties associated with losing and obtaining new health insurance increase employees' exit costs and thus the bargaining position of the employer. The Act also creates incentives for employers to adopt wellness programs in which employees enjoy premium reductions for engaging in health-promoting activities such as exercise. These initiatives do not appear to promote healthier activities, however, but rather merely shift healthcare costs onto less healthy populations.[113] In addition, the Act's insurance exchanges, which provide insurance access to those who don't have employer-provided insurance and don't qualify for Medicaid, are built upon the ideal of consumer sovereignty. In the healthcare context, however, this ideal is deeply flawed if not incoherent.[114] People often do not have clearly formed preferences about health plans and lack sufficient information to choose among them.[115] No amount of tinkering with the choice architecture is likely to make rational decision-

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[109] *See* Seema Mohapotra & Lindsay F. Wiley, *Feminist Perspectives in Health Law*, 47 J. L. Med. & Ethics 103, 104–5 (2019).

[110] *See* Gluck & Scott-Railton, *supra* note 82, at 508–11.

[111] *See generally* Nicole Huberfeld & Jessica L. Roberts, *Health Care and the Myth of Self-Reliance*, 57 B.C. L. Rev. 1 (2016).

[112] *See* Elizabeth Anderson, Private Government: How Employers Rule Our Lives (And Why We Don't Talk About It) 37–71 (2017) (arguing that employers operate as governments and often exercise arbitrary power over their employees).

[113] Jill R. Horwitz, Brenna D. Kelly & John E. DiNardo, *Wellness Incentives in the Workplace: Cost Savings Through Cost Shifting to Unhealthy Workers*, 32 Health Aff. 468 (2013).

[114] Allison K. Hoffman, *The ACA's Choice Problem*, 45 J. Health Pol., Pol'y & L. 501 (2020).

[115] *Id.* at 504.

making both meaningful and efficient in a field as complex and consequential as health insurance. The "modern American obsession with choice" that the ACA encodes has therefore impeded this practice of public caring.[116]

There are some signs that the winds are shifting, however. Hoffman hoped that the ACA would make it possible for "public consciousness . . . to accept the solidaristic norm and support a notion of sharing of health resources more collectively."[117] Abbé Gluck and Thomas Scott-Railton show that this change is indeed in the winds, as the ACA has shifted the terms of public deliberation on health insurance, moving us towards a more universal and solidaristic system.[118] Bipartisan support for mandatory coverage of preexisting conditions, for instance, has "occurred as a result of the ACA as lived facts on the ground . . . have evolved into new understandings of rights."[119] In addition, the expansion of the Medicaid system to cover a much broader portion of low-income healthcare consumers has increased support for publicly provided health insurance, such as Senator Bernie Sanders' influential proposal for "Medicare for All."[120] The practice of public care has generated wider expectations that the government will continue to provide and expand such care.

C. Furthering the Purpose of Care through Administrative Policy Change

The previous Sections have examined the significant but contested and marginalized commitment to public care in American welfare and health law. This Section considers how the purpose of public care has been undermined by the actions of the Trump Administration, and how that purpose might be more effectively advanced through administrative policy change concerning contraceptive coverage and Medicaid work requirements.

The Trump Administration's rule on women's contraceptive coverage evinced a failure to implement the regulatory purpose of public care, insofar as it gave unreasonably narrow effect to the Affordable Care Act's Women's Health Amendment.[121] That amendment states that health insurance must "at minimum provide coverage for and shall not impose any cost sharing requirements" for "additional preventive care and screening" for "women."[122] The purpose of this amendment was to ensure health equity for women.[123] The late Justice Ginsburg would later interpret this provision in light of the Court's recognition, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[124] that "[t]he ability of women to participate equally in the economic

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[116] *Id.* at 508.
[117] Hoffman, *supra* note 83, at 369.
[118] Gluck & Scott-Railton, *supra* note 82, at 558–66.
[119] *Id.* at 559.
[120] *Id.* at 561–66.
[121] 42 U.S.C. § 300gg–13(a)(4).
[122] *Id.*
[123] Rebecca Hall, *The Women's Health Amendment and Reproductive Freedom: Finding a Sufficient Compromise*, 15 J. HEALTHCARE L. & POL'Y 401, 406–07 (2012).
[124] 505 U.S. 833 (1992).

and social life of the Nation has been facilitated by their ability to control their reproductive lives."[125] The amendment thus provides for basic material support for individual, and arguably collective, agency. By increasing women's reproductive autonomy, the amendment enables them both to pursue their private plans and participate as equals in public and political fora.[126]

The Obama Administration's initial implementation of the amendment, which included conscience-based exemptions for certain religious employers, drew objection from religious organizations. In *Burwell v. Hobby Lobby Stores, Inc.*,[127] the Court held that the Religious Freedom Restoration Act (RFRA) required that existing regulatory exemptions for religious nonprofits be extended to closely held religious for-profits. The Trump Administration went beyond *Hobby Lobby*'s requirements,[128] providing that any employer with a moral or religious objection to providing contraceptive coverage not only did not have to provide such coverage but did not need to certify their objection so as to enable their employees to obtain no-cost coverage by other means.[129] The rule imposed a substantial financial burden on many women employed by religious employers, predicted to result in between 70,500 and 126,400 women losing access to no-cost contraceptive coverage.[130] The Supreme Court nonetheless upheld the rule in *Little Sisters of the Poor v. Pennsylvania*.[131]

As the late Justice Ginsburg noted in her dissent, the majority's interest in the rights of religious groups "casts totally aside countervailing rights and interests," namely those of women.[132] Ginsburg understood that the rule would leave tens of thousands of women "to fend for themselves," rather than receive the attention and support from the government that the Affordable Care Act contemplated.[133] As Elizabeth Sepper notes, conscience rights held by healthcare providers impose significant costs on the quality of patient care and may also result in sex discrimination.[134] Exemptions for religious organizations further deteriorate what Cary Franklin has called "the infrastructure of provision," the governmental support that enables people to

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[125] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 741 (2014) (Ginsberg, J., dissenting) (quoting *Casey*, 505 U.S. at 856).

[126] *Cf.* Ruth Rubio-Marín, *Women and Participatory Constitutionalism*, 18 INT'L J. CONST. L. 233, 246 (2020) (explaining social and economic barriers to women's participation in constitution-making, including childcare responsibilities).

[127] 573 U.S. 682 (2014).

[128] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed Reg. 47,792, 47,806 (Oct. 13, 2017).

[129] *Id.* at 47, 808–09.

[130] 83 Fed. Reg. 57,536, 57,578, 57,580 (Nov. 15, 2018).

[131] Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

[132] *Id.* at 2400 (Ginsberg, J., dissenting).

[133] *Id.*

[134] Elizabeth Sepper, *Conscientious Refusals of Care*, *in* THE OXFORD HANDBOOK OF U.S. HEALTH LAW 354, 362–66, 373–74 (I. Glenn Cohen, Allison K. Hoffman, and William M. Sage, eds. 2017).

make effective use of their constitutional right to reproductive freedom.[135] This is not to deny that some level of accommodation for religious objections may be statutorily required by RFRA.[136] The problem is that the existing rules do not approach any reasonable balance between such conscience rights and the ACA's codified public care obligations.[137] The sorts of "complicity based conscience claims" the Government recognized in this case work considerable material and dignitary harms on women who lose access to contraceptive coverage.[138]

The Biden Administration can and should rely upon public care rationales to rescind and replace the existing contraceptive coverage rules. The purpose of public care demands attention to values including economic well-being but going further to encompass people's full and equal participation in social and economic life. That purpose would provide support for significantly narrowing religious exemptions, as it would increase the strength of the government's interests in providing no-cost contraceptive coverage. For instance, even assuming the self-certification requirement would impose a substantial burden on some employers' religious conscience, the government should make the case that that burden is the least restrictive means to advance the government's compelling interest not only in women's economic security but also in their ability to pursue their life plans and to participate as equals within the political community.[139] Even if such arguments do not ultimately prevail before a Court keen to protect religious and business interests, the government ought to invoke and emphasize the public care purposes that the ACA and the welfare state more broadly institutionalize. It should speak in a language that will influence public discourse around care even if it does not persuade the Court.

Another example of implementing care as a regulatory purpose concerns Medicaid work requirements approved by the Trump Administration. The Trump Administration encouraged states to impose work requirements as a condition for receipt of the ACA's expanded Medicaid benefits.[140] While billed as an effort to improve health outcomes, the true motive for these work requirements seems to have been to increase the burden of participation so as to limit access to Medicaid for certain classes of beneficiaries

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[135] Cary Franklin, Griswold *and the Public Dimension of the Right to Privacy*, YALE L. J. F. 332, 338 (2015).

[136] 42 U.S.C. § 2000bb; Religious Exemptions and Accommodations, 82 Fed. Reg. at 47,802; *Little Sisters of the Poor*, 140 S. Ct. at 2378 (2020).

[137] On the lack of balance in the Trump administration's religious conscience policies, see Elizabeth Sepper, *Toppling the Ethical Balance — Health Care Refusal and the Trump Administration*, 381 N. ENG. J. MED. 896 (2019).

[138] *See* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2566–78 (2015).

[139] *See* 42 U.S.C. § 2000bb–1(b); Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 728 (2014) (assuming without deciding that there is a compelling governmental interest in no-cost contraceptive coverage).

