

**FALSE COMFORT AND IMPOSSIBLE PROMISES: UNCERTAINTY,
INFORMATION OVERLOAD, AND THE UNITARY EXECUTIVE**

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[The time will assuredly come] when every vital interest of the state will be merged in the all-absorbing question of who shall be the next President?

—Alexander Hamilton¹

Reasonable people might reasonably fear that contemporary American government has gotten out of control. Even those who do not believe in a minimalist, night-watchman state justifiably worry that much U.S. policy making and implementation is now beyond the ability of even most politically engaged citizens to comprehend, let alone to assess on the merits and attribute to the appropriate institutional actors. In such a society, is it any longer possible to retain even an ideal conception of our collective civic identity as a government “of the people, by the people, [and] for the people”?²

To this fundamentally important question, the unitary executive conception of the presidency emphatically answers “yes.”³ Its argument is essentially this: the people can maintain control over the direction and performance of the national regulatory state through

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¹ Quoted in 3 JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES OF AMERICA AS TRACED IN THE WRITINGS OF ALEXANDER HAMILTON AND OF HIS COTEMPORARIES 346–47 (1859) (emphasis omitted).

² President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

³ Scholarship in the unitary executive tradition is cited throughout this Essay, but the principal works are: Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 67 (1995); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241–46 (1994). Memoranda from the George W. Bush Administration Office of Legal Counsel contain some of the most emphatic recent statements of unitary executive theory. See *infra* notes 6 and 88.

Two other important articles advocate the unitary executive approach without accepting that it is required as a matter of originalist constitutional interpretation: Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

their ultimate representative, the President. Article II⁴ vests him with the full federal executive authority. All officials charged with implementing federal statutes are therefore *his* agents. Authorized to “take Care” that all federal laws “be faithfully executed,”⁵ he has the duty—and hence the power—to direct and, if necessary, correct the decisions of those agents.⁶ Unlike either the multi-member legislature or the collegial judiciary, his office is deliberately structured to focus responsibility and to foster resolute, purposeful and efficient action. Moreover, as the only official whose electoral constituency is nationwide, only he represents all Americans. When he coordinates policy, establishes administrative priorities, and sets the goals and limits of regulatory solutions, he answers to the whole people rather than to the narrow factional interests of particular regions. When he acts to secure our interests at home and abroad he, uniquely, reflects and embodies the mandate of the nation.

This is a bold solution to the riddle of how a twenty-first century global superpower can be governed both democratically and effectively. When, in addition, scholars such as Steven Calabresi and Christopher Yoo not only trace unitary executive theory back to the original constitutional understanding but also discern two hundred years of conforming executive practice,⁷ they undergird the theory’s

4 “The executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1.

5 U.S. CONST. art. II, § 3.

6 “Power follows responsibility” reasoning is a staple technique of unitary executive interpretation. See, e.g., Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to William J. Haynes II, Gen. Counsel, Dep’t of Def. 4, 6 (Mar. 14, 2003), available at http://gulcfac.typepad.com/georgetown_university_law/files/march.14.memo.part1.pdf (arguing that “the Founders entrusted the President with the primary responsibility, and therefore the power, to protect the security of the United States,” and that the President has “complete discretion in exercising the Commander-in-Chief power”). I argue elsewhere that the converse reasoning—“responsibility follows power”—is a far more important constitutional principle. See Cynthia R. Farina, *Presidential Virtue: An Essay on Constitutional Culture and Constitutional Conscience* (Jan. 2010) (unpublished manuscript, on file with author).

A subset of unitary executive scholarship hesitates to recognize presidential power to direct specific regulatory outcomes, although it insists that the President can fire decisionmakers who do not make the decision the President prefers. See, e.g., Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 597–98 (2010).

7 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). Earlier historical accounts included Calabresi & Prakash, *supra* note 3; Calabresi & Rhodes, *supra* note 3; Lawson, *supra* note 3; Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701.

Challenges to the originalist case include: David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71 (2009); Cynthia R. Farina, *The Consent of*

audacity with authenticity. In this Essay, I am less interested in debating the historical pedigree of unitary executive theory than in considering its remarkable ascendancy over the last thirty years. No longer just the credo of the Federalist Society and Reagan Republicans,⁸ it has attained mainstream constitutional status and won adherents across the political spectrum.⁹

Those outside the legal academy might respond that the greater wonder than the striking success of unitary executive theory is that it has taken law so long to catch up with larger cultural phenomena. Over the last hundred years, Presidents of both parties have been exploiting the growing pervasiveness and immediacy of mass media communications to establish a highly personal representative relationship with citizens. In the process, the presidency has been redefined as the core of American government. Speaking directly to the people, and enlisting their support in what thereby becomes the uniquely presidential enterprise of leading the country to safety and prosperity, modern Presidents have emerged as “the single head of the government and moral leader of the nation who speaks for and may be taken as equivalent to all the people.”¹⁰ In this “personal” (or “plebiscitary”) presidency,¹¹ Congress and federal agencies recede to

the Governed: Against Simple Rules for a Complex World, 72 CHI.-KENT L. REV. 987, 1007–18 (1997); A. Michael Fromkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Lessig & Sunstein, *supra* note 3; Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259 (2009); Garrett Epps, *The Ill-Made Prince: A Modest Proposal for a New Article II* (Aug. 7, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445643.

