

CONCERTED CIVIC ADMINISTRATION

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INTRODUCTION

With the benefit of hindsight, the Roberts Court’s decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*¹ marked the arrival in the U.S. Supreme Court of what has aptly been called the “separation-of-powers counterrevolution.”² For the first time in history, the Court voided statutory criteria limiting the removability of a subordinate officer by a principal officer within the executive branch.³ Since then, the Court has crafted an increasingly complex separation-of-powers jurisprudence aimed at protecting the President’s supposed Article II authority to control subordinate administrators.⁴ Underlying this jurisprudence is the Court’s supposition that, constitutionally speaking,

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1. 561 U.S. 477 (2010).
2. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 *YALE L.J.* 2020, 2030 (2022).
3. *See Free Enter. Fund*, 561 U.S. at 492. The U.S. Supreme Court’s two earlier decisions invalidating the terms on which certain officers were made removable held, respectively, that Congress could neither require Senate consent as a precondition for removing an executive officer, *Myers v. United States*, 272 U.S. 52, 163–64, 176 (1926), nor provide for congressional removability through means other than impeachment, *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).
4. *See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (“We hold that the CFPB’s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.”).

executive branch administrators “wield executive power on behalf of the President in the name of the United States,” and thus the powers that administrators exercise achieve “legitimacy and accountability to the public” only “through ‘a clear and effective chain of command’ down from the President.”⁵

I have long argued that the “unitary executive theory” that informs this campaign in the separation-of-powers counterrevolution is, to borrow a Scalia rhetorical trope, “wrong, wrong, wrong.”⁶ It is based on a wrongheaded approach to constitutional interpretation.⁷ It misconstrues our founding history and the original meaning of constitutional text.⁸ And it sows the seeds of a vision of the presidency that is dangerously authoritarian⁹—a vision no longer merely hypothetical in the wake of the Trump administration.¹⁰ In contrast, I have proposed that courts resolve the Constitution’s ambiguities regarding the separation of powers in ways that advance checks and balances and enhance Congress’s capacities to structure, regulate, and oversee the exercise of executive power.¹¹

My interpretive conclusions follow, I argue, from a pragmatic or “adaptavist” approach to interpretation that I call “democratic constitutionalism,” which involves “the candid use of democratic values to resolve ambiguities in constitutional construction and . . . root[s] the application of constitutional principles on an assessment of contemporary democratic needs.”¹² Applying such an approach to questions such as the

5. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (quoting *Free Enter. Fund*, 561 U.S. at 498).

6. *Constitution a ‘Dead, Dead, Dead’ Document, Scalia Tells SMU Audience*, DALL. MORNING NEWS (Jan. 28, 2013, 11:08 PM), <https://www.dallasnews.com/news/2013/01/29/constitution-a-dead-dead-dead-document-scalia-tells-smu-audience/> [<https://perma.cc/QYR3-8LV5>].

7. PETER M. SHANE, DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY 109–36 (2022).

8. *Id.* at 34–45. See generally Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241 (2019); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016). Legal historian Professor Jed Handelsman Shugerman has labeled as the “three originalist pillars” of unitary executive theory the Article II Executive Power Vesting Clause, the “Take Care” or Faithful Execution Clause, and the legislative maneuvering of the First Congress known (misleadingly) as the Decision of 1789. See Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1481 (2022). His research shows, in devastating terms, the wobbliness of each. See *id.* (discussing the Vesting Clause); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019) (addressing the Take Care Clause). See generally Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023).

9. SHANE, *supra* note 7, at 3–31, 52–106.

10. See BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 1–4 (2020).

11. SHANE, *supra* note 7, at 142–52.

12. *Id.* at 154. As it happens, many, if not all, of these conclusions would also follow from conscientious attention to the actual history of constitutional development. But “[e]ven where originalism and democratic constitutionalism point to similar conclusions, the path from democratic constitutionalism to sensible contemporary interpretation is shorter, and its normative underpinnings clearer and more compelling.” *Id.* at 162.

permissibility of independent agencies, the scope of the nondelegation doctrine, the applicability of criminal law to the President, the acceptability of presidential self-pardons, and so on, would help to reduce the risks of national descent into increasingly authoritarian presidential government.

It turns out, however, that the ideal of a genuinely democratic or antiauthoritarian presidency is not self-defining, in part because the nature of American democracy is itself complex. We are governed by a hybrid of institutions rooted in both electoral and deliberative democratic models for legitimating the exercise of political power. In our current historical moment, I have suggested that “[d]emocratic constitutionalism should prioritize democracy’s deliberative side, at least to the extent of not allowing the tenuous links between elections and policy outcomes to excuse a reduction in deliberative opportunities.”¹³ Because “[o]ur electoral processes incorporate ‘distortions of the democratic process long abandoned by most democracies,’” I have urged that we would best be served by constitutional doctrine that “protect[s] and expand[s] the ways in which democracy can be strengthened and legitimated through non-electoral means.”¹⁴

Putting debates over doctrine aside, however, it turns out that even among those who would wish for a genuinely democratic presidency, there are different models available of the kind of presidency that would most advance democratic values. Recent public law scholarship has brought forth two such normative takes on the presidency—each asserting democratic bona fides but pointing in somewhat different institutional directions. One approach is deeply rooted in deliberative democracy theory and the other in a creative new theorizing of electoral democracy. The deliberative democracy school is represented with great insight by Professors Blake Emerson and Jon D. Michaels, who have set forth a vision for what they call “civic administration.”¹⁵ In contrast, it is the fundamental democratic role of elections that undergirds a powerful *Harvard Law Review* foreword by Professor Cristina Rodríguez, who argues for a legal framing of the presidency that would facilitate “concerted executive action.”¹⁶ Rodríguez, whose article was published a few months after the Emerson-Michaels essay, acknowledges the earlier work and deems it not “inconsistent” with her own recommendations.¹⁷ She is persuaded, however, that “diffuse forms of popular participation,” which play a central role in deliberative democracy theory, “will not be enough to ensure that government and its capacities evolve to address the demands of politics and our world.”¹⁸

13. *Id.* at 145.

14. *Id.* at 145–46 (quoting Matthew Graham & Milan Svobik, *Democracy in America?: Partisanship, Polarization, and the Robustness of Support for Democracy in the United States*, 114 AM. POL. SCI. REV. 392, 406 (2020)).

15. Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 108 (2021).

16. Cristina M. Rodríguez, *Regime Change*, 135 HARV. L. REV. 1, 63 (2021).

17. *Id.* at 76.

18. *Id.* at 71.

Correspondingly, although Emerson and Michaels wish “to reconfigure the presidency in service of empowering a host of decentralized democratic actors and democratic institutions,”¹⁹ Rodríguez’s approach “require[s] appetite for some centralization and high-level direction within the administrative state.”²⁰

In light of these somewhat divergent emphases, this Essay offers three sets of observations. Initially, it suggests that the most attractive model of a nonauthoritarian, democratic presidency would, in fact, draw on insights from both the Rodríguez and Emerson-Michaels works. Following Rodríguez, that is, we can aspire to an executive branch sufficiently efficacious to make meaningful through concerted action our exercises in electoral democracy.²¹ At the same time, following Emerson and Michaels, we can support approaches to policymaking that accentuate the independent decision-making competencies and authorities of individual agencies and pluralize the voices that shape the public agenda, thus deepening deliberative democracy.²² This Essay refers to that two-sided normative vision as “concerted civic administration.”