[140] PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 116–19 (2018).

deemed undeserving.[141] In *Gresham v. Azar*,[142] D.C. Circuit held that the Trump Administration's approval of Arkansas' Medicaid work requirements was arbitrary because it "prioritize[d] a non-statutory objective to the exclusion of the statutory purpose."[143] The statutory purpose was to "to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[144] The court distinguished this purpose from that of the Temporary Assistance for Needy Families Program (TANF), which is explicitly geared towards "end[ing] the dependence of needy parents."[145]

Medicaid, by contrast, is a statute of public care. Its central goal is not to end dependency but rather to provide a modicum of support for those who find themselves responsible for dependents or are themselves in a state of dependency. Work requirements fit uneasily, if at all, with the purpose of public care. Noah Zatz has shown, in the context of TANF, that policymakers purport to justify work requirements either on the grounds that they encourage economic self-sufficiency, or because work activities are somehow virtuous, or because work provides a social benefit in exchange for social support.[146] In approving Arkansas' work requirements, the Trump Administration transplanted the self-sufficiency and self-improvement rationales to the healthcare context. Health and Human Services Secretary Azar argued that work requirements would "improv[e] health outcomes . . . address[ ] behavioral and social factors that influence health outcomes; and . . . incentiviz[e] beneficiaries to engage in their own health care and achieve better health outcomes."[147]

As noted, these objectives were probably mere pretext for dismantling or at least reducing the Act's expansion of Medicaid. But suppose for the sake of argument that the objective of improving health outcomes was offered in good faith and that the administration had shown that this objective could be efficiently achieved through work requirements. Even so, achieving the goal of improved health outcomes in this manner was beyond the scope of, and was likely to undermine, the domain public care that Medicaid and the ACA describe. Medicaid and the Affordable Care Act codify a democratic understanding that healthcare coverage is an essential good that should be publicly furnished to those who are unable to pay. When HHS pursued the goal of improved health outcomes without concern for decline in health

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[141] *Id.* For a broader description of litigation around Medicaid as well as Food Stamp work requirements, and analysis of the impact of litigation and federalist implementation structures on the durability of these programs, see Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 Nw. U. L. Rev. 361 (2020).

[142] 950 F.3d 93 (D.C. Cir. 2020).

[143] *Id.* at 104.

[144] 42 U.S.C. § 1396–1.

[145] *Gresham v. Azar*, 950 F.3d 93, 101 (D.C. Cir. 2020) (quoting 42 U.S.C. § 601(a)(2)).

[146] *See generally* Noah D. Zatz, *What Welfare Requires from Work*, 54 UCLA L. Rev. 373 (2006).

[147] *Gresham*, 950 F.3d at 97.

coverage, it not only acted outside the bounds of its statutory authority but, worse, put the statute's central objective of healthcare coverage in jeopardy. Public commenters had raised the concern that the work requirements would result in a loss of healthcare coverage.[148] While the Secretary acknowledged these concerns, the court held this discussion of the issue to be "conclusory," given that he did not justify his finding that the health benefits of work requirements would exceed the cost in terms of lost healthcare coverage: "Nodding to concerns raised by commenters only to dismiss them is not a hallmark of reasoned decision-making."[149]

Here, the regulatory purpose of care overlaps with care as a procedural principle, which is to be discussed in the next Part. The Secretary's failure to offer a reasoned response to commenters' objections concerning loss of healthcare coverage evinced his lack of concern for Medicaid's purpose of care. One might generously concede to the Trump Administration that some individuals might enjoy health improvements as a result of incentives that coerced them to seek employment. But any individuals who lose Medicaid coverage as a result of work requirements nonetheless have been deprived of the public care that Congress intended to provide.

The Supreme Court initially planned to review Medicaid work requirements but removed the cases from its docket at the request of the Biden Administration, which is unwinding the Trump-era waiver programs.[150] As the Biden Administration rethinks the implementation of Medicaid, it can rely on and articulate the value of public care that is expressed and codified in Medicaid. It can explain that public health insurance provision is not a matter of charity or kind-heartedness, but rather of ensuring that people have the material capacity to exercise their moral and political agency within the democratic community. By providing such public care as widely and efficiently as possible, the Biden Administration can trigger a virtuous cycle in which people experience the practice of care and so become committed to the provision of care as a governmental responsibility. It can forthrightly reject the distinction between the "neediest" groups the Supreme Court is willing to recognize and those childless adults who also need public support to effectively exercise their rights.

II. Public Care as Administrative Procedure: Reasonable Agencies and the Affected Public

The previous Part examined public care as a regulatory purpose the administrative state pursues. This Part now examines public care as a procedural principle in administrative law. Whereas regulatory-purposive care is a

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[148] *See id.* at 103.

[149] *Id.*

[150] James Romoser, *Court Nixes Upcoming Argument on Medicaid Work Requirements*, SCOTUSblog (Mar. 11, 2021, 12:55 PM), https://www.scotusblog.com/2021/03/court-nixes-upcoming-argument-on-medicaid-work-requirements [https://perma.cc/TV7Q-9CCV].

reason for which the state should act, administrative-procedural care is a *way* in which the state should act. Administrative-procedural care requires that agency officials exercise their discretion in a way that is responsive to the interests of the parties their acts and policies affect and implicate. Agencies' purposive care obligations are "nested" within,[151] constrained, and informed by this broader procedural requirement to demonstrate attention to and deliberate with members of the public. Administrative-procedural care ensures that the effort to provide care does not convert into a coercive effort to dictate to citizens what their interests and needs consist in.

This Part will reappraise core doctrines and procedures of administrative law as obligations of public care. Administrative law, at bottom, aims to ensure that government action is attentive and responsive to human concerns. Agencies must care—and show that they care—about the people their policies impact. Their decisions must take relevant factors into account, not consider inappropriate factors, and respond to the viewpoints and interest of affected parties. Analyzing these core aspects of administrative law as responsibilities of care casts them in a new light. Administrative law should be understood to convey respect and concern not only for the law itself but for private persons the law benefits and burdens. The administrative process does not always adequately exhibit this kind of concern, insofar as public participation in administrative policymaking is skewed towards powerful parties, well-equipped interest groups, and single-minded concern with economic efficiency. This Part will first interpret administrative law's core legal requirements as recognizing procedural care obligations. It will then provide suggestions for how agencies could better comply with these obligations through more extensive and equitable public participation in the administrative process.

A. Reasonable Administrative Care

Administrative law is all about reasonableness. *Chevron* tells us that where a statute is ambiguous, courts should defer to agencies' "reasonable" interpretations.[152] This reasonableness determination overlaps with the Administrative Procedure Act's (APA) requirement that agency action cannot be "arbitrary" or "capricious."[153] Where statutory requirements are not themselves dispositive of the course of conduct to be taken, the agency must analyze and address the problem in a way that is responsive to all relevant concerns and not misled by extraneous ones.[154]An agency must provide a

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[151] *See* TRONTO, *supra* note 10, at 21 (describing how "care practices can be *nested* in several ways" in the sense that the ultimate care for an individual such as a patient requires that the direct provision of care be informed by relevant professional standards and maintenance of necessary technical knowledge and equipment).

[152] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

[153] 5 U.S.C. § 706.

[154] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

"reasoned explanation for its action."[155] When it changes policy, it must "display awareness" that it is doing so, explain any altered factual findings, and take into account any "serious reliance interests" engendered by its previous policy.[156]

As David Zaring has argued, we can conceptualize the many standards of judicial review of administrative action as all imposing a "reasonable agency standard,"[157] analogous to tort law's standard of the "reasonable person."[158] The reasonable person exercises "reasonable care,"[159] which is "that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against the probable danger."[160] Administrative law's reasonableness requirements similarly recognize a duty of care, or attention, consideration, and regard for the interests relevant to agencies' conduct. There are, of course, many important differences between the concept of reasonableness in tort and administrative law, not least that the reasonableness of an agency's conduct will be measured by the agency's articulated explanation for its action rather than simply by the objective reasonableness of its conduct. Whereas tort law centrally concerns private conduct, administrative law concerns public actors who have affirmative legal obligations to provide services, rather than merely a negative obligation not to harm others. Evan J. Criddle describes agencies' affirmative duties as fiduciary obligations to advance the interest of others.[161] They are "bound to exercise reasonable prudence when exercising delegated powers."[162] In both tort and fiduciary law, reasonable care requires a concern for others that informs and constrains what one would otherwise do. The reasonableness standard "represents the moral judgment of the community"[163] and as such incorporates a requirement of "adequate respect and appreciation" for all of the moral interests that are put at risk or otherwise implicated by the conduct in question.[164] The duty of reasonable care is an obligation to consider the welfare of others when one acts in the world.[165] It acknowledges the fact that we live together in society

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[155] F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

[156] *Id.*

[157] David Zaring, *Reasonable Agencies*, 97 VA. L. REV. 136, 138 (2010).

[158] *See, e.g.*, Bethel v. New York City Transit Authority, 703 N.E.2d 1214 (N.Y. 1998).

[159] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 3 (AM. L. INST. 2010).

[160] Brown v. Kendall, 60 Mass. (6. Cush.) 292 (Mass. 1850).

[161] *See generally* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

[162] *Id.* at 151.

[163] 3 FOWLER V. HARPER, FLEMING JAMES JR., & OSCAR S. GRAY, THE LAW OF TORTS § 16.2 at 432–34 (3d ed. 2007).

[164] Seana Valentine Shiffrin, *The Moral Neglect of Negligence, in* 3 OXFORD STUDIES IN POLITICAL PHILOSOPHY 200, 201 (David Sobel, Peter Vallentyne & Steven Wall. eds., 2017).

[165] The reasonableness standard, of course, has a troubled, gendered history. The "reasonable person" was once the "reasonable man," and the duty of reasonable care historically excluded injuries historically more likely to be suffered by women, such as emotional injuries suffered from witnessing injury to a child. *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990). "Care" in tort

and are responsible for how our actions impact one another. To this extent, tort and fiduciary law's notion of reasonableness is comparable to administrative law's, as agencies must consider how their collective actions put at risk or benefit the interests of private parties.

Many failures in agency reasoning can be seen as failures of respect for the interests involved. In *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,[166] the Court held that the National Highway Traffic Safety Administration had unlawfully rescinded a regulation requiring that cars be manufactured with either airbags or automatic seatbelts.[167] It concluded the agency had acted arbitrarily because it had failed to consider the possibility of requiring airbags alone given that the benefits of automatic seatbelts were unproven.[168] We might interpret this ruling as concerned with the agencies' carelessness or inattention to the human interest in safety that the statute was meant to protect. Even if it had been legitimate for the agency to act on the basis of the deregulatory policies of the incumbent President,[169] the failure to contemplate an obvious alternative showed a lack of respect for the people whose lives would be put at risk by the deregulatory action.