⁸ See Amanda Hollis-Brusky, *The Federalist Society and the Unitary Executive: An Epistemic Community at Work*, (Paper Prepared for the Annual Meeting of the Am. Political Sci. Ass'n, Sept. 3, 2009), *available at* <http://papers.ssrn.com/abstract=1456598>.

⁹ *E.g.*, Kagan, *supra* note 3; Lessig & Sunstein, *supra* note 3. Accounts of the unitary executive propensities of recent administrations include Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005) and Christopher S. Kelley, *The Unitary Executive and the Clinton Administration* (Jan. 17, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329485.

¹⁰ BARBARA HINCKLEY, *THE SYMBOLIC PRESIDENCY: HOW PRESIDENTS PORTRAY THEMSELVES* 134 (1990) (analyzing presidential speeches from Truman to Reagan); *see also* MARY E. STUCKEY, *THE PRESIDENT AS INTERPRETER-IN-CHIEF* (1991) (studying presidential rhetoric and reaching similar conclusions). Presidential scholar Lyn Ragsdale notes that the effort to emphasize the uniqueness of each President has itself become an institutional feature of the modern presidency. *See* LYN RAGSDALE, *VITAL STATISTICS ON THE PRESIDENCY: GEORGE WASHINGTON TO GEORGE W. BUSH 170–71* (2009).

¹¹ *See, e.g.*, SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* (2d ed. 1993); THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* xi (1985); CRAIG A. RIMMERMAN, *PRESIDENCY BY PLEBISCITE: THE REAGAN-*

supporting roles in the enterprise of democratic governance: at best, they are sidekicks doing the actual work of implementing the President's policy agenda. At worst, they are rogues and obstructionists to achieving the people's interests that the President will overcome with the people's help. Unitary executive theory (finally) provides the constitutional backstory for this ongoing political drama.

Still, recognizing unitary executive theory as the inevitable, if belated, legal apologia for the modern American presidency reframes the question, rather than resolving it: what is the attraction of personal, President-centered government as now justified by unitary executive theory? The President, in the cultural and the legal account, is an exceptionally faithful and beneficent representative of the people. Yet neither the contemporary process of presidential selection nor the observed behavior of voters, candidates, or Presidents corroborates the story of a "Representative-in-Chief," whose immunity from regionalism and special interest politics enables him, uniquely, to identify and further some higher will of the whole nation. Moreover, the managerial claim that Presidents do—or *could*, if only our legal regime would acknowledge their full constitutional authority—bring coherence, rationality, and accountability to the vast U.S. regulatory enterprise is unrealistic, if not completely implausible. Lawyers should also recognize that this "Decider-in-Chief" story threatens the values of expertise and legality that have been foundations of the modern administrative state.¹² Given all these improbabilities and contradictions, why is unitary executive theory, along with the larger socio-political phenomenon of President-centered government it legitimizes, so appealing to the popular and scholarly imagination?

Part I draws on cognitive, social, and political psychology to suggest that the extreme cognitive and psychological demands made on citizens by modern life create particular susceptibility to a political and constitutional ideology organized around a potent and beneficent leader, who champions the people's interests in the face of internal obstacles and external dangers. Part II, which considers the exaggerated representational and managerial claims made by this ideology, draws on the large body of relevant work in election studies, public administration, and political science to argue that very conditions which make the personal, unitary executive presidency so appealing also, ironically, ensure that no President can be the leader it

BUSH ERA IN INSTITUTIONAL PERSPECTIVE 24–25 (1993); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987).

12 See Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

promises. Finally, the conclusion considers the post-2008 revisionism that is now interpreting the George W. Bush Presidency as a perversion of unitary executive theory. It warns against the reassuring conclusion that a peculiar conjunction of inept but ruthless leadership¹³ and professional irresponsibility of epic proportions¹⁴ produced the excesses of that Administration. Accurate as those assessments may be, the vital lesson for the future is that the capacity for extremism is inescapably part of the unitary executive presidency.

I. FALSE COMFORT

[People] are guided by two chief motivations, the desire to make a **good** decision, and the desire to make an **easy** decision.

—Lau, Andersen, and Redlawsk, *An Exploration of Correct Voting in Recent U.S. Presidential Elections*¹⁵

Modern American citizenship is hard on the human psyche. The volume and breadth of social and economic policymaking undertaken by the federal government on our behalf is breathtaking. A recent empirical study estimates that regulatory agencies annually issue 600–800 notices asking for public comment on proposed rules, plus about 200 final rules that become effective without public comment.¹⁶ These agency actions run the gamut from the monumental to the (relatively) trivial; they may implicate deeply contested value judgments or involve resolution of mind-numbingly technical questions. In 2008 alone, the nearly 200 federal entities with rulemaking authority finalized regulations on issues ranging from permissible levels of airborne lead¹⁷ to handling onions grown in South Texas.¹⁸ They es-

¹³ E.g., Peter Bergen, *How Bush Botched War on Terror*, CNN.COM, Jan. 8, 2009, <http://www.cnn.com/2009/WORLD/meast/01/07/bergen.war.terror/index.html>.

