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THE SUPREME COURT 2020 TERM

FOREWORD: REGIME CHANGE

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THE SUPREME COURT 2020 TERM

FOREWORD: REGIME CHANGE

*Cristina M. Rodríguez**

INTRODUCTION

On the last day of oral argument this Term, in an atypical May convening, the Justices of the Supreme Court grappled with how to integrate two recent reforms to the federal sentencing regime in the case of *Terry v. United States*.¹ In 2010, Congress had enacted the Fair Sentencing Act² and reduced the by-then notorious 100:1 sentencing disparity between crack and powder cocaine offenses to 18:1. The Act was a triumph for criminal justice reformers after decades of advocacy highlighting the racially disproportionate and loaded nature of the disparity.³

* Leighton Homer Surbeck Professor of Law, Yale Law School. I am enormously grateful for the insightful feedback on drafts of this piece from Ashraf Ahmed, Daryl Levinson, Marty Lederman, Douglas NeJaime, Nicholas Parrillo, Daphna Renan, and Reva Siegel. The ideas explored in this Foreword have also been deeply shaped by two significant collaborations, with Adam Cox on the subject of the President and immigration law, and Anya Bernstein on the question of how agencies interpret statutes and how political and institutional judgment blend. Any errors or misguided observations here are of course my own. I also could not be more grateful for and impressed with the research assistance I have received from a group of highly energetic and talented Yale Law School students, including Sam Ayres, Callie Bruzzone, Colin Burke, Kayla Crowell, Beatrice Pollard, Thomas Ritz, Lexi Smith, Nate Urban, and Bardia Vaseghi. Last, I owe an enormous debt to the editors of the *Harvard Law Review* for their rigorous and painstaking work.

¹ 141 S. Ct. 1858 (2021).

² Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

³ For an account of the origins of the disparity, see RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 74–75 (2019). In his opinion for the Court, Justice Thomas cited a 1995 report from the Sentencing Commission stating its view that the 100:1 ratio was too high, that the layering of the Sentencing Guidelines on top of the ratio “doubly punished” offenders, and that the Sentencing Guidelines’ disproportionate effects on Blacks created a “perception of unfairness.” *Terry*, 141 S. Ct. at 1861 (quoting U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 192, 196 (1995), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf [https://perma.cc/22ZV-TEFQ]). It took another fifteen years for Congress to act, underscoring the political perils of criminal justice reform. See BARKOW, *supra*, at 170 (discussing how in 1995, Congress rejected the Sentencing Commission’s proposed guidelines that would have treated crack and powder cocaine equally, and how Congress often ignores both the Commission’s views and empirical evidence).

In 2018, Congress then enacted the First Step Act⁴ to complete its work. In an amicus brief to the Supreme Court, four senators who co-sponsored the First Step Act described it as encompassing a “historic bipartisan coalition — the likes of which, over the last several decades, Congress has rarely seen,” one that “came together to bring greater fairness and justice to the Nation’s criminal justice system.”⁵ In an era marked by partisan rancor and legislative torpor, this significant criminal justice enactment rang out as the kind of reform still possible under the right circumstances. Section 404 of the First Step Act, “[c]ritical to that coalition,” applied the 2010 changes to the crack and powder cocaine sentencing ranges retroactively, enabling offenders still in prison to apply for resentencing under the fairer terms.⁶

Tarahrick Terry was denied this opportunity. Federal prosecutors argued (and the Eleventh Circuit agreed) that section 404 did not apply to the drug offense under which he had been convicted for possessing just under four grams of crack cocaine — the bottom tier on the ladder of offenses involving possession with intent to distribute.⁷ During his original sentencing under the 1986 Anti-Drug Abuse Act,⁸ coupled with the relevant enhancements under the Federal Sentencing Guidelines, Terry faced a sentencing range of no more than thirty years, and the district court ultimately imposed a sentence of 188 months, followed by a period of supervised release.⁹ With the benefit of the First Step Act, the upper limit on his sentence would have been twenty years, which in his view almost certainly would have translated into a substantially lower sentence than he received.¹⁰ As he explained in his petition for certiorari, the evidence from the first year of the First Step Act has been powerful: district courts have applied section 404 to reduce sentences on

⁴ Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, 34, and 42 U.S.C.).

⁵ Brief of Senators Richard J. Durbin et al. as Amici Curiae in Support of Petitioner at 2, *Terry*, 141 S. Ct. 1858 (No. 20-5904) [hereinafter Brief of Senators Richard J. Durbin et al.].

⁶ *Id.*; see First Step Act § 404.

⁷ See Petition for a Writ of Certiorari at 13–14, *Terry*, 141 S. Ct. 1858 (No. 20-5904). Terry was charged under 21 U.S.C. § 841(a)(1) and sentenced to just over 15.5 years pursuant to 21 U.S.C. § 841(b)(1)(C). See *id.* at 11. When the Supreme Court granted certiorari in the case, three other courts of appeals had also adopted this construction of the statute, whereas two more had concluded that the 2018 statute applied in cases like Terry’s. See *id.* at 14. Section 404 of the First Step Act authorizes federal district courts to reduce the sentence of anyone convicted of a “covered offense,” First Step Act § 404(b), which Congress defines as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . , that was committed before August 3, 2010.” *Id.* § 404(a). The question in the case was thus whether the statutory penalties for the offense for which Terry was convicted, under 21 U.S.C. § 841(b)(1)(C), were “modified” by the Fair Sentencing Act. Petition for a Writ of Certiorari, *supra*, at i.

⁸ Pub. L. No. 99-570, 100 Stat. 3207 (1986).

⁹ See *Terry*, 141 S. Ct. at 1862 n.3, 1866; Petition for a Writ of Certiorari, *supra* note 7, at 22.

¹⁰ See Petition for Writ of Certiorari, *supra* note 7, at 12, 25.

average by seventy-one months, or by 26%.¹¹ More than 90% of those who have obtained relief have been Black men, 57.4% of whom were sentenced as career offenders.¹²

The United States government opposed certiorari in the case. Throughout most of the litigation and across the courts of appeals, the Department of Justice (DOJ) consistently defended the construction of the First Step Act that precluded Terry and those similarly situated from resentencing.¹³ But in March of 2021, the acting Solicitor General (SG) sent the Court a letter.¹⁴ “Following the change in Administration,” she wrote, “the Department of Justice began a process of reviewing the government’s interpretation of Section 404 of the First Step Act,” after which it changed its position to support Terry’s claims that the First Step Act applied to him.¹⁵ The government was now calling for the reversal of the Eleventh Circuit and seeking leave to file an out-of-time brief.¹⁶ The Court obliged and appointed an amicus to take the position the government had abandoned.¹⁷ The government’s about-face required the Court to reschedule the argument for May, when it ordinarily would have closed its virtual doors and turned inward to produce the stream of summer opinions.¹⁸ It also prompted questions from the Justices.

Chief Justice Roberts opened his questioning of the Deputy Solicitor General by noting the switch: “Prior administrations have done that. Subsequent administrations are going to do that. But I wondered what standard your office applies in deciding when to take that . . . step. Is it just that you think the position is wrong and you would have reached a different one?”¹⁹ Justice Barrett probed still further: “[Y]ou changed pretty late. It was the day your brief was due. Would you characterize [the government’s prior position] as implausible, or is it your position that the statute is ambiguous and that in light of the purposes of the

¹¹ See *id.* at 10 (citing U.S. SENT’G COMM’N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 43 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [<https://perma.cc/Z79J-TQY4>]).

¹² *Id.* (citing U.S. SENT’G COMM’N, *supra* note 11, at 44–45).

¹³ See *id.* at 12–13.

¹⁴ Letter from Elizabeth B. Prelogar, Acting Solic. Gen., U.S. Dep’t of Just., to Hon. Scott S. Harris, Clerk, U.S. Sup. Ct. (Mar. 15, 2021), https://www.supremecourt.gov/DocketPDF/20/20-5904/171877/20210315103509839_20-5904%20Terry.pdf [<https://perma.cc/N6DT-ERC6>].

¹⁵ *Id.* at 1.

¹⁶ See Motion of the United States for Leave to File Out of Time and Brief for the United States, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904).

¹⁷ See *Terry*, 141 S. Ct. at 1862.

¹⁸ See Docket Entry on March 25, 2021, *Terry*, 141 S. Ct. 1858 (No. 20-5904) (rescheduling oral argument).

¹⁹ Transcript of Oral Argument at 34, *Terry*, 141 S. Ct. 1858 (No. 20-5904), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-5904_1bn2.pdf [<https://perma.cc/632G-7FT4>].

First Step Act and the Fair Sentencing Act that yours is the better interpretation?”²⁰ The cold transcript masks any hint of skepticism or annoyance behind these questions. But the Justices were clearly seeking to get their bearings — to determine the modes of reasoning the government had adopted to change its view of the law. The Justices were looking for familiar processes or administrative law concepts with which to assimilate the government’s switch into the range of reasonable disagreement about the law’s meaning.²¹

Tarahrick Terry lost in the Supreme Court by a vote of 9–0, despite the fact that the U.S. government had changed its reading of the law to support his claim to resentencing.²² He is scheduled to be released from prison later this year, so the outcome of the case will have a limited effect on him.²³ But the Court’s reading of the statute will have significant implications for defendants like Terry who were sentenced before 2010, for terms of a decade or more, for convictions involving low-level drug possession.²⁴ The exquisite technical puzzle of the case does not quite match the gargantuan political effort the two reconciled statutes represent — the bipartisan effort to refashion the punitive federal sentencing regime in a way that transformed the system from top to bottom. But despite the government’s best efforts, not a single Justice could reach an answer that matched the text with the actual ambitions of the new sentencing regime as articulated by the lawmaker amici.²⁵ In her concurrence, Justice Sotomayor called on Congress to use its “tools to right this

²⁰ *Id.* at 52–53.

²¹ Justices in other cases have taken note and even expressed displeasure when the government has changed its position before the Court. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), Justice Scalia took the Solicitor General to task: “[T]hat is a new position for the . . . State Department, isn’t it? . . . [A]nd for the United States Government? Why should . . . we listen to you rather than the solicitors general who took the opposite position . . . ?” Transcript of Oral Argument at 43, *Kiobel*, 569 U.S. 108 (No. 10-1491), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/10-1491rearg.pdf [<https://perma.cc/DC2Z-ARFF>]; see also Transcript of Oral Argument at 28, *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (No. 16-980), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-980_5426.pdf [<https://perma.cc/9Y85-XTGM>] (statement of Sotomayor, J.) (“General, could you tell me, there’s a 24-year history of solicitor generals of both political parties under . . . Presidents of both political parties who have taken a position contrary to yours . . . Seems quite unusual that your office would change its position so dramatically.”).

²² See *Terry*, 141 S. Ct. at 1858, 1864.

²³ See Ekow Yankeh, *In Final Case the Court Will Hear This Term, Profound Issues of Race, Incarceration, and the War on Drugs*, SCOTUSBLOG (May 3, 2021, 11:03 AM), <https://www.scotusblog.com/2021/05/in-final-case-the-court-will-hear-this-term-profound-issues-of-race-incarceration-and-the-war-on-drugs> [<https://perma.cc/3GW4-26FV>].

²⁴ The brief submitted by the ACLU and the NAACP Legal Defense and Education Fund highlighted some of these cases. See Brief Amici Curiae of the American Civil Liberties Union et al. in Support of Petitioner at 23–29, *Terry*, 141 S. Ct. 1858 (No. 20-5904).

²⁵ The First Step Act applies the new sentencing schemes of the Fair Sentencing Act retroactively to defendants sentenced for a “covered offense,” defined as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act

injustice,” to once and for all accomplish what lawmakers believed they already had achieved but in fact had failed to bring to fruition because of inartful drafting.²⁶ Members of Congress from both parties immediately pledged to make the necessary changes to the law.²⁷

The juxtaposition of the government’s changed position with the resounding loss immediately raises questions about the shift in position in the first place. Was the government’s confession of error itself an error? In his opinion for the Court, Justice Thomas accused the government of having engaged in a textual “sleight of hand.”²⁸ Does the stark contrast between the government’s argument and the unanimous Court’s conclusions show that the changed position was politically motivated? If the answer to this question is yes, does it matter?

of 2010 . . . , that was committed before August 3, 2010.” First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222. Federal law defines non-marijuana drug offenses in three tiers. See 21 U.S.C. § 841(b)(1)(A)–(C). The Fair Sentencing Act changed the quantity of crack cocaine required for a Tier 1 offense from 50 grams and above to 280 grams and above and for Tier 2 offenses from between 5 and 49 grams to between 28 and 279 grams. *Id.* § 841(b)(1)(A)–(B). The Act also eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine. See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 29–30 (2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf [<https://perma.cc/E7G7-XTHT>]. Congress did not, however, change Tier 3, which applies to offenses involving less than five grams. 21 U.S.C. § 841(b)(1)(C). Based on this congressional silence, federal prosecutors have argued that the Fair Sentencing Act did not “modify” Tier 3 offenses and that the retroactive effect of the First Step Act does not apply to Tier 3 offenses as a result. See, e.g., Petition for a Writ of Certiorari at i, *Terry*, 141 S. Ct. 1858 (No. 20-5904). Petitioner Terry, prominent U.S. Senators as amici curiae in support of petitioner, and now the U.S. government responded with their own textualist, legalistic approach to the case, arguing that Congress’s use of the word “modified,” with its broader meaning than “amended,” demonstrated that the changes to Tiers 1 and 2 raised the quantities required for Tier 3 offenses as well. Brief of Senators Richard J. Durbin et al., *supra* note 5, at 11–17, 26–30; Transcript of Oral Argument, *supra* note 19, at 26, 36–37. The amicus brief from the four sponsoring Senators was curiously bifurcated. See Brief of Senators Richard J. Durbin et al., *supra* note 5, at 2–3. The first half offered numerous pages of quotations from lawmakers in both parties about the historic, transformative, and practically bipartisan sweep and pedigree of the bill, *id.* at 3–10, and the second half then pivoted to a pure textual analysis that made no effort to explain the relevance of the statute’s historic nature to how the Court should interpret it, *id.* at 11–16. And yet the suggestion behind the brief’s acclaim for the political consensus behind the law must on some level have been intended to suggest that it should be read generously, not narrowly.

²⁶ *Terry*, 141 S. Ct. at 1868 (Sotomayor, J., concurring).

²⁷ See Press Release, Sen. Chuck Grassley, Grassley, Durbin Statement Supreme Court First Step Act Ruling on Low-Level Drug Offenders (June 14, 2021), <https://www.grassley.senate.gov/news/news-releases/grassley-durbin-statement-supreme-court-first-step-act-ruling-on-low-level-drug-offenders> [<https://perma.cc/5ZJP-Q99H>] (“[T]his decision doesn’t mean that nothing can be done. It’s now up to Congress to clarify the statute to unambiguously address sentencing in the cases like Mr. Terry’s.”).

²⁸ *Terry*, 141 S. Ct. at 1863. The government had argued that the statute’s reference to modified “statutory penalties” referred to the “penalty scheme,” not the specific penalty provisions directly altered by the First Step Act. *Id.* The Act defines “covered offense” as a “violation of a Federal criminal statute, the statutory penalties for which were modified by . . . the Fair Sentencing Act.” First Step Act § 404(a).

The fact that October Term 2020 straddled two presidential administrations representing two different political parties with highly salient and distinct identities, at a moment of political and social unrest, unsettled the Court's regular order by laying bare that legal interpretation is, in fact, often a function of politics.²⁹ Elections matter, not just for the policies the new executive branch will pursue, but also for what its lawyers will tell us and the courts about what the law requires or allows. Whether they like it or not, courts will be active participants in the political evolution represented by a new administration. The advent of this most recent one has already underscored (again) that the rhetoric and presumptions of legal continuity and transcendence are fragile and sometimes deceptive.

In this Foreword, I take October Term 2020 — a Term of transition — as an occasion to explore both the processes and the promise of what I will call regime change, or the replacement within the executive branch of one set of constitutional, interpretive, philosophical, and policy commitments with another. Given the occasion, I focus on the role of law, legal argument, and the courts in enabling or thwarting regime change and the democratic evolution it represents. Indeed, our current political transition confronts us with a central tension of our legal order, between a judicial and legal culture that valorizes stability and custom using language and concepts that sound in rule of law, and the democratic imperative that our institutions help effectuate rather than impede the political will reflected in election results.³⁰ It requires us to ask: What counts as a legitimate basis for change? How reasoned versus responsive should the government's legal and policy positions be? Are stability and democracy incommensurate values?

My basic claim will be that, in thinking through these and related questions, we ought not rush to treat disruption and change as shocks or aberrations that must be rigorously explained. Shifts in legal argument should not be met with skepticism, and they often should be credited as legitimate reinterpretations of law that, in turn, will help give rise to a new political regime. More generally, we should regard rapid evolution in legal interpretation and corresponding policy development as things to be valued, enabled, and pursued. The processes of unfurling, establishing, and perhaps eventually consolidating a new regime will extend well beyond an administration's first change of clothes be-

²⁹ For a nuanced discussion of what is entailed in the Office of the Solicitor General changing its position, with a focus on shifts precipitated by the advent of the Obama and Trump Administrations, see Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 YALE L.J.F. 541, 547–54 (2021); and *infra* notes 47–51 and accompanying text.

³⁰ Professors Robert Post and Reva Siegel capture this tension in their essay, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378–79 (2007), analyzing the practice of constitutional interpretation as coordinating commitment to rule of law and democratic self-governance.

fore the Court and will depend on the development of novel legal arguments and the valuation of institutional creativity. The viability of each of these dynamics, in turn, will depend upon the existence of political will on the inside to push for such innovation and political and legal patience on the outside to allow these dynamics to play out.

Valuing and pursuing these forms of change are justified, ultimately, because they help to sustain a connection between government and democratic politics. This connection should lead us to identify and then think twice about legal doctrines, institutional features, and modes of argument that slow transitions and transformations down, either intentionally or in service of objectives laudable on their face.³¹ We should be wary of the turn to legalisms that purport to advance the rule of law but that in fact inhibit the evolution of our political order. Moments of transition, such as the one through which we are living, can help to reveal how the concept of the rule of law forms part of an agonistic struggle perpetuated not just by courts, but also by political actors. The concept provides a ready-made vocabulary, well rooted in our legal culture, that serves important values but that can also be employed to stifle democratic development.³²

Sometimes, perhaps even often, presumptions in favor of the status quo may be wise, particularly when it comes to the exercise of executive and administrative power (my primary focus). But the orientation I take in this Foreword is to defend the use of power to bring regime change about, not without regard to institutional interests in stability, but with

³¹ One limited way to think about transitions is to focus on the period during an outgoing presidency when preparations are being made to transfer power. See *infra* notes 36–39 and accompanying text. These transition periods are critical to a new administration's ability to hit the ground running, and the early spate of executive orders issued by President Biden required months of advanced work before he took office. See Sarah Mucha, *Biden Officially Forms Transition Team*, CNN (June 20, 2020, 2:34 PM), <https://www.cnn.com/2020/06/20/politics/joe-biden-transition-team/index.html> [<https://perma.cc/WTV9-RPFZ>] (noting the formation of the Biden transition team in June 2020); Lisa Rein, *These Are the Experts Who Will Lead Biden's Transition at Federal Agencies*, WASH. POST (Nov. 10, 2020, 3:03 PM), https://www.washingtonpost.com/politics/biden-transition-team-federal-agencies/2020/11/10/6b4b6388-237f-11eb-a688-5298ad5d580a_story.html [<https://perma.cc/H8EK-KC8Z>] (noting the appointment of 500 experts to review the state of federal agencies and begin the development of policies for the new Administration). But the concept of transition I explore in this Foreword extends across years because of what is required to bring a political vision to fruition.

³² As I hope will become clear, my claim is not that rule-of-law concepts are necessarily invoked in bad faith, nor that arguments about stability, consistency, reasoned elaboration, and similar values ought not be taken seriously, but rather that they can be and are used to thwart legitimate and important disruption and change. In making these arguments, I will be clear that the collection of rule-of-law legalisms I'm describing are in the main desirable features of a legal order — which is in fact part of the challenge and tension. In certain contexts, they seem required not only by constitutional baselines around which most partisans can find consensus (the importance of due process and government neutrality in individual adjudications, for example), but also by norms aimed at preventing corruption and abuse of power by high officials (walling off criminal and other law enforcement-type investigations from partisanship, for instance).

a view to cultivating institutions capable of making political and democratic change concrete. This orientation centers two basic principles of vital importance to the nation's future as a polity: making the government work for the people and ensuring that the people accept the outcomes of democratic processes, even when they are outcomes with which they disagree.³³

In Parts I and II of this Foreword, I develop the concept of regime change. Part I is descriptive and presents an institutionally specific and context-dependent account by detailing the legal and policy changes brought about in the early months of the new presidential Administration. Consideration of what justifies a new administration's change of position before the Court — whether it should occur only sparingly, or as much as necessary to reflect the administration's values — only begins the inquiry into regime change. Legal innovation turns out to be vital to the realization of a new political order. This account thus requires an extended engagement with the relationship between law and politics, from which emerges a neorealist conception of each enabling the other.³⁴

Part II turns to justification and defends the concerted effort by executive officials to instantiate a new legal and political order, including by undoing the work of a predecessor administration. In this Part, I defend political disruption of legal and policy processes, casting skepticism on the arguments for stability and continuity often invoked by courts and commentators to slow down the exercise of power. I focus on what it can mean for a new regime to rise within the executive branch, contending that an assertive orientation to the new regime's powers has become essential in our time to maintaining responsive and effective institutions of governance. Neither the pursuit of legal and political change through reinterpretation of the law on the one hand,

³³ In their influential book, political scientists Steven Levitsky and Daniel Ziblatt identify two crucial norms that have made American democracy work: “[M]utual tolerance and institutional forbearance.” STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 212 (2018). The first of these two is integral to this concept of regime change — that is, “[t]reating rivals as legitimate contenders for power,” *id.*, which must entail accepting the legitimacy of their exercise of power. This bedrock assumption of our democratic order is both demanding of partisans and also increasingly at risk. What precisely is meant by institutional forbearance and how that might be in tension with the way a regime exercises power once it has power are the central themes of this Foreword. Cf. BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 18 (2020) (advocating application of a “golden rule” analysis to claims about how to constrain power: “Always imagine whether a constraint on the presidency would be legitimate if your preferred president were in office or, reciprocally, whether a conferral of presidential discretion would be legitimate if exercised by a president of another party.”).

³⁴ Cf. Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1250 (1931) (describing realism as a “mass of trends in legal work and thinking,” which includes “recognition of law as means; recognition of change in society that may call for change in law; interest in what happens; interest in effects[;] . . . [b]ut into the work of lower courts, of administrative bodies, of legislatures, of the life which lies before and behind law, the ferment of investigation spreads”).

nor the insistence on continuity in government on the other, has a single ideological valence. But my argument does challenge a particular, transcendent conception of the law and offer an account of self-government that depends on respect for the state — both contested positions in today's legal debates. These positions, in turn, require engaging the important structural question with which I end this Part. Treating executive governance as necessary to fulfilling the goals of democratic politics requires exploring the relationship of such governance to the capacities of Congress. Accordingly, I consider how interbranch relations might be implicated in regime change; the phenomenon I describe cannot have meaning without reference to the regime state of the other branches.

In Part III, because of the occasion for this Foreword, I focus on the role the courts play in facilitating and mediating the processes of regime change, not just at moments of transition, but in governance more generally. This inquiry requires critical consideration of the administrative law doctrines that structure and regulate policy change and development, as well as of the Court's rapidly evolving jurisprudence implicating the very capacity to govern. Though often couched in procedural, structural, or formal principles of law, this jurisprudence ultimately amounts to a political intervention because of the way it constrains the choices of the political branches. I argue that ideological and political preferences should be credited as justifications for administrative action, because administration is not just about rationalist thought, but also about evolving preferences.

What is more, recent jurisprudential developments that affect the capacities of government underscore that the Court itself has undergone its own regime change, and that judges can be agents of the phenomenon. We are, in fact, in a moment of regime conflict, the wages of which I explore to conclude this Part. Just as both the presidency and Congress were about to revert to Democratic hands, President Trump replaced the late Justice Ginsburg with Justice Barrett, creating a 6–3 conservative majority on the Court. Even if we acknowledge that there will be (and already have been) alliances among Justices in cases that are not predicted by ideology, and that the labels “conservative” and “liberal” contain within them distinct jurisprudential methodologies and orientations to doctrinal fields, the new array of Justices puts a fine point on the conservative identity of the judicial branch. Our particular moment and this particular Term thus offer up a stark contrast — between a new Administration and a Court with discordant theories of law, the state, and the reach of the Constitution.

I end with a Coda that considers how two developments in contemporary political culture, which also happened to buffet the Court this Term, threaten to render all of the preceding discussion superfluous. Increasingly, partisan and pitched debates over voting rights and immi-

gration — over whether and how to set limits on the polity’s expansion — threaten a kind of regime entrenchment that would distort and even subsume the dynamics of regime change that I describe and defend. Rule of law–style claims that long have been invoked to justify such limits today barely mask a deeper impulse to exclude people from power in order to prevent regime change altogether.

I. ELEMENTS OF REGIME CHANGE

The presidential transition that transpired over the course of the Supreme Court’s most recent Term was really the tale of two transitions. If we focus narrowly on the actual transfer of power in the period between the election and the inauguration, the transition’s feature most visible to the public was the outgoing Administration’s obstruction.³⁵ Though Congress has created a legal framework to ensure continuity in government, we learned in 2020 that its smooth functioning, like many aspects of the presidency, depends on the people who inhabit the relevant roles respecting norms of fair dealing and cooperation.³⁶ The outgoing President himself repeatedly and flagrantly breached these norms, likely driven by his refusal to accept the election’s clear outcome.³⁷ This

³⁵ Four days after the 2020 presidential election, after most major news outlets projected that Joe Biden and Kamala Harris would be the President-elect and Vice President-elect, President Trump released a statement that cast doubt on the transparency and legitimacy of the election results. See *Text of Statement from President Donald Trump*, ASSOCIATED PRESS (Nov. 7, 2020), <https://apnews.com/article/transcript-statement-donald-trump-c809d17b5cd34048e1a5e9bbb4b73cb7> [<https://perma.cc/E2KA-XCRR>] (“We all know why Joe Biden is rushing to falsely pose as the winner[:] . . . they don’t want the truth to be exposed. . . . The American People are entitled to an honest election: that means counting all legal ballots, and not counting any illegal ballots. . . . It remains shocking that the Biden campaign . . . wants ballots counted even if they are fraudulent, manufactured, or cast by ineligible or deceased voters.”).

³⁶ The transition period officially commences when the Administrator of the General Services Administration (GSA) ascertains the “apparent successful candidates” of the election. See 3 U.S.C. § 102 note (Services and Facilities Authorized to be Provided to Presidents-Elect and Vice Presidents-Elect); see also GEN. SERVS. ADMIN., ADM 1080.1D, GSA SUPPORT FOR ELIGIBLE PRESIDENTIAL CANDIDATES, PRESIDENTIAL TRANSITION AND INAUGURAL (2012) (describing ascertainment). After the transition begins, the Administrator must appropriate funds to the incoming administration’s transition team to carry out transition activities. See 3 U.S.C. § 102 note (Authorization of Appropriations) (stipulating that “not more than \$3,500,000 may be appropriated for the purposes of providing services and facilities to the President-elect and Vice President-elect” during the transition, though mandating that this amount be adjusted for inflation); Continuing Appropriations Act of 2021 § 134(a), Pub. L. No. 116-159, 134 Stat. 709, 716 (2020) (appropriating \$9.9 million to the GSA “for necessary expenses to carry out the Presidential Transition Act”).

³⁷ On November 23, 2020, President Trump tweeted that he recommended that the GSA Administrator, Emily Murphy, and his White House staff begin the transition. A letter “ascertaining” Joe Biden and Kamala Harris as the President-elect and Vice President-elect was sent from the GSA Administrator to Joe Biden that same day. See Kevin Breuninger, *Trump Administration Officially Begins Transition to Biden After Weeks of Delay*, CNBC (Nov. 24, 2020, 10:53 AM), <https://www.cnbc.com/2020/11/23/trump-appointee-informs-biden-that-gsa-will-begin-transition-process-reports-say.html> [<https://perma.cc/6789-AXE8>]. Months later, however,

refusal, in turn, prevented officials inside the Administration from recognizing the President-elect for weeks beyond what had long been customary, including during previous transitions in party control of the White House.³⁸

But during this same period, hundreds of people nonetheless expended extraordinary energy to lay the groundwork for regime change.³⁹ At least as measured by the raft of executive orders, proclamations, and memoranda issued by the new President in the weeks after the inauguration, the transition was a productive success.⁴⁰ These many presidential acts performed two primary functions: they announced the Administration's vision across a range of high-priority policy domains, and they initiated policy processes across the administrative state to translate that vision into concrete rules, guidelines, and practices. In other words, they were necessary "preludes" to months and years of

President-elect Biden continued to accuse President Trump's agencies of obstruction. See Kevin Breuninger & Amanda Macias, *Biden Accuses Trump's Pentagon and OMB of Obstruction, Demands Cooperation with Transition Team*, CNBC (Dec. 28, 2020, 7:08 PM), <https://www.cnbc.com/2020/12/28/biden-accuses-trumps-pentagon-and-omb-of-obstruction-demands-cooperation.html> [https://perma.cc/L9WN-KJEL]. The events of January 6, 2021, at the U.S. Capitol dramatically underscored just how far the outgoing President and his supporters were willing to go to undermine the transition of power. See Patricia Zengerle & Richard Cowan, *Pro-Trump Protesters Swarm Capitol Amid Challenge to His Election Loss*, REUTERS (Jan. 6, 2021, 6:05 AM), <https://www.reuters.com/article/us-usa-election-congress-idUSKBN29B1A8> [https://perma.cc/WYY4-ABHD].

³⁸ The transition between the Trump and Biden Administrations has not been the only protracted one in living memory. The Florida recount in 2000 left President-elect George W. Bush with just thirty-seven days before his inauguration to execute a transition. *How 2020's "Unusual" Presidential Transition Compares to Past Transfers of Power*, CBS NEWS (Nov. 24, 2020, 9:35 AM), <https://www.cbsnews.com/news/us-presidential-transition-trump-biden-history> [https://perma.cc/TJ7T-Q7CR]. That delay later became part of the report of the 9/11 Commission, which observed that the "shortened transition left the country vulnerable to a terrorist attack because national security officials were playing catch up." *Id.* And though President Clinton did not encounter obstruction from his predecessor, his transition generally has been characterized as disorganized and chaotic. See JOHN P. BURKE, *PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE* 3 (2000) (attributing the delay in President Clinton's policy agenda in part to the "failure to marshal, during the transition period, some of the resources it would need to perform effectively," and to poor management decisions during the transition); see also Graham Vyse, *Bill Clinton's Transition Was Worse Than Trump's (For Now)*, NEW REPUBLIC (Nov. 16, 2016), <https://newrepublic.com/article/138805/bill-clintons-transition-worse-trumps-for-now> [https://perma.cc/AZW7-HH99].

³⁹ In addition to emphasizing the importance of collaboration between outgoing and incoming administrations — including for the transmission of vital institutional knowledge, see BURKE, *supra* note 38, at 4 — political science scholarship also emphasizes how transitions are increasingly becoming extensions of campaigns, heightening their volatility, see CHARLES O. JONES, *PASSAGES TO THE PRESIDENCY: FROM CAMPAIGNING TO GOVERNING* 5, 118 (1998).

⁴⁰ See, e.g., Jason Breslow, *Biden's 1st 100 Days: A Look by the Numbers*, NPR (Apr. 27, 2021, 5:00 AM), <https://www.npr.org/2021/04/27/988822340/bidens-1st-100-days-a-look-by-the-numbers> [https://perma.cc/9GMN-KJ7H]. For a tabulation of the number of executive orders issued by each President since George Washington, see *Executive Orders: Washington–Biden*, THE AM. PRESIDENCY PROJECT (Sept. 20, 2021), <https://www.presidency.ucsb.edu/statistics/data/executive-orders> [https://perma.cc/R4NP-HV FY].

complicated work. Indeed, though scholars typically define the presidential transition as occurring from six months before the election to six months after the inauguration, the concept of regime change I explore in this Foreword extends across years because of what is required to bring a political vision to fruition.⁴¹

Shifting our perspective in this way, from transition to regime change, demands a definition of concepts. My descriptive account of regime change entails something more than a mere transition from one administration to the next. Had Hillary Clinton won the 2016 election, for example, the transition from the presidency of Barack Obama to hers would have entailed regime continuity. I characterize today's political transition as the advent of a regime change because the rise of the Biden Administration, in both its campaign and transition phases, has entailed the replacement of one conception of the law and its limits, and one view about the purpose of government and its limits, with another — contrasts I hope to bring to life in this Part. The fact that the people and ideas that sustain these new conceptions now control the levers of government further justifies referring to the new Administration as a regime.

My concept of regime change, while intended to signal the possibility of legal and political transformation, is also much less sweeping and more partial and workaday than the big-picture histories and typologies offered by other scholars. Professor Stephen Skowronek, for example, offers a much-discussed account of the cycles of political time and a historicized typology of presidential regimes, each of which encompasses numerous presidencies of different parties.⁴² But because something short of the type of transformational presidency that Skowronek treats as defining a new regime can still shape our legal and political cultures, not to mention the material world we live in, the concept of a regime

⁴¹ For a helpful conceptualization of the transition itself, see James P. Pfiffner, *Presidential Transitions*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 85, 86 (George C. Edwards III & William G. Howell eds., 2009) ("Most scholars adopt the widely accepted bounds of transition as extending from about six months before the election to six months after inauguration.").

⁴² See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 34–45 (1993). Skowronek argues that presidential powers are defined and delimited by the stage of regime cycle in which a President finds himself. *Id.* at 34. A regime is defined by a reigning set of political and ideological commitments (and an opposition party), such as the New Deal regime that ran from 1932–1980, or the Reagan regime that began in 1980 and may now be in its death throes. *See id.* at 287–88, 405, 446. He writes: "A president's political authority turns on his identity vis-à-vis the established regime; warrants for exercising the powers of the office vary depending on the incumbent's political relationship to the commitments of ideology . . . embodied in preexisting institutional arrangements." *Id.* at 34. So, for example, Ronald Reagan was a reconstructive President who remade government wholesale, the two George Bushes were affiliated Presidents who sustained and adapted the Reagan regime, Bill Clinton and Barack Obama were preemptive Presidents — opposition leaders forced to compromise and triangulate while still challenging the dominant ideology — and Donald Trump was a disjunctive President, ascending in the midst of the regime's decay. *See id.* at 36–45, 414, 430, 446.

suits what I describe in this Part. I do acknowledge that a particular regime's ability to enact its legal and political visions will depend a great deal on where that regime sits in history and in relation to the other branches of government, federal and state, which may themselves be governed by regimes counter to the one in control of the presidency.⁴³ In other words, my concept of regime change contemplates the possibility of regime conflict across the branches. How could it be otherwise in our moment of partisan polarization? Indeed, one of the striking features of this Term, which I spend time exploring in Part III, is that it juxtaposes a new political regime within the executive branch with the consolidation of an entirely different regime in the judiciary generally and the Supreme Court in particular.

Every presidential transition produces changes in personnel and policy.⁴⁴ But the advent of the Biden Administration has been highly consequential for the U.S. government. The sea change in personality, legal positions, policy priorities, and governing style that transpired in January 2021 may be recorded as among the most significant in U.S. history.⁴⁵ That this most recent regime change occurred in a highly po-

⁴³ My version of regime change, in some sense, reflects the privileges of peace. For all of the invective, polarization, and even violence that accompanies our present moment, the reordering I am describing is far less totalizing than recovery from what Professor Kim Lane Scheppele calls "regimes of horror," see Kim Lane Scheppele, *Constitutional Interpretation After Regimes of Horror*, in *LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES* 233, 233–57 (Susanne Karstedt ed., 2009), and decidedly more gradualist and less revolutionary than the coerced regime changes abroad that the United States has been responsible for unleashing. American politics of our time do not entail regime change of the most wrenching kind: the aftermath of a civil war whose bloodshed necessitates and produces a new constitutional regime, as emerged from the American Civil War. The upheaval associated with recovery from periods of this sort of evil recalls the famous story, recounted by H.L.A. Hart, of a wife who denounced her husband to the German courts for making disparaging remarks about Hitler, which led to the husband's imprisonment. After the war, the wife was herself prosecuted as part of German society's reckoning with the Nazi regime, and the court that ultimately convicted the wife explained that she utilized out of free choice a Nazi law "contrary to the sound conscience and sense of justice of all decent human beings." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 618–19 (1958). As the period of American retrenchment in the decades after the Civil War and Reconstruction reminds us, even regime changes of this profound sort may not exorcise the prejudices and interests that sustained the order ostensibly replaced.

⁴⁴ As Professors Stephen Skowronek, John Dearborn, and Desmond King put it: "All [Presidents] disrupt prior arrangements . . . the critical question is how far down the disruption reaches, how deeply it cuts." STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* 5 (2021).

⁴⁵ For one indication that President Biden may well represent the start of a new order — the beginning of the end to our polarized state through potential political realignments — see JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 69 (2020). See also Jack M. Balkin, Addison C. Harris Lecture, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 *IND. L.J.* 253, 295 (2019) ("Trump was only able to rise to power because the Reagan coalition is aging and falling apart . . . It will eventually fall away, replaced by a new regime . . ."). To put it

larized political environment, after an actual violent attack by supporters of the losing candidate on Congress, dramatically heightens the stakes and fragility of the change through which we are living. Whether our current regime change will be transformational or simply another turn in the cycles of political time will depend, of course, on numerous contingencies in what comes next.⁴⁶ And, as my discussion will make clear, whether President Biden represents the beginning of a new order or not, his power will be limited by the increasingly thick institutions of American government, as well as by the current polarized state of our politics.

In what follows, I trace some of the acts of the new Administration's first days and months to bring to light the myriad dimensions and mechanisms of regime change — the complex legal and institutional maneuvers entailed in bringing to fruition a new set of political ambitions and even a new conception of government. I begin with the government's changed legal positions this Term before the Supreme Court — the highest profile of venues for the announcement of a new legal order. These changes are but the beginning of legal and political transformation, however. The realization of regime change includes not only making new legal arguments in court but also developing new legal policy, developing new understandings of the policy that is legally possible, and through all of these vehicles, advancing a conception of the government and its functions that achieves the regime's substantive objectives. By tracing the steps taken along these lines, we get a very vivid picture of what it means for law to be in service of politics and for politics to be shaped by law.

in Skowronek's terms, the Trump presidency was a disjunctive one, reflective of a last gasp of a prior transformational presidency: the Reagan regime. See SKOWRONEK, *supra* note 42, at 34–45. Elected as a through-and-through contrast to President Trump, President Biden and his Administration arguably contain the component parts of a new transformation that will accomplish more than simply providing a counterweight to the Reagan vision, as Skowronek argues the Clinton presidency did. *Id.* at 446. Of course, whether the Biden presidency results in true transformation depends in part on the strength of the opposition party, its hold on structural features of government, and the state of public opinion as shaped by contemporary economic and social developments. Skowronek himself suggests that the possibilities for the sort of regime change he envisions have run out. *Id.* at 442–44. The growth of political institutions, including the judiciary, has restricted the President's ability to bring about systemic change, *id.*, such that the era of transformational presidencies may be over. This development would leave the nation in a state of perpetual preemption, which “offers reasonable prospects for presidents to get things done and shake things up,” *id.* at 444, but scant room for revolutionary change — a state that favors pragmatism above all else, see *id.* at 444–45.

⁴⁶ These contingencies first and foremost include whether Democrats retain their weak control of Congress and whether the next election cycle pushes the country into divided government and new versions of the extreme partisan warfare of the Obama years.

A. *Switching Sides*

Realizing a consequential change of regime begins with identifying existing policies and practices that conflict with the new administration's agenda and values and then determining whether and how to undo them. This process often has immediate implications for the lawyers of the U.S. government. All policy emanates from law, and political regimes enter office accompanied by officials with jurisprudential worldviews that inevitably shape the new administration's understanding of the legally possible, the legally preferable, and the legally required. In just over a decade, control of the executive branch has changed hands from one party to the other three times. The Solicitor General's office and the Department of Justice have been crucial custodians of the consequent legal evolution in different ways, including by announcing to the Supreme Court the government's new positions on cases pending before it.

Government-initiated legal evolution can extend well into an administration, as new cases implicating old positions arise through the litigation pipeline over the course of years. Changes in the U.S. government's legal positions before the Court did not come until the second of President Obama's two terms, for example.⁴⁷ And the changes can occur gradually through shifts in litigation strategies in the lower courts over time. But the commencement of a new legal regime is usually the most visible in the Supreme Court Term that coincides with the political transition.⁴⁸ During President Trump's only term, the Office of the Solicitor General (OSG) announced four major position changes, in a string of cases in which the eventual outcomes matched the new Administration's bottom line and dramatically reshaped several areas of law.⁴⁹ The sharp contrast between the legal and political worldviews of

⁴⁷ For an account of these changes, which involved cases implicating the Alien Tort Statute, ERISA, the Federal Tort Claims Act, and the question of whether Puerto Rico constituted a separate sovereign for double jeopardy purposes, see Dreeben, *supra* note 29, at 549–51.

⁴⁸ It can be difficult to detect changes in the government's legal positions beyond the Term during which the transition takes place, when any changes to litigating positions already taken have to be made explicit. *See id.* at 548 n.25. Detecting shifts in position that are not clearly announced can require nuanced understanding of particular cases and the doctrinal lines into which they fit. In an interview on the subject, for example, former Deputy Solicitor General Michael Dreeben noted the more hostile posture of the government during the Trump Administration toward the Alien Tort Claims Act than during the Obama years, though that hostility was not made explicit as a position change. *See* Kimberly Strawbridge Robinson, *Biden on Pace to Flip Positions at the Supreme Court More than Trump*, BLOOMBERG L. (Mar. 18, 2021, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/biden-on-pace-to-flip-positions-at-supreme-court-more-than-trump> [<https://perma.cc/GRV2-AMKS>].

⁴⁹ *See* Dreeben, *supra* note 29, at 552. These cases included *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018); *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018); and *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

the new Biden presidency and the regime it replaced similarly were on vivid display during October Term 2020.

These changes in legal positions may have been few in number, but they opened a useful window into the mechanics and implications of regime change and nicely encapsulated a fundamental question: How much should our legal order value stability and seek to control change, either in defense of a conception of law as transcending politics or in pursuit of systemic values that might be loosely grouped under a “rule of law” heading, including predictability and transparency?

In general, the lawyers who initiate and then defend changed positions reportedly feel unease at declaring that the law now means something different than what the government previously represented.⁵⁰ These officials’ role morality understandably leads them to worry that their professional credibility, and even the integrity of the institution they inhabit, might be jeopardized if changed legal positions appear to be politically motivated rather than the result of good faith interpretation of the law. Not surprisingly, then, changed positions are often characterized as admitting error — a professionally required (and often performative) resistance to legal realism.⁵¹

But as the acts of the new Administration underscore, changed positions also typically signal that a new regime is in town — a regime that brings with it much more than campaign promises. It arrives, as well, with particular and contested views about statutory interpretation, the scope of constitutional rights, and commitments to particular legal values.⁵² Though the OSG is unlikely to characterize the process of transition in this way and might even actively resist it, the Court thus becomes a forum for announcing the legal priorities and positions a new administration intends to fight for.

⁵⁰ See *infra* note 84.

⁵¹ See Dreeben, *supra* note 29, at 542 (arguing that the OSG should operate with the presumption that it ought to correct errors before the Court).

⁵² This reluctance to change position relates to bigger picture questions concerning the legitimacy of legal interpretation and the decisionmaking of legal actors, including and especially the Supreme Court. In his work exploring legitimacy and the Court, Professor Richard Fallon has articulated three concepts of legitimacy — sociological (determined by the public’s acceptance of the Court’s decisions), moral (determined by the morality of the Court’s decisions), and legal (determined by the fit of the Court’s decisions given existing doctrine and legal materials). RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 21 (2018). Though the concept of error correction clearly emphasizes the legal, even that form of legitimacy can sustain varied interpretations of the law. And like the Court, the lawyers of the executive branch must balance the interrelationship of these forms of legitimacy (legal legitimacy may be essential to the sociological kind, for example). But unlike the Court as a whole (though maybe with a parallel in the individual Justices themselves), politically appointed executive branch lawyers are avatars of a political regime that contains within it a legal one. To borrow Fallon’s terms, for those lawyers neither “excessive flaccidity” nor “untenable rigidity” in legal interpretation will properly integrate these forms of validation. *Id.* at 127.

I. Enlisting the Court. — The Biden Administration’s intention to undo prominent features of its predecessor’s agenda became immediately visible in the disappearance from the Supreme Court’s calendar of two high-profile cases that might have produced consequential opinions concerning presidential power and border security. Each involved charged immigration policies of the Trump era that lower courts had enjoined but that the Court had permitted to remain in effect pending resolution on the merits.⁵³ On Inauguration Day, President Biden suspended further construction of the ur-symbol of his predecessor’s immigration platform — a new border wall. He began by pronouncing “unwarranted”⁵⁴ the border emergency President Trump had declared pursuant to the National Emergencies Act.⁵⁵ He further determined that the construction of a wall was “not a serious policy solution,” and ordered that “no more American taxpayer dollars be diverted” to it.⁵⁶ The Court had been poised to consider the legality of the Trump Administration’s repurposing of military construction funds for wall building — a repurposing supposedly unlocked by the emergency declaration.⁵⁷ The case thus implicated a fundamental separation of powers question (Congress’s authority to constrain executive power by controlling the funds at its disposal) in the form of technical statutory interpretation, which in turn might have prompted a debate on the Court about the extent to which declared presidential emergencies cast a shadow over that legal enterprise.

By declaring the precipitating emergency declaration unwarranted, President Biden defused the very public tussle between a prior Congress

⁵³ See *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564, 1564 (2020) (mem.); *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (mem.).

⁵⁴ Proclamation No. 10142, 86 Fed. Reg. 7225, 7225 (Jan. 20, 2021).

⁵⁵ National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended in scattered sections of 50 U.S.C.); Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019) (declaring a national emergency at the southern border); see also Damian Paletta, Mike DeBonis & John Wagner, *Trump Declares National Emergency on Southern Border in Bid to Build Wall*, WASH. POST (Feb. 15, 2019), <https://wapo.st/3g5qEFJ> [<https://perma.cc/6J92-HC3B>] (“We’re talking about an invasion of our country with drugs, with human traffickers, with all types of criminals and gangs . . .” (statement of President Trump)).

⁵⁶ Proclamation No. 10142, 86 Fed. Reg. at 7225.

⁵⁷ Funds for the construction were drawn from the Treasury Forfeiture Fund, pursuant to 31 U.S.C. § 9705(g)(4)(B); the Department of Defense Drug Interdiction and Drug Activities Account, pursuant to 10 U.S.C. § 284; and the Department of Defense Military Construction Account, pursuant to 10 U.S.C. § 2808(a) and 33 U.S.C. § 2293(a). See CHRISTOPHER T. MANN, CONG. RSCH. SERV., IN11675, AN UPDATE ON MILITARY FUNDING FOR THE BORDER WALL 2 fig.1 (2021); JENNIFER K. ELSEA & EDWARD C. LIU, CONG. RSCH. SERV., R45908, LEGAL AUTHORITY TO REPURPOSE FUNDS FOR BORDER BARRIER CONSTRUCTION 4–5 (2019). For a discussion of the legal authorities triggered by a declaration of national emergency under the National Emergencies Act, see Robert Chesney, *Can President Trump Fund the Wall by Declaring a National Emergency?*, LAWFARE (Jan. 7, 2019, 6:58 PM), <https://www.lawfareblog.com/can-president-trump-fund-wall-declaring-national-emergency> [<https://perma.cc/SJ5Q-E3ZX>].

that had clearly refused to allocate funds for wall construction and a prior Administration determined to exploit the technical details of appropriations laws to fulfill the President's wish for a wall.⁵⁸ The actual motion from the Acting Solicitor General simply asked the Court to remove the case from the calendar and hold briefing in abeyance in a measured request for time so that the new Administration could review the "legality of the funding and contracting methods used to construct the wall."⁵⁹ But the effect of the Court's granting the government's request was to obviate a three-branch constitutional confrontation that would have required the Court to resolve this dispute between the political branches. The Administration's decision to make the case disappear also gave the President his own powerful symbolic statement regarding his ambitions for a new immigration regime.

The second case removed from the calendar similarly involved a first-day reversal in border policy. It also obviated the production of a Supreme Court opinion that may well have been in tension with the Biden Administration's policy agenda — an opinion that might have offered an interpretation of the asylum laws that clearly empowered a future President to adopt the very policy the new regime now opposed.⁶⁰ *Pekoske v. Innovation Law Lab*⁶¹ would have addressed a challenge to the Trump Administration's controversial "remain in Mexico" policy — formally, the Migrant Protection Protocols (MPP) — pursuant to which the Department of Homeland Security (DHS) required non-Mexicans seeking asylum in the United States to remain in Mexico until their hearings.⁶² These waits in unsanitary and unsafe conditions, exacerbated by the pandemic, extended many months.⁶³ In the view of the government's challengers, the program defied the limits of statutory law and basic precepts of humanitarian protection.⁶⁴ But after the change

⁵⁸ For a brief account of this back-and-forth, see ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 1–2 (2020).

⁵⁹ Motion of Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar at 5, *Biden v. Sierra Club*, 141 S. Ct. 1289 (2021) (mem.) (No. 20-138).

⁶⁰ See Motion of the Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar at 1–3, *Pekoske v. Innovation L. Lab*, 141 S. Ct. 1289 (2021) (mem.) (No. 19-1212).

⁶¹ 141 S. Ct. 1289.

⁶² See Priscilla Alvarez, *Biden Administration Formally Ends "Remain in Mexico" Policy After Suspending It Earlier This Year*, CNN (June 1, 2021, 6:36 PM), <https://www.cnn.com/2021/06/01/politics/immigration-remain-in-mexico/index.html> [<https://perma.cc/PP7R-KU35>].

⁶³ Michael Garcia Bochenek, *US: "Remain in Mexico" Program Harming Children*, HUM. RTS. WATCH (Feb. 12, 2020, 8:00 AM), <https://www.hrw.org/news/2020/02/12/us-remain-mexico-program-harming-children> [<https://perma.cc/V23D-2Y2H>].

⁶⁴ See Brief for Respondents at 1, 6, *Mayorkas v. Innovation L. Lab*, 2021 WL 2520313 (U.S. June 21, 2021) (No. 19-1212) ("The agency has returned asylum seekers to border regions that the State Department considers as hazardous active-combat zones. . . . The State Department has

in administration, the Acting Secretary of Homeland Security announced that DHS would cease enrolling migrants in MPP, pending a review of the program,⁶⁵ and the Acting Solicitor General requested that the Court remove the case from its argument calendar and hold briefing in abeyance.⁶⁶

Again, the sparse motion masks some of the strategic and institutional complexities underlying the policy shift, though the negotiated nature of the Administration's new position is evident in the filing. In the same statement calling an end to MPP, the Acting Secretary explained that "current COVID-19 non-essential travel restrictions, both at the border and in the region, remain in place."⁶⁷ In other words, the end of MPP did not mean entry of all migrants into the United States. With the exception of unaccompanied children, asylum-seeking migrants would continue to be kept outside the United States pursuant to an order issued by the Department of Health and Human Services (HHS) exercising authority under the Public Health Service Act,⁶⁸ thus uneasily reconciling the Biden Administration's immigration and pandemic policies.⁶⁹ Similarly, the Acting Solicitor General's motion reflects

warned that 'gun battles, murder, armed robbery, carjacking, kidnapping, forced disappearances, extortion, and sexual assault' are common there" *Id.* at 6 (citations omitted).).

⁶⁵ On February 19, 2021, DHS began processing the cases of individuals enrolled in MPP in phases and on June 1, 2021, declared that the result of its review was a decision to terminate the program. See *Migrant Protection Protocols (Biden Administration Archive)*, U.S. DEP'T OF HOMELAND SEC. (Feb. 17, 2021), <https://www.dhs.gov/archive/migrant-protection-protocols-biden-administration> [<https://perma.cc/SEZ2-TGKL>].

⁶⁶ Motion of the Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar, *supra* note 60, at 1.

⁶⁷ Press Release, U.S. Dep't of Homeland Sec., DHS Statement on the Suspension of New Enrollments in the Migrant Protection Protocols Program (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program> [<https://perma.cc/2PE7-JQ6A>].

⁶⁸ Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§ 201-300).

⁶⁹ The U.S. District Court for the District of Columbia granted a preliminary injunction in November 2020 to bar enforcement of the Title 42 order with respect to unaccompanied minors. *P.J.E.S. ex rel. Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492, 520 (D.D.C. 2020). The D.C. Circuit later stayed the preliminary injunction pending appeal. Order, *P.J.E.S. ex rel. Escobar Francisco v. Pekoske*, No. 20-5357, slip op. at 1 (D.C. Cir. Jan. 29, 2021). Soon after, the Centers for Disease Control and Prevention (CDC) issued a notice "temporarily except[ing] . . . unaccompanied noncitizen children" from expulsion under Title 42. Notice of Temporary Exception from Expulsion of Unaccompanied Noncitizen Children Pending Forthcoming Public Health Determination, 86 Fed. Reg. 9942, 9942 (Feb. 12, 2021). The CDC explained that it was "in the process of reassessing" the Title 42 order and confirmed that the temporary exception for unaccompanied minors would "remain in effect until CDC has completed its public health assessment and published any notice or modified Order." *Id.* Recently, the district court again granted a preliminary injunction to prevent the Biden Administration's use of the Title 42 order to turn back families, though not single adults. *Huisha-Huisha v. Mayorkas*, No. 21-cv-00100, 2021 WL 4206688, at *1 (D.D.C. Sept. 16, 2021), *appeal filed*, No. 21-100 (D.C. Cir. Sept. 17, 2021). As the public health justifications for the order recede, the interest in exclusion for the sake of management is diminished.

a likely delicate negotiation with the case's respondents. They might still have sought resolution of the question of whether the government had authority to hold migrants in Mexico, but they nonetheless agreed to hold the briefing schedule in abeyance "without prejudice,"⁷⁰ perhaps to give the Administration time to resolve the underlying disputes as a policy matter rather than in court.

In these early reversals,⁷¹ the new Administration was able to achieve its crucial political and policy objectives relatively easily, at least at first.⁷² In the case of the border wall, the reversal was facilitated by the fact that the policies being undone flowed from emergency authority delegated to the President. The unwinding of MPP has proven to be more fraught, despite the fact that the policy's legal foundation was dubious to begin with, within the discretion of the Secretary of Homeland Security, and connected to the President's foreign policy. As this Foreword went to press, the Supreme Court, with three Justices dissenting, declined to stay a district court injunction ordering the Administration to reinstitute MPP, on the ground that the government

⁷⁰ Motion of the Petitioners to Hold the Briefing Schedule in Abeyance and to Remove the Case from the February 2021 Argument Calendar, *supra* note 60, at 2.