Administrative-procedural care is also recognized and enforced by the APA's notice-and-comment rulemaking process, in which agencies must publish proposed rules and accept and respond to comments from the public.[170] We might understand that process as purely informational, giving affected parties the opportunity to advise the agency of any errors it has made and challenge the agency in court for failure to address them. But there's more to the comment process than that. Responses to comments, which often run scores or even hundreds of pages in the *Federal Register*, express attentiveness to the points of view, the judgments, and the interests of members of the public. Such responses acknowledge that official acts are done on behalf of people and for them, and thus must be sensitive to what the people themselves know and think about the problem at hand.

Notice-and-comment requirements fulfill functions roughly analogous to a physician's fiduciary duty to obtain informed consent from a patient. In both contexts, one party, who has superior knowledge and control over another, must explain a proposed treatment that will affect and may injure the

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law long predates and partially excludes the feminist ethic of care, imposing masculine understandings of duty, such as by excluding any affirmative obligation to come to the aid of others. *See, e.g.*, Leslie Bender, *The Changing Values in Tort Law*, 25 TULSA L. REV. 759, 767–73 (1990) (arguing that tort law does not currently recognize interpersonal care responsibilities and proposing that it should); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33–34 (1988) (offering a feminist critique of the no-duty-to-rescue rule).

[166] 463 U.S. 29, 57 (1983).

[167] *Id.* at 57 (1983).

[168] *Id.* at 46 (1983).

[169] *Id.* at 59 (Rehnquist, J., concurring).

[170] 5 U.S.C. § 553(c).

dependent party.[171] Administrative action, of course, does not require the consent of regulated parties and beneficiaries. But it does generally require that they be notified of proposed courses of conduct and have a meaningful opportunity to communicate their views and interests to the expert agency before it takes binding action. In both the law of informed consent and in administrative law, the decision-making process must respect the "intersubjectivity" of care: the contemplated action must be justified on the basis of the values, interests, and knowledge of both the caregiver and the parties who receive care.[172]

When an agency invests considerable time and effort to respond to comments, it demonstrates not only its diligence but its respect and concern for members of the public.[173] By contrast, a failure to respond to relevant comments conveys a failure to consider the way in which rules are likely to affect regulated parties or beneficiaries. For instance, in *United States v. Novia Scotia Food Products Corp.*[174] the Court of Appeals for the Second Circuit invalidated a regulation on fish smoking in part for failure to respond to a comment by Nova Scotia that the requirement would "completely destroy" the whitefish products it produced.[175] "[T]o sanction silence in the face of such vital questions" would make the notice-and-comment provisions "less than an adequate safeguard against arbitrary decision-making."[176] The arbitrariness in question is an unjustified resolution to do as one pleases in the face of evidence that one's conduct will substantially harm the interests of others. This is regulatory negligence.

Such carelessness was a consistent feature of the Trump administration, which had a markedly bad track record in administrative law cases.[177] One of the most notable instances of thoughtless administration was the Department of Homeland Security's failed attempt to rescind the Deferred Action for Childhood Arrivals Program (DACA).[178] Chief Justice Roberts held that the rescission was arbitrary and capricious in part because it failed to consider the reliance interests of DACA recipients, including their educational, business, and familial plans, as well as the interests of governments in the revenue and economic benefits of recipients' labor.[179] In this case, the human stakes of agency action were quite plain, as rescission of DACA would have

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[171] *See e.g.*, Matthew v. Mastromonaco, 733 A.2d 456, 459 (N.J. 1999); Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 496 (Cal. 1990) (en banc).

[172] *See* John P. Goldberg, *The Fiduciary Duty of Care*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 405, 414 (Evan J. Criddle et al. eds., 2019).

[173] *See* Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) (notice-and-comment provides for "public participation and fairness to affected parties").

[174] 568 F.2d 240, 245 (2d Cir. 1977).

[175] *Id.* at 245.

[176] *Id.* at 253.

[177] *Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. INST. FOR POL'Y INTEGRITY, https://policyintegrity.org/trump-court-roundup [https://perma.cc/2YET-MHKS]; *see also* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 153 (2019) ("[T]he Trump administration has doggedly ignored some settled administrative-law expectations for agency decisionmaking.").

[178] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020).

[179] *Id.*

left hundreds of thousands of undocumented residents liable to deportation, despite their significant ties to the country. The government's failure to take these interests seriously showed disregard and disrespect for DACA recipients as well as other stakeholders.[180] Indeed, as Justice Sotomayor pointed out in her partial concurrence, the respondents' complaints "plausibly alleged" animus, raising a colorable equal protection claim.[181]Administrative law standards do not require any such showing of an invidious motive, however. It is enough to fail review if the agency has simply ignored important human interests, as though the relevant officials couldn't be bothered, or as though certain people were somehow outside the circle of public concern.

The Trump Administration's Title X rule on federal funding of family planning similarly evinced a failure of procedural care.[182] Title X gives the Secretary of the Department of Health and Human Services (HHS) authority to make grants for family planning services.[183] But these grants may not be "used in programs where abortion is a method of family planning."[184] The Trump Administration's rule followed on a series of prior interpretations that struck varying balances between reproductive healthcare access and the requirement not to fund abortions. The Trump Administration's rule strongly disfavors interests in reproductive health and freedom relative to the rule it replaced, which was issued at the end of the Clinton Administration.[185] It forbids Title X providers from making abortion referrals, requires physical and financial separation of Title X projects from abortion-related activities, and permits providers to decline to discuss abortion in the course of providing pregnancy counseling, which is required by appropriations rider to be "nondirective."[186]

In *California v. Azar*,[187] the Ninth Circuit Court of Appeals reversed the district court and upheld this rule, concluding that it rested on a reasonable interpretation of the law under *Chevron* and was adequately justified on the record.[188] That holding was questionable for two reasons. First, it strains credulity that pregnancy counseling could be truly "nondirective" where providers must offer referral for prenatal services, must not refer for abortion, and may refuse to provide abortion counseling even if a patient seeks information about abortion.[189] As Judge Paez put it in dissent, the rules ensure that "patients are steered toward childbirth at every turn."[190] They direct the patient away from an option a patient may seek to understand and that the

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[180] On the interests in social recognition and inclusion implicated in DACA, see Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L. J. 2122, 2195–2216 (2019).
[181] 140 S. Ct. at 1917 (Sotomayor, J., concurring in part and dissenting in part).
[182] *See* 84 Fed. Reg. 7714 (Mar. 4, 2019).
[183] 42 U.S.C. § 300(a).
[184] 42 U.S.C. § 300a-6.
[185] *See* 65 Fed. Reg. 41270 (July 3, 2000).
[186] California v. Azar, 950 F.3d 1067, 1080–82 (9th Cir. 2020).
[187] 950 F.2d 1067 (9th Cir. 2020).
[188] *Id.* at 1084–1105.
[189] *Id.* at 1088.
[190] *Id.* at 1107 (Paez, J., dissenting).

Constitution makes available to them.[191] In this sense, the rule fails to show reasonable care for the reproductive aspects of the human condition and the autonomy interests they implicate.[192] The second problem with the court's conclusion was that the agency did not adequately address commenters' concern that the rule's constraints would force major providers to leave the program entirely to maintain their ethical obligations to patients.[193] HHS was sanguine that new providers with moral or religious convictions would come in to fill the gap, but did not provide any real evidence for its predictions.[194] In this respect, the ruling failed to give adequate attention to the expressed viewpoints and interests of regulatory beneficiaries.[195]

Here, as with the DACA rescission, the failure to take seriously concrete harms that the agency had been alerted should have rendered the action arbitrary. The rule's restrictions threaten to dismantle the infrastructure of family planning services for many low-income Americans.[196] That is a particularly stark failure of care, as it impacts both caregiving parents and cared-for dependents. The Biden Administration's HHS has proposed a rule that would rescind the Trump Administration rule and largely reinstitute previous requirements, including allowing abortion referral.[197] As it revises and finalized the proposal, the agency should advance the purpose of public care by construing grant recipients' obligations broadly. For instance, the final rule might require abortion referrals upon clients' request but allow re-

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[191] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[192] It is worth noting here that Carol Gilligan's original work on the ethic of care considered women's moral reasoning over abortion decision as its central example. GILLIGAN, *supra* note 24, at 64–128. She describes, based on interviews, different stages of moral reasoning in which pregnant women thought through their care-responsibilities in determining whether or not to have an abortion. Because the regulatory structure of the Title X rule proactively discourages abortion and allows providers to conceal abortion options from pregnant persons, it plays a paternalistic role in depriving women of this sort of moral agency. This regulation is an example of a pathology of care—an attempt to make a moral judgment for pregnant persons rather than give them the resources to make the decision on their own.

[193] *See Azar*, 950 F.3d 1067, at 1116 (Paez, J., dissenting).

[194] *See* 84 Fed. Reg. 7714, 7781 (Mar. 4, 2019); *Azar*, 950 F.3d at 1116 (Paez, J., dissenting).

[195] HHS further argued that the rule's provisions disallowing abortion referrals and allowing providers to refuse abortion counseling were necessary to protect religious conscience. *See* 84 Fed. Reg. 7714, 7747–49 (Mar. 4, 2019). It is not clear, however, how Title X rules could place legally cognizable burdens on religious conscience given the courts' prior jurisprudence on subsidies in this field. The Court has held, in a prior case on Title X regulations, that the right to abortion is not disfavored by the state's decision not to fund abortion. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991). If that is so, there should be no basis for claiming that religious conscience rights are burdened where the state conditions receipt of federal family planning funds on the provision of abortion referral or counseling. If the constitutional right to abortion is preserved even if the government chooses not to subsidize it, presumably the same principle ought to apply for religious conscience rights.

[196] As a consequence of the rules, Planned Parenthood, which serves forty percent of Title X recipients, announced that it has ceased participating in the program. Sarah McCammon, *Planned Parenthood Withdraws from Title X Program Over Trump Abortion Rule*, NPR (Aug. 19, 2019), https://www.npr.org/2019/08/19/752438119/planned-parenthood-out-of-title-x-over-trump-rule [https://perma.cc/DT9R-NGP7].