¹⁴ E.g., Peter M. Shane, *Three Takes on the OLC Torture Memos*, EXECUTIVE WATCH, Apr. 21, 2009, <http://executivewatch.net/2009/04/21/three-takes-on-the-olc-torture-memos/>.

¹⁵ Richard R. Lau, David J. Andersen & David P. Redlawsk, *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 AM. J. POL. SCI. 395, 397 (2008).

¹⁶ Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 931 (2008); see also Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rulemaking "Ossified"?* 12, 32 (Univ. Wis. Legal Studies Research Paper Series, Paper No. 1079, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371588 (estimating average of 720 notice-and-comment rulemakings per year based on Unified Agenda).

¹⁷ National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964 (Nov. 12, 2008) (codified at 40 C.F.R. § 50.12).

¹⁸ Onions Grown in South Texas, 73 Fed. Reg. 10,973 (Feb. 29, 2008) (codified at 7 C.F.R. § 959).

established compensation levels for “bumping” airline passengers,¹⁹ set maximum hours of driving for commercial truckers,²⁰ defined inflation adjustments for immigration law violation penalties,²¹ and specified minimum square footage of indoor and outdoor space for home child-care providers serving Head Start children.²²

The scale of federal policymaking is often incomprehensible to citizens. A single policy initiative, the bailout of financial institutions, is estimated to cost two trillion dollars over its lifetime—a figure with no reality to most of us until it is rescaled to “ordinary” dimensions (e.g., the cost of giving \$5,500 to every U.S. resident), at which point it becomes frightening.²³ The geographical scope of U.S. interest and influence is literally global. Countries about which the average person knows little, if anything, suddenly emerge as objects of need that claim our financial and human resources, centers of conflict that require our soldiers, and sources of threat that imperil our societal and personal well-being.

The Parts that follow examine how socio-political conditions of late twentieth and early twenty-first century America create an environment in which citizens are especially susceptible to the simplifying, palliating claims of the modern “personal” presidency and unitary executive theory.

19 Oversales and Denied Boarding Compensation, 73 Fed. Reg. 21,026 (Apr. 18, 2008) (codified at 14 C.F.R. § 250.8).

20 Hours of Service of Drivers, 73 Fed. Reg. 69,567 (Nov. 19, 2008) (codified at 49 C.F.R. § 395).

21 Inflation Adjustment for Civil Monetary Penalties Under Sections 274A, 274B, and 274C of the Immigration and Nationality Act, 73 Fed. Reg. 10,130 (Feb. 26, 2008) (codified at 28 C.F.R. § 280.53).

22 Head Start Program, 73 Fed. Reg. 1285 (Jan. 8, 2008) (codified at 45 C.F.R. §§ 1304, 1306).

23 Oddly, “\$2 trillion” featured frequently in discussions of events in the last quarter of 2008. In addition to being a conservative estimate of Federal Reserve Bank loans to troubled financial institutions, Mark Pittman et al., *Fed Defies Transparency Aim in Refusal to Disclose*, BLOOMBERG.COM, Nov. 10, 2008, http://www.bloomberg.com/apps/news?pid=20601087&sid=aatky_cH.tY&refer=worldwide, it emerged as Nobel-prize winning economist Joseph Stiglitz’s estimate of the total cost of the Iraq war, Tom Regan, *Report: Iraq War Costs Could Top \$2 Trillion*, CSMONITOR.COM, Jan. 10, 2006, available at <http://www.pierretristam.com/Bobst/07/wf032807.htm>, and the loss of Americans’ retirement savings from the stock market’s prolonged slide, Nancy Trejos, *Retirement Savings Lose \$2 Trillion in 15 Months*, WASH. POST, Oct. 8, 2008, at A1.

A. *Future Shock and Cognitive Compensation*

The world of today . . . is as different from the world in which I was born as that world was from Julius Caesar's. I was born in the middle of human history, to date, roughly. Almost as much has happened since I was born as happened before.

—Kenneth E. Boulding (1910–1993)²⁴

Attention is a finite and non-renewable resource.

Whenever we search for and choose intentional investments, the acts of searching and choosing themselves require attentional investments.

—Thorngate's First & Fifth Principles of the economics of attention²⁵

In 1970, sociologist Alvin Toffler speculated that people in modern industrial societies live under conditions of such intense exposure to new information and accelerated rate of cultural change that they become vulnerable to a state of “future shock.”²⁶ Rapid evolution of scientific knowledge, coupled with cumulating advances in communication, transportation, and other technologies, he argued, produce a state of sensory overstimulation, “information overload,” and “decision stress”:

[T]he increased rate at which situations flow past us vastly complicates the entire structure of life, multiplying the number of roles we must play and the number of choices we are forced to make

Moreover, the speeded-up flow-through of situations demands much more work from the complex focusing mechanisms by which we shift our attention from one situation to another. There is more switching back and forth, less time for extended, peaceful attention to one problem or situation at a time

There is, however, still another, even more powerfully significant way in which the acceleration of change in society increases the difficulty of coping with life. This stems from the fantastic intrusion of novelty, newness into our existence

The acceleration of change . . . radically alters the balance between novel and familiar situations. Rising rates of change thus compel us not merely to cope with a faster flow, but with more and more situations to which previous personal experience does not apply. And the psychological implications of this simple fact . . . are nothing short of explosive.²⁷

24 ALVIN TOFFLER, *FUTURE SHOCK* 15 (1970) (quoting Kenneth E. Boulding, *The Prospects of Economic Abundance*, Nobel Conference Lecture (1966)).