⁷¹ On February 22, 2021, the Acting Solicitor General asked the Court to remove a third case from the argument calendar, in light of the new Administration's policy intentions. The consolidated cases *Cochran v. Gresham*, No. 20-37; and *Arkansas v. Gresham*, No. 20-38, both addressed "demonstration projects" approved by the Secretary of Health and Human Services likely "to assist in promoting the objectives of Medicaid." Motion to Vacate the Judgments of the Courts of Appeals and Remand, to Remove the Cases from the March 2021 Argument Calendar, and to Hold Further Briefing in Abeyance Pending Disposition of This Motion at 4, *Cochran v. Gresham* and *Arkansas v. Gresham*, Nos. 20-37, 20-38 (Feb. 22, 2021) [hereinafter Motion to Vacate the Judgments of the Courts of Appeals]; *see also* 42 U.S.C. § 1315(a). The projects approved by the Secretary in 2018 were designed to test the imposition of work requirements on adult Medicaid recipients in the states of Arkansas and New Hampshire. Motion to Vacate the Judgments of the Courts of Appeals, *supra*, at 2. Individual beneficiaries had brought suit challenging the approval of these projects, and the lower courts uniformly vacated the Secretary's approvals. *Id.* The Trump Administration sought certiorari, and opening briefs were filed on January 19, 2021. *See id.* at 3. Shortly after the Administration changed hands, HHS officials sent letters to the states with previously approved demonstration projects, which had been rendered infeasible during the COVID-19 pandemic, and notified them that HHS had begun a process of reviewing whether to withdraw the work requirements, observing that it had determined "preliminarily" that work-related requirements "would not promote the objectives of the Medicaid program." Letter from Elizabeth Richter, Acting Adm'r, Ctrs. for Medicare & Medicaid Servs., to Dawn Stehle, Dir., Ark. Medicaid 2 (Feb. 12, 2021), <https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ar-works-cms-ltr-state-demo-02122021.pdf> [<https://perma.cc/CW88-F7W3>]. In her motion to the Court, the Acting Solicitor General indicated that the government's review of the demonstration projects, and by implication its preliminary reinterpretation of the Medicaid statute, meant the case was no longer suitable for the Supreme Court's review. *See* Motion to Vacate the Judgments of the Courts of Appeals, *supra*, at 5-6.

⁷² This observation is not to say that these disputes were over quickly. It took several months before the Court fully mooted the Ninth Circuit opinion in the border wall case, because the process of unwinding its construction actually took some time. *See Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021) (mem.); Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

was unlikely to succeed in showing that its rescission was not arbitrary and capricious, as the district court had found.⁷³ Again, MPP is not required by law and may in fact be contrary to law, but the plaintiff states of Texas and Missouri, with the Supreme Court's help, have thrown serious legal complications into the new Administration's efforts to manage the southern border, to add to already pressing humanitarian and logistical challenges.⁷⁴

In another set of cases, in which interpretive or regulatory authority lay outside the Executive, the new Administration could not obviate Supreme Court decisions potentially inimical to its agenda and thus had to turn to persuasion to advance its new conceptions of law and the Constitution. In five of the Term's important cases, the Office of the Solicitor General broke with its past positions concerning the proper interpretation of both statutes and the Constitution. As noted above, denizens of the office describe the choice to change positions in sober and careful terms. Now-Justice Kagan observed in describing her time as Solicitor General: "The office was very clear that you were supposed to think long and hard, and then you were supposed to think long and hard again, before you changed anything."⁷⁵ This idea that changes in legal position ought to be few and far between and made only after careful consideration reinforces the conceit of many commentators on the Solicitor General's Office — that error and not the difference of ideology or even perspective ought to precipitate legal change.⁷⁶ Confessing error with respect to factual matters protects the integrity of

⁷³ See *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021) (mem.) (denying a stay of the injunction on the ground that the government had not shown likely success on the merits that its rescission of MPP was not arbitrary and capricious); *Texas v. Biden*, No. 21-cv-00067, 2021 WL 3603341 (N.D. Tex. Aug. 13, 2021) (holding that DHS's termination of MPP was arbitrary and capricious because the agency "ignored critical factors" and based its decision on arbitrary reasoning).

⁷⁴ The initial policy victory represented by the end of MPP was swamped during the Administration's early months by logistical challenges at the border, which again led the Administration to rely on other exclusion authorities. See Lomi Kriel, *How Inconsistent Policies and Enforcement Have Created False Hope for Migrants at the Border*, TEX. TRIB. (May 13, 2021, 5:00 PM), <https://www.texastribune.org/2021/05/13/biden-border-policy-migrants> [<https://perma.cc/5K36-VQR7>] (citing confusion at the border resulting from mixed policies concerning who can enter and noting continuous lawsuits filed by the state of Texas to compel the Biden Administration to use enforcement authorities, including to expel unaccompanied minors).

⁷⁵ Am. L. Inst., *Annual Meeting Reception: Elena Kagan and Paul D. Clement (2018)*, VIMEO, at 18:34 (May 21, 2018), <https://vimeo.com/272791402> [<https://perma.cc/YA3N-DYRR>].

⁷⁶ What constitutes error is certainly open to debate; the conception of it could be narrow, focused on factual misrepresentations and realizations that a complex legal position missed an argument or misread a statutory provision. But error might also encompass disagreements about interpretive methodologies, such as the failure to read the text in light of the clear intent of Congress as expressed in legislative history. Or error could be constitutional, as in the decision to either embrace or eschew the unitary executive theory of the removal power, for example.

the office and ensures that the Court understands the truth of the matter.⁷⁷ Confessing error in interpretive matters can be a form of recognizing the limits of our reason. Both sorts of confessions might serve the interests of justice, a pervading ethos of the Department of Justice generally and the Solicitor General's office in particular.⁷⁸ While the construct of a stable legal order that does not depend on the personality of those who hold office can withstand corrections of these sorts, that order's survival, on one view, depends on interpretations and understandings of the law that transcend changes in political regime.

But with one possible exception — the *California v. Texas*⁷⁹ case involving a radical and extremely weak statutory challenge to the Affordable Care Act⁸⁰ (ACA) — none of the new SG's position changes really fit this concept of error. Instead, the changes underscore the con-

⁷⁷ The confession of error also raises the possibility of disingenuous motives on the government's part. The most infamous example of deception of the Court by the Department of Justice occurred in the litigation challenging the various measures adopted by the Roosevelt Administration to restrict the liberties of Japanese Americans during World War II. See generally *Hirabayashi v. United States*, 320 U.S. 81 (1943). In its brief to the Court defending the necessity of the curfew and exclusion policies adopted by the military, the Solicitor General failed to present evidence that cast doubt on the military intelligence that purported to justify the measures. The so-called Ringle Report concluded, "The entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people." K.D. Ringle, U.S. Navy, Report on Japanese Question, BIO/ND11/EF37/AB-5 Serial LA1055, § I(h) (Jan. 26, 1942). Despite being made aware of this evidence, the Solicitor General emphasized in his brief that "[i]t is entirely possible that an unknown number of the Japanese may lack to some extent a feeling of loyalty toward the United States as a result of their treatment, and may feel a consequent tie to Japan, a heightened sense of racial solidarity, and a compensatory feeling of racial pride or pride in Japan's achievements." Brief for the United States at 21, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 870) (footnote omitted). In *Korematsu v. United States*, 323 U.S. 214 (1944), neither the Federal Bureau of Investigation (FBI) nor the Federal Communications Commission (FCC) found evidence to support the allegations in the report by General John L. DeWitt justifying internment, and despite internal debate within the Department, the lack of evidence to support the order was obscured before the Court. For a thorough recounting of this saga, including its revelation in the 1980s by historian Peter Irons through a Freedom of Information Act request, see Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3032–37 (2013).

For an account of more recent, less incendiary, but still arguably problematic distortions by the Solicitor General's office, see Nancy Morawetz, *Convenient Facts*, Nken v. Holder, *The Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600 (2013) (describing trend of the SG making unsupported factual assertions about internal government operations that are not part of the record and arguing that "the temptation to include such information is very powerful, even when the information is filtered through self-interested agency personnel or has not been thoroughly vetted," *id.* at 1612).

⁷⁸ The motto inscribed atop the Attorney General's conference room — "The United States wins its point whenever justice is done its citizens in court" — has been attributed, perhaps apocryphally, to Solicitor General William Lehman in a brief confessing error. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 17 (1987).

⁷⁹ 141 S. Ct. 2104 (2021).

⁸⁰ Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

trast between the ambitions of the new regime and those of its predecessor. These changes in position were arguably more important than the early policy reversals that led to the mooting of cases before the Court, not because the government's new claims were likely to change the outcome of the cases in question — indeed, in four out of the five cases, the Court disagreed with the government's new views. Instead, these shifts underlined how politics helps determine perspectives on law.⁸¹ Unlike the border wall, MPP, and Medicaid disputes, which could (mostly) be resolved by the new Executive's decision to exercise its discretionary powers differently, this set of cases telegraphed to the Court and the world that the executive branch had come to believe that both major statutes and particular provisions of the Constitution meant something different because a new political regime had come to power.

For some critics, these changed positions, and the Court's rejection of them, may seem like proof that legal argument is synonymous with political argument, conducted using a different vocabulary. This equation may or may not delegitimize the legal enterprise, but it does rob interpretation of its pretenses to reasoned objectivity. The fact that the Court disagreed with most of the government's new positions this Term could suggest the weakness of some of the new positions. But the new positions also highlight that the new regime has a different conception of the law and its purposes, which puts the Court's own interpretations in a political perspective too.

One need not embrace the thesis that legal interpretation is entirely indeterminate to acknowledge the possibility of multiple credible readings of either the Constitution or statutory law. These readings ultimately produce different outcomes, which in turn demonstrates that the interpretive enterprise contains room for the realization of political goals. Of course, the possibility of stark divergence between a set of new views offered by the government after a change in administration and the decisions of the Court is precisely why lawyers within the SG's office approach the prospect of changing position soberly and frame such changes as emanating from a considered process,⁸² to shield the office from suggestions that it operates in a political fashion. But even as the results of this Term chip away at that veneer, these outcomes should say at least as much about the politics of the Court. They certainly underscore that the actual shape of a statutory or regulatory regime depends on who superintends it, both at the agency level and in the courts. And thus, the prospect of a new SG offering the Supreme

⁸¹ Though the SG's office can certainly be persuasive and carries more than the typical advocate's credibility, each of these cases had a level of jurisprudential salience that made the identity of the Court and not the government more determinative of their outcomes. For further discussion of whether and how the Solicitor General influences the Court's decisions, see Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115 (2001), providing former SG Seth Waxman's account of the influence of the office on the Court.

⁸² See Am. L. Inst., *supra* note 75, at 16:36.

Court a perspective on the law's scope that advances the goals (whether legal or policy) of the new regime should arguably be regarded as unsurprising, if not routine.

Perhaps the most significant and predictable of changed positions was the Biden Administration's reaffirmation of the ACA as a complete, integrated, and fully legal statute. In *California v. Texas*, arguably the most radical challenge to the ACA yet, a group of state litigants asserted that Congress's decision in 2017 to eliminate the monetary payment attached to the law's so-called individual mandate — the payment required of tax filers who could not declare that they had acquired health insurance — rendered the provision an unconstitutional exercise of Congress's commerce power, which in turn required the invalidation of the entire ACA.⁸³ The Trump Administration had initially declined to defend the mandate but did not call for the invalidation of the entire statute.⁸⁴ But in a switch apparently precipitated by the President's

⁸³ See *California v. Texas*, 141 S. Ct. at 2112. The payment had been a part of 26 U.S.C. § 5000A, enacted as part of the ACA. In the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified in scattered sections of 26 U.S.C.), Congress eliminated the tax penalty payment for failure to procure health insurance, effective January 2019. See 26 U.S.C. § 5000A(c).

⁸⁴ See Letter from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Just., to Paul Ryan, Speaker, U.S. House of Representatives (June 7, 2018), <https://www.justice.gov/file/1069806/download> [<https://perma.cc/4C8H-5RZG>]. The legal and even political extremity of the Trump Administration's decision to not defend the ACA and to initially call for its partial invalidation appears to have triggered a senior career lawyer not only to decline to sign the briefs, but also to resign from the Department altogether. See Devlin Barrett & Matt Zapposky, *Senior Justice Dept. Lawyer Resigns After Shift on Obamacare*, WASH. POST (June 12, 2018, 5:19 PM), https://www.washingtonpost.com/world/national-security/senior-justice-dept-lawyer-resigns-after-shift-on-obamacare/2018/06/12/b3001d7c-6e55-11e8-afd5-778aca903bbe_story.html [<https://perma.cc/ML6T-FPDV>]. Shortly after the Trump Administration's decision, one of the lead attorneys — Joel McElvain, a twenty-year veteran of the DOJ who had defended the ACA in earlier challenges to the law — resigned. See *id.* McElvain and two other career attorneys who had withdrawn from the case were replaced by three political appointees and by one career attorney who had joined the DOJ two months earlier. See Josh Gerstein, *Justice Department Attorney Resigns After Legal Shift on Obamacare*, POLITICO (June 12, 2018, 7:19 PM), <https://www.politico.com/story/2018/06/12/obamacare-justice-department-resign-642992> [<https://perma.cc/W3MF-R7UM>].

This form of protest within the career ranks of the Department was not limited to the ACA case. In 2020, the four attorneys prosecuting Roger Stone resigned from the case after the DOJ recommended a reduced sentence following tweets by President Trump criticizing the original sentencing proposal as a “miscarriage of justice.” Dartunorro Clark, Michael Kosnar, Dareh Gregorian & Tom Winter, *All Four Roger Stone Prosecutors Resign from Case After DOJ Backpedals on Sentencing Recommendation*, NBC NEWS (Feb. 11, 2020, 10:18 PM), <https://www.nbcnews.com/politics/politics-news/doj-backpedalling-sentencing-recommendation-trump-ally-roger-stone-n1134961> [<https://perma.cc/K4QT-A458>]. In the lead-up to the 2020 election, a DOJ official assisting the prosecutor assigned to review the Trump-Russia investigation resigned, reportedly in response to political pressure from Attorney General William Barr. See Edmund H. Mahony, *Nora Dannehy, Connecticut Prosecutor Who Was Top Aide to John Durham's Trump-Russia Investigation, Resigns amid Concern About Pressure from Attorney General William Barr*, HARTFORD COURANT (Sept. 11, 2020, 2:55 PM), <https://www.courant.com/news/connecticut/hc-news-john-durham-dannehy-resignation-20200911-20200911-xcsapnq7g5e63kvtw5aqi7cv34->

own insistence, the government eventually filed an amicus brief asserting that the unconstitutional mandate could not be severed from the statute,⁸⁵ thus bringing the federal government's arguments in line with the holdings of the lower courts that had invalidated the entire statute.

In a letter to the Court dated February 10, 2021, OSG explained in some detail why it was now the position of the United States that the amended provision of the ACA was in fact constitutional: Congress's reduction of the "shared responsibility payment" to zero did not convert the choice previously offered by the law between making a tax payment and buying health insurance into a mandate, but rather "preserved the choice between lawful options and simply eliminated any financial or negative legal consequence from choosing not to enroll" in a health plan.⁸⁶ For good measure, the letter added that, should the Court determine otherwise, it was "also now the position of the United States" that the presumption in favor of severability could not be overcome.⁸⁷

The reasons for the Biden Administration's change in position were certainly overdetermined. The ACA was a major achievement of the last Democratic Administration, and the lawsuit by the states, whose arguments found favor in the lower courts, imperiled this social-welfare accomplishment, as well as a now-vast regulatory apparatus and the profound reliance interests of the public, employers, and corporations. As commentators have pointed out since the inception of the litigation, the challenge rested on the flimsiest of legal arguments,⁸⁸ making the switch in position eminently justifiable as error correction of the prior Administration's truly radical interpretation. And from an institutional perspective, the new position returned the government to its standard

story.html [https://perma.cc/9NDX-BVJ5]. And the Director of DOJ's Election Crimes Branch resigned "in protest" after Attorney General Barr issued a memo allowing federal prosecutors to investigate voter fraud allegations prior to the certification of election results. See Dartunorro Clark & Ken Dilanian, *Justice Department's Election Crimes Chief Resigns After Barr Allows Prosecutors to Investigate Voter Fraud Claims*, NBC NEWS (Nov. 10, 2020, 11:09 AM), <https://www.nbcnews.com/politics/2020-election/doj-s-election-crimes-chief-resigns-after-barr-directs-prosecutors-n1247220> [https://perma.cc/J5YV-MGGK].

⁸⁵ See Brief for the Federal Defendants at 36, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19-10011).

⁸⁶ Letter from Edwin S. Kneedler, Deputy Solic. Gen., U.S. Dep't of Just., to Scott S. Harris, Clerk, U.S. Sup. Ct. 2 (Feb. 10, 2021), <https://www.scotusblog.com/wp-content/uploads/2021/02/No.-19-840-US-Letter.pdf> [https://perma.cc/CHH3-KVUG]. Because the letter came three months after oral argument and submission of the cases, the government did not request supplemental briefing, only that the clerk of the Court circulate its letter to the Justices. *Id.* at 2.

⁸⁷ *Id.*

⁸⁸ See, e.g., Jonathan H. Adler & Abbe R. Gluck, *What the Lawless Obamacare Ruling Means*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html> [https://perma.cc/5RFR-H0HY] ("[The states] claim that the mandate is so central to the [ACA] that nothing else in it can operate without it. That's not how the relevant law works.").

form by offering a defense of a duly enacted statute,⁸⁹ though it could only assert rather than elaborate that defense given that the time for briefing and argument had passed. To be sure, administrations have not treated the so-called duty to defend as absolute, and some scholars have criticized the very conceit as inhibiting a President and his administration from advocating their good faith understandings of what the law and the Constitution require.⁹⁰ But in this case, legal substance, political agenda, and institutional considerations aligned beautifully. The claim of the Trump Administration — that the entire ACA, which includes multiple provisions wholly unrelated to the individual mandate and the monetary payment attached to it, ought to be struck down — belied any sense of responsible stewardship or credible legal argumentation and converted the Office of the Solicitor General into an agent of blunderbuss partisanship.

In two other statutory cases this Term, the Biden Administration altered the government's position in an effort to advance a more expansive conception of the law's scope than the one offered by the prior Administration. The last-minute change in position in *Terry v. United States* operated within the same basic methodological framework as the prior position did — rigorous, internal textualism. But the government's new reading matched the transformative purposes claimed by the sponsors of the law in their amicus brief, by opening up resentencing to the lowest-level drug offenders under the newly amended federal scheme. The fact that the Court eventually and unanimously rejected the government's new position did not make the changed position pointless, at least if we understand one of the functions of the government's litigating positions to be developing legal claims that push the boundaries of or otherwise try to perfect the legal order. The 9–0 result did, however, raise inevitable questions about the political motivations behind the position change while also highlighting that not all change can come

⁸⁹ See, e.g., Jonathan H. Adler, *The Clever Red State Lawsuit Against the Individual Mandate, and the Justice Department's Disappointing Response*, VOLOKH CONSPIRACY (June 11, 2018, 11:35 PM), <https://reason.com/volokh/2018/06/11/the-clever-red-state-lawsuit-against-the> [https://perma.cc/M6Q7-JRAH] ("It is common for the Justice Department to make strained arguments in defense of questionable federal laws. After all, we expect the Justice Department to defend the laws Congress enacts. Here, however, the Justice Department is doing the opposite. It is straining not to defend a law Congress enacted — and doing so terribly."); Nicholas Bagley, *Why Trump's New Push to Kill Obamacare Is So Alarming*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/opinion/trump-obamacare-affordable-care-act.html> [https://perma.cc/E9WT-747R] ("The irresponsibility of [the federal government's] new legal position is hard to overstate. It's a shocking dereliction of the Justice Department's duty, embraced by Republican and Democratic administrations alike, to defend acts of Congress if any plausible argument can be made in their defense.").

⁹⁰ See *infra* notes 124–129 and accompanying text.

through legal interpretation — sometimes Congress must act to fix what everyone involved understands to have been a mistake.⁹¹

The new Administration also offered the Court a new position in *Brnovich v. Democratic National Committee*,⁹² which called upon the Court to apply section 2 of the Voting Rights Act of 1965⁹³ (VRA) for the first time to the state regulation of ballot counting and collecting.⁹⁴ Before the Court's decision, which upheld the state laws at issue and significantly narrowed the reach of section 2 to challenge vote denial (as opposed to vote dilution) claims,⁹⁵ the Democratic legal establishment retained hope that section 2 might be read to further the grandest ambitions of the VRA. In her dissent in the case, Justice Kagan characterized the law as reflecting both “the best of America” and “the worst of America” — the promise of true equal participation and the persistent reality of racial exclusion.⁹⁶ In the wake of the Court's 2016 decision in *Shelby County v. Holder*,⁹⁷ after the Court effectively rendered the pre-clearance process of section 5 of the VRA⁹⁸ useless for policing the states' adoption of discriminatory voting laws,⁹⁹ scholars and advocates

⁹¹ See *supra* note 26–27 and accompanying text (discussing Justice Sotomayor's concurrence in *Terry v. United States* and the possibility of a congressional response).

⁹² 141 S. Ct. 2321 (2021).

⁹³ Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. § 10301). Section 2 of the VRA reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section [4(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

⁹⁴ *Brnovich*, 141 S. Ct. at 2330.

⁹⁵ Vote dilution claims allege that a state's electoral schemes or districting plans disenfranchise minority voters by impermissibly weakening the capacity of a racial group to elect a candidate of their choice, including by breaking up a racial minority bloc into separate congressional districts, or through the use of at-large or multimember elections. Heather K. Gerken, *The Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001). Vote denial claims allege that a law prevents individual voters or groups of voters from actually voting in the first instance.

⁹⁶ *Brnovich*, 141 S. Ct. at 2350 (Kagan, J., dissenting).

⁹⁷ 570 U.S. 529 (2013).

⁹⁸ Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified as amended at 52 U.S.C. § 10304).

⁹⁹ See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2145 (2015). Since *Shelby County*, members of both chambers of Congress have proposed voting rights legislation that would restore

speculated that section 2 might evolve to cover laws and regulations that had the effect of denying the right to vote and to which section 5 previously would have applied.¹⁰⁰ The en banc decision from the Ninth Circuit in *Brnovich* invalidating the laws signaled the way forward.¹⁰¹

The Biden Administration agreed with its predecessor that the Arizona laws in question did not violate section 2 and that the Ninth Circuit should be reversed.¹⁰² But in a letter on February 16, 2021, the Acting SG informed the Court that it no longer adhered to the three-part test the government previously had advocated, such that the “previously filed [amicus] brief does not represent the current views of the United States.”¹⁰³ Though this letter tells us nothing about what the new Administration believed the doctrinal test should be, presumably the favored alternative would have made section 2 violations easier to establish. This changed position highlighted a belief in the relevance of technical legal positions to the realization of larger systemic ambitions and in the role litigation can play in defining the meaning of a statutory regime.¹⁰⁴ But despite the fact that much of oral argument was spent parsing the possible tests through which section 2 could be applied to

the preclearance process of section 5. See John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. § 5 (2020); Voting Rights Advancement Act, H.R. 4, 116th Cong. § 4 (2019).

¹⁰⁰ See Elmendorf & Spencer, *supra* note 99, at 2158, 2216.

¹⁰¹ The Ninth Circuit, sitting en banc, invalidated two Arizona laws — one that declares votes cast in the wrong precinct to be invalid, ARIZ. REV. STAT. ANN. § 16-584(E), and another that makes it a crime for a person outside a limited set to knowingly collect an early ballot for another, *id.* § 16-542(D). The court concluded that the laws imposed a disparate burden on minority voters, burdens that in turn were “in part caused by or linked to ‘social and historical conditions’ that have or currently produce ‘an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives’ and to participate in the political process.” Democratic Nat’l Comm. v. Hobbs, 948 F.3d 989, 1032, 1037 (9th Cir. 2020) (en banc) (alteration in original) (citations omitted).

¹⁰² Letter from Edwin S. Kneedler, Deputy Solic. Gen., U.S. Dep’t of Just., to Scott S. Harris, Clerk, U.S. Sup. Ct. (Feb. 16, 2021), https://www.supremecourt.gov/DocketPDF/19/19-1257/169119/20210216164922124_Letter%20-%2019-1257%20and%2019-1258.pdf [<https://perma.cc/8YCQ-KWEB>].

¹⁰³ *Id.* The timing of the case likely made it impossible to offer an alternative to the Trump Administration’s proposed test, which notably was distinct from the position taken by the State of Arizona in defense of its laws. Briefing was already complete by the time of President Biden’s inauguration, and with oral argument scheduled for March, little time for a new filing remained.

¹⁰⁴ Shoring up voting rights and protections emerged early on as a clear priority of the Department of Justice and the Administration as a whole. See “Will Not Hesitate to Act”: Garland Vows to Protect Voting Rights, N.Y. TIMES (Associated Press Jun. 11, 2021), <https://www.nytimes.com/video/us/elections/100000007811528/garland-voting-rights-justice-department.html> [<https://perma.cc/CE99-3RB5>]; cf. Cristina M. Rodríguez, *From Litigation, Legislation*, 117 YALE L.J. 1132, 1134 (2008) (reviewing BRIAN LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007)) (highlighting how pre- and post-VRA litigation against the acts of local registrars to block Blacks’ access to the vote helped shape the content and scope of the VRA and subsequent amendments themselves).

vote denials,¹⁰⁵ the Court in its opinion dismissed this doctrinal debate. “All told, no fewer than 10 tests have been proposed,” the Court wrote, ultimately offering instead a set of “guideposts” for section 2 claims — guideposts that appeared to signal that section 2 will have little relevance to laws the Court frames as innocuous “time, place, and manner” regulations for casting a ballot.¹⁰⁶

In still two other reversals this Term, the SG’s actions underscored that the advent of a new political regime can also entail announcing a new set of constitutional understandings. *Cedar Point Nursery v. Hassid*¹⁰⁷ involved a challenge to a California labor regulation that required employers in agricultural workplaces to permit unions onto their property — subject to certain time, place, and manner restrictions — to communicate with workers, on the ground that it constituted a per se taking under the Fifth Amendment, requiring just compensation of the employer.¹⁰⁸ Whereas the Trump Administration filed an amicus brief supporting this position in early January 2021,¹⁰⁹ on February 12, 2021, the Acting Solicitor General submitted a letter to the Court disclaiming the view that the regulation authorized a “permanent physical occupation,” and arguing instead that the access authorized was “temporary and limited in nature,” linking the regulation at issue to other government purposes, including law enforcement and inspection, that the Court has subjected to a less onerous “balancing” process under the

¹⁰⁵ At oral argument, Justice Kagan wryly observed that the more the argument proceeded, the more difficult it was to tell apart the different standards propounded by each side. Transcript of Oral Argument at 79, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (No. 19-1257); cf. SEAN FARHANG, *THE LITIGATION STATE* 94–128 (2010) (discussing congressional incentives to leverage private-actor litigation in the realization of statutory goals); Sean Farhang, *Legislative Capacity & Administrative Power Under Divided Polarization*, 150 DÆDELUS, Summer 2021, at 49, 59 (same).

¹⁰⁶ *Brnovich*, 141 S. Ct. at 2336.

¹⁰⁷ 141 S. Ct. 2063 (2021).

¹⁰⁸ *Id.* at 2069.

¹⁰⁹ The government’s original amicus brief sought to characterize the California labor regulation as a permanent and therefore per se taking by recasting the access right it created as indefinite because it required access for a certain amount of time each year. The government argued that the fact that the access was “intermittent” as opposed to “continuous” or “round-the-clock” should make no difference, on the ground that these “invasions cause the same kind of special injury provoked by the intrusion of a stranger.” Brief for the United States as Amicus Curiae in Support of Reversal at 9, *Cedar Point Nursery*, 141 S. Ct. 2063 (No. 20-107).

Constitution.¹¹⁰ One administration’s “invasion[]”¹¹¹ became another’s “regulation.”¹¹²

*Americans for Prosperity Foundation v. Bonta*¹¹³ entailed a First Amendment challenge to another California law that required charities to disclose the names and addresses of their major donors.¹¹⁴ The challengers relied in part on civil rights-era case law that protected membership lists from disclosure and called for the Court to apply some form of strict or exacting scrutiny to the regulation, which they contended discouraged donations and thus violated their right to free association with their donors.¹¹⁵ California defended the law on the ground that it helped police charitable fraud and called for the allegedly less exacting standard of “exacting scrutiny” to be applied, which would enable the state to show all of the ways in which the challengers’ feared repercussions had not and would not come to pass.¹¹⁶ Whereas the Trump Administration as amicus argued that exacting scrutiny required narrow tailoring,¹¹⁷ the new Acting Solicitor General, much as in *Brnovich*, called in a new amicus brief for application of a different doctrinal test, claiming that its November 2020 brief not only misstated the standard but also failed to give sufficient “weight to the nonpublic nature of the disclosure that California [law] requires.”¹¹⁸

Both *Cedar Point* and *Americans for Prosperity* encapsulate a major battle of our time over the reach of state authority. The conflict has

¹¹⁰ Letter from Elizabeth B. Prelogar, Acting Solic. Gen., to Scott S. Harris, Clerk, U.S. Sup. Ct. 1 (Feb. 12, 2021), https://www.supremecourt.gov/DocketPDF/20/20-107/168955/20210212160515182_20-107%20letter.pdf [<https://perma.cc/64A5-PAP9>] (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982)); see also *id.* (noting that *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, contains a footnote observing that a provision of the National Labor Relations Act that requires companies to permit union organizers on their premises does not effect a per se taking because it grants only temporary and limited access).

¹¹¹ Brief for the United States as Amicus Curiae in Support of Reversal, *supra* note 109, at 9.

¹¹² Letter from Elizabeth B. Prelogar, Acting Solic. Gen., to Scott S. Harris, Clerk, U.S. Sup. Ct., *supra* note 110, at 1.

¹¹³ 141 S. Ct. 2373 (2021).

¹¹⁴ *Id.* at 2379–80.

¹¹⁵ Brief for the Petitioner Thomas More Law Center at 17, *Americans for Prosperity*, 141 S. Ct. 2373 (No. 19-251).

¹¹⁶ Combined Brief in Opposition at 12, 25, *Americans for Prosperity*, 141 S. Ct. 2373 (No. 19-251).

¹¹⁷ Brief for the United States as Amicus Curiae at 7, *Americans for Prosperity*, 141 S. Ct. 2373 (No. 19-251) (“As this Court’s precedents make clear, compelled disclosures that carry a reasonable probability of harassment, reprisals, and similar harms are subject to exacting scrutiny, which requires a form of narrow tailoring. That distinguishes the disclosures here from those required to participate in voluntary tax-benefit programs . . .”).

¹¹⁸ Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 13, *Americans for Prosperity*, 141 S. Ct. 2373 (No. 19-251). The U.S. government subsequently called for vacatur and remand on the ground that the lower court had misapplied established legal principles to the facts of the case but had not misstated the applicable standard — the claim of the OSG under the Trump Administration. See *id.*

been both reflected and heightened by the Supreme Court's burgeoning jurisprudence that has turned to the Bill of Rights, primarily the First Amendment, to limit social welfare and good-government regulation, in the name of defending a sweeping conception of those rights.¹¹⁹ In each of these cases, by breaking with the amicus positions of its predecessors, the Biden Administration signaled its resistance to this constitutional litigation designed to curb the regulatory state. Again, the fact that these reversals did not persuade the Court's majority, which struck down both California laws as violations of constitutional rights, is beside the point. The U.S. government changed its views because it would have been untenable for executive branch lawyers to persist in making legal arguments anathema to the new regime's concept of regulation in the social or public welfare. The function of the new positions became the clear articulation in constitutional terms of the authority of the administrative and regulatory state writ large — authority as relevant to federal power in general as to the specific expressions of state power in the cases before the Court. The fact that the Court disagreed, and divided along ideological lines in the process, simply reinforces that the Constitution has multiple meanings and the choice of one of them is no less a political than a jurisprudential act.

2. *The Interests of the United States.* — To suggest that the position changes offered by the Biden Administration through the Solicitor General's office reflect the legal views of a particular political order does not mean that the office primarily serves the sitting President. Both formally and in the self-conception of the lawyers within the office and throughout the executive branch, the SG serves "the long-term interests of the United States."¹²⁰ In their most high-minded form, these interests of the United States are the interests of the American people, as Attorney General (AG) Merrick Garland informed Congress in a recent oversight hearing.¹²¹ But more typically, and concretely, these interests are of the U.S. government qua government and cannot be reduced to the goals of

¹¹⁹ For discussion of these developments, see *infra* note 491 and accompanying text.

¹²⁰ Am. L. Inst., *supra* note 75, at 19:32 (statement of former Solic. Gen. Elena Kagan).

¹²¹ See *A Review of the President's Fiscal Year 2022 Funding Request for the U.S. Department of Justice: Hearing Before the Subcomm. on Com., Just., Sci. & Related Agencies of the Comm. on Appropriations*, 117th Cong., at 45:30 (June 9, 2021), <https://www.appropriations.senate.gov/hearings/a-review-of-the-presidents-fiscal-year-2022-funding-request-for-the-us-department-of-justice> [<https://perma.cc/8FJT-ZY23>] (statement of Merrick Garland, Att'y Gen., U.S. Dep't of Just.) ("The job of the Justice Department in making decisions of law is not to back any administration, previous or present. Our job is to represent the American people. And our job in doing so is to ensure adherence to the rule of law, which is the fundamental requirement of a democracy or a republic or a representative democracy. . . . Sometimes it means that we have to make a decision about the law that we would never have made and that we strongly disagree with as a matter of policy.").

any one regime or loyalty to a particular President or party.¹²² When standing for these interests, the SG's goal is not necessarily to be uniquely persuasive, but to inform the Court of a particular set of institutional demands.¹²³

This concept of transcendent government interests in fact has various manifestations. The executive branch's so-called duty to defend the enactments of Congress in court reflects this concept; the duty amounts to a showing of loyalty to the government as a set of institutions, in the form of past Congresses and the Presidents who signed the laws in question. The duty also suggests a concept of legislation as law, not just the realization of a particular regime's policy agenda, and of all legislation as embodying the will of the people generally.¹²⁴ President Biden himself invoked this principle, linking it to the rule of law, in explaining why his Administration continued to defend, before the Court, the law that rendered residents of Puerto Rico ineligible for Supplemental Security Income (SSI) against an equal protection challenge, even though the position was "inconsistent with [the] Administration's policies and values."¹²⁵ That the government's lawyers represent and de-

¹²² Former SG Elena Kagan, in an interview at the Annual Meeting of the American Law Institute, underscored this point, saying that the office "is supposed to be . . . serving the long-term interests of the United States, not any one President. The credibility of the office in great measure depends" on courts perceiving it that way. Am. L. Inst., *supra* note 75, at 19:32.

¹²³ Reflecting on his time as Solicitor General during the Clinton Administration, Seth Waxman observed that the Supreme Court takes heed of the SG's views because they constitute a "distillation — a reconciliation — of the often-disparate long-term interests of a national, representative government." Waxman, *supra* note 81, at 1117. What is more, the Solicitor General can influence which cases the Court hears, and in what order. *Id.* at 1118. With respect to federalism cases, in particular, Waxman underscored that the Court may not care about the federal government's "bottom-line" views — it is an interested party, after all — but would pay attention to what the office has to say about the real-world consequences of a particular constitutional rule or doctrinal development. *Id.* at 1119.

¹²⁴ In fact, 28 U.S.C. § 530D requires the executive branch to submit a report to Congress when it intends not to defend a federal law in court, underscoring the legal system's conclusion that such a decision is a departure from ordinary interbranch relations and executive duties. Administrations do not regard this duty as absolute, of course. As already noted, the Trump Administration declined to defend the ACA, *see supra* p. 25, and the Obama Administration chose not to defend the Defense of Marriage Act, *see* Press Release, U.S. Dep't of Just., Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act> [<https://perma.cc/PR82-64X2>]. *But cf.* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509, 512, 543–545 (2012) (arguing that OSG should implement, or at least not impede, the President's "constitutional vision," *id.* at 509, but portraying OSG as motivated largely by institutional "self-interest," *id.* at 512, and the desire to insulate the office from presidential influence and protect the credibility of its lawyers).

¹²⁵ Press Release, The White House, Statement by President Joseph R. Biden, Jr. on Puerto Rico (June 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/07/statement-by-president-joseph-r-biden-jr-on-puerto-rico> [<https://perma.cc/7CC8-ASCY>]. Of course, this duty is far from absolute. One of the most celebrated acts of the Obama-era DOJ was

fend the interests of the United States parallels other institutional conceptions of the government and its officials, such as the idea that the United States speaks with one voice in international relations,¹²⁶ or has collective interests that the federal government must defend.¹²⁷

Of course, as with claims about one voice, the notion that the interests of the United States can be coherently defined belies the enormous complexity of the government and the sometimes-conflicting objectives of the statutory regimes that give the government its authorities and purposes.¹²⁸ That the OSG purports to represent these interests reflects the centralizing and coordinating role the Department of Justice plays in litigation as much as it does the existence of singular U.S. interests. Professor Margaret Lemos, for example, has documented the significant extent to which the agencies ostensibly represented by the SG before the Court actually do not sign the briefs submitted by the office, underscoring the particular authority the SG possesses to characterize the government's interests by suggesting what it thinks the law means to the Court.¹²⁹

Perhaps the best illustrations of what precisely it means for the SG to represent the interests of the United States are those cases in which

its very public decision to cease defending the Defense of Marriage Act. See Press Release, U.S. Dep't of Just., Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/MF69-EHMB>]; Dawn Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 599 (2012) (asserting that the DOJ "acted appropriately and admirably" in deciding to stop defending the Defense of Marriage Act).

¹²⁶ See, e.g., *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[M]any [foreign relations] questions uniquely demand single-voiced statement of the Government's views.")

¹²⁷ For a classic statement of this idea, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("If any one proposition could command the universal assent of mankind, we might expect it would be this — that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts.") It is, of course, also embodied in the Supremacy Clause. U.S. CONST. art. VI, cl. 2.

¹²⁸ See Sarah H. Cleveland, Crosby and the "One-Voice" Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975, 989 (2001) ("Thus, on the national level, a trio of voices contributes to making U.S. foreign policy. And while those voices often speak in harmony, their independent authority creates real and constitutionally-intended potential for a-tonal and discordant policy results."); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 576 (2008) (contesting the idea that the nation can or should speak with one voice, through the federal government, on immigration policy).

¹²⁹ See Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 187 (finding that in twenty-seven percent of cases, the agency does not join the SG's brief and arguing that "the SG's control of litigation in the Supreme Court threatens to undermine the very attributes of agency decisionmaking that provide the basis for judicial deference and serve to legitimize the important role that agencies play in modern governance," in part because the SG's office appears to be closer in its views to the Court than to the agencies).

the office maintains its legal positions even after the inauguration of a new President who mostly repudiates his predecessor. In some cases this Term, the clear policy agenda of the Biden Administration might have led us to expect still more changed positions than the ones taken, including in the case just noted involving the exclusion of Puerto Ricans from SSI. In a series of immigration cases, too, the government declined to change the prior Administration's positions, despite the new regime's very clear desire to transform that policy domain.¹³⁰ In *Johnson v. Guzman Chavez*,¹³¹ the Court addressed the scope of the government's authority to detain noncitizens pending their removal hearings. The case presented the Court with a choice between two statutory provisions, one of which made detention mandatory and the other of which authorized bond.¹³² The case was highly technical, and plausible statutory arguments could have been made on either side. Though the oral argument occurred before the presidential transition,¹³³ we might still have expected a letter of the sort circulated in other such cases announcing a new view. Given that due process-grounded canons of constitutional avoidance arguably counseled in favor of applying the more permissive statutory provision, we might have expected a new regime expressly committed to reviving due process in the immigration system to at least contemplate reconsidering the government's typically bullish defense of its detention authorities.¹³⁴

¹³⁰ For discussion of the many manifestations of this intention, see *supra* notes 53–57 and accompanying text; and *infra* section I.B.1, pp. 41–48.

¹³¹ 141 S. Ct. 2271 (2021).

¹³² *Id.* at 2280. The case involved previously deported immigrants who reentered the United States and then had reinstated orders of removal, as well as pending applications for withholding of removal alleging that they would suffer persecution if returned to their countries of citizenship. *Id.* The noncitizens challenging the government's authority contended that 8 U.S.C. § 1226, which provides only that an "alien may be arrested and detained" pending a decision in their immigration case, *id.* § 1226(a), governed their case, whereas the government claimed that the applicable statute was 8 U.S.C. § 1231, which establishes that the government "shall detain the alien" during the removal period, *id.* § 1231(a)(2). See *Guzman Chavez*, 141 S. Ct. at 2280. The case turned on whether the noncitizens in question had been "ordered removed" with a final removal order under § 1231(a)(1)(A). *Id.* The Court ultimately concluded that § 1231, not § 1226, governs the detention of aliens subject to reinstated orders of removal. *Id.* For an effective account of the case and the oral arguments in which the Justices' questions reflected the viability of alternate interpretations, see Gabriel Chin, *Argument Analysis: A Complex Question of Immigration Bond*, SCOTUSBLOG (Jan. 12, 2021, 1:18 PM), <https://www.scotusblog.com/2021/01/argument-analysis-a-complex-question-of-immigration-bond> [<https://perma.cc/QH6G-YMER>].

¹³³ See Transcript of Oral Argument, *Guzman Chavez*, 141 S. Ct. 2271 (No. 19-897) (argument held on January 11, 2021).

¹³⁴ See Exec. Order No. 13,993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051, 7051 (Jan. 20, 2021) ("The policy of my Administration is to protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety. We must also adhere to due process of law as we safeguard the dignity and well-being of all families and communities. My Administration will reset the policies and

The fact that no such reconsideration appears to have occurred ultimately underscores that the government qua government often has interests in preserving its power and prerogatives, including in their most muscular form.¹³⁵ In fact, expansive defense of the government's enforcement authorities has been a mainstay of the U.S. government's legal arguments in the immigration domain, as well as in other law enforcement settings, though variation in the regard for defendants' rights and conceptions of the scope of the prosecutorial power can certainly be detected across administrations based on political affiliation¹³⁶ — *Terry v. United States* provides something of a case in point. In *Johnson v. Guzman Chavez* and other cases like it, even though the defense of the more severe of the two detention statutes does not necessarily square with the views of the immigration reformers ascendant in the new regime, it nonetheless reinforces the government's authority to run its enforcement bureaucracy as it deems appropriate.¹³⁷ Indeed, George W. Bush-era Solicitor General Paul Clement has framed the objective of the office as defending the interests of the *executive branch* itself.¹³⁸ For government lawyers who are a part of the new regime but who are not policy advocates, this objective will seem evident and its defense part of

practices for enforcing civil immigration laws to align enforcement with these values and priorities.”).

¹³⁵ As former Solicitor General Paul Clement has put it, “[i]f both administrations are looking out for the long-term interests of the executive branch, they really shouldn’t change that much.” Am. L. Inst., *supra* note 75, at 22:30.

¹³⁶ Compare Richard L. Pacelle, Jr., *Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici*, 89 JUDICATURE 317, 323 (2006) (“Issues like crime control know no partisan divisions. . . . [T]here is no statistically significant confluence between presidential ideology and the position adopted by the solicitor general in [these amicus cases]. . . . In the criminal cases, there is no expectation of partisan differences.”), and Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General’s Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1364, 1377 (2010) (explaining that “there are definite constants in the Justice Department’s institutional responsibilities — such as prosecuting criminals,” *id.* at 1364, and so “[i]n the criminal area, the Solicitor General thus seems to have remained in the ‘institution’s lawyer’ mode, participating . . . where resolution of the constitutional issues would impact the federal government’s own institutional interests,” *id.* at 1377), with Cordray & Cordray, *supra*, at 1333 (“[S]olicitors general in Republican administrations have submitted substantially more amicus briefs in criminal cases (and have generally advocated tighter restrictions on defendants’ rights).”), Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts: A Research Note*, 41 W. POL. Q. 135, 142 (1998) (arguing based on a study of amicus filings by the Solicitor General’s office that “the position of the solicitor general changes as presidential administration changes”), and David A. Strauss, *The Solicitor General and the Interests of the United States*, LAW & CONTEMP. PROBS., Winter 1998, at 165, 166, 170 (explaining that “there are certain things that lawyers in the Department of Justice do, no matter who is Attorney General or President,” *id.* at 166, but that Solicitors General also serve the interests of a particular administration, which may or may not support policies that maximize prosecutorial or government power, *id.* at 170).

¹³⁷ For a discussion of how institutional and political interests intertwine in the formulation of enforcement policy, see COX & RODRÍGUEZ, *supra* note 58, at 129–30.

¹³⁸ Am. L. Inst., *supra* note 75, at 22:27.

representing the “interests of the United States.”¹³⁹ A similar ethos pervades other government offices, such as the Office of Legal Counsel (OLC), in which each successive administration weaves together a conception of the interests of the executive branch with a set of jurisprudential views that vary depending on the partisan identity of the regime in power.¹⁴⁰

If we think of the SG as sitting atop a set of government institutions, then we can also begin to see the development of its legal positions as part of a complicated set of trade-offs. Whether the government changes position could reflect some combination of the salience of the policy priority that would be served by the changed position and the availability or plausibility of the new legal interpretation. Contrast the new Admin-

¹³⁹ *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), presented a similar set of considerations. The case involved the burden of proof applicable to a noncitizen seeking a form of relief from removal known as cancellation. *Id.* at 758–60. Its availability depended on whether the crime that made the petitioner removable (a conviction under Nebraska law for the misdemeanor of impersonation, for presenting a fake social security card to obtain employment) constituted a crime of moral turpitude, a term of art in the immigration statute that would have rendered him ineligible for relief. *Id.* In yet another case that turned on the proper application of a technical doctrine known as the categorical approach, the Justices were split along ideological lines, with the dissenters favoring a reading that would have broadened the availability of relief. *See id.* at 767 (Breyer, J., dissenting). Again, though the case was submitted before the new Administration came into office, the government maintained its reading of the statute that maximized its flexibility. *See* Brief for the Respondent at 13–14, *Pereida*, 141 S. Ct. 754 (No. 19-438). It seems highly likely that this case would not have registered as a candidate for a change in sides, despite the more severe consequences for noncitizens of the position advocated by the government and ultimately adopted by the Court.

¹⁴⁰ For extended consideration of one dispute that clearly reflects the change in regime, see *infra* note 151 (discussing whether the Treasury Department is required to release President Trump’s tax returns to the House Ways and Means Committee). Institutional and political considerations shape the work of the OLC, which ostensibly provides independent legal advice to executive branch actors to ensure that their actions conform with the law, and the office maintains a commitment to providing its “best understanding of what the law requires.” *See, e.g.*, Memorandum from David Barron, Acting Assistant Att’y Gen., U.S. Dep’t of Just., to Att’y’s of the Off. of Legal Couns. 1 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/M7ZG-8XP5>]. And yet, each new administration is confronted by ideologically inflected legal positions not only about substantive areas of the law, but also most importantly on the proper understanding of congressional-executive relations and the powers of the presidency. While an executive branch–favoring thread runs through the opinions and advice provided by OLC across administrations, each regime change requires the office to confront whether stare decisis–like norms mean it must maintain stances that reflect conceptions of a legal order alien to its new political appointees’ views of the law and the Constitution. For the leading exploration of whether and how stare decisis should constrain the evolution of OLC advice, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010), showing that OLC rarely openly departs from past precedent but is more likely to do so when the affected executive branch agency requests it, and arguing that OLC’s place within the executive branch should shape when and how it applies stare decisis norms. *See id.* at 1481, 1488–89, 1494; *see also* Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 812, 850–54 (2017) (showing how legal interpretation within the executive branch serves as a tool of presidential administration, not as an exogenous constraint on presidential power).

istration's positions in *Terry v. United States* and *Sanchez v. Mayorkas*.¹⁴¹ In the former case, as already established, the government changed its view in favor of an interpretation that advanced the criminal justice reform goals of the new regime. But in *Sanchez*, it took a different approach, despite the fact that the alternative legal position would have partially advanced a key element of its immigration policy agenda — enabling holders of Temporary Protected Status (TPS) to become permanent residents — by reading a provision of existing law differently.¹⁴² Perhaps the government's decision not to change its position in *Sanchez* is itself evidence of the constraints of law. After all, the Court unanimously and decisively repudiated the TPS holders' claims, and the government may well have recognized, *ex ante*, the implausibility of the legal position that would otherwise have advanced its interests.¹⁴³ And yet the government “lost” just as badly in *Terry* — an outcome it might also have been able to foresee. But it changed its position in *Terry* nonetheless. Going out on this legal limb likely signified the priority placed by the new Department on reading the First Step Act expansively. In other words, the import of the underlying policy change, and even its relationship to the duties of the Department itself, may help determine whether DOJ overcomes its institutional interest in continuity. If the policy priorities advanced by a new and even risky legal position are too attenuated, or if a case is not sufficiently integral to the new legal order being established, then the discomfort and even cost of changing position might not be worth it. Perhaps *Terry* can be explained by the new Administration's fervent wish to bring about a wholesale reimagining of criminal law, which would depend on numerous forms of concerted action by DOJ.¹⁴⁴

¹⁴¹ 141 S. Ct. 1809 (2021).

¹⁴² See Brief for Respondents at 10, *Sanchez*, 141 S. Ct. 1809 (No. 20-315). This case turned on whether TPS holders who entered the United States without inspection were “admitted” when granted TPS status, which would have made them eligible to adjust their status to permanent resident once they otherwise became eligible for that status through a family or other relationship. See 8 U.S.C. §§ 1254–1255.

¹⁴³ In her opinion for the Court, Justice Kagan wrote that a “straightforward application” of the statute led to the Court's decision. See *Sanchez*, 141 S. Ct. at 1813. But see Reply Brief for Petitioners at 3–7, *Sanchez*, 141 S. Ct. 1809 (No. 20-315) (offering a perfectly plausible interpretation of the statute — arguably one more “available” than what was offered in *Terry v. United States*).

¹⁴⁴ Still other institutional interests inform what is arguably a presumption against changing position, including respect for other institutional actors. Judge Learned Hand once observed: “It's bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General.” David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2079 (1994) (quoting Judge Learned Hand). For other examples, see *supra* note 140 and accompanying text. Prosecutors who have secured a conviction under one interpretation of the law might be flummoxed or undermined by a change in position on the meaning of the law. Katyal, *supra* note 77, at 3030–31. Solicitor General Drew Days drew fire when he confessed error in the merits brief of *Knox v. United States*, 510 U.S. 939 (1993), arguing

It is ultimately too crude to expect that the legal positions taken by the Department of Justice necessarily match the policy goals of a campaign or even a White House, or to presume a clear or explicit transmission of values from high-level political officials, including the President, to the government's lawyers. But although the reasons for such skepticism certainly include the conceit that the Department must defend the interests of the United States, the disconnect also arises from certain structures and norms of government. The perception and fact of its independence from the White House is critical to the self-conception of the OSG, as well as to its stature atop the hierarchy of lawyers with control over the legal positions of the U.S. government.¹⁴⁵ Maintaining this independence does not require sustaining a conception of legal questions as puzzles that always have a "correct" answer, nor does it require officials to pretend as if a change in political regime does not also entail a change in legal conception, both in methodology and substance. But it does require that the office exercise its own judgments, including by relying on legal expertise to determine whether offering the Court a new view of the law adequately synthesizes the various considerations delineated above.

This independence, in turn, relates to the interests of the DOJ as a whole and the norm-based insulation of its work from day-to-day partisanship and interference by political actors concerned primarily with electoral prospects or temporary news cycles — precisely the line grossly breached by the Trump Administration that both the new President and the new Attorney General have pledged to redraw.¹⁴⁶ And yet, finding where to draw this line can be delicate, as it demands the pursuit of cases and the development of legal policy without favoring personal or partisan interests alongside the recognition of daily values trade-offs Department officials must make, which in turn shape the domains the Department oversees in ways that regulate and therefore require sensitivity to political questions.¹⁴⁷

contrary to the George H.W. Bush Administration that the Third Circuit below had adopted an overly broad interpretation of a federal child pornography statute. See Rosenzweig, *supra*, at 2079.

¹⁴⁵ Cf. Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 930 (2011) (describing the efforts of the Attorney General and Solicitor General to preserve the national judiciary and counter limiting the jurisdiction of the federal judiciary).

¹⁴⁶ This institutional independence is likely what motivated long-time career lawyers from within the Department to withdraw from the briefs submitted by the Trump Administration calling for the invalidation of the entire ACA in *California v. Texas* — a change in position purportedly pressed by the President himself and based on legal arguments so implausible that anything other than a political motive was hard to discern. See *supra* note 84. For further discussion of DOJ independence, see *infra* note 152. See also BAUER & GOLDSMITH, *supra* note 33, at 147–53.

¹⁴⁷ See BAUER & GOLDSMITH, *supra* note 33, at 138–39; COX & RODRÍGUEZ, *supra* note 58, at 236–37; Renan, *supra* note 140, at 810–11.

In the next Part, I explore in detail the more general costs associated with a reluctance among officials and lawyers to change policy or position. But here I acknowledge both that some changes in legal argument before the Court will be foreclosed by statutory text or precedent, and that many others will be available should the Administration seek to incur whatever cost is associated with the change. When the office does switch sides, and it is evident that the reason is not some sort of objective error but a function of shifts in political control of the Administration, perhaps candor is in order. It certainly traffics in fictions about law to pretend that the positions in cases like *Cedar Point Nursery* and *Americans for Prosperity* don't relate to particular constitutional visions that emanate from political and ideological worldviews.¹⁴⁸

B. A New Order

Changed positions at the Court, though probative of the new Administration's priorities, may have limited effect on legal outcomes. In October Term 2016, the Court took the same view of the law as the Trump Administration in each of the four cases in which the government changed its position. But the Biden Administration's "record" has been decidedly more mixed. Again, these outcomes almost certainly have more to do with the ideological composition of the Court than with the quality or correctness of the legal arguments offered, and so the value in exploring them is not to discern what the best view of the law might be, but rather to better understand the implications of the shift in power.¹⁴⁹

The legal order a new regime ushers in to support the political one is not limited to what the administration can convince the Supreme Court to adopt, and the Biden Administration's changed positions open only a narrow window into the legal and political order now under creation. Regime change entails myriad assertions and recalibrations of power, not just through the pen or the person of the President, but through agents across the state. An administration with investigatory,

¹⁴⁸ Michael Dreeben recounts an oral argument in 2013 in which Chief Justice Roberts pressed an Assistant to the Solicitor General on the government's change in position in an ERISA case, saying: "You say that, in [the] prior case, the Secretary of Labor took this position. And then you say that, upon further reflection, the Secretary is now of the view — that is not the reason. It wasn't further reflection. . . . [I]t would be more candid for your office to tell us when there is a change in position, that it's not based on further reflection . . . but [on the fact that] there has been a change [in the Secretary]." Dreeben, *supra* note 29, at 550 (quoting Transcript of Oral Argument at 32, *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) (No. 11-1295), and citing other similar examples pressing OSG for candor).

¹⁴⁹ For a discussion of this regime "conflict" between today's Court and our current executive branch, see *infra* section III.C, pp. 126–139. See also Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 481–82, 486–87, 525–26 (2011) (distinguishing among transitions in each of the branches and discussing the interrelationship among them).

prosecution, and enforcement powers must determine how to use them. And effectuating a new set of policy priorities requires working with and through the bureaucracy, through new agency procedures and practices, guidance documents, and of course notice-and-comment rules. Law and legal interpretation suffuse these changes. A new administration must develop a range of legal positions to guide its day-to-day work. And law structures the policy processes that determine whether and how a predecessor's acts can be replaced with a new vision. It is well established that a President accomplishes the most in the first year in office,¹⁵⁰ making the institutional and legal obstacles to regime change especially salient when a new administration is disjunctive with the last, and the acts of the first year of transition particularly significant.

