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Emerson, Blake

Michaels, Jon D

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Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism

Blake Emerson & Jon D. Michaels

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ABSTRACT

Upon assuming the presidency, Joe Biden is likely to enjoy limited congressional support for his legislative agenda. Democrats believe they have a good playbook for this situation: “presidential administration.” Coined by now-Justice Kagan, presidential administration endorses the use of unilateral executive action to advance the president’s policy priorities. We argue that presidential administration is unlikely to be successful. More to the point, we fear it may prove dangerous, further legitimizing practices that enable and embolden future authoritarians far more adroit with the tools and language of power than Donald Trump.

We propose that Biden instead practice (and preach) “civic administration,” diffusing authority away from the office of the president in ways that empower the federal bureaucracy, state, local, and tribal officials, and civil society. These other institutions and actors would serve as (1) partners in advancing social and economic policy and (2) potential counterweights if and when the White House pushes reckless initiatives. Biden should of course lead federal administrative agencies to take lawful action on the major issues of the day, from the pandemic, to climate change, to social inequality. But these and other actions should be taken in ways that recalibrate executive power, amplify and leverage the talents and resources of any number of competent actors outside of the West Wing and Cabinet, and remain mindful of the dangers of presidential unilateralism.

AUTHORS

Assistant Professor of Law, UCLA School of Law; Professor of Law, UCLA School of Law. The authors would like to thank Bruce Ackerman, Jessica Bulman-Pozen, Jennifer Chacón, David Marcus, and Miriam Seifter for their insightful comments, and give special thanks as well to the editors of the *UCLA Law Review* for welcoming on short notice what we hope is a very timely intervention.



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INTRODUCTION

On January 20, 2021, Joe Biden will be sworn in as America's forty-sixth president. With the Senate evenly divided, Mitch McConnell will continue to play the obstructionist role he's long relished.¹ President Barack Obama recounts that when then-Vice President Biden attempted to convince the then-Senate Majority Leader of the merits of a bill, McConnell quipped: "You must be under the mistaken impression that I care."² There is no reason to think McConnell will start caring in 2021. As a result, Biden will need the full support of the entire Democratic caucus (plus Kamala Harris's tiebreaking vote) to advance a progressive legislative agenda and, quite possibly, secure confirmation of his Cabinet appointments and nominees to the federal bench.³ Given the centrist leanings of some senators in the Democratic caucus⁴—and their stated opposition to quite a few of the reforms that Biden

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1. MATT JONES, MITCH, PLEASE!: HOW MITCH MCCONNELL SOLD OUT KENTUCKY (AND AMERICA, TOO) 37, 127–28, 130, 405–06, 422 (2020) (noting Mitch McConnell's boast that he's the "guardian of gridlock" and describing instances of McConnell's refusal to work with colleagues across the aisle and work with President Barack Obama).
 2. Michael Kranish, *In His New Memoir, Barack Obama Writes of Hope, Despair and Life at the Center of a Divided Nation*, WASH. POST (Nov. 13, 2020, 12:31 PM), https://www.washingtonpost.com/politics/obama-book-biden-trump-palin/2020/11/13/36c4828a-25b8-11eb-8599-406466ad1b8e_story.html [http://perma.cc/EE7B-YKA9].
 3. See Jennifer Haberkorn, *Fragile Senate Majority Means a Tightrope Act for Democrats*, L.A. TIMES (Jan. 6, 2021), <https://www.latimes.com/politics/story/2021-01-06/what-georgia-senate-results-mean-for-congress-biden> [https://perma.cc/NC7M-JVZ6]; Paul Kane, *Schumer Realizes Dream of Senate Control—But With a Razor-Thin Edge*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/powerpost/schumer-poised-to-realize-dream-of-senate-control--but-with-a-razor-thin-edge/2021/01/06/10bc1e00-4fd8-11eb-bda4-615aaefd0555_story.html [https://perma.cc/U44N-LQLR].
 4. See Luke Broadwater, *'We've Harmed the Senate Enough': Why Joe Manchin Won't Budge on the Filibuster*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2020/11/30/us/politics/joe-manchin-interview.html> [https://perma.cc/6TMS-SW5X]; Luke Broadwater, *For Manchin, a Divided Senate Is a 'Golden Opportunity' for Action*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/11/30/us/politics/joe-manchin-senate.html> [https://perma.cc/7366-LAK9]; Burgess Everett, *The New Democratic Senator Irritating the Left and Delighting the GOP*, POLITICO (Oct. 29, 2019, 10:04 AM), <https://www.politico.com/news/2019/10/29/kyrsten-sinema-arizona-democrats-060187> [https://perma.cc/HKK2-ZELG].

and his surrogates have been championing⁵—we expect some rough sledding.⁶

Democrats believe they have a playbook for this sort of situation: Take unilateral actions under existing legal authorities to advance moderately progressive priorities.⁷ That playbook—long labeled presidential administration—offers more than a glimmer of hope, something many are desperate for after four long years of corrupt, reckless, and authoritarian stewardship under President Donald Trump. Popularized by now-Justice Kagan, presidential administration describes (and, in truth, prescribes) extensive reliance on executive orders and White House control over federal agencies to achieve significant policy change.⁸

5. See Dana Milbank, *'Moderate' Joe Biden Has Become the Most Progressive Nominee in History*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/opinions/2020/10/27/bidens-temperament-is-moderate-his-agenda-is-transformative/> [https://perma.cc/X9MB-PS8Y]; Matthew Yglesias, *Progressives Don't Love Joe Biden, But They're Learning to Love His Agenda*, VOX (July 18, 2020), <https://www.vox.com/21322478/joe-biden-overton-window-bidenism> [https://perma.cc/K64T-AXZW].
6. See Kane, *supra* note 3 (“With Manchin and several other Democrats leery of abolishing filibuster rules, Schumer will have to work with Pelosi and Biden on a very narrow track to achieve their legislative goals, using every parliamentary maneuver to get around McConnell’s expected opposition to almost every agenda item.”). Given the slim Democratic majority in the House of Representatives, it is hardly a forgone conclusion that Biden’s legislative agenda will sail through that body, a combination of Republican intransigence and internecine struggles between centrist and progressive Democrats. See Sarah D. Wire, *Slim Majorities in the New Congress Will Make Big Legislation Difficult*, L.A. TIMES (Jan. 3, 2021), <https://www.latimes.com/politics/story/2021-01-03/house-democrats-small-majority-nancy-pelosi-challenges> [https://perma.cc/MFP3-T9MY].
7. Daniel Hemel, *You’ll Get the Presidency, Democrats. That’s the Main Prize*, WASH. POST (Nov. 6, 2020, 10:32 AM), https://www.washingtonpost.com/outlook/you-got-the-presidency-democrats-thats-the-main-prize/2020/11/06/0154313e-1fa7-11eb-b532-05c751cd5dc2_story.html [https://perma.cc/34VG-LRH5]; Michael D. Shear & Lisa Friedman, *Biden Could Roll Back Trump Agenda With Blitz of Executive Actions*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/08/us/politics/biden-trump-executive-action.html> [https://perma.cc/3KFQ-5D7W]; Juliet Eilperin & Annie Linskey, *How Biden Aims to Amp Up the Government’s Fight Against Climate Change*, WASH. POST (Nov. 11, 2020 10:11 AM), <https://www.washingtonpost.com/climate-environment/2020/11/11/biden-climate-change/> [https://perma.cc/7N9G-86QZ].
8. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). Joe Biden’s stated plan to appoint not one but two White House czars to run climate change exemplifies this presidentialist effort to take policymaking authority out of the hands of administrative agencies and their career staff and concentrate it in the White House. See Juliet Eilperin & Brady Dennis, *Biden Picks Former EPA Chief Gina McCarthy as White House Climate Czar*, WASH. POST (Dec. 15, 2020), <https://www.washingtonpost.com/climate-environment/2020/12/15/gina-mccarthy-climate-change-czar-biden/> [https://perma.cc/89E8-FZVX]; Ari Natter, *Biden Picks John Kerry, Paris Accord Author, as Climate Czar*, BLOOMBERG (Nov. 23, 2020), <https://www.bloomberg.com/news/articles/2020-11-23/biden-picks-john-kerry-paris-accord-architect-as-climate-czar> [https://perma.cc/4L2J-5NP7]; Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and*

But the presidentialist playbook has delivered often illusory short-term gain, only to be followed by long-term pain. We urge a new approach: civic administration. Civic administration calls on the president to use his preeminent position in American government to more fully empower an array of elected officials, expert bureaucrats, grassroots organizers, and civic institutions. Specifically, the president should redistribute authority centrifugally—that is, away from the White House and out to those aforementioned responsible actors.⁹ Whereas presidential administration seeks to aggrandize and magnify the discretionary power of the president to achieve substantive policy goals, civic administration would invite the president to pursue a procedural goal—to redistribute power amongst other public actors.

We should underscore that this turn away from presidentialism would not mean abdicating presidential leadership on pressing issues such as climate change, public health, or social and economic inequality. Rather, we envision a different mode of leadership—one in which the president invites, indeed relies on, affected parties and institutions to help shape and thus gain a stake in executive policy.