Second, we are not actually lacking for models for how the White House can infuse the President’s priorities throughout the executive branch, while accommodating—and even encouraging—inclusive deliberation and public engagement.²³ Executive orders from both the Trump and Biden administrations show how balanced policymaking can be structured;²⁴ the reason why the former administration appeared to threaten democratic values, although the latter does not, is not due to the formal elements of those instruments through which the President sought to channel administrative activity. Rather, the Trump administration was antidemocratic—in ways the Biden administration is not—because of the way in which President Donald J. Trump implemented his formal processes and because of his notoriously authoritarian style of leadership.²⁵

Finally, I would argue that there are several foundational administrative law doctrines currently up for grabs that have much to say about the room for presidential politics to infuse administration.²⁶ These doctrines—the nondelegation doctrine, the major questions doctrine, and *Chevron*²⁷ deference—have more relevance to the democratic character of the presidency than does the debate over unitary executive theory and presidential removability. Yet unitary executive theory remains hazardous for democracy because it “rejects the validity of . . . traditionally accepted

19. Emerson & Michaels, *supra* note 15, at 118.

20. Rodríguez, *supra* note 16, at 70.

21. *See infra* Part II.

22. *See infra* Part I.

23. *See infra* Part III.

24. *See infra* Part III.

25. *See* BAUER & GOLDSMITH, *supra* note 10, at 1–7.

26. *See infra* Part IV.

27. The Supreme Court crystallized this doctrine in *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference refers to a court’s deference to an agency’s interpretation of ambiguous statutory text.

practices” for holding the President accountable²⁸ and thus encourages a dangerous psychology of presidential entitlement throughout the executive branch.

I. CIVIC ADMINISTRATION

Emerson and Michaels chose the phrase “civic administration” to distinguish their vision from the model of “presidential administration”²⁹ championed by then-Professor (now Justice) Elena Kagan in her famous article by that name.³⁰ Justice Kagan, who had served as deputy director of President Bill Clinton’s Domestic Policy Council, celebrated what she described as President Clinton’s innovations in “guiding and asserting ownership over administrative activity.”³¹ She described those steps as follows:

At the front end of the regulatory process, Clinton regularly issued formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course. And at the back end of the process (which could not but affect prior stages as well), Clinton personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own, in a way new to the annals of administrative process.³²

In other words, President Clinton was proactive in setting the policy agendas of the administrative agencies, and his rhetoric laid claim to final agency decisions as presidential and not merely administrative accomplishments.

Such presidential administration, Justice Kagan argued, should be welcomed not because Article II commands it, but because Congress has most often decided not to curb it.³³ The results, she hoped, would be salutary.³⁴ She argued that presidential administration would increase accountability by making more transparent the political decisions that were driving even technocratic decision making.³⁵ And the centralization of policy initiatives would make regulatory policymaking more dynamic and responsive.³⁶

28. William G. Howell & Terry M. Moe, *The Strongman Presidency and the Two Logics of Presidential Power*, 53 *PRESIDENTIAL STUD. Q.* 145, 160 (2023) [hereinafter Howell & Moe, *Strongman Presidency*]. Among political scientists, Professors William G. Howell and Terry M. Moe are the most directly engaged in a project analogous to what this Essay advocates, proposing reforms to “leverage the promise of presidential leadership without falling victim to its dangers.” WILLIAM G. HOWELL & TERRY M. MOE, *PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY* 159–219 (2020).

29. Emerson & Michaels, *supra* note 15, at 108.

30. Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2282 (2001).

31. *Id.* at 2249.

32. *Id.*

33. *Id.* at 2251.

34. *Id.* at 2252.

35. *Id.* at 2331–32.

36. *Id.* at 2384.

The 2021 Emerson-Michaels’s riposte to Justice Kagan, although building on significant, theoretically rich early work by each of the two authors, came in the form of an essay that had the flavor of a white paper for the incoming Biden administration.³⁷ The authors’ overall message was to discourage primary reliance on a Kagan-esque “[p]residential [a]dministration [p]laybook”—that is, unilateral actions under existing legal authorities—to advance the progressive policies to which the administration would likely be committed.³⁸ Instead, they urged the promotion of those goals by “redistribut[ing] authority centrifugally” to “more fully empower an array of elected officials, expert bureaucrats, grassroots organizers, and civic institutions.”³⁹

Their reasons included matters of both principle and strategy. They argued that unilateral presidential administration undermines the professional civil service and that its achievements prove ephemeral because what one President may accomplish unilaterally may be similarly undone.⁴⁰ Perhaps worse, presidential administration “sometimes walks perilously close to a kind of plebiscitary dictatorship,” which may prove to be “a force of subordination as much as liberation.”⁴¹ Strategically, they speculated that, given the Democrats’ razor-thin hold on the Senate, President Joe Biden might not be able to fully staff up key positions with the “energetic, progressive leaders” needed to carry out presidential administration most effectively.⁴² Moreover, Trump-appointed judges and their many conservative judicial colleagues would likely look upon perceived unilateralist initiatives with a skeptical eye.⁴³ These forecasts of institutional behavior were not off course.⁴⁴

Better, in the Emerson-Michaels view, would be to “build[] a broad[] foundation for more robust, sustainable policy advances [that] guard[s] against future forays into presidential unilateralism.”⁴⁵ They offered a set of proposals, both inward- and outward-facing, intended to be “ultimately redistributive, reaffirming and reestablishing strong bases of institutional and popular legitimacy at some distance from the presidency. This should help to ensure that policies in furtherance of democratic equality proceed even when presidential support is not forthcoming.”⁴⁶

37. See generally Emerson & Michaels, *supra* note 15.

38. *Id.* at 109.

39. *Id.* at 108.

40. *Id.* at 114.

41. *Id.* at 115–16.

42. *Id.* at 110.

43. See *id.* at 113.

44. See, e.g., *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2616 (2022); Nandita Bose, *Biden’s Labor Secretary Pick Julie Su to Stay in Job Indefinitely, Sources Say*, REUTERS (July 20, 2023, 7:21 PM), <https://www.reuters.com/world/us/bidens-labor-secretary-pick-julie-su-stay-job-indefinitely-sources-say-2023-07-20> [<https://perma.cc/6A4R-82GY>].

45. Emerson & Michaels, *supra* note 15, at 118.

46. *Id.*

Suggested reforms included bolstering the civil service;⁴⁷ shoring up the independence of law enforcement;⁴⁸ creating a U.S. Department of Justice “dissent channel” resembling that of the U.S. Department of State;⁴⁹ reaffirming civilian control of the military;⁵⁰ bringing “key leaders from Congress and civil society” into the President’s diplomatic efforts;⁵¹ pursuing yet more vigorous efforts to involve federal, local, and tribal representatives into federal policymaking;⁵² and communicating directly with sympathetic state legislatures.⁵³ Emerson and Michaels would also reduce the importance of centralized White House oversight of regulation and direct agencies to identify and reach out to underrepresented stakeholders, perhaps with the use of formal “listening sessions.”⁵⁴ In a particularly striking proposal, they even suggested an executive order “specifically directing cabinet secretaries to accept the consensus advice of career staff in the relevant offices when making policy.”⁵⁵ Even a milder requirement to “accept the consensus” or explain reasons for not doing so would be a major innovation, to be sure.⁵⁶ And the authors are alert, of course, to the irony of recommending unilateral presidential action to create a non-unilateralist organizational culture.⁵⁷

An obvious theme running through each of these ideas is that of pluralizing the voices that are heard meaningfully—that is, in a plausibly impactful way—in collective decision making. This aspiration corresponds to what, in my own writing, I have taken to be the essential aspects of democracy’s legitimating character: “the promise of equal respect for the interests of all citizens in the course of collective decision-making” and the opportunities afforded “each citizen . . . to experience himself or herself as an authentically efficacious actor in the formation of the collective will.”⁵⁸ To the extent that these goals are effectively realized through our institutional life, we can justly assert that our form of government enjoys moral legitimacy through its commitment to democratic decision making.