[197] 86 Fed. Reg. 19,812, 19,818 (Apr. 15, 2021).

cipients with self-certified conscience objections not to provide abortion counseling.[198] HHS should meet the procedural obligation of public care by giving careful consideration to the input of all affected parties, including particularly the beneficiaries of the Title X program—the people who require reproductive healthcare services to participate freely and equally within economic, social, and political life.

B. Heightening Care Obligations

While administrative law requires agencies to exercise public care, the public law system today is too unequal and too preoccupied with efficiency concerns to meet the procedural demands of care. In the heady days of the Civil Rights Revolution, the expansion of hearing and public participation rights was motivated by the need to open the administrative process to the input of marginalized groups.[199] Rulemaking today is often something different. The process tends to be dominated by powerful regulated parties as opposed to diffuse beneficiaries.[200] The changes made to proposed rules tend to reflect this imbalanced participation.[201] Moreover, agencies are usually reluctant to make significant changes to their regulatory policies on the basis of the comments they receive. Given that courts often look skeptically at significant changes between the proposed and final rule,[202] agencies have strong incentives to "get it right the first time"[203] rather than treat the comment period as a genuine opportunity for public deliberation. The consequence is that the comment period theatrically rehearses the more informal kinds of stakeholder engagement that went on when the rule was being developed.[204] At least in some important cases, this pre-comment period is also "monopolized by regulated parties."[205]

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[198] The proposal would allow but not require both referrals and counseling. *Id.*

[199] *See, e.g.*, Off. of Commc'n of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* Charles A. Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227 (1966).

[200] *See* Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy,* 68 J. POL. 128, 128–29 (2006); Cynthia R. Farina, Dmitry Epstein, Josiah Heidt, & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1186–87 (2012).

[201] *See* Amy McKay & Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 AM. POL. RSCH. 336, 350 (2007); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 130–32 (2011).

[202] *See, e.g.*, Nat'l Black Media Coal. v. F.C.C., 791 F.2d 1016, 1022 (2d Cir. 1986) ("While a final rule need not be an exact replica of the rule proposed in the Notice, the final rule must be a logical outgrowth of the rule proposed. Clearly, if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.") (internal citations and quotations omitted).

[203] William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC. 576, 582 (2009).

[204] E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L. J. 1490, 1492 (1992).

[205] *See* Wagner, Barnes & Peters, *supra* note 201, at 125.

The structural imbalances in the rulemaking process evince a procedural failure of public care. The comment period has arguably become an opportunity for regulated industries to push the agency to adopt favorable rules and pack the rulemaking record with as many objections to regulatory protections as possible. As currently constituted and practiced, the procedure shows a lack of attention and concern for the interests of beneficiaries.

Similar problems plague regulatory impact analysis, which focuses on the monetary costs and benefits of agency action. Regulatory impact analysis has been a staple of the American administrative state since the method was introduced by the Reagan Administration. According to Executive Orders 12,866[206] and 13,563,[207] agencies must submit major rules to the White House's Office of Information and Regulatory Affairs (OIRA) for review. Agencies must prepare regulatory impact analyses that measure the monetary costs and benefits of their rules.[208] Though these executive orders allow agencies to note and rely on qualitative values like fairness, equity, and dignity,[209] costs and benefits are to be monetized or otherwise quantified where possible.[210] Even under Democratic Presidents, regulatory review has often taken a skeptical eye towards regulation and functioned as a "one-way ratchet" to reduce and delay regulatory interventions.[211] The Trump administration's iteration of this process altogether excluded consideration of benefits, taking the deregulatory philosophy of the past forty years to an absurd extreme.[212]

Even honestly and competently conducted cost-benefit analysis can constitute its own kind of carelessness. Economic losses are inevitably easier to count in dollars than non-economic gains, such as health or dignitary effects. And the methods of translation are prone to underestimate and misrepresent their value. The "value of a statistical life," for instance, is based on how much money people in high risk jobs are willing to accept for a certain percentage increase in the risk of death.[213] The amount of money such people will accept for a certain percentage risk of increased death is a function not of some objectively true valuation of their safety but rather of the price the labor market will bear and their need for income to meet their needs.[214] Such prices, in turn, are the product of current social arrangements, which

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[206] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[207] Exec. Order No. 13,563, 3 C.F.R. 13,563 (2011).

[208] *See* 3 C.F.R. 13,563 at 215–16.

[209] *Id.*

[210] *See* Off. of Mgmt & Budget, Exec. Off. of the President, OMB Circular A-4, Regulatory Impact Analysis: A Primer 1, 18 (Sept. 17, 2003), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf [https://perma.cc/KZ46-F9HS].

[211] *See* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 Mich. J. Env. & Admin. L. 209, 268–72 (2012).

[212] *See generally* Richard Revesz, *Editorial—The Trump Administration's Attacks on Regulatory Benefits*, 14 Rev. Env. Econ. and Pol'y 2 (2020).

[213] *See* Cass Sunstein, *Are Poor People Worth Less than Rich People? Disaggregating the Value of Statistical Lives* 2 (John M. Olin Program in L. & Econ., Working Paper No. 207, 2004).

[214] *Id.* at 25–26.

may themselves be inefficient, unfair, even dominating. When the government takes current "willingness to pay" or "willingness to accept" as the baseline by which to measure whether and how to regulate, it naturalizes economic conditions as they are, rather than placing in question whether such conditions are in need of fundamental reform. In addition, this approach treats values like life and health as fungible with monetary values, so that life saved by a regulatory requirement is balanced against a certain amount of money firms and others have to pay out or forgo to meet a regulatory requirement. This translation serves the important function of showing that non-economic values such as life have significant economic value as well.[215] Accounting of this sort can prove powerful in preventing unjustified deregulatory actions.[216] But cost-benefit analysis risks moral myopia and distortion when it becomes the primary method of reasoning through regulatory alternatives, as it has today.

The problem is not the concern with economic effects per se, which are certainly central in assessing whether and how to regulate. Rather, the failure of care consists in the effort to turn each and every human value into a dollar amount, instead of trying to understand the distinctive features of multiple values and the social groups who hold them.[217] Consider, for instance, that in tort law, the costs and benefits of conduct are part, but not all, of how trial courts are supposed to assess whether a party acted reasonably.[218] In the encompassing moral language of the common law, factors like custom and the number of persons whose interests are put at risk are relevant, above and beyond net utility, in determining whether reasonable care was exercised.[219]

Administrative reasoning should (re)learn to incorporate, and to articulate rationally, such a pluralistic understanding of moral and political values. Instead, the fiction of the perfectly competitive market has come to set the normative baseline for human goods that are not in fact rooted in their exchange value.[220] It is symptomatic of the neoliberal regime we inhabit that public policy is evaluated primarily from the standpoint of economic efficiency, rather than from the standpoint of equality, positive freedom, or social solidarity.[221] This approach fails to recognize citizens' and others' rights

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[215] John D. Graham, *Saving Lives through Administrative Law and Economics*, 157 U. Pa. L. Rev. 395, 465–81 (2008).

[216] Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Flexibility*, 68 Duke L.J. 1593, 1628–36 (2019).

[217] Elizabeth Anderson, Value in Ethics and Economics 192 (1993).

[218] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (stating cost-benefit test for negligence but noting that, if custom dictated greater or lesser precautions than the test, "custom should control").

[219] Restatement (Second) of Torts § 293 (Am. L. Inst. 1965).

[220] Wendy Brown, Edgework: Critical Essays on Knowledge and Politics 42 (2005).

[221] *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L J. 178, 1797–1800 (2020); Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & Contemp. Probs. 71, 72–73 (2014).

and capacities as moral agents to determine what level of risk they are willing to accept under conditions of profound uncertainty.[222]

President Biden's memorandum on *Modernizing Regulatory Review* takes a step in the direction of public care.[223] Substantively, it deemphasizes the weighing of monetary cost and benefits and highlights instead the multiple values that are implicated in the administrative process, including "racial justice" and "the interests of future generations," and other non-quantifiable benefits, as well as distributional concerns.[224] Procedurally, it directs the Office of Management and Budget to reform regulatory review collaboratively with staff in executive departments and agencies in a way that would conform to the principles of structural-constitutional care discussed in Part III below. This Memorandum, on its own, is merely a shift in tone, not a detailed program. But it shows a noteworthy effort to change the focus of review away from overall economic gain and towards other human concerns the administrative state must attend to.

It is unlikely that simply fine-tuning cost benefits analysis will give adequate weight to value pluralism or to distributional concerns. The information costs of accurate distributional analysis and the difficulties of translating non-monetary values into dollars make it difficult to shoehorn concerns other than economic efficiency into a fundamentally economic framework.[225] Reorienting our administrative process around a philosophy of public care would therefore require more robust deliberative democratic processes to engage the affected public.[226] There are some promising practices already underway. Brian Feinstein has examined and recommended extension of "identity conscious" participation provisions in federal regulatory agencies that aim to give voice to otherwise underrepresented constituencies.[227] Michael Sant'Ambrogio and Glen Staszewski have documented how the Forest Service, Nuclear Regulatory Commission, and the Consumer Financial Protection Bureau engage in extensive public involvement during the process of formulating their rules.[228] Based on their research and proposals, the Administrative Conference of the United States (ACUS) has recom-

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[222] DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 47, 90 (2010).

[223] 86 Fed. Reg. 7223 (Jan. 26, 2021).

[224] *Id.*

[225] On the informational and expressive challenges of distributionally weighted cost-benefit analysis, see Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, U. CHI. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796235 [HTTPS://PERMA.CC/GNJ2-MEZL]. On the failure of cost-benefit analysis to capture value pluralism, see ANDERSON, *supra* note 217, at 147–67 (1993).

[226] *See* EMERSON, *supra* note 17, at 149–85 (normative defense of the need for egalitarian public participation in the administrative state).

[227] Brian Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, GEO. WASH. L. REV. (forthcoming 2021), https://ssrn.com/abstract=3787704 [HTTPS://PERMA.CC/5BRS-3AS2].