25 Warren Thorngate, *On Paying Attention*, in *RECENT TRENDS IN THEORETICAL PSYCHOLOGY* 247 (W. Baker, L. Mos, H. Rappard & H. Stam eds., 1988).

26 TOFFLER, *supra* note 24.

27 *Id.* at 33.

These psychological implications, Toffler posited, include the feeling of being overwhelmed with the complexity of modern life; a perception of individual and collective loss of control; increased tension, self-doubt, and anxiousness; and “a deepening sense of confusion and uncertainty.”²⁸ He hypothesized that people try to avoid these disturbing mental states through a number of strategies: attempting to return to past modes of thought and action, individually or through a collective “politics of nostalgia” (reversion); “search[ing] for a unitary solution” or explanation (super-simplification); and “flatly refus[ing] to take in new information” that further complicates decisions or calls into question existing beliefs (denial).²⁹

In the forty years since *Future Shock* was published, research has significantly advanced our understanding of human thinking and behavior. Yet, the picture contemporary psychologists paint of cognition, motivation, and social interaction aligns surprisingly well with Toffler’s predictions.

Cognitive psychology models the human brain as an information processor with a remarkable ability to conserve its own resources. Studies of attention and judgment reveal the brain making use of numerous strategies to stretch finite cognitive capacity; these strategies allow rapid, almost reflexive, determination of which pieces of information ought be attended to, how the pieces fit together, and what they signify.³⁰ Chief among the strategies are heuristics (simple, “fast and frugal” rules of thumb for making judgments³¹), schemata (mental models or scripts that organize our experience into generic patterns we use to interpret, and bridge gaps in, new information³²), and prototypes (items which, by representing the “most typical” char-

28 *Id.* at 322.

29 *Id.* at 319–21.

30 *See, e.g.*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

31 GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART (1999). “By ‘heuristics,’ we mean problem-solving strategies (often employed automatically or unconsciously), which serve to ‘keep the information processing demands of the task within bounds.’” Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 952 (2001) (citation omitted).

32 “For example, one’s schema about university professors might include the information that they are bookish, methodical, verbose, and badly-dressed.” Patricia Pliner, *Cognitive Schemas: How Can We Use Them to Improve Children’s Acceptance of Diverse and Unfamiliar Foods?*, 99 BRITISH J. NUTRITION S2, S2 (Supp. I 2008). The relationship between schemata and stereotyping is obvious.

acteristics that distinguish what is in a given category from what is not, provide a benchmark for categorizing new information).

Social and political psychologists discern these same mental strategies operating when individuals make choices about social behavior, group affiliation, and formation of political judgments.³³ For example, prototyping and the use of schema helps us differentiate and evaluate social groups and political candidates.³⁴ Extensive reliance on heuristics is thought by some political scientists to explain how relatively coherent mass public opinion can emerge from a nation of individuals who have little knowledge and less sophistication about political candidates and issues.³⁵

The human brain, in other words, works hard to manage incoming stimuli in a way that avoids “information overload.”³⁶ Attention is a limited resource,³⁷ and if the brain is forced to process more information than available cognitive capacity can manage, the individual experiences anxiety, fatigue, a sense of being overwhelmed, frustration, anger, increasingly poor decision making, depression, withdrawal, feelings of panic, and, ultimately, complete inability to act.³⁸ Factors that contribute to the “cognitive load” of incoming information include quantity, interrelatedness, complexity, novelty, ambigu-

³³ See, e.g., RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); *POLITICAL COGNITION: THE 19TH ANNUAL CARNEGIE SYMPOSIUM ON COGNITION* (Richard R. Lau & David O. Sears eds., 1986).

³⁴ Michael A. Hogg, *Uncertainty, Social Identity, and Ideology*, 22 *ADVANCES GROUP PROCESSES* 203, 207 (2005). “If the salient characteristics of a particular politician are consistent with or representative of the prototypic Republican, say, then voters may readily infer that she is for a strong defense, low taxes, against government intervention in the economy, against abortion, and so on . . .” Lau & Redlawsk, *supra* note 31, at 953.

³⁵ For collection of the literature, see James N. Druckman, *Does Political Information Matter?*, 22 *POL. COMM.* 515 (2005); Lau & Redlawsk, *supra* note 31. This thesis is controverted. Lau and Redlawsk found that almost all voters use common political heuristics at times, and that such use is especially likely in situations of complex choice. However, use of heuristics by politically unsophisticated voters actually *reduces* the likelihood that they will choose the candidate most closely reflecting their views. *Id.*; see *infra* text accompanying notes 99–113. For discussion of why this is so, see Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 *CRITICAL REV.* 413 (1998) (vigorously disputing the theory that heuristics enable meaningful democratic judgment by an uninformed citizenry).