I. The Legal Regime. — Within DOJ and across the administrative state, the new Administration has launched myriad changes in its legal understandings and policies — changes that reflect substantive and ideologically determined disagreements over what the law requires, as well as what it enables.¹⁵¹ In these changes, the political has driven the legal,

¹⁵⁰ See PAUL C. LIGHT, *THE PRESIDENT'S AGENDA* 41–45 (3d ed. 1999) (documenting the President's greater capacity to effect policy outcomes in the first year of his term).

¹⁵¹ To take one pointed example, legal positions taken by the Office of Legal Counsel during the Trump years reflect contentions about the separation of powers and even the meaning of statutory regimes that are grossly inconsistent with the new Administration's conceptions of law and government. Two recent OLC opinions highlight the differing views of the current and prior administrations toward congressional oversight. The opinions reached divergent conclusions concerning whether the House Ways and Means Committee could obtain President Trump's tax returns pursuant to a provision of the Internal Revenue Code. In 2019, OLC advised the Secretary of the Treasury that although the statute "does not require the Committee to state any purpose for its request," and "[w]hile the Executive Branch should accord due deference and respect to congressional requests, the Executive need not treat the Committee's assertion of the legitimacy of its purpose as unquestionable." See Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 43 Op. O.L.C., slip op. at 3 (June 13, 2019) [hereinafter 2019 OLC Opinion]. As "the head of a co-equal branch of government," the President "is separately accountable to the people for the faithful performance of his responsibilities," so "Treasury thus had the responsibility to confirm *for itself* that the Chairman's request serves a legitimate legislative end." *Id.* (emphasis added). Based upon the statements of Chairman Neal and other Democratic congresspersons, OLC further added that it "was reasonable [for the Secretary] to conclude that the . . . asserted interest in the IRS's audit of presidential returns was pretextual, and that the true aim was to make the President's tax returns public," which meant releasing them was prohibited by the relevant provision. *Id.* When Chairman Neal of the Ways and Means Committee sued again to acquire President Trump's tax returns after the change in administration, the new OLC concluded instead that Treasury did have to turn over the tax information. See Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C., slip op. at 3 (July 30, 2021) [hereinafter 2021 OLC Opinion]. Although the Biden-era OLC opinion did not disagree with the Trump-era office that such a request must serve a legitimate legislative purpose, the former concluded that Treasury should, as a starting point, presume there is a legitimate purpose, *id.* at 13–15, and only "conclude that a facially valid tax committee request lacks" such a purpose "in exceptional circumstances," *id.* at 4. The 2021 opinion criticized the 2019 opinion for "fail[ing] to give due weight to Congress's status as a co-equal branch of government," thus disagreeing that "the Executive Branch, unlike a court, may 'engage in searching inquiries about congressional motivation.'" *Id.* at 19 (emphasis

but the new positions must still be defended on legal terms in order to be credible — to the agents who initiate the change, as well as to a larger public — not to mention to survive challenges in court should they arise. As this new edifice comes into view, we see the familiar interweaving of an ideologically determined conception of the law leavened by strong institutional interests.¹⁵²

Much like Attorney General Sessions did when he assumed office,¹⁵³ the new leadership of the Department of Justice immediately rescinded several of its predecessors' enforcement memoranda. This move reintroduced the principle of forbearance into the conception of enforcement and to stake out new positions on the scope of federal law. Chief among these rescissions was the repudiation of the Sessions-era zero-tolerance policy at the southern border that demanded prosecution of all cases of

added) (quoting 2019 OLC Opinion, *supra*, at 24). The 2019 opinion also “erred” insofar as it overlooked that the “political branches” had, through the relevant Internal Revenue Code provision, determined that “the tax committees” — not Treasury officials — “are best situated to determine when Congress ought to have access to tax information.” *Id.* Thus, even though Treasury need not “blindly accept a pretextual justification,” *id.* (quoting 2019 OLC Opinion, *supra*, at 17), most “facially valid” requests should be granted, *id.*

Outside commentators have called for review of OLC opinions issued during the Trump years to see what might need righting. See Statement, Am. Const. Soc’y, The Office of Legal Counsel and the Rule of Law 3–5 (Oct. 30, 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf> [<https://perma.cc/U2CZ-6J2V>]. With some of these acts, unlike the tax return controversy, we may never know of a change in course. What is significant, though, is that the very possibility of such reconsideration reinforces the coming into effect of a new legal regime, which is adjunct or corollary to a political one. For an argument in support of a modified version of *stare decisis* within the Office of Legal Counsel that incorporates some of these presuppositions about the interwovenness of politics and law within the executive branch, see Morrison, *supra* note 140, at 1502–03.

¹⁵² Another related concern that follows regime change and that is particularly salient this time around is the importance of sustaining an independent Department of Justice whose investigations and prosecutions do not advance regime change per se but instead reflect the decisional independence of prosecutors that must transcend partisanship and personal preference to be fair. This introduces an enormously complex question that cannot be so easily answered by cabining off the law enforcement domain altogether. See BAUER & GOLDSMITH, *supra* note 33, at 153–62 (elucidating various reforms to the Department of Justice that would secure the norm of the Attorney General’s independence from the President’s control); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2357–58 (2001) (observing that presidential control of criminal processes would be inappropriate); Aaron Blake, *Trump’s Ever-Present — and Still Growing — Exploitation of the Justice Department*, WASH. POST (June 11, 2021, 11:12 AM), <https://www.washingtonpost.com/politics/2021/06/11/trumps-ever-present-still-growing-exploitation-justice-department/> [<https://perma.cc/QTk9-XGU2>] (citing a litany of Trump abuses of DOJ).

¹⁵³ Memorandum from the Att’y Gen., U.S. Dep’t of Just., to All Fed. Prosecutors (May 10, 2017), <https://www.justice.gov/archives/opa/press-release/file/965896/download> [<https://perma.cc/YE5G-B3H5>]; Press Release, U.S. Dep’t of Just., Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [<https://perma.cc/N26Z-YCBA>]; Press Release, U.S. Dep’t of Just., Attorney General Jeff Sessions Rescinds 24 Guidance Documents (July 3, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents> [<https://perma.cc/HTQ9-8J2H>] (announcing the rescission of numerous Obama-era DOJ guidance documents).

illegal entry and re-entry — the prosecution policy that facilitated the odious family separations of the Trump era that enraged public opinion and became the moral centerpiece of the Biden campaign’s promises to depart from the maximalist immigration enforcement strategy pursued by the Trump Administration.¹⁵⁴ In the Biden Administration’s second week in office, the Acting Attorney General also rescinded the Sessions charging memo, which generally required prosecutors to “charge and pursue the most serious, readily provable offense,”¹⁵⁵ and temporarily reinstated an Obama-era guidance providing that prosecutors should ordinarily pursue the most serious charges but should still make charging decisions on a case-by-case basis.¹⁵⁶

It remains to be seen how consequential such shifts in high-level guidance will be. Coupled with the creation of an interagency task force devoted to reuniting still separated migrant families, the rescission of the zero-tolerance policy is meaningful on its own terms: it accepts the government’s accountability for the malign consequences of its policies, helping to restore the Department’s reputation tarnished by its support for separation at its very highest levels, as we now know from a report by the Inspector General.¹⁵⁷ The new policy also makes a credible commitment to eschewing the prosecution practices that necessitated separation, regardless of the United States’ interest in prosecuting illegal re-entry.¹⁵⁸ The other prosecution memos signal a distinct conception

¹⁵⁴ Priscilla Alvarez & Evan Perez, *Justice Department Officially Rescinds Policy that Led to Family Separations*, CNN (Jan. 26, 2021, 6:44 PM), <https://www.cnn.com/2021/01/26/politics/zero-tolerance-immigration-justice/index.html> [<https://perma.cc/523L-Q7UY>]; see also Cristina Rodríguez & Adam Cox, *The President and Immigration Law: Introduction to a Just Security Series*, JUST SEC. (Oct. 12, 2020), <https://www.justsecurity.org/72793/the-president-and-immigration-law-introduction-to-a-just-security-series> [<https://perma.cc/45MB-JHMR>] (discussing the awareness of family separation policies among high-level Trump Administration officials).

¹⁵⁵ Memorandum from the Att’y Gen., U.S. Dep’t of Just., to All Fed. Prosecutors, *supra* note 153, at 1.

¹⁵⁶ Memorandum from the Acting Att’y Gen., U.S. Dep’t of Just., to All Fed. Prosecutors (Jan. 29, 2021), <https://www.justice.gov/ag/page/file/1362411/download> [<https://perma.cc/2A84-XGT9>]; Memorandum from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Just., to All Fed. Prosecutors at 2 (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [<https://perma.cc/HWB6-NKTH>]. But see Memorandum from the Att’y Gen., U.S. Dep’t of Just., to All Components at 1–2 (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> [<https://perma.cc/8GQM-937F>] (prohibiting the issuance of guidance documents that bind third parties and emphasizing the importance of notice-and-comment rulemaking in informing the public of regulations with binding effect).

¹⁵⁷ U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT OF JUSTICE’S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES 2 (2021), https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf [<https://perma.cc/A9QW-YHL7>].

¹⁵⁸ The separation of parents and children arose because parents charged with illegal entry were remanded to criminal custody, where children by law cannot be held, requiring them to be turned over to the custody of the Border Patrol or the Department of Health and Human Services. As

of prosecutorial power that incorporates principles of forbearance and may even acknowledge the overbreadth of some criminal statutes. But their implementation depends on the actions of myriad diffuse officials in the U.S. Attorney's Offices around the country. And even though the memos' appreciation for forbearance and overbreadth constitutes part of a larger criminal justice reform agenda, the memos' reach is limited to the small footprint of the federal criminal justice system.

Perhaps the more relevant question, then, is whether these shifts in the Executive's purported approach to enforcing the law renders its judgments impermissibly political, or dismissive of its constitutional obligations to "take Care that the Laws be faithfully executed."¹⁵⁹ Elsewhere, a coauthor and I characterize these sorts of memos as vehicles for policymaking and attempt to assimilate them to our understanding of the administrative state.¹⁶⁰ That connection presents unique concerns in the law enforcement setting, where principles of fair application across like cases and adequate notice to the regulated world might counsel strict adherence to the so-called letter of the law at the wholesale level, even if in individual cases the classical conception of prosecutorial discretion unquestionably contemplates forbearance.¹⁶¹ This conundrum is particularly fraught in one of the more brutal developments of the Trump years — the acceleration of federal executions in the waning days of the Administration after decades of a de facto nonexecution policy.¹⁶² Although the death penalty is authorized by federal law, Merrick Garland, the new Attorney General, declared his doubts about capital punishment in his confirmation hearings.¹⁶³ After several months of deliberation, the Department of Justice has signaled its change of course. Although it is seeking reinstatement of the death penalty against the

Attorney General Sessions is quoted as saying in the Inspector General report, "we need to take away [the] children." *Id.* at 39.

¹⁵⁹ U.S. CONST. art. II, § 3, cl. 5.

¹⁶⁰ COX & RODRÍGUEZ, *supra* note 58, at 103–30, 215–37.

¹⁶¹ See *id.*; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 704–05 (2014).

¹⁶² Press Release, U.S. Dep't of Just., Federal Government to Resume Capital Punishment After Nearly Two-Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [<https://perma.cc/3D2F-82QK>]; Mark Berman & Matt Zapotosky, *Trump Administration Sets Wave of Executions for Days Leading Up to Biden Inauguration*, WASH. POST (Dec. 2, 2020, 4:31 PM), https://www.washingtonpost.com/national-security/federal-executions-accelerate-before-biden-inauguration/2020/12/02/34db45e0-340d-11eb-b59c-adb7153d10c2_story.html [<https://perma.cc/H2HE-FXE7>].

¹⁶³ See Sarah N. Lynch & Doina Chiacu, *Garland Concerned by Disproportionate Impact of Death Penalty on Blacks, Communities of Color*, REUTERS (Feb. 22, 2021, 12:25 PM), <https://www.reuters.com/article/us-usa-senate-justice-death/garland-concerned-by-disproportionate-impact-of-death-penalty-on-blacks-communities-of-color-idUSKBN2AM256> [<https://perma.cc/F5VT-D3DH>].

Boston Marathon bomber,¹⁶⁴ DOJ has also announced a moratorium on executions pending a review of policies and procedures.¹⁶⁵

The Biden Administration faces a range of other weighty issues that pit high politics against institutional interests, namely whether to investigate or bring to light alleged misdeeds by its predecessors. We should not be surprised when the resolution of these questions, such as whether to disclose the DOJ's internal deliberations and opinions about the Mueller Report and how it was to be presented to the public, turns on the institutional interests of the executive branch in discretion and secrecy¹⁶⁶ and does not satisfy calls for public transparency and accountability.¹⁶⁷ The executive branch's interests in nonpublic deliberation and maintaining the secrecy surrounding investigations truly do transcend partisan views, and politics will not easily dislodge them. There is, of course, a political valence to how to approach allegations of misconduct or illegality by one's predecessors. To this day, critics of President Obama cite as a moral failure his Administration's decision not to hold high-level officials of the Bush-Cheney Administration accountable for the CIA torture program and to opt instead for simply repudiating torture — a position that enabled the rehabilitation of people complicit in the program.¹⁶⁸ The decision not to investigate such

¹⁶⁴ Debra Cassens Weiss, *DOJ Seeks Reinstatement of Death Penalty for Boston Marathon Bomber*, ABA J. (June 16, 2021, 9:29 AM), <https://www.abajournal.com/news/article/justice-department-brief-says-supreme-court-should-reinstate-death-penalty-for-boston-bomber> [https://perma.cc/9MVR-GAHY].

¹⁶⁵ Memorandum from Merrick Garland, Att'y Gen., U.S. Dep't of Just., to the Deputy Att'y Gen. et al., U.S. Dep't of Just., on Moratorium on Federal Executions Pending Review of Policies and Procedures (July 1, 2021), <https://www.justice.gov/opa/page/file/1408636/download> [https://perma.cc/93VK-J4DX] (citing arbitrariness in application, disparate impact on people of color, and “troubling number of exonerations,” *id.* at 1, as very weighty concerns that justify moratorium).

¹⁶⁶ See Devlin Barrett & Matt Zapotosky, *Justice Dept. Releases Part of Internal Memo on Not Charging Trump in Russia Probe*, WASH. POST (May 25, 2021, 4:00 PM), https://www.washingtonpost.com/national-security/justice-department-memo-mueller-trump/2021/05/24/50bof580-b432-11eb-a980-a60af976ed44_story.html [https://perma.cc/DPK4-LKWD].

¹⁶⁷ See, e.g., Cristina Rodríguez, Opinion, *Fixing Trump's Damage to Government Will Take More than Executive Orders*, WASH. POST (Jan. 22, 2021, 11:47 AM), https://www.washingtonpost.com/outlook/fixing-trumps-damage-to-government-will-take-more-than-executive-orders/2021/01/22/5e3c50f8-5c2d-11eb-8bcf-3877871c819d_story.html [https://perma.cc/VU7V-ZKLH].

¹⁶⁸ See, e.g., Adam Serwer, *Obama's Legacy of Impunity for Torture*, THE ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578> [https://perma.cc/TQY5-78YP]. President Obama justified his decision not to investigate Bush Administration officials responsible for torture by referencing his “belief that we need to look forward as opposed to looking backwards. And part of my job . . . is to make sure that, for example, at the C.I.A., you've got extraordinarily talented people who are working very hard to keep Americans safe. I don't want them to suddenly feel like they've got [to] spend all their time looking over their shoulders.” David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), <https://www.nytimes.com/2009/01/12/us/politics/12inquire.html> [https://perma.cc/H9RK-LLDY]. During President Obama's first term, the Department of Justice's Office of Professional Responsibility did issue a memorandum of decision

misdeeds, like any choice today not to plumb into offenses of law or ethics by Trump officials, clearly has a political motivation: to avoid sidetracking a policy agenda with what will inevitably become partisan-inflected recriminations and media distractions. This “political” interest is also clearly bound up with the institutional interests of the presidency writ large. One of the lessons of the Nixon era, for example, may well have been that a public reckoning with the failures of a past presidency — a reckoning that results in meaningful reform of institutions to prevent abuses from recurring — demands Congressional intervention — a dim prospect in our polarized era.

Other legal policy shifts more directly relate to the new Administration’s affirmative agenda but underscore how elements of it depend on or emanate from contested understandings of the law. The Department of Justice’s decision to drop the lawsuit against Yale University for its race-conscious admissions policies — a suit in which the prior Administration alleged that the University violated civil rights law through impermissible forms of discrimination, particularly against Asian American students — will not resolve the legal question.¹⁶⁹ The

finding no misconduct on the part of Deputy Assistant Attorney General John Yoo and Assistant Attorney General Jay Bybee, who were responsible for memoranda providing legal justification for “enhanced interrogation techniques.” See Memorandum from David Margolis, Assoc. Deputy Att’y Gen., U.S. Dep’t of Just., to the Att’y Gen., U.S. Dep’t of Just., 2 (Jan. 5, 2010), <https://fas.org/irp/agency/doj/opr-margolis.pdf> [<https://perma.cc/6VQW-HV33>]. For insight into congressional displeasure with the Administration’s handling of the matter, see Spencer Ackerman, *No Looking Back: The CIA Torture Report’s Aftermath*, THE GUARDIAN (Sept. 11, 2016, 8:00 AM), <https://www.theguardian.com/us-news/2016/sep/11/cia-torture-report-aftermath-daniel-jones-senate-investigation> [<https://perma.cc/S8WY-M8EL>] (statement of Senator Mark Udall) (“While the study clearly shows that the CIA’s detention and interrogation program itself was deeply flawed, the deeper, more endemic problem lies in a CIA, assisted by a White House, that continues to try to cover up the truth. . . . [The White House is] letting the CIA do whatever it likes, even if its efforts are aimed at actively undermining the president’s stated [torture] policies. . . . Director Brennan and the CIA today are continuing to willfully provide inaccurate information and misrepresent the efficacy of torture. In other words, the CIA is lying. This is not a problem of the past.”); and Press Release, Sen. Dianne Feinstein, Feinstein Statement on Obama Decision to Maintain Torture Report in Presidential Papers (Dec. 12, 2016), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=DAB81BD7-2E67-48A6-ACFC-1F5CC1CBD7B1> [<https://perma.cc/92VK-D2K6>] (“It’s my very strong belief that one day this report should be declassified. The president has refused to do so at this time, but I’m pleased the report will go into his archives as part of his presidential records, will not be subject to destruction and will one day be available for declassification.”). For the published sections of the CIA torture report, see generally S. REP. NO. 113-288 (2014).

¹⁶⁹ Anemona Hartocollis, *Justice Department Drops Suit Claiming Yale Discriminated in Admissions*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/us/yale-admissions-affirmative-action.html> [<https://perma.cc/U4XD-Z5DW>]. A spokesperson stated that “in light of all available facts, circumstances, and legal developments,” the Department of Justice dismissed the lawsuit but would continue to pursue an underlying investigation into whether the University complied with the Civil Rights Act of 1964. Rachel Treisman, *Justice Department Drops Race Discrimination Lawsuit Against Yale University*, NPR (Feb. 3, 2021, 2:19 PM), <https://www.npr.org/2021/02/03/968888888>.

Supreme Court may very well take up the matter in the form of a similar, private lawsuit against Harvard College next Term.¹⁷⁰ But the decision does announce the Administration's ongoing commitment to affirmative action, despite the fact that as a remedy, it has met an increasingly beleaguered fate in the courts and within public opinion.¹⁷¹ This commitment, in turn, forms part of a larger, affirmative civil rights agenda that centers principles of equity and inclusion.¹⁷² The

www.npr.org/2021/02/03/963666724/justice-department-drops-race-discrimination-lawsuit-against-yale-university [<https://perma.cc/XX6N-8HLQ>].

¹⁷⁰ The Court has called for the views of the United States in the matter, ostensibly to aid its decision as to whether to grant certiorari. See Amy Howe, *Justices Request Government's Views on Harvard Affirmative-Action Dispute*, SCOTUSBLOG (June 14, 2021, 12:40 PM), <https://www.scotusblog.com/2021/06/justices-request-governments-views-on-harvard-affirmative-action-dispute> [<https://perma.cc/D282-VFCC>].

¹⁷¹ After the Supreme Court's decision in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), and the replacement of Justices Kennedy and Ginsburg by Justices Kavanaugh and Barrett, the legal future of affirmative action does not seem particularly bright. Not only does *Fisher* impose tighter evidentiary burdens on universities that pursue race-conscious admissions policies, see Kimberly Jenkins Robinson, *The Supreme Court, 2015 Term — Comment: Fisher's Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 188 (2016), it seems unlikely that five Justices on today's Court will follow Justice Kennedy's reluctant embrace of the diversity rationale from *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). Political threats, though, represent an underdiscussed challenge to affirmative action practices. In 2020, as nearly two-thirds of California voters supported President Joe Biden, a California ballot initiative that would have repealed a ban on the use of race- and sex-based affirmative action failed, with the anti-affirmative action side receiving more than fifty-seven percent of the vote. ALEX PADILLA, CAL. SEC'Y OF STATE, STATEMENT OF VOTE: GENERAL ELECTION: NOVEMBER 3, 2020, at 14, <https://elections.cdn.sos.ca.gov/sov/2020-general/sov/complete-sov.pdf> [<https://perma.cc/2VEF-BYJC>]. This rejection of affirmative action in California came even as the proponents of the ballot initiative had far more financial support and endorsements from California's political leaders than the opponents of the initiative did. Scott Jaschik, *Why Did Prop 16 Fail?*, INSIDE HIGHER ED (Nov. 9, 2020), <https://www.insidehighered.com/admissions/article/2020/11/09/experts-discuss-failure-californias-proposition-16> [<https://perma.cc/87DQ-UWYY>].

¹⁷² See generally Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 14,035, 86 Fed. Reg. 34,593 (June 25, 2021). The last three administrations have engaged in a bit of guidance-memo dueling around this issue, reflecting their very different views of the viability of affirmative action under the civil rights laws and the Constitution, and underscoring how the Department of Justice can become a platform for signaling and even developing legal positions that help construct the reigning regime's conception of racial justice. See, e.g., Dear Colleague Letter from Catherine E. Lhamon, Assistant Sec'y, U.S. Dep't of Educ., Philip H. Rosenfelt, Deputy Gen. Couns., U.S. Dep't of Educ., & Jocelyn Samuels, Acting Assistant Att'y Gen., U.S. Dep't of Just. (May 6, 2014), <https://www.courthousenews.com/wp-content/uploads/2018/07/joint-letter.pdf> [<https://perma.cc/3E3H-LT99>] (reaffirming the validity of affirmative action in the aftermath of *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 572 U.S. 291 (2014), related to but not coextensive with the legality of affirmative action in higher education); Press Release, U.S. Dep't of Just., Attorney General Jeff Sessions Rescinds 24 Guidance Documents (July 3, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents> [<https://perma.cc/84A6-2XFN>] (rescinding the Obama-era guidance on affirmative action); cf. Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2125 (2019) (arguing that the Obama Administration's guidance documents on sex discrimination in education attempted to "push the boundaries of social inclusion").

Administration's decision to issue a 100-day review of the changes made by its predecessor to Title IX guidance on sex discrimination and sexual assault similarly reflects its need to deploy new legal interpretations to serve a larger civil rights agenda whose emphasis departs dramatically from what came before.¹⁷³ The policy vision cannot be separated from the legal one. At least in the Title IX context, though, the events of the last four years may result in some form of departure from the Obama-era guidance issued by the Department of Education.¹⁷⁴ Across-the-spectrum critiques of the Obama-era guidance for its failure to adequately protect due process values could prompt a slightly different calibration of the legal and policy values at stake.¹⁷⁵

2. *The Bureaucracy.* — A number of the executive orders President Biden issued in the months after he entered office immediately changed the position of the United States government on controversial and high-profile matters. The new President rescinded his predecessor's immigration travel ban,¹⁷⁶ rejoined the Paris climate accord,¹⁷⁷ canceled a gas pipeline permit,¹⁷⁸ and disbanded the 1776 Commission established to produce a hagiography of the United States.¹⁷⁹ These initial flourishes underlined the stakes of the 2020 election and the starkly contrasting worldviews of the outgoing and incoming regimes. But this

¹⁷³ See Exec. Order No. 14,021, 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021); Dear Colleague Letter from Candice Jackson, Acting Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ. at 1 (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/E7F7-52J5>].

¹⁷⁴ See generally Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/5KWB-YJRU>]; Assistant Sec'y, Office for Civ. Rts., U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/FP4K-ZBPU>]. Both guidance documents were rescinded by Betsy DeVos in 2017. See Dear Colleague Letter from Candice Jackson, Acting Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ., *supra* note 173, at 1.

¹⁷⁵ For leading and representative critiques, see MARTHA C. NUSSBAUM, *CITADELS OF PRIDE: SEXUAL ASSAULT, ACCOUNTABILITY, AND RECONCILIATION* (2021); and Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016).

¹⁷⁶ *Proclamation on Ending Discriminatory Bans on Entry to the United States*, WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states> [<https://perma.cc/3JEU-NC9Q>].

¹⁷⁷ Elian Peltier & Somini Sengupta, *U.S. Formally Rejoins the Paris Climate Accord*, N.Y. TIMES (Feb. 19, 2021), <https://www.nytimes.com/2021/02/19/world/us-rejoins-paris-climate-accord.html> [<https://perma.cc/A4CD-66QA>].

¹⁷⁸ Coral Davenport, *The Keystone XL Pipeline Project Has Been Terminated*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/business/keystone-xl-pipeline-canceled.html> [<https://perma.cc/ZK58-GEQZ>].

¹⁷⁹ Michael D. Shear, *On Day 1, Biden Moves to Undo Trump's Legacy*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/01/20/us/politics/biden-executive-action.html> [<https://perma.cc/U2EH-FGYZ>].

dramatic run of reversals, which mostly emanated from power belonging to the President himself, made the Trump era seem more ephemeral than it was, and much of the Trump regime will not be so easily set aside.

Even where an administration is organized to issue executive orders that launch a slew of policy processes that reach deep into the administrative state, those orders are but the first step. As I have said elsewhere, “[executive] orders must be followed with concrete actions by lower-level officials who have the express authority to bring about change.”¹⁸⁰ A “strong political will, sustained over time and acted upon in concert by officials throughout the bureaucracy,”¹⁸¹ is required to bring about regime change, which happens not over a matter of months but of years. Who those officials are and what their priorities entail will shape the substance and speed of subsequent action.¹⁸² The complexity of standing up a new policy order is compounded by the fact that the new regime is likely to be confronted by a flurry of activity, including a host of new rules, issued by its predecessor on the way out of government. As Professor Anne Joseph O’Connell demonstrates, outgoing administrations engage in concerted “midnight rulemaking,” both completing and initiating major regulatory projects on their way out the door, which raises the difficulty associated with moving on to a new regime in whatever domain the regulation covers.¹⁸³

At the Administration’s outset, President Biden’s Chief of Staff followed the precedents of numerous predecessors and issued a memorandum to the Office of Management and Budget directing it to place a hold on all regulations that had not yet been finalized.¹⁸⁴ The numerosity and complexity of these regulations means that the sorting process will be time intensive, and it is far from obvious that all such regulatory efforts should be abandoned; at least some considered deliberation as a matter of agency practice is likely to precede their abandonment. More challenging still is determining how to proceed with regulations that

¹⁸⁰ Rodríguez, *supra* note 167.

¹⁸¹ *Id.*

¹⁸² *See id.*

¹⁸³ Relying on a newly constructed database covering rules proposed or issued between 1983 and 2010, O’Connell demonstrates both that there is a peak in rulemaking in the final months of an outgoing administration’s term and also that there is variation across administrations in the degree of this midnight activity. *See* O’Connell, *supra* note 149, at 493–500. She also finds spikes in the issuance of notices of proposed rulemaking during midterm transitions in control of Congress in 1994 and 2006, positing that the Democratic Clinton Administration in 1994 sought to begin rulemakings before Republicans took control of the House of Representatives, presumably to make it more difficult to undo those policy processes in the face of congressional pressure. *See id.* at 503–04.

¹⁸⁴ Memorandum from Ronald A. Klain, Assistant to the President & Chief of Staff, White House, to Heads of Exec. Dep’ts & Agencies (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidentialactions/2021/01/20/regulatory-freeze-pending-review> [https://perma.cc/ZU6D-FPVK].

have in fact become final — whether to continue to defend them in court where they have been challenged or to seek continuances and abeyances to buy time to consider their rescission and then initiate the complex notice-and-comment processes required for their undoing.

Further still, constructing a new regime, while dependent on undoing parts of the prior one, will also require its own regulatory actions, and the new administration must consider whether to pursue new regulations in an effort to entrench an alternative policy regime. Rulemakings, in particular, take considerable time, and as O’Connell shows, agencies are often slow to initiate rulemakings in the first year of an administration.¹⁸⁵ The process of filling leadership positions, especially those that require Senate confirmation, can be protracted, and yet the installation of new officials with the internal authority and energy to initiate new policy processes is crucial to policy transformation. Legislative rules require bargaining across agencies with “equities,” and the procedural requirements imposed by the Administrative Procedure Act¹⁸⁶ (APA) and court doctrine, and the increasingly omnibus nature of rules, make their production painstaking.¹⁸⁷ And yet they may be the key to the new regime’s survival past its term, as they are the hardest form of agency action to undo.

Of course, the difficulty of unwinding an old regime in order to create a new one, and of maintaining the stability of that new regime, might be relative across time. Professors Bethany Davis Noll and Richard Revesz, in work surveying the Trump Administration’s efforts to unwind the Obama Administration’s accomplishments, point to the rise of rollback tools, new in kind, that emerged during those years and more effectively unwound predecessor policies.¹⁸⁸ These tools’ persistence into the future will make it increasingly difficult for each new administration to realize its policy objectives — a phenomenon exacerbated by partisan polarization and the vanishing common ground between the two parties.¹⁸⁹ These developments, they argue, practically necessitate

¹⁸⁵ O’Connell, *supra* note 149, at 496.

¹⁸⁶ 5 U.S.C. §§ 551, 553–559, 701–706.

¹⁸⁷ See, e.g., O’Connell, *supra* note 149, at 496–97.

¹⁸⁸ Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 13 (2019) (identifying tools such as use of the Congressional Review Act, holding litigation in abeyance, and stop work orders that the Trump Administration took “to a whole new level”).

¹⁸⁹ *Id.* at 11, 48–54 (describing Republicans and Democrats as currently engaged in “tit-for-tat” behavior, under which “one actor will be cooperative in one period only if the other actor was cooperative in the prior period,” *id.* at 48, and noting the possibility of “no obvious endpoint” to this strategy, *id.* at 53). But see BALKIN, *supra* note 45, at 33–37 (arguing that polarization is cyclical and that “[w]e can already see signs of how depolarization might occur in the next few decades. . . . As the next regime develops, the growing incoherence and tensions within each party’s electoral coalition will create new possibilities for cross-party alliances,” *id.* at 37).

a two-term presidency for an incoming regime to have lasting effect.¹⁹⁰ Whether rollback tools have become more powerful or not, it remains the case that instantiating a new policy regime with some staying power entails massive amounts of work across and deep within an administration. These conditions ultimately highlight the significance of political will to accomplishing a new regime's agenda by assigning priorities among its numerous component parts.

President Biden's earliest executive orders signaled where some of that will would be directed. In the immigration arena, which I know best, those orders initiated legal and policy processes that have begun to reverse the hundreds of manifestations of the Trump Administration's remarkable effort to bend the law and the bureaucracy to serve its maximalist enforcement agenda.¹⁹¹ Realization of President Biden's own agenda has entailed centralized planning, streams of legal work and policy development across agencies, and crucial personnel changes designed to remove obstacles to change.¹⁹² At DHS, guidance to prosecutors has been revamped, enforcement memos prescribing norms of forbearance have been issued (and enjoined),¹⁹³ a notice-and-comment effort to fortify the Deferred Action for Childhood Arrivals (DACA) immigration

¹⁹⁰ The increased use of these rollback techniques will change the incentives of incoming administrations. Davis Noll and Revesz argue that such techniques may induce Presidents to prepare their regulatory strategies during transition, Davis Noll & Revesz, *supra* note 188, at 66, agencies to attempt to complete rules more quickly, which could lead to sloppiness and vulnerability to judicial review, *id.* at 71–72, and Presidents to promulgate more controversial regulations in their first term, *id.* at 72–73. For other literature discussing the ways in which administrations attempt to entrench their policies against future change, which may or may not overcome the power of these rollback tools, see *infra* note 310 and accompanying text. Cf. Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-Making "Ossified"?*, 20 J. PUB. ADMIN. RSCH. & THEORY 261 (2009) (challenging the ossification thesis that these procedural requirements prevent agencies from issuing rules, finding instead that agencies are able to seize their authorities relatively quickly, but finding as well that agencies issue fewer rules in times of divided government, which suggests that the prospect of oversight tempers agency enthusiasm).

¹⁹¹ See, e.g., Executive Order No. 14,010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021) (directing, among other things, that the Attorney General and Secretary of Homeland Security promulgate a joint rule defining when an asylum applicant should be considered a member of a "particular social group" as defined by the Immigration and Nationality Act).

¹⁹² See, e.g., Eileen Sullivan, *Biden Administration Forces Out Border Patrol Chief, a Supporter of Trump's Policies*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/us/politics/border-patrol-chief-biden.html> [<https://perma.cc/BE4F-VWN4>]; Raymond G. Lahoud, *James McHenry, Trump Appointed Head of Immigration Courts, Replaced by Jean King*, NAT'L L. REV. (Feb. 11, 2021), <https://www.natlawreview.com/article/james-mchenry-trump-appointed-head-immigration-courts-replaced-jean-king> [<https://perma.cc/3YZD-2VSP>].

¹⁹³ See Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, U.S. Dep't of Homeland Sec., Interim Guidance: Civil Enforcement and Removal Priorities (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [<https://perma.cc/2MGZ-ZL99>]; see also Press Release, U.S. Dep't of Homeland Sec., DHS Announces New Guidance to Limit ICE and CBP Civil Enforcement Actions in or Near Courthouse (Apr. 27, 2021), <https://www.dhs.gov/news/2021/04/27/dhs-announces-new-guidance-limit-ice-and-cbp-civil-enforcement-actions-or-near> [<https://perma.cc/683G-YA79>].

relief program has been launched,¹⁹⁴ and new procedures to manage a complex set of circumstances at the southern border and to expand eligibility for asylum have been devised.¹⁹⁵ At DOJ, officials have restored discretion to immigration judges who were tightly supervised during the Trump years and have dropped the Department's opposition to the effort by the union of immigration judges to undo its decertification by the Trump Administration — efforts to help bolster those judges' autonomy.¹⁹⁶ At the same time, the Attorney General has exercised his own authority to rescind decisions by his predecessors that narrowed the scope of asylum law.¹⁹⁷ These acts have helped clear the ground for DOJ and DHS to follow through on the direction in the executive orders to initiate a rulemaking to define key components of asylum law, signaling the prospect of fundamental change that eluded the Clinton and Obama Administrations and that would instantiate that change in the most durable form of agency action. And both agencies have opened themselves up again to conversation with and input from the advocacy community, which had been shut out by the previous Administration.¹⁹⁸ These assertions of power and authority alone will not solve the problems of this complex policy arena. And the immediate political interests of the Administration, especially when faced with noticeable increases in migrants at the border, will sometimes supersede its larger philosoph-

¹⁹⁴ See Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053 (Jan. 20, 2021); Press Release, U.S. Dep't of Homeland Sec., Statement by Homeland Security Secretary Mayorkas on DACA (Mar. 26, 2021), <https://www.dhs.gov/news/2021/03/26/statement-homeland-security-secretary-mayorkas-daca> [<https://perma.cc/3F4J-MM32>].

¹⁹⁵ Press Release, White House, Fact Sheet: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System (July 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system> [<https://perma.cc/95SX-8YU2>].

¹⁹⁶ See Press Release, Int'l Fed'n of Pro. & Tech. Eng'rs, NAIJ Statement on Policy Shift and Legal Action by DOJ Related to Immigration Judges' Union Rights (June 30, 2021), <https://www.ifpte.org/news/naij-statement-on-policy-shift-and-legal-action-by-doj-related-to-union-rights-for-immigration-judges> [<https://perma.cc/YC4Q-FUYQ>].

¹⁹⁷ See *Matter of A-B*, 28 I&N Dec. 307 (A.G. 2021) (rescinding prior AG opinion that cast doubt on the viability of asylum claims based on private-actor violence); *Matter of L-E-A*, 28 I&N Dec. 304 (A.G. 2021) (rescinding prior AG opinion casting doubt on membership in a family as constituting a particular social group).

¹⁹⁸ See, e.g., Press Release, U.S. Dep't of Homeland Sec., Readout of Secretary Mayorkas's Visit to El Paso, Texas with Vice President Harris (June 25, 2021), <https://www.dhs.gov/news/2021/06/25/readout-secretary-mayorkas-s-visit-el-paso-texas-vice-president-harris> [<https://perma.cc/UVV6-5PRN>]; Merrick B. Garland, Att'y Gen., Remarks on the Biden Administration's Gun Crime Prevention Strategy (June 23, 2021), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-biden-administration-s-gun-crime> [<https://perma.cc/CDN9-XYEK>].

ical commitments — see the controversy over the President’s own decision, later reversed, to keep refugee admissions low.¹⁹⁹ But together all of these moves begin to define what concerted regime change entails.

Similar concerted maneuvers using multiple levers of power available to officials inside agencies have been repeated across the administrative state: to turn the tide in the environmental realm,²⁰⁰ to advance the Administration’s objective of empowering workers,²⁰¹ and to shift the language and substance of American diplomacy.²⁰² Shifts in rhetoric and substance in countless policy domains underscore the dramatic divergence between the two most recent Presidents’ visions and the consensus views within the Republican and Democratic parties today. This divide, in turn, highlights a crucial corollary to regime change that I explore in more depth in the next Part — the volatility it introduces into political and regulatory processes. In a polarized context such as ours, in which the two political parties each have reasonable prospects of controlling the presidency (and Congress for that matter), and the prospects

¹⁹⁹ Zolan Kanno-Youngs & Miriam Jordan, *Biden Wavers on Restricting Refugee Entry*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/04/16/us/politics/joe-biden-refugee-policy.html> [<https://perma.cc/QJY3-XETJ>].

²⁰⁰ President Biden has overturned at least forty-two Trump-era policies related to environmental regulation and has added twenty-four of his own. See Juliet Eilperin, Brady Dennis & John Muyskens, *Tracking Biden’s Environmental Actions*, WASH. POST (Aug. 30, 2021, 8:19 PM), <https://www.washingtonpost.com/graphics/2021/climate-environment/biden-climate-environment-actions/> [<https://perma.cc/RL28-QH3S>]. Actions on this front have ranged from the easily accomplished to the onerous: seeking stays or abeyances in dozens of cases pending in court challenging the Trump-era rollbacks of Obama-era regulations; reviewing myriad Trump-era rules on toxic chemical safety, emissions, and extractive activities; and initiating far-reaching, scientifically complex and politically fraught rules that will take years to bring to fruition and whose lasting effect may depend on who succeeds President Biden. See *id.* For a comprehensive summary of the nearly 100 rollbacks initiated by the Trump Administration and a picture of the daunting work to be done by an administration committed to environmental regulation and justice, see Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More than 100 Environmental Rules. Here’s the Full List.*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [<https://perma.cc/4PW6-8VWL>]. And in perhaps no other domain is the contrast in approaches to science and expertise between the old and new regimes clearer — the shift from a posture of deep skepticism and denial to one that self-consciously embraces expertise as a foundation for policy is pronounced. See Eilperin, Dennis & Muyskens, *supra*.

²⁰¹ See Press Release, White House, Fact Sheet: Executive Order Establishing the White House Task Force on Worker Organizing and Empowerment (Apr. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/26/fact-sheet-executive-order-establishing-the-white-house-task-force-on-worker-organizing-and-empowerment/> [<https://perma.cc/CH66-KB8M>].

²⁰² See *How Joe Biden Is Reshaping America’s Global Role*, THE ECONOMIST (Apr. 22, 2021), <https://www.economist.com/united-states/2021/04/22/how-joe-biden-is-reshaping-americas-global-role> [<https://perma.cc/4Z6D-F4W7>].

for consensus building seem dim,²⁰³ political and institutional conditions are likely to produce significant swings in policy.²⁰⁴

This instability also points to one of the limits of regime change through executive action — its lack of staying power relative to legislation.²⁰⁵ To begin with basics, even though legislation is not permanent, it can achieve policy objectives in longer-lasting ways and will be more effective in entrenching a policy regime than rulemaking, not to mention the myriad other forms of agency policymaking that are formally easier to undo.²⁰⁶ No executive regime change proceeds without cognizance of this fact or without a legislative strategy. But the nature of that strategy will depend on the particular partisan dynamics between an incoming administration and the houses of Congress, as well as where the administration and the country stand in historical time.²⁰⁷

The newest regime's legislative strategy arguably has been consistent with the circumstances it faces, of the narrowest form of unified control of government, with an even split in the Senate, a majority in the House that could easily be lost in the 2022 midterm elections, and the persistence of lawmakers' attachment to the countermajoritarian filibuster. We might describe the Biden Administration's approach to the legislature on several tracks, which together reflect both a vision of a transformative regime and the elements to achieve an actually consequential one. Early in his Administration, he signed the American Rescue Plan,²⁰⁸ justified and launched as a response to a grave economic crisis brought on by the pandemic, but lauded as advancing major social welfare objectives through various income supports and child tax credits, which if made permanent could render the Act the most significant social welfare legislation in generations.²⁰⁹ In announcing it, President

²⁰³ Professor Frances Lee powerfully makes this argument in recent work that underscores why consensus has become so difficult to achieve. See FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 198–200 (2016).

²⁰⁴ See Davis Noll & Revesz, *supra* note 188, at 4.

²⁰⁵ For an extended discussion, see COX & RODRÍGUEZ, *supra* note 58, at 210–14.

²⁰⁶ Even this point is relative, as the trajectory of the Affordable Care Act suggests. It arguably has taken three high-stakes cases, at least two of which could have turned out very differently at the Supreme Court, and sufficient political will in Congress to withstand numerous repeal attempts with a sympathetic President, to entrench this statute. See generally JONATHAN COHN, *THE TEN-YEAR WAR: OBAMACARE AND THE UNFINISHED CRUSADE FOR UNIVERSAL COVERAGE* (2021) (detailing the political and legal machinations that propelled the battle over the ACA); Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495 (2020).

²⁰⁷ For further discussion of this concept, see *infra* notes 224–235 and accompanying text.

²⁰⁸ Pub. L. No. 117-2, 134 Stat. 4 (2021).

²⁰⁹ The Act spent a total of \$1.9 trillion on various measures of economic relief both directly and indirectly related to the COVID-19 health and economic crisis, including: means-tested direct cash payments, extended unemployment benefits, an expanded child tax credit, grants to state educational agencies, grants to state and local governments with flexible spending provisions, grants to industries affected by the pandemic, and grants to expand vaccine and testing access. See Robinson

Biden emphasized a central philosophical tenet: that the legislation “[f]or the first time in a long time, . . . puts working people in this nation first.”²¹⁰ Possible only because it could be fit within the parameters of the legislative maneuver of reconciliation,²¹¹ it nonetheless amounts to

Meyer, *The Weekly Planet: Biden’s Stimulus Is a Big Deal for Public Transit*, THE ATLANTIC (Mar. 10, 2021), <https://www.theatlantic.com/science/archive/2021/03/bidens-stimulus-is-also-sort-of-a-climate-bill/618247> [https://perma.cc/5938-U4YE]; Jim Tankersley & Sheryl Gay Stolberg, *Biden’s \$1.9 Trillion Challenge: End the Coronavirus Crisis Faster*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/03/22/business/biden-coronavirus-stimulus.html> [https://perma.cc/B8XA-4JEN]. Some commentators have noted how the flexible state and local grants support “creative problem-solving” by local governments. See, e.g., Mark Muro, Eli Byerly-Duke & Joseph Parilla, *The American Rescue Plan’s Secret Ingredient? Flexible State and Local Aid*, BROOKINGS INST. (Apr. 2, 2021), <https://www.brookings.edu/blog/the-avenue/2021/04/02/the-american-rescue-plans-secret-ingredient-flexible-state-and-local-aid> [https://perma.cc/MKK6-RBHV]. Others have noted that the expanded credits to everyday Americans have the potential to reduce the poverty rate by nearly a third and the child poverty rate by half. See, e.g., LAURA WHEATON, SARAH MINTON, LINDA GIANNARELLI & KELLY DWYER, URBAN INST., 2021 POVERTY PROJECTIONS: ASSESSING FOUR AMERICAN RESCUE PLAN POLICIES 1 (2021), https://www.urban.org/sites/default/files/publication/103794/2021-poverty-projections-assessing-four-american-rescue-plan-policies_o_o.pdf [https://perma.cc/G2LK-DFEA]. Yet more have called it transformational, underscoring its shift away from trickle-down economic theory, its focus on aid for working families, and its contrast with austerity-constrained economic relief strategies. See Statement, Winnie Stachelberg, Exec. Vice President for External Affs., Ctr. for Am. Progress, *The American Rescue Plan Meets the Historic Challenge Our Country Faces* (Mar. 10, 2021), <https://www.americanprogress.org/press/statement/2021/03/10/497001/statement-american-rescue-plan-meets-historic-challenge-country-faces> [https://perma.cc/EFG7-9XND]; David Brooks, Opinion, *Joe Biden Is a Transformational President*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/opinion/biden-covid-relief-bill.html> [https://perma.cc/AWX7-DLZF] (arguing that the pandemic has ushered in an “intellectual revolution” in fiscal policy, and noting the lack of strong mobilization against the COVID relief package on conservative television); Jacob M. Schlesinger & Andrew Restuccia, *Behind Biden’s Big Plans: Belief that Government Can Drive Growth*, WALL ST. J. (Mar. 30, 2021, 11:37 AM), <https://www.wsj.com/articles/behind-bidens-big-plans-belief-that-government-can-drive-growth-11617118656> [https://perma.cc/VU6C-QCB8]; Adam Serwer, *Biden Chooses Prosperity over Vengeance*, THE ATLANTIC (Mar. 15, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/biden-chose-prosperity-over-vengeance/618279> [https://perma.cc/5KFH-QJZB]. But cf. Michael R. Strain, Opinion, *Can’t We Stop Yammering About Paradigm Shifts?*, BLOOMBERG (Mar. 24, 2021, 10:00 AM), <https://www.bloomberg.com/opinion/articles/2021-03-24/biden-pandemic-relief-law-was-not-a-paradigm-shift> [https://perma.cc/V2RP-M36T] (“Something that is transformational can’t be temporary. . . . But while the relief law as a whole doesn’t represent a new era of fiscal policy, some components of it might.”).

²¹⁰ President Biden, Remarks on the American Rescue Plan (Mar. 12, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/12/remarks-by-president-biden-on-the-american-rescue-plan-2> [https://perma.cc/GQM8-GB46] (detailing the Act’s key provisions, highlighting bipartisan local government support, and characterizing the Act as “historical,” “transformational,” and “chang[ing] the paradigm”).

²¹¹ Although President Biden and some Senate Democrats hoped to win bipartisan support for a COVID relief package, the American Rescue Plan circumvented the filibuster through reconciliation, a process created in 1974 wherein the Senate can enact budget legislation through a simple majority. Kelsey Snell, *What Is “Reconciliation”? Democrats Face Hurdles to Use It for COVID Relief*, NPR (Feb. 2, 2021, 5:01 AM), <https://www.npr.org/2021/02/02/962812082/what-is-reconciliation-democrats-face-hurdles-to-use-it-for-covid-relief> [https://perma.cc/DTW9-2RVS]. Inherent in the reconciliation process are numerous roadblocks: Congress generally only passes one

a lasting economic achievement that would have been difficult to accomplish through multi-agency regulations proceeding on different tracks. And then the President has also thrown his support behind aspirational bills that articulate reform visions almost certainly out of reach given the shape of Congress and divided public opinion but that nonetheless could provide templates for smaller-scale, negotiated legislation.²¹²

The Executive's relationship to Congress also matters in a different sense: as I noted at the outset, the tools a given President and his regime have available or feel well placed to exploit will depend a lot on the distribution of power across the branches as a whole,²¹³ as well as the place the new regime occupies in history.²¹⁴ There is some evidence that divided government affects the energy of administrative agencies, suggesting that the prospect of oversight or discipline through appropriations restrictions might temper executive energy.²¹⁵ But where government is unified, a new administration might receive help from the Congressional Review Act²¹⁶ (CRA), which authorizes Congress within sixty days of the promulgation of a regulation to rescind it through majority vote.²¹⁷ With this coordination, unraveling a prior administration's late-breaking enactments could prove straightforward. Indeed,

budget bill per year, and therefore only uses reconciliation once per year; Congress may only enact revenue and spending provisions; and bills passed via reconciliation come with a "vote-arama" period wherein Senators may propose floor amendments without further debate. *Id.*

²¹² The Administration's draft immigration reform legislation — the U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. (2021) — while almost certain not to pass, accomplishes at least three objectives. First, it outlines a template for immigration reform that breaks with the dynamics of the last forty years of offering relief to present immigrants and modernizing the system of admissions only in exchange for a massive new enforcement initiative or the creation of new legal forms of enforcement. Second, it offers a set of discrete policies that could be broken apart and enacted as smaller reforms. And third, it acknowledges and commits at least some executive energy to the proposition that only Congress can provide long-lasting stability to the so-called Dreamers and other unauthorized immigrants the Administration would otherwise insulate from deportation through executive action. For a fact sheet describing the bill released on Inauguration Day, see Press Release, White House, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system> [<https://perma.cc/P3M6-3NZQ>].

²¹³ I leave for Part III the consideration of regime conflict with the Court.

²¹⁴ See sources cited *supra* notes 188–189 and accompanying text (discussing the cycles of political time).

²¹⁵ See, e.g., O'Connell, *supra* note 149, at 485–86; Jason Webb Yackee & Susan Webb Yackee, *Divided Government and U.S. Federal Rulemaking*, 3 REGUL. & GOVERNANCE 128, 129 (2009) (finding that "during periods of divided government, the bureaucracy indeed issues fewer rules than under unified government").

²¹⁶ 5 U.S.C. §§ 801–808.

²¹⁷ *Id.* §§ 801(b)(1), 802(a).

the use of the CRA by the Trump Administration to undo fourteen rules by the outgoing Obama Administration constitutes one of the game-changing moves Davis Noll and Revesz cite as enabling regime change but destabilizing prior accomplishments.²¹⁸ But despite the partisan alignment across the branches, only three Trump-era rules ended up on a CRA docket during President Biden's first months, leaving any other unravelings to the procedurally cumbersome notice-and-comment process.²¹⁹

Predictable partisan alliances and gaming aside, there is one further, perhaps overly high-minded, context in which to situate regime change — one that moves us from its explication to its justification in

²¹⁸ See Davis Noll & Revesz, *supra* note 188, at 13, 19–20.

²¹⁹ One account attributes the anemic use of the CRA to the overloaded congressional agenda, including the second President Trump impeachment, the enactment of the crisis-driven American Rescue Plan, and the need to confirm President Biden's nominees, as a sort of administrative power tradeoff. See Suzy Khimm, *Why Senate Democrats Reversed Few of Trump's "Midnight Rules,"* NBC NEWS (June 8, 2021, 6:00 AM), <https://www.nbcnews.com/politics/congress/why-senate-democrats-reversed-few-trump-s-midnight-rules-n1269905> [https://perma.cc/JD34-G2UM]. The current Congress has thus far invoked the CRA to reverse several regulations from the Trump Administration. President Biden, Remarks on Signing Three Congressional Review Act Bills into Law: S.J.Res.13; S.J.Res.14; and S.J.Res.15 (June 30, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/30/remarks-by-president-biden-signing-three-congressional-review-act-bills-into-law-s-j-res-13-s-j-res-14-and-s-j-res-15> [https://perma.cc/AC43-BBYX]. The rules that Congress has reversed are: True Lender Rule, 12 C.F.R. § 7.1031 (2021) (allowing banks making loans in one state to charge interest rates above state limits if they are partnered with a federally chartered bank in a separate state); 29 C.F.R. §§ 1601.24, 1626.12, 1626.15 (2021) (requiring the Equal Employment Opportunity Commission (EEOC) to give more information to employers during conciliation in discrimination cases); Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018 (Sept. 14, 2020) (amending sections of 40 C.F.R. pt. 60) (removing methane emissions standards and transmission and storage limits for certain substances). For a critical appraisal of the CRA, see Paul Rose & Christopher J. Walker, *The Congressional Review Act and the Biden Administration's Approach to Financial Regulation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 29, 2021), <https://corpgov.law.harvard.edu/2021/01/29/the-congressional-review-act-and-the-biden-administrations-approach-to-financial-regulation> [https://perma.cc/STB5-GYB6] (“[T]he CRA is perhaps best suited to repeal hastily drafted and poorly developed midnight rules, rather than a rule demonstrating compromise and thoughtful agency engagement over the course of a decade.”). For an account that attributes less enthusiasm to Democrats than Republicans for using the CRA, see Helaine Olen, Opinion, *Biden and Democrats Have a Powerful Weapon to Overturn Some of Trump's Last Acts. They Should Use It.*, WASH. POST (Jan. 20, 2021, 5:22 PM), <https://www.washingtonpost.com/opinions/2021/01/20/biden-democrats-have-powerful-weapon-overturn-some-trumps-last-acts-they-should-use-it> [https://perma.cc/7NLP-NEGL]. This discrepancy could be explained by the threat the CRA poses to administrative governance, more likely to be used by Democrats to achieve their policy objectives than by deregulatory Republicans. See *id.* But see Bridget C.E. Dooling, Daniel Pérez & Steven J. Balla, *Where Are the Congressional Review Act Disapprovals?*, BROOKINGS INST. (Mar. 24, 2021), <https://www.brookings.edu/research/where-are-the-congressional-review-act-disapprovals> [https://perma.cc/4BBL-6XN8] (“[S]ince 1996, Democrats have been responsible for 16% of resolutions introduced when the party was in the minority. However, when the party has held the majority, Democrats have introduced half of the resolutions of disapproval — oftentimes accounting for all or nearly all of the resolutions introduced in a particular session of Congress.”).

Part II. Legislation and executive actions might and should be seen as complements. Our separation of powers culture conditions officials, courts, and scholars to think in terms of usurpations. But in times of divided government, and even in today's hyperpolarized moment, the bulk of what the Executive does is to superintend and adapt pre-existing legislative arrangements to bring them in line with the times.²²⁰ Competition and complementarity offer better frames for understanding the forms of power that make government run and that also enable democratic transformation. To put it simply, statutes create frameworks, but day-to-day governance fills them out in ways that can be highly consequential and even serve a meaning-making function.²²¹ And whatever Congress's ability to enact new legislation today, the state is awash in statutory authority and mandates, enacted by recent and long-past Congresses — mandates that must be continually brought into being through administration.²²² This dovetails with observations in political science literature and other commentary that treat the energetic presidency as reflective not of efforts to circumvent Congress, but of the rise of Executive-driven party leadership and a function of the fact that the President sits atop a massive administrative state with responsibilities for its supervision and forward motion.²²³ With this complementarity in mind, I turn to a consideration of why concerted regime change, even when it might produce volatility, can serve democratic purposes.

II. IN DEFENSE OF POWER

The copious media comparisons of the initial days of the Biden Administration to the early acts of President Franklin D. Roosevelt were

²²⁰ Professor Adam Cox and I develop this concept in *THE PRESIDENT AND IMMIGRATION LAW*. See *supra* note 58, at 206–14 (articulating the concept of two principals as good government, emphasizing that both the Executive and the legislature possess virtues of responsiveness and accountability but that they manifest in different ways); see also Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) (“We argue that agencies are better suited than courts to do that updating work [because] . . . the agency has the superior claim to interpret the statute’s application to new problems during periods of congressional quiescence.”).