Under civic administration, the Executive isn't an "I" institution. It's a "we" institution. Civic administration activates congressional coalitions, state, local, and tribal governments, civil society groups, and the federal bureaucracy. The president partners with those groups, amplifying their voices and leveraging their political and financial resources (and distinct and preexisting legal authorities) to engender greater, more sustainable, and more egalitarian programmatic advances. Civic administration thus does not depend critically on any one president outfoxing the wiliest of senators. And, even more importantly, civic administration does not set up a future president—possibly far more unscrupulous than Biden—to use all that "I" presidential power in an abusive or self-serving fashion. Quite the contrary, it leaves future, would-be "I" presidents, particularly those with authoritarian

the Law of the White House Staff, 79 *FORDHAM L. REV.* 2577, 2583 (2011) (explaining that Barack Obama's use of czars "mad[e] presidential influence over agencies opaque to political accountability and legal controls"); Michael D. Shear & Michael Crowley, *Biden Cabinet Leans Centrist, Leaving Some Liberals Frustrated*, *N.Y. TIMES* (Dec. 19, 2020), <https://www.nytimes.com/2020/12/19/us/politics/biden-cabinet.html> [<https://perma.cc/B3RV-WJBA>] (describing how Biden is selecting "White House advisers with the kind of stature and experience to face off with the cabinet secretaries during debates over complex and difficult issues").

9. Cf. Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National Security State*, 83 *U. CHI. L. REV.* 199 (2016) (describing the dominant trend in modern American governance to centralize and consolidate power in the federal executive).

or antidemocratic tendencies,¹⁰ with fewer opportunities—and less maneuverability—to pursue objectives unilaterally.

I. TOSsing OUT THE PRESIDENTIAL ADMINISTRATION PLAYBOOK

Let's be clear why we're down on presidential administration.

Midway through each of their presidential tenures, Bill Clinton and Obama faced intense congressional opposition to their respective legislative agendas.¹¹ Clinton's *bête noire* was then-Speaker of the House Newt Gingrich. Obama's was then-Senate Majority Leader McConnell. Both Clinton and Obama responded by using executive orders, extant regulatory tools, and longstanding statutory authorities to promote policy initiatives.¹²

These turns to presidential administration approach yielded some significant achievements. Obama, for example, engineered the Deferred Action for Childhood Arrival (DACA) program and the Paris Climate Accord.¹³ While some see such actions as a kind of constitutional self-help during times when the U.S. Congress has broken cooperative conventions,¹⁴ others defend presidential unilateralism without such qualifications, often as a requisite for functional government.¹⁵

But even as we acknowledge these successes and appreciate that most of the statutory authorities used by Clinton and Obama remain on the books today—and thus are available to Biden—we recognize that presidential administration won't be nearly as useful in 2021. Indeed, it may have become more dangerous. Here's why.

First, presidential administration requires talented and dexterous administrators, and Biden will struggle to get his senior appointees confirmed. McConnell, who refused even to hold a hearing for Judge Merrick Garland's confirmation to the Supreme Court, appears ready to oppose

10. See *infra* notes 51–52.

11. Kagan, *supra* note 8, at 2248; Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers*, 35 YALE J. REGUL. 549, 566 (2018).

12. See Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html> [<https://perma.cc/U734-469Z>]; Kagan, *supra* note 8, at 2281–319.

13. Mashaw & Berke, *supra* note 11, at 563–68, 579–83.

14. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 76–79 (2014).

15. Eric A. Posner, *The Presidency Comes With Executive Power. Deal With It.*, NEW REPUBLIC (Feb. 3, 2014), <https://newrepublic.com/article/116450/obama-use-executive-power-unexceptional> [<https://perma.cc/4B3E-GZET>].

Biden's nominees to federal agencies.¹⁶ This again means that Biden will need the support of every single senator who caucuses as a Democrat, making it exceedingly difficult to staff the Departments of Labor, Treasury, and even Health and Human Services—a vital agency even when we're not beset by a global pandemic—with energetic, progressive leaders.¹⁷

It is important to recall that by the time Obama and, before him, Clinton, needed to resort to presidential administration, they already had installed their capable and experienced teams of agency heads, department chiefs, and senior staffs. The Senate leadership in both 1993 and 2009 was Democratic, and thus confirmed Clinton and Obama's preferred slates of administrators well before congressional obstructionism set in. Biden is unlikely to enjoy the same benefit of a friendly Senate to quickly confirm heads of department and other high-ranking positions.¹⁸

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16. Sam Adler-Bell, *The Brewing Democratic Fight Over Biden's Cabinet*, NEW REPUBLIC (Nov. 15, 2020), <https://newrepublic.com/article/160213/brewing-democratic-fight-bidens-cabinet> [<https://perma.cc/89B5-GB7P>]; Hans Nichols & Mike Allen, *GOP Senate Wins Wreak Havoc on Biden Transition Plans*, AXIOS (Nov. 5, 2020), <https://www.axios.com/gop-senate-biden-transition-50ebe6c8-e318-4fdb-b903-048908b3b954.html> [<https://perma.cc/2J7L-7CMH>].
 17. E.g., Press Release, Senator Joe Manchin, Manchin Statement on Opposition to Dr. Murthy's Surgeon General Confirmation (Dec. 15, 2014), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-statement-on-opposition-to-dr-murthys-surgeon-general-confirmation> [<https://perma.cc/YZ2X-9DGD>]. Perhaps predictably, Biden has avoided any such potential showdowns by making a range of very cautious, centrist appointments. See Jordain Carney, *Democrats Brush Off Calls for Biden to Play Hardball on Cabinet Picks*, HILL (Nov. 22, 2020), <https://thehill.com/homenews/senate/526981-democrats-brush-off-calls-for-biden-to-play-hardball-on-cabinet-picks> [<https://perma.cc/V2MT-4T6P>]; Alexi McCammond & Alayna Treene, *Progressives' Patience With Biden Wears Thin*, AXIOS (Dec. 10, 2020), <https://www.axios.com/joe-biden-progressives-bernie-sanders-c86f3e90-b369-4146-8c9b-afdbdcdb3bb7.html> [<https://perma.cc/86RR-RRRN>]; Michael D. Shear & Michael Crowley, *Biden Cabinet Leans Centrist, Leaving Some Liberals Frustrated*, N.Y. TIMES (Dec. 19, 2020), <https://www.nytimes.com/2020/12/19/us/politics/biden-cabinet.html> [<https://perma.cc/YXS4-PWUM>].
 18. To be sure, Biden can rely on the Vacancies Act and other agency-specific succession provisions to fill Senate confirmed positions with "acting" officials temporarily. 5 U.S.C. §§ 3345–49(c); see also 6 U.S.C. § 113 (Homeland Security). But, under the Vacancies Act, he will be limited to first assistants to the vacant office, officials who are already Senate-confirmed to other positions, or who else have been employed within the relevant agency for at least ninety days. 5 U.S.C. § 3345(a). This will significantly restrict Biden's room to maneuver early on in his administration, particularly given the loss of talented career officials throughout Donald Trump's term and the possibility that some Trump loyalists will remain in place. In addition, though acting officials have the same statutory authority as Senate-confirmed appointees, they will lack confirmed officials' political legitimacy and accountability. Acting officials are likely to be treated by subordinate agency officials as "substitute teachers" who lack "real authority." Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 694–99 (2020) (quoting Russell Berman, *President Trump's 'Substitute Teacher' Problem*, ATLANTIC (Apr. 17, 2017),

Second, presidential administration has undermined the professional civil service. Tenured civil servants, who are protected from at-will removal and thus from improper political interference, have been essential actors in any and all efforts to conduct diplomacy, assure the national defense, and design and administer regulatory and welfare programs.¹⁹ Yet every president from Ronald Reagan onward has lent credence to, if not explicitly embraced, the Gipper's assertion that "government is not the solution to our problems, government is the problem."²⁰ Indeed, among other things, they've all endorsed privatization and other such efforts to run government like a business.²¹ Businesslike government, closely associated with neoliberalism,²² involves the private outsourcing of governmental functions and responsibilities such as environmental inspections, welfare-benefit determinations, and military and law enforcement operations.²³ All of this contracting around the federal civil service has left the bureaucracy ill-equipped to do the heavy lifting that is warranted today—both because of the need to address all the pathologies introduced or aggravated by Trump²⁴ and

<https://www.theatlantic.com/politics/archive/2017/04/president-trumps-substituteteacher-problem/523101> [<https://perma.cc/RD5L-8MV9>]). The Trump Administration made significant use of acting officials. *Id.* at 623. Recently, sloppy mistakes in succession orders have resulted in the invalidation of the Department of Homeland Security's actions to unwind the Deferred Action for Childhood Arrivals program. *Batala Vidal v. Wolf*, No. 16-CV-4756 (NGG) (VMS), 2020 WL 6695076, at *9 (E.D.N.Y. Nov. 14, 2020). A Biden Administration would probably not be so incompetent but would likely be criticized for acting appointments that circumvented the Senate's Advice-and-Consent role.

19. JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 43–50, 60–61 (2017).
20. Ronald Reagan, Inaugural Address (Jan. 20, 1981), <https://www.reaganfoundation.org/media/128614/inaguration.pdf> [<https://perma.cc/4NT8-LVJH>]; *see also, e.g.*, William Jefferson Clinton, State of the Union Address (Jan. 23, 1996), <https://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html> [<https://perma.cc/YT54-QD38>] (“[T]he era of big government is over.”); Ganesh Sitaraman, *The Collapse of Neoliberalism*, NEW REPUBLIC (Dec. 23, 2019), <https://newrepublic.com/article/155970/collapse-neoliberalism> [<https://perma.cc/52TG-CTV9>] (“President Barack Obama’s advisers shrank the size of the post-crash stimulus package for fear it would seem too large to the neoliberal consensus of the era—and on top of that, they compromised on its content.”).
21. Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152 (2015) (book review).
22. *E.g.*, Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, in EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 37 (2005); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014).
23. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 578–80 (2015).
24. *See infra* notes 26–31.

because, again, there are likely to be gaps and vacancies in senior political positions as Biden struggles to get his appointees confirmed.