II. CONCERTED EXECUTIVE ACTION

Rodríguez is far from hostile to the impulses guiding the Emerson-Michaels prescriptions. But she cautions against undervaluing the role of political appointees who are accountable to the President in achieving the kind of openness to competing viewpoints that deliberative democracy

47. *Id.* at 119.

48. *Id.* at 121.

49. *Id.* at 125.

50. *Id.* at 125–27.

51. *Id.* at 128.

52. *Id.* at 129.

53. *Id.* at 130.

54. *Id.* at 132.

55. *Id.* at 122.

56. *Id.*

57. *Id.* at 118.

58. SHANE, *supra* note 7, at 142–43.

prizes. Citing her empirical work with Professor Anya Bernstein, she urges work toward

a much deeper concept of political control over the administrative state, one in which political appointees work in integrated and complementary fashion with career civil servants to advance policy priorities often defined well below the level of the presidency. These priorities are typically consistent with the worldview associated with the reigning political regime. But they also represent a decentralized and context-specific elaboration of that worldview [T]his very elaboration can be and often is informed by responsiveness to evolving circumstances and public inputs on the ground, not just or even primarily to center-directed mandates. These myriad political officials are points of entry into government and sources of influence for organized groups and social movement actors that affiliate with the political coalition that helped bring the administration into being. In other words, both the presidency itself and the political layer that runs throughout the state create venues for democratic politics and agitation to inform administration and policymaking.⁵⁹

Although it seems somewhat paradoxical, Rodríguez argues “we must begin to decenter the presidency in our consideration of the politics of administration,”⁶⁰ even as we embrace the critical role of presidential leadership in accomplishing what she calls “regime change.”⁶¹

The administrative law argument that most immediately prompts the Rodríguez foreword can be captured in four propositions. First, most exercises of executive branch power operate within the channels that Congress authorizes through statutes: “The bulk of what the Executive does is to superintend and adapt pre-existing legislative arrangements to bring them in line with the times [S]tatutes create frameworks, but day-to-day governance fills them out in ways that can be highly consequential and even serve a meaning-making function.”⁶²

Second, contrary to the interpretive self-confidence of at least some modern-day textualists, many authorizing statutes are reasonably susceptible to multiple plausible understandings, both linguistically and legally.⁶³ In fact, “these readings ultimately produce different outcomes, which in turn demonstrates that the interpretive enterprise contains room for the realization of political goals.”⁶⁴

Third, Rodríguez argues, it should not count against an administration’s reasons for choosing among plausible statutory readings that the selected interpretation is candidly rooted in the administration’s political values. She would thus extend to statutory reading⁶⁵ a proposition she cites from Justice William Rehnquist’s partial dissent in *Motor Vehicle Manufacturers Ass’n of*

59. Rodríguez, *supra* note 16, at 74–75.

60. *Id.* at 73.

61. *Id.*

62. *Id.* at 58.

63. *Id.* at 24.

64. *Id.*

65. *Id.* at 107.

*the United States v. State Farm Mutual Automobile Insurance Co.*⁶⁶: “As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”⁶⁷ In staking out this position, she aligns herself with the work of Professor Kathryn Watts, who likewise argues that “political motivations should have a place in arbitrary and capricious review.”⁶⁸

Finally, to the extent that political values find their way into agency reasoning, we should not worry overmuch about the role of centralized White House policy supervision, even if there is room for discussion about the ways in which White House–agency collaboration should occur. Implementing a policy regime is a whole-of-executive-branch operation, and as any administration seeks to implement its philosophy of government, “top-down presidential control need be but one feature of its realization.”⁶⁹ What distinguishes Rodríguez’s receptivity to White House policy leadership finding its way into administrative action is that, unlike advocates for unitary executive theory, she divorces her support for politically responsive executive administration from any naïve notion that Presidents enjoy a popular plebiscitary mandate for policy change. Rodríguez’s “democratic conception,” she asserts, “does not depend on the supposed representativeness of the presidency of a national polity—a contested and incomplete formulation.”⁷⁰ Instead, and without trivializing the well-documented democratic defects of our electoral systems, she conceptualizes the outcome of a presidential election as the legitimate victory for one side or another of “ideas forged by and connected to not only a political party and its related legal establishment, but also affiliated interest groups and organizations in civil society that organize and agitate for different layers of the body politic.”⁷¹ Although she does not explicitly say so, under this conception, elections become not just a source of plebiscitary legitimacy, but a vehicle for vindicating deliberative democratic legitimacy, as well.

Presidential elections likewise bring into government not just a new Chief Executive, but also “a whole set of political actors, which consists of not only Senate-confirmed nominees to high-level positions, but also political appointees deeper within the bureaucracy who perform much of the work of bringing into being new interpretations of the law and the policy initiatives that flow from those innovations.”⁷² However, in titling her work, “Regime Change,” Rodríguez is not referring primarily to just the repopulation of

66. 463 U.S. 29 (1983).

67. *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part); *see* Rodríguez, *supra* note 16, at 107.

68. Rodríguez, *supra* note 16, at 107 n.402 (citing Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 8 (2009)).

69. *Id.* at 60.

70. *Id.* at 63–64.

71. *Id.* at 64.

72. *Id.* at 73–74.

executive branch offices. What is key—and what marks some elections as “regime change” and some not—is “the replacement within the executive branch of one set of constitutional, interpretive, philosophical, and policy commitments with another,”⁷³ and more specifically, “the replacement of one conception of the law and its limits, and one view about the purpose of government and its limits, with another.”⁷⁴ There are norms, to be sure, and recognizably legal materials and forms of argument that appropriately constrain the momentum of regime change. For Rodríguez, however, democratic legitimacy implies “that those with power to move and adapt the administrative state according to a set of politically ratified policy objectives ought to exercise that power.”⁷⁵ In short, some Oval Office involvement in developing and pursuing an administration’s regulatory rationales helps to vindicate the promise of genuine democracy.

Interestingly, just as the Emerson-Michaels vision of civic administration cannot be accomplished without top-down presidential leadership,⁷⁶ Rodríguez is clear that her conception of politically responsive government—even of presidentially led regime change—cannot be accomplished without “channeling popular pressures for change through administration.”⁷⁷ The skills and efforts of a huge cast of characters—both political appointees and career civil servants—are “essential to the effectuation of democratic politics” through the responsive mobilization of state capacity.⁷⁸ Thus, she asserts, scholars and other observers who refer to presidential “unilateralism” are giving in to a misunderstanding of how Presidents work their will.⁷⁹ The central problem with the Trump administration was not properly described as unilateralism, but rather corruption—abuses “less about the circumvention of Congress, and more about exhibiting contempt for the component parts of government and their independence; a highly personal form of self-dealing; concerted attempts to use the machinery of government to promote personal interests, protect allies, and target opponents; and extreme mendaciousness.”⁸⁰

If Rodríguez is correct—if “an assertive orientation to [a presidential] regime’s powers has become essential in our time to maintaining responsive and effective institutions of governance”⁸¹—then concerted executive action of the kind she wishes to enable would seem a critical component of building democratic legitimacy. Professor Richard Pildes has argued that political and legal theorists have paid too little attention to the role of effective governance

73. *Id.* at 7.