²²¹ Cf. COX & RODRÍGUEZ, *supra* note 58, at 122–24, 192–202 (demonstrating how executive enforcement over time can change the meaning and scope of a statutory regime); Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos & Narrative*, 97 HARV. L. REV. 4, 11–19 (1983) (exploring multiplicity of sites and frames for the production of legal meaning).

²²² For further discussion of this point, see *infra* Part II, pp. 58–91.

²²³ This conception also aligns with the argument Cox and I make about executive control over immigration law — that it is deeply historically rooted and a product of the structure of the law, not a manifestation of partisan polarization, though such polarization may help explain why Congress has repeatedly failed to reform immigration law over the last three decades. See COX & RODRÍGUEZ, *supra* note 58, at 3, 6.

telling.²²⁴ FDR created the First Hundred Days construct itself,²²⁵ and his presidency is often cited as marking a new phase in the American presidency.²²⁶ The analogy performs a dual function in today's political and legal discourse: to highlight the energy of the new Administration and to initiate a by-now familiar unilateralism critique²²⁷ — a lament

²²⁴ See, e.g., Ron Elving, *Can Biden Join FDR and LBJ in the Democratic Party's Pantheon?*, NPR (Apr. 17, 2021, 7:00 AM), <https://www.npr.org/2021/04/17/985980593/can-biden-join-fdr-and-lbj-in-the-democratic-partys-pantheon> [https://perma.cc/VSN5-VVJ5]; Michael Hirsh, *The Most Vital 100 Days Since FDR*, FOREIGN POL'Y (Apr. 12, 2021, 10:21 AM), <https://foreignpolicy.com/2021/04/12/the-most-vital-100-days-since-fdr> [https://perma.cc/VZ8F-8DFS].

²²⁵ JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE* 273 (2006).

²²⁶ See, e.g., Thomas E. Cronin & William R. Hochman, *Franklin D. Roosevelt and the American Presidency*, 15 PRESIDENTIAL STUD. Q. 277, 277 (1985) ("When Franklin D. Roosevelt died in 1945, the modern presidency had been firmly established."); see also *id.* at 284 ("Critics of the Roosevelt conception and use of the presidency sometimes see in FDR's methods the beginning of the 'imperial presidency.'").

²²⁷ This critique reflects the desire to defend congressional prerogatives, but it also entails partisan grandstanding. For some examples of representative critiques by members of Congress lodged against Presidents of the opposing party, see *Obama Administration's Abuse of Power: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 2 (2012) (statement of Rep. Lamar Smith) ("The President ignored the Senate's constitutional role in the appointment process in order to place partisans in key positions that regulate labor and the financial markets. . . . The Administration also has shown contempt for Congressional oversight of its activities. . . . The President has also ignored the Constitution's protections of individual rights, most notably religious freedom. . . . Together, these abuses by the Obama administration form a disturbing pattern. When the Constitution and laws limit the Administration's ability to impose its partisan agenda, the President ignores the Constitution and the laws. This pattern of behavior hurts our country, disrespects the Constitution and undermines our democracy."); and Press Release, Sen. Ben Sasse, *Sasse Criticizes Lawmaking by Executive Order* (Aug. 8, 2020), <https://www.sasse.senate.gov/public/index.cfm/2020/8/sasse-criticizes-lawmaking-by-executive-order> [https://perma.cc/99PV-HGW3] ("The pen-and-phone theory of executive lawmaking is unconstitutional slop. President Obama did not have the power to unilaterally rewrite immigration law with DACA, and President Trump does not have the power to unilaterally rewrite the payroll tax law. Under the Constitution, that power belongs to the American people acting through their members of Congress."). For critiques of President Trump's unilateralism, see Press Release, Sen. Ben Sasse, *supra*; and Rachel Treisman, *Democrats Slam Trump's Executive Actions, Critiquing Both Substance and Legality*, NPR (Aug. 9, 2020, 3:50 PM), <https://www.npr.org/2020/08/09/900674818/democrats-slam-trumps-executive-actions-critiquing-both-substance-and-legality> [https://perma.cc/48DD-PZ6N] (quoting Rep. Justin Amash's criticism of President Trump's approach to executive action: "Our Constitution doesn't authorize the president to act as king whenever Congress doesn't legislate."). For similar responses to President Biden's early executive orders, see Press Release, Rep. Andy Barr, *Congressional Update from Congressman Andy Barr* (Jan. 29, 2021), https://iqconnect.house.gov/iqextranet/view_newsletter.aspx?id=104873&c=KY06AB [https://perma.cc/798C-FETY] ("After calling for unity and vowing democratic governance, President Biden has already undertaken more Executive Orders during his first week in office than President Trump did in his first 100 days. By governing exclusively through Executive Orders, the President has undermined his own plans for unity and working together, all while creating more economic uncertainty for the middle-class during a pandemic. The President's Executive Orders have damaged our energy sector and raised the price of insulin meaning Americans will be paying more for life-saving drugs, gas and household electricity while China continues to operate as normal without repercussions."); and Aaron Blake, *The GOP's Oversimplified Pushback on Biden's Executive Actions*, WASH. POST (Jan. 21, 2021, 5:49 PM), <https://www.washingtonpost.com/politics/2021/01/21/gops-oversimplified-pushback-bidens->

that has many dimensions but that at its core warns of an overly powerful presidency as a threat to the rule of law, legislative supremacy, and the possibility of bipartisan politics.²²⁸

But another way to understand these early executive actions — a better way, I would argue — is as a legitimate, justified, and even necessary assertion of power, or a statement of the new Administration's willingness to use the forms of action available to it to usher in a new legal and political order. Having provided an institutionally and politically specific picture of the beginnings of regime change in Part I, here I articulate an affirmative case for its concerted pursuit, namely that such pursuit serves democracy and can be essential to the promotion of social welfare. In so doing, I hope to decenter the presidency in the picture of regime change, by attempting to show that top-down presidential control need be but one feature of its realization. I then turn to consider a classic critique of radical, wholesale, and even rapid change in law and policy that emphasizes stability and fidelity to law as means of preventing abuses of power and social disruption. While these concerns should be heeded in specific contexts, they do not justify a big-picture aversion to regime change. I finally consider what this concept of regime change through executive action means in relation to Congress and its own capacities and incentives, concluding that very real concerns about congressional capacity do not justify skepticism of the change I advocate. Such skepticism should not drive the court doctrines or approaches to institutional design that mediate regime change.

executive-actions [<https://perma.cc/2KQW-GC66>] (quoting Rep. Lauren Boebert's criticism of President Biden's use of executive orders: "If Biden wants Congress to work with him, he should work with Congress instead of signing 15 executive orders and 2 executive actions to circumvent us.").

²²⁸ I discuss several of these concerns in more detail below, but they include worries that presidential control over administration leads to White House interference in legal and policy processes that formally belong with agencies, that such involvement excessively politicizes what ought to be a process of effectuating congressional will and sidelines important values, such as expertise and fact-based decisionmaking, and that the rise and expansion of executive action — the strategy President Obama memorably referred to as action with his "pen [and] phone," see Rebecca Kaplan, *Obama: I Will Use My Pen and Phone to Take on Congress*, CBS NEWS (Jan. 14, 2014, 12:44 PM), <https://www.cbsnews.com/news/obama-i-will-use-my-pen-and-phone-to-take-on-congress> [<https://perma.cc/D2TT-8TMJ>] — enervates Congress over time by robbing it of incentives to act, and paves the way for authoritarianism in the process. See *infra* pp. 66–67, 76–77. For a leading academic articulation of these concerns, written during the years of the George W. Bush Administration, see PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 160, 162–64 (2009). See also Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 45 (2019) ("While frequent electoral swings incentivize Congress to obstruct and oppose compromise, the President turns to unilateral action for policy progress during divided government. Policymaking comes in the form of new regulations, enforcement priorities, executive actions, and presidential agreements, rather than bipartisan legislation.").

Before developing these claims, however, I should note that the institutionally specific account of regime change I outlined in Part I reflects the features of our existing legal order that either enable or restrain a new administration's adoption of its preferred policies and legal interpretations. Many of these features are contested or in flux; as I argue in Part III, for example, ferment defines the administrative law doctrines that implicate legal and policy development across administrations. But the specific picture I have presented bears the mark of the system we have.²²⁹

We could, alternatively, frame a debate over regime change by defining different models for it, arrayed along a spectrum, from a system that enables radical change overnight, to one that makes it painfully slow if not impossible. The former model might permit a new Chief Executive to replace all government officials at will — to totalize the Trump Administration's Schedule F, for example²³⁰ — and endow the President with the power to immediately rescind all regulations and policies he identifies as undesirable. The latter molasses model, by contrast, might eliminate the political class altogether from inside administrative agencies and expressly preclude the President from exercising any di-

²²⁹ Professors Jonathan Gould and David Pozen argue that the structures of our existing government systematically advantage the Republican agenda and undermine the Democratic one. First and foremost, “[b]ecause Democrats now have consistently more ambitious legislative agendas than do Republicans . . . the many veto points in the federal lawmaking process have a disparate negative impact on Democratic agendas.” Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. (forthcoming 2022) (manuscript at 3) (on file with the Harvard Law School Library). And within the administrative state, the proceduralization of administrative law and centralized oversight of rulemaking within the Office of Information and Regulatory Affairs (OIRA) are more likely to stymie proregulatory agendas. *Id.* (manuscript at 30–31). Other scholars, such as Professors Nicholas Bagley and Richard Revesz, show how “devotion to regulatory cost cutting” within the Office of Management and Budget to curb supposed agency overregulation has had an antiregulatory bias. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1265 (2006). Scholars debate the effects of cost-benefit analysis (CBA) on policymaking. Compare DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 113–14 (2010) (criticizing CBA for prioritizing individuals’ revealed spending preferences over collective deliberation in determining the worth of a public good), with Cass Sunstein, *Some Costs & Benefits of Cost-Benefit Analysis*, 150 DÆDELUS, Summer 2021, at 208, 209, 211, 216 (arguing that cost-benefit analysis offers a means of attending to the real-world consequences of regulation but that it could be better in identifying those consequences, including by focusing directly on diversity and welfare and distributional considerations).

²³⁰ See Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 21, 2020) (creating Schedule F in the Excepted Service, an exception to the competitive hiring process for career federal employees who do work “of a confidential, policy-determining, policy-making, or policy-advocating character,” and excepting such employees from adverse action procedures in order to give agencies “flexibility to expeditiously remove poorly performing employees from these positions without facing extensive delays or litigation,” *id.* at 67,632). On his third day in office, President Biden revoked the Executive Order establishing Schedule F, lauding the civil service as the “backbone” of government. Exec. Order No. 14,003, 86 Fed. Reg. 7231, 7231 (Jan. 22, 2021).

rective or even supervisory authority over the state itself, so that government runs without regard to who has won election, leaving the legislature exclusively in charge of policy direction and the policing of any slack between statutes and regulation.

These caricatured and unrealizable conceptions of government ultimately underscore that debates about change versus stability will always be relative, focused on where along the spectrum from constant churning to perpetual stasis strikes the right balance among the systemic values in play. Reconciling this tension is at the heart of innumerable debates over the institutional design of our current order,²³¹ as well as over how to design a constitutional democracy in the first place. It also shapes the exploration in comparative politics of the relative virtues and vices of parliamentary versus presidentialist systems. One cut of this debate emphasizes the democratic virtues of the parliamentary model, which enables democratic change, in law and policy, through a relatively unconstrained or unchecked legislature, which in turn controls the Executive. These features are lauded for giving the people far greater control over law and policy and precluding the threat of authoritarianism by eliminating a monarch-like figure from the system.²³² The contrasting model, of course, is classical Madisonianism, which emphasizes separated powers as one of the means of checking tyranny.²³³ This vision of government appears often in Supreme Court rhetoric emphasizing the importance of the checking function of separation of powers²³⁴ and in scholarly justifications of these checks as ensuring that the government not engage in rash or impulsive action — a normative and stability-based claim that could be made about the myriad features

²³¹ Some of these debates include: whether the Constitution should be understood as requiring a unitary executive, either formally or to advance certain goals of the separation of powers; when agencies should be designed as independent and what should the guarantors of independence be; whether Congress should delegate power to regulate to a single agency or to multiple agencies to create overlapping jurisdictions; whether agencies should be designed hierarchically or with multiple veto points within them; and, of course, how onerous or “soft” should the myriad judicial doctrines and procedural requirements that structure agency decisionmaking be.

²³² See IAN SHAPIRO, *POLITICS AGAINST DOMINATION* 67–78, 84–85 (2016) (arguing that democracy along the parliamentary model, which alternates control between parties, better guards against domination and serves the interests of the people than does the more sclerotic and checked republican form of government embodied in our presidentialist separation of powers); cf. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640–41 (2000) (advocating a constrained parliamentary model, in which the democratic parliament is checked, but not with the drag of presidentialism).

²³³ See THE FEDERALIST NO. 51, at 317–20 (James Madison) (Clinton Rossiter ed., 2003).

²³⁴ See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501 (2010) (discussing the structural separation of powers as envisioned by Madison in The Federalist No. 51 as “critical to preserving liberty” and protecting against the abuse of power (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986))).

of our government that stymie or limit the power of democratic majorities.²³⁵

Here I neither purport to offer an ideal structure for the proper extent of regime change, nor attempt to resolve any of the myriad design debates of the present moment (though in Part III I use the occasion of the Supreme Court’s 2020 Term to consider the particular role of the courts in these dynamics). Instead, I offer an argument in favor of concerted regime change and its connection to democratic politics, and a commitment to evaluating judicial doctrines and institutional characteristics with this connection at the forefront. And because I have chosen to focus on regime change initiated by transitions in the control of the executive branch, I also advocate for shifting our frame of reference in these debates from the trope of “unilateral executive action” to “concerted executive action,” to remove the presumption that legal and policy change motivated by the political preferences that enter government with a new presidential administration is inherently suspicious.

A. *Asserting Power*

I begin with the strong form of the argument, without the requisite caveats. A new regime’s success will depend on the vigor with which the administration assumes power.²³⁶ More important, there are good reasons, apart from the realization of the new regime’s own goals, for officials on the inside and supporters on the outside to greet a new regime with this mindset. I emphasize two here. The legitimacy and necessity of concerted regime change, and its corollary of energetic administration in service of the regime’s goals, are grounded in the pursuit of two fundamental values: democracy and social welfare.

1. *Democracy and Social Welfare.* — First and foremost, an orientation toward change within government is justified as a means of translating the evolving views, preferences, and needs of the body politic into real, concrete action. The central justification for concerted regime change is that the massive ship of state — the federal government — does and should serve as a vehicle for politics, because it is through the government that popular aspirations become day-to-day reality. This democratic conception does not depend on the supposed representativeness of the presidency of a national polity — a contested and incomplete

²³⁵ For a full explication and analysis of these scholarly justifications, see MELISSA SCHWARTZBERG, *COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE* 7–11 (2014).

²³⁶ See LIGHT, *supra* note 150; sources cited *supra* note 190 (discussing the importance of early actions by Presidents); see also Pfiffner, *supra* note 41, at 86 (“The inauguration of a newly elected president does not guarantee full control of the government or policy success. Authority is transferred; power must be seized.”).

formulation.²³⁷ Instead, it imagines the injection of democratic politics more directly and diffusely into administration and the legal interpretation and reinterpretation I describe in Part I. As I will explain throughout this section, one of the primary means by which the workings of government stay connected to the evolving views and demands of the public is through the implementation of ideas associated with a newly elected regime by the people who join it. These people carry 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.²³⁸ A concerted approach to regime change can thus help ensure that agency action will be driven by a principle of responsiveness, to changed circumstances and preferences and the ways in which the latter might shape the construction and management of the former.²³⁹

Theories of democratic government and arguments for democracy in separation of powers discourse typically and understandably connect the people and their will with Congress or the legislature.²⁴⁰ The service of democracy revolves around respect for and deference to the legislature,

²³⁷ See, e.g., Edward Rubin, Essay, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073, 2079–80 (2005) (emphasizing that presidential candidates often poorly capture all preferences of a particular voter, and that voters are often underinformed); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 197–202 (1995) (arguing that presidential elections are not a precise enough mechanism to capture the electorate's policy preferences).

²³⁸ For an argument concerning the democratic function of political parties, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001) ("Political parties are among the most important institutions for translating and integrating popular will and negotiating among various interest groups and factions. Political parties are both influenced by and provide a filter for the views of social movements.").

²³⁹ This observation would have purchase even if we lived in a time when Congress effectively legislated subject only to ordinary gridlock. Of course, to describe this as ordinary is not to say that the legislative process minus polarization is set up to translate popular and political preferences easily, even in times of unified control of the political branches. But the country seems to be careering further toward stasis as the default condition, brought on by polarization and the refusal, in particular, of the Republican Party to participate in legislative "wins" for the other party. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS* 103 (2012) (arguing that the Republican Party has become an "insurgent outlier" and paralyzed our institutions of government); Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 933 (2018). For further discussion of these dynamics, see *infra* notes 308–314 and accompanying text.

²⁴⁰ For a small sampling of literature that draws this out with specific reference to debates over judicial review, see sources cited *supra* note 232 and *infra* note 505. For my own views, elaborated with Cox, on the relative democratic characteristics of Congress and the Executive, see COX & RODRÍGUEZ, *supra* note 58, arguing that executive governance can be democratically responsive and deliberative and that the democracy "payoff" simply works differently for the legislature and the Executive, in a manner that reflects the particular institutional features of each branch. See *id.* at 208–10.

for structural and formal reasons, but also for some of the pragmatic reasons I describe in Part I.²⁴¹

But channeling popular pressures for change through administration is just as essential to the effectuation of democratic politics. For one thing, this sort of commitment to action through politically informed (if not politically driven) administration arguably represents our current government's best and primary way of addressing popular interests and demands because of the evenly divided and highly polarized state of the contemporary Congress.²⁴² And yet, my claims for the importance of Executive-driven change do not depend only on conditions of polarization and legislative stasis. The need for politically informed adaptation and evolution in the actual workings of government will exist even with a robust legislature or in times of consensus politics. The concept of regime change I offer ultimately reflects the view that weaving political judgment into administration and all that government entails is the best way to consistently sustain a relationship between the democratic sphere and state governance, the latter of which is almost entirely in executive hands.²⁴³ For democracy and self-government to mean something in practice, it is vital that popular preferences and evolving views, including as reflected in election results, be reflected in the actual work and output of government. This form of governance in service of the people also must be shaped, which requires political actors within government to assert themselves. Even an active Congress alone will not be enough. But polarization and legislative torpor do underscore that concerted regime change within the executive branch is vital to advancing the political goals of the electorate, as often this form of action will be the only means by which to secure democratic change.²⁴⁴

Of course, today's polarized state could also cut against the democratic argument for concerted regime change. If the country is so evenly divided and consensus so difficult to achieve, not only with respect to which problems in the world matter, but also with respect to how best to address them, then the sort of cycling adverted to in Part I arguably weakens the democratic case for any regime change, as it will defy the will and interests of a good part of the public and political establishment. But as I discuss in more detail in the next section, there is no neutral way out of this problem. The better conception of government is for regimes to continue the contest. In the political and media arenas, this may look like the polarized degeneration visible in news cycles every day. But if the contest plays out through acts of governance resembling

²⁴¹ See *supra* p. 54 (describing the importance of a legislative strategy to a new administration).

²⁴² For empirical accounts of this state, see LEE, *supra* note 203.

²⁴³ For further elaboration of this idea, see *supra* pp. 57–58 (describing the complementarity of executive and legislative judgment).

²⁴⁴ For further consideration of this point, see *infra* section II.B, pp. 87–90.

what I describe in Part I, then ideas and policy will develop. Though there can be no guarantee, the further hope is that gradual depolarization through realignment also might result. Perhaps such transformation of our politics will be aided by the empirical triumph of a particular regime and its policies that turn out to be able to deliver results to the people, including through policies that begin to chip away at the very causes of polarization.²⁴⁵

This possibility of policy development and the emergence of political consensus as the result of concerted action that produces salutary results for the public leads directly to a second justification for concerted regime change — that it is vital to promoting the social welfare. At the core of this justification is the idea that the government ought to be structured and staffed in a way that actually enables it to pursue the social welfare — an idea inflected by democracy in the sense that it focuses on the means for collective action. This vision of social welfare also animates certain versions of the separation of powers that emphasize the virtues of flexibility, practicality, and effectiveness in government and treat the law as a tool to implement that vision.²⁴⁶

This claim from social welfare is fundamentally statist in that it posits a powerful state as necessary to welfare's realization. Numerous scholars, for example, highlight the relative expertise and size of the administrative state as necessary to implementing congressional delegations and providing an infrastructure to address the extreme complexity of the modern world.²⁴⁷ What the concept of regime change adds to the

²⁴⁵ Professor Jack Balkin, for example, expresses optimism, though not certainty, that depolarization will occur, particularly if and when lawmakers and politicians address some of its root causes. BALKIN, *supra* note 45, at 37. These causes could be addressed by proposing an economic agenda focused on workers and the reduction of poverty and inequality, *see* Jeanna Smialek & Jim Tankersley, *One Thing America Might Buy with All the Spending? Less Inequality*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2021/04/23/business/economy/biden-inequality-monetary-policy.html> [<https://perma.cc/2SPV-MUMN>], and pursuing a multifaceted approach to immigration reform that would seek to regularize and update legal immigration to address U.S. economic needs, invest significantly in immigrant integration and economic betterment (including through legalizing the status of the unauthorized), and take seriously the challenge of addressing the root causes of migration through diplomacy and development aid, *see* BALKIN, *supra* note 45, at 34–35; sources cited *supra* notes 191, 212. In addition, the concrete realization of policy goals can change the proverbial Overton window with respect to what is possible. Policies that begin as partisan lightning rods may generate reliance interests that then entrench those policies and attract actual popular support and investment in those policies. For an account of this phenomenon with respect to the Affordable Care Act that highlights the role the pitched litigation played in entrenching the statute, *see* Gluck & Scott-Railton, *supra* note 206, at 517–30.

²⁴⁶ *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion).

²⁴⁷ *See, e.g.*, ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* 126–54 (2016) (developing a consequentialist account of the administrative state based on the complexity of governing in the midst of extreme uncertainty); Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 86–91 (2017) (defending the value of an effective administrative

picture is that this pursuit demands the assertion of political will *within* the state to fulfill those functions, including in a manner that can channel evolving popular preferences. In other words, the willingness of a new regime to exercise its power is necessary for the state to serve the public interest. This connection seems especially necessary today, when across regulatory domains the ability to govern boldly matters to the government and the nation's ability to address urgent problems, many of which are enormous in scale.²⁴⁸ Even if we could anticipate transformative legislation in a given domain, which we cannot today, past experience in the implementation of major legislative achievements underscores the ongoing relevance of administrative creativity and will to action. The enactment of legislation is only the beginning of the realization of political objectives. Years, and even decades, can be spent in the acts of interpretation and implementation. This conception of government ultimately points to a recovery of the view that the administrative state will be legitimated by its outcomes and by how well it works to address the needs of people, again a link between democracy and social welfare. This connection, in turn, will be difficult to achieve without the impetus from political officials for the state to exercise its power.²⁴⁹

In today's context, it is easy to point to specific problems that require boundary-pushing executive action, driven by political officials, for their

state and arguing that it is even constitutionally necessary given the contemporary reality of delegation); *id.* at 85 ("Neither legislatures nor courts have the kind of expertise and institutional capacity that agencies do, or the ability to adapt policy at the pace demanded by contemporary society, across the vast range of contexts in which administrative government is active."); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608–11 (2016).

²⁴⁸ For an argument that the Executive in fact needs more power because it is the branch capable of solving national problems, see WILLIAM G. HOWELL & TERRY M. MOE, *RELIC* 95–142 (2016). This idea relates to, or is complementary to, the central argument made by Professors Eric A. Posner and Adrian Vermeule in *THE EXECUTIVE UNBOUND* (2010), in that it shares the premise about the relative capacity of the Executive as compared to Congress — the former has two million civilian employees and 1.4 million military members, whereas the latter is made up of 535 members and a staff that numbers around 30,000 employees. *Id.* at 28–29. In other words, the Executive accounts for nearly the entirety of the national state. Of course, to some commentators that is cause for extreme alarm. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 1 (2014).

²⁴⁹ See, e.g., Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 733 (2016) (book review) (discussing progressive-era reforms and the belief that the achievement of the more just distribution of resources "along with democratic support and expert guidance, were the sufficient conditions of the state's legitimacy"); see also Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 349–50 (2019) (citing historical sources to highlight how administrativism and its outputs have shaped conceptions of the state's legitimacy); cf. JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 2–3 (1938) ("The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the situation, agencies were created whose functions embraced three aspects of government. Rule-making, enforcement, and the disposition of competing claims made by contending parties, were all intrusted to them.").

management or resolution. Perhaps the best and most urgent example of the need for decisive, consistent, and wide-ranging executive and regulatory action is the imperative of combatting climate change.²⁵⁰ The contemporary reality is that, without the Executive's willingness to use its authorities creatively and aggressively, the phenomenon will overtake our human capacity to address it, both in the face of legislative stasis and even if and when Congress acts.²⁵¹ The nearly totalizing struggle through the COVID-19 crisis has also underscored this sort of perspective on the state — not only that the nation requires a central government with the authority and the will to use the state to meet the emergency,²⁵² but also that the success of such political leadership will depend on the depth of state capacity²⁵³ and the effective integration of scientific *and* political judgment. In our work on executive power in immigration law, Professor Adam Cox and I have insistently made a similar, though less existential, point. While acknowledging that any Executive remains bound by the terms of the statutes that give it its authorities, we also have shown how the structure of immigration law has made executive policymaking necessary to managing the wide

²⁵⁰ See KYSAR, *supra* note 229, at ix; Freeman & Spence, *supra* note 220, at 8–17 (describing decline in congressional responsiveness on environmental and energy matters); Lisa Heinzerling, *The Rule of Five Guys*, 119 MICH. L. REV. 1137, 1143–46 (2021) (book review) (making this point in the context of discussing the complex litigation culminating in the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 437 (2007), in which the Court held that the Environmental Protection Agency (EPA) had the authority to regulate greenhouse gases and could not refuse to act on a petition to do so). In making this observation, I am of course mindful that the opposition to this sort of action is fierce and comes from a range of interests, and that courts have found flaws with far-reaching regulatory initiatives, such as the Obama-era Clean Power Plant rule. See, e.g., Daniel Hornung, Note, *Agency Lawyers' Answers to the Major Question Doctrine*, 37 YALE J. ON REGUL. 759, 779–80 (2020) (describing complex litigation over the Clean Power Plan rule in the context of analyzing how the major questions doctrine shaped the rule's formulation); see also *infra* pp. 101–02 (discussing an administrative law doctrine that inhibits change).

²⁵¹ Cf. POSNER & VERMEULE, *supra* note 248, at 108 (emphasizing the importance of boundary-pushing executive action in the face of major crises, including the 2008 financial crisis and national security disasters such as 9/11).

²⁵² See, e.g., David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608, 608 (2020) (arguing, in the context of the COVID-19 pandemic, that executive underutilization of its powers can undermine constitutional governance).

²⁵³ For an argument that the COVID-19 pandemic has revealed the degraded capacity of the American state, see David E. Lewis, *Is the Failed Pandemic Response a Symptom of a Diseased Administrative State?*, 150 DAEDALUS, Summer 2021, at 68, 78–81 (presenting results of survey of federal officials showing their low opinion of the Trump White House but also revealing longstanding failures by administrations of both parties to invest in state capacity, leading to administrative failures that put the entire public at risk).

sweep of formal law, including through injecting humanitarian and stabilizing values into the deportation system.²⁵⁴ In other words, the structure of this regulatory domain calls out for executive and presidential leadership, too.²⁵⁵

This vision of the relationship between the government and its powers on the one hand and social welfare on the other is, of course, contestable, and two obvious critiques spring immediately to mind. One could argue that the vision is overly statist — even that a strong state is the enemy of social welfare. Cox and I make a version of this argument in indicting the deportation state as too vast, even as we defend the value of high-level officials using their power to control it.²⁵⁶ But even though people from across the political spectrum can find grounds for declaring the state too powerful in certain contexts, it can still be generally true that the polity is better off with a well-run state that has robust problem-solving capacity.

Perhaps the more trenchant critique would be not of statism, *per se*, but of the view that political officials within the state should have and exercise power, for fear that such assertions will make the state and the bureaucracy overly susceptible to the volatility that characterizes contemporary politics, thus inviting irrationality and abuse — threats I explore in greater depth in the next two sections. Indeed, the identity of a political regime (conservative, libertarian, progressive, neoliberal) will shape the construction of the problems to be solved, the nature of any solutions, and even the question of whether to expand or dismantle particular features of the state in response. And there is no guarantee that a new regime will in fact act in the face of a particular need it chooses to recognize, because it may prefer to leave matters to the private sector, or to the states, which could in fact be better sites for regulation in certain contexts. The problem is not so much that some political regimes will seek to enervate the state entirely, but rather that they will pick and choose among its component parts. The mission of the Trump Administration, for example, was less to eradicate the deep state entirely than to use those elements of the state (the deportation regime, for example) that served its ends and to undermine those (the diplomatic corps, for example) that did not.

The answer to this sort of ideological uncertainty is not, however, to hamstring political power inside the state. It is, instead, on the one

²⁵⁴ See COX & RODRÍGUEZ, *supra* note 58, at 103–30. This overbreadth, and consequent authority for the Executive to innovate, stems from the fact that formal law makes anyone present in the United States without legal authorization removable, giving rise to a shadow immigration system in which nearly eleven million people are formally removable. See *id.* at 105, 112. This number is far too high for the government to fully enforce the law, necessitating prioritization by the executive branch, which has in turn given rise to relief programs such as DACA. See *id.* at 162–88.

²⁵⁵ See *supra* notes 191–197 and accompanying text (discussing forms of presidential agenda setting at the start of the Biden Administration).

²⁵⁶ See COX & RODRÍGUEZ, *supra* note 58, at 238–47.

hand to be clear eyed about the consequences of democratic elections and on the other to engage sometimes-picayune institutional design debates to figure out how to integrate a civil service with democratic leadership. And above all, a conception of government that prioritizes the state's capacity to respond to facts on the ground, over time, requires a conception of executive and administrative power that embraces their exercise and calibrates those forms of power with an orientation toward politically informed action.

2. *Presidential and Political Control.* — The picture I have presented thus far does require appetite for some centralization and high-level direction within the administrative state. The connection I have drawn between democracy and concerted regime change, in particular, takes as a given 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.

This conception of power need not and does not exclude a different sort of inquiry into democracy and administration. A scholarly movement within administrative law seeks to inject concepts of democratic politics more directly into existing frameworks for public participation and into structures of agency decisionmaking.²⁵⁷ This seems very much

²⁵⁷ See, e.g., K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 27 (2019) (“[W]here inclusive economic and political arrangements have proven effective, transformative, and durable, they have depended not just on a durable coalition of organized civil society supporters; they have also depended on the creation of powerful state institutions in which these policies are embedded, and through which they are enforced.” (emphasis omitted) (footnote omitted)); *id.* at 142 (“We suggest that building civic power and democratizing government cannot be achieved just by building external advocacy power through social movements that demand policy change. Civic power and deep democracy require a more thorough transformation within government itself, including at the level of organizational structure and culture and personnel. . . . [I]n the long run building a new democracy will require that outsider, adversarial, and oppositional frame to be supplemented by a focus on the actual, day-to-day mechanics of governing.” (emphasis omitted)); 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. DISCOURSE 418, 446 (2021) (“A Biden directive could specify that public engagement must be egalitarian and inclusive, ensuring that no major regulations are proposed without meaningful consultation with those for whom the laws and regulations are designed to protect. It could, further, give preference to interest groups that engage their members in setting policy over those that claim to be representative without any real internal participatory procedures. To ensure meaningful and inclusive participation at the agency level, Biden could direct agencies to designate officials as ‘regulatory public defenders’ tasked with identifying absent stakeholders, translating their stated needs and values into applicable regulatory language, and certifying that rule-drafting processes have given a fair consideration to regulatory beneficiaries.” (footnotes omitted) (quoting Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 491 (2005))); Matthew Cortland & Karen Tani, *Reclaiming Notice and Comment*, L. & POL. ECON. PROJECT (July 31, 2019), <https://lpeproject.org/blog/reclaiming-notice-and-comment> [<https://perma.cc/2JU8-GPBC>] (“[N]otice-and-comment is more than just a tool in the battle over the administrative state. It is also an opportunity for marginalized people — people whose voices are often diluted or excluded in the realm of formal electoral politics — to call out the power dynamics they see operating

worth consideration and development, both to check and legitimate power, and to promote responsiveness across the state. The APA already makes democracy constitutive of the administrative state, including through the requirements of informal rulemaking, even though the notice-and-comment process may still not be sufficiently democratic or responsive.

But by themselves, these diffuse forms of popular participation will not be enough to ensure that government and its capacities evolve to address the demands of politics and our world. My insistence on concerted regime change requires high politics and thus some engagement with the now-familiar specter of the imperial presidency — a formulation that has become an all-purpose warning about the myriad dangers of “unilateral” executive action.²⁵⁸ As Professor Daryl Levinson emphasizes, who exercises power is as important as the fact that it exists.²⁵⁹

in the world and to name the casualties.”); *id.* (noting as well that even where comments don’t change the agency’s mind, they can make a difference in court); *cf.* Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. (forthcoming 2021) (manuscript at 22–25, 68–73) (on file with the Harvard Law School Library) (establishing administrative law’s erasure of race, which arose amidst larger developments in legal culture, especially the fateful constitutional choice in *Washington v. Davis*, 426 U.S. 229 (1976), to dismiss disparate impact alone as a violation of the Equal Protection Clause).

The interest in injecting democratic politics directly into the operations and mechanics of the administrative state is not new and has its roots in the enactment of the APA. See K.C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 521 (1986) (transcription of panel moderated by Paul R. Verkuil) (noting that notice and comment was an “original” idea and the APA’s “most important” one). Doctrines that require agencies to be responsive to the comments they receive during rulemakings instantiate a democratic norm in agency decisionmaking, and movements for greater public involvement, such as the turn in the late twentieth century to negotiated rulemaking, reflect persistent democratic pressure on agency decisionmaking. President Gerald Ford’s Secretary of Labor, John Dunlop, first introduced the idea of negotiated rulemaking, which gained prominence in response to a concern that traditional rulemaking had become too adversarial. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1261 (1997). The process entailed agencies and affected interest groups directly negotiating a proposed rule, which would then be published in the Federal Register and opened for notice and comment. Congress passed the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570, to encourage the usage of this technique, and it is now incorporated into the APA, though it has fallen into disuse. For accounts of the roots and features of negotiated rulemaking, see CURTIS W. COPELAND, CONG. RSCH. SERV., RL32452, NEGOTIATED RULEMAKING (2006); and Coglianese, *supra*, at 1266–71. For a study showing none of the benefits claimed for it, including faster rulemaking and decreased litigation, see Coglianese, *supra*, at 1271–309. See also Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 655–56 (2000) (explaining that negotiated rulemaking “appears to surrender rulemaking to explicit interest group bargaining”).

²⁵⁸ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 420 (1st Mariner Books ed. 2004) (1973) (coining the infamous term, “imperial presidency,” but also underscoring that our objective should not be to eliminate or subjugate executive power but rather to contain it); see also SHANE, *supra* note 228, at 173–74 (describing the costs of an excessively unilateral presidency in the context of the EPA).

²⁵⁹ See Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33–38 (2016).

The voluminous and forceful literature lamenting presidential control tells us that the President should be exercising much less of it. Indeed, one of the most consistent critiques of executive power made by scholars and commentators across the four years of the Trump Administration pointed to the unique threat of a President unrestrained either by his own character or by Congress. This threat was only compounded by the concomitant dangers of the President's agents asserting muscular political will, a robust conception of their legal authorities, and high-level control over the bureaucracy to advance their objectives while sidelining career government officials and norms of deliberative decisionmaking.²⁶⁰

But “unilateralism” is a tendentious misnomer, at least for what I describe in Part I and analogues in other recent administrations that have provoked the unilateralism critique. It also fails to adequately describe the chief offenses of the last Administration, which were 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.²⁶¹ Both in the examples offered in Part I and in most any domestic regulatory domain, executive action is grounded in statutory authority.²⁶² We can and should have a

²⁶⁰ For representative examples, see Emerson & Michaels, *supra* note 257, at 430; and Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549 (2018), arguing that “[p]residentialism needs reasonable constraint to avoid excessive, unchecked executive action, given the one-way ratchet of power that recent experience seems to illustrate,” *id.* at 614. Cf. TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 103 (2018) (emphasizing the importance of an independent bureaucracy to democratic integrity and the threat of centralization to that bureaucracy); *id.* at 153–54 (arguing that experimentation with centralization creates the threat of politicized prosecutions); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2189–94 (2018) (identifying longstanding power-constraining norms that experienced erosion during the Trump years, as part of an effort to understand the role norms play in shaping the presidency).

²⁶¹ See *supra* note 260.

²⁶² In his treatment of presidential administration, Professor Thomas Merrill describes this approach as the “positivist tradition” according to which the central question is “whether the government agency has legal authority for the action it is taking.” Thomas W. Merrill, Essay, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1954 (2015). He contrasts this with the process tradition, a twentieth-century invention that I discuss in detail in Part III, whose concern is to ensure that agency action comports with requirements of reasoned decisionmaking. *Id.* at 1955, 1957. His prediction is that the process tradition is becoming dominant, because “administrative governance is increasingly outrunning legislative authorization,” *id.* at 1958, a claim that is necessarily a function of the theory of statutory interpretation to which one subscribes. Though the process fouls of the Trump era received the highest-profile attention — think the lower court litigation challenging and pushing back the so-called travel ban on nationals from Muslim-majority countries — the courts also held the Administration to task for repeated breaches of statutory authority. See, e.g., *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, 512

reasonable debate about whether those authorities as conceptualized by Congress are too broad or insufficient. This inquiry might be general, as is sometimes the case in debates surrounding the formal and practical propriety of delegation. Or it might be specific to regulatory context — that certain statutory regimes give the President or administrators too much power and ought to be scaled back.

In either case, it is always relevant and vital to assess whether executive officials have distended or breached their specific authorities in particular circumstances. This analysis is far from simple — it takes us into the contested domain of statutory interpretation, which itself is shaped by debates about the scope executive and agency officials ought to have to advance their preferred readings of their own authority. But we should still realize that acts often described as unilateral are in fact forms of collaboration between the political branches *across time*. Charges of unilateralism may ultimately undermine this collaboration. Moreover, an energetic Executive does not have to be mutually inconsistent with meaningful collaboration with the Congress of the moment where such reciprocity is practically possible.²⁶³

Still more important, though — my central claim — is that we must begin to decenter the presidency in our consideration of the politics of administration. My claims about the connection between concerted regime change and democratic politics are not claims about the plebiscitary presidency and its value within or distortions of our political process.²⁶⁴ Instead, the advent of a new presidential administration brings

F. Supp. 3d 966, 977 (N.D. Cal. 2021) (enjoining final rule creating new categories of crimes that would preclude asylum eligibility as contrary to Congress's intent); *Gilliam v. U.S. Dep't of Agric.*, 486 F. Supp. 3d 856, 882 (E.D. Pa. 2020) (enjoining policy that barred certain families from receiving emergency Supplemental Nutrition Assistance Program allotments as inconsistent with the Families First Coronavirus Response Act), *withdrawn*, No. 20-3152, 2021 WL 1554180 (3d Cir. Apr. 1, 2021); *Oakley v. Devos*, No. 20-CV-03215, 2020 WL 3268661 (N.D. Cal. June 17, 2020) (holding that plaintiffs were likely to succeed in showing that Department of Education's imposition of eligibility restrictions on emergency relief funds violated the CARES Act), *appeal dismissed*, No. 20-16564, 2021 WL 3624854, at *19 (9th Cir. May 20, 2021); *New York v. U.S. Dep't of Lab.*, 363 F. Supp. 3d 109, 141 (D.D.C. 2019) (invalidating Department rule redefining employer provisions of the ACA as unreasonable interpretations of the statute), *appeal filed*, No. 19-5125 (D.C. Cir. 2019). For a complete list of Trump Administration losses in court, on statutory and administrative law grounds, see *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, N.Y.U. SCH. OF L. (Apr. 1, 2021), <https://policyintegrity.org/trump-court-roundup> [<https://perma.cc/69DD-ZE5H>].

²⁶³ See, e.g., Press Release, White House, Fact Sheet: President Biden Announces Support for the Bipartisan Infrastructure Framework (June 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-president-biden-announces-support-for-the-bipartisan-infrastructure-framework> [<https://perma.cc/E5LT-GJGP>] (announcing that the Biden Administration supported a bipartisan infrastructure bill, while the Administration nonetheless pursued more extensive infrastructure legislation through the budget reconciliation process).

²⁶⁴ For discussion of the plebiscitary presidency, see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 69–70 (2010); and 1 BRUCE ACKERMAN, *WE THE*

into office not just a new Chief Executive, but 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.²⁶⁵ In the many iterations of debate concerning presidential control over the administrative state, this more holistic picture has become subsumed by sharp conflict over the propriety of presidential direction — a focus that ultimately elides the complexity, diversity, and fundamental incompleteness of regime change, even of the most concerted sort.

In our work together, Professor Anya Bernstein and I have begun to offer a qualitative empirical investigation of how agencies work with statutes, which leads us to 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.²⁶⁶ These priorities are typically consistent with the worldview associated with the reigning political regime.²⁶⁷ But they also represent

PEOPLE: FOUNDATIONS 72 (1991). See also STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL 156 (2008).

²⁶⁵ While “[t]here is no single source of data on political appointees serving in the executive branch that is publicly available, comprehensive, and timely,” U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-249, FEDERAL ETHICS PROGRAMS: GOVERNMENT-WIDE POLITICAL APPOINTEE DATA AND SOME ETHICS OVERSIGHT PROCEDURES AT INTERIOR AND SBA COULD BE IMPROVED 10 (2019) (capitalization omitted), according to the latest version of what is commonly known as the *Plum Book*, there are more than 7,000 appointed positions in the legislative and executive branches, of which nearly 4,000 are political appointees, H. COMM. ON OVERSIGHT & REFORM, 116TH CONG., UNITED STATES GOVERNMENT POLICY AND SUPPORTING POSITIONS iii, app. at 212 (Comm. Print 2020). In terms of raw numbers, this represents a dramatic rise from the 200 or so political appointees in 1933, and the fewer than 2,000 in 1960. DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS 97 (2010). It also represents an overall if uneven increase as a percentage of the federal government: political appointees in 2004 represented a larger proportion of federal civilian employees than they did in 1960, when Congress began collecting and publishing this data, but that percentage fluctuated during that time period, peaking in 1980 following the Carter Administration. *Id.* at 97–101, 98 fig.4.2. Even as they fluctuate, these percentages are small: there are currently roughly 2.1 million civilian federal employees. JULIE JENNINGS & JARED C. NAGEL, CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 1 (2021).

²⁶⁶ See Anya Bernstein & Cristina Rodríguez, The Accountable Bureaucrat 5 (Apr. 4, 2021) (unpublished manuscript) (on file with the Harvard Law School Library) (“[W]e contend that presidential control is actually subsumed within a larger phenomenon of political control, with the layers of political officials who are not direct agents of the president playing central policymaking roles, through forms of only semi-hierarchical supervision.”).

²⁶⁷ *Id.* at 11 (documenting how political appointees absorb “a general administration philosophy, not always tied directly to the president, with respect [to] the policies within their purview: that the philosophy of the ACA was to cover as many people as possible for the lowest premiums possible; that mine safety enforcement should be taken more seriously; that criminal justice reform was

a decentralized and context-specific elaboration of that worldview.²⁶⁸ And as our research also suggests, this 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.²⁶⁹ 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.

In thinking through why concerted regime change promotes democratic objectives, then, I seek to integrate, not separate, our understandings of executive and administrative power. An administration will not be adequately responsive to the politics of the day without leadership from the President and the political class. But successful responsiveness demands sensitivity and dexterity with the workaday features of governance and administration, as well as deference to the elements of government that make it function well, including its fact-gathering and knowledge-production processes and methods of incorporating public opinion and the expectations of regulated entities.²⁷⁰ The point is that the political and the bureaucratic — appointees and civil servants — are integrated and collaborative and bring to bear sometimes rivalrous,

pressing; that small business grant decisions should focus on economic recovery” (footnotes omitted)).

²⁶⁸ See *id.* at 7.

²⁶⁹ See *id.* at 24 (demonstrating that, as the result of organizational sociology, legal culture, and institutional design, administrative policymaking demonstrates accountability despite the absence of a direct electoral connection to the bureaucracy). In a recent essay, Professor Cass Sunstein challenges the easy presumptions of public choice theory about the acquisition by industry of agency administrators, calling for greater empirical understanding of how administrators gather and process information. See Cass Sunstein, *Stigler’s Interest-Group Theory of Regulation: A Skeptical Note*, PROMARKET (Apr. 16, 2021), <https://promarket.org/2021/04/16/george-stigler-theory-regulation-capture-cass-sunstein> [https://perma.cc/85FX-NMNY] (“In terms of understanding the sources of regulations, it would therefore be valuable to obtain more clarity about the sources of regulators’ beliefs—about what information they receive and find credible, and why.”).

²⁷⁰ As Bernstein and I put it:

[P]ervasive presidential and political influence over the administrative state does not necessarily confront us with the “ineluctable question” of “whether we are finally resigned to let go of old republican values and accept a strong, hierarchically controlled presidential democracy.” That is because presidential influence is already integrated into our administrative state, as a diffuse but pervasive value-setting force. Rather than threatening to obliterate administrative expertise, though, presidential influence usually works in tandem with it to produce administrative actions.

Anya Bernstein & Cristina Rodríguez, *Are the Phantoms Real?*, BALKINIZATION (July 14, 2021) (citations omitted) (quoting SKOWRONEK, DEARBORN & KING, *supra* note 44, at 201), <https://balkin.blogspot.com/2021/07/are-phantoms-real.html> [https://perma.cc/4728-CFAX].

but more often complementary, forms of reasoning and approaches to decisionmaking.²⁷¹

By calling for a decentering of the presidency, I do not mean to suggest that the ongoing debate over the meaning, scope, and propriety of presidential control and administration ought not continue. In some contexts, the centralization of power, including in the presidency, can in fact check its abuse, as Cox and I show with respect to immigration enforcement by highlighting the need for politically accountable officials to provide a counterweight to the semi-militarized law enforcement culture of field agents.²⁷² In the end, as Professor Kathryn Watts persuasively has argued, some form of presidential control and administration is here to stay.²⁷³ The specific executive orders that initiated White House oversight of administrative rulemaking date back to the Reagan Administration and have effectively become “constitutive” of today’s administrative state.²⁷⁴ Although the institutions of centralized oversight have evolved since Elena Kagan’s canonical account of their rise in the late twentieth century, they persist as a way for the White House to begin to comprehend and possibly influence and coordinate the sprawling activities of the executive branch the President has a constitutional duty to oversee. Unwinding this institutional advantage seems a fanciful proposition.

Recognizing persistent presidentialism does not require unthinking acceptance of its tenets, such as cost-benefit analysis, in their current form.²⁷⁵ Nor is it inconsistent with a call for strengthening the civil service, like the one Professors Blake Emerson and Jon D. Michaels issue,²⁷⁶ or for giving careful thought to the form White House oversight

²⁷¹ For a classic study of the motivations of civil servants, see MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* 167 (2000) (showing that many bureaucrats are invested in “long-term national interest and confronting rulers with awkward facts”).

²⁷² COX & RODRÍGUEZ, *supra* note 58, at 216 (describing the reference to presidential control over immigration law as a synecdoche for myriad forms of executive power and emphasizing that the appropriate location of discretionary decisionmaking within a regulatory domain must be defined contextually rather than abstractly, but that centralizing strategies in immigration law have been essential in curbing the semi-militarized law enforcement culture of immigration agents). For scholars emphasizing the dangers of centralization, see *supra* note 260.

²⁷³ Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 726–44 (2016) (arguing against reflexive opposition to presidential control and in favor of reforms that nurture what is good and temper what is bad about presidential control, proposing rules to define when presidential influence over statutory readings is appropriate, creating incentives to disclose presidential influence, and modifying the notice-and-comment process to take presidential influence into account).

²⁷⁴ Bernstein & Rodríguez, *supra* note 266, at 7.

²⁷⁵ See RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY* 149–90 (2008), for an example of how to reimagine these tools in service of a better and stronger government.

²⁷⁶ See Emerson & Michaels, *supra* note 257, at 432–37.

or collaboration should take.²⁷⁷ Nor is it incompatible with the adoption of strategies that diffuse power. Indeed, diffusion within the federal government and across governments is a time-honored and favored strategy for achieving a variety of valid objectives within a democratic context, including as means of resolving conflict and channeling diversity,²⁷⁸ enabling dissent,²⁷⁹ improving the quality of decisionmaking,²⁸⁰ and enhancing possibilities for ground-level democracy.²⁸¹ But a single-minded focus on presidential control and its features elides the more fundamental and more vital phenomenon of political control, which should change the frame for our debates over the structure of government and the separation of powers.

3. *Political Stare Decisis*. — The genre of antipresidentialism, even if it over- or misstates all of the phenomenon's manifestations, does implicate a constitutional and political concept that will necessarily and properly limit regime change to some extent. The counterpoint to the conception of power I have just been describing is the value of constraint. The means by which power is exercised must be properly defined, lest power become abusive (because the state has a unique capacity to coerce) or ineffective and illegitimate (say by eliding expertise or advancing personal interests of officials as opposed to public-regarding ends). To what end and for what reasons constraints are to be imposed on the state is often obscured by formal debates about what the Constitution requires, which usually begin with the encomium that some form of limited government is necessary to protect our basic (usually undefined) liberties. In the domain of administrative law, the constraint question typically revolves around ensuring that unelected bureaucrats are accountable and that the Executive generally acts as a faithful agent of Congress.

²⁷⁷ In some contexts, including in the development of law enforcement policy or administration legal positions, White House involvement is unlikely to be of the directive sort, but instead will come in the form of soft supervision, or a “checking in” on policy and legal developments. This form of oversight may sometimes come across as intrusive from the agency point of view but can also ensure a situational awareness of the goings-on across the administrative state on which a responsible White House might want to have purchase. The metaphor often used to describe this form of White House involvement in my own professional experience — “kicking the tires” — reflects not a desire to direct but an interest in understanding and suggesting. Watts, for her part, recommends some very sensible and constructive tweaks: bolstering statute-based rules, transparency-enhancing mechanisms, and process-forcing rules. Watts, *supra* note 273, at 726–44.

²⁷⁸ Cristina M. Rodríguez, Essay, *Negotiating Conflict Through Federalism*, 123 YALE L.J. 2094, 2096 (2014).

²⁷⁹ See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1759–97 (2005) (on federalism).

²⁸⁰ See generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE* (2d ed. 2016).

²⁸¹ See *supra* note 257 (discussing literature on incorporating popular perspectives and democratic engagement into the administrative state); cf. JON. D. MICHAELS, *CONSTITUTIONAL COUP* 4–6 (2017) (raising alarms about the privatization of government functions, which circumvents accountability and enervates public administration).

Beneath these claims about restraining power lies a deeper point or fixation. The justifications given for restraining the state's power to reshape policy and the institutions that bring such policy to life also revolve around a defense of legal and systemic continuity. As Justice Gorsuch has put it, the "cornerstone of the rule of law"²⁸² is a "basic premise of our legal order: that we are governed not by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable."²⁸³ This valorization of fixed law, apart from reflecting a formalist mentality, might also relate to the desire to secure the legitimacy of law's coercion. In that sense, the valorization relates to the question with which I opened this Foreword. The Chief Justice's implication during oral argument in *Terry v. United States*, namely that the Solicitor General must follow a deliberate and rigorous process for changing the government's legal position,²⁸⁴ links continuity to legal legitimacy, underscoring that the latter depends on an interpretation of law that transcends changes in political regimes. This is strikingly familiar reasoning that tracks the contours of the Supreme Court's own account of stare decisis and the limited factors that justify the Court's decisions to overrule past precedents.²⁸⁵ This reasoning is a transposition of the Supreme Court's own institutional practices to the legal work performed by political institutions — the erection of a presumption of political stare decisis. And just as adherence to legal stare decisis might help tame cynicism about legal interpretation in the courts, consistency from the government might help present a public face worthy of trust by fostering the belief that the government is public minded or operating in the public interest.

The defense of legal and institutional continuity also suggests a pragmatic preference for stability. Arguments for political stare decisis, especially in relation to agency interpretations of statutes, but also with respect to regulatory policy more broadly, assume that the executive branch and its rules ought to have a continuous identity that presumptively ought not be changed by the advent of a new ideological agenda atop the executive branch.²⁸⁶ This concept of continuity favors and even valorizes the version of the administrative state as guided by expertise, science, and fact-based, reasoned judgment, not by discretion and preference. On this view, rapid and politically driven shifts in policy

²⁸² *Kisor v. Wilkie*, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in the judgment).

²⁸³ *Id.* at 2442.

²⁸⁴ See *supra* p. 4.

²⁸⁵ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–69, 879 (1992).

²⁸⁶ Cf. Dreeben, *supra* note 29, at 542 (arguing that the Solicitor General owes a duty to the Court to alert it to errors in interpretation made by the office, thus justifying a change in the government's legal position under these circumstances).

threaten expertise-driven government²⁸⁷ — a concept that also depends on some level on belief in objectivity.

In this Burkean formulation, institutional stability and continuity become integral to avoiding unintended, unforeseen, and even violent consequences that might result from reforming systems.²⁸⁸ These concerns about stability infuse debates over democracy generally, even though they might be especially salient in relation to the power of an Executive in a presidentialist system.²⁸⁹ The literature that explores the importance of constitutional and institutional norms, as opposed to law, in structuring government and distributing and restraining power similarly reflects this pragmatic conception of stability. The lament directed at norm erosion, and even the call to instantiate certain norms in law, reflects a tendency to favor stability and gradualism over radical change.²⁹⁰

Concerns for fairness, tinged with practicality, drive this interest in continuity and stability. Consistency in law and policy helps ensure that like cases are treated alike. As Professor Lon Fuller put it, a legitimate legal system must avoid “introducing such frequent changes in the rules that the subject cannot orient his action by them.”²⁹¹ Perhaps the most salient encapsulation of the idea that continuity ensures both fairness and stability is the reliance interest, which entitles those who hold it to slow down the processes of policy change to ensure that something they

²⁸⁷ See, e.g., *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2592–95 (2019) (Breyer, J., concurring in part and dissenting in part) (criticizing the Trump Administration’s decision to depart from longstanding practice by including a citizenship question on the census as disrupting and undermining the expertise of the Census Bureau as to what might depress response rates among certain demographics).

²⁸⁸ For an elaboration of this conception of sovereignty and its comparison to other conceptions of state power, see David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015), noting that “sometimes it is more important that matters be resolved than that they be resolved correctly,” *id.* at 55, and emphasizing the value of allowing the wisdom born from trial and error of past generations to remain in place, *see id.* at 54–55.

