

Don't Forget the States

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Date : February 5, 2020

Jessica Bulman-Pozen, [Administrative States: Beyond Presidential Administration](#), 98 *Tex. L. Rev.* 265 (2019).

In 2001, Elena Kagan published [Presidential Administration](#)—her now well-known account of presidents' increasingly aggressive efforts to control agencies' regulatory decisions. In the nearly two decades since her article appeared in the pages of the *Harvard Law Review*, presidents have exerted more and more control over agencies. Indeed, in recent years, the entrenchment of presidential administration has been evident simply by reading the nation's news headlines. In 2015, for example, the *New York Times* trumpeted that "[Obama Announces New Rule Limiting Water Pollution](#)," and then in 2019, the same paper announced: "[Trump Administration Rolls Back Clean Water Protections](#)." Similar headlines about other presidentially influenced regulatory reversals abound.

In response to the entrenchment of presidential administration, many scholars have written about potential counterweights that might come from various federal actors, such as the federal courts, Congress, or the executive-branch bureaucracy. Largely missing from this scholarly discourse, however, has been a focus on the important role that the states can and have played in both furthering—and counteracting—presidential administration. In her forthcoming article titled [Administrative States: Beyond Presidential Administration](#), Professor [Jessica Bulman-Pozen](#) seeks to remedy this scholarly void. Specifically, Professor Bulman-Pozen seeks to bring the states into the modern day account of presidential administration.

Although Professor Bulman-Pozen makes many important contributions in her article, I found three of her assertions to be the most thought provoking. First, citing to the Supreme Court's recent [Census case](#), Professor Bulman-Pozen asserts that the federal courts have accepted presidential control as not only permissible but also legitimating. Yet, at the same time, she also argues that the courts have expressed an interest in limiting the power enjoyed by the administrative state. According to Professor Bulman-Pozen, if the courts continue to treat presidential control as legitimate while at the same time limiting agencies' power to adopt rules, then the zone in which presidents can direct agencies' rulemaking activities will shrink. And, as a result, the president may need to look outside the federal executive branch to advance her agenda. It is here that Professor Bulman-Pozen argues that the states could play a big role by helping presidents to achieve ends that they could not achieve through federal agency action alone.

On this first point, I think it remains to be seen whether Professor Bulman-Pozen is correct in her assertion that the courts are likely to continue to treat presidential administration as legitimate. Here, for example, I cannot help but think of the spate of recent high-profile litigation, such as the transgender troop litigation and deferred action immigration litigation, in which lower federal courts seemed to treat presidential involvement as a tainting, not a legitimizing, factor. Nonetheless, the broader point raised by Professor Bulman-Pozen—that the president may look to the states if the courts limit what presidents can achieve through the federal regulatory state—seems absolutely correct.

Second, Professor Bulman-Pozen argues that "[i]ncorporating states into understandings of presidential administration reveals not only additional resources for presidential policymaking" but "also a set of actors who may oppose the President's choices." (p. 39) In other words, the states can collaborate with a president and thus help to solidify a president's policies, or the states can push back against a president's policies. Indeed, the very same state might be seen as doing both. For example, "the same states that are providing an afterlife for Obama-era policies are actively rejecting President Trump's administrative decisions." (p. 54) On this point, Professor Bulman-Pozen also seems quite clearly correct: The states need to be thought of both as a resource that presidents can use to further their own policy agendas *and* as a potential tool of opposition to be used by those who seek to challenge presidential policies.

Third, Professor Bulman-Pozen suggests that states' efforts to support—or to push back against—presidential policies may well bring greater accountability and representativeness into our governmental system. For example, California legislation that adopts net neutrality rules or California legislation limiting cooperation with federal immigration enforcement is more politically responsive to the will of the people than policies adopted by unelected administrative agencies at the federal level. In addition, such legislation helps to further pluralism. Here too, I agree with Professor Bulman-Pozen: When policies that had been simply a matter of executive action at the federal level become a matter of legislation at the state level, greater political representation flows. Nonetheless, in focusing primarily on state *legislation* in this particular article, I think Professor Bulman-Pozen downplays to some degree how the states may turn to non-legislative modes of supporting or attacking presidential policies, such as litigation, which will not necessarily ensure political accountability.

Thanks to cases like [Massachusetts v. EPA](#), the states can and often do establish standing to challenge federal executive policies, and in an era of nationwide injunctions, a single state can succeed—by appealing to the unelected federal judiciary—in blocking a given presidential policy from being implemented anywhere in the nation, not just simply within that one state. As a result, Professor Bulman-Pozen may be a bit too quick to suggest that adding states into the story of presidential administration helps to ensure greater political accountability and electoral responsiveness. To the extent that a state's Attorney General is elected (as is often the case), litigation pursued by a given state may help to further accountability and political responsiveness from the perspective of that one state's voters. Yet it might do so at the expense of the preferences of the voters in the country as a whole. In light of this, it seems to me that whether state involvement does or does not help to ensure greater political accountability (similar to whether it does or does not help to bring about more durable policies) depends largely on the specific tool used by the states. Although legislation is a powerful tool at states' disposal, it is not the only tool, and it is important to consider whether different tools (e.g., state-led litigation versus state legislation) might carry with them different benefits and costs.

In short, how states choose to both further and oppose presidential policies is an area to watch moving forward. Regardless of how state-level involvement in presidential policymaking plays out in the future, Professor Bulman-Pozen's article does an excellent job of reminding those who are fixated on presidential power not to forget the states at this moment in time. For all who are interested in issues of presidential power and agency policymaking, her article is well worth a read.

Cite as: Kathryn Watts, *Don't Forget the States*, JOTWELL (February 5, 2020) (reviewing Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 *Tex. L. Rev.* 265 (2019)), <https://adlaw.jotwell.com/dont-forget-the-states/>.