74. *Id.* at 13.

75. *Id.* at 70.

76. Emerson & Michaels, *supra* note 15, at 108 (“[T]his turn away from presidentialism would not mean abandoning presidential leadership on pressing issues.”).

77. Rodríguez, *supra* note 16, at 65.

78. *Id.*

79. *Id.* at 72.

80. *Id.*

81. *Id.* at 9.

in legitimating a democratic (or presumably any other kind of) regime.⁸² Effectiveness is not the only value that Pildes argues “small-d” democrats should care about.⁸³ But a polity’s choices as to how we pursue other values—such as accountability, political equality, government transparency, representativeness in decision making, and participatory decision-making—should not cause us to lose sight of how important it is to democratic legitimacy that incumbent regimes be able to “deliver on the issues their citizens care about most urgently.”⁸⁴

III. CONCERTED CIVIC ADMINISTRATION

Given their different emphases, the Emerson-Michaels and Rodríguez approaches to institutionalizing a prodemocracy presidency are not identical. It seems doubtful, for example, that Rodríguez would be an enthusiast for the most ambitious Emerson-Michaels proposals, which call for major deference to the career civil service (e.g., an executive order commanding department heads to accept consensus policy advice from career staff in relevant offices).⁸⁵ Nor would Emerson and Michaels be as sympathetic as Rodríguez to at least some elements of presidential administration celebrated in Justice Kagan’s account, such as taking “ownership over administrative activity” by “personally appropriat[ing] significant regulatory action through communicative strategies that present[] regulations and other agency work product, to both the public and other governmental actors, as [the President’s] own.”⁸⁶ As Justice Kagan said of her White House boss, President Clinton, “In event after event, speech after speech, [he] claimed ownership of administrative actions, presenting them to the public as his own.”⁸⁷ Such a rhetorical strategy obscures both the sources of executive authority and the processes by which it is exercised, thus effectively reducing transparency and demoting the significance of nonpresidential actors.

Yet both the Emerson-Michaels and Rodríguez approaches have much in them that should appeal to scholars and other citizens worried about the authoritarian threat latent in the accelerating trajectory toward more and more presidential power. Although each values *some* role for White House coordination of the “sprawling activities of the executive branch,”⁸⁸ the two theories both emphasize the critical role that decentralized actors play in strengthening the legitimacy of democratic governance.⁸⁹ The challenge for

82. Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. (forthcoming) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465533 [<https://perma.cc/DCJ7-8DJ9>].

83. *See id.* at 6–8 (discussing the tradeoffs between political accountability and effective government).

84. *Id.* at 24.

85. *See* Emerson & Michaels, *supra* note 15, at 122.

86. Kagan, *supra* note 30, at 2249.

87. *Id.* at 2300.

88. Rodríguez, *supra* note 16, at 76.

89. *Compare id.* at 75 (“[B]oth the presidency itself and the political layer that runs throughout the state create venues for democratic politics and agitation to inform administration and policymaking.”), *with* Emerson & Michaels, *supra* note 15, at 108 (“Civic

scholars who recognize the normative importance of our institutional commitments to both deliberative democracy and electoral accountability is to envision a way of institutionalizing the relationship between the President and the decentralized actors within the executive branch that allows us to vindicate both.

As it happens, however, there are numerous examples from administrations of both Democratic and Republican Presidents of formally structured relationships and explicitly established policymaking processes that infuse presidential values into executive branch decision-making without necessarily compromising the values of deliberation and inclusiveness. Presumably, from an antiauthoritarian standpoint, the best processes would be those that are transparent, that take seriously the agencies' deliberative capacities and statutory discretion, and that bolster or at least do not undermine the agencies' capacity for law enforcement and implementation. Both the Trump and Biden administrations have used executive orders as instruments of policy coordination that most often, on their face, appear to strike an acceptable balance between central direction and decentralized responsibility. Although a comprehensive review of such orders is beyond the scope of this Essay, even a partial review of illustrative examples is instructive.

We can think of unilateral presidential orders⁹⁰ as falling along a spectrum in terms of how little or how much they purport to constrain the discretionary judgment of agencies subject to them. At the least aggressive end of the spectrum are orders that simply direct official attention to specific subjects and request responsive information and recommendations. President Trump, for instance, issued an executive order entitled, "Core Principles for Regulating the United States Financial System,"⁹¹ which set forth statements of administration policy (the "Core Principles") and then directed the U.S. Secretary of the Treasury, in consultation with other relevant agency heads, to report to President Trump "on the extent to which existing laws, treaties, regulations, guidance, reporting and recordkeeping requirements, and other Government policies promote the Core Principles and what actions have been taken, and are currently being taken, to promote and support the Core Principles."⁹² The Secretary of the Treasury was also required to "identify any laws, treaties, regulations, guidance, reporting and recordkeeping requirements, and other Government policies that inhibit Federal regulation of the United States financial system in a manner consistent with the Core

administration activates congressional coalitions, state, local, and tribal governments, civil society groups, and the federal bureaucracy. The president partners with those groups . . .").

90. I am putting aside those orders that implement authority bestowed on the President by Congress, such as executive orders imposing or lifting sanctions on foreign governments or individuals. *See, e.g.*, Exec. Order No. 14,046, 86 Fed. Reg. 52389 (Sept. 17, 2021) ("Imposing Sanctions on Certain Persons with Respect to the Humanitarian and Human Rights Crisis in Ethiopia.").

91. Exec. Order No. 13,772, 3 C.F.R. 286 (2018), *revoked by* Exec. Order No. 14,018, 86 Fed. Reg. 11855 (Feb. 24, 2021).

92. *Id.* at 286.

Principles.”⁹³ Although the statement of policy commitments is meaningful, nothing in the order significantly constrains any official in the decision of specific administrative matters. The reporting requirement is squarely supported by the President’s constitutional authority to demand information from the heads of departments.⁹⁴

A comparable example from President Biden is part of Executive Order 14,025, entitled, “Worker Organizing and Empowerment.”⁹⁵ Among other things, that order established a multiagency task force with an assignment to “identify executive branch policies, practices, and programs that could be used, consistent with applicable law, to promote [the] Administration’s policy of support for worker power, worker organizing, and collective bargaining.”⁹⁶ The task force is also directed to “submit to the President recommendations for actions . . . to promote worker organizing and collective bargaining in the public and private sectors, and to increase union density.”⁹⁷ Lest the order’s limited role be missed, it provides explicitly: “The functions of the Task Force are advisory in nature only; the purpose of the Task Force is to make recommendations regarding changes to policies, practices, programs, and other changes that would serve the objectives of this order.”⁹⁸ In other words, the order purports not to affect the decision-making of any government agency except insofar as it may be involved in this wholly advisory process.