²⁸⁹ Professor Melissa Schwartzberg, for example, shows how a range of modern supermajority rules have arisen to “curb the abuses of unfettered majoritarianism.” SCHWARTZBERG, *supra* note 235, at 7. Justified by a series of goals desirable on their face, including deliberative virtues, as well as outcome-oriented claims (to ensure that a bare majority does not act beyond social consensus, for example), these rules nonetheless fail the test of democracy. *See id.* at 7–11. Schwartzberg argues that these sorts of rules cannot be justified, as they fail to treat people with equal respect, and are not required by constitutionalism. *Id.* at 105–16. She advocates instead a set of complex majoritarian institutions that ensures deliberation over time and provides for vetoes by historically disadvantaged groups only in formally prescribed contexts. *Id.* at 182–204.

²⁹⁰ For exemplary discussions of this literature, see BAUER & GOLDSMITH, *supra* note 33, arguing that norms should sometimes be hardened into law, but that one of the advantages of norms over law is their flexibility, *see id.* at 15–17; and Renan, *supra* note 260, at 2189–94. *See generally* Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. (forthcoming 2022).

²⁹¹ LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969).

already have been granted is not taken away arbitrarily or unlawfully.²⁹² We might prioritize stability in government, then, by ensuring that the state think twice before it changes someone's economic or legal context. Reliance interests, in fact, play an important role in administrative law doctrine,²⁹³ but the concept arguably warrants a broader systemic preference for continuity and stability in institutions regardless of shifting political winds. Indeed, we might think that the concern for stability — the stalwart common law virtue that enables individuals to plan based on assumptions about the parameters of the law — becomes heightened when the prospects for change are magnified across regulatory domains in the wake of an especially dramatic regime change.²⁹⁴

The assertion of strong executive powers may be particularly threatening to these values of stability and fairness,²⁹⁵ because the Executive can bring about change much more quickly than the legislature, for the familiar reasons cited to justify the very need for a strong Executive, including its more unitary character, its control of the day-to-day mechanisms of governance, and its more malleable forms of governance.²⁹⁶ And change that is quick to make relative to legislation is similarly quick to undo, introducing volatility into government.²⁹⁷ Not surprisingly, our current conditions of “extreme political polarity” have led scholars to heighten alarms about policymaking through executive action.²⁹⁸

²⁹² See, e.g., TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 16–17 (2017).

²⁹³ See *id.*

²⁹⁴ The value of stability or continuity relates to but is not continuous with the values of certainty — that the law be clear — and uniformity — that federal law, at least, be the same across state jurisdictions. Both certainty and uniformity, the argument goes, enable planning. See Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 451 (2019) (describing the problematic results of disuniformity in federal law, including that it makes it “difficult for businesses to operate in multiple jurisdictions,” and that, in the criminal law context, it “can make it hard for the government to treat all violators equally”). But as I argue elsewhere, even in domains such as immigration, where federal law is exclusive and uniformity of regulation is theoretically achievable, it might still be practically elusive. A baseline problem remains — uniform according to what standard? For a challenge to the value of uniformity, see Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J.F. 499 (2014), arguing that it is possible to promote consistency and integrity in the law without uniformity. See *id.* at 522–23.

²⁹⁵ See COX & RODRÍGUEZ, *supra* note 58, at 211 (“[E]nforcement policy can shift by simple announcement, often without the specter of court involvement, leading the scope of the legal regime to fluctuate dramatically depending on who’s in charge. . . . [T]hose benefits can come at an unacceptable cost when responsiveness devolves into volatility, with enforcement policy sharply reversing course after each change in administration.” (footnote omitted)).

²⁹⁶ THE FEDERALIST NO. 70, *supra* note 233, at 421–23 (Alexander Hamilton).

²⁹⁷ See COX & RODRÍGUEZ, *supra* note 58, at 223–24 (“[W]hile centralization provides greater policy coordination within an administration, it can lead to less coordination and more instability across presidential administrations.”).

²⁹⁸ Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 103 (2021).

Professor Richard Pierce, for example, has concluded that the country can no longer afford the flexibility given to presidential administrations by doctrines of deference such as *Chevron*,²⁹⁹ which, combined with political polarity, “makes it certain that government policies in many important contexts will change dramatically every four to eight years.”³⁰⁰ Similarly, Professor Michael Livermore and Daniel Richardson have emphasized that the polarization of the political parties exacerbates this volatility in our day, as have the rise and expansion of robust presidentialist government since the Clinton era.³⁰¹ They call for doctrinal changes that would tighten controls on agency position changes, and they emphasize that our extreme polarization produces “partisan legislation” during short waves of unified government and increasingly extreme and radically opposed policy pushes from the Executive as the administration changes hands.³⁰²

Another value related to stability and also threatened by polarization might also come into play at this stage of analysis — the value of forbearance. In their work on democracy’s decline, Professors Steven Levitsky and Daniel Ziblatt emphasize the importance of political actors exhibiting forbearance, that is, restraint in the use of formal powers decisionmakers might have, as a way of both showing respect for the other side and working to achieve consensus.³⁰³ An Executive that forbears from using its powers to unravel all of a predecessor’s actions or push the limits of the law to advance its own agenda shows a form of comity across regimes with potential democratic and depolarizing benefits. It reflects respect for decisionmaking that already has occurred, which may have taken enormous resources over months or years, as well as a bit of humility about what amounts to the “right” thing for government to do. The high-minded incentive to forbear is that it will promote political norms that prioritize consensus, or at least respect for the other side. And at the very least, any Executive will have to calibrate the political risks associated with pushing the limits of the law, including

²⁹⁹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³⁰⁰ Pierce, *supra* note 298, at 103.

³⁰¹ See Livermore & Richardson, *supra* note 228, at 36.

³⁰² See *id.* at 43, 72. These authors also argue that this fluctuation poses “a unique threat to the legitimacy of agency actions, which continue to rely on technical expertise to justify their authority.” *Id.* at 49. They further contend that, “[g]iven the volatile nature of the current party system, placing more interpretive power in courts could have a stabilizing effect.” *Id.* at 57. For further consideration of so-called executive “unilateralism,” see *supra* note 227 and accompanying text. For further consideration of the role courts should play in promoting stability, see *infra* Part III, pp. 91–139.

³⁰³ See *supra* note 33. In section I.B, I highlight the return of a related concept of forbearance in the prosecution policies of the Department of Justice — a commitment to restraint in the application of government power to individuals who might formally be susceptible to enforcement actions. This form of enforcement forbearance can actually be seen as a dramatic assertion of power, and so in evaluating this concept, it matters who the beneficiary of enforcement might be, and certain forms of forbearance in fact require taking a firm and even aggressive political stand.

future retaliation — the sort of institutional and strategic judgment I describe in Part I.

* * *

So how should we reconcile the value of responsiveness to evolving preferences and circumstances and the need for effective problem-solving with the risks of volatility and instability and the prospect of abuse of power? In one formulation of the question, we must find a way to “restrain the state without effectively robbing politics of its transformative potential.”³⁰⁴

We might begin by taking some comfort (or finding frustration) in one background condition that will operate to ensure stability in the face of a highly energetic and even destructive agent of change at the top of the executive branch. The state is indeed deep and vast and constituted by sedimented knowledge and practices.³⁰⁵ Even when a new administration pursues a bold initiative predicated in part on undoing the work of its predecessor, the processes of change can be slow. The transformation of a regulatory regime through executive action takes concerted political will and painstaking attention to the structure of the bureaucracy and the law that governs the domain. No amount of loose presidential rhetoric can move the ship of state, which is not to say that it cannot be done, but rather that such major changes require considerable internal deliberation and high-level priority setting and therefore will be limited in number when compared to the total output of today’s administrative state.³⁰⁶

³⁰⁴ ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 114 (Verso 2015) (1983). This perennial tension in legal and political debates about the structure and authorities of government is a mainstay of policy analysis and legal theory, across the ideological spectrum and scholarly domains. See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT* 206–11 (2012) (defining these features of debates over executive branch power and describing the rise of a “synopticon” of watchers that attempt, sometimes unsuccessfully, to ensure that vast government power is not abused); Levinson, *supra* note 259, at 33–38 (generally calling for greater precision in identifying and defining power in government and noting this tension between those who emphasize a concept of separation of powers that facilitates government and those who focus on checking and constraining).

³⁰⁵ See SKOWRONEK, DEARBORN & KING, *supra* note 44, at 5–6, 13–23; see also Bernstein & Rodríguez, *supra* note 266, at 28 (arguing that the unitary executive is a “descriptive impossibility”); Cristina M. Rodríguez, *Complexity as Constraint*, 115 COLUM. L. REV. SIDEBAR 179, 191–96 (2015) (arguing that the scale of government and the diversity of interests within it constrain executive power); cf. JEREMI SURI, *THE IMPOSSIBLE PRESIDENCY: THE RISE AND FALL OF AMERICA’S HIGHEST OFFICE* xxii (2017) (“The most successful presidents recognized their condition, honestly assessed the constraints they faced, and defined realistic priorities. They spent less time considering how much power they had; they preserved their maximum attention for determining *where* and *when* to use it.”).

³⁰⁶ The arc of immigration policy from the Obama to the Biden years underscores this observation. As Cox and I have explored with respect to DACA, it was only after several years of attempting to shape the bureaucracy’s enforcement choices through guidance, which had minimal effect on the law enforcement culture of U.S. Immigration and Customs Enforcement (ICE), that the Obama Administration chose to exert the discretionary authority of the Secretary in a way that truly limited

What is more, whatever role courts can or should play in balancing the imperatives of stability and change (the subject of Part III) a lively scholarly debate has been going on for some time about the existence and propriety of internal institutional restraints on regulation and executive action. Some of this work laments the antiregulatory drag of features of the administrative state designed to promote forms of accountability, including the entrenchment of cost-benefit analysis since the Reagan years.³⁰⁷ Other scholars have described concepts of internal administrative law and the internal separation of powers in an effort to understand whether and how the state restrains itself, or whether existing institutional design features prevent agency abuse or recklessness.³⁰⁸ Whether these restraints arise because of organizational sociology or

the discretion of line agents. See COX & RODRÍGUEZ, *supra* note 58, at 184–88. The Trump Administration’s immigration policy, in turn, was breathtaking not only because of the President’s own incendiary rhetoric, but also because of the meticulous detail and wide-ranging reach of Cabinet and other political appointees who engaged in a multiyear strategy to narrow asylum law and speed up deportation. See *id.*

³⁰⁷ See, e.g., Bagley & Revesz, *supra* note 229, at 1304–12 (discussing OIRA review and challenges associated with prompting regulation); Lisa Heinzerling, *Knowing Killing and Environmental Law*, 14 N.Y.U. ENV’T L.J. 521, 521 (2006) (arguing that cost-benefit analysis sidesteps the ethical questions of knowingly taking action that will lead to the loss of human life); Lisa Heinzerling, Comment, *The Rights of Statistical People*, 24 HARV. ENV’T L. REV. 189, 207 (2000) (arguing that analyzing unidentified, abstract statistical lives in cost-benefit analysis allows economists to sidestep the uncomfortable questions of monetarily valuing real, individual people’s lives that will be lost); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807–16 (2010) (explaining the problem of reducing regulation through underenforcement).

³⁰⁸ The literature on internal agency accountability, or the idea that through institutional design or self-regulation agencies will be constrained without ongoing supervision by Congress or courts, has grown extensive, as have its critics. Much of this literature tends to focus on formal structures of the executive branch as designed by Congress, such as overlapping jurisdictions, inspectors general, robust civil service protections, reporting requirements, and separation of enforcement, adjudication, and rulemaking functions. For work that treats internal administrative law as historically rooted, see Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010), arguing that administrative law exerted its influence long “before the field of administrative law [even] had a name,” *id.* at 1471. See also JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 1–16 (1983) (arguing that bureaucratic processes are guided by norms that create internal administrative law). For complications and critiques, see Jennifer Nou, Essay, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 524–25 (2017) [hereinafter Nou, *Subdelegating Powers*] (“[P]olitical actors have the best set of tools and the strongest incentives to prevent the entrenchment of delegations to internal agency actors . . .” *Id.* at 524.). For an effort to define internal administrative law, see Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1249–50 (2017) (“What counts as internal administrative law can vary widely on several dimensions, such as content, source, audience, and scope. Measures could represent internal administrative law because they govern actions within an agency, originate from within an agency, are aimed at an intra-agency audience, or some combination thereof.”). See also Elizabeth Magill, *Annual Review of Administrative Law — Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 863 (2009) (defining self-regulation as “voluntarily initiated agency actions that constrain agency discretion when no source of authority requires the agency to act”); Jennifer Nou, *Intra-agency Coordination*, 129 HARV. L. REV. 421, 424–30 (2015) (describing intra-agency coordination as an instrument to facilitate regulatory agendas).

through deliberate design predicated on the inherent dangers of Executive-led government, they are features of today's administrative state that will mediate concerted attempts to undo past acts.³⁰⁹

But these observations about the inbuilt stability of the extant system of government still do not answer the question of whether to resist change. The more important challenge to the preference for stability is that it poses a serious baseline problem that might be best understood in terms of the question: Why ought one administration be able to bind its successor for the sake of stability? One of the institutional norms that preoccupies presidential transition teams has long resisted this binding; the concern that a prior administration not burrow its political officials in civil servant positions both reflects the norm in favor of an apolitical bureaucracy, as well as a belief in a new administration's ability to govern itself.³¹⁰ Another way of asking this question is, for how

³⁰⁹ Though skepticism of the various claims made about constraints internal to the state has met this strand of work since its inception, the Trump Administration has dramatically eroded its persuasive potential because of the myriad ways in which high-level officials of that Administration were thought to have trampled the authority of the bureaucracy. Examples include the politicization and rejection of climate science, *see* Popovich, Albeck-Ripka & Pierre-Louis, *supra* note 200, the tight control exerted over quasi-independent immigration adjudicators, *see* COX & RODRÍGUEZ, *supra* note 58, at 186–87, and the depletion of the diplomatic establishment, *see* Richard Haass, *Present at the Disruption: How Trump Unmade U.S. Foreign Policy*, FOREIGN AFFS. (Sept./Oct. 2020), <https://www.foreignaffairs.com/articles/united-states/2020-08-11/present-disruption> [<https://perma.cc/S85S-3N6B>]. But the internal separation of powers literature, while perhaps sometimes overly optimistic or naively predicated on the assumption that most officials will be public regarding or respectful of deliberative and procedural norms within the bureaucracy, has never excluded the need for other forms of supervision and oversight, nor need it be seen as mutually exclusive with an account that emphasizes the importance of character, virtue, and governing philosophy in our public officials.

³¹⁰ On the subject of burrowing, *see* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 589–99 (2003). As the discussion in Part I underscores, administrations have various incentives to attempt to entrench their policies in order to prevent successors from unwinding them. We can recognize this as a fact about transitions in government, but these forms of entrenchment are not necessarily reasons to prefer their persistence over a different vision, should subsequent legal actors have the will and the power to undo them. For a discussion of entrenchment that details a host of tactics legislators and other political actors might use to “insulate power holders and policies against downstream political change,” *see* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 429 (2015); and *id.* at 454–56. *See also* Magill, *supra* note 308, at 888 (“An agency might . . . formalize [its] approach in a legislative rule in order to impose the highest costs possible if and when a future agency wants to change the rule.”); Nou, *Subdelegating Powers*, *supra* note 308, at 505–07 (demonstrating how bureaucratic structure can entrench agency policy). The Trump Administration engaged in various highly novel attempts to entrench some of the policies it cared most about. The Department of Homeland Security, for example, purported to execute two kinds of contracts with a view to preventing the incoming Biden Administration from changing DHS’s immigration enforcement policies — one with various states, including Texas, that purported to commit to seeking permission from the signatories before changing major enforcement policies, and one that purported to do the same with the ICE union. For an account of the agreements signed with the state of Texas, *see* Texas v. United States, No. 21-CV-00003, 2021 WL 2096669, at *1–2 (S.D. Tex. May 24, 2021). For an argument that these agreements are void, *see* Brief for ACLU as

long must a regulatory regime persist in the name of stability?³¹¹ Why ought we privilege the status quo ante?³¹² If we begin from the premise that an administration's legal authorities can sustain a range of interpretations and then acknowledge that different administrations will gravitate toward different statutory powers they possess, then the preference for stability will never be able to answer this question.

How precisely to reconcile these countervailing considerations will frequently depend on context — in some domains, stability and independence will be crucial values. But in other contexts — in emergencies, or where a regulatory structure has grown sclerotic, been proven ineffective, or become overmatched by circumstances — radical change may be warranted. And as I have been arguing throughout, fundamental philosophical disagreements justify disruption, too. But here I close with an observation that I believe to be a vital throughline in this sort of debate: the question of whether and how to exercise power should not be guided by the fear that the other side will exercise power, too. This prospect should be embraced as a consequence of politics. Accepting the legitimacy of one's opponents' exercise of power constitutes a basic precept of democratic governance. Unilateral trepidation is a sure way to fail in delivering on campaign promises already difficult to satisfy, as well as a recipe for torpor in government.³¹³

In the end, it makes little sense to define and justify constraints on government before understanding or articulating what government is supposed to accomplish in the first place. The vision of constraint should follow from the vision of power. And the vision of power I have

Amici Curiae in Support of Defendants at 2–4, *Texas v. United States*, 2021 WL 2096669 (No. 21-CV-00003).

³¹¹ In his work on norms and conventions, Ashraf Ahmed presents a version of this question, by showing that what we regard as constitutional norms, whose erosion critics often decry, are contingent and arbitrary. See Ahmed, *supra* note 290 (manuscript at 4). To recognize these features and to then accept that underlying conditions might change, leading to norm evolution or erosion, does not mean that we shouldn't contest that erosion or try to salvage norms, including by legalizing them. But in its most radical form, his argument does mean letting go of an overriding focus on maintaining the stability of the status quo for its own sake.

³¹² Cf. SCHWARTZBERG, *supra* note 235, at 182 (“[S]upermajority rules bias decisions in favor of one set of judgments, typically those supportive of the status quo. In the context of constitutionalism, supermajority amendment thresholds mitigate risks associated with instability, but introduce the risk of entrenching bad norms that may reflect distributive inequalities and other injustices dating to the framing. Further, the institutional bias in favor of a minority's judgment or interest is introduced on an arbitrary basis, because of the indeterminacy of the threshold choice . . .”).

³¹³ This point can also be made more strategically and politically. The flipside of what Professors David Pozen and Joseph Fishkin have called “asymmetric constitutional hardball” would be a highly counterproductive asymmetrical disarmament by Democratic lawmakers and officials. See Fishkin & Pozen, *supra* note 239, at 978. This posture would have none of the virtue of sustaining norms of compromise or continuity across administrations and compound the already deregulatory biases of our present system. See *id.* at 981–82; see also *supra* note 229 and accompanying text (discussing systemic biases against regulation).

begun to offer here is one in which politically driven change, including in legal interpretation, is not only legitimate but also democratically necessary. This is not to say that there aren't difficult questions to confront about how that politically driven change should occur, or where considerations that sound in constraint apply. There are also risks associated with projecting this conception of power into an unknown future. As Levinson has put it, what an "unfettered national state might use its power to accomplish" depends, in part, "on who is likely to control the direction of the federal government."³¹⁴ Rather, it is only to say that our conception of the legitimate must be expanded.³¹⁵ Justifications for constraint should be invoked not to preclude even dramatic change, but rather to shape the tools used to achieve it.³¹⁶

To be fully equipped in Part III to assess some of the doctrinal rules that mediate these forms of change, one more point is in order. A malaise hangs over debates about effective and democratic government — a malaise that could either be alleviated by increased popular participation in government or render such participation a nice fantasy outside of certain discrete contexts. Opinion surveys document a dramatic decline since the middle of the last century in public trust of the federal government, though people are more inclined to trust the government when their party controls the White House.³¹⁷ This decline in trust and its partisan valence are paralleled by Americans' plummeting trust in

³¹⁴ Levinson, *supra* note 259, at 55.

³¹⁵ There are also domains within the administrative state, namely spheres of adjudication, where independence from political control will be valuable to ensure fair treatment of individuals pressing claims before an agency. Immigration judges, for example, ought to be able to exercise judgment in individual cases independent of political interference. Immigration judges, as officials within the Department of Justice, are subject to the appellate jurisdiction of the Board of Immigration Appeals, and the Attorney General may properly seek to ensure that the system of adjudication is running efficiently and producing high-quality decisionmaking. Yet excessive oversight runs the risk of undermining their independence and substituting political judgment for adjudication attuned to particular facts in particular cases.

³¹⁶ Nothing in my analysis should be taken to imply that Congress cannot legitimately insulate executive officials through for-cause removal requirements or other indicia of agency independence, though the extent of such agencies' independence from the White House as a matter of fact is subject to debate. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772–74 (2013) (observing that independent and executive agencies exist on a spectrum from more to less insulated and that there should be no freestanding presumption that the President may not direct so-called independent agencies apart from the constraints Congress has imposed). For a brief discussion of related and recent precedent by the Court that chips away at this independence, including in two cases this Term, see *infra* notes 449–468 and accompanying text.

³¹⁷ See *Public Trust in Government, 1958–2021*, PEW RSCH. CTR. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021> [https://perma.cc/5RTW-GUY3].

one another³¹⁸ and the rise of what researchers call negative partisanship, or the phenomenon of people's intense disdain for the opposition.³¹⁹ We know viscerally from our present experience that distrust in institutions is among the most significant threats to the state's ability to perform welfare-promoting, even life-saving functions, such as ensuring widespread distribution of the vaccine to prevent COVID-19 and issuing credible advice for preventing the spread of disease. It is unnerving to contemplate that resistance to mask mandates and vaccination may be driven in large part by Republican hostility to policies perceived as Democratic, rather than clear-eyed judgments on the merits. Partisan-inflected distrust of government and institutions may well also be behind the heightened threat of political violence perceived by national security experts and political scientists alike.

Given these levels of popular cynicism and even hostility, it may seem off base to draw a relationship between democracy and the state generally, much less between democracy and the assertion of power within the state by the representatives of a particular political regime. Such assertions might undermine confidence in government by those with alternate party affiliations, and finding confidence and validation in government does not seem high on the people's list of priorities in any case. But some surveys also suggest that people worry about the decline in trust precisely because it impedes the state's ability to work for the people, something respondents to this sort of survey imply that they want.³²⁰

The sources of this popular distrust are exceedingly difficult to untangle and are well beyond the scope of this Foreword. Political actors themselves almost certainly have had a big hand in producing public cynicism concerning government. Delegitimation of the state has been a central tenet of the Republican Party and conservative legal theory; the picture of the out-of-touch, inept, and corrupt bureaucrat crosses party lines but is central to a particular antistatist ethos much more common to conservative politics — an ethos that in today's world has

³¹⁸ Lee Rainie, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/politics/2019/07/22/trust-and-distrust-in-america> [https://perma.cc/7HW6-MGKA].

³¹⁹ *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal> [https://perma.cc/3M6Q-EGTD].

³²⁰ See Rainie, Keeter & Perrin, *supra* note 318. For a view that the general public does not view the administrative state as illegitimate, see Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> [https://perma.cc/8TA6-ADPL].

devolved in some quarters into extreme hostility to science and expertise.³²¹ And yet, it would be a mistake to think that either shoring up a technocracy-promoting vision of the state, or downgrading the state, will lift this disenchantment. It also seems improbable that stability in policymaking, especially in the midst of political upheaval or after a regime-changing election driven by demands that government work differently, will be the thing that reestablishes trust. The best and perhaps only bet instead may be to work to ensure outcomes that serve the public interest — a project that requires a close connection between administration and the dynamic political sphere, even though the actors in that sphere sometimes misfire.

B. *In Relation to Congress*

The affirmative conception of regime change I have attempted to lay out in this Part may not on its surface appear to track constitutional design. At least, it may appear to sit in tension with the presumption of legislative supremacy by advancing executive branch policy objectives that may be inconsistent with Congress's own.³²² But formally speaking, the power embodied in this regime change emanates from Congress through delegation and the accretion of executive branch practices that have evolved through the development of the administrative state over the last century.³²³ This idea, as I observe in the previous section, contains the whole domain of statutory interpretation, and so it is not meant to suggest that there can be no such thing as an errant Executive or that

³²¹ See Metzger, *supra* note 247, at 3–6 (documenting the rise of today's anti-administrativism and noting its parallels to opposition to the New Deal); Louis Menand, *Are Liberals to Blame for Our Crisis of Faith in Government?*, NEW YORKER (Aug. 9, 2021), <https://www.newyorker.com/magazine/2021/08/16/are-liberals-to-blame-for-our-crisis-of-faith-in-government> [<https://perma.cc/6EJS-J3R9>] (reviewing two new books that link public distrust to different culprits — the Republican Party and liberal reformers such as Ralph Nader — both of which have attacked the administrative state as nefarious, corrupt, and ineffectual); see also *infra* notes 460–470 (considering the rise of opposition amid conservative politicians and constituencies to the administrative state).

³²² See HAMBURGER, *supra* note 248, at 4–5 (arguing that the administrative state is unlawful by virtue of giving lawmaking power to the Executive); Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 433–35 (2013) (defending separation of powers in the traditional sense as distributing discrete types of power to the various branches). As a formal matter, though, my conception of regime change does not and need not discount that Congress can oversee and supervise the government in aid of its legislative authority in order to help it discern whether to change the regime the Executive has enacted by updating the statutory authorities granted by its predecessor Congresses.

³²³ There is also a significant political science literature contending that the absence of direct congressional control does not mean Congress does not exert control over agency choices, through ex ante design that creates agencies that share Congress's preferences as well as ex post monitoring. See Levinson, *supra* note 259, at 58 n.154, 62 (collecting sources).

defining deviation is not itself a politically contested process.³²⁴ And the concept of regime change does not directly broach the question of whether the Executive possesses the right amount of delegated authority, though that question would be quite difficult to answer divorced from institutional context.³²⁵

But even with these caveats, it remains important to think through the potential implications of concerted regime change for interbranch relations. In Part I, I gave some consideration to how the identity of Congress factors into the successes or failures of regime change.³²⁶ Unified government does not guarantee resounding legislative victories, particularly given the Senate's enduring filibuster rule for legislation.³²⁷ Divided government may not produce stasis — in fact, some studies suggest that it may have little to no impact on lawmaking at all.³²⁸ But can concerted regime change actually undermine Congress? Has a view of the Executive and its governing capacity as the crucial engines of policy change contributed to the decline of Congress as an institution? Even if congressional abdication of its lawmaking function helps to explain the rise of policymaking through executive channels, even if polarization and congressional decline have necessitated a rise in executive governance and innovative policymaking,³²⁹ does the assertive Executive simply further enable an abdicating Congress?

³²⁴ Cox and I have argued the opposite in the immigration context. See COX & RODRÍGUEZ, *supra* note 58, at 192–96. Much of the game is in how agencies (and thus the regime) interpret their statutory authorities. Through these very acts of interpretation and administration, the Executive can reshape the meaning of a statutory regime.

³²⁵ A robust literature exists exploring the incentives Congress has to delegate. See generally DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS* (1999) (finding that under unified government Congress delegates more often to executive agencies and during divided government to independent agencies). For a recent treatment, see Farhang, *supra* note 105, at 49, 54–59, focusing on the content of enacted statutes rather than quantity and finding that in this era of polarization Congress has enacted a growing volume of regulatory policy through fewer laws and employed implementation designs intended to limit bureaucratic and presidential power.

³²⁶ See *supra* pp. 54–57 (examining how the identity of Congress influences its relationship with the Executive).

³²⁷ For a recent scholarly treatment, see JAMES M. CURRY & FRANCES E. LEE, *THE LIMITS OF PARTY* 11–12, 32–33, 38 (2020).

³²⁸ See DAVID R. MAYHEW, *DIVIDED WE GOVERN* 177–78 (2d ed. 2005).

³²⁹ For a study concluding that polarization in Congress has reduced its capacity and provoked the expansion of executive power, see Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOB. LEGAL STUD. 369, 379–95 (2017). See also MARC J. HETHERINGTON & JONATHAN D. WEILER, *AUTHORITARIANISM AND POLARIZATION IN AMERICAN POLITICS* 4–5 (2009) (highlighting how authoritarian personalities in particular exploit polarization to legitimate their agenda and force confrontation); Alexander Bolton & Sharece Thrower, *Legislative Capacity and Executive Unilateralism*, 60 AM. J. POL. SCI. 649, 660–62 (2016) (arguing that diminished legislative capacity in periods of nonunified partisan control leads to an increase in executive governance); cf. Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, Essay, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L.

The answers to these questions are complex and well beyond the scope of this Foreword. The diagnosis of the problem is itself contested, but there are reasons to be skeptical that executive action, rather than some deeper factor such as polarization, is what has diminished Congress. Professor Frances Lee has shown how today's evenly matched parties, each with a reasonable shot at control of Congress, have few incentives to compromise on cross-party legislation.³³⁰ Our evenly divided country not only produces volatility in executive policy-making, but also makes the sort of longer-lasting change reflective of popular consensus that legislation represents much harder to come by.³³¹ The incentives of lawmakers, especially in times of divided government, are to grandstand and decry executive abuses rather than legislate to steer government in a problem-solving direction.³³² Another strand of political science literature notes Congress's degraded capacity but attributes it to various structural features that cannot reasonably be overcome.³³³ Others suggest congressional decline is overstated, even though some recent Congresses have been extremely unproductive and riven.³³⁴ Numerous scholars instead have pointed to ways in which Congress has adapted to changing structural and political factors by creating "unorthodox" forms of lawmaking that enable Congress to continue its business.³³⁵ And so-called executive unilateralism varies depending on the distributions of party power, rising in some contexts during divided government, though hardly absent in unified government.³³⁶ This latter point, in particular, is attributable to some of the very reasons invoked

REV. 1789, 1796, 1828–30 (2015) (arguing that gridlock gives rise to more of what Professor Barbara Sinclair calls "unorthodox lawmaking," *id.* at 1796).

³³⁰ See LEE, *supra* note 203, at 2–5 (arguing that this partisan competition must be integrated into accounts that point to ideological polarization — that is, the distance in views of the two major political parties — as an explanation for partisan conflict).

³³¹ See *id.* at 1 ("The Senate majority changed hands seven times between 1980 and 2016, . . . [t]he House majority shifted three times during the same period, . . . [and] [b]oth parties can generally count on receiving between 47 and 53 percent of all the votes cast in congressional elections [in] any given year.").

³³² See *id.* at 66–67.

³³³ See HOWELL & MOE, *supra* note 248, at 51–55 (arguing that members of Congress are parochial, myopic, and piecemeal in their approach to policymaking); THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH* 224–26 (2006) (tracking the shift in Congress that centered party loyalty above other considerations); MANN & ORNSTEIN, *supra* note 239, at 102–03 (arguing that the Republican Party has become an "insurgent outlier," *id.* at 103, and paralyzed our institutions of government); Freeman & Spence, *supra* note 220, at 14–17 (attributing Congress's decline in responsiveness to polarization).

³³⁴ See Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 97–98 (2015) (arguing that the picture of congressional capacity is more mixed than most scholars suggest).

³³⁵ See, e.g., BARBARA SINCLAIR, *UNORTHODOX LAWMAKING* 256–59 (5th ed. 2017).

³³⁶ See Bolton & Thrower, *supra* note 329, at 660–62.

above to defend concerted regime change, including the need for energetic administrative action to address massive collective action and other social welfare problems.³³⁷

But perhaps a better retort to the claim of enervation as a justification for tempering administrative and executive action is that the claim is beside the point. The capacity differential between Congress and the Executive is simply insoluble.³³⁸ The Trump Presidency underscored why this differential makes the power of the modern presidency worrisome, to say the least.³³⁹ And yet the executive branch as a whole is arguably the far more functional of the two political branches.

The question of congressional capacity is nonetheless a serious one, at least if we believe in government problem-solving, and an agenda for congressional revival is urgent.³⁴⁰ After all, the Executive will always be constrained by the law's limits, and its innovation will eventually run into those limits, regardless of the theory of statutory interpretation pursued or the degree of energy that exists for new rulemaking and the like. But to focus any argument about expanding congressional capacity on the depredations caused by executive aggrandizement distracts us from what are much deeper systemic features and other sources of our democratic dysfunction.³⁴¹ It is far from obvious that congressional revival runs through efforts to temper, clip, or unwind either the power of the presidency, or more importantly, the reach of the executive branch. And as I explore in more detail in Part III, if the Court is determined to hamstring Congress, too, then a call to reinvigoration may be compelling in theory but ineffective in fact.

III. THE PLACE FOR COURTS

In Part I, I considered reasons why the government itself might be reluctant to change its position, as well as the institutional and political obstacles to doing so with respect to every norm, policy, or practice that

³³⁷ For further discussion of the way partisanship shapes executive branch capacity, see *supra* notes 205–223 and accompanying text.

³³⁸ See HOWELL & MOE, *supra* note 248, at 47–94 (criticizing congressional incapacity to solve policy problems); POSNER & VERMEULE, *supra* note 248, at 28–29 (detailing the contrast between the relatively small size of congressional staff and the vast administrative state).

³³⁹ For a leading example of this literature, see Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 19–44 (2020).

³⁴⁰ Professor Vicki Jackson, for example, has begun to develop a set of pro-constitutional norms that ought to guide legislators, including that they represent and engage with their constituents, that they be willing to compromise, and that they pay special solicitude to the responsibilities and capacities that fall to the federal government. See Vicki C. Jackson, *Pro-constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1759–68 (2016). This picture offers a stark contrast to the partisan loyalists and reelection-seeking lawmakers of most political science, but it also reflects an underlying need for renewal in government.

³⁴¹ See Klarman, *supra* note 339, at 153–74; *infra* Coda, pp. 139–156.

might on a clean slate have been treated differently by a new regime. This analysis then broadened into a larger discussion about the importance of state capacity and the mobilization of political will to use it. In this Part, I address the role that the courts, especially the Supreme Court, play in facilitating, mediating, and thwarting this concept of regime change, primarily through administrative law, but also in constitutional jurisprudence involving the structures of and limits on power.

In doctrine, rhetoric, and effect, the courts have long employed rule-of-law concepts (consistency, predictability, transparency, fidelity to law) and legalistic modes of reasoning (especially high textualism) to police government, for reasons grounded in a formal conception of the Constitution, as well as for pragmatic considerations and in the interests of stability. At the same time, the courts have developed a suite of deference doctrines that reflect a judicial orientation toward government that enables at least gradual and sometimes even radical change across regimes, including doctrines that insulate discretionary judgments from review, that defer to agency interpretations of law and of their own regulations, and that exert minimal to nonexistent restraint on congressional delegations of power that enable robust administrative policymaking.

It is always risky to purport to identify trends — doctrinal development is neither linear nor always coherent within the same court or even the same chambers.³⁴² But each of these strands of administrative law is experiencing ferment with implications for the concept of regime change. Doctrinal proceduralism, which slows things down, is arguably waxing; judicial deference to the (legal and policy) choices made by the political branches, which allows things to move forward, is waning.³⁴³ And all of this is happening as the Court has come to be dominated by

³⁴² For a very helpful picture of this inconsistency and cycling among interpretive methods and doctrinal positions, see Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 61–66; and Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 412 (2015) (“Because of their distinctive role, judges care about the law, and they cannot and do not act in a single-minded way.”).

³⁴³ Scholars debate the extent of the change we are witnessing in Court doctrine, with different predictions of how far the Court will take its demolition of administrative law and the administrative state. Compare CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 11, 116–18 (2020) (suggesting that the Court won’t radically alter administrative law), with Metzger, *supra* note 342, at 62–66 (identifying developments with radical potential in the opinions of some Justices and concluding that, while incrementalism won out in October Term 2018, a gradualist approach has the potential to have a significant impact on administrative law over time), and Nicholas Bagley, *I’m Still Worried: A Post on Law and Leviathan*, YALE J. ON REGUL.: NOTICE & COMMENT (April 15, 2021), <https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-04> [<https://perma.cc/BN55-5LRG>] (fearing the “cumulative detrimental effects of multiple small changes, especially in state courts and the lower federal courts,” and that the Court’s “rhetorical bombast” may be enough to encourage lower courts to see “agencies as the bastard stepchildren of a damaged constitutional system”).

a conservative majority, many of whose members speak and write derisively and suspiciously of government power, especially in its regulatory and bureaucratic incarnations.³⁴⁴ Indeed, the very legitimacy of the administrative state, a perennial scholarly preoccupation, seems increasingly up for reconsideration in a judicial back-and-forth that Professor Thomas Merrill describes as “shadow boxing”³⁴⁵ and Professor Gillian Metzger as “mortal combat.”³⁴⁶ Whatever its level of intensity, deep disagreement defines the Court’s view of the administrative state’s legal identity and the forms of judicial supervision required as a result of that identity.

In what follows, I focus first on the procedural order that constrains government and thus, by definition, regime change, especially two decisions from October Term 2019 that addressed the Trump Administration’s efforts to significantly change government practice. In my own view, scholars and commentators should evaluate these cases with a conception of the executive branch as a *political* branch in mind. What we think it ought to be allowed or enabled to accomplish as a *political* branch should shape the extent and nature of the restraints courts place on executive branch policymaking and legal interpretation. This approach ultimately requires integrating our understandings of executive power and administrative governance — two dimensions of government sometimes treated as distinct and opposed, not least in the Court’s jurisprudence that reflects skepticism of bureaucrats but deference to presidential power.³⁴⁷ For many of the same reasons I offer in Part II in defense of concerted regime change, we should instead see these two forms of power as interrelated and often essential to one another, at least to the extent that we value a government that is both responsive and efficacious. I then address a range of developments that I characterize as affecting government capacity, with a focus on what

³⁴⁴ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (“The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the [Sex Offender Registration and Notification Act] scrambles that design. It purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?”).

³⁴⁵ Thomas W. Merrill, *Symposium: Shadow Boxing with the Administrative State*, SCOTUSBLOG (June 27, 2019, 7:00 AM), <https://www.scotusblog.com/2019/06/symposium-shadow-boxing-with-the-administrative-state> [https://perma.cc/Z8YT-VUZT].

³⁴⁶ Metzger, *supra* note 342, at 1 (defining the “legal equivalent of mortal combat” as “where foundational principles are fiercely disputed and basic doctrines are offered up for ‘execution’” (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in judgment))).

³⁴⁷ For accounts of the political dynamics through which unitary executive theory and suspicion of the deep state have become woven together, as exemplified by the rhetorically stark claims made by former President Trump about presidential power (that it is vast) and the bureaucracy (that it was engaged in a conspiracy to destroy his presidency), see SKOWRONEK, DEARBORN & KING, *supra* note 44, at 3–4, 6–12; and Metzger, *supra* note 247, at 9–10, 13–16.

several cases from this Term suggest about institutional design, interpretive authority, and the role of constitutional rights in limiting government power. As I explain in closing, these recent developments in the Court's jurisprudence, including during October Term 2020, ultimately highlight the ascendancy (or perhaps consolidation) of a new regime within the Court itself, considerably at odds with the regime that controls the political branches, bringing us into a state of regime conflict and therefore uncertainty about the future of government.

A. *Procedural Order*

Administrative law is shot through with procedural requirements, imposed by the APA, as well as through judicial common law. Perhaps the most basic of expectations is that actors within the administrative state provide reasons for their actions — to show why their policies are authorized by law,³⁴⁸ establish a link between the “facts found and the choice[s] made,”³⁴⁹ explain the rejection of alternative possibilities and arguments made by the public and interested groups,³⁵⁰ and (most important to my argument here) justify changed interpretations of their

³⁴⁸ Section 706 of the APA authorizes courts to set aside agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

³⁴⁹ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

³⁵⁰ Section 553 of the APA requires agencies adopting what are now known as legislative rules to provide “[g]eneral notice” of rulemakings, 5 U.S.C. § 553(b), and to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation,” *id.* § 553(c). Courts have interpreted these requirements of notice and comment to mean that agencies must also explain why they have or have not incorporated or addressed comments in their final rules. Courts have read section 553(c) to require that agencies consider and respond to comments submitted during the notice-and-comment period. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (holding that 5 U.S.C. § 553(c) requires an agency to “consider and respond to significant comments received during the period for public comment”); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (stating that judicial review of agency rulemaking requires considering “whether [an agency’s] decision was based on a consideration of the relevant factors,” which is routinely interpreted to mandate taking account of comments, *see, e.g., Home Box Off., Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977)), *abrogated on other grounds by* *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020) (“[A] central purpose of notice-and-comment rulemaking is to . . . obligate the agency to consider and respond to the material comments and concerns that are voiced.” (citing *Perez*, 575 U.S. at 96)); *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56, 64 (D.C. Cir. 2020) (“[An] agency must issue a final rule including a ‘general statement of . . . basis and purpose,’ which must address significant comments and forms the basis for judicial review.” (second alteration in original) (citations omitted)); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (ruling that agencies cannot “leave vital questions, raised by comments which are of cogent materiality, completely unanswered” under 5 U.S.C. § 553(c)). Section 553(c) also requires that “[a]fter consideration of the relevant matter presented [by interested persons during the notice-and-comment period], the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose,” which also supports a response requirement. 5 U.S.C. § 553(c).

statutes and shifts in their policy positions.³⁵¹ These requirements seek to ensure that government acts within its statutory authorities. These requirements also attempt to rationalize administrative governance by ensuring that agencies act for reasons justified by reality and for reasons deemed appropriate, which prevents unelected administrators' personal preferences or the mere caprice of their political supervisors from determining administrative outcomes and ensures that public-regarding reasons play at least some role in agency decisionmaking. Ultimately, if a decision cannot be explained, that might be a good sign that the idea is a bad one.³⁵²

The extent to which courts have enforced these principles and doctrines has of course varied greatly over time. That variation is the stuff of administrative law. Scholarly accounts of the functions of this body of law also have evolved. One now-outmoded account of the APA regarded it as a nonpartisan, technocratic effort to articulate widely agreed-upon principles to properly balance efficiency and individual liberty — features that helped explain the unanimous consent it received in Congress.³⁵³ But other, more recent accounts regard it more politically, as the product of a fierce contest over the legacy of the New Deal.³⁵⁴ The Act, in the end, helped enable the consolidation of the

³⁵¹ In *Encino Motocars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), the Court laid out its expectations: “Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.” *Id.* at 2125. An agency’s explanation need not be more detailed than what would be required to adopt a new policy “on a blank slate,” *id.* (quoting *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502, 515 (2009)), but the agency must show “awareness that it is changing position,” “show that there are good reasons for the new policy,” and display cognizance of “reliance interests,” *id.* at 2126 (quoting *Fox I*, 556 U.S. at 515).

³⁵² As a matter of law, the requirements of the APA do not apply to the President, whose actions are much less likely to be directly and aggressively superintended by the courts in any case. As a matter of politics, a President may seek to explain himself, but in the form of speeches or announcements that articulate and defend a larger political vision. Scholars have drawn attention to the particular challenge of presidential factfinding and whether courts have any role to play in ensuring that presidential acts that depend on the finding of facts about the world are grounded in actual as opposed to “Potemkin” facts. See, e.g., Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 894 (2019).

³⁵³ See Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 231–32 (1986); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559–60 (1996).

³⁵⁴ See, e.g., Shepherd, *supra* note 353, at 1559. Proponents of reform during this time described themselves as being motivated by ire for two New Deal agencies, the Securities and Exchange Commission and the National Labor Relations Board. *Id.* at 1562, 1604–07, 1609; see also *id.* at 1681 (“Only after political warfare and negotiation had determined the fundamental balance between efficiency and individual rights could scientific investigation into the administrative process play a role. Experts on the administrative process could then suggest the soundest means for implementing the combatants’ agreement.”).

administrative state, rather than its dismantlement.³⁵⁵ Under this conception, we can begin to see procedure and expectations of rationality as means of legitimating government power.³⁵⁶ In their recent account of today's administrative law, leading scholars Cass Sunstein and Adrian Vermeule advert to various procedural doctrines that cabin the administrative state as transcending the positive law of the APA and containing an immanent Fullerian morality that prioritizes rule-of-law values, such as predictability, consistency, and respect for reliance interests.³⁵⁷ They regard the law's insistent protection of these values as anchored in our deep legal traditions, prominent among them the commitment to due process of law.³⁵⁸ They characterize this law, and their own interpretation of it, as legitimating government power in the face of vitriolic conservative critics and the existential battle described above.

And yet, these very same doctrines can be mobilized to do more than curb state power. Each new judicial adaptation and restraint could easily be characterized as promoting rule-of-law values, but the thickening

³⁵⁵ See *id.* at 1678 ("The [APA] . . . represents the country's decision to permit extensive government, but to avoid dictatorship and central planning. The APA permitted the continued growth of the regulatory state that exists today."); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 205 (1999) (portraying the APA as a more deliberate win for New Dealers because it was "designed in part" to guard against future Republican efforts to administratively hollow out New Deal programs). But see Jeremy Rabkin, *The Origins of the APA: Misremembered and Forgotten Views*, 28 GEO. MASON L. REV. 547, 571 (2021) ("The debate about the rule of law in the formative period of the APA was not actually a debate about whether to encourage or resist particular regulatory programs. Nor was it primarily about such secondary issues . . . as presidential oversight or judicial review. . . . The debate was principally about reconciling administrative authority with the rule of law.").

³⁵⁶ See Shepherd, *supra* note 353, at 1569 ("Indeed, throughout the seventeen-year prelude to the APA, a substantial fraction of supporters of reform backed changes in administrative process not as a cynical means to hobble the New Deal, but as a sincere, nonpolitical attempt to foster agency fairness and efficiency."). Scholars also debate the extent to which the APA codified or incorporated preexisting judicial common law. One of its innovations, however, was the introduction of the requirement that agencies open up their rules to public comment. *Id.* at 1583; see also McNollgast, *supra* note 355, at 198–200 (characterizing the APA as implementing the "fire alarm" theory of congressional oversight, delegating to constituents through various transparency mechanisms, including litigation, the ability to bring administrative failings to legislators' attention and noting that this was in part due to the Democrats' weakening grip on the presidency and the need for external monitoring of Republican Presidents in charge of the state).

³⁵⁷ SUNSTEIN & VERMEULE, *supra* note 343, at 8–12. Sunstein and Vermeule label today's conservative critiques of the administrative state "The New Coke" because these critics often invoke the threat of tyranny and "valorize" Edward Coke, the jurist who challenged "Stuart despotism." *Id.* at 19. Despite the fact that today's law students are unlikely to grasp the cheekiness of this label, it does suggest that Sunstein and Vermeule think critics of the administrative state are selling an inferior product that is likely to disappear into the dustbin of massive marketing blunders.

³⁵⁸ *Id.* at 8; cf. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001) (describing depth of American commitment to conceptualizing and wielding legal processes as protection against "official corruption and arbitrariness").

of procedure can also begin to render government ineffective and to deprive those who wield power within it from shaping government policies and practices to reflect their considered and value-laden views about what the state should do for the public. This law's application slows government processes down, not only by enabling judges to send agencies back to the drawing board, but also by prodding agencies over time either to go through lengthy internal processes in anticipation of litigation to ensure that they have complied with administrative proceduralism or to forego boundary-pushing regulation altogether.³⁵⁹ These procedures offer formality but are not obviously the sole or even primary source of agency accountability to the public,³⁶⁰ nor are they so clearly what legitimates the administrative state — a process that arguably depends more on what the state produces than how it produces.³⁶¹ These procedures are also antidemocratic because they empower courts to stop or slow the work of government actors, many of whom are part of the sort of elected regime I describe in Part II, and all of whom are enmeshed in the worlds they regulate and in communication with the regulated public and interest groups. And, when deploying these procedures, judges often telegraph deep suspicion of administrative power, as well as of regulation, suggesting that they themselves are engaged in a political project. To put the argument in its strongest form, the rule of law can be mobilized as an excuse to insert the judiciary in the policymaking process to thwart outcomes judges regard with suspicion, with limited discernable benefit flowing from the insistence on reason-giving.³⁶²

³⁵⁹ We need not “prove” the ossification thesis regarding notice-and-comment rulemaking, for example, to appreciate that the perception of litigation risk by agencies cognizant of hyperproceduralism makes promulgating legislative rules enormously costly and complicated. See O’Connell, *supra* note 149, at 498–500 (discussing protracted rulemaking). Indeed, this difficulty may be partially responsible for the rise of agency guidance documents to shape policy. See NICHOLAS R. PARRILLO, ADMIN. CONF. OF THE U.S., FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 4–5 (2017), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf> [<https://perma.cc/V7AN-G3VQ>]; Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law Before and After the APA*, in ADMINISTRTATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 163, 184 (Nicholas R. Parrillo ed., 2017); cf. Mila Sohoni, *A Fuller Picture of Internal Morality*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 14, 2021), <https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-03> [<https://perma.cc/JCS3-HCHX>] (arguing, in response to Sunstein and Vermeule, that courts perform their Fullerian responsibilities poorly, because the Court’s doctrines “are not transparent,” are “difficult to understand,” are applied on “an ad hoc basis,” and create a disconnection between the “rules as announced” and the “rules as administered”).

³⁶⁰ Drawing on the work of Professor Jerry Mashaw, an important strand of administrative law scholarship focuses on the internal procedures agencies adopt to structure their actions and distribute responsibility and supervision. See *supra* note 308 and accompanying text for a discussion of scholarship on internal administrative law.

³⁶¹ See sources cited *supra* note 249.

³⁶² Indeed, conservative lawmakers and legislative-norm entrepreneurs well understand the utility of procedure in stifling regulation and hamstringing government. Legislative proposals to

How these procedural doctrines play out in discrete contexts matters a great deal, and the Supreme Court has at various points cleared away the procedural sediment that has accumulated around agencies.³⁶³ Much worthwhile administrative law scholarship traces and debates these doctrinal evolutions and backtrackings.³⁶⁴ It ultimately may not be possible to fully adjudicate between the two pictures of procedure I have provided. It is easy to lose one's bearings when descending into structural and administrative law debates, precisely because they are often defined by the competing values reflected in the two pictures. On each side sit values, structures, and ideas that constitute necessary parts of our democratic legal and political orders: power versus constraint; democratic action versus reasoned decisionmaking; political accountability versus bureaucratic and decisional independence; political officials versus civil servants. Scholarly and jurisprudential debates thus entail trade-offs among competing values, even when the judge or analyst's point of view is a formal one (since her formalism is typically supported by one of these values).

Structural arguments are also double-edged swords, malleable and available to both sides of a political debate when their opponents are in power — administrative law and the courts were central to stunting much of President Trump's agenda, for example, and they may well play the same role in relation to President Biden's.³⁶⁵ We could take the view that the benefits of procedure are wholly divorced from substance, or that the right processes will necessarily produce salutary and legitimate outcomes, but these are views of a lost era of rough political consensus

thicken the procedural layer have been floating around Congress for more than decade, the most recent instantiation of which — the Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017) — would impose the requirements of formal rulemaking, including an oral hearing with cross-examination, onto “high-impact” rules, codify cost-benefit analysis and centralized White House oversight, and regulate the issuance of guidance documents, all backstopped by judicial review. See *id.*; cf. Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017) (requiring congressional approval for “major” rulemakings).

³⁶³ The classic example is *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), directing that courts may not add to the procedural requirements imposed by the APA. *Id.* at 524. More recently, the Supreme Court has pulled back on the creeping proceduralism of the D.C. Circuit by overruling the latter's doctrine in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), that the rescission of interpretive rules requires notice-and-comment rulemaking, even though the initial rule was exempt from those requirements. *Id.* at 583; see *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015).

³⁶⁴ See, for example, the longstanding debate, descriptive and normative, over whether arbitrary and capricious review should be “hard look” or “soft glance.” See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1361 (2016) (explaining the debate around “hard look” review and arguing for a less demanding constraint); Livermore & Richardson, *supra* note 228, at 29–34 (periodizing administrative law and identifying a “reformation period,” *id.* at 29, between 1969 and 1980 characterized by robust judicial review of agency action followed by the post-Reagan era and decisions that broadened executive authority over administration, including *State Farm* and *Chevron*).

³⁶⁵ See *infra* notes 397–399 for further discussion of these developments.

and legal myth.³⁶⁶ These structural arguments, instead, require legal actors (judges and litigants, in particular) with substantive views to confront a strategic question — a risk calculation of sorts: Is it better to hamstring one’s own regime of choice in order to stave off or temper the successes of an opposing regime, or is it better to accept some losses or setbacks in order to have the future chance at quick and potentially radical change?³⁶⁷

In what follows, I take the second risk, not only because I hope for ambitious government action on the problems of our day, but also because the position embodies the basic democratic principles without which a democratic society would be lost — that winning means accepting the possibility of losing and that pluralism and disagreement demand accepting that preferences other than one’s own may prevail. And even if we accept (as I do) that some amount of proceduralization promotes rule-of-law values bedrock to our system, or promotes accountability and fidelity to law, we should still always ask: What do procedures do to the actual workings of government? Do they make them better? Or are they in fact tools for preventing the state from acting? To flesh out this critical perspective in one context, I focus on the way the Court recently has broached the question central to this Foreword — what does it take for the government to change its mind? — not only because I regard the ability to change to be democratically necessary, but also because moments when the government seeks to reverse course heighten the tension between the vaunted rule of law and the actual (or at least ostensible) functions of the administrative state.

I. Changing Positions and Rationality Review. — Two of the Supreme Court’s decisions from October Term 2019 implicated the ability of the government to change the status quo: in one case to undo a policy and in the other to initiate a measure contrary to longstanding practice but not obviously illegal. On one view, the expectation of reason-giving should be heightened when the government changes its mind; an about-face in the interpretation of the law threatens any concept of legal continuity, and a shift in policy suggests a new conception

³⁶⁶ This process-theory view of the matter seems strikingly naive and incomplete today, when the prospect of cross-ideological consensus is so elusive, and in light of how baked-in politics is to the processes of governance.

³⁶⁷ Bagley answers this question sharply, addressing the Trumpian elephant in the room: “[A]n administrative law oriented around fears of a pathological presidency may itself be pathological — a cure worse than the disease.” Bagley, *supra* note 249, at 350. Bagley generally criticizes progressives for failing to understand the value of “loosen[ing] administrative law’s constraints” to advance their objectives, arguing that “[a]dministrative law is shot through with arguably counterproductive procedural rules,” including the “drag” imposed by OIRA review, “the presumption in favor of judicial review,” “the presumption in favor of preenforcement review,” and “reflexive invalidation of defective agency action.” *Id.* at 348. Indeed, in his response to Sunstein and Vermeule, *supra* note 343, Bagley does not place great confidence in the ability of supposedly legitimating procedure to save the administrative state from conservative “high water[s].” Bagley, *supra* note 343.

of government authority and potentially threatens entrenched interests to boot.³⁶⁸

In *DHS v. Regents of the University of California*,³⁶⁹ the Supreme Court weighed in on one of the Trump Administration's highest-profile efforts to undo a signature policy of its predecessor — the attempted rescission of the DACA immigration relief program.³⁷⁰ In his opinion for the Court, Chief Justice Roberts held the government to procedural task, concluding that it had not adequately justified its change in policy because it failed to consider all of the possible ways DHS could shift policy course short of abandoning DACA altogether.³⁷¹ This opinion and its ongoing reverberations offer an especially clarifying moment in which to consider the judiciary's role in policing policy change. The outcome in the case — that DACA survived past the inauguration of President Biden, who declared his commitment to preserving it early on³⁷² — is certainly a welcome one. But the fact that it was so difficult for DHS and DOJ to unwind a discretionary policy not required by the governing statute should come as a surprise, and a warning.