[228] Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U.L. REV. 793, 823–26 (2021).

mended that agencies adopt general policies explaining their pre-notice participation procedures.[229] The ACUS Recommendation also provides that:

> When agencies believe that their public engagement may not reach all affected interests, they should consider conducting outreach that targets experts not already likely to be involved, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, and members of the public with relevant views that may not otherwise be represented.[230]

Public participation and engagement are costly, however, and agencies must already comply with a number of onerous procedural requirements, not least of which is the White House's regulatory review process itself.[231] The costs of participation might be compensated for by allowing agencies to avoid the OIRA review process if they engage in sufficiently robust and inclusive public participation prior to issuance of proposed rules. For example, an agency might avoid OIRA review on a particular rule if it engages in pre-notice listening sessions composed of a cross-section of relevant stakeholders, including in particular those ordinary citizens and marginalized groups that do not ordinarily contribute to the agency's rulemaking process. The agency would then have to document how these listening sessions informed the proposal and explain how its regulation took into account the viewpoints and interests of all groups, including those who ordinarily do not participate in the rulemaking. The proposed rule would need to be cleared by a "regulatory public defender" within the agency or detailed from the White House with responsibility to ensure that the agency had demonstrated due engagement and consideration of all affected interests.[232]

This proposal is meant to be experimental, allowing some agencies to go on with ordinary regulatory review processes, and others to begin to develop a new and inclusive regulatory discourse that would demonstrate care for a wider spectrum of human interests.

III. Public Care as Constitutional Structure: The Qualified Hierarchy of the Executive

The previous Parts articulated the regulatory purpose of care and the set of administrative procedures that require officials to take due consideration of relevant social interests when they implement the law. This Part now turns to official relations within the executive branch, in particular the relationship between the President, principal officers, and the civil service. I re-

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[229] Admin. Conf. of the U.S., Notice of Adoption of Recommendation 2018–7, Public Engagement in Rulemaking, 84 Fed. Reg. 2139, 2146 (Feb. 6, 2019).

[230] *Id.* at 2148.

[231] See Emerson, *supra* note 17, at 175.

[232] The proposal for a regulatory public defender is from Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. 411, 491 (2005).

fer to the subset of public care obligations that apply to the President's relation to other administrative officials as structural-constitutional care.

Structural-constitutional care is textually anchored in Article II of the Constitution, which provides that the President "shall take Care that the Laws be faithfully executed."[233] I argue for an understanding of the President's caretaking obligation as a responsibility to defer to and respect the reasonable judgments of other officials while maintaining the integrity of law-administration as a whole. This interpretation departs from "unitary" theories of the executive[234] in understanding the President's caretaking obligation not as license for unilateral command but as an injunction to deliberate with other responsible executive officers. Structural-constitutional care is a responsibility to work with other officials rather than to subject them to one's will. Such care is a component of the more general principle of public care, insofar as it requires one particular official—the President—to take into account the interest, viewpoints, and values of other officeholders. Having interpreted the Take Care Clause in light of the principle of public care, I argue that the Clause supports limitations on the President's power to remove administrative officials. Such restrictions reinforce the President's caretaking obligation, which he has incentives to shirk, with specific protections that encourage intra-branch deliberation and law-oriented decision-making. More broadly, structural-constitutional care would oblige the President and appointed officials to heed the reasoned advice of career officials with relevant authority and expertise.

A. Taking Care and Executive Branch Structure

Proponents of "unitary" presidential control over administration have interpreted the Take Care Clause as granting or at least affirming a presidential power to control how all other executive officials exercise their discretion.[235] They argue that the President must have whatever powers are necessary to ensure that other executive officials implement the laws faithfully. He could not guarantee these other officials' faithful execution if he could not direct and remove them.[236] In *Seila Law v. Consumer Financial Protection Bureau*,[237] the Supreme Court relied on this reasoning to hold unconstitutional a statutory restriction on the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB).[238] In cases like this, the Take Care Clause operates to confirm the President's unilateral power over other executive officers.

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[233] U.S. CONST. art. II, § 3, cl. 5.

[234] *E.g.*, Stephen G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

[235] *Id.* at 1167 (1992).

[236] *See* Myers v. United States, 272 U.S. 52, 117 (1926); Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

[237] 140 S. Ct. 2183 (2020).

[238] *Id.* at 2197.

The Clause as understood by unitary theorists underscores stereotypically masculine understandings of political power, favoring dominance, authority, and control over deliberation, attentiveness, and interdependency.[239] It therefore runs contrary to the principal of public care this paper has developed. It is important to underscore, however, that the unitary theory is not only inconsistent with the moral insights of feminist and Progressive political thought but also unconvincing as a matter of textual interpretation and original public meaning. As Justice Kagan noted in partial dissent in *Seila Law*, the Clause "speaks of duty, not power."[240] It obliges the President to safeguard and maintain the steady, conscientious, and fair implementation of law. The caretaking obligation does not augment but rather restricts the President's supervision to the "faithful" execution of the law. Professors Andrew Kent, Ethan J. Leib, and Jed Shugerman have shown that "faithful execution" in the Founding Era was a fiduciary obligation associated with "true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law."[241]

These official qualities are markedly different from attitudes of "direction" and "control" that usually predominate in discussions of the Executive.[242] They are instead oriented towards preserving, improving, and attending to interests other than one's own.[243] An honest person says the truth, rather than whatever is most convenient to them, so that the facts are known. One who is skillful and diligent does their job in the right way, rather than in the way that is easiest or most profitable, so that the work is of good quality. The President's caretaking obligation, similarly, is a duty to orient his conduct toward the law rather than his own interest, so that the acts of government are reliably motivated by, linked to, and confined within known and stable rules.[244] This duty of care requires "special attention" to ensure that the requirements established and the powers granted by statute are put into effect.[245] The law must guide the President's conduct, and the law's sound administration must count as one of his ends.

The caretaking obligation extends further than particular statutes and towards preservation of the constitutional system that authorizes law and limits it.[246] The President, like other officeholders, is a caretaker for the Constitution and the laws. He holds certain legal powers in trust, to be used

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[239] Eileen McDonagh & Paula A. Monopoli, THE GENDERED STATE AND WOMEN'S POLITICAL LEADERSHIP, IN FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES, 169, 179–81 (2012).

[240] 140 S. Ct. at 2228 (Kagan, J., dissenting in part).

[241] Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2118 (2019).

[242] *See, e.g.*, *Myers*, 272 U.S. at 117; *Seila Law*, 140 S. Ct. at 2203–04.

[243] Evan J. Criddle & Evan Fox-Decent, *Guardians of the Legal Order: The Dual Commissions of Public Fiduciaries,* FIDUCIARY GOVERNMENT 67, 84 (2017).

[244] *Seila Law*, 140 S. Ct. at 2228 (Kagan, J., dissenting in part) (the Take Care Clause requires "fidelity to law itself, not to every Presidential policy preference").

[245] Kent, Leib & Shugerman, *supra* note 241, at 2134.

[246] *See also* U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will

appropriately for the common interest. That means there may be some things the President or his voters want him to do, even things that the law might formally allow him to do, that he should not do because they will undermine the impartial administration of law or the health of the constitutional order as a whole.[247]

We need not rely on hypotheticals to understand what it is for the President to breach his caretaking obligations. What David L. Noll calls "administrative sabotage," aiming to subvert and cripple statutorily mandated programs, has been a lasting strategy of political efforts to dismantle the administrative state.[248] Though Democratic Presidents have hardly been innocent of breaches of caretaking duties,[249] these failures of care have been particularly pronounced on the conservative side of the aisle where the welfare state is concerned, given the Republican Party's ideological opposition to the statutory purposes underlying that state. The Trump Administration was rife with examples.[250] As Nicholas Bagley has shown, "President Trump . . . exploited his position as the head of the executive branch . . . to sabotage the very law he is charged with administering,"[251] in particular the Affordable Care Act. His very first executive order directed executive branch agencies to "take all actions consistent with the law to minimize the unwarranted economic and regulatory burdens of the Act."[252] This was an example of complying with the letter of the law while failing to care for its spirit. The instances of sabotage were legion: cutting ninety percent of the budget for HealthCare.gov, undermining the ACA's coverage regulations with expansion of "short term" and "association health plans," and ending cost-sharing payments to insurers.[253]

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faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'").

[247] *See* Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L. J. 109, 146–54 (2018) (describing rhetorical, procedural, and substantive requirements of political officials' role, including reaching out to and deliberating with members of the other party and adhering to established norms and conventions). Insofar as Siegel's understanding of official role morality requires political moderation, it differs from public care, which includes a substantive commitment to support individuals' moral and political agency. But administrative-procedural and structural-constitutional care may often require moderation and compromise with viewpoints other than that of the President and the President's political party.

[248] David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3880678 [https://perma.cc/SW3N-C3PX].

[249] *See generally* Joshua Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 398 (2019).

[250] Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. REG. 91, 156 (2021).

[251] NICHOLAS BAGLEY, EXECUTIVE POWER AND THE AFFORDABLE CARE ACT, IN THE TRILLION DOLLAR REVOLUTION: HOW THE AFFORDABLE CARE ACT TRANSFORMED POLITICS, LAW, AND HEALTH CARE IN AMERICA 192–93 (Abbe R. Gluck & Ezekiel J. Emanuel, eds. 2020).

[252] Exec. Order. No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017).

[253] *See* Bagley, *supra* note 251, at 198–202.

A number of cities brought suit, alleging that such instances constituted a violation of the President's caretaking obligation.[254] While the District Court for the District of Maryland dismissed these claims, the court's argument turned largely on the judiciary's capacity to interfere in matters left to executive discretion, rather than with the underlying question of whether the President had failed to exercise his discretion so as to faithfully execute the law.[255] Whether or not the court was correct on that jurisdictional question, the point here is that the substance of the caretaking obligation is to ensure that the laws are administered well and that the legal system as a whole remains functional.[256] This obligation leaves significant leeway in the President's hands to determine what the sound administration of law requires. But the content of the take-care obligation cannot be determined wholly subjectively according to the President's will; in that case it would not be a meaningful legal duty at all. A President's attempts to make the laws unworkable because he does not like them or because they contravene his political commitments violates his caretaking obligations—whether or not such violations are justiciable.