Civil service erosion began decades ago, during the Reagan Administration.²⁵ But whatever deficiencies Clinton and Obama confronted pale in comparison to what Biden is likely to face in 2021. Under Trump, mid- and lower-level career staffing in most agencies has been terribly compromised, more hollowed out than ever before.²⁶ From day one, he and his surrogates have waged a sustained campaign to “drain the swamp,”²⁷ purge the so-called “deep state,”²⁸ and “deconstruct[] the administrative state.”²⁹ Many civil servants have nonetheless persevered, plugging away as they advanced lawful directives and resisting, at least on occasion, tendentious ones.³⁰ But the past four years have seen the demoralization, defanging, and departure of phalanxes of dedicated, capable civil servants—thus leaving Biden with a weakened corps of officials to implement his policies.³¹

Third, even assuming presidential administration enables Biden to bypass Congress, it won’t help him with the courts. Agency rules and other administrative actions must withstand judicial review. Presidents Clinton and Obama won some of those court contests, and lost others. By and large, however, the courts during those presidencies tended to defer to the judgment

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25. See PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT 15–16 (2017) (describing the displacement of civil service by private contracting, beginning in the Reagan Administration).
 26. Lisa Rein, Tom Hamburger, Juliet Eilperin & Andrew Freedman, *How Trump Waged War on His Own Government*, WASH. POST (Oct. 29, 2020, 3:00 AM), https://www.washingtonpost.com/politics/trump-federal-civil-servants/2020/10/28/86f9598e-122a-11eb-ba42-ec6a580836ed_story.html [https://perma.cc/6UEB-2VCH].
 27. Trevor Hughes, *Trump Calls to ‘Drain the Swamp’ of Washington*, USA TODAY (Oct. 18, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/10/18/donald-trump-rally-colorado-springs-ethics-lobbying-limitations/92377656> [https://perma.cc/FA69-YY9B].
 28. Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018).
 29. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State’*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/E6L6-APNW].
 30. See Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 351 (2019); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 635 (2019).
 31. Jon Michaels, *How Trump Is Dismantling a Pillar of the Administrative State*, GUARDIAN (Nov. 7, 2017), <https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state> [https://perma.cc/MC4X-KPNJ].

of executive agencies,³² a position supported by, among others, that original proponent of presidential administration, Justice Kagan.³³

We doubt that such deference will continue, at least on the sorts of issues of “deep economic and political significance” where presidential administration is likely to matter.³⁴ For several years, conservative members of the Supreme Court have been signaling discomfort with exercises of administrative power.³⁵ During the Obama presidency, these conservatives were in a distinct minority, usually unable on their own to do more than write impassioned dissents. (Such positions were barely contemplated during the Clinton presidency, with even Justice Clarence Thomas holding his powder until the 2000s.³⁶)

Things have changed now thanks to Trump’s appointment of three conservative justices. Joining veteran justices Thomas, Samuel Alito, and John Roberts, Trump appointees Neil Gorsuch and Brett Kavanaugh, and likely Amy Coney Barrett, appear ready and willing to scale back if not eliminate judicial deference, especially in disputes involving social and economic regulation.³⁷ If five of these justices’ recent rejection of public

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32. Kent Barnett & Chris Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017) (reporting that circuit courts upheld agency interpretations 71 percent of the time between 2003 and 2013); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 852 (2006) (reporting that circuit courts upheld Environmental Protection Agency and National Labor Relations Board interpretations more often than not (between 60 and 76 percent) between 1990 and 2004).
 33. See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 (arguing that *Chevron* should only apply to agency actions taken by the official Congress empowers, for reasons of “accountability” and “discipline”).
 34. *King v. Burwell*, 576 U.S. 473, 486 (2015); see also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).
 35. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426–41 (2019) (Gorsuch, J., concurring); *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring); *id.* at 112 (Thomas, J., concurring).
 36. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring); *Christensen v. Harris County*, 529 U.S. 576 (2000).
 37. While Justice Barrett’s views on *Chevron* are not clear, her commitment to textualism and the use of substantive canons suggests that she will be interested in limiting it. See Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. REGUL.: NOTICE & COMMENT (July 3, 2018), <https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick> [https://perma.cc/QJ74-329S]; see also Chris Matthews, *A Barrett Court Would Continue Trump’s Deregulatory Agenda Long After He’s Left the White House, Experts Say*, MARKETWATCH (Oct. 12, 2020), <https://www.marketwatch.com/story/a-barrett-court-could-continue-trumps-deregulatory-agenda-long-after-hes-left-the-white-house-experts-say-2020-10-10> [https://perma.cc/9RJK-UVPW]; Jody Freeman, *What Amy Coney Barrett’s Confirmation Will Mean for Joe Biden’s Climate Plan*, VOX (Oct. 26,

health measures taken during the pandemic is any indication,³⁸ future administrative action that impinges on private rights is likely to be met with a very cold reception. There may even be a majority on the Court now to revive the long-defunct nondelegation doctrine, which could be deployed to invalidate entire administrative agencies and legislative programs.³⁹ Trump has, moreover, appointed nearly a quarter of all federal judges, an overwhelming contingent of whom likely share the conservative legal movement's ideological aversion to the regulatory state.⁴⁰ With so many federal judges hostile to administrative power, expansive unilateral action from the Biden Administration is sure to be met with a negative, even retaliatory, judicial response.

Fourth, presidential administration is brittle. Because it turns on the unilateral powers of a president, the next president can usually—and fairly effortlessly—undo the work done by their predecessor. That's certainly what happened to Obama's climate change initiative, which Trump swiftly mothballed.⁴¹ The staying power of Obama's signature immigration policy, DACA, owed not to the inherent stickiness of unilateral executive action but, quite the contrary, to the objections of career officials and to particularly rigorous judicial review that resulted in the invalidation of Trump's rather hamfisted attempt to countermand the policy.⁴² Biden can surely issue executive orders to

2020), <https://www.vox.com/energy-and-environment/21526207/amy-coney-barrett-senate-vote-environmental-law-biden-climate-plan> [https://perma.cc/S3GD-95WU]. Justice Gorsuch seems keen to eliminate *Chevron* deference, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–52 (10th Cir. 2016) (Gorsuch, J., concurring), and Justice Kavanaugh to limit it, *U.S. Telecommunication Ass'n v. FCC*, 855 F.3d 381, 417–19 (2017) (Kavanaugh, J., dissenting).

38. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (enjoining enforcement of executive order setting attendance limits on religious services in order to reduce the spread of COVID-19).

39. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); see also Nicholas Bagley, Opinion, 'Most of Government Is Unconstitutional,' N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/Sunday/gundy-united-states.html> [https://perma.cc/JLV8-KEVH].

40. John Gramlich, *How Trump Compares With Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (July 15, 2020), <https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [https://perma.cc/GS9E-EY3S].

41. The Obama Administration rule was stayed by the Supreme Court pending litigation. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). Trump has subsequently replaced it. See Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units, 84 Fed. Reg. 32,520 (July 8, 2019); Umair Irfan, *Trump's EPA Just Replaced Obama's Signature Climate Policy With a Much Weaker Rule*, VOX (June 19, 2019), <https://www.vox.com/2019/6/19/18684054/climate-change-clean-power-plan-repeal-affordable-emissions> [https://perma.cc/84U6-5LPD].

42. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); Michael D. Shear, *Leading Homeland Security Under a President Who Embraced 'Hate-*

reboot or maintain some Obama-era policies.⁴³ But we should be clear-eyed that the next president after him will be able to undo most of the policy successes Biden achieves in this manner. Easy come, easy go.

This brings us to our fifth objection: Presidential administration is downright dangerous. Used carefully, it can help push a moderately progressive agenda at a time when the country is ready for it.⁴⁴ But presidential administration sometimes walks perilously close to a kind of plebiscitary dictatorship.⁴⁵ That is to say, it centers national politics around a single, charismatic leader who claims a democratic mandate (regularly with less than 50 percent of the popular vote), and acts decisively to implement it. This governance model can and has yielded major gains for democratic equality under presidencies like Franklin Roosevelt's and Obama's. But not every president shares their progressive commitments.⁴⁶ We thus remain

Filled' Talk, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/10/us/politics/elaine-duke-homeland-security-trump.html> [<https://perma.cc/Q2BL-TRJQ>] (asserting that Acting Secretary of the Department of Homeland Security Elaine Duke, who had served in the Department for almost thirty years, “did not include policy reasons in the memo because she did not agree with the ideas being pushed by Mr. Miller and Mr. Sessions: that DACA amounted to an undeserved amnesty and that it would encourage new waves of illegal immigration”).

43. We certainly don't wish to minimize the significant benefits that Deferred Action for Childhood Arrivals (DACA) conveyed, or to question the legality of the program. See Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 48–49 (2018) (describing work-authorization benefits); Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2207–10 (2019) (arguing that DACA expressed “official recognition” of recipient's membership in the political community, in addition to legal benefits like work authorization). We think this program should remain in place until a proper legislative solution can be found. Nonetheless, the partial, contingent, and revocable legal status that DACA conveyed should not be mistaken for an unqualified success story, given the social subordination such uncertainty can cause and convey. See Nina Rabin, *Legal Limbo as Subordination: Immigrants, Caste, and the Precarity of Liminal Status in the Trump Era*, GEO. IMMIGR. L.J. (forthcoming 2021).
44. Kagan, *supra* note 8, at 2252 (“[T]he new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.”).
45. See BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 181–84, 193–203 (2019) (describing the antidemocratic tendencies and authoritarian dangers of presidential administration). For a recent proposal that Biden adopt and deploy the conservatives' “unitary executive” theory, see Ronald Krotoszynski, *The Conservative Idea That Would Let Biden Seize Control of Washington*, POLITICO (Dec. 10, 2020), <https://www.politico.com/news/magazine/2020/12/10/nathan-simington-christopher-waller-fcc-federal-reserve-appointments-unitary-executive-authority-444136> [<https://perma.cc/ME8G-6SUN>].
46. Progressive presidents, of course, can abuse power too, as did Franklin Roosevelt when he ordered the internment of Japanese citizens during World War II. Exec. Order No. 9,066, 3 C.F.R. 1092 (1942).

mindful that the administrative state may be a force of subordination as much as liberation.