It is not unusual for orders requiring investigation and recommendations, like the Biden order on worker empowerment, to create task forces or working groups to engage in policy deliberation across organizational silos. Similar examples include a Trump order, entitled, “Promoting Agriculture and Rural Prosperity in America,”⁹⁹ which created an Interagency Task Force on Agriculture and Rural Prosperity,¹⁰⁰ and another Biden order, “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans,”¹⁰¹ which, among other things, created an Interagency Working Group on Promoting Naturalization.¹⁰² The mission assigned to these particular working groups and task forces, like the Trump directive to the Secretary of the Treasury, is to identify problems and opportunities and develop recommended strategies for pursuing the administration’s objectives. And, of course, creating such working groups and mandating interagency consultation are functions that must be performed centrally. The White House is uniquely well positioned to perform this coordinating role.

93. *Id.*

94. U.S. CONST. art. II, § 2, cl. 1.

95. Exec. Order No. 14,025, 86 Fed. Reg. 22829 (Apr. 26, 2021).

96. *Id.* at 22830.

97. *Id.* at 22831.

98. *Id.* at 22830.

99. Exec. Order No. 13,790, 3 C.F.R. 330 (2018).

100. *Id.* at 330–31.

101. Exec. Order No. 14,012, 86 Fed. Reg. 8277 (Feb. 2, 2021).

102. *Id.* at 8279.

Somewhat more ambitious are executive orders that go beyond initiatives to “consider,” “study,” and “recommend,” and instead direct agencies to coordinate in the actual performance of executive functions. Thus, the Biden order on immigrations systems also directs the U.S. Secretary of State, the Attorney General, and the Secretary of the Department of Homeland Security to develop a joint plan to promote naturalization by eliminating unnecessary barriers, reducing processing times, and increasing access through the possible use of fee waivers, among other steps.¹⁰³ These three cabinet members are also directed to report back within 180 days on the progress that they have made.¹⁰⁴ Along similar lines is a Trump order directing the U.S. Secretary of the Interior and the U.S. Secretary of Agriculture to “[c]oordinate with the heads of all relevant Federal agencies to prioritize and promptly implement post-wildfire rehabilitation, salvage, and forest restoration.”¹⁰⁵ That order went so far as to specify a series of potential program objectives, expressed in terms of numbers of acres of public lands to be protected by each department.¹⁰⁶ The secretaries were told, regarding their respective departments, to “give all due consideration” to pursuing the specified objectives for 2019, “as feasible and appropriate in light of [the departments’ submitted] budget justifications, and consistent with applicable law and available appropriations.”¹⁰⁷ A 2021 Biden order, “Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government,”¹⁰⁸ was even more direct. Cabinet members and other agency heads received specific assignments to develop online tools that would improve the public’s access to federal services or make it easier for members of the public to comply with their reporting obligations.¹⁰⁹ Such orders can obviously affect agency resource allocation, but they have a more managerial than political feel.

As it happens, executive orders in both of these categories typically start with an explicit statement of administration policy. The President, who has chosen all agency heads, presumably intends that the articulation of administration policy will influence how subordinate administrators exercise whatever legal discretion they have in the implementation of their respective agencies’ statutory authorities. Even so, the Reagan administration took a significantly more ambitious approach regarding White House oversight of regulatory policy. Executive Order 12,291,¹¹⁰ signed just weeks into President Ronald Reagan’s first term, not only mandated that agencies respect cost-benefit principles in issuing new regulations,¹¹¹ but institutionalized oversight of the cost-benefit analysis process in the Office

103. *Id.* at 8278–79.

104. *Id.* at 8279.

105. Exec. Order No. 13,855, 3 C.F.R. § 3(a) (2019).

106. *Id.* at 893–94.

107. *Id.*

108. Exec. Order No. 14,048, 86 Fed. Reg. 71357 (Dec. 13, 2021).

109. *Id.* at 71359–62.

110. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

111. *Id.* at 128.

of Management and Budget (OMB).¹¹² To be sure, the order explicitly directed agency compliance only “to the extent permitted by law.”¹¹³ And Executive Order 12,866,¹¹⁴ a Clinton administration replacement adopting much the same oversight strategy, underscored the point by providing: “Nothing in this order shall be construed as displacing the agencies’ authority or responsibilities, as authorized by law.”¹¹⁵ Yet critics of the process have said that, in operation, the Office of Information and Regulatory Affairs (OIRA), the office within OMB that reviews draft regulations, functions as the agency’s boss, thus interfering significantly with agency policymaking.¹¹⁶ To the extent there is overreach, OIRA would not be respecting the legal understanding that undergirded the adoption of the Reagan order. In approving the order’s legality, the U.S. Department of Justice’s Office of Legal Counsel (OLC) observed that the presidential power of “supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official.”¹¹⁷ The opinion goes on to describe in relatively modest terms the restrained role presidential supervision would play under Executive Order 12,291. Specifically, the direction to prepare and follow cost-benefit analysis would

leave[] a considerable amount of decision-making discretion to the agency. Under the proposed order, the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs. The agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take. The limited requirements of the proposed order should not be regarded as inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency. Any other conclusion would create a possible collision with constitutional principles, recognized in *Myers*, with respect to the President’s authority as head of the Executive Branch.¹¹⁸

Although OLC’s 1981 understanding may appear more normative than descriptive, the Biden administration—at least in principle—has declared its commitment to inclusive deliberation¹¹⁹ and transparency,¹²⁰ which have the potential to tame OIRA’s centripetal impact on policymaking and empower more voices in the processes of formulating front-end policy and holding decision-makers accountable for performance. Whether this ultimately

112. *Id.* at 128, 132–33.

113. *Id.* at 128.

114. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

115. *Id.* at 649.

116. *See, e.g.,* Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REGUL. ONLINE 39 (2012).

117. Proposed Exec. Order Entitled “Fed. Regul.,” 5 Op. O.L.C. 59, 61 (1981).

118. *Id.* at 63.

119. *See* Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023).

120. *See* OFF. OF MGMT. & BUDGET, CIRCULAR A-4 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf> [<https://perma.cc/Y6Z3-A4B2>].

proves reassuring or not from the Emerson-Michaels point of view can only be determined by observing the system in operation.

Executive Orders 12,291 and 12,866 represented an important innovation, at least outside the context of national security, in the use of executive orders to impose on most administrative agencies an enforceable set of presidential value preferences to guide discretionary decision making. It is easy to overlook the potential of such orders to steer the executive branch dramatically in one policy direction because the regulatory oversight system has enjoyed support from both Democratic and Republican Presidents.¹²¹ Although cost-benefit analysis may be (and has been) pushed in a deregulatory direction, the underlying concept that agencies should maximize net benefits in designing their regulatory strategies has an obvious nonpartisan appeal. Subsequent orders in this vein, however, have promoted policies far more likely to appeal to voters of one party rather than another.¹²²

An important example is a Biden executive order on “Tackling the Climate Crisis at Home and Abroad,”¹²³ issued during his first week in office. Among other things, the order creates an interagency process, chaired out of the White House, with the responsibility to make “recommendations on how certain federal investments might be made toward a goal that 40 percent of the overall benefits flow to disadvantaged communities.”¹²⁴ The so-called Justice40 Initiative encompasses federal investments related to energy, transportation, housing, workforce development, pollution remediation, and clean water infrastructure.¹²⁵ The order does not squarely say that the recommendations are binding on agencies, but rather that agencies “shall identify applicable program investment funds based on the recommendations.”¹²⁶ At the same time, however, the implication is clear

121. Republican Presidents George W. Bush and Trump and Democratic Presidents Barack Obama and Biden have all kept the OIRA process in place. Exec. Order No. 13,272, 67 Fed. Reg. 53461, 53461 (Aug. 13, 2002) (assigning responsibilities to the Chief Counsel for Advocacy of the Small Business Administration “[c]onsistent with . . . Executive Order 12866 of September 30, 1993, as amended”); Exec. Order No. 13,563, 3 C.F.R. § 1(b) (2012) (“This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993.”); Exec. Order No. 13,777, 3 C.F.R. § 2 (2018) (“Each [Regulatory Review Officer] shall oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. These initiatives and policies include: . . . Executive Order 12866 of September 30, 1993 . . .”); Exec. Order No. 14,094, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023) (“This order supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 . . .”).