This way of thinking about presidential caretaking has implications for the constitutional structure of the executive branch. The first is that the hierarchical structure of the branch must be qualified or partially flattened by the requirements of due caretaking. As Gillian Metzger has argued, the Take Care Clause together with other constitutional provisions requires the President's "overall hierarchical control and accountability" over and for the subordinate offices and agencies of the executive branch.[257] Unlike unitary theorists of the executive, however, Metzger does not understand this "duty to supervise" as requiring presidential control over all decisions within the branch. Rather it can be and, in many contexts, should be met instead through "systematic" forms of bureaucratic control such as the use of audits and the issuance of circulars and enforcement guidance.[258] This account rightly focuses on the obligations, rather than merely the powers, of the presidency, and shifts attention away from personal, plebiscitary authority towards steadier forms of administrative routine.

Understanding the President's caretaking role complicates Metzger's emphasis on hierarchy, however. To ground the duty to supervise, Metzger relies in part on the hierarchical structure contemplated in the Appointments Clause,[259] which provides that the President may appoint principal officers to lead executive departments and empowers Congress to vest the appointment of inferior officers in those principals.[260] But the Appointments Clause

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[254] *See, e.g.*, City of Columbus v. Trump, 453 F.Supp.3d 770 (D. Md. 2020).
[255] *Id.* at 800–04.
[256] *See* Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. (forthcoming 2021), https://ssrn.com/abstract=3573110 [https://perma.cc/R8ZX-K8XR].
[257] Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1845 (2015).
[258] *Id.* at 1840.
[259] Id. at 1879.
[260] U.S. CONST. art. II, sec. 2, cl. 2.

also incorporates lateral checks amongst the branches, including the requirement of senatorial advice and consent and Congress' power to vest the appointment of inferior officers in the courts.[261] In addition, when the President nominates an official to head a department, the President's caretaking obligations should be understood to require her to select someone with subject-matter and managerial skills that are "germane" to that post.[262] For instance, the very first Congress required that the attorney general be "learned in the law."[263] Picking an attorney general with no background or training in law would be inconsistent with the President's caretaking responsibilities as applied to her appointment powers. The legal obligation to match the candidate to the official role is politically rather than judicially enforced by way of the senate's advice and consent role. But it is a genuine obligation nonetheless, which may go underenforced without senatorial watchfulness. As George A. Kraus and Anne Joseph O'Connell have shown, there are often significant tradeoffs between President's incentives to choose "loyal" officers and to choose "competent" ones.[264]

Beyond the initial appointment decision, due regard for the law also requires that the President respect and heed the independent judgment of the officials she appoints. The President, at a minimum, must seriously entertain the viewpoints of subordinate officials with knowledge about the legal issues in question in order to show that her conduct is appropriately oriented toward the law. As Shalev Roisman has argued, the President has a "duty to deliberate," which requires "gathering relevant information and making a considered judgment before exercising power delegated directly to her."[265] If she does not listen to what qualified subordinates think about areas within their jurisdiction, she is likely to err as to what the law requires. That is because such officials' narrower remit should enable them to devote their attention to the problems before them and understand their workings much better than a President who must oversee the execution of all laws at once.

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[261] *Id.* The third option for inferior officers is that the President may appoint them "alone," without senatorial consent. *Id.* This possibility confirms presidential control but complicates the hierarchy. *Id; see* Emerson, *supra* note 250, at 114–15.

[262] *See* Shoemaker v. United States, 147 U.S. 282, 301 (1893); Weiss v. United States, 510 U.S. 163, 174 (1994). These cases allow the assignment of additional "germane" duties to officers beyond the duties of the office to which they were appointed. This conclusion implies that germaneness inquiries might apply to the Appointments Clause generally. *See* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 663 (2020) ("All but the strictest formalists . . . would permit a person confirmed to a 'germane' position to serve temporarily in a different, principal Office."). It would be anomalous if germaneness were constitutionally relevant to the assignment of additional duties to an already appointed officer but not to the prior decision to appoint a particular person to a certain office in the first place.

[263] An Act to establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789).

[264] George A. Kraus & Anne Joseph O'Connell, *Loyalty–Competence Trade-off's for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRES. STUD. Q. 527, 530 (2019).

[265] Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1292 (2021). For arguments against the currently limited reviewability of presidential decisions, see generally Kevin Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009); Kathryn Kovacs, *Constraining the Statutory President*, 98 WASH. U.L. REV. 62 (2020).

Reliance on the judgment of subordinate officials with specific authority and expertise provides some security that the ultimate decision will be guided by the purposes of the law rather than by irrelevant political or policy concerns foisted upon a compliant bureaucracy.

In the usual case of legislative delegation, where Congress vests discretionary power in an official other than the President, such as a cabinet secretary, the President does not possess authority to dictate how the statutorily designated officer exercises her power. While some unitary theorists claim that the President possesses such power, and Presidents often act as if they possess it, such an implied right of direction is difficult to square with statutory text explicitly vesting authority in another official.[266] Moreover, the President's structural-constitutional obligation to faithfully enforce the law requires her to support the administrative-procedural care obligations that statutory law and judicial interpretation have imposed on agencies. The President therefore has the duty and power to ensure that agencies exercise their authority reasonably, which might include alerting agencies to any political preferences of the White House that are relevant to the statutory scheme the agency implements. But the President does not have the power to dictate the agency's course of conduct or require that it consider a factor that is irrelevant to the statutory scheme. A public care perspective on executive power would reject those occasional decisions in which reviewing courts seem to approve of such White House interference.[267] It insists that the agency act for reasons grounded in the law rather than the President's will.

Taking care of the law, in other words, requires what Joan Tronto has called "caring with"—a democratic ethos that relies not on command and control but on "plurality, communication, trust, and respect."[268] Without ignoring the President's electoral mandate to speak for the nation as a whole, structural-constitutional care insists also on a democratic organization of offices which, to borrow Seana Valentine Shiffrin's terms, "manifests equality in its explicit structure."[269] Executive branch relations based on "trust" between the President and other officers are likely not only to enhance the programmatic quality of administration but also to reflect back on citizens an image of their own deliberative responsibilities.[270]

Structural-constitutional care therefore requires a substantially qualified official hierarchy. Beyond the Take Care Clause itself, the Opinion Clause empowers the President to "require the Opinion, in writing, of the principal

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[266] *See generally* Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

[267] *See* Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981).

[268] *See* TRONTO, *supra* note 10, at 35.

[269] Seana Valentine Shiffrin, *Speaking Amongst Ourselves: Democracy and the Law*, THE TANNER LECTURES ON HUMAN VALUES 16 (Apr. 18–19, 2017), https://tannerlectures.utah.edu/Shiffrin%20Manuscript.pdf [https://perma.cc/P9T3-GCD7].

[270] *See generally* WILLIAM G. RESH, RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, CAPITAL, AND APPOINTEE-CAREER RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION (2015). On the trust-promoting features of administrative procedure, see generally Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633 (2018).

Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[271] The Clause pulls in two directions. It suggests that the President would have final decisional authority over some matters of law administration. At the same time, as Peter Shane has argued, the clause expresses an "ethos of deliberation."[272] It indicates that the President's conduct should, at least in certain cases, be guided by the input of his principal officers.[273] The Clause implies that these officers' opinions must be independent from the President's. It would be of no use to the President's careful decision-making if the principal officers were lackeys who merely flattered the President with what he wanted to hear. Furthermore, these officers' opinions must concern "the Duties of their respective Offices."[274] Such duties are separate from the President's will and power, because the executive departments are established not by the President, but by Congress.[275] If the President is to respect the law, he must consider the written opinions conveyed to him by the officers Congress empowers.[276]

Failure to consider subordinates' judgments, by contrast, may evince a failure to act on the basis of law. If the President or his political appointees altogether ignore the considered views of administrative officials who work on and attend to particular policy issues on a daily basis, there will be reason to suspect that the law is merely a pretext for the political officials' actions, rather than the reason for which they act.[277] This concern with presidential policy concerns undermining agency decision-making arose when the Obama Administration interfered with the Food and Drug Administration's decision to offer the Plan-B contraceptive over the counter. In *Tummino v. Torti*,[278] the District Court for the Eastern District of New York found the

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[271] U.S. CONST. art. II, §. 2, cl. 1.

[272] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 11 (2009).

[273] Emerson, *supra* note 250, at 111–12.

[274] U.S. CONST. art. II, §. 2, cl. 1.

[275] *See* U.S. CONST. art. II, § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."); *Id.* art. I, § 8, cl. 18 (Congress has power to "carr[y] into Execution" powers vested in "the Government of the United States, or in any Department or Officer thereof.").

[276] The Office of Legal Counsel plays a significant role in providing such advice, but the degree to which it offers genuinely impartial opinions and constraints is fiercely disputed. *Compare* Trevor Morris, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L REV. 1448, 1455–58 (2010) *with* Peter M. Shane, *Executive Branch Self-Policing in Times of Crisis: The Challenges for Conscientious Legal Analysis,* 5 J. NAT'L SEC. L. & POL'Y 507, 517–18 (2012) *and* Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 809–10 (2017). The executive branch also relies heavily on interagency working groups to vet regulations where multiple agencies have a stake in the issue. *See* Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 182–83 (1995); Roisman, *supra* note 265, at 1326–31.

[277] *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575 (2019) (Secretary of Commerce's decision to add citizenship question was arbitrary because it was based on a pretextual rationale). Justice Roberts in this case missed the opportunity to underscore the relationship between pretext and the Secretary's failure to listen to the advice of subordinates, in this case the staff of the Census Bureau.

[278] 603 F. Supp. 2d 519 (E.D.N.Y. 2009).

resulting decision unlawful, in part because the White House "wrested control over the decision-making . . . from staff that would have normally issued the final decision[.]"[279] In many other cases, courts rely on reports from agency staff to assess whether the agency leadership's decision is well-reasoned.[280] Reliance on the record composed by inferior officers and other subordinate officials empowers these officials to contest arbitrary assertions of policy preference and encourages instead a "dialogue inside the agency."[281] Caretaking thus requires not only a stable system for applying policy downwards through the hierarchy but a complementary system for communicating information and judgments upward.