Just think about recent presidents. Clinton used presidential administration fairly modestly, in keeping with his decidedly centrist approach to governance. But his successor was far less constrained. President George W. Bush embraced executive unilateralism, notoriously frustrating even his own Justice Department lawyers who urged him to secure congressional authorization in times when such authorization would have been readily forthcoming.⁴⁷ And whereas Obama was more assertive than Clinton, he too presented a study in timidity compared to his successor, as evidenced by, among other things, Trump's defiant, unlawful effort to construct a southern border wall without appropriated funds,⁴⁸ or to invoke emergency authorities to deploy the U.S. military to confront a ragtag caravan of unarmed migrants seeking a marginally better life in America.⁴⁹

As destructive as Trump has been, we can readily imagine a far more dangerous president. Trump and his subordinates were easily distracted and largely incompetent. They often did not understand how to use the levers of the bureaucracy to achieve their goals. They rarely bothered to adhere to the rules and conventions of administrative law and procedure. They thus had an abysmal track record in the federal courts.⁵⁰ Future authoritarian presidents are likely to be far more skilled.⁵¹ They might undermine the equal

47. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 124–26 (2007).

48. See *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020).

49. Thomas Gibbons Neff & Helene Cooper, *Deployed Inside the United States: The Military Waits for the Migrant Caravan*, N.Y. TIMES (Nov. 10, 2018), <https://www.nytimes.com/2018/11/10/us/deployed-inside-the-united-states-the-military-waits-for-the-migrant-caravan.html> [<https://perma.cc/9JT2-RDN2>].

50. Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. SCH. L., <https://policyintegrity.org/trump-court-roundup> [<https://perma.cc/NR76-UMTB>].

51. Zeynep Tufekci, *America's Next Authoritarian Will Be Much More Competent*, ATLANTIC (Nov. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/trump-proved-authoritarians-can-get-elected-america/617023> [<https://perma.cc/6A8V-Z7HS>]; Jonathan Chait, *Even If Trump Loses, Republicans' Authoritarian Ambitions Will Live On*, N.Y. MAG.: INTELLIGENCER (Oct. 24, 2020), <https://nymag.com/intelligencer/2020/10/donald-trump-authoritarianism-after-the-election.html> [<https://perma.cc/9RRK-3X5X>]; Matthew C. MacWilliams, *Trump Is an Authoritarian. So Are Millions of Americans*, POLITICO (Sept. 23, 2020, 5:45 PM), <https://www.politico.com/news/magazine/2020/09/23/trump-america-authoritarianism-420681> [<https://perma.cc/9U33-6YP9>]; Jeet Heer, *Tom Cotton Is Preparing to Be Trump 2.0*, NATION (June 5, 2020), <https://www.thenation.com/article/politics/tom-cotton-trump-2-0> [<https://perma.cc/HAL5-EM5Y>]; Vanessa Williamson, *Confronting the Enduring Appeal of Fascism*,

protection of the laws quietly, rather than making their bigotry obvious, as Trump did with the Travel Ban. They might hire (and better retain) a team of talented conservative public law scholars—rather than cadres of cronies—who know how to navigate the Administrative Procedure Act. And, in all this, they would benefit from a federal judiciary more willing to sign off on their agenda than it had been under Trump. We then might look back on the Trump years as some now look back on the tenure of George W. Bush: You thought *that* was bad?

Biden, moreover, is a pragmatic politician, not an ideologue. If he were to follow the Clinton-Obama playbook, he'd use presidential administration judiciously, and then quite possibly hand the reins of the powerful presidency over to a more authoritarian successor who may, in turn, govern very much like Trump—or worse. That is to say, whatever short-term benefits in terms of progressive policymaking might possibly be secured during the Biden years are apt to be offset by larger and deeper cuts by those who've shown themselves less committed to democratic equality (or possibly even democracy⁵²) and also less restrained with these unilateral tools.⁵³

II. CHARTING A NEW COURSE

What does this mean for Biden? Surely, we do not suggest he wait patiently until the Senate throws him a bone. Nor are we suggesting administrative agencies should refrain from taking action on pressing issues like climate change, economic inequality, and civil rights. Far from it. Still, Biden needs to use this

BROOKINGS: FIXGOV BLOG (Nov. 6, 2020), <https://www.brookings.edu/blog/fixgov/2020/11/06/confronting-the-enduring-appeal-of-fascism> [https://perma.cc/Y585-FQF2].

52. See, e.g., Glenn Thrush, 'We're Not a Democracy,' Says Mike Lee, a Republican Senator. *That's a Good Thing, He Adds*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/elections/mike-lee-democracy.html> [https://perma.cc/L3MN-K68C]; Jonathan Chait, *The GOP's Future Leaders Are Endorsing Trump's Election Fraud Lie*, N.Y. MAG.: INTELLIGENCER (Nov. 9, 2020), <https://nymag.com/intelligencer/2020/11/trump-election-vote-fraud-lie-giuliani-four-seasons-myth-biden-won-2020.html> [https://perma.cc/6TX9-RQET]; Kristina Peterson & Lindsay Wise, *Top GOP Lawmakers Back Trump on Challenges to Election Result*, WALL ST. J. (Nov. 10, 2020), <https://www.wsj.com/articles/many-republicans-back-trump-on-challenges-to-election-result-11604925680> [https://perma.cc/AYA5-KXA3]; Amy Gardner, Ashley Parker, Josh Dawsey & Emma Brown, *Top Republicans Back Trump's Efforts to Challenge Election Results*, WASH. POST (Nov. 9, 2020, 5:09 PM), https://www.washingtonpost.com/politics/trump-republicans-election-challenges/2020/11/09/49e2c238-22c4-11eb-952e-0c475972cfc0_story.html [https://perma.cc/AL9U-JHBV].
53. PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 175 (2009) ("The most dangerous threats to checks and balances have appeared when the aggressive, norm-breaching tendencies of the Republican Right have joined with a trend toward increased executive power . . .").

moment—dare we say this opportunity—first to strip away the current trappings of authoritarianism and then to reconfigure the presidency in service of empowering a host of decentralized democratic actors and democratic institutions.⁵⁴ The goal, ultimately, is to take the bully out of the bully pulpit, with the president building a broader foundation for more robust, sustainable policy advances and guarding against future forays into presidential unilateralism.

As we've signaled, Clinton, Bush, Obama, and Trump were Fiat presidents, using executive orders and policy directives to dictate policy. We play, of course, with the double meaning of "fiat," conjuring images of the flashy, tiny, and notoriously unreliable Italian sports cars. Perhaps it is only fitting that Biden—the world's most famous Amtrak enthusiast—emerge as a Railroad president, using the power of his office to link up with state and local governments, civil society groups, and clusters of elected officials and civil servants, coupling and pulling along the key players from what one of us has called "the thick political surround."⁵⁵

The blueprint we set out below is far from complete. What we offer is a preliminary sketch that captures the spirit and structure of civic administration, both as a more progressive, egalitarian alternative to presidential administration and as a safeguard against creeping authoritarianism. Our proposals are focused on what a Biden Administration could do to make the executive branch less demagogic and more deliberative, less commandeering and more consultative. We surely understand the irony of our relying on executive actions to unwind presidential administration. But, doubtful as we are that state-building will be a legislative priority, we think Biden must hit the ground running on his own initiative. What's more, we see our proposals as ultimately redistributive, reaffirming and reestablishing strong bases of institutional and popular legitimacy at some distance from the presidency. This should help to ensure that policies in furtherance of democratic equality proceed even when presidential support isn't forthcoming.

For our preliminary purposes, we focus on two components of civic administration: internal housekeeping and outward-facing partnerships.

54. *Id.* at 189 (arguing in 2009 that "a new president can . . . make and keep a series of pledges to halt creeping presidentialism").

55. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 346 (2016).

A. Internal Housekeeping

We are well aware of the dangers—disappointments, really—of starting here. Exhortations to clean house seem underwhelming, perhaps dreadful. But this isn't makeshift work. It's necessary to rebuild strong institutions that will not only help prudent presidents but also constrain reckless ones.

1. Rebuild the Civil Service

Biden must begin rebuilding the civil service that, as noted, has been in a steady decline for decades and has just weathered four years of blistering attacks from the Oval Office,⁵⁶ from cabinet secretaries who called career employees categorically disloyal,⁵⁷ and from members of the American public who've defied bureaucratic directives, disparaged government workers, and gone so far as to threaten the very lives of our public servants.⁵⁸

Capable and honest civil servants are crucial allies of any administration committed to using statutory authority and expertise to advance the public good, and essential checks on those administrations with different aims in mind. But they've been undervalued, demoralized, and marginalized for the better part of two generations. Biden can reverse that trend.