122. See CARROLL DOHERTY, JOCELYN KILEY & BRIDGET JOHNSON, PEW RSCH. CTR., *LOW APPROVAL OF TRUMP’S TRANSITION BUT OUTLOOK FOR HIS PRESIDENCY IMPROVES* 32 (2016), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2016/12/12-08-16-December-political-release.pdf> [<https://perma.cc/83ZQ-SEN4>] (“As in the past, Republicans and Democrats take opposing views of government regulation: 71% of Republicans and Republican-leaning independents think government regulation of business does more harm than good . . .”).

123. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

124. *Id.* at 7632.

125. *Id.* at 7631–32.

126. *Id.*

that the recommendations should be followed. The order also directed the creation of an online Environmental Justice Scorecard to make transparent each agency's performance in the pursuit of environmental justice.¹²⁷ From all appearances, Justice40 has engendered considerable agency initiative in pursuit of President Biden's vision of environmental justice. Agencies retain significant discretion in designating the funding programs covered, and all funding applications need to meet statutory and regulatory criteria to qualify for support.¹²⁸ The definition of "disadvantaged communities" is wide-ranging.¹²⁹ The prospect that one community's application for funding lost out to another solely because it failed to qualify as a disadvantaged community seems remote. And the 40 percent figure, of course, operates as a floor, not a ceiling. There is no reason to think that agencies will disfavor applications from qualifying disadvantaged communities once the 40 percent figure has been reached. Yet this is the kind of order that vindicates the adage, "elections matter." At least as the major party platforms currently line up, it is hard to imagine this order coming from a Republican President.

The most ambitious Trump order in this genre was Executive Order 13,771, entitled, "Reducing Regulation and Controlling Regulatory Costs."¹³⁰ Its partisan valence is also equally conspicuous; it was issued shortly after President Trump's first day in office and revoked on the day of President Biden's inauguration.¹³¹ The order called for two institutional reforms long advocated—but never successfully enacted—by Republicans in Congress, both to be implemented by OMB. Under the first, each covered agency was required to "identify at least two existing regulations to be repealed" whenever it "publicly proposes for notice and comment or otherwise promulgates a new regulation."¹³² Although this part of the order plainly trumpets a presidential preference for deregulation, it operated more symbolically than substantively.¹³³

127. See The Environmental Justice Scorecard, ENV. JUST. SCORECARD, <https://ejscorecard.geoplatform.gov/scorecard/> [<https://perma.cc/68ZU-CDXP>] (last visited Oct. 6, 2023).

128. See, e.g., Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7625, 7632 (Jan. 27, 2021).

129. See *id.* at 7629.

130. Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

131. President Trump signed Executive Order 13,771 on January 30, 2017, ten days after his inauguration. *Id.*; Annie Karni, 5 *Takeaways from Trump's Inaugural Address*, POLITICO (Jan. 20, 2017, 3:08 PM), <https://www.politico.com/story/2017/01/2017-trump-inauguration-5-takeaways-233925> [<https://perma.cc/RV2S-L422>]. President Biden revoked the order on the day of his inauguration. Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021); Peter Baker, *Biden Inaugurated as the 46th President Amid a Cascade of Crises*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/20/us/politics/biden-president.html> [<https://perma.cc/XSR2-7XWW>].

132. Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

133. Stuart Shapiro, Opinion, *Making Sense of the Trump Administration's Regulatory Numbers*, REGUL. REV. (Jan. 14, 2020), <https://www.theregreview.org/2020/01/14/shapiro-making-sense-trump-administration-regulatory-numbers> [<https://perma.cc/WR36-ME8G>].

Of seemingly greater consequence, at least in principle, was the establishment of a so-called “regulatory budgeting” process. Under that process, the OMB Director—who delegated this authority to the OIRA Administrator—was required to “identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year.”¹³⁴ For the fiscal year already in process, agencies were told that “the total incremental cost of all new regulations, including repealed regulations, to be finalized . . . shall be no greater than zero.”¹³⁵ On its face, it is easy to see how—as a centralizing order—this system both resembles and differs from an initiative like Justice40. On one hand, like Justice40, it requires agencies to take account—to the extent permitted by law—of certain presidential values that are not made relevant by the agency’s statutes.¹³⁶ On the other hand, it is possible to imagine how such cost ceilings could interfere with the effectiveness with which an agency discharges its admission. If, based on a cost ceiling, an agency foregoes or even delays a regulatory program that would fare well under an actual cost-benefit analysis, there is a cost imposed on society by the aggregate limit. Yet because recommendations for the aggregate costs came from the agencies themselves, the debilitation of agency effectiveness would not have been inevitable. We do not know to what degree OIRA’s review was conducted with due regard for each agency’s mission.

Unfortunately, regulatory budgeting did not proceed with anything like the transparency that has accompanied implementation of Justice40. Hence, it seems far less likely to have engendered the kind of inclusive deliberation or public accountability that the White House has tried to facilitate regarding Justice40. President Trump’s OIRA did publish the guidance provided to agencies regarding how to comply with regulatory budgeting,¹³⁷ as well as the aggregate incremental cost targets ultimately assigned for Fiscal Year 2018¹³⁸ and Fiscal Year 2019.¹³⁹ But there were no publicly shared

134. Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9340 (Jan. 30, 2017), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

135. *Id.* at 9339.

136. To my knowledge, there are no statutes that instruct agencies, when issuing rules, to consider how any particular rule adds or subtracts to the aggregate cost of regulatory implementation imposed by the agency via its entire regulatory output.

137. Memorandum from Dominic J. Mancini, Acting Adm’r, Off. of Info. & Regul. Aff., to Regul. Pol’y Officers at Exec. Dep’ts & Agencies & Managing & Exec. Dirs. of Certain Agencies & Comm’ns (Apr. 5, 2017), <https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf> [<https://perma.cc/2UAL-7UVD>]; Memorandum from Neomi Rao, Adm’r, Off. of Info. & Regul. Aff., to Regul. Reform Officers at Exec. Dep’ts & Agencies (Sept. 7, 2017), <https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/omb/memoranda/2017/FY%202018%20Regulatory%20Cost%20Allowances.pdf> [<https://perma.cc/H CJ6-7Y8Y>].

138. OFF. OF INFO. & REGUL. AFF., REGULATORY REFORM: REGULATORY BUDGET FOR FISCAL YEAR 2018 (2018), https://www.reginfo.gov/public/pdf/eo13771/FINAL_TOPLINE_ALLOWANCES_20171207.pdf [<https://perma.cc/G2YY-KW5H>].