³⁶ Also called “cognitive overload,” “knowledge overload,” and “sensory overload.” See Martin J. Eppler & Jeanne Mengis, *The Concept of Information Overload: A Review of Literature from Organization Science, Accounting, Marketing, MIS, and Related Disciplines*, 20 *INFO. SOC'Y* 325, 326 (2004).

³⁷ E.g., Carol A. Heimer, *Thinking About How To Avoid Thought: Deep Norms, Shallow Rules, and the Structure of Attention*, 2 *REG. & GOVERNANCE* 30, 30 (2008). See also Thorngate, *supra* note 25 (identifying six principles of “the economics of attention”).

³⁸ E.g., Kenneth Einar Himma, *The Concept of Information Overload: A Preliminary Step in Understanding the Nature of a Harmful Information-Related Condition*, 9 *ETHICS & INFO. TECH.* 259, 267 (2007).

ity, simultaneity, and intensity.³⁹ As these factors cumulate, the uncomfortable sensations associated with approaching the limits of cognitive and attentive capacities increase; this, in turn, increases the value of cognitive strategies that reduce attentional and cognitive processing demands. Consciously or not, individuals under conditions of information overload gravitate toward ways of thinking that simplify issues, narrow the range of acceptable choices, and delegate decisional responsibility to someone perceived to have power or competence.⁴⁰

At the collective level, this phenomenon can increase the attractiveness of certain types of groups and belief systems. When people perceive that they cannot know, or understand, all the information necessary to be confident of making the right decision about something that matters to them, the result is a psychologically uncomfortable state of uncertainty.⁴¹ Social psychologist Michael Hogg explains:

People strive to reduce feelings of uncertainty, particularly uncertainty about and related to themselves, and about their social world and their place within it Some uncertainty is exciting, making us feel edgy and alive, but for most of us most of the time acute uncertainty, enduring uncertainty, and uncertainty about and related to self in social context is aversive.⁴²

People can reduce such uncertainty by affiliating with a group that defines the individual's role and relationship to others, or by adhering to a belief system (an "ideology") that offers an integrated set of beliefs and values explaining the world and specifying appropriate individual and social action.⁴³ Certain types of groups and belief sys-

³⁹ For an excellent synthesis of the literature, see Eppler & Mengis, *supra* note 36, at 330–33. See also John Sweller & Paul Chandler, *Why Some Material Is Difficult to Learn*, 12 COGNITION & INSTRUCTION 185 (1994) (discussing problem in context of learning theory and instructional design).

⁴⁰ See, e.g., Eppler & Mengis, *supra* note 36; Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1226–29 (2003) (collecting literature on simplification and reduction of options); cf. Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999) (examining citizen use of unions, political parties, and corporations as political intermediaries to oversee and monitor government action).

⁴¹ See Janet A. Sniezek & Timothy Buckley, *Becoming More or Less Uncertain*, in INDIVIDUAL AND GROUP DECISIONMAKING: CURRENT ISSUES 87, 88 (N. John Castellan, Jr. ed., 1993) ("subjective uncertainty" is the individual's perception of inaccessibility of information, in contrast to "environmental uncertainty" which is the objective reality that information is unavailable).

⁴² Hogg, *supra* note 34, at 209.

⁴³ Group affiliation "renders one's own and others' behavior predictable and thus allows one to avoid harm and plan effective action. It also allows one to know how one should feel and behave." *Id.* at 210. For an overview of studies demonstrating that uncertainty

tems are more capable of serving this function than others. The greatest degree of uncertainty reduction is afforded by groups and ideologies that (i) define themselves through unambiguous, uncompromising boundaries; (ii) adopt a highly focused, internally consistent set of beliefs and values; (iii) reject subtlety and contradiction in favor of a single, uncomplicated version of “the truth;” (iv) prize loyalty and conformity over individual critical judgment and initiative; and (v) offer a clear hierarchical structure, in which power is vested in a leader strongly associated with the group’s identity and trusted to determine its destiny.⁴⁴ Appeals to authority and shared tradition often play an important part.⁴⁵

arising from social context makes people more likely to identify (or to identify strongly) with groups, see Michael A. Hogg, *Subjective Uncertainty Reduction Through Self-Categorization: A Motivational Theory of Social Identity Processes*, 11 EUR. REV. SOC. PSYCHOL. 223 (2000).

- 44 Michael A. Hogg et al., *Uncertainty, Entitativity, and Group Identification*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 135 (2007); see also Hogg, *supra* note 34, at 211–13 (citing additional sources).