In many respects, Biden is especially well positioned to do so. He is not known to be a master tactician like Clinton or a stirring orator like Obama. But he wears his heart on his sleeve and is perhaps uniquely capable of providing comfort and a morale boost to a bludgeoned, deflated civil service. Biden is, in addition, a seasoned and skilled retail politician. He needs to turn

56. E.g., Justin Wise, *Trump Calls FBI Investigators in Russia Probe "Human Scum,"* HILL (Apr. 20, 2020, 8:50 AM), <https://thehill.com/homenews/administration/493631-trump-calls-fbi-investigators-in-russia-probe-human-scum> [https://perma.cc/XTQ4-XD3F].

57. Darryl Fears & Juliet Eilperin, *Zinke Says a Third of Interior's Staff Is Disloyal to Trump and Promises 'Huge' Changes*, WASH. POST (Sept. 16, 2017, 8:40 AM), <https://www.washingtonpost.com/news/energyenvironment/wp/2017/09/26/zinke-says-a-third-of-interiors-staff-is-disloyal-to-trump-and-promises-huge-changes> [https://perma.cc/4K6U-DCFL].

58. Rob Stein, *Fauci Reveals He Has Received Death Threats and His Daughters Have Been Harassed*, NPR (Aug. 5, 2020, 5:43 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/08/05/899415906/fauci-reveals-he-has-received-death-threats-and-his-daughters-have-been-harassed> [https://perma.cc/WVW2-JALE]; Michael M. Grynbaum & Davey Alba, *After Vindman's Testimony Went Public, Right-Wing Conspiracies Fired Up*, N.Y. TIMES (Oct. 29, 2019), <https://www.nytimes.com/2019/10/29/business-media/fox-news-alexander-vindman.html> [https://perma.cc/MBF2-VU6C].

his attention to the federal workforce, connecting with them, lifting their spirits, and championing their voices and their concerns.⁵⁹

Biden may also make government service more rewarding. So many have been deterred from entering into public service, particularly at the federal level. It's an opportune time to reverse that trend. We've just closed the door on a year marked by incredible pain, loss, and frustration. 2020 brought us manifold calamities, including the still-raging pandemic, rampant police brutality, and vivid reminders of the spectacular dangers of a warming global climate. The response by many of our most talented students and young adults has been to commit to grassroots activism, to vote in record numbers, and to take on huge burdens as citizens, family members, and frontline workers. The federal civil service is another, and often overlooked, avenue for public engagement, and there are now many openings to fill after four years of unusually high attrition.⁶⁰ Now is the time for Biden along with Vice President Kamala Harris, another career public servant, to draw the best among us into government, recruiting especially intensively from historically underrepresented communities. By streamlining the hiring process,⁶¹ and using the office of the presidency to highlight the important work that everyday government officials do, Biden can draw a new generation into the

59. Joe Davidson, *Biden Urged to Rebuild the Relationship Between the Government and Its Workers*, WASH. POST (Nov. 19, 2020, 3:00 AM), https://www.washingtonpost.com/politics/biden-federal-employees-trump/2020/11/18/b66ba798-2928-11eb-b847-66c66ace1afb_story.html [https://perma.cc/VJ6J-AAHB] ("Biden has said he would overturn three May 2018 orders that undermined federal labor organizations and made it easier to fire feds."); Eric Katz, *Biden's Transition Has Focused on Civil Service Issues as Familiar Faces Spearhead Efforts*, GOV'T EXEC. (Nov. 10, 2020), <https://www.govexec.com/workforce/2020/11/bidens-transition-has-focused-civil-service-issues-familiar-faces-spearhead-efforts/169943> [https://perma.cc/D8AX-TRVP] (describing the Biden transition team's interest in bolstering civil service).

60. Eric Katz, *Trump Has Slashed Jobs At Nearly Every Federal Agency; Biden Promises a Reversal*, GOV'T EXEC. (Nov. 19, 2020), <https://www.govexec.com/workforce/2020/11/trump-has-slashed-jobs-nearly-every-federal-agency-biden-promises-reversal/170203> [https://perma.cc/RSK5-J5FN]; Megan Cassella & Alice Miranda Ollstein, *Biden Confronts Staffing Crisis at Federal Agencies*, POLITICO (Nov. 12, 2020, 4:30 AM), <https://www.politico.com/news/2020/11/12/shrinking-workforce-can-hurt-biden-436164> [https://perma.cc/6SZD-RXBG].

61. Erich Wagner, *Proposed Executive Order for Biden Would 'Reinvigorate' Federal Workforce, Make OPM a Cabinet-Level Agency*, GOV'T EXEC. (Nov. 13, 2020), <https://www.govexec.com/management/2020/11/proposed-executive-order-biden-would-reinvigorate-federal-workforce-make-opm-cabinet-level-agency/170048> [https://perma.cc/3JX9-MVV7]; Yevgeny Shrigo, *Uncle Sam's HR Department Needs Help*, WASH. MONTHLY (Oct. 22, 2020), <https://washingtonmonthly.com/2020/10/22/uncle-sams-hr-department-needs-help> [https://perma.cc/4BRU-8LLN]. We are not convinced elevating the Office of Personnel Management to cabinet is appropriate, but we support streamlining the hiring process and increasing hiring capacity.

ranks of the public service. Promptly restaffing the civil service, assuming the funding exists, will be especially important to ensure that those political officials Trump “burrows” into the career ranks in his final days will not exercise significant sway over agency decisionmaking.⁶²

Lastly, Biden can restore the integrity of professional public service by depoliticizing the work of government lawyers, scientists, engineers, social workers, and law enforcement officers. He can start by rescinding Trump-era executive orders that have exposed policy officials and adjudicators to partisan interference and termination.⁶³ He can assure them, fairly credibly we think, that they will not be pulled into the throes of culture wars in the manner that has happened time and again over the past four years.

To be clear, we see such efforts to promote the independence, vitality, and importance of the civil service as distributing rather than increasing executive power. After all, a weak, vulnerable civil service is far more susceptible to bullying and browbeating by the White House and the political appointees leading the agencies.⁶⁴ Empowering the civil service during the Biden Administration should make it significantly harder for a future president to corrupt, defang, or terminate federal bureaucrats—harder, but not impossible. A president determined to dynamite what remains of the regulatory state won’t be stopped by the sorts of remedies we have on offer. Ultimately, statutory intervention will be necessary to bolster and protect the civil service. For now, however, civic administration can create precedent and momentum for stickier legislative reforms. That is to say, four and possibly eight years of presidential protection will give the civil service the type of fortification that it has long needed and can, if nothing else, gird it for a future abusive presidency. A restaffed and reinvigorated civil service will have the confidence, resources, and solidarity to stand up against future efforts to corrupt the workings of government. What’s more, these small efforts under civic administration won’t be taken in isolation. As we propose below,

62. See Lydia DePillis, *How Dozens of Trump’s Political Appointees Will Stay in Government After Biden Takes Over*, PROPUBLICA (Dec. 3, 2020), <https://www.propublica.org/article/how-dozens-of-trumps-political-appointees-will-stay-in-government-after-biden-takes-over> [https://perma.cc/5VLK-WVPN].

63. *Executive Order on Creating Schedule F in the Excepted Service*, WHITE HOUSE (Oct. 21, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service> [https://perma.cc/67HD-TBJ9]; *Executive Order Excepting Administrative Law Judges From the Competitive Service*, WHITE HOUSE (July 10, 2018), <https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service> [https://perma.cc/MN48-SJP4].

64. MICHAELS, *supra* note 19, at 198.

supplementary and complementary efforts will further empower the federal bureaucracy as an independent force in American law and politics.

2. Center the Civil Service

Biden must center the civil service. Currently so much power rests at the very top of the agencies, in the hands of a few presidentially chosen allies. (Again, we have our doubts that Biden will necessarily be able to do even that.) But centering the civil service would mean reestablishing the importance of this essential cohort of career, expert policy analysts, scientists, lawyers, and social workers within the agency. Biden could do this by specifically directing cabinet secretaries to accept the consensus advice of career staff in the relevant offices when making policy. An executive order could require agencies to issue a procedural rule which would formalize and codify the political appointees' obligation to heed the advice of career staff.⁶⁵

65. We don't wish to oversimplify and assume that career officials are always public-spirited and impartial. In the immigration context, for instance, officials in Immigration and Customs Enforcement (ICE) and Customs and Border Protection have often used unnecessarily punitive, sometimes lawless, enforcement and detention practices. See Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 756 (2015) (describing an "insurrection" by lower-level ICE agents who did not comply with enforcement priorities); U.S. DEP'T OF HOMELAND SEC., OFF. OF THE INSPECTOR GEN., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 3 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [<https://perma.cc/6UBS-VCF4>] (describing "significant health and safety risks, including nooses in detainee cells, improper and overly restrictive segregation, and inadequate detainee medical care"); Robert Moore, *Border Agents Are Using a New Weapon Against Asylum Seekers*, TEX. MONTHLY (June 2, 2018), <https://www.texasmonthly.com/politics/immigrant-advocates-question-legality-of-latest-federal-tactics> [<https://perma.cc/YN8F-6VH7>] (describing Customs and Border Protection tactics to keep migrants from asserting their right to asylum at the border). Likewise, the Trump administration has accelerated staffing of proenforcement immigration judges in the Executive Office of Immigration Review. Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration*, ROLL CALL (May 4, 2020, 3:23 PM), <https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration> [<https://perma.cc/8SUW-D2D9>]. These are difficult problems and we don't pretend to have an easy answer. But one approach would be to focus on what political scientists call the "mezzo-level" of the bureaucracy—not the frontline enforcement officers and administrative judges, but their supervisors who hear appeals and issue directives. See DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 21 (2001). Rather than relying on top-level appointees to discipline hostile enforcement personnel, the Biden Administration should concentrate on building a cadre of professionals closer to the ground—not only in Washington, D.C. but in field offices—with a mandate and real authority to ensure impartial administration by their immediate subordinates. Biden should take an "expertise-forcing" approach by hiring competent professionals to staff

Once issued, a rule must be followed—even by the president—so long as it remains in effect.⁶⁶ Obviously, a future administration could rescind the rule, but only over the objections of the newly empowered career bureaucrats, interest groups pleased with the elevation of expertise over politics, and a public more fully appreciative of a professional civil service. Rules of this sort would therefore promote power sharing, rather than power hoarding. They would ensure that career experts' voices are always reckoned with. They would curb hyperpoliticized decisionmaking dictated by the White House or agency heads. And, perhaps, they would encourage courts to confer greater deference on agencies if and when those agencies can certify political-expert consensus. The potential for greater judicial deference might be enough to deter future administrations—which cannot help but value the benefits of such greater deference—from seeking to scrap the presidential directive and rescind the agencies' procedural rules.