The Trump Administration's response to the COVID-19 pandemic evinced a failure of caretaking in this specific, structural sense: he failed to listen to and interfered with the work of the professional government officials who staff and constitute the executive departments, particularly the Department of Health and Human Services, and its component agency, the Centers for Disease Control.[282] We also saw Trump flout mask wearing guidance and reject school closure recommendations from government scientists.[283] Trump's conduct constituted a failure of care in the direct, purposive sense that the President could have done more to protect people physically

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[279] Tummino v. Torti, 603 F. Supp. 2d 519, 523 (E.D.N.Y. 2009) (FDA action on Plan B unlawful because "wrested control over the decision-making . . . from staff that normally would issue the final decision"). For the leading discussion, see Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 111 GEO. L.J. 962, 981–82 (2014).

[280] *See, e.g.*, Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 104 (1983) (relying in part on "staff reports" to conclude agency action not arbitrary and capricious); Mobil Pipe Line Co. v. FERC, 676 F.3d 1098, 1099, 1102–05, 1103 n.2 (D.C. Cir. 2012) (Kavanaugh, J.) (relying on Federal Energy Regulatory Commission "expert staff" to conclude Commission's decision unlawful).

[281] *See* E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts, and Agencies*, 16 VILL. ENVTL. L.J. 1, 12 (2005); *see also* Emerson, *supra* note 250, at 145–47.

[282] *See, e.g.*, Cheyenne Haslett & Anne Flaherty, *Amid Pandemic, Confidence in CDC Erodes with Questions of Political Interference*, ABC NEWS (Sept. 26, 2020), https://abcnews.go.com/Politics/amid-pandemic-confidence-cdc-erodes-questions-political-interference/story?id=73239582 [https://perma.cc/5YN6-JGFW]; Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti & Julian E. Barnes , *He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus*, N.Y. TIMES (Apr. 11, 2020), https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html [https://perma.cc/84LC-YPTG]; Abby Goodnough & Maggie Haberman, *White House Rejects C.D.C.'s Coronavirus Reopening Plan*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/05/07/us/politics/trump-cdc.html [https://perma.cc/A9JE-LRFG]; Sheryl Gay Stolberg, *A C.D.C. Official Says She Was Ordered to Destroy an Email Showing Trump Appointees Attempted to Interfere with a Report's Publication*, N.Y. TIMES (Dec. 9, 2020), https://www.nytimes.com/live/2020/12/10/world/covid-19-coronavirus/a-cdc-official-says-she-was-ordered-to-destroy-an-email-showing-trump-appointees-attempted-to-interfere-with-a-reports-publicati [https://perma.cc/PRZ4-WAHN].

[283] Tara McKelvey, *Coronavirus: Trump to Defy 'Voluntary' Advice for Americans to Wear Masks*, BBC NEWS (Apr. 4, 2020), https://www.bbc.com/news/world-us-canada-52161529 [https://perma.cc/DXA5-N98X] Eliza Relman, *Trump is Forcing the CDC to Ease School Reopening Guidelines Despite Experts' Warnings that Kids Will Be Super-Spreaders*, BUS. INSIDER (Jul. 8, 2020), https://www.businessinsider.com/trump-defies-cdc-director-threatens-cuts-states-with-closed-schools-2020-7 [https://perma.cc/TY7V-79BU]; Associated Press, *The Latest: Trump Contradicts CDC Director on Vaccines, Masks*, AP NEWS (Sept. 16, 2020), https:/

against a deadly virus.[284] But it also represented a related failure to preserve the structures of deliberation, comity, and jurisdictional differentiation that the Constitution contemplates for the executive branch.[285] This not to say that scientists are infallible or that government officials are generally better informed than private parties. Indeed, the administrative-procedural dimension of care discussed in Part II emphasizes the need for government agencies to consult with private parties who hold relevant information and value-orientations. The point here is that presidential caretaking depends on extensive consultation that informs executive policymaking. When the President and political appointees ignore and even threaten the independent judgment of agency officials, they fail to fulfill their obligation to carefully and faithfully execute the law.

While these lapses have been acute during the Trump administration, the problem is not one of personal psychology but of broader trends in ideological and institutional development. For decades, Presidents across both parties have chipped away at the subordinate checks within the executive, undermining the civil service and attempting to maximize presidential control.[286] The regulatory review process described in Part II.B has been a part of that trend, imposing centralized White House direction over executive agency rulemaking. The unitary theory of the executive and now-Justice Kagan's theory of presidential administration fortify this trend with constitutional and democratic justifications for extensive presidential control.[287] At the same time, as William H. Simon has diagnosed in the realm of welfare administration, the civil service has long been hollowed out by disinvestment and by increasingly stringent hierarchical constraints on the discretion of lower-level officials, reducing not only the prestige but the professional ethos and judgment of government service.[288] Such "proletarianization" of the civil service has converged with what Jon D. Michaels calls "deep service contracting," in which private contractors, "working for practically every federal agency, draft legal memoranda for agency leadership, produce economic and scientific studies critical to the rulemaking process, design government license and benefit applications, . . . and author parts of final rules[.]"[289] Outsourcing of this sort undermines the internal checks and balances within the administrative state, as contractors do not enjoy the same employment pro-

/apnews.com/article/election-2020-virus-outbreak-health-delaware-wilmington-9e5568c6d2a6e7a3f05bc4e8b57fc8aa [https://perma.cc/RGJ5-NHCB].

[284] *See* Alyssa Bilinski & Ezekiel J. Emanuel, *COVID-19 and Excess All-Cause Mortality in the US and 18 Comparison Countrie*s, 324 JAMA 2100 (2020), https://jamanetwork.com/journals/jama/fullarticle/2771841 [https://perma.cc/LLB2-TGE6] ("Compared with other countries, the US experienced high COVID-19–associated mortality and excess all-cause mortality into September 2020. . . . This may have been a result of several factors, including weak public health infrastructure and a decentralized, inconsistent US response to the pandemic.").

[285] Emerson, *supra* note 250, at 145–46.

[286] *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO AMERICAN DEMOCRACY 82–118 (2017).

[287] Kagan, *supra* note 14, at 2331–39.

[288] *See generally* Simon, *supra* note 66.

[289] *See* MICHAELS, *supra* note 286, at 111–12.

tections as civil servants, and so are more likely to bend to the will of their political principals.[290]

The Trump Administration's criticism of the "deep state" took aim at the already weakened deliberative structures within the branch.[291] As Michaels has argued, however, the American state's "depth" is a virtue.[292] The civil service is socially, economically, disciplinarily, jurisdictionally, and politically diverse, recreating the complex ecosystem of American democracy within the executive branch.[293] Structural-constitutional care requires that we reverse the trend toward consolidated unitary power and increase the quality, quantity, and independence of the civil service. The President must enjoy advice from and work under the salutary constraint imposed by professionals with subject-matter expertise and policy perspectives that do not necessarily align with her own. Such a qualified hierarchy will help to ensure that the law is executed with care for the information and values that are relevant to the legislative scheme Congress enacts.

B. Careful Removal

The principle of qualified hierarchy has implications for the question of for-cause removal. Hierarchy requires that the President, directly or indirectly, supervise all persons within the executive branch. But must she be able to fire any of them for whatever reason she wants? Unitary executive theorists take that position.[294] In this Section, I argue that a proper understanding of the President's caretaking obligation supports congressional power to impose removal restrictions on both principal and inferior officers. More broadly, public care requires the diffusion of authority throughout the executive branch hierarchy, so that political decisions are informed and constrained by professional norms and other relevant policy values.

Seila Law embraced the unitary executive view that the President must be able to control and remove other executive officers.[295] In his opinion for the Court, Chief Justice Roberts held that it was unconstitutional for Congress to condition the removal of the single Director of the CFPB on "ineffi-

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[290] *Id.* at 126–30.

[291] *See* Kelsey Brugger, *Trump Order Looks to Dismantle the 'Deep State[,]'* E&E NEWS (Oct. 20, 2020), https://www.eenews.net/stories/1063716869 [https://perma.cc/9X8Y-8R5F]; Reuters Staff, *Trump Says Without Proof that FDA 'Deep State' Slowing COVID Trials*, REUTERS (Aug. 22, 2020), https://www.reuters.com/https://perma.cc/8H4S-BLFFarticle/us-health-coronavirus-trump-fda/trump-says-without-proof-that-fda-deep-state-slowing-covid-trials-idUSKBN25I0LF [https://perma.cc/8H4S-BLFF].

[292] *See generally* Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018). For a more ambivalent assessment of depth, see STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (2021).

[293] *See* Michaels, *supra* note 292, 1660–63.

[294] *See* Calabresi & Prakash, *supra* note 15, at 597.

[295] *See* Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 375–82 (2020).

ciency, neglect of duty, or malfeasance in office."[296] The holding itself is fairly modest, as it leaves the CFPB otherwise intact and does not reach multi-member bodies such as the Federal Trade Commission and the Securities Exchange Commission or restrictions on the removal of inferior officers. However, the logic of the opinion and of the Roberts Court's removal jurisprudence more broadly is to erode restrictions on the President's ability to remove, and thus to command and control, other officers within the executive.[297] The reasoning of *Seila Law* puts into doubt the constitutionality of for-cause removal protections in other independent agencies. It permits for-cause removal for the heads of "multimember agencies that do not wield substantial executive power."[298] But what counts as "substantial" is left undefined. Already, in *Collins v. Yellen*,[299] the Supreme Court has held unconstitutional removal restrictions on the head of the Federal Housing Finance Authority, who arguably wields significantly less coercive power over private parties than the CFPB Director.