On the importance of the group leader in times of uncertainty and crisis, see Daan van Knippenberg & Michael A. Hogg, *A Social Identity Model of Leadership Effectiveness in Organizations*, 25 RES. ORGANIZATIONAL BEHAV. 243, 245–46 (2003). Michael Hogg and Daan van Knippenberg review studies suggesting that under conditions of strong group identification, members will attribute status, support, capability, and persuasiveness to the most prototypical member of the group. *Social Identity and Leadership Processes in Groups*, 35 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1 (2003) [hereinafter Hogg & van Knippenberg, *Social Identity*]. “Attribution processes, specifically the fundamental attribution error, correspondence bias, or essentialism, operate to construct a charismatic and leadership persona for the prototypical leader.” *Id.* at 41; see also Michael A. Hogg, *From Prototypicality to Power: A Social Identity Analysis of Leadership*, 18 ADVANCES GROUP PROCESSES 1, 1 (2001) [hereinafter Hogg, *Prototypicality*] (analyzing how “prototypical group members can become leaders”). In other words, leaders whose attitudes, behaviors, etc. are seen as epitomizing the characteristics that separate “us” (in group) from “them” (out group) are perceived to be effective and so “acquire[] greater and more secure leadership ability.” Hogg & van Knippenberg, *Social Identity*, *supra* note 44, at 41.

For a broader discussion of these issues in the context of political leadership, see BARBARA KELLERMAN, *BAD LEADERSHIP: WHAT IT IS, HOW IT HAPPENS, WHY IT MATTERS* 22 (2004).

- 45 See Hogg, *supra* note 34, at 215–19 (discussing work on orthodoxy and authoritarianism). See also Michael A. Hogg, *Uncertainty-Identity Theory*, 39 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 69, 93–94 (2007) (describing work of “postmodern paradox” theorists, who argue that the contemporary “atomistic, individual-oriented status societ[ies]” which have replaced stable matrices of rank, familial, and social relationship give rise to a paradox in which “people with today’s less structured self yearn for community and the collective affiliations of times past”).

B. *Present Shock and Palliative Politics*

A weekday edition of The New York Times contains more information than the average person [in the seventeenth century] was likely to come across in a lifetime during seventeenth-century England.

—Richard Saul Wurman, in *The Employee Handbook of New Work Habits for a Radically Changing World*⁴⁶

Anyone with an Internet connection today has access to exponentially greater quantities of writing, images, sound, and video than anyone on earth could have imagined just twenty years ago.

—David A. Bell, *The New Republic*⁴⁷

Against this background, consider the environment in which unitary executive theory has become a widely-endorsed and influential legal justification for the modern “personal” presidency.

In the forty years since *Future Shock* was published, the volume, pace, novelty, complexity, and simultaneity of information has, if anything, intensified. In 2000, and again in 2003, researchers at the Berkeley School of Information Management and Systems estimated the volume of new information created annually. Their findings⁴⁸ were mind-boggling:

- Print, film, magnetic, and optical storage media produced about five exabytes of *new* information annually. One exabyte (10^{18} , or 1 billion billion, bytes) is roughly the amount of information in seventy-seven novels—for every person on earth. Five exabytes represents 37,000 times the information in the Library of Congress’s book holdings—or all the words spoken by humans to date.⁴⁹
- Electronic media—telephone, radio, TV, and the Internet—contained approximately 17.7 exabytes of *new* information (out of a much larger total information flow).⁵⁰

⁴⁶ Quoted in PRICE PRITCHETT, *THE EMPLOYEE HANDBOOK OF NEW WORK HABITS FOR A RADICALLY CHANGING WORLD* 21 (1994).

⁴⁷ David A. Bell, *The Colbert Report*, *THE NEW REPUBLIC*, Oct. 7, 2009, <http://www.tnr.com/article/books-and-arts/the-colbert-report>, (reviewing JACOB SOLL, *THE INFORMATION MASTER: JEAN-BAPTISTE COLBERT’S SECRET STATE INTELLIGENCE SYSTEM* (2009)).

⁴⁸ UNIV. OF CAL. BERKELEY SCH. OF INFO. MGMT. & SYSTEMS, *HOW MUCH INFORMATION?* (2003), <http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm>.

⁴⁹ This, and the other equivalencies given here, appear on multiple websites including *id.* and *The Digital Big Bang* (Feb. 20, 2008), <http://ideonex.com/2008/02/20/the-digital-big-bang/>.

⁵⁰ These estimates include audio and visual files, which are considerably larger than the equivalent information in text form. Still, the quantities involved are so huge that they

When Toffler wrote, the extension of Internet access to the general public through creation of the World Wide Web was barely on the horizon.⁵¹ In fewer than twenty years, the Web has exploded to 63 billion pages that can be readily retrieved by commercial search engines;⁵² its total content is vastly larger.⁵³ The Internet has brought e-mail, texting, Instant Message, Twitter, and YouTube—media of such speed, immediacy, and accessibility that the increased information load has profoundly altered our working and social lives.⁵⁴

The depth and scope of cultural change experienced by Americans in the last four decades has been equally momentous. Social, political, and technological developments have included: the oil crisis, recycling, and global warming; the women's movement, the fight for gay rights, and the end of apartheid; personal computers, pocket calculators, and videogames; fiber optics, lasers, and nanotechnology; microwave ovens, cable TV, and VCRs; multinational corporations, al Qaeda, and the TSA; the discovery of black holes, the creation of the International Space Station, and the demotion of Pluto; facelifts, MRIs, and organ transplants; the fall of the Berlin Wall, the dissolution of the USSR, and the recognition of (mainland) China; FedEx,

remain sobering even if adjusted down by several orders of magnitude. For example, if the estimate of five exabytes, is reduced to five megabytes (i.e., from 10^{18} to 10^6), the amount of new information annually would still be equivalent to the text of Shakespeare's complete works.