The Trump Administration came on the heels of decades of diminution and slander to government service, thus making resistance to presidential negligence, malfeasance, corruption all the more challenging—and heroic where it happened. But faithful execution of law shouldn't have to be heroic. It should be routine. By taking concrete as well as symbolic steps to center the civil service, Biden can help to reestablish the governmental culture of lawfulness, checks-and-balances, and deliberative decision-making that undergirds constitutional democracy. By making this effort a focal point of his agenda—as well as talking up the very clear intrinsic and instrumental benefits of fortifying the civil service and giving it a more prominent role within federal agencies—Biden could trigger a virtuous circle in which public opinion shifts in favor of professional government, and such public support in turn protects the civil service against future assaults.

3. Reforms to the Justice Department and the Pentagon

There is a great deal of agency-specific work to do with respect to any number of federal departments and bureaus. Immediately, however, we think

the U.S. Citizenship and Immigration Services and Executive Office for Immigration Review. See Bijal Shah, *Investigating a Unitary Executive Model of Immigration*, BALKINIZATION (Dec. 4, 2020), <https://balkin.blogspot.com/2020/12/investigating-unitary-executive-model.html?m=1> [<https://perma.cc/S8A4-3W3X>]. Biden might also direct the Secretary of Homeland Security to empower the Department's Office of Inspector General to monitor, review, and clear enforcement practices and policies for statutory compliance as well as broader fairness concerns.

66. *United States v. Nixon*, 418 U.S. 683, 695–97 (1974) (holding that courts can enforce a subpoena against the president on the authority of regulations promulgated by the attorney general).

the Justice Department and the Defense Department require the most urgent interventions, here too in service of an explicit shift away from presidential administration.

Current Justice Department policies, regulations, and internal chains of command are more or less designed to enhance and protect presidential power, rather than guard against it.⁶⁷ It need not be this way. We propose four rather simple and quick fixes. First, a Biden Justice Department could propose and publish a rule fully committing to the independence of a special counsel, allowing that office far greater autonomy than was the case under Robert Mueller.⁶⁸ Second, the Attorney General could take steps to insulate the Office of Legal Counsel from political control, so that it would provide independent opinions as to the legality of proposed executive and administrative actions.⁶⁹ Third, Biden should obligate the Attorney General to commit to insulating U.S. Attorneys' offices from political interference, a problem of significant magnitude under both Trump and George W. Bush.⁷⁰

67. See Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks From Madison to Mueller*, 38 YALE J. REGUL. (forthcoming 2021) (discussing the departmental limitations on the special counsel investigation into Russian interference in the 2016 presidential election).

68. ANDREW WEISSMAN, WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION 225–43 (2020) (describing how the threat of firing shaped Robert Mueller's investigation); BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 182–88 (2020) (proposing various reforms to special counsel regulations, including greater transparency and investigatory independence). Bill Barr has appointed John Durham as Special Counsel to investigate the investigation of the 2016 election. Charlie Savage, *Barr Makes Durham a Special Counsel in a Bid to Entrench Scrutiny of the Russia Inquiry*, N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/12/01/us/politics/john-durham-special-counsel-russia-investigation.html> [<https://perma.cc/L4V3-5ZBL>]. A new special counsel rule would probably not apply retroactively to this investigation. But Barr's appointment of Durham suggests there might be good reason to amend the special counsel provisions to provide that any ongoing investigation conclude when a new president takes office, unless the new president's attorney general approves a continuance. This would prevent outgoing presidents from installing insulated prosecutors to investigate their successors.

69. See Annie Owens, *A Roadmap for Reform: How the Biden Administration Can Revitalize the Office of Legal Counsel*, JUST SEC. (Dec. 16, 2020), <https://www.justsecurity.org/73879/a-roadmap-for-reform-how-the-biden-administration-can-revitalize-the-office-of-legal-counsel/> [<https://perma.cc/KFM2-3G4W>]; AM. CONST. SOC'Y, THE OFFICE OF LEGAL COUNSEL AND THE RULE OF LAW (2020), <https://www.acslaw.org/wp-content/uploads/2020/10/OLC-ROL-Doc-103020.pdf> [<https://perma.cc/PFB8-53Y4>].

70. Adam Zagorin, *Why Were These U.S. Attorneys Fired?*, TIME (Mar. 7, 2007), <http://content.time.com/time/nation/article/0,8599,1597085,00.html> [<https://perma.cc/AP2S-WKYR>]; Katie Benner, *Third Justice Dept. Prosecutor Publicly Denounces Barr*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/justice-department-barr-prosecutors.html> [<https://perma.cc/H4YQ-8DZB>]; Frederick Baron & Dennis Aftergut, Opinion, *Dannehy Joins Justice Honor Roll By Resigning From*

Fourth, the Justice Department ought to create a dissent channel, along the lines of that which has long existed within the State Department.⁷¹ Aggrieved or alarmed career employees would then have a clear and lawful route to protest a given decision or nondecision by their superiors. Anyone who registers a dissent using the Justice Department's specified process would be able to memorialize their objections, remove themselves (if so desired) from the controversy in question, and be protected against any retaliation.⁷²

Turning to the Pentagon, it is of vital importance, we think, to keep the military leadership at some greater distance from the president. For four years Trump has referred to "his generals,"⁷³ seeking (and finally getting) a military parade of the kind entirely antithetical to American constitutional tradition⁷⁴—but common in places like Moscow and Pyongyang—and recklessly deploying the military on U.S. soil to menace unarmed migrants⁷⁵ and forcibly disperse peaceable protestors in the nation's capital.⁷⁶

Biden now needs to barrack the brass. We think he has taken a step in the wrong direction by announcing his nomination of recently retired Army General Lloyd Austin as Secretary of Defense. Austin himself is surely a highly capable officer, and we credit the symbolic and representational value

Politicized Durham FBI Russia Probe, USA TODAY (Sept. 15, 2020), <https://www.usatoday.com/story/opinion/2020/09/15/justice-department-honor-roll-dannehy-resigns-fbi-probe-column/5791381002> [https://perma.cc/TDU5-QBKA]; Adam Goldman, *Ex-Justice Dept. Officials Lash Out at Barr Over Flynn and Stone Cases*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/11/us/politics/mccord-kraivis-barr.html> [https://perma.cc/EJ65-WWYQ].

71. Michele Kelemen, *At State Department, 'Dissent Channel' in High Gear With Refugee Ban Protests*, NPR (Jan. 30, 2017, 4:46 PM), <https://www.npr.org/sections/parallels/2017/01/30/512494230/at-state-department-dissent-channel-in-high-gear-with-refugee-ban-protests> [https://perma.cc/3ZRL-DCZW].

72. Cf. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2328–31 (2006) (advocating federal agencies follow the State Department's lead and likewise adopt dissent channels).

73. Joshua Geltzer, *Trump Loved "His Generals"—Until He Got To Know Them*, JUST SEC. (Jan. 2, 2020), <https://www.justsecurity.org/67884/trump-loved-his-generals-until-he-got-to-know-them> [perma.cc/H7SB-WYHL].

74. Jonathan Bernstein, *How Is Trump's Parade Offensive? Let Me Count the Ways*, BLOOMBERG (July 3, 2019, 8:22 AM), <https://www.bloomberg.com/opinion/articles/2019-07-03/trump-military-parade-betrays-american-values-on-fourth-of-july> [perma.cc/NJ47-3BUR].

75. Jennifer Jacobs & Justin Sink, *U.S. to Send 5,200 Troops to Border as Migrant Caravan Nears*, BLOOMBERG (Oct. 29, 2018, 9:15 PM), <https://www.bloomberg.com/news/articles/2018-10-29/trump-is-said-to-plan-ordering-about-5-000-troops-to-border> [https://perma.cc/QEU8-9VGU].

76. Thomas Gibbons-Neff, *Former Commanders Fault Trump's Use of Troops Against Protesters*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/06/02/us/politics/military-national-guard-trump-protests.html> [perma.cc/5SAT-E6YT].

of appointing the first African American to this post. Nonetheless, Lloyd's appointment would continue to erode the essential principle of civilian control of the military, compound the impression that the military and the military alone are worthy of the public trust. His appointment would also invite further politicization of the military insofar as we'll have General Lloyd, not Mr. Lloyd serving in the Cabinet and participating in any number of inescapably partisan political conversations and decisions.⁷⁷ There is a good reason for the seven-year statutory cooling-off period between active duty military service and running the Pentagon,⁷⁸ and Congress should resist requests to grant exceptions.⁷⁹

Indeed, rather than continue to elevate the brass, Biden needs to reduce their public and political prominence. A few easy measures can be taken. First, the secretary of defense should require senior military personnel to wear dress uniforms, not combat fatigues, when making public appearances with civilian leaders.⁸⁰ Presidents have for some time been leveraging the military's prowess and popularity for domestic political purposes—and vice versa.⁸¹ Dropping the combat cosplay when in and around Washington, D.C. would be a small, costless step to remind everyone that the military does not treat civilian, domestic space as part of its remit.⁸² The president needs to be clear to support soldiers and veterans without turning them into props, as the outgoing president did time and time again.⁸³ Imagine, for example, if the president went to West Point

77. See Editorial Board, Opinion, *Civilian Control of the Military Is Vital*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/opinion/biden-lloyd-austin-defense-secretary.html> [https://perma.cc/L5GZ-SZAN].