It is perhaps comforting to think that the unique incompetence of the Trump DHS produced the years of litigation resulting in an almost unanimous determination by the courts of various jurisdictions that DHS had failed to pass basic administrative law.³⁷³ But a more concerning and cynical interpretation of events, particularly at the Supreme

³⁶⁸ This expectation of reason giving and the insistence that it be adequate is increasingly ironic coming from this Court, whose so-called shadow docket has been generating controversy for quick decisionmaking in consequential cases often without elaboration on the Court's rationale for its decisions. See, e.g., William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 38 (2015); Stephen I. Vladeck, *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 157–159 (2019). The stakes of this docket could not have been higher this Term, as both challenges to state and local election laws in the run-up to and immediate aftermath of the 2020 election and emergency motions involving state and local COVID-related health restrictions came before the Court in expedited fashion. See Lawrence Hurley & Andrew Chung, *Analysis: U.S. Supreme Court's "Shadow Docket" Favored Religion and Trump*, REUTERS (July 28, 2021, 12:30 PM), <https://www.reuters.com/legal/government/us-supreme-courts-shadow-docket-favored-religion-trump-2021-07-28> [<https://perma.cc/M5LE-2UBP>].

³⁶⁹ 140 S. Ct. 1891 (2020).

³⁷⁰ *Id.* at 1901.

³⁷¹ *Id.* at 1913.

³⁷² See *The Biden Plan for Securing Our Values as a Nation of Immigrants*, JOE BIDEN FOR PRESIDENT, <https://joebiden.com/immigration> [<https://perma.cc/LX75-9MRQ>].

³⁷³ NYU School of Law's Institute for Policy Integrity has documented the Trump Administration's litigation losses and shown that its rate of failing arbitrary and capricious review has been unusually high. See *Roundup: Trump-Era Agency Policy in the Courts*, *supra* note 262. It seems likely that these outcomes are the result of process failures within the Administration, though it is also possible in discrete contexts to characterize the courts' review as driven by suspicion of the regime that motivates heightened review. For an analysis of where the Trump Administration went wrong, see William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1582–88 (2019).

Court, should be taken seriously. Early in the litigation, when the government defended its rescission effort as required by law (on the theory that DACA exceeded the Executive's legal authority), courts balked, determining for themselves that DACA was legally available and that the agency needed a different, policy-oriented rationale.³⁷⁴ These decisions, which forced the Administration to be transparent about its political judgments, were arguably salutary.³⁷⁵ But after the D.C. District Court directed the agency to come up with policy justifications for its rescission, and the agency obliged with a new memorandum elaborating on and extending its prior reasoning,³⁷⁶ the litigation took a new turn. The Supreme Court ultimately rejected what ordinarily would have been sufficient policy justifications for the rescission through the application of two longstanding administrative law precedents: the principle articulated in *SEC v. Chenery Corp.*³⁷⁷ that an agency must defend its policy choice on the ground it invoked to make that choice, and the principle articulated in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*³⁷⁸ that before rescinding a regulation, an agency must consider as part of its "reasoned analysis" whether alternatives "within the ambit of existing [policy]" might be viable.³⁷⁹ In the case of DACA, the original rescission rationale offered in a memorandum by Acting Secretary Elaine Duke was that the whole program was

³⁷⁴ See, e.g., *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018) (granting plaintiffs' motion for preliminary injunction); *NAACP v. Trump*, 298 F. Supp. 3d 209, 210 (D.D.C. 2018). But see *CASA de Md. v. DHS*, 284 F. Supp. 3d 758, 768 (D. Md. 2018) (concluding that "it was reasonable for DHS to have concluded — right or wrong — that DACA was unlawful and should be wound down in an orderly manner").

³⁷⁵ See, e.g., Adam Cox & Cristina Rodríguez, *Don't Let Trump Hide Behind the Constitution in Ending DACA*, JUST SEC. (Sept. 6, 2017), <https://www.justsecurity.org/44735/dont-trump-hide-constitution-daca> [<https://perma.cc/DH4F-UYU7>] (arguing that the Trump Administration was hiding behind flimsy legal claims in order to avoid the political cost of rescinding DACA). In the wake of the *Regents* decision, Professor Benjamin Eidelson has characterized the litigation and the Court's decision as "accountability-forcing." See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1761 (2021). *Regents*, in particular, implicates an antiregulatory strategy one scholar has called "statutory abnegation," according to which agencies disclaim statutory authorities on which they had previously relied — a strategy courts typically resist in order to promote various forms of political accountability. See Buzbee, *supra* note 373, at 1582; see also Eidelson, *supra*, at 1768 (arguing that *Regents* does not let the Trump Administration claim Congress has made the decision that the Administration itself is making).

³⁷⁶ Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [<https://perma.cc/NSV9-PUVZ>] [hereinafter Nielsen Memorandum] (laying out policy reasons for rescinding DACA, including that DHS should exercise prosecutorial discretion on a case-by-case basis, leaving categorical relief to Congress, and that it was "important for DHS to project a message" that the immigration laws were to be enforced against all categories of violators, *id.* at 3).

³⁷⁷ 318 U.S. 80 (1943).

³⁷⁸ 463 U.S. 29 (1983).

³⁷⁹ *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (alteration in original) (quoting *State Farm*, 463 U.S. at 51).

illegal.³⁸⁰ But the agency, in violation of *State Farm*, failed to consider whether a limited version of DACA (one that included forbearance from deportation but not the extension of benefits to recipients) was legal.³⁸¹ What is more, in violation of *Chenery*, the policy justifications the agency attempted to offer in the midst of litigation in a memorandum from Secretary Kirstjen Nielsen invoked but then diverged from the original rationale.³⁸²

I have written elsewhere at length about the complexities of the Court's application of the *State Farm* and *Chenery* doctrines,³⁸³ but two big-picture observations about the *Regents* case and its context are warranted here. First, much of what the decision would have required of DHS for the agency to achieve its objectives, had the Administration not changed hands, was arguably needless. DACA is not required by law, and everyone in the litigation, including Chief Justice Roberts in his opinion, agreed that DACA, as a legal matter, could be unwound.³⁸⁴ The rationale offered in the Nielsen Memorandum should have been more than sufficient to justify the rescission, and sending the agency back to the drawing board to declare a new policy process by declaring independence from the Duke Memorandum seems to exalt form over substance in the supposed name of accountability.³⁸⁵

To be sure, the one element of the *Regents* decision that does appear to have shifted the agency's intentions a bit was the requirement that it consider the reliance interests of DACA recipients, which the Court underscored were not legally dispositive but ought to be taken into account³⁸⁶ — a requirement that leaves open the possibility of a sober second thought by the agency in light of expected effects. On the verge of the 2020 election, the government announced its conclusion that prospective DACA applicants had no reliance interests, justifying the termination of the program moving forward, but also made clear that it would continue to consider how best to wind down DACA for existing recipients.³⁸⁷ Perhaps this delay reflected acceptance of the fact that

³⁸⁰ See Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigr. Servs., et al. (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/ZEJ5-Z4LD>].

³⁸¹ *Regents*, 140 S. Ct. at 1911–13.

³⁸² *Id.* at 1908.

³⁸³ Cristina Rodríguez, *Reading Regents and the Political Significance of Law*, 2020 SUP. CT. REV. (forthcoming 2021) (manuscript at 10, 19–22) (on file with the Harvard Law School Library).

³⁸⁴ *Regents*, 140 S. Ct. at 1905.

³⁸⁵ See Eidelson, *supra* note 375, at 1773–75. Another way of understanding the decision was as a canny compromise by Chief Justice Roberts. He was able to avoid opining on the bigger-picture question of DACA's legality while also coming across as a rigorous supervisor of the Trump Administration, chastising it not for its policy positions themselves, but for its procedural failures.

³⁸⁶ *Regents*, 140 S. Ct. at 1913–14.

³⁸⁷ See Memorandum from Chad F. Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec., to Mark Morgan, Senior Off. Performing the Duties of Comm'r, U.S. Customs & Border Prot. 6–7 (July 28,

those interests were weighty — that the Court’s insistence that the agency take reliance interests into account made a difference in outcome. And yet, had President Trump won re-election, it seems likely that the agency would eventually have crafted an explanation as to why the reliance interests were not sufficient to keep existing DACA in place in perpetuity.³⁸⁸ In other words, the Court’s insistence that reliance interests be taken into account amounted to symbolism by the Court and procedure for procedure’s sake for the agency.³⁸⁹

Second, a decision like *Regents* ought to raise concerns about the Court’s use of procedure to stifle change within the bureaucracy, especially change in line with the priorities of political officials. Again, the Nielsen Memorandum offered perfectly adequate justifications to wind down a discretionary program, citing the Administration’s conception of the propriety of enforcement discretion that simply differed from the one held by its predecessor — a discretion essential to DACA’s creation in the first place.³⁹⁰ Had the Trump Administration succeeded in unwinding DACA, how easily could it have been restarted? In our consideration of whether and how courts might discipline the Executive’s enforcement powers, Cox and I note the value of importing reason-giving requirements from the mainstream of administrative law but also warn against the imposition of overly wooden procedural expectations that “stand in the way of an incoming regime’s ability to better tailor policy to its own political views.”³⁹¹

Already lawsuits have been filed, and several have succeeded at the district court level, stymying the Biden Administration’s efforts to shift enforcement policy dramatically away from the maximalism of the Trump years.³⁹² And empowered state litigators have called on the

2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf [<https://perma.cc/47RQ-TLPX>].

³⁸⁸ See *id.* at 5–7. A judge in the U.S. District Court for the Eastern District of New York later invalidated this new memorandum on the ground that Acting Secretary Chad Wolf had been improperly appointed. *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 138 (E.D.N.Y. 2020) (granting summary judgment for plaintiffs in challenge to memorandum effectively suspending DACA program pending DHS review).

³⁸⁹ Elsewhere I argue that the real import of this reliance interest passage is not in its legal implications, which are thin, but in the way it contributes to a larger political debate over the status of the Dreamers in the American polity. See Rodríguez, *supra* note 383 (manuscript at 20).

³⁹⁰ See Nielsen Memorandum, *supra* note 376, at 2.

³⁹¹ COX & RODRÍGUEZ, *supra* note 58, at 230 (“An expectation of reason giving could prompt courts to ask various questions of an enforcement policy. Does the policy reflect deliberation within the agency or the administration, such that the outcome reflects considered judgment[s] . . . ? Was an agency’s choice to shift its enforcement strategy based on values that can be defended as public-regarding and legitimate? . . . [T]his reason-giving approach should re-enforce the complexity of governance to the Executive, helping to sustain its culture of deliberation grounded in evidence and sound judgment.”).

³⁹² A judge in the U.S. District Court for the Southern District of Texas enjoined an enforcement priorities memo issued by the Secretary of Homeland Security — the sort of guidance document

courts to require the Administration to reinstate some of the border policies it rescinded when it came into office, citing similar rationales that sound in continuity and inadequate justification.³⁹³ Both a federal district court and the Supreme Court itself have obliged, citing the *Regents* decision. In holding that the Administration's rescission of MPP was arbitrary and capricious, the district court cited *Regents* generally as it engaged in a detailed, critical assessment of the new Secretary's judgments about how best to manage the border, emphasizing the reliance interests of Texas and Missouri in not bearing the burden of large numbers of asylum seekers.³⁹⁴ The district court thus appeared to expect the Administration either to negotiate with Mexico to restart a policy of holding migrants in its territory, or to try its hand again at providing reasons sufficiently persuasive for bringing an end to a policy political officials have judged a humanitarian disaster. In its order denying the Administration a stay of the lower court injunction, the Supreme Court noted only that it did not find the Administration likely to succeed on the merits of the arbitrary and capricious claim, its citation to *Regents* to support this proposition potentially signaling how that decision has empowered courts and hostile litigants to slow or block change.³⁹⁵

The Administration may ultimately be able to pursue its objectives once it explains them to the satisfaction of the courts, but the effects of these lawsuits extend well beyond the courts' actual judgments. These now inevitable, procedurally grounded lawsuits with a partisan tinge threaten to exacerbate an already prevalent risk aversion among policy-

long utilized by agency officials and regarded as an uncontroversial exercise of the Secretary's power to define priorities for the enforcement of the law. See *Texas v. United States*, No. 21-cv-00016, 2021 WL 3683913, at *2 (S.D. Tex. Aug. 19, 2021). The Fifth Circuit recently granted the government's petition for a stay. *Texas v. United States*, No. 21-40618, 2021 WL 4188102, at *1 (5th Cir. Sept. 15, 2021). But this most recent district court opinion showed a judge's willingness to legalize and proceduralize this discretionary authority, injecting the court's own judgments about how to manage the enforcement system in the process. Among other things, the court concluded that the plaintiffs were likely to succeed on their claim that the guidance was arbitrary and capricious. *Texas v. United States*, 2021 WL 3683913, at *43. Although in the memorandum the agency identified factors that make immigration enforcement complex, the court found that it "[did] not disclose how or why any of these enumerated factual considerations are connected to the policies the Government ultimately pursued." *Id.* at *44. The judge then determined that the agency had not shown how ongoing litigation, the responsibility to ensure that eligible noncitizens may be afforded relief from removal, relationships with other sovereign nations, and safety concerns during the COVID-19 pandemic were rationally related to the enforcement priorities that the agency had chosen — a remarkable second-guessing. *Id.* at *45–46. The court also determined that DHS had failed to consider states' costs and expenses (citing *Regents*) and public safety (particularly the risk of recidivism, rejecting the Government's argument that it had considered this factor). *Id.* at *47–50; see also *Texas v. United States*, No. 21-CV-00003, 2021 WL 2096669, at *2–4 (S.D. Tex. Feb. 23, 2021).

³⁹³ See, e.g., Complaint at 17, *Arizona v. Mayorkas*, No. 21-cv-00617 (D. Ariz. Apr. 11, 2021).

³⁹⁴ *Texas v. Biden*, No. 21-cv-00067, 2021 WL 3603341, at *19 (N.D. Tex. Aug. 13, 2021).

³⁹⁵ *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021).

makers that stifles policy development that would advance a larger political vision.³⁹⁶ The fact that these lawsuits increasingly result in nationwide injunctions by district courts further stunts legal and policy development.³⁹⁷ Rigorous review by the courts, fear of heightened litigation risk, and the anticipation of slogs in the courts have pushed the

³⁹⁶ Cf. Noah Feldman, *Biden Didn't Deserve to Lose that Immigration Case*, BLOOMBERG OP. (Jan. 27, 2021, 12:30 PM), <https://www.bloomberg.com/opinion/articles/2021-01-27/biden-s-immigration-order-lost-in-court-but-didn-t-deserve-to> [<https://perma.cc/V4J2-HGC8>] (treating the new lawsuit as an opening salvo in a battle in which partisan litigants and courts will use administrative law to thwart the Biden agenda).

³⁹⁷ The Department of Justice reported that federal courts issued at least fifty-five nationwide injunctions during the first three years of the Trump Administration as compared to nineteen during the eight years of the Obama Administration. Jeffrey A. Rosen, Deputy Att'y Gen., U.S. Dep't of Just., Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide> [<https://perma.cc/CK4M-YQ5V>]; see also Tessa Berenson, *Inside the Trump Administration's Fight to End Nationwide Injunctions*, TIME (Nov. 4, 2019, 3:12 PM), <https://time.com/5717541/nationwide-injunctions-trump-administration> [<https://perma.cc/4JR3-MMC5>] (quoting Professor Amanda Frost as saying that the increased use of nationwide injunctions during the Trump Administration “may partly be in response to unilateral executive orders changing enormous aspects of U.S. policy”). Courts have continued to issue nationwide injunctions during the Biden Administration, thus far at a slower clip. A federal district court in Texas enjoined President Biden’s 100-day moratorium on removals of noncitizens in January 2021. Samuel Bray, *The First National Injunction Against the Biden Administration*, VOLOKH CONSPIRACY (Jan. 26, 2021, 3:57 PM), <https://reason.com/volokh/2021/01/26/the-first-national-injunction-against-the-biden-administration> [<https://perma.cc/U2ML-DTPX>]. Then, in March of this year, a California district court blocked a rule — issued under the Trump Administration but defended by the Biden Administration — to limit noncitizens’ rights during removal proceedings. See Jennifer Doherty, *Trump Immigration Rule “Divorced from Reality,” Judge Says*, LAW360 (Mar. 11, 2021, 10:04 PM), <https://www.law360.com/articles/1363797/trump-immigration-rule-divorced-from-reality-judge-says> [<https://perma.cc/Z98X-H5LD>]. Finally, in June, the courts delivered a nationwide injunction against the American Rescue Plan’s loan forgiveness program for nonwhite farmers and ranchers and halted President Biden’s pause on oil and gas leases on certain public lands. See Samuel Bray, *A National Injunction Setback for the Biden Administration*, VOLOKH CONSPIRACY (June 16, 2021, 8:32 AM), <https://reason.com/volokh/2021/06/16/a-national-injunction-setback-for-the-biden-administration> [<https://perma.cc/MMM6-ARQE>]; Valerie Richardson, *Biden’s Race-Based Pandemic Relief Suffers Another Loss in Court*, WASH. TIMES (June 24, 2021), <https://www.washingtontimes.com/news/2021/jun/24/biden-race-based-pandemic-relief-suffers-court-los> [<https://perma.cc/3NLL-XN97>]. Scholars have debated the novelty of this phenomenon. Compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–38 (2017) [hereinafter Bray, *Multiple Chancellors*] (arguing that “[t]hrough the middle of the twentieth century, there do not appear to have been any national injunctions,” *id.* at 437), with Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924 (2020) (“The universal injunction against federal law did not ‘emerg[e] for the first time in the 1960s[.]’ . . . The Court itself issued a universal injunction in 1913, in the months preceding its opinion in *Lewis Publishing Co. v. Morgan* . . .” (alteration in original)), and James E. Pfander, *Due Process and National Injunctions*, JOTWELL (Dec. 11, 2019), <https://courtslaw.jotwell.com/due-process-and-national-injunctions> [<https://perma.cc/8PL9-SCBW>] (agreeing with Professor Mila Sohoni that the “Supreme Court and many lower federal courts granted non-party protective orders as early as 1913”). Regardless of the historical debate, the nationwide injunction has become a potent tool for those seeking to stymie the federal government, creating incentives for forum shopping, precluding resolution of legal issues through percolation in the lower courts, and

Biden Administration into the notice-and-comment process to fortify DACA — a program arguably justified as a matter of enforcement discretion.³⁹⁸ Because DACA remains in place as precisely that, the costs of this procedural delay are mostly in the form of agency resources (and diverted priorities). But the hyperproceduralization of agency action makes policy change slower and therefore limits the reach of a new administration. Of course, this very ability — to thwart one's opponents in the courts or otherwise create incentives for administrative continuity — may be sought after and valued by lawmakers themselves and by public interest litigants, who may be, as a matter of necessity, as devoted to preventing alternate realities from taking root as to advancing their positive visions.³⁹⁹ But it is far from obvious and certainly difficult to establish empirically that any side wins with this gambit.

The *Regents* decision, the litigation that fed into it, and the shadow both have already cast over the Biden years should ultimately lead us to a bigger-picture confrontation with the litigation's political and ideological undercurrents. Administrative law in the case was clearly a tool used by litigants to buy time, either for the unlikely event that Congress acted to provide the Dreamers a path to status, for the eventuality of a new administration committed to preserving DACA, or simply to prolong what they may have thought was the inevitable demise of DACA at the hands of the Roberts Court. This strategic use of procedure to advance what are ultimately substantive goals that sound in equality and justice has become commonplace, not least because it may be the only tool certain litigants have to persuade courts unreceptive to the underlying substance.⁴⁰⁰

But the expectation that the government rigorously explain changes in its policies to satisfy a rationalist standard relies in various ways on fictions that can inhibit policy change and thus the concrete realization

increasing the risk of conflicting injunctions across jurisdictions. See Bray, *Multiple Chancellors*, *supra*, at 457–65.

³⁹⁸ In a long-awaited decision, a judge in the Southern District of Texas held that DACA must proceed through notice and comment, as it was not a general statement of policy. In making this determination, the judge emphasized that the Supreme Court in *Regents* had found that the DACA Memorandum conferred significant rights and benefits, had gone into effect immediately (thereby affecting present, rather than future, policy), and “impose[d] obligations on private actors, individual states, and the federal government.” *Texas v. United States*, No. 18-cv-00068, 2021 WL 3025857, at *20 (S.D. Tex. July 16, 2021), *appeal filed*, No. 21-40680 (5th Cir. Sept. 16, 2021).

³⁹⁹ The rise of partisan state attorneys general challenging or supporting federal policy and legal positions depending on whether they are allied or opposed to the party in power at the federal level has heightened this litigation risk. For explorations of this rise of state attorneys general in this role, see Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism,”* 105 CALIF. L. REV. 1739, 1742 (2017); and Mark L. Earley, “*Special Solitude*”: *The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561, 564–65 (2018).

⁴⁰⁰ See Rodríguez, *supra* note 383 (manuscript at 19–20) (discussing the Court's dismissive approach to the equal protection claim in the case and collecting sources documenting the substitution of procedure for substance in equality litigation).

of democratic politics. The insistence that evolution in government policy be reasoned or grounded in evidence elides one of the chief reasons a government changes course — the shift in political ideologies and values governing the extant regime. The requirement of reasoned decisionmaking has at its core a concept of the executive branch as continuous across administrations. This conceit might reflect the stability imperative discussed in Part II, and it also embodies the valorization of an apolitical bureaucracy that operates according to professional norms rather than political ones. The Chief Justice in *Regents* thus reinforced the dictates of *State Farm*. And yet the central point of then-Justice Rehnquist’s dissent in *State Farm* still rings true and loudly today: the fact that the political system has given rise to a regime with a different philosophy of regulation should arguably be enough to justify a change in course. To my mind, his key observation was that, “[a]s long as the agency remains within the *bounds established by Congress*,” in other words, as long as the agency operates according to its legal authorities, “it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.”⁴⁰¹

Periodically, scholars return to then-Justice Rehnquist’s observation in an effort to justify it. In her seminal article on presidential administration, then-Professor Elena Kagan called for a relaxation of hard look review and a reorientation of the view that the administrative state is “driven by experts” in favor of a “revised doctrine [that] would acknowledge and, indeed, promote an alternative vision centered on the political leadership and accountability provided by the President,” easing the rigors of hard look review when “evidence shows that the President has taken an active role in, and by doing so has accepted responsibility for, the administrative decision in question.”⁴⁰² I, too, have

⁴⁰¹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (emphasis added). As then-Justice Rehnquist wrote:

It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.

Id. In a valuable essay, Merrill distinguishes between two strands of doctrine designed to hold the administrative state accountable. See Merrill, *supra* note 262, at 1960. One focuses on consistency with statutory law, the other on procedure as a means of cabining state power. *Id.* at 1960–62. In expressing a preference for the former, though not necessarily to the exclusion of the latter, I do not mean to suggest that courts might not overreach or otherwise be empowered in their application of law to agency action. Indeed, this inquiry covers the whole domain of statutory interpretation and the deference regimes discussed *infra* section III.A.2, pp. 110–15. But this statutory terrain is at least a more honest and concrete basis on which to be debating the scope of agency authority, not least because, as the DACA case itself reveals, statutory authority is often not in question.

⁴⁰² Kagan, *supra* note 152, at 2380. Kagan, in fact, cabins her embrace of the Justice Rehnquist approach with some basic proceduralizing tools, arguing that the relevant actors should have to disclose publicly their input in advance. *Id.* at 2382. Watts takes up and adapts the Kagan mantle,

been seeking throughout this Foreword to advance a conception of politics and politically driven decisionmaking that justifies executive policymaking, which in turn should be recognized in doctrine.

But the political conception of administration I advance here is much less tied to the Madisonian separation of powers and flawed assumptions about presidential accountability. Instead, I claim, this idea should be clearly and candidly grounded in the legitimacy of politics and values-driven decisionmaking spearheaded by representatives of the political regime as a whole — a concept of political decisionmaking more closely tied to the vision then-Justice Rehnquist in fact offered in his *State Farm* dissent. This conception requires accepting that both legal interpretation and the policies that emanate from it are not just the product of a rationalist enterprise but also of preferences. For courts to recognize this feature of government does not immerse them in the political fray — to the contrary, relying on legalisms to thwart the outcomes of politics is itself a far more political act. It should be possible for a court to insist on adequate factfinding or evidence to support the exercise of state power while also crediting purely political choices as justifications for a government about-face, particularly where a statute does not require a specific course of action, as is the case with DACA.⁴⁰³ This understanding eschews the value of supposedly neutral procedures in favor of a deeper democratic norm. It enshrines the reciprocal values of accepting losses and seizing wins in the political process — a reciprocity currently under siege, as I explore in closing. And it acknowledges what arguably matters most about those electoral outcomes —

arguing that political motivations should have a place in arbitrary and capricious review. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) (arguing that what should count as “‘valid’ reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency’s rulemaking record”); see also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2026, 2090–91 (2018) (observing that Progressive-era architects of the administrative state understood that bureaucrats would resolve important values debates and applying that understanding to argue that the major questions doctrine should not apply to notice-and-comment rules).

⁴⁰³ See Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. 3 (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/D9BW-MGET>] (explaining that DACA is a “policy for the exercise of discretion within the framework of the existing law” rather than a program mandated by a particular statute). The good cause exception, which is an exception to regular order, is a context in which the courts closely scrutinize the government’s evidence. See, e.g., *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 675 (9th Cir. 2021).

control of the machinery that turns political visions into everyday realities.⁴⁰⁴

Though often treated together with *Regents* as part of the Court's attempt to hold Trump officials accountable for their norm-busting disregard for reasoned decisionmaking,⁴⁰⁵ the Court's position in *Department of Commerce v. New York*,⁴⁰⁶ the census case from the same Term, in fact presents a useful contrast to the *Regents* decision. The Chief Justice's two-part resolution of the case glancingly acknowledged and arguably legitimated the political justifications I have been defending. The decision is mostly invoked for the Chief Justice's willingness to call out the mendacity and corruption of the Secretary of Commerce in his bid to add a citizenship question to the 2020 census.⁴⁰⁷ Critics of the move underscored that such a question had not appeared on the version of the census questionnaire sent to every household since 1950⁴⁰⁸ and insisted that it was a way to depress the Latino response rate because it would trigger fears of immigration enforcement.⁴⁰⁹ The Secretary claimed, instead, that the information gleaned from the census would help the Department of Justice enforce the Voting Rights Act.⁴¹⁰ Surveying the process by which the Secretary produced this justification, which involved agency forum shopping, the Court found it to be a bad faith pretext and declared that "[o]ur review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'"⁴¹¹

But largely overlooked is the portion of the opinion that acknowledged the room for agency value judgments. The Court rejected the lower court's holding that insufficient evidence existed to support a con-

⁴⁰⁴ Professors Jacob Gersen and Adrian Vermeule offer another, compatible reason for favoring soft glance as opposed to hard look review — that agencies regulate in a context of uncertainty. See Gersen & Vermeule, *supra* note 364, at 1370. This uncertainty means that agencies must not only make risk assessments but also make values trade-offs, decisions not easily second-guessed by courts that might otherwise seek to apply content-neutral procedural rules to ensure consistency and regularity in agency decisionmaking. For an argument that the imperative to make systemic trade-offs justifies and even requires political control of enforcement policy setting, see COX & RODRÍGUEZ, *supra* note 58, at 192–202.

⁴⁰⁵ See, e.g., Neal K. Katyal & Joshua A. Geltzer, *Why Trump Keeps Losing at the Supreme Court*, THE ATLANTIC (June 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/why-trump-keeps-losing-at-the-supreme-court/613315> [<https://perma.cc/LP2T-T6R8>] (arguing that the Court overturned the rescission of DACA and the citizenship question because of President Trump's "abuse of the executive branch" and "executive actions that lack any meaningful justification rooted in expertise, or even rational thought").

⁴⁰⁶ 139 S. Ct. 2551 (2019).

⁴⁰⁷ *Id.* at 2575.

⁴⁰⁸ *Id.* at 2586 (Breyer, J., concurring in part and dissenting in part).

⁴⁰⁹ *Id.* at 2584.

⁴¹⁰ *Id.* at 2557 (majority opinion).

⁴¹¹ *Id.* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

clusion that existing methods were not adequate to collect valuable citizenship information.⁴¹² For the Court, the agency's decision weighing the value of such a question against the potential risk of depressing the response rate was a value-laden one, and holding otherwise risked elevating technocratic expertise above value-centric policymaking.⁴¹³ By drawing a line between judicial review to ferret out malign motives and judicial recognition of an agency's domain for judgment, even in the face of empirical uncertainties, the Court was on the right track.⁴¹⁴

None of this critique means that courts ought to abandon the expectation that agencies provide reasons when changing their positions, particularly if court review can influence agencies' communications with the public. Indeed, one way to think about heightened reason-giving expectations is less as a way to be sure that agencies are not motivated by illicit forms of politics (which would be hard to define), and more as a prod to communication that makes government more useful and responsive to the people it regulates. Perhaps we should expect that government justify its policy changes when informing and educating the public as to those reasons that may be especially salient to the public, though it is far from clear that courts always can or should intervene in these moments.⁴¹⁵ And ultimately, the validation of political or ideological reasons is not incompatible with a justification requirement — only with the view that some sort of neutral, factual, or technocratic principle must be behind the government's decision to use its authorities in a new way.

2. *A Word About Deference.* — Deference doctrines in administrative law enable change and adaptation in the law's application and empower

⁴¹² See *id.* at 2570.

⁴¹³ *Id.* at 2571.

⁴¹⁴ Cf. Watts, *supra* note 273, at 720 (arguing that expertise-forcing conception of judicial review “adheres to outmoded notions of agencies as apolitical experts, and . . . threatens to drive political, policy-laden decisions underground where they are insulated from oversight and scrutiny”).

⁴¹⁵ Understanding the reasons for a change in policy may be essential to the public's conforming its conduct to the new policy and to maintaining trust in the government by making clear that changes in policy are warranted, can be explained, and are not simply arbitrary. Take, for example, the repeated changes in public health guidelines issued by the Centers for Disease Control during the COVID-19 pandemic. The director of the agency, in a span of just months, went from predicting impending doom while urging strict disease-mitigation behavior to lauding the end of masking requirements for vaccinated individuals. See Derek Thompson, *The CDC's Big Mask Surprise Came Out of Nowhere*, THE ATLANTIC (May 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/cdc-guidelines-masks-vaccinated-indoors/618883> [<https://perma.cc/95MW-JKD5>]. Without an explanation of the scientific and public health bases behind this dramatic fluctuation, the public was left uncertain of the depth of trust the new guidelines warranted or how to apply them to myriad specific situations not addressed by the guidelines. See *id.*; David Shepardson & Kevin Landrigan, *CDC Loosening of Mask Rules Catches NH Officials by Surprise*, N.H. UNION LEADER (May 15, 2021), https://www.unionleader.com/news/health/coronavirus/cdc-loosening-of-mask-rules-catches-nh-officials-by-surprise/article_e331024-36cf-5986-a9c5-6d09cc347484.html [<https://perma.cc/J7PR-THFR>].

new administrations to utilize existing statutory and regulatory tools to put their own imprimatur on federal law and policy. As highlighted in Part II, some scholars actually indict the *Chevron* doctrine that instructs courts to defer to reasonable agency interpretations of ambiguous statutes⁴¹⁶ for this very reason, contending that *Chevron* combines with hyperpolarization to produce volatility by allowing administrations with wholly different worldviews to change the law's scope.⁴¹⁷ The rise and persistence of these deference doctrines arguably helps account for the rise of proceduralism I critique above, too.⁴¹⁸ As courts have refrained from scrutinizing agency decisionmaking as a matter of statutory substance, their oversight role has evolved to entail the application of requirements that agencies engage in reasoned decisionmaking.⁴¹⁹ These doctrines help to ensure transparency in government and accountability for public actors, and they substitute for interpretive second-guessing to keep agency power in check.⁴²⁰

But one of the Roberts Court's chief legacies may end up being the redefinition of the deference regime, which has never been especially stable.⁴²¹ As has been well documented, and either celebrated or lamented depending on one's perspective on regulation,⁴²² the Court's

⁴¹⁶ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁴¹⁷ See Livermore & Richardson, *supra* note 228, at 71–72 (noting that ideological swings in agencies have become more common and citing *Chevron* for facilitating “volatility for the subset of questions that are entitled to deference,” ultimately arguing that scaling back *Chevron* would “limit the ability of agencies to shift views in response to partisan volatility and may instead encourage them to spend their time on undecided legal questions,” *id.* at 72, but acknowledging that complete abandonment of *Chevron* would politicize the judiciary and critiquing the major questions doctrine accordingly); Pierce, *supra* note 298, at 103.

⁴¹⁸ See Merrill, *supra* note 262, at 1964; *supra* pp. 96–97.

⁴¹⁹ Merrill, *supra* note 262, at 1964.

⁴²⁰ See Eidelson, *supra* note 375, at 1752 (arguing that *Regents* signals the rise of an approach that “give[s] agencies relatively broad substantive deference — deference based, in part, on the executive branch’s greater political accountability — but [the Court] will guard against efforts to clog and manipulate the very channels of political accountability themselves”).

⁴²¹ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 226–67 (2001) (holding that *Chevron* applies only where Congress has clearly delegated lawmaking authority to an agency); *id.* at 239–61 (Scalia, J., dissenting) (arguing that any position formally taken by an agency head, other than a litigating position, should be entitled to *Chevron* deference); see also Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812–19 (2002). For an account of the historical roots of deference doctrines, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912–13, 912 n.5 (2017) (describing sources asserting historical support for such deference). For an account of the rise and significance of *Chevron* in expanding agency authority over the meaning of statutes, see Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

⁴²² Compare Metzger, *supra* note 247, at 38–44 (framing the erosion of deference doctrines as part of an assertion of judicial control over the administrative state), with HAMBURGER, *supra* note 248, at 315–17 (calling for an end to *Chevron* deference), Pierce, *supra* note 298, at 103 (same), and Kristin E. Hickman & Aaron Nielsen, *Narrowing Chevron’s Domain*, 70 DUKE L.J. 931, 964–82 (2021) (arguing that *Chevron* should extend only to agency interpretations in legislative rules, not in adjudications).

various deference doctrines are in a state of flux. Cases implicating these doctrines' reach have provoked high-minded debates amongst the Justices about the meaning of law and the authority of the judiciary,⁴²³ and the Roberts Court has made deference harder to come by. The Court, for example, has pushed forward longstanding efforts to limit *Chevron*'s reach in ways that evince skepticism of the underlying doctrine, even if they do not eliminate deference altogether. Perhaps the most concrete manifestation of this is the Court's bolstering of the major questions doctrine, which has roots in the 1990s⁴²⁴ but has been advanced by the Roberts Court. In some high-stakes cases, Chief Justice Roberts himself has reinforced the principle that statutory ambiguities cannot be read as delegating questions of great social and economic significance to agencies.⁴²⁵

These deference battles also have played out in the subtext of related decisions. As Merrill has suggested, the distinct positions taken by the Justices in *Kisor v. Wilkie*⁴²⁶ — which redefined the doctrine long maligned by numerous conservative Justices by which courts have deferred

⁴²³ For an account of early skepticism of *Chevron*'s reach, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatments of Deference to Agencies from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1087 (2008). For contemporary illustrations, see *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); and *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

⁴²⁴ See, e.g., *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (finding it “highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion”).

⁴²⁵ In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court concluded that the FDA had exceeded its statutory authority in attempting to regulate tobacco as a “device” under the Food, Drug, and Cosmetics Act. *Id.* at 161. This turn to regulation by the Clinton Administration was part of a sea change in the government’s recognition of and action to address the link between smoking and disease and the tobacco industry’s power as an interest group. See *id.* at 125. But in surveying the statutory authorities on which the Food and Drug Administration (FDA) relied, the Court could not find the requisite delegation of power, declaring that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Id.* at 160. For an example of what is now referred to as the major questions doctrine of the Roberts era, see *King v. Burwell*, 135 S. Ct. 2480 (2015), considering whether subsidies allocated by Congress for individuals who turn to “State Exchanges” for health insurance are also available on Federal Exchanges and observing that the question is “of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.” *Id.* at 2488–89 (emphasis omitted) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). For a critique of the major questions doctrine as interfering with the institutional competencies of the administrative state, see Emerson, *supra* note 402, at 2086–87.

⁴²⁶ 139 S. Ct. 2400 (2019). In her opinion, Justice Kagan appeared to be attempting to strike a compromise to save something of the *Auer* doctrine, which has been in the sights of some of the conservative Justices for quite some time. Though the Court did not expressly overrule *Auer*, its opinion in *Kisor* grafted limits onto the doctrine, by requiring that the agency’s interpretation be its “authoritative view,” *id.* at 2416 (quoting *Mead*, 533 U.S. at 258 (Scalia, J., dissenting)), that it “implicate [the agency’s] substantive expertise,” *id.* at 2417, and that it reflect “fair and considered

to agency interpretations of their own regulations⁴²⁷ — also marked out positions with respect to the bigger *Chevron* question.⁴²⁸ Recall Justice Gorsuch’s declaration in *Kisor*: a “basic premise of our legal order: that we are not governed by the shifting whims of politicians and bureaucrats, but by written laws whose meaning is fixed and ascertainable”⁴²⁹ — a conception of law that cannot coexist with the idea of ambiguity itself. Indeed, Justice Gorsuch, along with Justice Thomas, would inter *Chevron* altogether.⁴³⁰ During his confirmation hearings, Justice Gorsuch drew attention to his deep skepticism of the doctrine,⁴³¹ which he expressed this way while on the Tenth Circuit: “*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. . . . When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.”⁴³² *Chevron* famously blurs the line between law and policy, which helps explain why it represents such an affront to a judge with faith in the idea that law has a fixed and discernible meaning. This open challenge may be unlikely to win majority support, but it does require ongoing defense of deference, which in turn prompts its narrowing by Justices whose conception of law fits awkwardly with *Chevron*’s basic premise that a law can reasonably be read to yield more than one conclusion or possibility.

The Court did not further define or limit these deference doctrines in its 2020 Term, but *Chevron*’s shakiness was on display in one of its statutory cases. During oral argument in *Sanchez v. Mayorkas*,⁴³³ the Justices puzzled through how to situate the government’s interpretation of the Immigration and Nationality Act within the *Chevron* regime — was the government arguing that its interpretation was the correct one, or a reasonable one the Court should accept?⁴³⁴ Justice Breyer: “[A]ren’t

judgment,” *id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)), and not “create[] unfair surprise to regulated parties,” *id.* at 2418 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)). This is a much more involved judicial inquiry than whether the agency’s interpretation is reasonable. In his concurrence in the judgment, Justice Gorsuch described the Court as having “maimed” *Auer* deference. *Id.* at 2425 (Gorsuch, J., concurring in the judgment).

⁴²⁷ See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

⁴²⁸ See *Merrill*, *supra* note 345.

⁴²⁹ *Kisor*, 139 S. Ct. at 2442 (Gorsuch, J., concurring in the judgment).

⁴³⁰ See *id.*; *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring). For a discussion of the Court’s orientation toward *Chevron*, see Metzger, *supra* note 247, at 24–33.

⁴³¹ *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. *passim* (2017).

⁴³² *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016).

⁴³³ For a discussion of this case, see *supra* note 143 and accompanying text.

⁴³⁴ Transcript of Oral Argument at 30–31, *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021) (No. 20-315), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-315_l647.pdf [<https://perma.cc/28RE-E3NW>]. As Chief Justice Roberts pointed out during oral argument, at the

we in the world where there is ambiguity in the statute and we have to get into the *Chevron* issue, which, as you well know, is a big issue where there are two sides[?]"⁴³⁵ Justice Alito: "Well, members of the Court may have different opinions about *Chevron*. So are you saying that it is necessary for us to address *Chevron* here?"⁴³⁶ Despite tangling with the government over whether and how to invoke *Chevron*, the Court decided the case unanimously, and Justice Kagan's opinion contained no mention of *Chevron*, ambiguity, alternative plausible readings, or deference,⁴³⁷ perhaps an indication of the clarity of the statute's text and an evasion of an increasingly complicated debate at the same time. Again, even if the Court is unlikely to do away with *Chevron* altogether,⁴³⁸ its internal conversations seem to highlight a growing unease with the use of *Chevron* to frame statutory questions.

Whatever its ultimate fate, for my purposes it is important to highlight the role *Chevron* and deference doctrines more generally play in ensuring the democratic evolution of the law.⁴³⁹ This benefit has never been one of the primary justifications for the doctrine, which alternate between a presumption that statutory ambiguity amounts to an implicit congressional delegation of authority to agencies to determine statutory meaning and that agency expertise supports this distribution of authority.⁴⁴⁰ But deference of all sorts does enable the government to adapt to

certiorari stage (during the Trump Administration), the government argued that its position was clearly the best interpretation based on "text, structure, and context." *Id.* at 32. But during oral argument, which occurred after the presidential transition, the government's position became that the Court need not conclude that there were no other plausible interpretations of the statute, only that the government's interpretation was better than the challengers' and that petitioners could not show that the statute clearly foreclosed the government's interpretation — a *Chevron*-esque way of constructing its position. *See id.* at 32–33. These subtle shifts may well represent a complex but obscure negotiation of the different orientations toward *Chevron* and the administrative state held by the conservative and progressive legal regimes.

⁴³⁵ *Id.* at 37.

⁴³⁶ *Id.* at 40.

⁴³⁷ Cf. Eskridge & Baer, *supra* note 423, at 1120–21 (arguing that *Chevron* "is not the alpha and the omega of Supreme Court agency-deference jurisprudence," *id.* at 1120, and that it exists alongside numerous other, context-specific deference regimes and is often not even invoked when it might otherwise be understood to apply).

⁴³⁸ For an argument that a doctrine like *Chevron* is an inevitability and that the courts are becoming more deferential, see VERMEULE, *supra* note 247, at 28, 157–58. *See also* Metzger, *supra* note 247, at 27 ("Far too many judicial decisions sustain administrative actions on deferential review to identify a clear move toward rejecting *Chevron*."); cf. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (finding in a survey of forty-two appeals court judges that most lower court judges are not "fans" of *Chevron*, except on the D.C. Circuit, which hears the bulk of administrative law cases).

⁴³⁹ This conception of change is explicit in the Court's precedent in *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), in which the Court acknowledged agencies' authority to change their interpretations of statutes even after a court effectively ratified a prior interpretation. *See id.* at 981–82.

⁴⁴⁰ *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

changing circumstances and changing times, both by recognizing the legitimacy of varied readings of legal materials, and by giving agencies the freedom to choose among plausible interpretations to advance their policy goals.⁴⁴¹ This recognition of indeterminacy has helped nurture a culture of innovation and revision within agencies⁴⁴² and has made politically driven policy adaptation possible and even likely. It is also consonant with the idea that the legislature has the authority to create a dynamic and adaptable system,⁴⁴³ as well as with various realistic features of legislation: that statutes are imprecise, that they are the product of compromise and therefore understood by lawmakers as being susceptible to more than one meaning. And as Justice Kagan put it in her opinion in *Kisor*, “sometimes the law runs out and policy-laden choice is what is left over.”⁴⁴⁴

The debates over *Chevron* and deference more generally thus require confronting the trade-offs I explore in Part II between democratic responsiveness and the values of stability and reliance. Even if *Chevron*’s whittling away emanates from formal conclusions about the allocation of power in the Constitution, there is no escaping the fact that the decline of deference empowers the courts to control the meaning of statutory law — a control that implicates the judiciary’s power to define and delimit the products of the democratic process no less than its power to void laws altogether. Defending deference does not mean that agencies shouldn’t have to explain their interpretations, including when they have changed from one administration to the next. When it comes to changes in legal position, in particular, as opposed to discretionary policy reversals, the requirement of explanation can help ensure the integrity of a statutory regime.⁴⁴⁵ A demand for explanation need not depend on the belief that a statute has only one meaning, but rather could be

⁴⁴¹ For a discussion of the importance and validity of this adaptation, see *supra* section II.A. For an argument that the deference *Chevron* permits reflects a bias in favor of government action, see Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1211–13 (2016). Cf. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (arguing for purposivism in statutory interpretation that allows for an “evolutive perspective” that captures changes in society and law).

⁴⁴² This feature of agency statutory interpretation and its link to *Chevron* comes out vividly in the research into administrators’ practices that Bernstein and I have conducted. See Bernstein & Rodríguez, *supra* note 266, at 4 n.9, 11, 17.

⁴⁴³ Cf. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 927–28 (2013) (finding that staffers charged with drafting legislation are mindful of *Chevron* and its implications).

⁴⁴⁴ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

⁴⁴⁵ See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (stating that an agency must explain “why it deemed it necessary to overrule its previous position”); *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (invalidating an agency action that relied “on the chance correspondence between statutory categories”).

seen as a way of ensuring that the government has not forgotten the statutory limits on its authority altogether.⁴⁴⁶

B. Capacity to Govern

My claims in Part II about the importance of concerted regime change depend on the state having capacity to translate changing social and political demands into concrete action. This capacity also depends on securing a place for political influence over the bureaucracy's power-enabling tools — influence that helps align the state's actions with the political imperatives of the day. Part of my motivation for defending concerted regime change stems from a belief about the state — that democratic self-government requires a state with this capacity in order to enable self-rule.⁴⁴⁷ As Professors Steven Skowronek, John Dearborn, and Desmond King write, “[d]epth [of the state], particularly depth added through the expansion of administrative and advisory instruments, is one of the most conspicuous byproducts of political development in the twentieth century.”⁴⁴⁸ Positing a link between this institutional development and democratic self-government ultimately presents a normative conception of government power and its utility. As I explore immediately below and in the next section, a primary goal of one powerful strand of the conservative legal movement is to reject this very equation and to limit state power over economic and social life — a fact about the world that should not delegitimize regime change but does underscore the stakes of it.

This Term, the Court continued its development of various constitutional doctrines that structure state capacity and determine who has decisionmaking authority within the state. In two decisions, one involving the Appointments Clause and the other the President's removal powers, the Court asserted a strong concept of political control over administration, rejecting two particular ways in which Congress had chosen to balance the values of independence and control that infuse just about every debate over administrative design. And perhaps of a piece with its view of the need for political and presidential control over the state, the Court also advanced its own skepticism of statism generally, by redefining constitutional limits on state power with potentially profound effects on governments' ability to pursue particular social welfare objectives. Together with the recent precedents on which they build, this

⁴⁴⁶ See, e.g., *Judulang*, 565 U.S. at 64 (invalidating an agency program that was “unmoored from the purposes and concerns” of the authorizing statutes); *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (noting that “[u]nexplained inconsistency” between an old statutory understanding and a new interpretation would be a reason for holding that interpretation in violation of the APA).

⁴⁴⁷ In her survey of the administrative state, Metzger argues that the administrative state is democratically necessary. Metzger, *supra* note 247, at 3.

⁴⁴⁸ SKOWRONEK, DEARBORN & KING, *supra* note 44, at 4 (emphasizing also that depth is a function of public sector penetration into all aspects of national life).

Term’s cases reflect the Court’s increased interest in exerting oversight over how the political branches structure their dealings through the Court’s own beliefs and assumptions about the Constitution’s relationship to government power. And together, these decisions underscore that there is no agreed-upon relationship between the state and democracy, only competing visions continually fought over.

I. Designing the State. — The Supreme Court’s precedents concerning the appointment and removal of federal officers have long served as vehicles for the Justices to articulate competing conceptions of the types and functions of power created by the Constitution. During the Roberts era, in particular, the Court has exercised considerable supervision of Congress’s efforts to build independence into the design of the administrative state, and October Term 2020 advanced that project. In *Collins v. Yellen*⁴⁴⁹ and *United States v. Arthrex, Inc.*,⁴⁵⁰ the Court expanded its conception of the offices that must be politically controlled in order to conform to the Constitution’s separation of powers.

In *Collins*, petitioner and shareholders brought suit to challenge the legal validity of certain financial regulations issued by the Federal Housing Finance Agency (FHFA), which Congress created in the aftermath of the housing crisis of 2008 to oversee mortgage financing corporations Fannie Mae and Freddie Mac.⁴⁵¹ The Court declared unconstitutional Congress’s creation of a single Director position atop the agency, removable by the President only for cause, finding its decision in *Seila Law LLC v. Consumer Financial Protection Bureau*⁴⁵² from the October 2019 Term “all but dispositive.”⁴⁵³ In *Arthrex*, the Court held that the Director of the U.S. Patent and Trademark Office must have the discretion to review the final decisions of the administrative judges who make up the Patent Trial and Appeal Board that adjudicates patent claims, lest those judges amount to principal officers under the Constitution, which would require their appointment by the President and confirmation by the Senate, pursuant to the Constitution’s Appointments Clause.⁴⁵⁴

Both of these decisions advanced the proposition that politically accountable officials must have control over consequential decisions made within the administrative state. They dovetail with a conception of the

⁴⁴⁹ 141 S. Ct. 1761 (2021).

⁴⁵⁰ 141 S. Ct. 1970 (2021).

⁴⁵¹ Housing and Economic Recovery Act of 2008, 12 U.S.C. §§ 4501, 4511, 4617.

⁴⁵² 140 S. Ct. 2183 (2020).

⁴⁵³ *Collins*, 141 S. Ct. at 1783. The Court found none of the distinctions between the FHFA and the Consumer Financial Protection Bureau (CFPB), whose structure it invalidated in *Seila Law*, convincing. *Id.* at 1784. Notably, the Court had to appoint an amicus to argue on behalf of the congressional design, as the Solicitor General’s office (of the Trump era) agreed with the court of appeals decision invalidating the single director structure. *See id.* at 1775.

⁴⁵⁴ *Arthrex*, 141 S. Ct. at 1988.

removal power as enhancing administrative flexibility by ensuring that the principal figure of the executive branch has greater control of agency leadership through the threat of dismissal. Both decisions directly and clearly advanced the power of political officials to shape decisionmaking within the state to reflect their objectives, promoting the regime change objectives I have been describing. *Collins*, in particular, empowered the President himself, and the current occupant of the office wasted little time in making great use of the Court's new precedent. Within hours of the decision, the President removed the Trump-appointed head of the FHFA and replaced him with someone the White House described as "an appointee who reflects the administration's values."⁴⁵⁵ Within weeks, President Biden fired the Administrator of the Social Security Administration after the Office of Legal Counsel issued an opinion concluding that the Court's decisions in *Collins* and *Seila Law* made the for-cause removal restriction in the statute establishing the position unenforceable.⁴⁵⁶ Through the Court's formalism, the new Administration was thus able to exert authority over two agencies with significant responsibility for economic and social welfare through a very direct way of replacing the old regime's worldviews and policy ambitions with its own.⁴⁵⁷

Despite this democracy-promoting effect, however, it is hard not to worry that that these decisions are just the latest installments in the current Court's broader refashioning of the state, propelled by its skepticism of that state's legitimacy.⁴⁵⁸ We might also understand this further expansion of the removal power as actually bad for government

⁴⁵⁵ Andrew Ackerman & Brent Kendall, *Biden Administration Removes Fannie, Freddie Overseer After Court Ruling*, WALL ST. J. (June 23, 2021, 10:15 PM), <https://www.wsj.com/articles/supreme-court-issues-mixed-ruling-on-government-seizure-of-fannie-freddie-profits-11624459222> [<https://perma.cc/YKB9-A4EC>].

⁴⁵⁶ See Constitutionality of the Commissioner of Social Security's Tenure Protection, 45 Op. O.L.C., slip op. at 15 (July 8, 2021), <https://www.justice.gov/olc/file/1410736/download> [<https://perma.cc/7PAJ-N43C>]. Following the Court's holding in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2015), the head of the Securities and Exchange Commission appointed by President Biden fired all of the members of the Public Company Accounting Oversight Board (PCAOB), whom the Court had declared could not be insulated by Congress from at-will control by the head of the agency, given that the Commissioner herself was insulated from removal by the President. See *id.* at 492; Kellie Mejdreich, *SEC Fires Republican Audit Watchdog After Push from Warren, Sanders*, POLITICO (June 5, 2021, 8:26 AM), <https://www.politico.com/news/2021/06/04/sec-fires-republican-watchdog-491939> [<https://perma.cc/VNR4-TBEF>].

⁴⁵⁷ The political benefits of *Arthrex* are less clear, as the remedy in the case incorporates what could amount to a relatively modest political check by the presidentially appointed head of the agency. That said, adjudicatory structures in the Departments of Labor and Health and Human Services, as well as in the Social Security Administration, may need to be brought in conformity with the decision.

⁴⁵⁸ See Metzger, *supra* note 247, at 17–20 (situating the Court's removal cases in the Roberts Court's anti-administrativism).

because it prevents Congress from making complex trade-offs and determining how best to sustain good governance and legitimacy within the administrative state. For-cause removal provisions reflect efforts to calibrate the relationship between agency independence and the value of political control — trade-offs that come in no single best version given the myriad forms of regulation and affected interests in play across domains. But the Court, through its own assertion of power, has here empowered the President at the expense of Congress.

The majorities and dissents in these and related cases thus advance distinct conceptions of how to weave democracy into the administrative state, in one conception insisting on ongoing, direct supervision by political officials and in the other trusting the democratic process itself to design an effective and legitimate state.⁴⁵⁹ In her dissent in *Seila Law* just last Term, Justice Kagan offered an extended and pointed disquisition on this point. She invoked Chief Justice Marshall for the proposition that Congress, not the courts, generally has the authority to choose the “means by which government should, in all future time, execute its powers,”⁴⁶⁰ and concluded:

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges.⁴⁶¹

In *Arthrex*, both Justices Thomas and Breyer in dissent made clear the stakes of the decision. For his part, through a series of rhetorical questions, Justice Thomas suggested that the majority’s conception of “final” and the supervision it imposes on officials within the state in the course of fulfilling their duties threaten to stymie a whole manner of quotidian yet significant judgments and embroil courts in impossible line-drawing exercises involving the duties of government officials.⁴⁶² Justice Breyer echoed Justice Kagan’s refrain from *Seila Law* — that it is for Congress and the President acting together through legislation to decide these

⁴⁵⁹ Cf. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994) (“[I]f we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers’ principles . . . we must also accept some (though not all) congressional efforts at regulating presidential lawmaking.”).

⁴⁶⁰ *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2237 (2020) (Kagan, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).

⁴⁶¹ *Id.* at 2226.

⁴⁶² *United States v. Arthrex*, 141 S. Ct. 1970, 2004 (2021) (Thomas, J., dissenting) (“The majority assures that not every decision by an inferior officer must be reviewable by a superior officer. But this sparks more questions than it answers. Can a line prosecutor offer a plea deal without sign off from a principal officer? If faced with a life-threatening scenario, can an FBI agent use deadly force to subdue a suspect?” (citations omitted)).

questions.⁴⁶³ He wrote a brief for the technocratic conception of the state, emphasizing that the Court ignored the “technical nature of patents,” which justified Congress’s insulation of the judges from political influence so as to enable expertise to control outcomes.⁴⁶⁴

But the remedies adopted by the Court in each case also reflect its pragmatic streak, and a willingness by some of the Justices with formal conceptions of executive power nonetheless to find ways to avoid causing great disruption to the decisions and operations of the state.⁴⁶⁵ In *Collins*, the Court declined to void certain of the agency’s past actions, requiring the shareholders who challenged the agency structure to show that, but for the removal protection, the President would have dismissed the Director on account of the actions being challenged.⁴⁶⁶ As Justice Kagan wrote in her partial concurrence:

As the majority explains, its holding ensures that actions the President supports — which would have gone forward whatever his removal power — will remain in place. In refusing to rewind those presidentially favored decisions, the majority prevents theories of formal presidential control from stymying the President’s real-world ability to carry out his agenda. Similarly, the majority’s approach should help protect agency decisions that would never have risen to the President’s notice.⁴⁶⁷

And in *Arthrex*, rather than require that the members of the patent board be treated as principal officers and appointed through the laborious Senate confirmation process, the Court offered the much easier fix of allowing the agency to add a layer of political supervision to the Board’s judgments.⁴⁶⁸ The Court still second-guessed Congress and eroded further the constitutional foundations of the concept of independence, but here at least it made its interventions in the democratic process workable.