- 51 The World Wide Web dates from the early 1990s; the technology that evolved into the Internet developed from research in the early 1970s.
- 52 The Size of the World Wide Web, <http://www.worldwidewebsite.com/> (last visited Jan. 29, 2010). Search engines construct a database of the Web by using programs called *spiders*, or Web crawlers, that begin with a list of known Web pages. The spider gets a copy of each page and *indexes* it, storing useful information that will let the page be quickly retrieved again later. Any hyperlinks to new pages are added to the list of pages to be *crawled*. Eventually all reachable pages are indexed, unless the spider runs out of time or disk space. Surface Web, http://en.wikipedia.org/wiki/Surface_Web (last visited Jan. 29, 2010).
- 53 Indexed pages constitute the “surface Web.” A 2001 study estimated that the “deep Web” is 1000 to 2000 times larger than “surface” content. See Michael K. Bergman, *The Deep Web: Surfacing Hidden Value* (2001), <http://www.brightplanet.com/industry-insight/white-papers/>. The deep Web can't be reached for indexing by standard search engines in many cases because the web pages are generated on the fly (“dynamically”) by pulling content from databases or other locations in response to specific search requests. As this description implies, information in the deep Web is retrievable but not easily quantifiable. *Id.*
- 54 A recent study estimates that the time and distraction involved in managing information generated through these electronic media occupies a substantial percentage of the work day of “knowledge workers” and costs the U.S. \$900 billion annually in lost productivity. Julian Sanchez, Report: Info Overload Costs \$900 Billion, Blame Mr. Rogers (Dec. 30, 2008), <http://arstechnica.com/news.ars/post/20081230-measuring-the-costs-of-info-overload.html>.

Polaroid, and Starbucks; the end of the Cold War, the beginning of the War on Drugs, and the declaration of the War on Terror; the Human Genome Project, stem cell research, and cloning; the European Union, NAFTA, and Microsoft; AIDS, anti-smoking campaigns, and anthrax threats; no-fault divorce, in vitro fertilization, and assisted suicide; cell phones, camcorders, and MP3 players; disco, techno, and emo; CNN, Dr. Ruth, and reality television; the Euro, barcoding, and GPS; Columbine and Oklahoma City, Katrina, and 9/11. That many of these developments are triumphs rather than tragedies is largely beside the point: even “good” change creates stress if it is too swift and fundamental.

In this cognitively demanding, rapidly shifting, frequently bewildering, and increasingly threatening world, Americans maintain a complex and conflicted relationship with government. We insist that public agencies and institutions should care for those in need, protect the environment, assure health care for all, police the safety of food, drugs, and other products, and defend our homes and borders.⁵⁵ Yet, we believe that programs run by government tend to be wasteful and ineffective, and that regulation of business usually does more harm than good.⁵⁶ We are convinced that voting gives us a voice in how government operates.⁵⁷ At the same time, we doubt that government officials care what we think, and increasingly question the ability of the public to make wise political choices.⁵⁸ As government takes greater responsibility for our physical, social, and economic well-being, we insist that greater transparency is the touchstone of democratic accountability.⁵⁹ Yet, more information further

55 See, e.g., THE PEW RESEARCH CTR., TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987–2007, at 12–19, 62–63 (2007), available at <http://people-press.org/reports/pdf/312.pdf>; see also, Polling Report.com, Health Policy, <http://www.pollingreport.com/health.htm> (last visited Jan. 29, 2010) (providing multi-year results of various polls on government provision of health insurance and food and product safety).

56 See THE PEW RESEARCH CTR., *supra* note 55, at 45–47.

57 See *id.* at 48 (“Roughly seven-in-ten Americans . . . agree with this statement: ‘Voting gives people like me some say about how government runs things.’”); AM. NAT’L ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: ELECTIONS MAKE THE GOVERNMENT PAY ATTENTION 1964–2004, http://www.electionstudies.org/nesguide/toptable/tab5c_2.htm; AM. NAT’L ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: GOVERNMENT RESPONSIVENESS INDEX 1964–2004, http://www.electionstudies.org/nesguide/toptable/tab5c_3.htm.

58 See THE PEW RESEARCH CTR., *supra* note 55, at 45–50; AM. NAT’L ELECTION STUDIES, THE ANES GUIDE TO PUBLIC OPINION AND ELECTORAL BEHAVIOR: PUBLIC OFFICIALS DON’T CARE WHAT PEOPLE THINK 1952–2004, http://www.electionstudies.org/nesguide/toptable/tab5b_3.htm.