139. OFF. OF INFO. & REGUL. AFF., REGULATORY REFORM: REGULATORY BUDGET FOR FISCAL YEAR 2019 (2019), https://www.reginfo.gov/public/pdf/eo13771/EO_13771_Regulatory_Budget_for_Fiscal_Year_2019.pdf [<https://perma.cc/TJZ9-H79E>].

documents regarding how agencies arrived at their recommended cost allowances, how OIRA evaluated them, or whether their targets were achieved. By way of contrast, OMB has not only published guidance on implementing Justice40—including the definition of “disadvantaged communities”¹⁴⁰—but individual agencies have created pages showing their responsive initiatives,¹⁴¹ and the Council on Environmental Quality has created a publicly available online map showing the location of disadvantaged communities by census tract.¹⁴² The site makes available the underlying data and invites the sharing of other data sources. The information thus provided both recognizes the role of agencies beyond the White House and empowers deliberation both within and beyond the agencies themselves.

The comparison between Justice40 and President Trump’s regulatory budgeting order reveals what is perhaps, on reflection, an obvious point: whether a top-down initiative ought to count as protoauthoritarian or supportive of democracy is as likely to depend on the way it is implemented as on its formal features. Looking back on the Trump administration, its most disturbingly antidemocratic features had less to do with its formal instruments of agency coordination than with President Trump’s autocratic style of leadership and the administration’s attempts within agencies to ostracize dissenters.¹⁴³ In other words, the democratic deficiencies of the Trump administration had less to do with structure than with indifference to norms—norms of tolerance, transparency, inclusiveness, and accountability.

Seen in this light, unitary executive theory appears both largely irrelevant to the needs of administration and hazardous to democracy. It is largely irrelevant because the vulnerability of agency heads to removal at will contributes little, if anything, to a President’s capacity to structure White House–agency relations in a mutually empowering way. None of the executive orders described above relied for its validity on unitary executive theory. Yet as a governing philosophy, the theory supports an organizational psychology of presidential entitlement that threatens the normative structure

140. Memorandum from Shalanda D. Young, Dir., Off. of Mgmt. & Budget, Brenda Mallory, Chair, Council on Env’t Quality & Gina McCarthy, Nat’l Climate Advisor, to the Heads of Exec. Dep’ts & Agencies (July 20, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf> [https://perma.cc/X3EP-FU4G].

141. Links to the agency pages are accessible via the online Environmental Justice Scorecard. *See supra* note 127.

142. Council on Env’t Quality, *Explore the Map*, CLIMATE & ECON. JUST. SCREENING TOOL, <https://screeningtool.geoplatform.gov/en/#11.44/40.6928/-73.9918> [https://perma.cc/D8PC-A7A8] (last visited Oct. 6, 2023). The administrative guidance formally issued to agencies regarding use of the tool has also been published. Memorandum from Shalanda D. Young, Dir., Off. of Mgmt. & Budget, Brenda Mallory, Chair, Council on Env’t Quality & Ali Zaidi, Nat’l Climate Advisor, Climate Pol’y Off., to the Heads of Exec. Dep’ts & Agencies (Jan. 27, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-09_Signed_CEQ_CPO.pdf [https://perma.cc/959Y-7THA].

143. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 617 (2021); BAUER & GOLDSMITH, *supra* note 10, at 1–4.

of deliberative inclusiveness, mutual accountability, and institutional self-restraint on which genuine democracy rests.¹⁴⁴ It should be discarded.

IV. THE ROLE OF THE JUDICIARY

Rodríguez elaborated her theory of “regime change” in response to Supreme Court administrative law decisions that, in her view, were unjustifiably skeptical of the role of presidential politics in influencing agency decision making.¹⁴⁵ Rodríguez does not argue for unitary executive theory—with Bernstein, she has written in another article of “the descriptive impossibility of the unitary executive and the limited reach of the major doctrine that seeks to safeguard [i.e., presidential removal power] it in the name of accountability.”¹⁴⁶ Rather, Rodríguez argues that “political influence over administration is not something to be feared and can operate in ways essential to democratic judgment.”¹⁴⁷

Again, the limited scope of this Essay precludes a comprehensive treatment of the role of judicial review in seeking to promote what, from a democratic point of view, is the maximally optimal relationship between Presidents and agencies. Any such analysis, however, must start with the fact that courts have more effective tools to stop things than to generate them. For example, they can tear down statutory protections against the overpoliticization of federal administration;¹⁴⁸ but as a general matter, they cannot compel Presidents to eschew demagoguery.¹⁴⁹ They can enjoin administrative action that exceeds an agency’s statutory authority.¹⁵⁰ But, as Professors Jody Freeman and Sharon Jacobs have put the point eloquently: “Constitutional law and administrative law both have blind spots when it comes to presidential management of the bureaucracy, especially when the President’s mission is incapacitation.”¹⁵¹

It is worth noting, however, that there are currently in play several foundational public law doctrines unrelated to the scope of the President’s removal power that may bear directly on the degree to which presidential politics may infuse agency decision making. Two of them are the constitutionally rooted nondelegation doctrine and its administrative common-law cousin, the newly crystallized major questions doctrine. The first, stated most generally, is a bar against Congress vesting Article I “legislative power” in the executive branch.¹⁵² The second is a prescription

144. SHANE, *supra* note 7, at 3–31.

145. Rodríguez, *supra* note 16, at 99–110.

146. Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1671 (2023).

147. *Id.* at 1674.

148. *See, e.g.*, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987–88 (2021).

149. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (“Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements.”).

150. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2370 (2023).

151. Freeman & Jacobs, *supra* note 143, at 665.

152. *See Gundy v. United States*, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) (“If Congress could pass off its legislative power to the executive branch, the ‘[v]esting

of judicial skepticism for certain “extraordinary cases” involving judicial review of an agency’s interpretation of its own statutory authority, namely, “cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress[] meant to confer such authority.’”¹⁵³ Both doctrines work to diminish the role of presidential politics in agency decision making because each, directly or indirectly, would narrow the scope of discretionary authority within which an agency’s judgment can be influenced by a President’s agenda. In his provocative solo concurrence in *West Virginia v. Environmental Protection Agency*,¹⁵⁴ Justice Gorsuch made explicit how the major questions doctrine is hostile to the idea of democratic regime change:

By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time Permitting Congress to divest its legislative power to the Executive Branch would “dash [this] whole scheme.” Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him. In a world like that, agencies could churn out new laws more or less at whim. Intrusions on liberty would not be difficult and rare, but easy and profuse. Stability would be lost, with vast numbers of laws changing with every new presidential administration.¹⁵⁵

Gorsuch explicitly views the cumbersome quality of the legislative process and the consequent institutional bias towards federal government inaction as intentional and commendable features of the constitutional scheme.¹⁵⁶

Despite my own concerns about the authoritarian potential of strong presidencies, I nonetheless believe that, on balance, the aggressive judicial deployment of either the nondelegation or major questions doctrine would be a bad idea. Political scientists Professors William G. Howell and Terry M. Moe have accurately pointed out “[t]he simple fact . . . that big government generates presidential power.”¹⁵⁷ But, as I have argued elsewhere, judicial assertiveness in limiting the breadth of permissible delegation threatens too easily to undermine Congress’s authority to employ administrative agencies

[c]lauses, and indeed the entire structure of the Constitution,’ would ‘make no sense.’” (alterations in original) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002)).

153. *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2608 (2022) (alteration in original) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

154. 142 S. Ct. 2587 (2022).