2. *Against the State.* — As should by now be well established, a majority of today’s Court harbors deep skepticism of the administrative state. The rise of this skepticism and its increased injection into judicial doctrine represents an enormously significant byproduct of a decades-long political project, dating back even before the Reagan years, to

⁴⁶³ *Id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part).

⁴⁶⁴ *Id.* at 1996.

⁴⁶⁵ Scholars have noted that the Court has in some cases been careful that its formalistic separation of powers decisions not be too disruptive to the arrangements the Court is invalidating. See Metzger, *supra* note 342, at 46–47 (observing that in *Free Enterprise Fund v. PCAOB*, the Court invalidated only the double-for-cause removal provision but did not invalidate the entire oversight board in the process). *Arthrex*, similarly, provides a remedy that makes it relatively easy for agencies to continue about their business while still complying with the Court’s judgment, namely authorizing the appointment defect to be cured by giving an officer nominated by the President and confirmed by the Senate supervisory power. *Arthrex*, 141 S. Ct. at 1988.

⁴⁶⁶ *Collins v. Yellen*, 140 S. Ct. 1761, 1788–89 (2021).

⁴⁶⁷ *Id.* at 1801–02 (Kagan, J., concurring in part) (citations omitted).

⁴⁶⁸ *Arthrex*, 141 S. Ct. at 1988.

target social and economic regulation and the means by which it is enacted.⁴⁶⁹ A key feature of this skepticism, both in its political and jurisprudential forms, is distrust of the unelected bureaucrat and the belief that large bureaucracies result in irrational and even oppressive treatment. The distrust of bureaucrats echoes across the U.S. Reports in the opinions of several Justices.⁴⁷⁰ It is reflected in the legal tools I have

⁴⁶⁹ The famous memo of Justice Lewis Powell, written when he was an attorney for the Chamber of Commerce, calling for litigation and interpretation to pare down and stave off regulation is often cited as the beginning of the contemporary attack on the administrative state, which was nurtured by Reagan-era politics but is now truly coming into full flower with the shape of the federal judiciary and the composition of the Supreme Court. See Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com. (Aug. 23, 1971), <https://www.reuters.com/investigates/special-report/assets/usa-courts-secrecy-lobbyist-powell-memo.pdf> [<https://perma.cc/L8TL-EPGT>]. These developments relate, as well, to one of the principal characterizations of the Roberts Court as especially business friendly. See Metzger, *supra* note 247, at 66–67 for a discussion of this memo and its place in the rise of anti-administrativism. See also Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470–73 (2013) (finding that the Supreme Court has become increasingly pro-business since the 1960s). On another front, the simultaneous rise of the unitary conception of the Executive as embodied in the removal power cases, discussed *infra* note 470, and the increased restrictions on administrative and bureaucratic actors may seem to be at odds, especially if we understand presidential control as enabling the exercise of state power. And yet, they are part of a similar project that trusts and assumes political officials will restrain unaccountable bureaucrats while empowering courts to do the same. For an account of this phenomenon at the D.C. Circuit that frames doctrinal developments in ideological terms, see Sunstein & Vermeule, *supra* note 342, at 410–11. Sunstein and Vermeule demonstrate how an ethos of restraining government power pervades decisionmaking on a range of administrative law questions, evincing hostility to government power as well as substituting for the larger belief that much of the administrative state is unconstitutional. See *id.* at 402–03; see also Metzger, *supra* note 342, at 6–7 (observing two tendencies on the Roberts Court — the impulse to restrain the state through formalist interpretation, distrust of the bureaucracy, and empowerment of the President to control them, and a pragmatic impulse that restrains the Court from thoroughly undermining the state — and that the pragmatic impulse is still winning).

⁴⁷⁰ See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499–501 (2010) (Roberts, C.J., writing for the majority) (“One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.” *Id.* at 499.); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring in the judgment) (“We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.”); *PHH Corp. v. CFPB*, 881 F.3d 75, 166 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (“The CFPB’s concentration of enormous power in a single unaccountable, unchecked Director poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multi-member independent agency does. . . . This new agency, the CFPB, lacks that critical check [of presidential control], yet still wields vast power over American businesses and consumers. This ‘wolf comes as a wolf.’” (quoting *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting))).

already described, including the supposed rigor with which textualists interpret statutes,⁴⁷¹ the administrative law forms that limit, slow, and even foreclose administrative action, and the constitutional opinions scrutinizing the design of the state to limit its independence. But perhaps the most significant threat is in doctrines that hamstringing the state's capacity to regulate altogether. A majority of the sitting Justices have now expressed degrees of appreciation for some version of the nondelegation doctrine that would constrain Congress's authority to endow administrative agencies with broad discretionary powers in the first place;⁴⁷² the doctrine has evolved from historical curiosity to a subject of mainstream debate.

Whether these nondelegation stirrings of recent years will bring back the doctrine in any meaningful way remains to be seen. My own prediction lines up with those who treat these critiques and their manifestation in Court opinions as rhetoric unlikely to be truly transformative in the face of the powerful social demand for an administrative state, for many of the reasons I explore throughout this Foreword.⁴⁷³ Any revival of the concept of nondelegation may trim around the edges of the vast administrative state, or invigorate nondelegation as a canon of interpretation. Such developments might create modest incentives for Congress to be a bit more directive in its delegations to agencies. Nonetheless, a nondelegation doctrine with teeth is simply up against too large a leviathan that serves the inexorable needs of a modern society to come to fruition. But nondelegation talk does serve as a synecdoche for a more general antistatist view that is certain to keep surfacing in judicial review of government action.⁴⁷⁴

⁴⁷¹ For a recent analysis of the evolution in textualism that helps to explain the counter-conservative result in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), in which, on textualist grounds, the Court read Title VII's prohibition on sex discrimination to encompass discrimination on the basis of sexual orientation and gender identity, *id.* at 1754, see Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 279–90 (2020).

⁴⁷² See, e.g., Metzger, *supra* note 247, at 3; cf. Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 265 (2014) (expressing openness to nondelegation arguments in the emergency powers context: "Delegating too much discretion to the Executive risks undermining the structural protections built into [the constitutional] design.").

⁴⁷³ See, e.g., Kristin E. Hickman, *Foreword: Nondelegation as Constitutional Symbolism*, 88 GEO. WASH. L. REV. (forthcoming 2021) (on file with the Harvard Law School Library) (arguing that delegation is more firmly embedded in American government than its detractors admit and that any paring back on it will be piecemeal and case by case); Metzger, *supra* note 247, at 87–89 (noting the rise of nondelegation concerns but expressing skepticism that the Court will do more than restrain the scope of some delegations through narrow interpretations of statutes).

⁴⁷⁴ See, e.g., *Texas v. Rettig*, 993 F.3d 408, 409, 410–11 (5th Cir. 2021) (Ho, J., dissenting) (arguing that "[t]he modern administrative state illustrates what happens when we ignore the Constitution," *id.* at 409, allowing the "real work of lawmaking to be exercised by private interests colluding with agency bureaucrats, rather than by elected officials accountable to the American voter," *id.* at 410–11, and leading to a situation in which "[t]he bureaucracy triumphs — while democracy suffers,"

This Term the Court did not have occasion to address directly its growing concerns with delegation, but it did demonstrate its antistatist predilections. Its decision in *Niz-Chavez v. Garland*⁴⁷⁵ provides a vivid example. The specific question it addressed draws us into the thickest of weeds of the administrative state: whether the notice to appear (for removal proceedings) that stops the accumulation of time required for a noncitizen to become eligible for cancellation of removal must contain all of the information listed in the removal statute, or whether the government may issue an initial notice to stop time with some information and follow up later with additional notice.⁴⁷⁶ On its surface and in effect, the Court's holding that the government must provide the relevant information in a single form was a victory for the noncitizen in the case and for all those who struggle with the inscrutability of the deportation regime.⁴⁷⁷

But the fact that Justice Gorsuch wrote the opinion for the Court was also consequential. The opinion opened with sarcasm meant to evoke frustration with burdensome government forms,⁴⁷⁸ as well as with an intricately detailed treatise on how to read this and other statutory texts.⁴⁷⁹ A good bit of the opinion also offered observations about the importance of resisting the government's "pleas" for deference.⁴⁸⁰ And although this rhetoric invokes high concepts such as accountability and fidelity to law, it walks a fine line between seeking to promote fairness and evincing a general displeasure with bureaucracy. Here the Court's contempt for agency processes served the interests of an immigrant caught up in a byzantine system. But Justice Gorsuch's particular formulations can easily be trained against a whole manner of bureaucratic practices designed to make government work better — practices that might impose justifiable costs on much less disadvantaged regulated parties than the petitioner in *Niz-Chavez*.⁴⁸¹

Other threats to state capacity appeared this Term in cases that went to the heart of the state's authority to act to promote social and group

id. at 409); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring).

⁴⁷⁵ 141 S. Ct. 1474 (2021).

⁴⁷⁶ *Id.* at 1478.

⁴⁷⁷ *Id.* at 1486.

⁴⁷⁸ *See id.* at 1478.

⁴⁷⁹ A long passage of the opinion considers what it means for the statute to refer to "a" notice to appear. *See id.* at 1480.

⁴⁸⁰ *Id.* at 1485.

⁴⁸¹ When this opinion first came down, Professor Michael Dorf offered a pointed characterization of it worthy of Justice Gorsuch's own preference for sharp framing. *See* Michael C. Dorf, *Petty Sticklerism that Fortuitously Benefits an Undocumented Immigrant Is Still Petty Sticklerism*, DORF ON L. (Apr. 30, 2021), <http://www.dorfonlaw.org/2021/04/petty-sticklerism-that-fortuitously.html> [<https://perma.cc/74YX-SVY6>].

welfare, limiting the state's police powers through robust judicial protection of particular individual liberties. *Cedar Point Nursery v. Hassid*⁴⁸² offers a vivid case in point of the conservative mobilization of classically liberal rights — a mobilization with increasingly radical implications for the state's capacity to govern. In *Cedar Point*, the Court confronted the question of whether a California regulation that allows labor organizers to enter employers' property under certain conditions constitutes a per se taking in violation of the Fifth Amendment.⁴⁸³ The Court concluded that it does, and that "[t]he access regulation appropriates a right to invade the growers' property. . . . Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude," "'one of the most treasured' rights" protected since at least the age of Blackstone.⁴⁸⁴

The fact that the Biden Administration changed the U.S. government's amicus position in the case to support the California law immediately signaled the political and regulatory stakes of the decision.⁴⁸⁵ Much time will be spent speculating over what the Court's ultimate decision to invalidate the law as a violation of the Takings Clause will mean for all manner of environmental, inspection, and even nondiscrimination rules that effectively direct how property owners control access to their properties. If the decision leads to the proliferation of obligations on the government's part to compensate property owners so that the state might advance important and even critical regulatory goals, the costs of regulation might become too much to sustain, or the state could be forced to choose among objectives it has long treated as equally important.⁴⁸⁶ The Court laid out a series of exceptions to its rule, including the government-authorized physical invasions the Court said are "consistent with longstanding background restrictions on property rights" such as "common law privileges to access private property."⁴⁸⁷ The Court also emphasized that health and safety inspection regimes

⁴⁸² 141 S. Ct. 2063 (2021).

⁴⁸³ *Id.* at 2069.

⁴⁸⁴ *Id.* at 2072 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

⁴⁸⁵ See generally Brief for the United States as Amicus Curiae in Support of Reversal, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

⁴⁸⁶ For a view that the Roberts Court's takings jurisprudence will lead to deregulation, see Nikolas Bowie, *The Deregulatory Takings Are Coming!*, LPE PROJECT (Sept. 3, 2019), <https://lpeproject.org/blog/the-deregulatory-takings-are-coming> [https://perma.cc/2RG4-6J2R] ("'Laws take. It's what they're for. Taxes take dollars from some people and distribute them to other people. . . . Federal judges will have a lot to work with. . . . [L]ocal governments have passed rent control laws, inclusionary zoning laws, environmental protections, antismoking ordinances, gun-control laws, paid-leave requirements, labor regulations, and more. All of these laws take.'"). In *Cedar Point*, at least, the Court does articulate a series of exceptions to its rule. See *Cedar Point*, 141 S. Ct. at 2078–79.

⁴⁸⁷ *Cedar Point*, 141 S. Ct. at 2079.

“generally” will not constitute takings.⁴⁸⁸ In dissent, Justice Breyer expressed skepticism that this new system will work, in part because it has substituted for a simple rule a complex scheme that will empower courts to decide how much is too much.⁴⁸⁹ From the dissenters’ point of view, this whole project belies the reality of modern social life — that we all “live together in communities,” which necessitates temporary entry regulations to property.⁴⁹⁰

However far the majority’s rule extends, it seems appropriate to classify the decision with the Court’s growing jurisprudence that relies on constitutional rights (namely those protected by the First and Fifth Amendments) to limit regulatory power generally and its use more specifically to protect unions and other laws and institutions that might facilitate economic redistribution.⁴⁹¹ The Court’s decisions on its emergency docket addressing state laws and orders promulgated in an emergency fashion to impose mitigation and prevention measures to stop the spread of COVID-19 also reflect this radical skepticism of government power in the name of cherished rights. In its decisions picking apart the states’ restrictions on large gatherings and indoor capacity limits as applied to religious convenings, the Court uses language that evinces contempt and disbelief. Its heightened review of the public health measures in the name of protecting religious liberty downplays

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 2088 (Breyer, J., dissenting).

⁴⁹⁰ *Id.* at 2087.

⁴⁹¹ For debates among the Justices that underscore this development, see *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2381–83 (2018) (Breyer, J., dissenting), arguing that the Court “invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation,” *id.* at 2381, and citing *Lochner v. New York*, 198 U.S. 45 (1905); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting), warning that the Court has “weaponiz[ed]” the First Amendment “in a way that unleashes judges . . . to intervene in economic and regulatory policy,” *id.*; and *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 602–03 (2011) (Breyer, J., dissenting) (“At worst, [the majority decision] reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.”). On the rise of a new *Lochner*, see, for example, Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 30; Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1941–76 (2016); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 195, 198–203; and Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 178–82. For a scholarly account that analyzes the increased acceptance of religious liberty claims to limit government nondiscrimination regulation and situates these cases in relation to how the Court had developed free exercise jurisprudence to similarly limit regulatory power, see Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 75) (on file with the Harvard Law School Library), drawing a link between these cases and the growing worry that the contemporary Court is developing its own *Lochner*-style jurisprudence. See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–85 (2014) (invalidating on religious freedom grounds regulations requiring employers to provide health insurance with coverage for contraceptive drugs); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1466–71 (2015).

broad-gauged regulatory interests in a way that breaks with an understanding of the police power once taken for granted.⁴⁹²

Skepticism (or embrace) of the state can be two-sided. One thing the Trump Administration taught us is that the interest in using government power to serve one's ends transcends parties but depends on the domain of regulation at issue. The mobilization of the state to serve the Trump Administration's immigration goals was massive, for example, and at least some of the Justices who are ordinarily highly skeptical of state power seem content for the state in its law enforcement role to exert mostly unconstrained power.⁴⁹³ And as I discuss at length above, the Trump Administration's use of all manner of regulatory tools to advance its agenda brought out progressive litigators and critics calling for robust judicial review to slow and frustrate the state.

But in the long run, it seems safe to predict that skepticism of government and its processes is more likely to be damaging to regimes like the current one, and to points of view about state capacity that I advance in Part II, in which I emphasize the value of deploying the government and the bureaucracy to promote social welfare, ameliorate the consequences of the market, and enable some economic redistribution.⁴⁹⁴ And for that reason, *Cedar Point* and the Roberts Court's trimming of the police power through the development of constitutional backstops will thwart the realization of these political goals, even once their proponents acquire the power that would once have made the goals viable, removing from the democratic process a set of choices about how to organize social life.

C. Regime Conflict

Once we juxtapose the procedural cases with the state capacity cases, and whatever we think about their merits, it becomes clear that it would be naive to characterize courts as mere obstacles to political regime change. The courts are in fact agents of regime change. Today's Court is itself the product and avatar of a different regime altogether than the one that assumed office on January 20, 2021. The appointment of three Justices in four years by the most recent outgoing Republican President has produced the most conservative Supreme Court in our history by some measures.⁴⁹⁵ With the consolidation of conservative dominance of

⁴⁹² For an analysis that describes the emergence of a new religious liberty in this doctrine, which also helps to explain the skepticism of the state in these cases, see Tebbe, *supra* note 491 (manuscript at 2–5).

⁴⁹³ See Rodríguez, *supra* note 383 (manuscript at 15–16) (discussing Justice Alito's appreciation for state power in this context).

⁴⁹⁴ See COX & RODRÍGUEZ, *supra* note 58, at 184–88; Metzger, *supra* note 247, at 4–5.

⁴⁹⁵ Empirical studies show both that the current Court is the most business friendly and skeptical of labor in history and that it has ruled far more favorably with religious claimants than its predecessors. On the former point, see Epstein, Landes & Posner, *supra* note 469, assessing cases between

the lower federal courts over the last four years,⁴⁹⁶ conservatism is ascendant in the judiciary. The interpretive approaches and substantive constitutional views of a supermajority of the Court's members are in great tension with or outright opposed to those of the new presidential Administration, and the Democratic Party as a whole. The nation thus finds itself in the midst of a striking regime conflict.

I. The Wages of Conflict. — On the subject of state power, the clash over the importance, utility, and viability of the administrative state and the very purposes of government is stark. And whereas the current Court is arguably the most pro-business and anti-union in history, the current Administration has embraced worker power and an approach to economic competition and big business that harkens back to the trust-busting era that accompanied our first Gilded Age.⁴⁹⁷ As I explore in more detail in closing, the two regimes also harbor opposed understandings of how best to safeguard democracy, especially to address the nation's sordid history of racial exclusion. *Shelby County v. Holder* and now *Brnovich v. Democratic National Committee* treat the Voting Rights Act as a relic. The new Administration and its allies regard this civil rights law as essential and seek legislation that would curtail state power to erect barriers to voting in the name of election integrity. Debates over which rights restrain the state — debates over abortion, LGBTQ rights, religious freedom, gun regulation, affirmative action — also seem newly urgent in light of conservative consolidation on the Court.

These differences, understood as regime conflict, help to explain the divided and heightened state of the debate over the role of the Supreme

1946 and 2011 and concluding “[t]he[] rankings [of Justices by their votes in favor of business interests] suggest . . . that the Roberts Court is indeed highly pro-business — the conservatives extremely so and the liberals only moderately liberal,” *id.* at 1449; and *id.* at 1472 (“We find that five of the ten Justices who, over the span of our study (the 1946 through 2011 Terms), have been the most favorable to business are currently serving, with two of them[, Alito and Roberts,] ranking at the very top among the thirty-six Justices in our study.”). On the latter, see Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2020 SUP. CT. REV. (forthcoming 2021) (manuscript at 7 & fig.2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3825759 [<https://perma.cc/P7L4-2WRK>]. For an analysis discussing the challenges of sorting Justices’ ideological preferences, see generally Michael A. Bailey, *Is Today’s Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences*, 75 J. POL. 821 (2013).

⁴⁹⁶ John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [<https://perma.cc/VGE3-6BU7>] (documenting President Trump’s success in shaping the courts of appeals and noting that more than a quarter of currently active federal lower court judges are Trump appointees).

⁴⁹⁷ Compare Epstein, Landes & Posner, *supra* note 469, at 1449, with Exec. Order No. 14,025, 86 Fed. Reg. 22,829 (Apr. 29, 2021), and Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021).

Court in our democratic system of government.⁴⁹⁸ That the country could be in the midst of two different regime changes whose goals may be irreconcilable is both symptom and cause of hyperpolarization. This juxtaposition of regime and counter-regime recalls the conflicts of the New Deal era, heightening the sense of uncertainty about the future, escalating the stakes of the judicial confirmation process, and perpetuating the latest calls for reforming the courts.⁴⁹⁹ Some of that debate is hyperpartisan and tied to the belief that the Senate Republicans demolished norms of comity in the confirmation process — the view that norms have eroded over the last three decades but still sustained some viability until Majority Leader Mitch McConnell and Republicans refused even to meet with then-Chief Judge Garland, much less bring his nomination by President Obama to a vote.⁵⁰⁰

More deeply, the calls for reform reflect increasing despair that Democratic majorities of the recent past — and the left-of-center bent of the American polity as a whole — have not yielded a left-of-center judiciary. The reasons cited for this state of affairs range from the Democratic Party's failure to prioritize judicial nominations during the Obama years;⁵⁰¹ contingencies such as the timing of the death and retirements of recent Justices, particularly Justice Ginsburg's passing

⁴⁹⁸ The debate during the campaign led then-candidate Joe Biden to promise to establish a Presidential Commission on the Supreme Court to study the issue, which he did in April 2021. Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021). I was named one of the Co-Chairs of that Commission. The views in this Foreword are entirely my own and do not represent the views of the Commission.

⁴⁹⁹ See Judiciary Act of 2021, S. 1141, 117th Cong. (2021); Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020); Letter from Sens. Sheldon Whitehouse & John Kennedy, to Merrick Garland, Att'y Gen., U.S. Dep't of Just. & Donald W. Washington, Dir., U.S. Marshals Serv. (June 4, 2021), <https://www.whitehouse.senate.gov/download/letter-to-usms-and-doj-on-scotus-travel> [<https://perma.cc/CZ58-MSXN>].

⁵⁰⁰ A crop of progressive advocacy organizations has emerged in recent years to push the cause of "court reform," including Demand Justice, which calls for restoring balance on the Court by adding more seats, and Fix the Court, which advocates a number of reforms to improve the transparency and accountability of the Court. See DEMAND JUST., <https://demandjustice.org> [<https://perma.cc/LMP7-J538>]; FIX THE CT., <https://fixthecourt.com> [<https://perma.cc/DM47-ZCBJ>]. These groups join long-established organizations devoted to scrutinizing judicial nominations, such as Alliance for Justice and the American Constitution Society. See ALL. FOR JUST., <https://afj.org> [<https://perma.cc/6FL3-PU9Q>]; AM. CONST. SOC'Y, <https://acslaw.org> [<https://perma.cc/SZ2H-BUK4>]. Notably, the groups calling for Court reform all lean left, and the Federalist Society — arguably the most powerful conservative legal organization — was intimately involved in the Trump Administration's concerted push to populate the lower courts and advance President Trump's three Supreme Court nominees in four years. Caroline Fredrickson & Eric J. Segall, Opinion, *Trump Judges or Federalist Society Judges? Try Both*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html> [<https://perma.cc/J6EU-Y5GT>].

⁵⁰¹ See, e.g., Charlie Savage, *Obama Lags on Judicial Picks, Limiting His Mark on Courts*, N.Y. TIMES (Aug. 17, 2012), <https://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html> [<https://perma.cc/GQX4-KU67>].

during the waning days of the Trump Administration;⁵⁰² and structural impediments in our system of government, such as the gross under-representativeness of the Senate and the vagaries of the Electoral College.⁵⁰³ Indeed, for some of the commentators and activists for whom reforming or disempowering the Supreme Court has become an urgent cause, the increasingly minoritarian composition of the courts, which relates to how the minoritarian structure of the Senate has informed the judicial confirmation process over the last three administrations, has risen to the level of democratic crisis.⁵⁰⁴ The fact that a conservative legal regime has consolidated in the branch of government hardest to change because of judges' life tenure also reinforces a longstanding critique of the Court itself — that its claims to supremacy are antidemocratic and thus borderline illegitimate.⁵⁰⁵ Such claims do not depend on the particular reasons a new debate over Court reform has emerged but that address the agonism behind the debate nonetheless.

Of course, the fact that the Court is at odds with today's political majorities does not delegitimize it for all observers.⁵⁰⁶ The existence of a counter-regime arguably reflects an actual systemic purpose — to

⁵⁰² See, e.g., Adam Taylor, *How the U.S. Supreme Court Affects the World*, WASH. POST (Sept. 24, 2020, 12:00 AM), <https://www.washingtonpost.com/world/2020/09/24/ruth-bader-ginsburg-death-supreme-court-international-effects/> [https://perma.cc/8PB5-SFB4].

⁵⁰³ See, e.g., Ronald Brownstein, *Small States Are Getting a Much Bigger Say in Who Gets on Supreme Court*, CNN (July 10, 2018, 6:01 AM), <https://www.cnn.com/2018/07/10/politics/small-states-supreme-court/index.html> [https://perma.cc/WMU6-5GE4]; Ian Millhiser, *The Astounding Advantage the Electoral College Gives to Republicans, in One Chart*, VOX (Sept. 17, 2019, 7:50 AM), <https://www.vox.com/policy-and-politics/2019/9/17/20868790/republicans-lose-popular-vote-win-electoral-college> [https://perma.cc/YEG2-WABL].

⁵⁰⁴ See Klarman, *supra* note 339, at 247 (arguing that Senator McConnell's efforts were “so norm-defying that many Democrats initially assumed he would eventually back down, and even some Republicans were shocked by his strategy”).

⁵⁰⁵ The debate over the Court's democratic legitimacy is longstanding. For influential scholarship decrying judicial supremacy, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 233–46 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 7–32 (1999); and JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 1–2 (1999). Calls for reform in the present moment have spawned organizations dedicated to pursuing it, and a new round of scholarship decrying the Court's interference with democracy has emerged, targeted expressly at disempowering the Court. For representative examples, see Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021) (manuscript at 6) (on file with the Harvard Law School Library); and Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1780–84 (2020). For other scholarship that links reform to restoring the Court's legitimacy, see Daniel Epps & Ganesh Sitaraman, *Feature, How to Save the Supreme Court*, 129 YALE L.J. 148, 150–52 (2019).

⁵⁰⁶ See Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93, 95 (2019) (“The last three years reflect not ‘an unprecedented legitimacy crisis,’ but a partisan realignment: something that might have occurred nearly thirty years ago, had circumstances been slightly different.” (footnote omitted) (quoting Epps & Sitaraman, *supra* note 505, at 153)).

enable the partial rule of past majorities.⁵⁰⁷ On this view, the jurisprudential and ideological identity of the Court changes in line with the evolution of political culture and the regimes that happen to be in place when the Court's members are appointed. Given our sharply divided polity and the lessons from political science emphasizing that each party is poised to win control of the political branches in each election,⁵⁰⁸ we might think of what appears like a rearguard action to some as, in fact, the representation of a live and considerable segment of the electorate. Under this view, the courts may reflect past majorities, but it is misleading to describe them as countermajoritarian, given the partisan volatility in who controls government and the polarized and roughly "even" divisions in public opinion that are driving and exacerbating this volatility. We might also recall the insights of political scientists and legal scholars who debate the extent to which political figures actually depend on courts playing a role in consolidating and legitimating political victories and in resisting opponents, even when such resistance might be used against them.⁵⁰⁹

But the life tenure of Justices, as well as the culture of judicial supremacy, make this ostensibly democratic account hard to accept. The current state of affairs might be better understood as partisan entrenchment run amok, enabled by the happenstance of judicial turnover — a phenomenon that disconnects the Court in dramatic ways from the actual polity it governs in the here and now.⁵¹⁰ The courts today arguably

⁵⁰⁷ Professors Jack Balkin and Sandy Levinson offer a theory of partisan entrenchment and its relationship to constitutional change. See Balkin & Levinson, *supra* note 238, at 1066–83. This theory begins from the premise that a party that wins the White House “can stock the federal judiciary with members of its own party,” and the authors observe that:

When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. . . . Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties.

Id. at 1066–67. “One might think of this as ‘counter-majoritarian,’” they write, but “it is not. It represents a temporally extended majority rather than a contemporaneous one.” *Id.* at 1076. As Balkin and Levinson explain, writing in the wake of *Bush v. Gore*, 531 U.S. 98 (2000), this “normal” process of entrenchment contrasts sharply with what the Court did in that case, which was a “totally unprecedented spectacle of five members of the Court using their powers of judicial review to entrench their party in the Presidency, and thus, in effect, in the judiciary as well, because of the President’s appointments power.” *Id.* at 1083. See also Michael W. McConnell, Richard & Frances Mallory Professor, Stan. L. Sch., Written Testimony Before the Presidential Commission on the Supreme Court of the United States 1 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf> [<https://perma.cc/8KY3-EZXX>] (defending the rule of past majorities).

⁵⁰⁸ See, e.g., LEE, *supra* note 203, at 200–01; John H. Aldrich & Daniel J. Lee, *Why Two Parties? Ambition, Policy, and the Presidency*, 4 POL. SCI. RSCH & METHODS 275, 286–89 (2016).

⁵⁰⁹ See *supra* note 33.

⁵¹⁰ See Jamal Greene, Dwight Professor of L., Colum. L. Sch., Statement to the Presidential Commission on the Supreme Court of the United States: Closing Reflections on the Supreme Court

represent the long arc of the Reagan coalition consolidated in the judiciary, even as that coalition crumbles in American politics⁵¹¹ — a culmination of decades of political struggle and concerted effort to control the membership of the courts in order to curb political action counter to the substantive goals of the movement.⁵¹² The confirmation during this Term of Justice Barrett to replace the late Justice Ginsburg simply put a flourish on these developments.⁵¹³

But however we understand the origins and implications of today's regime conflict, the central observation of this Part remains salient. The judicial and political rhetoric insisting on fidelity to law often works as an arm of politics — as the legal framework that helps bring the political

and Constitutional Governance 1–3 (July 20, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf> [<https://perma.cc/JFD3-CQ74>] (“Democrats and Republicans, progressives and conservatives can and do disagree about the degree to which the ideological makeup of the Court constitutes a genuine social problem. But the amount of power individual justices wield over American life should concern policymakers, lawyers, and citizens of all political and ideological perspectives.” *Id.* at 2.); Vicki C. Jackson, Laurence H. Tribe Professor of Const. L., Harv. L. Sch., Submission to Presidential Commission on the Supreme Court of the United States 22 (July 16, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf> [<https://perma.cc/F7A9-WXP7>] (“It is an unstable situation for a party supported by a minority of the population to be able to control the Senate, frequently the Presidency, and the Supreme Court. . . . If citizens cannot look to elections, nor to the Courts, nor to the amending process, to achieve a federal government that is in broad terms responsive to democratic views, what remains are methods that should trouble all who believe in the rule of law.”).

⁵¹¹ See *supra* note 45 (citing debates over whether President Trump was a disjunctive President and a symbol of the final demise of the Reagan regime that has effectively held sway over the American political system for forty years).

⁵¹² A significant literature traces these developments. For three leading and comprehensive examples, see AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* 13 (2015), describing the Federalist Society as a “political epistemic network” with shared beliefs and goals among a group of activist lawyers and characterizing it as a support structure for change; AMANDA HOLLIS-BRUSKY & JOSHUA C. WILSON, *SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT’S RADICAL STRUGGLE TO TRANSFORM LAW AND LEGAL CULTURE* 135 (2020), analyzing the Christian conservative movement’s choice to build its own institutions rather than co-opt existing ones and pointing to its closeness to the Federalist Society at the same time; and STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 2–3 (2012), emphasizing the institutional efforts of the conservative legal movement, rather than the electoral successes of Republican politicians, in producing over time and through mobilization conservative control of the courts.

⁵¹³ This movement, of course, consists of various and sometimes conflicting claims about the meaning of the Constitution, the interpretive responsibilities of the courts, and the substantive priorities worth defending — differing claims advanced by often allied but still separate social movements and political factions. On abortion, see Linda Greenhouse & Reva B. Siegel, Feature, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2046–67 (2011); and Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 827 (2007). On gun rights, see Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J.L. MED. & ETHICS 11, 11 (2020). On what she terms “anti-administrativism,” see Metzger, *supra* note 247, at 8–51. On originalism, see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 674–82 (2009) (on the sociology of originalism); and Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 375–77 (2013).

one into being.⁵¹⁴ This understanding does not mean that the forms of argument employed or the conceptual frameworks within which the courts operate are not recognizably legal, or that legal materials (statutes, precedents, regulations, court-specific institutional norms) won't frequently determine outcomes in cases.⁵¹⁵ But legal constraint can exist alongside the reality that legal arguments also serve a broader agenda connected to a political regime that both transcends and includes the courts. This political connection might even legitimate the courts' actions, if we think of their doctrines as stand-ins for a worldview shared by a political party that continues to represent nearly half of an evenly divided electorate. But again, the propriety of the Court acting in politics will always be a source of debate, given its undemocratic structure and its life tenure.

2. *The Supreme Court's Capacity for Compromise.* — The conception of legal doctrine as part of a political process relates to another important feature of the Court's decisionmaking, which itself underscores its agency in regime conflict. The Court has some control over the extent and nature of the conflict it might produce. Because the Court as an institution is embedded in the contest between regimes, its decisions simultaneously offer complete ideological visions and also demonstrate concerted effort to integrate its particular visions of government power and the Constitution with the desire to preserve its own institutional status within the system of government. The remedies the Court adopted in *Arthrex* and *Collins* reflect this tendency, as does the incremental way in which the Roberts Court as a whole has come to reshape the authorities concerning the scope of the government's power to regulate.

We might, in fact, take Chief Justice Roberts himself as an exemplar of these sorts of integrative efforts.⁵¹⁶ The realization of the substantive

⁵¹⁴ For an argument that between the 1950s and 1990s, Justices often behaved in unpredictable ways but that since the 1990s, 5–4 and 5–3 decisions almost entirely reflect an ideological split predictable by the party of the President who appoints the Justices on each side, see Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [https://perma.cc/HG5T-59DX].

⁵¹⁵ Cf. Sunstein & Vermeule, *supra* note 342, at 413 (noting that doctrinal questions rarely present themselves in a way that perfectly suits an ideological agenda).

⁵¹⁶ Justices Kagan and Breyer often appear to play a similar role on the other side. See, for example, their decision to join the Chief Justice's plurality opinion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), striking down the mandatory Medicaid expansion authorized by the ACA as coercive under the Spending Clause. See *id.* at 579–80 (plurality opinion). This decision arguably reflects an effort to reconcile progressive views about government power with larger political and jurisprudential trends, in this case the persistence of federalism-based limits on congressional power. For commentary noting how the Chief Justice's opinion in *NFIB* reflected these competing considerations, see Martha Minow, *The Supreme Court, 2011 Term — Comment: Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, 126 HARV. L. REV. 117, 145–46 (2012).

goals of the multifaceted conservative legal movement has proceeded in fits and starts during his time on the Court. With some frequency, Chief Justice Roberts has shown a preference for very gradual evolution in the Court's jurisprudence that eschews radical displays in favor of a death-by-a-thousand-cuts approach to despised or maligned precedents. His adherence to *stare decisis* in the *June Medical Services LLC v. Russo*⁵¹⁷ decision — the challenge to the Louisiana abortion law nearly identical to the one the Court had invalidated just a few years earlier while Justice Kennedy was still on the Court in *Whole Woman's Health v. Hellerstedt*⁵¹⁸ — highlights this tendency.⁵¹⁹ His recent opinion deferring to the government of California's public health capacity restrictions during the pandemic also reflects a pragmatism about the Court's role in the system of government.⁵²⁰ These sorts of decisions might reinforce those scholars who emphasize that the Court never gets too far beyond what public opinion will tolerate in order to preserve its legitimacy. Striking down a major legislative achievement that has improved the lives of millions of Americans or decisively repudiating *Roe v. Wade*,⁵²¹ for example, could be a bridge too far.⁵²²

This Term, we certainly saw manifestations of Chief Justice Roberts the conservative pragmatist. In *California v. Texas*, the Court refused for a third time to invalidate key portions of the ACA, holding in an opinion by Justice Breyer that the states seeking to invalidate the statute did not have standing to sue because they could not be injured by an

⁵¹⁷ 140 S. Ct. 2103 (2020).

⁵¹⁸ 136 S. Ct. 2292 (2016).

⁵¹⁹ See *June Med. Servs.*, 140 S. Ct. at 2139 (Roberts, C.J., concurring) ("Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law.").

⁵²⁰ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring).

⁵²¹ 410 U.S. 113 (1973).

⁵²² See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009) ("The Court has this power only because, over time, the American people have decided to cede it to the justices. The grant of power is conditional and could be withdrawn at any time. . . . The justices recognize the fragility of their proposition, occasionally they allude to it, and for the most part (though, of course, not entirely) their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution."); see also Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 36 (1993) (arguing that the Court intervenes largely when governing coalitions are unable to resolve political controversies, noting that "[r]ather than treat judicial review as a practice that either sustains or rejects the measures favored by lawmaking majorities, theoretical and descriptive studies of the Supreme Court should play closer attention to the constitutional dialogues that take place between American governing institutions on crosscutting issues that internally divide the existing lawmaking majority").

individual “mandate” with no enforcement mechanism.⁵²³ Despite vociferous support from three members of the Court who would in fact have voted to invalidate the entire Act, opponents of the ACA failed yet again to accomplish through exacting textualism what Republicans in Congress repeatedly failed to do — unravel one of the signature achievements of the Obama era and the Democratic Party of the twenty-first century.⁵²⁴ This decision, in which the Court did not even reach the statutory-interpretation question, arguably further entrenched not just the statute itself but also popular expectations about what the government ought to provide the people.⁵²⁵ The entire saga of the Court’s

⁵²³ 141 S. Ct. 2104, 2117–18 (2021). The state of Texas and others advanced the theory that the so-called individual mandate became an unconstitutional exercise of Congress’s power once Congress effectively repealed the tax assessment that the original ACA applied to individuals who declined to purchase health insurance. *Id.* at 2112. This tax payment was the same portion of the law that enabled Chief Justice Roberts to uphold the ACA’s central scheme on the ground that it constituted a permissible tax and not just an illicit exercise of the commerce power. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2011).

⁵²⁴ On its own terms, the standing decision in *California v. Texas* could prove significant as a limitation on the recognition of state standing that the Court has been expanding in recent years, for example when the Court concluded that states had standing to sue over President Obama’s immigration relief programs. *See United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). Perhaps it signals the Court’s willingness to scrutinize with a bit more interest the states’ claims that they have been injured by federal policies — a claim of injury that has been instrumental in the rise of partisan litigation over changes in executive branch policy. But the Court does not address whether its understanding departs from or limits the “special solicitude” given the states in *Massachusetts v. EPA*, 549 U.S. 437 (2007), in which the Court held that Massachusetts could bring suit against the federal government for its failure to regulate greenhouse gases. *Id.* at 521. And yet, October Term 2020 was also a tale of two standing regimes. In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Court invalidated a statutory provision enacted by Congress authorizing citizens’ suits to enforce certain provisions of the Fair Credit Reporting Act. *See id.* at 2206–07. Justice Kavanaugh, writing for the majority, held that an injury in law is not enough to create Article III standing. *Id.* at 2205. In the case, plaintiffs suffered an injury in law where the Fair Credit Reporting Act obligated TransUnion to follow reasonable procedures to ensure accurate credit reports, disclose all information in an individual’s credit report to that individual, and provide a summary of rights in each written disclosure to a person. *Id.* at 2200–01. Plaintiffs alleged that TransUnion failed on all three counts, leading them to suffer a harm because their statutory rights were violated. *Id.* at 2208, 2213. The Court determined that more than half of the plaintiffs lacked standing because they did not suffer an injury in fact, only an injury in law. *Id.* at 2214. The Court said plaintiffs must suffer a concrete and particularized injury to establish standing. *Id.* at 2203. The Court determined that those harms that have a “close relationship” to harms that are “‘traditionally’ recognized as providing a basis for a lawsuit in American courts” constitute an injury in fact and thus give rise to Article III standing. *Id.* at 2204 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). Like the Court’s decisions in *Collins* and *Arthrex*, this opinion significantly limits Congress’s authority to determine how to implement its policy objectives, in this case through private vindication of rights granted by statute.

⁵²⁵ Despite the survival of the ACA, unless and until Congress acts, the case and its predecessors also embody the wide-ranging pressures arrayed against institutional and regime change — the vetogates in Congress that limit legislative potential, to be sure, but also the fundamentally different worldviews about the role of government in securing the social welfare. It was in this sense that the government’s shifting positions mattered — as signals of these very divergent worldviews and the legal premises that support them — and not whether they would shape the Court’s ultimate decision.

review of the ACA also arguably demonstrates Chief Justice Roberts's appreciation for how politically incendiary and destabilizing to institutions and markets it would have been for the Court to have invalidated this major piece of social-welfare legislation.

And, at the same time, the saga produced conservative jurisprudential victories — the reinvigoration of Spending Clause doctrine in the name of federalism through the incapacitation of the Medicaid expansion in *National Federation of Independent Businesses v. Sebelius*,⁵²⁶ even as the Court upheld the individual mandate, and the development of the major questions doctrine affecting agency authority to address questions of major social and economic significance in *King v. Burwell*,⁵²⁷ even as the Court upheld subsidies for federally enacted exchanges.⁵²⁸ In this pragmatist's mode, Chief Justice Roberts has even brought some of the more liberal Justices along in opinions that maintain a version of the status quo while shifting the legal landscape in a conservative direction nonetheless.

One of the other potentially transformative cases of the Term also ended this way. In *Fulton v. City of Philadelphia*,⁵²⁹ Chief Justice Roberts produced an opinion joined by six Justices, with the other three Justices concurring in the judgment — a remarkable alignment of judgments in a case involving one of the central and intractable conflicts of the present moment, between the rights of LGBTQ+ parents and religious organizations and individuals' free exercise and association rights. The Court held unconstitutional City actions that resulted in a freeze on a contract with Catholic Social Services for the placement of foster children because the organization would not place children with same-sex couples.⁵³⁰ The Court sidestepped the question of whether it should overrule its thirty-year-old precedent, *Employment Division v. Smith*,⁵³¹ which established that neutral, generally applicable laws cannot violate the free exercise of religion,⁵³² by finding that the City's actions were not, in fact, generally applicable. They were grounded instead in a discretionary policy that could have allowed the City Commissioner to

⁵²⁶ 567 U.S. 519, 579–80 (2012) (plurality opinion).

⁵²⁷ 135 S. Ct. 2480 (2015). For a critique of the major questions doctrine as interfering with the institutional competencies of the administrative state, see Emerson, *supra* note 402, at 2086.

⁵²⁸ *Burwell*, 135 S. Ct. at 2494–96; see also *Hearing on Pending Nominations Before the S. Comm. on the Judiciary*, 117th Cong. at 22:45–23:30 (June 23, 2021), <https://www.judiciary.senate.gov/meetings/06/16/2021/nominations> [<https://perma.cc/EM7U-D9VK>] (statement of Sen. Grassley) (calling out Democratic senators' "fearmongering" during confirmation hearings for Justice Barrett, when the criticisms levied against her included that she was being placed on the Court to gut the ACA, which turned out not to be what happened in *California v. Texas*).

⁵²⁹ 141 S. Ct. 1868 (2021).

⁵³⁰ *Id.* at 1874, 1882.

⁵³¹ 494 U.S. 872 (1989).

⁵³² *Id.* at 879.

grant exemptions for secular organizations and refuse to grant exemptions for religious ones. In reaching this conclusion, *Fulton* did not formally upend the *Smith* regime, but it did move the law in the direction of protecting religious believers by seeming to redefine general applicability.⁵³³ Several Justices also opened up the possibility of overruling *Smith* if enough of them can determine how to do so without creating too much doctrinal confusion and regulatory instability.⁵³⁴

This image of Chief Justice Roberts the pragmatist prodding the law in a conservative direction sits alongside the image of the Chief Justice who wrote the opinion in *Shelby County* gutting section 5 of the Voting Rights Act, despite that Act's near-unanimous reauthorization by Congress,⁵³⁵ because the Court had determined that times had changed.⁵³⁶ It is this Chief Justice Roberts who joined this Term's arguably most radical decision in *Brnovich* (discussed in more detail below), limiting the power of section 2 of the Voting Rights Act. Through these democracy decisions and others, and by joining the conservative turn to the First Amendment and other constitutional provisions to curtail labor power and economic regulation, the Chief Justice has shown both a weak commitment to stare decisis (as in *Janus v. AFSCME, Council 31*⁵³⁷) and agreement and even leadership in this regulation-defying, liberty-promoting dimension of the conservative legal agenda.⁵³⁸ And thus he demonstrates the will to challenge even long-

⁵³³ For a reading of the decision that regards it as a win for religious liberty, see Thomas Berg & Douglas Laycock, *Protecting Free Exercise Under Smith and After Smith*, SCOTUSBLOG (June 19, 2021, 6:37 PM), <https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith> [<https://perma.cc/4V6C-KXM3>], arguing that *Fulton* was a win because the Court prevented Catholic Social Services from losing its contract with the City on the basis of its teachings, because the Court made clear that civil rights laws do not automatically serve a compelling government interest, and because at least five of the Justices concluded *Smith* was misguided. See *id.*

⁵³⁴ Justice Barrett, joined by Justice Kavanaugh and joined in part by Justice Breyer, wrote a concurrence asking “[W]hat should replace *Smith*?” — seemingly inviting litigants and others to develop an alternative to *Smith* that would not depend on the adoption of a new categorical rule. *Fulton*, 135 S. Ct. at 1882 (Barrett, J., concurring).

⁵³⁵ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified at 52 U.S.C. § 10101).

⁵³⁶ *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

⁵³⁷ 138 S. Ct. 2448, 2460 (2018).

⁵³⁸ Cf. William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 329–33 (observing that stare decisis is treated as a discretionary tool by the Justices and arguing that this is worse than no precedent); Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL’Y 733, 739 (2020) (arguing that Chief Justice Roberts’s recent decisions reflect a nuanced approach to stare decisis and identifying the criteria of “fidelity to the Constitution” and whether a precedent exhibits “exceptionally ill founded” reasoning as guiding Chief Justice Roberts in his consideration of whether to overturn precedent); Frederick Schauer, *Stare Decisis — Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 131–32, 135–36 (arguing that stare decisis has little effect on judicial reasoning where the Justices can find ways to rationalize the nonapplicability of precedent, and that invocation of the doctrine of

entrenched laws, including those enacted by Congress, in the name of constitutional principle.

We may in fact be on the cusp of a new Supreme Court Term that tips decisively in this more radical direction — away from gradual erosion and pragmatic compromise and toward decisive announcement of a new order. Perhaps the most consequential decisions of the Term that just concluded will turn out to be not the opinions in its merits cases, but rather its grants of certiorari. The Court has begun to craft an October 2021 Term that may once and for all yield some of the sweeping victories the conservative legal movement has sought, through decisive repudiation of precedents the Court has made rickety but has yet to eliminate.

The Court will hear a challenge to a 100-year-old New York law requiring those who seek to carry a gun outside the home to attain a license for which they must show proper cause,⁵³⁹ which could have a dramatic impact on local authority to limit public carry. The challenge to Mississippi's fifteen-week abortion ban⁵⁴⁰ could result in an explicit overturning of *Roe* or an interpretation of the state's interest in the protection of fetal life or maternal health that opens the door for states to ban abortion altogether.⁵⁴¹ Though before the new Term even began, the Court ignited its progressive foes when it left in place a Fifth Circuit ruling that permitted a Texas abortion law to go into effect,⁵⁴² despite the fact that the law effectively ended abortions after six weeks in the

stare decisis is used by Justices who would have agreed or did agree with the earlier decision, citing *Janus* as an illustrative case).

⁵³⁹ *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 F. App'x. 99 (2d Cir. 2020), *cert. granted*, No. 20-843, 2021 WL 1602643 (U.S. Apr. 26, 2021); Robert Barnes, *Supreme Court to Hear Gun-Control Case Next Term on Carrying Weapons Outside Home*, WASH. POST (Apr. 26, 2021, 7:15 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-guns-second-amendment-national-rifle-association/2021/04/26/83e865c8-a690-11eb-8c1a-56f0cb4ff3b5_story.html [https://perma.cc/2HWZ-5YSZ].

⁵⁴⁰ *Dobbs v. Jackson Women's Health Org.*, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021); Adam Liptak, *Supreme Court to Hear Abortion Case Challenging Roe v. Wade*, N.Y. TIMES (May 27, 2021), <https://www.nytimes.com/2021/05/17/us/politics/supreme-court-roe-wade.html> [https://perma.cc/65NJ-83PW].

⁵⁴¹ A development that once seemed highly improbable but may be immanent in these most recent developments is the recognition of fetal life as protected under the Fourteenth Amendment — a recognition that would mean abortion could actually become unconstitutional, or at least would set up a conflict between two incommensurate rights — fetal right to life and the woman's right to bodily integrity, or whatever formulation of the abortion right remains. For an influential argument advancing this perspective, see John Finnis, *Abortion Is Unconstitutional*, FIRST THINGS (Apr. 2021), <https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional> [https://perma.cc/K92F-EFE2].

⁵⁴² *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *1 (U.S. Sept. 1, 2021) (mem.).

state, with Chief Justice Roberts joining the dissent to lament the unprecedented law and the Court's inaction.⁵⁴³ The Department of Justice, underscoring our state of regime conflict, has since filed a lawsuit and sought an injunction against the law.⁵⁴⁴

In yet another domain where the regimes diverge, the challenge to Harvard College's admissions policies⁵⁴⁵ may finally move the Court past Justice Kennedy's equivocations on the matter⁵⁴⁶ to a decision to overrule *Grutter v. Bollinger*⁵⁴⁷ and the constitutionality of race-conscious admissions, should the Court opt to take the case. And over the last several years and with the advent of the Biden Administration, commentators also have warned of the impending clash between the Court and the political branches of the federal government — the culmination of the regime conflict I have just described, through the most muscular assertions of judicial review to invalidate social and economic legislation emanating from Congress. Such a clash came close to occurring in relation to the ACA several times but fizzled.⁵⁴⁸ Assuming President Biden can secure any major legislative victories — a big assumption — are the courts generally and the Supreme Court in particular now poised to hobble or undo them, whether through their anti-statism or some combination of nondelegation, limited government, and fundamental rights adjudication?

In the end, rather than speculate over which is the truer Chief Justice (or the truer Court) — the conciliator or the warrior — we should acknowledge the complexity of the Court's institutional decisionmaking and accept that both personae exist. A single Court's Term might be dominated by some of the Justices' instincts to compromise or proceed incrementally, and other Terms will be defined by the dramatic pursuit of particular visions of government, democracy, and the Constitution. Regardless, it matters greatly who appoints the Justices, and the Court as currently constructed will forever be a coalition-constructing and often countervailing institution in American government. A rich and complex literature has long sought to assuage the direst concerns about the

⁵⁴³ See *id.* at *2 (Roberts, C.J., dissenting). Because the Texas law authorizes private parties to sue abortion providers but does not authorize the state to enforce the law, the Court concluded that an injunction was not procedurally appropriate because there was no party yet to enjoin and emphasized that it was not considering the merits of the law. See *id.* at *1–2 (order denying relief).

⁵⁴⁴ See Complaint at 3, *United States v. Texas*, No. 21-cv-796 (W.D. Tex. Sept. 9, 2021).

⁵⁴⁵ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *petition for cert. filed*, No. 20-1199 (Feb. 25, 2021).

⁵⁴⁶ Compare *Grutter v. Bollinger*, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting) (“The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review.”), with *Fisher v. Univ. of Texas*, 136 S. Ct. 2198, 2214 (2016) (“Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”).

⁵⁴⁷ 539 U.S. 306.

⁵⁴⁸ See, e.g., *California v. Texas*, 141 S. Ct. 2104, 2113 (2021).

Court's minoritarian features and the potential threats to democracy posed by active judicial review. That literature adverts to the Court's embeddedness in the political process and its variation with political regime change.⁵⁴⁹ But even if these accounts accurately capture the sweep of history, the possibility of regime conflict in particular moments remains precisely because the Court has become an integral part of the political process.⁵⁵⁰ And this conflict will continue to subject the Court and its practices to scrutiny by political actors and yield the sorts of debates currently playing out over its responsiveness to and control over the democratic process.

CODA: WHO VOTES AND WHO COUNTS

The preceding discussion all depends on crucial assumptions: that regime change will be possible and even regular, not only through transitions in presidential administrations, but also throughout the political sphere. The discussion also presumes reasonably fair terms of competition, or at least those terms set by the political system we have, minoritarian features and all. But developments within American political culture in recent years have begun to challenge these assumptions and now threaten to make democratic regime change incomplete, elusive, asymmetrical, or even impossible.⁵⁵¹ These developments have deep historical roots and antecedents. But they also foretell a future in which hyperpolarization ends not through the reemergence of consensus and our collective capacity for civic compromise, but rather in the complete breakdown of the democratic system itself, through the reconfiguration of the rules of participation in ways that protect the power of one party and its constituencies at all costs. This possibility would thwart the ability of the people, inclusively defined, to determine the shape of their government — in other words, it would result in regime entrenchment.

⁵⁴⁹ This literature has foundation in Professor Robert Dahl's classic work, in which he argues that the Court is not actively countermajoritarian. See Robert A. Dahl, *Decisionmaking in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 282–85 (1957) (“[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.” *Id.* at 285.). Professor Keith Whittington advances this perspective by demonstrating how presidents come to rely on judicial review. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2009); see also KEITH E. WHITTINGTON, *REPUGNANT LAWS* (2019) (showing that the Court is a political and partisan actor, often working with political officials who support invalidation of laws because it serves their interests, but also exerting some independent power to advance its preferred priorities within the bounds of the politically tolerable). Professor Barry Friedman argues forcefully that the Supreme Court historically has eventually tacked toward the dominant public opinion. See FRIEDMAN, *supra* note 522, at 14; cf. Balkin & Levinson, *supra* note 238, at 1066–68 (detailing their theory of partisan entrenchment through judicial nominations).

⁵⁵⁰ See *supra* notes 510–12 and accompanying text (discussing the tensions that arise from the Justices' long tenures and the effective control those tenures give to long-gone majorities).

⁵⁵¹ Professor Michael Klarman has thoroughly catalogued and vigorously argued that the Supreme Court itself has been actively contributing to this threat. See Klarman, *supra* note 339, at 178–215.

Signs of breakdown through exclusion come from two of the pitched political contests of today — struggles over the law and practices of voting and debates over the metes and bounds of the nation's immigration policy. These conflicts over who votes and who counts, now and historically, draw from competing narratives defining who constitutes the legitimate polity. In particular, fears of fraud and subversion explicitly justify forms of exclusion: people unauthorized to vote might subvert the integrity of the polity by electing officials who do not actually have the support of the legitimate public, thus justifying rules that tightly control how and when people vote. People unauthorized to even be present in the United States might take advantage of an otherwise inclusive American spirit to steal the resources, jobs, and security that belong to true Americans, thus justifying an enforcement-oriented immigration law. These concerns often come dressed up in rule-of-law rhetoric — that people who follow the rules of the game are the ones worthy of inclusion, as voters and as members. This framing, in turn, links laws and arguments that justify exclusion with widely valued tenets of our legal system, lending these forms of exclusion an air of acceptability and dampening direct debate over the costs of exclusion.

Both sets of issues — who votes and who counts — landed at the Supreme Court's doorstep this Term. A brief consideration of the Court's approach to resolving them both underscores the stakes of the debates and leads to two important observations: the Court can and does choose to play a significant role in defining the terms and structure of the polity, but whatever the Court decides, the debate over the legitimate polity spills beyond the limits of legal interpretation and requires perpetual contest in the political sphere.

In one of the most significant cases of the Term — *Brnovich v. Democratic National Committee* — the Court continued its devaluation of the VRA by significantly narrowing the scope of claims under section 2, which prohibits laws that “result[] in a denial or abridgement of the right . . . to vote on account of race or color.”⁵⁵² The Court delineated “guideposts” for the adjudication of section 2 claims, offering an interpretation of the VRA likely to render the statute of limited-to-no use in curtailing state laws that deny or suppress the vote.⁵⁵³ As a result,

⁵⁵² 52 U.S.C. § 10301(a); see *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting).