Seila Law and *Collins* also heighten concern that protections for lower-level civil servants will be held unconstitutional or otherwise undermined by executive actions. Roberts treats protections on "inferior officers" as an "exception" to the President's unilateral control of the executive branch, lying at the "outermost constitutional limits of permissible congressional restrictions on the President's removal power."[300] This characterization follows on other recent holdings that expose such restrictions to constitutional challenge. In *Lucia v. Securities and Exchange Commission*,[301] the Court held that administrative law judges (ALJs) of the Commission count as such "inferior Officers.""[302] Removal restrictions on ALJs generally may now prove problematic, as such judges can only be removed for good cause by the Merit Systems Protection Board, the members of which may themselves only be removed for good cause.[303] The Court in *Free Enterprise Fund* ruled that similar "dual for-cause" restrictions were unconstitutional.[304] As Justice Breyer observed in his concurrence in *Lucia*, these holdings together "risk transforming administrative law judges from independent adjudicators into dependent adjudicators, serving at the pleasure" of political appointees.[305]

The Trump administration also took steps to undermine independent decisional authority and advice-giving by career civil servants. One executive order, explicitly relying on *Lucia*, removed administrative law judges from the competitive service and allowed agencies to choose their ALJs directly

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[296] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020); 12 U.S.C. § 5491(c)(3) (2018).
[297] *See also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).
[298] *Seila Law*, 140 S. Ct. at 2199.
[299] 141 S. Ct. 1761, 1784 (2021).
[300] *Seila Law*, 140 S. Ct. at 2199–2200.
[301] 138 S. Ct. 2044 (2018).
[302] *Id.* at 2055.
[303] 5 U.S.C § 7521(a) (2018). *See* Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 Duke L. J. 1695, 1709–11 (2020).
[304] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).
[305] Lucia v. S.E.C., 138 S. Ct. at 2060 (Breyer, J., concurring in part).

rather than from a list provided by the Office of Personnel Management.[306] Another executive order sought to exempt officials with policymaking responsibilities from civil service protections.[307] Momentum has thus built to institute the unitary executive theory through a combination of stringent constitutional rules against statutory removal restrictions and executive actions that subject subordinate administrative officials to political control. Though Biden swiftly rescinded Trump's directive regarding protections for policy staff, he has not done the same with regards to ALJ protections.[308] Meanwhile the broader project of undermining the independence of the civil service remains alive and well in the conservative establishment.[309]

The principle of qualified hierarchy that stems from the presidential caretaking obligations provides a constitutional basis to allow Congress to restrict the President's removal powers over both principal and inferior executive officers. It is hard to see how the President's executive power—which is limited by his duty of *faithful* execution—could be undermined by statutory requirements that he can only remove officials for "good" reasons, such as "inefficiency, neglect of duty, or malfeasance in office."[310] If an official fails on any of those accounts, care for the proper administration of law might in fact require the President to remove her and replace her with someone competent. Removal for other reasons, such as policy disagreements within the bounds of law, may undermine the President's caretaking responsibilities. As I argued in the last Section, presidential caretaking requires that subordinate officials within the executive exercise and communicate independent judgment. If the President may remove executive officials simply on the grounds that they disagree about policy, such officers will have reason not to communicate contrary opinions to the President for fear of reprisal.

Presidents, meanwhile, face strong incentives to act unilaterally. Deliberation is costly, can cause delay, and can create openings for political opposition to contest the President's decisions. First-term Presidents usually want to win reelection, and reelection may require delivering on campaign

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[306] Exec. Order 13,843, Excepting Administrative Law Judges from the Competitive Service, 83 Fed. Reg. 32,755 (July 10, 2018).

[307] Exec. Order 13,957, Creating Schedule F in the Excepted Service, 85 Fed. Reg. 67,635 (Oct. 21, 2020).

[308] Exec. Order 14,029, Revocation of Certain Presidential Actions and Technical Amendment, 86 Fed. Reg. 27,025, 27026 (May 14, 2021); Exec. Order, 14,003, Protecting the Federal Workforce, 86 Fed. Reg. 7231, 7231 (Jan. 27, 2021).

[309] James Sherk, *Increasing Accountability in the Civil Service*, Center for American Freedom, https://americafirstpolicy.com/docs/trump-civili-service-reform.pdf [https://perma.cc/AXW2-257K]; Nicole Ogrysko, *Schedule F is gone, but the debate continues in Congress*, Fed. News Network (Feb. 24, 2021), https://federalnewsnetwork.com/workforce/2021/02/schedule-f-is-gone-but-the-debate-continues-in-congress/ [https://perma.cc/BC7V-CU97].

[310] See Morrison v. Olson, 487 U.S. 654, 692 (1988) (a "good cause" restriction on inferior officers does not "impermissibly burden" the President's executive power); *see also* Jerry Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. Chi. L. Rev. Online (2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw/ [https://perma.cc/2X8P-DZN9].

promises to use the powers of their office to fulfill various policy goals.[311] The constitutional caretaking obligation therefore requires external reinforcement to ensure that the President fulfills the duty the Constitution bestows upon him. Administrative law principles of reason giving, record keeping, and rule following achieve this to some extent. Removal restrictions are necessary because they, unlike most administrative law rules, concern the President's power directly.

These restrictions are important not solely, or even principally, because of the specific protection they give one official. More important is the ethos of independent deliberative responsibility they communicate to executive branch personnel. The Court's removal jurisprudence further undermines executive officials' orientation toward law and orients them instead toward the will of the President. If such an attitude becomes dominant within the government, then careful implementation of law will give way to obedience to presidential policy. That servile self-understanding would likely seep out into the broader public, which will witness and experience the work of government not as the joint product of mutually responsive officials but rather as the hierarchical implementation of a charismatic leader's commands. Biden's invocation of the presidential duty of care invites us to step back from the brink of such presidentialist authoritarianism.[312] A more deliberative, pluralistic, and caring executive branch does not require that the President refrain from removing officials he has statutory authority to remove or that he forgo all supervision and influence over the conduct of government agencies. Nor does it require Congress to insulate each and every executive officer from removal. Rather, it requires the President, Congress, and the Court to approach and structure the execution of law as a collaborative endeavor, in which directives are conditioned and delimited by due consideration.

By rolling back parts of the Trump Administration's assault on the civil service, the Biden Administration has taken a first step to reestablish a qualified hierarchy within the executive. Michaels and I have argued elsewhere that Biden might also require executive agencies to issue procedural rules that would require agency heads to "heed the advice of career staff" and defer to their consensus advice.[313] This proposal aligns with Simon's earlier criticism of the transformation in welfare administration in the 1970 and '80s, when the welfare bureaucracy was deskilled and subject to strict hierarchical control.[314] What is needed today, as Simon put it then, is for public law and executive branch practice to recognize civil servants' "claims to participate in interpreting the goals" of the policies they administer.[315] The professions that constitute the civil service, such as law, public administration, and social and

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[311] Terry M. Moe & Scott A. Wilson, *The President and the Politics of Structure*, 5 LAW & CONTEMP. PROBS. 1, 11 (1994).

[312] *See generally* Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civil Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISC. 418 (2021).

[313] *See* Emerson & Michaels, *supra* note 312, at 436.

[314] *See generally* Simon, *supra* note 66.

[315] *Id.* at 1264.

natural science "provide evidence of the possibility of universalistic and altruistic commitment in public life and of responsibility and autonomy in work."[316] Formally respecting civil servants' independent judgment might in some cases impose costs on the Biden Administration's implementation of progressive policy priorities, including those that embody the regulatory purpose of care. But such a diffusion of responsibility would have the virtue of communicating to career and elected officials, and to the public at large, that the law is to be administered through thoughtful consultation, rather than by dictate from on high. Structural-constitutional care requires as much.

Conclusion

This Article has outlined the principle of public care along its three dimensions. The principle of public care generally requires officials to implement the law in a way that responds to and advances the interests of those the law affects. More specifically, it requires the President to listen to subordinates so as to evince an orientation towards law rather than solely her own objectives. It further requires agencies to attend to the input of affected parties in implementing policy. And public care requires government to provide individuals with the resources they need to exercise their moral and political agency. The argument has focused on those aspects of public care that are already embedded in U.S. constitutional and statutory law. These commitments to care could be more fully implemented through executive and legislative actions that disown presidential unilateralism, require agencies to deliberate with affected parties on materially equal terms, and more broadly provide health- and other care services to members of the public. Public care presents an attractive model for what government should do and how it ought to do it, orienting official practice towards mutual aid and concern rather than the creation of a maximally efficient marketplace.

There are, to be sure, tensions within this vision. Administrative-procedural care requires due regard for the perspectives of all affected parties. But in a nation where many are deeply committed to isolated individualism and limited government, some parties are unlikely to accept care as a regulatory purpose, preferring instead that government leave people to their own devices. Those perspectives need to be taken seriously. But the practice of care does not mean accepting each and every viewpoint simply because those viewpoints are widely or profoundly held. It rather requires that policies en-

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[316] *Id.* at 1266. Simon's emphasis on professionalism borrows from the German philosopher G.W.F. Hegel's understanding of the state bureaucracy as "the universal class," and rejects Max Weber's formalistic model of bureaucratic rationality. *Id.* at 1224–45. Hegel's thought also underlies my argument for Progressive administration in The Public's Law, *see* Emerson, *supra* note 17, at 23–37, 61–118, though I unfortunately did not encounter Simon's argument during my research. Whereas Simon focuses on the value of professionalism and the class position of the welfare bureaucracy, The Public's Law emphasizes the ethical orientation of the Hegelian administrative state towards preserving individual autonomy and the way in which this ideal was democratized in the hands of the American Progressives.

gage, respond to, and when necessary, adjust to affected parties' reasonable beliefs and values. Those kinds of accommodations can be justified in terms of the purpose of care so long as they are calculated to further the overall quality or extent caregiving services. They allow the circle of care to widen incrementally, opening up people's political perspectives as they experience public care's salutary effects.

Incrementalism, of course, has its costs. These are measured in healthcare policy by physical and financial suffering and even death. There is certainly much to be said for a more sweeping legislative as well as administrative politics of care that reengages the government in funding and directly providing care services, not only in healthcare specifically but also in schooling, public safety, and environmental, consumer and worker protections—which is to say, across the full spectrum of the administrative state's jurisdiction. The regulatory purpose of care gives officials reason to pursue such policies, even as the structures and procedures of care place conditions on the ways in which these policies may be pursued.