78. 10 U.S.C. § 113(a).

79. See Jennifer Steinhauer, Eric Schmitt & Luke Broadwater, *Biden's Pentagon Pick Reignites Debate Over Civilian Control of Military*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/us/politics/biden-austin-defense-secretary.html> [https://perma.cc/LRZ5-T3HE].

80. Paul Handley, *Top US General Says Wrong to Appear With Trump at Protest Site*, BARRON'S (June 11, 2020), <https://www.barrons.com/news/top-us-officer-says-wrong-to-appear-with-trump-at-protest-site-01591885505> [perma.cc/W8RL-SKE6].

81. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 43–66 (2010).

82. We cannot help but remain mindful of the fact that Secretary of Defense Mark Esper urged government officials dealing with mostly peaceful protestors in the wake of the George Floyd murder to “dominate the battle space.” Elizabeth McLaughlin & Luis Martinez, *Pentagon Defends Defense Secretary's Call to 'Dominate the Battle Space' in Response to Civil Unrest*, ABC NEWS (June 2, 2020), <https://abcnews.go.com/Politics/pentagon-defends-defense-secretarys-call-dominate-battle-space/story?id=71020529> [perma.cc/P3GA-WHK3].

83. See Lolita C. Baldor, *Pentagon Tells White House to Stop Politicizing Military*, AP (June 2, 2019), <https://apnews.com/article/3dba0b327e8e45e5b9589db4bb735505> [https://perma.cc/ZP9E-ERVBJ]; Eric Schmitt & Annie Karni, *Trump Speech to Bring 1,000 West Point Cadets Back to Campus*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/2020/04/24/us/politics/coronavirus-trump-west-point.html> [https://perma.cc/2WRW-MWLB].

to meet with cadets and then conspicuously left campus to give a speech about foreign policy, a jobs program, or any other matter of political consequence. That kind of explicit walling off of the military from politics is essential after so many years in which the line has been blurred. Biden might in this way set a healthy precedent. If after Biden, the following president reverted back to the model of commingling military service and politics, the military and the media would be inclined to cry foul.

Second, Biden and his defense secretary need to rewrite the operating protocols for what constitutes a state of emergency. Congress has given presidents vast and largely unchecked powers to mobilize military resources domestically in times of emergency.⁸⁴ Unless and until Congress is prepared to rescind those authorities, it is incumbent on the president to tie his own hands. For starters, the president may issue an executive order that says military personnel are not to be deployed domestically absent a joint finding by the attorney general and secretary of Homeland Security that civilian resources are, on their own, incapable of handling a given crisis.

Third, to the extent it becomes necessary, for reasons that escape us, for the military to maintain some role in domestic civilian policing, a special division must be created that separately and uniquely trains servicemembers for such tasks.⁸⁵ For military personnel to simply follow the protocols and practices common to overseas operations is a disaster waiting to happen.⁸⁶

Australian Defence Chief Angus Campbell set a great example by asking that military personnel not stand in the frame while the civilian Defence Minister addressed a political controversy. Andrew Greene, *Defence Chiefs Desert Christopher Pyne in Awkward Press Conference*, AUSTL. BROAD. CORP. (Mar. 27, 2019), <https://www.abc.net.au/news/2019-03-28/defence-chiefs-desert-christopher-pyne-in-press-conference/10949250> [https://perma.cc/AHU4-97UV].

84. Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418> [https://perma.cc/SHH7-XHJP].

85. The 2021 National Defense Authorization Act takes a small step in the right direction by providing that when members of the armed forces or federal law enforcement personnel “respond to a civil disturbance,” they must display their name or individual identifier and the name of the force or federal entity that employs them. William M. (Mac) Thornberry National Defense Authorization Act, Pub. L. No. 116-283, § 1064(a), 134 Stat. 3388 (2020) (to be codified at 10 U.S.C. § 723); see also H.R. 6395 (116th): *National Defense Authorization Act for Fiscal Year 2021*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr6395> [https://perma.cc/82VK-259D].

86. Sarah Blake Morgan & James LaPorta, *Military Chief: Troops Were Issued Bayonets in DC Unrest*, AP (July 2, 2020), <https://apnews.com/article/62e1aa26fe5043a63441dcacea70703e> [perma.cc/U25W-ESXC].

B. Outward Facing

While attending to housekeeping matters internal to the federal executive branch, Biden should of course also be looking outward, again with an eye to empowering those around him with the resources, legal and political mandates, and opportunities to advance programs that align with what his administration wants to achieve.

1. Strengthen Overseas Relationships

Among the most pressing missions for Biden is to connect with his foreign counterparts, provide assurances, and, in essence, rejoin the family of nations. The damage to our standing in the world, the trust we've lost globally, and the fracturing of important alliances have left us—and the world—in peril.⁸⁷ This is true when it comes to human rights, global commerce, energy, environmental, cybersecurity, and public health. One way Biden can begin to heal strained relationships, while also diffusing presidential power, is by bringing key leaders from Congress and civil society into his diplomatic entourage—and putting them at the center of important conversations. While such individuals have long accompanied past presidents and carried out sensitive missions, it makes sense now to more formally and explicitly diffuse America's foreign policy powers. Empowering nonexecutive diplomatic delegates will elevate those individuals' status (at home and abroad); take pressure off of bilateral head-of-state relationships that suffered so greatly when Trump was one of those heads; lessen reliance on the State Department that, we now see, can be gutted or coopted;⁸⁸ and position those delegates to be more forceful and influential partners or counterweights to future presidents.

Especially if McConnell drags his feet with respect to confirming senior State Department officials, the president should immediately reach out to

87. David A. Andelman, Opinion, *The World Watches Washington With Horror*, CNN (Jan. 7, 2021), <https://www.cnn.com/2021/01/07/opinions/world-watches-washington-with-horror-andelman/index.html> [<https://perma.cc/2SLB-WWMY>]; Ryan Bort, *America Last: How Trump Torpedoed the U.S. International Standing*, ROLLING STONE (Nov. 3, 2020), <https://www.rollingstone.com/politics/politics-features/trump-foreign-policy-destroyed-international-standing-1084802> [perma.cc/Y4TA-TGW9]; Wendy R. Sherman, *The Total Destruction of U.S. Foreign Policy Under Trump*, FOREIGN POL'Y (July 31, 2020), <https://foreignpolicy.com/2020/07/31/trump-destruction-foreign-policy> [<https://perma.cc/SS48-PG65>].

88. P. Michael McKinley, *The Politicization of the State Department Is Almost Complete*, ATLANTIC (Oct. 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/state-departments-politicization-almost-complete/616795> [<https://perma.cc/4MAV-SXP5>].

such delegates to start rebuilding our global reputation and to signal to the world that channels of diplomacy are open even when Foggy Bottom functions as poorly as it has under Secretary Mike Pompeo.⁸⁹ Among some possible matches, we could imagine Representative Tom Malinowski as especially valuable accompanying Biden to Eastern Europe; Representative Ilhan Omar helping Biden repair some of the damage done by his predecessor's Muslim ban; and Congresswoman Katie Porter and her whiteboard causing all sorts of good trouble in Davos and other economic summits.

These are not intended as slights to the official foreign policy team Biden installs. They are, instead, ways to empower coalitions within Congress, not to mention state or municipal officeholders. These individuals, what's more, are likely to end up being longer and more useful contributors than senior State Department appointees, who tend to serve no more than a few years in any presidential administration.⁹⁰

2. Partner With State, Local, and Tribal Governments

Some of the unsung heroes of the last four years were state and local officials, who did what they could to safeguard and empower their communities notwithstanding various acts of recklessness and retribution from Washington. Here we have in mind the federal government's immigration crackdowns; inconsistent, misleading, and downright dangerous responses to the COVID-19 crisis; and efforts to undermine the 2020 election.⁹¹ State and local officials'

89. Jackson Diehl, Opinion, *Mike Pompeo Is the Worst Secretary of State in History*, WASH. POST (Aug. 30, 2020, 1:17 PM), https://www.washingtonpost.com/opinions/global-opinions/mike-pompeo-is-the-worst-secretary-of-state-in-history/2020/08/30/00515750-e869-11ea-bc79-834454439a44_story.html [https://perma.cc/DH3S-J43Z].

90. David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 610–11 (2009) (describing the relatively short tenure of high-level executive branch officials).