⁵⁵³ For arguments to this effect, see David Cole, *Surprising Consensus at the Supreme Court*, N.Y. REV. OF BOOKS (Aug. 19, 2021), <https://www.nybooks.com/articles/2021/08/19/surprising-consensus-at-the-supreme-court> [<https://perma.cc/7X43-BT4M>] (observing that the Court, after offering the salve in *Shelby County* that section 2 would still be available for individual litigants to fight back against voter-suppression laws, issued a decision in *Brnovich* that makes that alternative “much more difficult,” potentially “insulating many voter suppression measures . . . from meaningful challenge”). Court observers have also underscored that the decision may well constrain efforts by the current Department of Justice to enforce the VRA through its own section 2 suits, including

Brnovich will be linked by history with *Shelby County*, an opinion that has become a central example in the progressive indictment of today's conservative Court and of the very concept of judicial supremacy altogether.⁵⁵⁴ Together, these two decisions enervating sections 2 and 5 of the VRA show the Court claiming power to define the terms of democracy, through constitutional and statutory interpretation, and at odds with Congress.⁵⁵⁵

In his opinion for the Court in *Brnovich*, Justice Alito prioritized the subversion threat to democracy over the exclusion threat. The mere possibility of fraudulent voting — of hypothetical individuals sully the democratic process by inserting themselves into the polity through

one already filed against Georgia. See, e.g., Adam Liptak, *Supreme Court Upholds Arizona Voting Restrictions*, N.Y. TIMES (July 1, 2021) <https://www.nytimes.com/2021/07/01/us/politics/supreme-court-arizona-voting-restrictions.html> [<https://perma.cc/J9M5-GUAE>]; see also Mark Joseph Stern, *The Supreme Court Just Mangled the Voting Rights Act Beyond Recognition*, SLATE (July 1, 2021, 12:28 PM), <https://slate.com/news-and-politics/2021/07/brnovich-voting-rights-act-alito.html> [<https://perma.cc/H4UJ-3LT3>] (arguing that “[m]any if not all of the voting restrictions passed after the 2020 election would survive” application of the Court’s guideposts).

⁵⁵⁴ See Keeanga-Yamahatta Taylor, *The Case for Ending the Supreme Court as We Know It*, NEW YORKER (Sept. 25, 2020), <https://www.newyorker.com/news/our-columnists/the-case-for-ending-the-supreme-court-as-we-know-it> [<https://perma.cc/UB7P-BZDJ>]. In *Shelby County*, Chief Justice Roberts transformed the equal sovereignty doctrine developed to govern the admission of states into the union into a structural constitutional principle that limits Congress’s explicit power to enforce the prohibition on race discrimination in voting in the Fifteenth Amendment, ultimately invalidating the formula enacted by Congress to determine which jurisdictions were required to submit changes to their voting laws to the Department of Justice for preclearance. See *Shelby County v. Holder*, 570 U.S. 529, 544, 557 (2013). In *Brnovich*, the Court resisted the plain language of section 2, articulating “guideposts” for adjudicating section 2 challenges that downplay the statute’s emphasis on disparate impact and its attention to the context from which a challenged state law has emerged. See *Brnovich*, 141 S. Ct. at 2336. See also *infra* note 566 for articulation of some of these guideposts.

⁵⁵⁵ The Court’s role in policing and defining the parameters of the democratic process itself was also on clear display this Term in the numerous emergency motions it handled throughout the presidential election, both before the election began and in its aftermath. Litigants in the pre-election cases cited the risk of fraud and ex post unfairness to challenge adjustments made by state voting officials to mitigate pandemic-related risk. See, e.g., Verified Complaint for Declaratory and Injunctive Relief ¶ 1, *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020) (No. 20-cv-00966). While the Court mostly stayed out of these disputes, various one-off opinions by Justices Thomas, Alito, Gorsuch, and Kavanaugh surfaced concerns for preventing fraud and a rigid rule-boundedness grounded in protecting state legislative supremacy. See *infra* note 568 (discussing cases). Post-election motions came from the Trump campaign asserting claims of actual fraud with no evidence to support them. See, e.g., Plaintiffs’ Memorandum of Law in Support of Renewed Motion for Temporary Restraining Order and Preliminary Injunction at 1–2, *Donald J. Trump for President, Inc. v. Boockvar*, 830 F. App’x 377 (3d Cir. 2020) (No. 20-cv-02078). The absence of reality from the Trump campaign’s claims and the universal and vehement rejection by state and lower courts of said claims effectively kept the Supreme Court out of these baseless disputes. See *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021, 10:41 AM), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1> [<https://perma.cc/AKU7-WNG8>].

subterfuge — justifies laws of the sort enacted by Arizona.⁵⁵⁶ And the supposed weight of the state’s hypothetical antifraud interests overcomes what the Court sees as minor and to-be-expected burdens on the ability to vote and only modest disparate effects of such burdens on voters *ex post*.⁵⁵⁷

The Court’s solicitude of this antifraud interest is not new. Long before *Brnovich*, the Supreme Court invoked the antifraud justification as a basis for upholding state laws that controlled the manner of voting. In *Crawford v. Marion County Election Board*,⁵⁵⁸ for example, the Court rejected a Fourteenth Amendment challenge to an Indiana law that required voters to show a government-issued form of identification, easily crediting the state’s interest in preventing fraud despite no actual evidence of fraud.⁵⁵⁹ The Court in *Crawford* cited the same 2005 Carter-Baker Commission on Federal Election Reform that Justice Alito invoked in *Brnovich* for the proposition that “[t]here is no extensive evidence of fraud or multiple voting in U.S. elections, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”⁵⁶⁰ For some judges who upheld voter-identification laws over a decade ago, their decisions prioritizing the state’s supposed interest in preventing fraud over potential

⁵⁵⁶ Justice Alito wrote for the Court, in hypothetical terms and without advertent to any evidence of widespread fraud:

One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.

Brnovich, 141 S. Ct. at 2340; *see also id.* at 2341 (defining a distinct concept of disparate impact for section 2 cases) (“[W]e think it inappropriate to read § 2 to impose a strict ‘necessity requirement’ that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question. . . . Demanding such a tight fit would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests. . . . The dissent . . . would rewrite the text of § 2 and make it turn almost entirely on just one circumstance — disparate impact. That is a radical project, and the dissent strains mightily to obscure its objective.” (citations omitted)).

⁵⁵⁷ *See id.* at 2344 (treating the requirement that one vote in one’s own polling place as the “usual burden[] of voting” and “an unremarkable burden[]”); *id.* at 2344–46 (describing the burdens imposed by the law as “modest” when considering Arizona’s political process as a whole, which provides other easy ways to vote early); *id.* at 2344 (describing the racial disparity in burdens as “small in absolute terms”); *id.* at 2347 (discussing the restrictions on gathering ballots and concluding that “[e]ven if the plaintiffs had shown a disparate burden . . . the State’s justifications would suffice to avoid § 2 liability. ‘A State indisputably has a compelling interest in preserving the integrity of its election process.’” (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*))); *id.* at 2348 (“[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.”).

⁵⁵⁸ 553 U.S. 181 (2008).

⁵⁵⁹ *Id.* at 193–96 (plurality opinion).

⁵⁶⁰ *Id.* at 194 (quoting COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 18 (2005)); *Brnovich*, 141 S. Ct. at 2347.

effects on voting access became a source of regret, as the practical implications of seemingly neutral, legalistic rhetoric came increasingly into view.⁵⁶¹ But clearly for a majority of the Court today, the same good-government assumptions hold.⁵⁶²

In her dissent, Justice Kagan linked the antifraud impulse driving the majority's conclusions to the history of exclusion that the VRA was designed in part to combat. "Throughout American history," she wrote, "election officials have asserted anti-fraud interests in using voter suppression laws. Poll taxes, the classic mechanism to keep black people from voting, were often justified as 'preserv[ing] the purity of the ballot box [and] facilitat[ing] honest elections.'"⁵⁶³ Other measures, such as "elaborate registration procedures" and "early poll closings" similarly "excluded white immigrants (Irish, Italian, and so on) from the polls on the ground of 'prevent[ing] fraud and corruption.' . . . States have always found it natural to wrap discriminatory policies in election-integrity garb."⁵⁶⁴ The majority clearly refused to put the challenged Arizona laws in this lineage, not only by crediting the state's election-integrity justifications as a decisive counterweight to any burden on voting the laws imposed, but also by rejecting the claim that the Arizona laws at issue were motivated by discriminatory intent, overruling the Ninth Circuit's conclusion to the contrary.⁵⁶⁵

⁵⁶¹ See, e.g., Robert Barnes, *Stevens Says Supreme Court Decision on Voter ID Was Correct, But Maybe Not Right*, WASH. POST (May 15, 2016) https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html [https://perma.cc/SRT6-KF32] (noting, in addition to Justice Stevens's regret, Judge Posner's statement that he got the case wrong at the court of appeals level and that voter-identification laws are more likely to be tools of voter suppression than antifraud devices).

⁵⁶² These assumptions relate, in a somewhat complex way, to another underpinning of some of the Court's recent voting jurisprudence: the belief identified by Professors Guy-Uriel Charles and Luis Fuentes-Rohwer as animating the Court's refusal to police partisan gerrymandering in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), namely that "politics is sordid, partisan, and unfair." Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Dirty Thinking About Law and Democracy in Rucho v. Common Cause*, 2019 AM. CONST. SOC'Y SUP. CT. REV. 293, 297. In *Rucho*, this assumption helps explain the Court's refusal to police the rules of the game — a rejection of a modern conception that envisions "a role for the Court in enforcing basic rules of fairness and fair play while at the same time indirectly promoting a particular vision of the public good that is not filtered through partisan identity." *Id.* In *Brnovich*, this assumption helps explain why the Court gave such credence to a hypothetically presented state interest in policing fraud. In both cases, the Court disclaimed a role in ensuring substantive fairness and access.

⁵⁶³ *Brnovich*, 141 S. Ct. at 2365 (Kagan, J., dissenting) (alterations in original) (quoting J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 111 n.9 (1974)).

⁵⁶⁴ *Id.* (alteration in original) (quoting ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 159 (2000)).

⁵⁶⁵ See *id.* at 2349–50 (majority opinion) (acknowledging inflammatory partisan statements and "racially-tinged" video that prompted debate over mail-in voting but crediting the district court's findings that the legislative debate was sincere and rejecting the "cat's paw" theory offered by the court of appeals — which alleges that the true motivation for the law was not the state's cited reason — as having no application to a legislative body).

But whether any given time, place, and manner restrictions on the vote amount to direct heirs to the blatantly discriminatory laws Justice Kagan decried or instead legitimately channel a good-government impulse, the sides in *Brnovich* reflect two distinct perspectives on the polity — one that instinctively trusts states' efforts to police the polity's boundaries and another that prioritizes defining it expansively. This Term, the Court made clear that the good-government assumption reigns, regardless of historical context and practical effect. In this sense, the Court continues the line of thought it began in *Shelby County*, of downplaying the discriminatory effects of voting rules by divorcing the state laws under its consideration from any history of discrimination, concluding that the gravest threat to the polity is not the exclusion of voters historically discriminated against, but rather federal intervention that precludes states from designing their own election schemes.

Through its solicitude of Arizona's interests in *Brnovich*, the Court thus introduced a provocative conceptual or structural dimension into the case, choosing sides in the debate over who bears the responsibility to safeguard the democratic process. In his opinion for the Court, Justice Alito did more than rely on the antifraud rationale to uphold a state election law; to accommodate Arizona lawmakers' antifraud arguments, he read narrowly a major congressional statute — the crown jewel of the civil rights movement. The guideposts he established each enable courts to review state laws in the abstract as opposed to with a view to their effects in context.⁵⁶⁶ But the Court offered its reading, which the dissent treated as a gross and antidemocratic abrogation of Congress's grand objectives, as a means of actually disempowering courts — taking them out of the business of policing democratically elected state legislatures in their regulation of voting.⁵⁶⁷ The Court in

⁵⁶⁶ Justice Alito began by concluding that section 2(b)'s "results test" is violated only when elections are not "equally open," and then delineated five guideposts to determine when the "totality of circumstances," as required by the statute, establishes such a violation. *Id.* at 2336–41. The relevant factors include "the size of the burden imposed by a challenged rule," *id.* at 2338, the size of the disparities imposed on racial groups, *id.* at 2339, as well as other opportunities provided in the state's entire voting system, *id.*, all of which can be used to downplay the disparate impact of a law when a court determines that such a law poses only a trivial or "[m]ere inconvenience," *id.* at 2338. Also relevant in Justice Alito's formulation was the degree to which a voting rule "departs from what was standard practice" in 1982 when section 2 was enacted, *id.* at 2338, which has the effect of preventing the Court's analysis from evolving to take account of changed practice when determining if a new law violates the antidiscrimination purposes of the Act. In 1982, for example, the vast majority of voters were required to vote in person, see Olivia B. Waxman, *Voting by Mail Dates Back to America's Earlier Years. Here's How It's Changed Over the Years*, TIME (Sept. 28, 2020, 8:17 PM), <https://time.com/5892357/voting-by-mail-history> [<https://perma.cc/R353-KYNR>], but this fact does not mean that a law enacted in 2021 eliminating or prohibiting mail-in voting (and returning to a practice of in-person voting) doesn't have discriminatory intent or effect in a time when mail-in voting has become pervasive.

⁵⁶⁷ In her dissent, Justice Kagan offered the counternarrative — that the democratic principle behind the VRA is "not one of States' rights as against federal courts. The democratic principle it

Brnovich thus purported to defend democracy by giving back to local legislatures some of the power Congress gave to the courts.⁵⁶⁸ Similarly, in last Term's decision, *Rucho v. Common Cause*,⁵⁶⁹ the Court refused the invitation to police partisan gerrymandering — a decision decried by some as enabling gross dilutions of the right to vote⁵⁷⁰ but defended by others as removing the courts from inherently political processes to be worked out by Congress and the states, not the federal courts.⁵⁷¹

upholds is the right of every American, of every race, to have equal access to the ballot box.” *Brnovich*, 141 S. Ct. at 2366 (Kagan, J., dissenting).

⁵⁶⁸ Of course, it's not clear how far this solicitude for state decisionmaking will go. In pre-election cases this Term, some of the Justices showed willingness to curtail the efforts by state administrative officials and courts to adapt voting rules to the constraints of the COVID-19 pandemic, on the ground that changes to voting rules had to be made by state legislatures — a conclusion that the Justices believed justified the Court's intervention in the structures of state decisionmaking. *See, e.g.,* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1206–07 (2020) (holding that the Wisconsin district court had improperly altered election deadlines only five days before the state's spring election by allowing ballots mailed and postmarked after election day to be counted in election results); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (affirming Seventh Circuit stay of district court injunction that would have altered mail-in voting deadlines in Wisconsin for the 2020 election); Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of certiorari) (contending that the case was of national importance and noting that “[w]e are fortunate that the Pennsylvania Supreme Court's decision to change the receipt deadline for mail-in ballots does not appear to have changed the outcome in any federal election. . . . But we may not be so lucky in the future”); *id.* at 739 (Alito, J., dissenting from denial of certiorari) (expressing concern about the state supreme court's ability to override even “very specific and unambiguous rules” passed by the state legislature, which the Pennsylvania court had done to extend the mail-in ballot deadline in the context of COVID-19, citing the state constitution's provision that elections shall be “free and equal”). *But see* Republican Party of Pa. v. Boockvar, 141 S. Ct. 643 (2020) (mem.) (declining to review state courts' decisions to alter mail-in voting deadlines and procedures in Pennsylvania). These cases may ultimately be laying groundwork for a robust use of the “independent state legislature” doctrine in the next election, grounded in the provisions of the Constitution that authorize state legislatures to determine the time, place, and manner of elections. This doctrine would enable partisan officials, and perhaps even the Justices, to resist and invalidate election-time adjustments made to voting practices either by state administrative officials or courts, on the ground that the legislature is supreme over these matters. Such a conflict might even result in a state legislature invalidating the outcome of the vote in a presidential election and selecting its own slate of electors. For an account of this doctrine's development, see Richard L. Hasen, *Trump Is Planning a Much More Respectable Coup Next Time*, SLATE (Aug. 5, 2021, 11:48 AM), <https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html> [<https://perma.cc/5SBB-SJ7Y>] (noting that Justices Thomas, Alito, Gorsuch, and Kavanaugh each expressed openness to this argument at some stage during the election of 2020). *See also* Richard H. Pildes, *The Constitutional Emergency Powers of Federal Courts* (N.Y.U. Sch. of L. Pub. L. Working Paper No. 20-59, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629356 [<https://perma.cc/578B-SUKY>] (studying the judiciary's affirmative role in developing state voting and elections policies during the COVID-19 crisis).

⁵⁶⁹ 139 S. Ct. 2484 (2019).

⁵⁷⁰ Charles & Fuentes-Rohwer, *supra* note 562, at 267.

⁵⁷¹ *See, e.g.,* Ken Klukowski, *Gerrymandering Symposium: Janus-like Judicial Restraint in Political Gerrymanders and the Census*, SCOTUSBLOG (June 28, 2019, 4:38 PM), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-janus-like-judicial-restraint-in-political-gerrymanders-and-the-census> [<https://perma.cc/9VWV-SNDK>]; Andrew Pinson, *Gerrymandering*

Brnovich ultimately represents another turn in what Professor Michael Klarman documents in last year's Foreword in arresting detail⁵⁷² — a further vindication by the Court of the good faith of state lawmakers operating in good-government mode and a deepening of the Court's skepticism of the need for federal intervention (by Congress or the courts) to protect the democratic process and voters themselves from racial discrimination. There is a certain irony in this perspective, not only because the Court asserts significant interpretive authority in order to disempower courts, but also because in *Shelby County* the Court effectively invalidated the preclearance process — the other, *political* mechanism Congress had created to empower a coordinate *political* branch to supervise state election laws. But the Court's decision in *Brnovich* is nonetheless likely to achieve its purported, prospective objective of reducing the courts' involvement in the oversight of elections by narrowing the universe of cognizable disparate impact claims against state regulations.

The Court's bottom-line conclusions about the particular Arizona laws at issue may well have been correct; recall the letter submitted by the Biden Administration to the Court agreeing with its predecessor that the state laws did not violate the Voting Rights Act but emphasizing that it would apply a distinct (presumably more plaintiff-friendly) doctrinal test to section 2 claims more generally.⁵⁷³ But in the process of reaching its conclusions, the Court continued down the path it opened in *Shelby County* by disconnecting the Voting Rights Act from its history and narrowing its reach,⁵⁷⁴ making it less likely that the law will be of use in combatting far more serious threats to democracy now emerging from state legislatures.⁵⁷⁵

Symposium: Time to Find Someone Else to Solve Partisan Gerrymandering, SCOTUSBLOG (June 28, 2019, 4:09 PM), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-time-to-find-someone-else-to-solve-partisan-gerrymandering> [https://perma.cc/7JM4-ZYEH].

⁵⁷² Klarman, *supra* note 339, at 190–95.

⁵⁷³ See Letter from Edwin S. Kneidler, *supra* note 102.

⁵⁷⁴ Scholars of voting rights have emphasized that the Court did not necessarily reach the wrong result but that it did reach well beyond what was required to resolve the case in an opinion that repudiates the core aims of the Voting Rights Act and evinces more of an interest in enabling states to enact laws that prevent “undue intrusions” from voters of color than in protecting voters of color from discrimination by states. See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse than People Think*, THE ATLANTIC (July 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330> [https://perma.cc/9ESL-6DS8].

⁵⁷⁵ The Court's decision in *Rucho*, by effectively removing the federal courts from the policing of even extreme partisan gerrymandering, prompted a similar response by some election law experts. See, e.g., Thomas Wolf, *Gerrymandering Symposium: Supreme Court Confirms that It Will Not Save Our Maps, Only Voters Can*, SCOTUSBLOG (June 28, 2019, 3:08 PM), <https://www.scotusblog.com/2019/06/gerrymandering-symposium-supreme-court-confirms-that-it-will-not-save-our-maps-only-voters-can> [https://perma.cc/M6BR-PQD2] (criticizing the Court's decision to walk away from partisan gerrymandering but calling for a renewed focus on voter- and legislator-led

And those threats appear to be extraordinarily serious. The reaction in Republican-run states to the results of the 2020 election thus far has been to rescind measures that once made voting more accessible or to erect new hurdles to the franchise.⁵⁷⁶ States have curtailed early voting, adopted measures that would exacerbate the stress associated with waiting in line to vote, eliminated policies that ease registration and therefore facilitate expansion of the voting population, and even authorized state legislatures to overturn county election counts.⁵⁷⁷ This last measure arguably reflects the most existential threat of all, as it empowers partisan lawmakers to countermand the counted will of the voters based on fear of fraud, which the 2020 election underscored has become more an article of partisan faith than an empirical reality in the world.⁵⁷⁸ Many of these laws likely transcend the tools the courts have to prevent threats to the democratic process, should they even choose to use them.⁵⁷⁹

reform efforts, such as independent redistricting commissions, mapmaking criteria reform, transparency, and public participation).

⁵⁷⁶ Between January and mid-July 2021, more than 400 bills were introduced in forty-nine states to regulate and restrict the voting process. *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> [https://perma.cc/T43R-U3VS]. More important, eighteen states enacted thirty laws that would make voting more difficult, including by imposing stricter identification requirements and limiting early and mail voting. *Id.* In the words of Georgia voting rights activist and former and potentially future political candidate Stacey Abrams, the Republicans in her state are threatening democracy through “user error.” Debbie Elliott, *Stacey Abrams Spearheads Campaign Against Alleged Voter Suppression*, NPR (Feb. 20, 2020, 5:02 AM), <https://www.npr.org/2020/02/20/807665148/stacey-abrams-spearheads-campaign-against-voter-suppression> [https://perma.cc/R7GD-UFVM]; see also Ronald Brownstein, *Democracy Is Already Dying in the States*, THE ATLANTIC (June 11, 2021), <https://www.theatlantic.com/politics/archive/2021/06/manchin-republicans-bipartisan/619167> [https://perma.cc/RK7D-Q2LR]. Many such measures predate the 2020 election, and at least one particularly notable case out of North Carolina led the Fourth Circuit to strike rules down as discriminatory because of the way they surgically identified and then shut down the means by which Black voters went to the polls. See *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214–15, 226, 235 (4th Cir. 2016) (enjoining all challenged provisions of North Carolina’s voting law, holding that five of its provisions disproportionately affected African American voters, and citing “smoking gun” evidence of discriminatory intent, *id.* at 226, including that legislators requested racially disaggregated data on the usage of the voting methods ultimately targeted by the law).

⁵⁷⁷ Georgia House Bill 531 is regarded as the most draconian of these laws to date. It creates a voter-identification requirement for absentee ballots, limits the number of early voting drop-off boxes, and reduces early voting days during the weekend prior to an election (allowing for just one Sunday for early voting). See H.R. 531, 156th Gen. Assemb., Reg. Sess. (Ga. 2021). Even before the pandemic, Georgia permitted widespread in-person early voting and nonexcuse absentee voting without identification. See GA. CODE ANN. § 21-2-385 (West 2021). The law also enacts criminal penalties for individuals who hand out food or drink to voters standing in lines — lines that disproportionately affect voters of color in Georgia. See Ga. H.R. 531 § 15.

⁵⁷⁸ Jim Rutenberg, Nick Corasaniti & Alan Feuer, *Trump’s Fraud Claims Died in Court, But the Myth of Stolen Elections Lives On*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [https://perma.cc/KU97-XV6L].

⁵⁷⁹ Cf. *supra* note 568 (discussing the specter of the independent state legislature doctrine that could be invoked to justify efforts by state legislatures to countermand the results of a popular vote count in selecting its presidential electors). As of this writing, efforts by the Biden Administration

Again, the Supreme Court may have helped enable these sorts of developments; perhaps some of the extreme and generally applicable limits now being placed on voting by state legislatures would have been precluded from going into effect by the Department of Justice under the section 5 preclearance process that the Court rendered a dead letter in *Shelby County*. But it is neither necessary to establish this empirical premise, nor is it necessary to show that these emergent state laws target nonwhite voters, who are far more likely to vote for Democrats than Republicans, to see the threat the laws pose. Developments throughout Republican-leaning states, in particular, signal the deep erosion of a political norm without which a representative democracy withers — acceptance of disappointing election outcomes and a recommitment to persuading voters through advocacy and effective government the next time around.⁵⁸⁰ Without such a predisposition, a radically diverse country like the United States loses hold of the concept of the public interest, and those with power become tempted to structure the system in order to permanently outcast voters and points of view. Indeed, these developments all reveal an increasingly riven political culture in which representatives of one of the two major parties and many of its voters harbor great hostility to the very ideas of power sharing and protest, two

and congressional Democrats to enact sweeping voting rights reform have failed. At least two different proposed bills would preempt or address some of these sorts of restrictions on registration and voting. H.R. 1, also known as the For the People Act, would enact far-reaching reform, including provisions that would require states to offer fifteen days of early voting, provide universal access to mail-in voting and same-day registration for federal races, and make election day a national holiday. For the People Act of 2021, H.R. 1, 117th Cong. §§ 1611, 1621, 1909 (2021). The bill also contains provisions to address campaign finance and to deter and reduce corruption in government. *Id.* divs. B–C. The John Lewis Voting Rights Advancement Act would restore the protections of the Voting Rights Act that have eroded or been invalidated, including by adopting a new coverage formula for section 5 preclearance — the formula invalidated as antiquated by the Supreme Court in *Shelby County*. See John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. § 5 (2020). But should such a congressional miracle even occur, it seems likely that litigation challenging the authority of Congress to regulate state practices would ensue, leaving the Court, again, in the position to meaningfully define the parameters of democracy by choosing state sovereignty over a federal partnership between Congress and the courts. For a skeptical take on how the Supreme Court would receive new federal voting legislation, see AARON BELKIN, TAKE BACK THE CT., SUPREME COURT WOULD LIKELY INVALIDATE H.R. 1 (2020), <https://static1.squarespace.com/static/5ce33e8da6bbe0001ea9543/t/5f61650a91030a588e451c88/1600218382757/Supreme+Court+Would+Likely+Invalidate+H.R.1.pdf> [<https://perma.cc/RA49-WJDF>].

⁵⁸⁰ See Alexa Corse, *Arizona Republicans Push Forward with Audit of 2020 Ballots*, WALL ST. J. (Apr. 27, 2021, 9:01 AM), <https://www.wsj.com/articles/arizona-republicans-push-forward-with-audit-of-2020-ballots-11610528402> [<https://perma.cc/RZR2-KVGG>] (discussing the 2020 election audit commissioned by the Republican-controlled Senate of Arizona, despite prior audits having confirmed Biden's victory in the state); Adam Liptak, *Supreme Court Rejects Texas Suit Seeking to Subvert Election*, N.Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html> [<https://perma.cc/A8AL-FRLY>] (highlighting Texas's attempt to throw out election results in four battleground states lost by President Trump).

lifebloods of democracy. These developments tear the mask off the antifraud justification and substitute it with the clear-eyed and brazen antidemocratic premise that changes in voting rules disadvantaging and even locking out one's opponents are justified — a view that a recent public opinion poll suggests is prevalent among Republican respondents, in particular.⁵⁸¹

The us/them mentality reflected in these hyperpartisan voting laws has always been a part of American political culture, of course, and it also has shaped much of American history. Perhaps it should not be surprising, then, that another classic us/them dichotomy — between immigrants and citizens — has also helped define the present moment. As with contemporary conflicts over the scope of the franchise, the debates over immigration policy reflect deep disagreement about who constitutes the legitimate polity. The highly visible and even acrimonious back-and-forth across recent presidential administrations concerning immigration policy contains within it a battle over the public conception of the nation's history and identity. Recent immigration debates also have reflected disagreement about two of the same questions behind debates concerning voting regulation: Who is legitimately part of the polity and how can law and policy be shaped to ensure that the right constituencies maintain their power? With what tools, legal rules, and presumptions will we define the polity — through an attitude of growth and inclusion or suspicion and rectitude?

The legal questions associated with the definition of the polity, courtesy of the Trump Administration's immigration restrictionism, have found their way to the Court in recent years. Because 2020 was a year

⁵⁸¹ In a May 2021 CBS News YouGov poll, forty-seven percent of Republicans surveyed affirmed that the Republican Party should focus on changing voting rules rather than on expanding its voting base through messaging and advocacy. Anthony Salvanto, Fred Backus & Jennifer De Pinto, *Republicans Weigh in on Liz Cheney and Direction of GOP*, CBS NEWS (May 16, 2021, 10:30 AM), <https://www.cbsnews.com/news/republicans-liz-cheney-opinion-poll> [<https://perma.cc/RQ2H-8YBP>]. In a powerful statement warning of the threat these developments present, a group of political scientists and scholars of the democratic process write:

[W]e have watched with deep concern as Republican-led state legislatures across the country have in recent months proposed or implemented what we consider radical changes to core electoral procedures in response to unproven and intentionally destructive allegations of a stolen election. Collectively, these initiatives are transforming several states into political systems that no longer meet the minimum conditions for free and fair elections.

Hence, our entire democracy is now at risk.

John Aldrich et al., *Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AM. (June 1, 2021), <https://www.newamerica.org/political-reform/statements/statement-of-concern> [<https://perma.cc/7AKM-R48M>]; see also Alexandra Villareal, *Texans March on Capitol to Protect Voting Rights — Will Washington Listen?*, THE GUARDIAN (Aug. 2, 2021, 11:10 AM) <https://www.theguardian.com/us-news/2021/aug/02/texans-march-state-capitol-voting-rights-washington-biden-beto-castro> [<https://perma.cc/PZ8W-9GNY>] (describing agonized protest in Texas over state laws that would heavily bias the system against Democratic voters).

of the constitutionally required decennial census,⁵⁸² the fundamental question of who counts was at issue in an especially direct way. Last Term, as discussed in Part III, the Court rebuffed the Trump Administration's extreme cynicism in its effort to use the census to identify noncitizens among the extant population (the census has always been understood as requiring the counting of the population, not the citizenry), declaring that its stated justification to enforce the Voting Rights Act was not only pretextual, but actually also incredible.⁵⁸³ Indeed, not only had the Administration shown little to no interest in enforcing the Voting Rights Act, but the record in that case also suggests that the Administration's real intention in adding the citizenship question was to depress the count of noncitizens and Latinos in an effort to better entrench the Republican Party by diminishing representation from jurisdictions with larger immigrant populations, which are more likely to skew Democratic.⁵⁸⁴

Once rebuffed by the Court with respect to the census count, the Trump Administration shifted course and developed a plan to discount unauthorized immigrants from the population tallies used to determine apportionment for the House of Representatives.⁵⁸⁵ Twenty-two state attorneys general and the Attorney General for the District of Columbia (led by New York's Solicitor General Barbara Underwood), fifteen cities, the United States Conference of Mayors, and multiple private parties including the ACLU filed suit.⁵⁸⁶ After the district court in the Southern District of New York ruled against the government, finding that the Executive exceeded its authority on statutory grounds without

⁵⁸² *Census in the Constitution*, U.S. CENSUS BUREAU (Mar. 30, 2020), <https://www.census.gov/programs-surveys/decennial-census/about/census-constitution.html> [<https://perma.cc/GT9V-WZXQ>].

⁵⁸³ *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574–75 (2019) (listing as reasons to doubt the Administration's justifications the evidence that the Secretary of Commerce entered office in search of a justification for a citizenship question and solicited support from various agencies before engineering a voting rights rationale).

⁵⁸⁴ During the litigation, a memo written by a Republican strategist expressing these sorts of motivations surfaced. See Letter of Respondents N.Y. Immigration Coalition, et al. Notifying Court of New Proceedings in the District Court, Exhibit 1 at *1, *Dep't of Com.*, 139 S. Ct. 2551 (No. 18-966); Plaintiffs' Letter Motion for an Order to Show Cause, Exhibit D at *7, *9, *New York v. Dep't of Com.*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019) (No. 18-cv-02921) (presenting the case that a citizenship question on the census would be "advantageous to Republicans and Non-Hispanic Whites," *id.* at *9, and "clearly" disadvantageous "for the Democrats," *id.* at *7).

⁵⁸⁵ Memorandum on Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 48 Fed. Reg. 44,679, 44,680 (July 21, 2020) ("For the purpose of the reapportionment of Representatives following the 2020 census, it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status under the Immigration and Nationality Act, as amended (8 U.S.C. § 1101 *et seq.*), to the maximum extent feasible and consistent with the discretion delegated to the executive branch.").

⁵⁸⁶ *New York v. Trump*, 485 F. Supp. 3d 422, 432, 434 (S.D.N.Y. 2020); see also Nina Totenberg & Hansi Lo Wang, *Supreme Court Punts Census Case, Giving Trump an Iffy Chance to Alter Numbers*, NPR (Dec. 18, 2020, 10:16 AM), <https://www.npr.org/2020/12/18/946875796/supreme-court-punts-in-census-case-says-its-premature-to-decide-the-issue> [<https://perma.cc/NP8V-DX56>].

reaching the constitutional issue,⁵⁸⁷ the Administration requested expedited review from the Supreme Court.⁵⁸⁸

In *Trump v. New York*,⁵⁸⁹ the Supreme Court held that the issue was not ripe for consideration because the case was “riddled with contingencies and speculation,”⁵⁹⁰ including about whether the government would have to rely on estimates to count the unauthorized population — a forbidden statistical practice.⁵⁹¹ At the time of decision, the Census Bureau had not actually provided the Executive with census numbers necessary to carry out the challenged action of excluding unauthorized immigrants.⁵⁹² In a dissent joined by Justices Kagan and Sotomayor, Justice Breyer emphasized that federal law required the apportionment base to include “the whole number of persons in each state,”⁵⁹³ and that “[t]he usual meaning of ‘persons,’ of course, includes aliens without lawful status.”⁵⁹⁴ Justice Breyer concluded that the move in 1929 to remove discretion from the counting of the population, “all things considered, . . . has served us fairly well. Departing from the text is an open invitation to use discretion to increase an electoral advantage.”⁵⁹⁵ But although the Court itself did not reach these questions, the Trump Administration simply ran out of time to manipulate the count, and President Biden quickly rescinded the relevant orders and returned to the longstanding practice of counting the entirety of the population to take the measure of the polity.⁵⁹⁶

⁵⁸⁷ *New York v. Trump*, 485 F. Supp. 3d at 435.

⁵⁸⁸ Motion for Expedited Consideration of the Jurisdictional Statement and for Expedition of Any Plenary Consideration of This Appeal if Appellants’ Forthcoming Motion to Stay the Judgment Is Not Granted at 1, *Trump v. New York*, 141 S. Ct. 530 (2020) (No. 20-366).

⁵⁸⁹ 141 S. Ct. 530.

⁵⁹⁰ *Id.* at 535.

⁵⁹¹ *Id.* at 535–36. As a technical matter, the Court vacated and remanded the district court’s opinion, directing the lower court to dismiss for lack of jurisdiction. *Id.* at 537.

⁵⁹² *See id.* at 535.

⁵⁹³ *Id.* at 540 (Breyer, J., dissenting) (quoting 2 U.S.C. § 2a(a)).

⁵⁹⁴ *Id.* at 542.

⁵⁹⁵ *Id.* at 547.

⁵⁹⁶ While *Trump v. New York* was pending, the Executive strategized on various ways to fulfill the Memorandum’s purpose of excluding undocumented immigrants from the census. *See* CENSUS BUREAU, U.S. DEP’T OF COM., BRIEFING MATERIALS FOR SECRETARY ROSS ON THE STATUS OF DATA ACQUISITION AND OPTIONS FOR ESTIMATING THE ILLEGAL POPULATION ENUMERATED IN THE 2020 CENSUS (2020), <https://campaignlegal.org/sites/default/files/2021-05/CTRL0000017369.0001%20NUL%20Production-%20Clean%20Version.pdf> [<https://perma.cc/25Z7-EWPC>]. According to an internal memorandum, Secretary of Commerce Wilbur Ross had three options, the enumeration of which underscores the haphazard and unreliable approach that would have been required to make good on the President’s promise: count the number of people held in ICE detention, *id.* at 2; “match administrative records to the 2020 census,” *id.* (capitalization omitted); and “use an aggregate residual method to estimate the number of illegal immigrants by state,” *id.* at 3 (capitalization omitted). President Biden ultimately reversed the directive along with a similar one attempting to collect citizenship information from administrative records. Ensuring

The census saga thus underscores the extent to which the Republican Party has come to see its electoral interests as aligned with immigration restrictionism and efforts to either prevent or sideline demographic change in the definition of who counts — interests also served and reinforced by various forms of racial resentment. In recent work, Professors Desmond King and Rogers Smith scrutinize the whole of President Trump’s immigration proclamations and speeches and label them “white protectionism”⁵⁹⁷ — a campaign to subordinate the agents of demographic change by portraying whites as victims of that change.⁵⁹⁸ In the form of Donald Trump, immigration exclusion became constitutive for the Republican Party.⁵⁹⁹ Professors Paul Pierson and Jacob Hacker argue that immigration operates as a classic wedge issue vital to the survival of the Republican Party, which has learned to throw visceral symbolism to a working-class population to distract those base voters from its tax, regulatory, and corporate policies that deepen and even embrace the widening wealth gap in our society.⁶⁰⁰ This sort of demographic politics echoes notable efforts in the American past to set the polity in place through counting, such as with the decision by Congress in the 1920s to link immigration quotas to the size of each nationality’s population in the 1890 rather than the 1910 census, to maintain an ethnic composition of the country more in keeping with the northern European preferences of the lawmakers of the day.⁶⁰¹ The protectionist predilections of today’s Republican Party thus weave

a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census, Exec. Order No. 13,986, 86 Fed. Reg. 7015, 7016 (Jan. 20, 2021).

⁵⁹⁷ Rogers M. Smith & Desmond King, *White Protectionism in America*, 19 PERSPS. ON POL. 460, 460 (2021).

⁵⁹⁸ *Id.* at 461. A concerted immigration enforcement policy need not traffic in or be linked to racist or nativistic assumptions, but numerous Trump actions seemed to convey distrust of foreigners and disdain for their humanity, including the travel ban and the President’s TPS rescissions, *see id.* at 469, and the family-separation policy authorized by the highest levels of the Department of Justice, *see id.* at 466.

⁵⁹⁹ A recent survey by the Pew Research Center notes the evolution of Republican and Democratic attitudes on immigration from more even support and opposition to a lopsided picture, with a majority of Republicans neutral or opposed to increasing legal immigration and a majority of Democrats neutral or in favor. PEW RSCH. CTR., SHIFTING PUBLIC VIEWS ON LEGAL IMMIGRATION INTO THE U.S. 2 (2018), <https://www.pewresearch.org/politics/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s> [<https://perma.cc/Q9YF-NMYW>].

⁶⁰⁰ JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS 163 (2020).

⁶⁰¹ *See* Immigration Act of 1924, Pub. L. 68-139, § 11(a), 43 Stat. 153, 159. For an account of this restrictionist moment that links it to the entrenchment of Jim Crow segregation and the underside of Progressive Era politics, *see* DESMOND KING, MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY 4–5 (2000) (showing that, in the 1920s, America chose “[t]he ethnically and racially restrictionist path . . . , an option that narrowed, in the short term, the United States’s conception of membership” and arguing that “the immigration decisions taken in the 1920s combined with the prevailing discriminatory segregationist regime toward African Americans presented a polity insensitive or, indeed, hostile to diversity,” *id.* at 5).

together with numerous strands of U.S. history, which has been meaningfully defined by efforts to shape and manipulate the legitimate body politic through racial definition, exclusion, and subordination.⁶⁰²

The Trump era's immigration enforcement maximalism fit well within this tradition, and it depended upon a century-long history of state building that created a massive administrative apparatus to effectuate and enforce the rules adopted to police the polity's outer bounds.⁶⁰³ This maximalism exploited familiar rule-of-law rhetoric that reifies compliance with rules, emphasizing that immigrants must follow the law and that the Executive has the duty to enforce it, wherever it has been breached. These arguments are not uniquely Republican, of course; President Clinton was responsible for signing several laws in 1996 that only further instantiated the enforcement logic in the immigration laws,⁶⁰⁴ and President Obama famously framed his immigration policy as targeting "[f]elons, not families[,] [c]riminals, not children."⁶⁰⁵ The Court itself has been a leading expositor of this particular, compliance-based conception of the rule of law, too.⁶⁰⁶ But as Smith and King

⁶⁰² The historiography that supports this sort of observation is vast. For a classic and comprehensive work, see ROGERS SMITH, *CIVIC IDEALS* (1997) (tracing with stunning breadth the history of how citizenship has been constituted in the United States, through competition between liberal, aspirational ideals of inclusion and a project of nation building predicated on the existence of a chosen people, master race, or superior culture — the persistence of white supremacy). See also HIDETAKA HIROTA, *EXPELLING THE POOR* 102–03 (2017); BETH LEW-WILLIAMS, *THE CHINESE MUST GO* 20 (2018) (describing American exclusion and exploitation of Chinese people in the mid-nineteenth century); MAE M. NGAI, *IMPOSSIBLE SUBJECTS* 23 (2004) ("[T]he Immigration Act of 1924 constructed a vision of the American nation that embodied certain hierarchies of race and nationality."); KUNAL M. PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000*, at 4 (2015) ("Americans have named and treated as foreigners not only those from outside the country's borders, but also those in their very midst. The history of immigration and citizenship law thus encompasses two intimately conjoined histories: that of the country's absorption and rejection of those from *beyond* its limits and that of its simultaneous efforts to render foreign those *within* its limits."); Mae M. Ngai, *The Chinese Question*, in *A GLOBAL HISTORY OF GOLD RUSHES* 109, 113 (Benjamin Mountford & Stephen Tuffnell eds., 2018) (describing American promotion of racist tropes to facilitate the exploitation of Chinese labor).

⁶⁰³ Cox and I trace the rise of this deportation state through the interaction over time of legal rules, the development of state capacity, and demographic change. See COX & RODRÍGUEZ, *supra* note 58, at 79–132; see also ADAM GOODMAN, *THE DEPORTATION MACHINE: AMERICA'S LONG HISTORY OF EXPELLING IMMIGRANTS* 2 (2020) (describing how immigration authorities "have used the machine's three expulsion mechanisms — formal deportation, voluntary departure, and self-deportation — to exert tremendous control over people's lives by determining who can enter the country and regulating who the state allows to remain").

⁶⁰⁴ For an account of these laws, see COX & RODRÍGUEZ, *supra* note 58, at 140.

⁶⁰⁵ Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-President-address-nation-immigration> [<https://perma.cc/N57T-AD3W>].

⁶⁰⁶ The Court's turn toward an enforcement-oriented conception of the rule of law has been marked in recent years. Elsewhere I link recent decisions, such as *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (expedited removal); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (the Trump Administration's travel ban); and *Jennings v. Rodriguez*, 138 S. Ct. 830

show, the immigration politics and policy of the Trump era embody American ascriptive traditions.⁶⁰⁷

This association of the rule-of-law conception of immigration policy with President Trump's maximalism and racialism ultimately may have helped displace the rule-of-law framing from the center of the progressive stance in the immigration debate; President Trump's own explicit connection between immigration enforcement and a particular white and Christian conception of the nation has discredited the rule-of-law argument.⁶⁰⁸ Taken together, the executive orders, legal arguments, and policy positions that have emanated from the Biden Administration on immigration signal a decisive repudiation of the politics of resentment and exclusion. What is more, read in their best light, they also begin to offer an alternative vision to the one that has united both political parties for decades, one that consistently has linked rule-of-law exhortations to any measures that would expand the scope of immigrant protection and inclusion, if the latter is to be pursued at all. The Biden orders offer instead an affirmative conception of immigration that foregrounds concepts of protection and expansion.

There is, of course, much arrayed against this inclusive conception, including the government's own interests in presenting an image of being in control, and in managing an enormously complex human and legal drama on the ground — institutional considerations that the Biden Administration almost certainly would not abandon, even if it could. Indeed, the totality of the Biden Administration's immigration policies are likely to disappoint advocates, scholars, and lawmakers who wish to see a more open and inclusive regime. The conventional politics of fear and chaos that exploit pressures on the southern border, for exam-

(2018) (mandatory detention), to demonstrate this point. Rodríguez, *supra* note 383 (manuscript at 13–18). In fact, in this context, a Court that is otherwise suspicious of state power seems to relish its exercise. *Thuraissigiam* in particular marked a shocking departure from basic habeas law and a threat to one of the crucial elements of a legitimate rule-of-law regime — the protection and valuation of due process. *See id.*

⁶⁰⁷ Litigants challenging Trump-era immigration policies attempted to bring equal protection or antidiscrimination arguments against them, citing their motivation by racial and religious exclusion, but met with little success. *See, e.g.,* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020) (rejecting equal protection challenge to DACA rescission as lacking any support); *Trump v. Hawaii*, 138 S. Ct. at 2421 (rejecting claim that President Trump's travel ban was motivated by antireligious sentiment and citing instead the plausible national security basis for the order). The fact that the Trump Administration was much more often rebuffed on administrative law and thus good-government grounds highlights how difficult it can be to consolidate recognizable and broad political exploitation of racialized thinking into cognizable legal claims.

⁶⁰⁸ *See* Cristina M. Rodríguez, *Closing the Nation's Doors*, DEMOCRACY J. (Oct. 2020), <https://democracyjournal.org/magazine/specialissue/closing-the-nations-doors> [<https://perma.cc/W7D2-RSWK>] (arguing that Trump-era immigration policy was motivated in part by the desire to shrink the polity and entailed a departure from various norms of democracy, including by advancing a racialized conception of democracy).

ple, initially scuttled President Biden's plan to revitalize the refugee resettlement program that the Trump Administration had decimated.⁶⁰⁹ In other words, even an inclusive administration will come up against institutional pressures and political dynamics constructed over a century.⁶¹⁰

But there is also high symbolism in many of the reversals of the Trump policies and legal positions. The rulemakings directed by executive order, in particular, will prod agencies to work within the law's parameters to expand the concept of protection. The administrative action that will replace the policies and legal positions of the prior regime will push around the edges of the polity and offer an alternative conception of it. The decision to abandon President Trump's border wall construction encapsulates this shift. Emblematic, too, is a recent change in U.S. Department of State policy announced in May 2021 that offers a modest but poignant encapsulation of the turn to inclusion. The Department established that it would now recognize birthright citizenship for children born abroad to married parents, as long as the child has a genetic or gestational tie to at least one of the parents and at least one of the parents is a U.S. citizen, whereas previously it had required the genetic or gestational relationship to be with the U.S. citizen parent.⁶¹¹ This change makes it easier for same-sex couples and married couples who have children through assisted reproduction to pass citizenship onto their children born abroad, offering a vision of a polity evolving and expanding to meet the moment.

There is, of course, an important sense in which the immigration debate differs from the battles over voting rights. Whereas the latter concern how best to ensure the representation of those whose equal citizenship has been established formally, constitutionally, and through ongoing political struggle, genuine academic and political debate about how to add new members to the polity through immigration and naturalization cannot be avoided — a debate that arguably has a more complex moral underpinning than the questions associated with securing voting rights, where ensuring that all citizens' rights to vote are protected has an unassailable status. Contemporary political theorists, for example, link control of the outer edges of the polity to the act of self-government, to the fundamental and inescapable identity of the nation-state itself, and to the promotion of solidarity within a democratic

⁶⁰⁹ Kanno-Youngs & Jordan, *supra* note 199.

⁶¹⁰ See COX & RODRÍGUEZ, *supra* note 58, at 162–90 (demonstrating how difficult moving the immigration bureaucracy can be despite political will to shift enforcement policy toward emphasis on relief, using DACA as a case study).

⁶¹¹ Press Release, U.S. Dep't of State, U.S. Citizenship Transmission and Assisted Reproductive Technology (May 18, 2021), <https://www.state.gov/u-s-citizenship-transmission-and-assisted-reproductive-technology> [https://perma.cc/WG8T-JJFV].

society.⁶¹² And some commentators even link the nation's ability to sustain a common American purpose in these hyperpartisan times to restricting immigration, even dramatically.⁶¹³

Unlike the white protectionism that runs throughout American history, these justifications for immigration restriction are worthy of debate, and it is vital that we confront honestly the complex relationships among large-scale economic immigration, inequality, political and social solidarity, and the sustainability of a social welfare state. Some scholars have pointed to troubling connections among high levels of immigration, wealth inequalities, and political polarization, linking the present moment to the last Gilded Age of the early twentieth century when each of these phenomena also defined American political and social life.⁶¹⁴ The connections drawn between large-scale immigration and inequality, in particular, demand interrogation and untangling. I will not attempt to resolve these matters here. But addressing these hard questions need not foreclose a humanitarian immigration policy nor require sustaining a massive deportation state to police and expel those already present.⁶¹⁵ And these immigration debates do resemble the democracy ones in the sense that they are about fundamental fairness for millions of people who already have a clear stake in the future of the country and therefore a stake in the legal and political regimes that will come to define it.

CONCLUSION

October Term 2020 was one of transition for the U.S. government. It coincided with the prospect of what I have called regime change — the advent of a new presidential administration that brings with it constitutional, interpretive, philosophical, and policy commitments distinct from those held by its predecessor and that taken together promise a

⁶¹² See SARAH SONG, *IMMIGRATION AND DEMOCRACY* 67–68 (2018); Michael Blake, *Immigration, Jurisdiction, and Exclusion*, 41 *PHIL. & PUB. AFFS.* 103, 104–15 (2013). But see ILYA SOMIN, *FREE TO MOVE* 91 (2020) (rejecting “collective rights and individual rights theories of self-determination that justify exclusion”).

⁶¹³ See DAVID FRUM, *TRUMPOLYPSE* 143 (2020) (arguing that to promote social and political solidarity, the United States must dramatically contract immigration to restore social trust and bonds).

⁶¹⁴ See BALKIN, *supra* note 45, at 35–37 (contending that pressure for economic redistribution decreases as immigrants, who are generally less well off than average citizens, make average voters feel like they are comparatively better off); see also NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 15 (2d ed. 2016) (linking polarization to wealth inequality, which in turn relates, historically and in our present moment, to high rates of immigration).

⁶¹⁵ One way of framing the arc of the last century is by understanding the civil rights revolution and the inclusive immigration policy that accompanied it as the integrative response required by our constitutional principles. See KING, *supra* note 601, at 5 (noting that the intertwined immigrant and racial exclusion laws and practices of the 1920s were subsumed by the civil rights ethos of the midcentury: “[T]hirty years later, these restrictions were powerfully challenged and displaced, and a politics based on the demand for equal rights was initiated.”).

transformation of areas of law and policy, and possibly even public opinion. Those distinctions appeared immediately at the Supreme Court, in the form of the government's numerous changed legal positions in pending cases, signaling how legal interpretation can help bring into being political and policy change. Throughout the executive branch, too, the new regime's distinct jurisprudential commitments changed the government's understanding of what was both legally required and legally possible. The government's changed litigating positions were thus matched by a much broader set of legal and political ambitions, announced through a series of executive orders and policy memoranda that articulated a distinct philosophy of government and set into motion reform processes across the administrative state designed to bring that philosophy into actual being.

Throughout this Foreword, I have defended these various assertions of power as legitimate and necessary on the ground that they are the vehicles by which politics and electoral outcomes become concrete — by being woven into administrative governance. Democratic self-government, I have argued, requires this connection between what happens in the political sphere and the everyday work of government. This connection, in turn, requires the concerted assertion of high-level political will. But far from making just an argument for presidential control, I have sought to demonstrate how this assertion can and should happen diffusely through the exercise of political and legal judgment by myriad officials connected through networks to the new political regime itself, as well as to its allies and supporters in the broader political world and body politic.

The fact that the Supreme Court mostly disagreed with the new Administration's changed legal positions points us to a second important dynamic highlighted by this Term. Though some of those disagreements were unanimous, others underscored that the Court itself has undergone its own transformation as dramatized by the addition of a new Justice days before the election. This juxtaposition underscores that we are in a moment of regime conflict; the Court's composition has and will predictably continue to generate outcomes at odds with the commitments of the political branches as currently constituted, heightening frustration in some quarters with the Court's role in our system of government.

For the purposes of this Foreword, the most important source of this conflict to highlight has been the distinct conceptions of the state — its formal authority and its utility — held by a skeptical Court on the one hand and a pro-government administration on the other. A series of recent doctrinal developments arguably have made politically driven change within government harder. Some of these developments may be laudable, such as the insistence that a change in the government's legal or policy position reflect reasoned decisionmaking rather than the mere assertion of power. But though this expectation is neither bad nor ide-

ologically determined on its face, its failure to acknowledge shifts in political preferences as legitimate bases for change privileges the status quo and makes executive governance more difficult. And it dovetails with another jurisprudential development evident this Term, too: skepticism of longstanding doctrines of deference that enable the political evolution of the law — a skepticism based in part on a view that the law has a fixed meaning to be determined through judicial interpretation.

Courts are hardly the only obstacle to legal and policy transformation, of course. I have focused on their role in mediating and even thwarting political change not only because of the occasion for this Foreword, but also because they have become venues for fighting out policy disagreements in today's politically polarized world. But I am under no illusions about a new regime's likelihood of success in achieving the transformation it promises in its founding documents and at its inception. The so-called interests of the United States, which create institutional imperatives and inertia that slow political change down, do exist. The status quo is extraordinarily difficult to dislodge, which is among the reasons why so-called executive unilateralism attracts partisan condemnation and litigation by states and interest groups opposed to the regime in power. And leaving aside the good reasons for preserving continuity across regimes to which I hope I have paid sufficient heed — respect for reliance interests chief among them — even an energetic and well-functioning regime will face both unexpected and predictable hurdles that will shift its priorities. External events, particularly in the form of emergencies and crises, will force a shift in priorities, and built-up bureaucratic cultures and regulatory logics will make even the best-laid plans difficult to achieve.

Throughout this Foreword I have used changes in immigration policy to help define the concept of regime change, and this domain vividly highlights some of the obstacles to change just enumerated. The enforcement mentality of the bureaucracy and the enforcement orientation of today's immigration law, both exploited by the last Administration and targeted for transformation by the current one, have been built up over a century, defining both the nitty gritty of immigration practice and the politics of immigration. When new crises arise — for example, when new but generally predictable pressures on the southern border materialize in the form of human suffering and demand for protection — the difficulty of the challenge means that entrenched ways of managing such pressures (through enforcement tools) become bureaucratic defaults and political necessities. But the political will for transformation can still survive such crises, if the political and popular support for transformation persists through the challenge.

These forces of the status quo, however, also reflect another feature of our current moment — deep disagreement. Regime change can only be, and perhaps should only be, partial because of the divided state of

our polity — a division that keeps producing presidential regimes of contrasting ambitions and is replicated in congressional elections and throughout our federalist system. On some level, it may not be possible to look at these divisions and devise a way out of them without discounting the genuine disagreement that underlies them. But this kind of effort took an ominous turn during this Term of transition; the principal reaction of significant actors within the losing political party was outright rejection of a very basic premise of our democracy — acceptance that power will change hands. As exemplified in the proliferation of laws intended to make voting more difficult, this shift in premise is producing an agenda focused on defining and entrenching a polity that will keep this party in power. The context in which the Term transpired thus points to a significant challenge of our time: how to sustain a political culture that can manage pluralism and disagreement without descending into noncompromising polarization and the use of power for antidemocratic ends. The Supreme Court, in its composition and its decisions, is not irrelevant to this challenge. But neither can the Court save the people and their representatives from themselves.