155. *Id.* at 2618 (Gorsuch, J., concurring) (quoting *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring)).

156. *Id.*

157. Howell & Moe, *Strongman Presidency*, *supra* note 28, at 156.

as first responders to new challenges and unforeseen circumstances.¹⁵⁸ The major questions doctrine effectively licenses unelected judges to veto even soundly developed administrative initiatives without due regard for the potential influence of the judges' own political preferences in deciding whether the relevant statutory language is too broad to provide the agency with sufficiently clear authority to act.¹⁵⁹ Moreover, there are good reasons to doubt that the framers would have been more concerned about excessive delegation than about replicating the legislative incapacities of the Articles of Confederation.¹⁶⁰ Making legislation even more difficult in an age of climate change and other crises unimaginable to the founding generation does not seem wise.

Correspondingly, the Court's seeming repudiation of so-called *Chevron* deference is regrettable.¹⁶¹ Acquiescing in an agency's reasonable interpretation of a legally ambiguous statute makes room for the role of agency expertise and policy deliberation, even as it preserves legal accountability for administrative action. Even if an agency's theory of its legal authority is accepted in principle, its policy rationale and the empirical basis for its challenged initiative must still pass muster under hard look review.¹⁶² Significant rulemaking activity will often follow from inclusive deliberation both within and beyond government. An agency that, in theory, might have been legally authorized to employ a particular strategy of statutory implementation will nonetheless find itself blocked if it ignores major issues or resolves doubts without adequate explanation based on a factual record.¹⁶³

There is nothing inherently incompatible between administrative law's hard look review—whether in judging the reasonableness of an agency's legal interpretation or the soundness of its policymaking—and the influence of presidential values. There is, however, one way in which I believe Justice Kagan's canonical article went too far in welcoming direct presidential

158. Peter M. Shane, *Chevron Deference is Superior to West Virginia Skepticism*, YALE J. ON REGUL.: NOTICE & COMMENT (July 12, 2023), <https://www.yalejreg.com/nc/chevron-deference-is-superior-to-west-virginia-skepticism-by-peter-m-shane> [https://perma.cc/2VU5-5R88].

159. Natasha Brunstein, *Taking Stock of West Virginia on Its One-Year Anniversary*, YALE J. ON REGUL.: NOTICE & COMMENT (June 18, 2023), <https://www.yalejreg.com/nc/taking-stock-of-west-virginia-on-its-one-year-anniversary-by-natasha-brunstein> [https://perma.cc/FR3U-KVUP].

160. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 292 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2326 (2022).

161. Shane, *supra* note 158.

162. *Id.*; see also Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 772 (2008) (“*State Farm* was widely taken to have ratified the hard look doctrine. The Court’s description of the appropriate standard of review, and its conclusions on the merits, suggested that courts should require detailed justifications for agency action and also examine the reasonableness of the agency’s conclusions.”).

163. See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983) (“[U]nder the ‘arbitrary and capricious’ standard . . . , the agency . . . must examine the relevant data and articulate a satisfactory explanation for its action.”).

involvement in agency policy. She would regard presidential involvement in an administrative decision as providing stronger grounds for *Chevron* deference.¹⁶⁴ I think such an approach gives too little weight to Congress's decision to vest decision-making power in an officer other than the President. Justice Kagan countenances the idea that presidential involvement in agency decision making is part of what affords that decision-making democratic legitimacy.¹⁶⁵ But "*Chevron*'s other explicit justifications—congruence with congressional intent, agency expertise, and the rigors of agency deliberative process—all cut against treating presidential involvement as a lever for intensifying judicial deference."¹⁶⁶

In general, the conventional tools of administrative law are well suited to avoid the abuse of executive power insofar as such abuse manifests itself as overambitious initiative in need of trimming. Rodríguez is thoughtful in arguing that judicial review can respect democratic values by being less hostile to the influence of political judgment in agency decision-making even as the courts continue to enforce the "arbitrary and capricious" test through hard look review.¹⁶⁷ The real challenge to administrative law in furthering an antiauthoritarian conception of the presidency is twofold: first, to curb the current enthusiasm for unitary executive theory and second, to develop doctrinal tools for better checking the actions of Presidents determined to undermine the democratic integrity of the administrative state.

CONCLUSION

This Essay was motivated by a presumption that to effectively oppose an authoritarian turn in presidential administration, it is not enough to mount a persuasive critique of unitary executive theory as an interpretation of Article II. It is also important to have a practical vision of what an antiauthoritarian presidency would look like. Yale Law School Professor Cristina Rodríguez and the UCLA School of Law—team of Professors Blake Emerson and Jon Michaels have laid the groundwork for two such constructive visions. The two conceptions emphasize different elements because the authors differ in the fears that animate their work most obviously. Emerson and Michaels most fear a continuing slide towards plebiscitary dictatorship, in which the only impactful voice in domestic policymaking is the President's. What they want a President to do is to "redistribute authority centrifugally," to "more fully empower an array of elected officials, expert bureaucrats, grassroots organizers, and civic institutions."¹⁶⁸ For her part, Rodríguez most fears an executive branch unable to effectuate the "constitutional, interpretive, philosophical, and policy commitments" that prevailed in the last election.¹⁶⁹

164. Kagan, *supra* note 30, at 2377.

165. *Id.* at 2384.

166. Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 *FORDHAM L. REV.* 679, 693 (2014).

167. Rodríguez, *supra* note 16, at 132–39.

168. Emerson & Michaels, *supra* note 15, at 108.

169. Rodríguez, *supra* note 16, at 7.

What she seeks is greater receptivity (both from courts and presidential scholars) to the role of politics in justifying administrative initiative, even initiative in one administration that differs sharply from that of its predecessor.

These two different visions rest on two different strains of democratic theory embodied with greater or lesser success by our political institutions. In the spirit of deliberative democracy, Emerson and Michaels want to empower more voices, both within and beyond government, that are heard meaningfully—that is, in a plausibly impactful way—in collective decision-making. Underscoring the importance of electoral democracy, Rodríguez wants those officials empowered by a presidential election—not only Presidents, but also political appointees they bring into government—to be able to accomplish “regime change”: the replacement of a predecessor’s conception of the law and its limits, and a predecessor’s view about the purpose of government and its limits, with another. Elections, she argues, should have substantive, not just staffing consequences.

Yet central to each of these visions is the relationship between the individuals who make up the executive establishment to the presidency as an office and to the President as a person.¹⁷⁰ In this respect, we can discern ways in which a variety of existing presidential practices point the way to operating a strong presidency that nonetheless embraces an intentionally antiauthoritarian synthesis of the two reformist strands. This is not to deny that any administration will sometimes overstep. But certain administrative precedents provide hints of how we can have an executive branch sufficiently efficacious to make meaningful our periodic exercises in electoral democracy, while still accentuating the independent decision-making competencies and authorities of individual agencies and pluralizing the voices that shape the public agenda. I would call such a synthesis “concerted civic administration.” Judicial review should enable that synthesis while avoiding the embrace of a unitary executive theory, which “[a]s currently constituted, . . . is extreme and exceedingly dangerous to our democratic system of government.”¹⁷¹

170. On the importance of conceptualizing executive power in relation to both the President, as an individual, and to the presidency as an office, see Daphna Renan, *The President’s Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

171. Howell & Moe, *Strongman Presidency*, *supra* note 28, at 160.