91. E.g., Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703 (2018); Robert Klemko, *Seattle Area Used Early Social Distancing, Testing, to Help Begin Flattening the Coronavirus Curve*, WASH. POST (Apr. 9, 2020, 2:10 PM), https://www.washingtonpost.com/national/coronavirus-seattle-flattening-curve/2020/04/09/7313b3c0-7689-11ea-85cb-8670579b863d_story.html [perma.cc/W6KR-CU9P]; Christina Farr, *How San Francisco Succeeded More Than Other U.S. Cities in Fighting the Coronavirus*, CNBC (Aug. 8, 2020), <https://www.cnbc.com/2020/08/08/how-san-francisco-beat-other-us-cities-in-fighting-the-coronavirus.html> [https://perma.cc/G3NB-PGCN]; Jonathan Mahler, *A Governor on Her Own, With Everything at Stake*, N.Y. TIMES MAG. (Oct. 8, 2020), <https://www.nytimes.com/2020/06/25/magazine/gretchen-whitmer-coronavirus-michigan.html> [https://perma.cc/D3L3-MYMN]; David E. Sanger, *Trump's Attempts to Overturn the Election Are Unparalleled in U.S. History*, N.Y. TIMES (Dec. 3, 2020), <https://www.nytimes.com/2020/11/19/us/politics/trump-election.html> [https://perma.cc/

successful administration of national election in the face of presidential intimidation indicates that deep reserves of public spiritedness, competence, and impartiality remain solvent. The Biden Administration can build on the momentum that we've seen across states, counties, and cities, and tribal communities,⁹² on matters relating to climate change, criminal justice reform, economic inequality, and elections. The Biden Administration can do so by lending civic leaders political and strategic support, thereby buoying their efforts to advance aims entirely compatible with what the new president might, under different circumstances, expect to achieve through federal legislation. Among other things, Biden—and, again Harris—could take the simple, modest, symbolically important, and potentially quite effective step of going to state legislatures and personally rallying support for key reform initiatives. Members of Congress are flattered and sometimes quite readily persuaded by a telephone call from or meeting with the president. Imagine how a state representative in New Mexico might feel if Harris laces up her Chuck Taylors and shows up at the Roundhouse.⁹³

In the modern era, presidents have regularly relied on the states to implement federal programs, often because the relevant statutes required it. But at times they've done so more deliberately, precisely to take advantage of state-government capacities.⁹⁴ We imagine a more general and vigorous effort to foster joint policy development among federal, state, local, and tribal policymakers. The Biden Administration could order executive agencies to develop major proposed rules in consultation with partner agencies at the state, local, and tribal levels. State and local governments that broadly agree with the Biden Administration's regulatory philosophy could give their federal partners useful information and policy proposals while developing their own plans to mirror and extend the

4ULF-P2JP]; David E. Sanger, Matt Stevens & Nicole Perlroth, *Election Officials Directly Contradict Trump on Voting System Fraud*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/11/12/us/politics/election-officials-contradict-trump.html> [https://perma.cc/Y9FQ-GSRV].

92. E.g., Nicola Jones, *How Native Tribes Are Taking the Lead on Planning for Climate Change*, YALE ENVIRONMENT 360 (Feb. 11, 2020), <https://e360.yale.edu/features/how-native-tribes-are-taking-the-lead-on-planning-for-climate-change> [https://perma.cc/4BSH-E3YS].

93. Here we have to note President Trump's effectiveness at using his prominence to spotlight even the most provincial of issues and allies. E.g., David J. Lynch, *Trump's Carrier Deal Fades as Economic Reality Intervenes*, WASH. POST (Oct. 26, 2020, 3:00 AM), <https://www.washingtonpost.com/business/2020/10/26/trump-carrier-manufacturing-jobs/> [perma.cc/M7VQ-SXQ8].

94. Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 265 (2019); see also Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999) (mandating consultation with states for executive orders with "federalism implications").

federal policy. Jurisdictions broadly opposed could register their opposition, so that the Biden Administration would get early notice of likely litigation positions and real weaknesses in their policy proposals.

This extensive consultation process would create incentives for government units across the country to increase their bureaucratic capacity, so as to be able to exert greater influence over federal policy—something that would be valuable for other reasons, too, including for resisting future authoritarian presidents. A state consultation regime would, at least during the Biden presidency, provide opportunities for continued deliberation and contestation between the center and progressive wings of the Democratic party over the correct course of action on issues like climate change, student debt, financial regulation, civil rights, and labor protections. The goal here, again, is to spread power outwards and downwards, to make the federal executive branch a site for pluralistic democratic engagement rather than plebiscitary rule.

These outreach efforts would be resource intensive. To offset the added costs in time, money, and personnel, the Biden Administration should consider curtailing the centralized White House regulatory review process, in which the Office of Information and Regulatory Affairs assesses whether federal executive agencies have appropriately weighed the costs and benefits of regulations.⁹⁵ This process, on the books since Reagan, has been a key tool of presidential aggrandizement and unitary control.⁹⁶ It has also tended to have a deregulatory bias, even under Democratic presidents, as it privileges a market-oriented perspective and provides an additional forum for industry groups to press their interests.⁹⁷ Some commentators prefer to preserve the regulatory review process

95. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011). The Office of Information and Regulatory Affairs review serves as a gatekeeper for agency regulations, enabling the White House to block new rules, pressure agencies to change rules to suit presidential policy preferences, and otherwise control and influence agencies' regulatory agendas. The Office of Legal Counsel concluded in 2019 that the regulatory review process may apply to independent agencies as well. Extending Regul. Rev. Under Exec. Order 12866 to Indep. Regul. Agencies, 43 Op. O.L.C. (slip op.) (Oct. 8, 2019), <https://www.justice.gov/olc/file/1349716/download> [<https://perma.cc/GYZ2-TK3W>].

96. Kagan, *supra* note 8, at 2277–81, 2285–90.

97. EMERSON, *supra* note 45, at 187–93; RENA STEINZOR, MICHAEL PATOKA & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (2011); Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507 (2015).

but make it more evenhanded.⁹⁸ We are skeptical. Reports from the Obama years suggest that regulatory review undermined sound scientific conclusions from agencies such as the Environmental Protection Agency.⁹⁹ It would be better for the health of our constitutional democracy to develop regulations in consultation with multiple layers of politically accountable government, rather than giving the president's inner circle a veto over the significant actions of the regulatory state.

At the same time as a Biden Administration would implement policy in cooperation with state and local governments, it should use existing tools to strengthen democracy at the subnational level. Bad-faith actors have relied on gerrymandering, lame-duck efforts to disempower the governor, and overrides of popular initiatives to undermine their state constitutions' commitment to democracy.¹⁰⁰ A state-coordination executive order could require that, in exchange for early participation in federal administrative policies, state agencies publicly adopt a memorandum of understanding that their programs will be implemented with equal consideration for citizens' interests and respect for majoritarian decisions.

3. Nurture Civil Society

Empowering other government actors is crucial, but it must be accompanied by a complementary boost to civil society. Agencies are generally required by law to accept comments from the public on proposed regulations.¹⁰¹ This notice-and-comment process tends, however, to be dominated by regulated industries. The voices of beneficiaries and ordinary members of the public are, by stark contrast, frequently underrepresented and too readily ignored.¹⁰² Biden can direct agencies to engage the broadly construed public earlier in the process, when regulatory priorities are first being identified and when proposals are being researched and drafted. Some agencies already do this—and with admirable results.¹⁰³ The gold standard may be “listening sessions,” in which agencies

98. RICHARD REVESZ, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT ENVIRONMENT AND OUR HEALTH* (2011).

99. Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACER ENV'T L. REV. 325 (2014).

100. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, MICH. L. REV. (forthcoming 2021).

101. 5 U.S.C. § 553(c).

102. See Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) (finding disproportionate influence of industry groups over administrative rulemaking process).

103. See Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, WASH. U. L. REV. (forthcoming 2021) (describing extensive public engagement by the Forest

consult with representative stakeholders while they are formulating policy.¹⁰⁴ But all too often, agencies' approaches are informal and haphazard; and, intentionally or not, the outreach tends to skew in favor of already powerful groups of insiders and repeat players.

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.¹⁰⁵ To ensure meaningful and inclusive participation at the agency level, Biden could direct agencies to designate officials as "regulatory public defenders"¹⁰⁶ 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.

For example, regulations on workplace safety should be drafted with direct input from unions, as well as organizations representing contractors and gig workers.¹⁰⁷ A regulation on sexual violence and harassment in educational institutions should make sure to solicit input from survivors, as well as from the educational institutions and other affected parties. These early interventions from statutory beneficiaries will make for more equitable rules. They will, furthermore, confer greater legitimacy and expertise on civic and social movement leaders who can then leverage their influence at the federal level to become more effective advocates at the local and state levels.

CONCLUSION

We recognize that our anti-presidential administration seems to pull some punches, at a moment when bold, aggressive actions are warranted. We

Service in developing its 2012 Planning Rule and by the Consumer Financial Protection Bureau in developing its mortgage disclosure regulation), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615896.

104. *Id.*

105. See Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1338–52 (2016) (describing different gradients in participation in interest groups).

106. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 491 (2005).

107. For proposals on prolabor administrative actions, see Matthew Cunningham-Cook & Jon Schwarz, *A Biden Administration Can Raise Wages and Give Workers More Power—If It Wants To*, INTERCEPT (Nov. 21, 2020), <https://theintercept.com/2020/11/21/biden-unions-workers-wages> [<https://perma.cc/VQ39-GA8H>].

are, by no means, insensitive to the crises all around us. But we must nevertheless insist on a new and different path forward—one that is, ultimately, more democratically organic, more resilient, and in many respects more likely to prove sticky. (Again, we think the pivot to civic administration is particularly low-cost in this moment. Given the evenly divided Senate, the House's narrow Democratic majority, and the extremely conservative Supreme Court, we truly question whether even the most dexterous of presidentialists could secure many short-term gains.)

What's more, precisely because civic administration focuses on the president empowering any number of additional institutions and public officials, future authoritarians will have a hard time acting unilaterally. All of the actors civic administration lifts up—civil servants, civil society groups, members of Congress, and state, local, and tribal officials—are going to be better positioned to challenge future assertions of arbitrary or authoritarian will.