59 See, e.g., Memorandum from President Barack Obama to the Heads of Executive Dep’ts and Agencies, Transparency and Open Gov’t (Jan. 21, 2009), available at

strains the already overtaxed attentional and cognitive processing resources we need to comprehend what government is doing.⁶⁰

Numerous studies and polls reveal that contemporary Americans believe fervently in our system of government, while knowing little about the people and processes through which it operates.⁶¹ Although this lack of civic understanding is often deplored,⁶² it is also not surprising. The United States is the geographically largest and most heterogeneous democratic country in the world, and the structures through which it is governed are probably the most complicated and confusing of any contemporary democracy.⁶³ We are committed to federalism. This means that authority over economic, social, and personal affairs is dispersed across national, state, and local government entities; the local level, closest to the people, itself comprises a byzantine jurisdictional tangle of counties, cities, townships, towns, villages, and school districts. We are also committed to separation of powers. This means that each of these levels typically has distinct legislative, executive, and judicial bodies, the names and powers of which vary considerably.⁶⁴ The administrative agencies, boards, and commissions also typically found at each level further multiply the number of governing entities able to make public policy and create rules with the force of law. And, to complicate matters even further from the average citizen's perspective, official entities at one level are required to obey, even enforce, the legal rules of higher-level entities, and so the "law" they announce to the public may be an amalgam of local, state, and national rules. Finally, the scope and content of pol-

http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/ (committing new Administration to "transparent," "participatory," and "collaborative" government).

60 The increasingly problematic relationship between transparency demands and democratic engagement is explored in Oren Perez, *Complexity, Information Overload, and Online Deliberation*, 5 I/S: J. L. & POL'Y FOR INFO. SOC. 43 (2009).

61 "The widespread ignorance of the general public about all but the most highly salient political events and actors is one of the best documented facts in all of the social sciences. . . . Bare majorities know the simplest facts about how government works, and fewer still hold 'real' attitudes toward even the most important political issues of the day." Lau & Redlawsk, *supra* note 31, at 951 (collecting sources) (citations omitted); *see infra* Part II.

62 *E.g.*, Somin, *supra* note 35, at 416 ("[T]he fact that a majority of American voters with an opinion on the issue believe that the federal government is too large and powerful and simultaneously favor increased spending in almost every major area of federal involvement" demonstrates the absence of the minimum knowledge required for meaningful democratic participation).

63 *See* Nelson W. Polsby, *On the Distinctiveness of the American Political System*, in ALAN BRINKLEY ET AL., *NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION* 29 (1997).

64 For example, in New York, "Supreme Court" denotes the trial courts of general jurisdiction. In Massachusetts, the "General Court" is the legislature.

icy measures no longer reliably match the level of the entity making them: city councils, thinking globally and acting locally, ban the products of misbehaving foreign countries,⁶⁵ while agencies of the national government specify the dimensions of curb ramps on village streets.⁶⁶

With the convoluted structures, overlapping powers, and diffused responsibility of this system, contrast the elegant simplicity, clarity, and logic of President-centered government under unitary executive theory. A single leader possesses the responsibility and power to oversee modern regulatory government, coordinating, rationalizing, and correcting its myriad decisions. Unique among public officials, he is elected by the entire country. He is therefore attuned to the will of all, rather than beholden to the parochial demands of a few. Congress is inevitably torpid, conflicted, and erratic. His office is intentionally structured for swift, resolute, and purposeful action. Legislators shirk personal responsibility, and administrators hide behind bureaucratic gibberish. The personal President is readily identifiable, highly visible, and inescapably accountable to the people, who watch and listen as he leads the country and addresses the world. Commander of our armed forces, focal point of our intelligence gathering, and head of a cadre of loyal and expert advisers, he commands the knowledge and the power of the nation.

This account responds powerfully to the uncertainty and overwhelming complexity of modern life. Scholars of the presidency have long recognized that the modern President serves as an important cognitive aid for Americans;⁶⁷ unitary executive theory supplies a coherent and compelling ideological framework for amplifying this effect. The theory rejects the fuzzy contextual reasoning of checks-and-balances for the certainty of roles fixed by separation of powers: “[the three vesting] clauses appear clearly to divide the world of governmental powers into a finite set of three, . . . each of which is assigned to one and only one governmental actor.”⁶⁸ It speaks in absolutes: “the Constitution unambiguously gives the President the power

65 *E.g.*, Mary-Rose Abraham, *Florida City Tries to Ban Chinese Products*, ABC NEWS, Oct. 24, 2007, <http://abcnews.go.com/business/creativeconsumer/Story?id=3765361&page=1> (describing how Palm Bay, Florida attempted to ban products made in China); John Nichols, *City Bans Sweatshop Products*, THE PROGRESSIVE, May 1997, at 14 (discussing the North Olmsted, Ohio ordinance banning municipal purchase of sweatshop products).

66 ADA Standards for Accessible Design, 28 C.F.R. pt. 36, App. A, § 4.7 (2010).

67 *See, e.g.*, Fred I. Greenstein, *Popular Images of the President*, in THE PRESIDENCY 287, 293–94, (Aaron Wildavsky ed., 1969).

68 *See, e.g.*, Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 n.45 (1994).

to control the execution of all federal laws.”⁶⁹ It draws bright lines: the President’s “power to superintend, control, and ensure the faithful execution of the laws” entails “the power to remove and direct *all* policymaking subordinates in the executive branch.”⁷⁰ It establishes a leader with unique claims to authority that simultaneously legitimate his actions (“he, and he alone, speaks for the entire American people”)⁷¹ and guarantee the beneficence of his judgments (“[Because] the national majority coalition. . . will, by its very nature, be likely to be moderate, temperate, and just, so too will its agent be likely to be moderate, temperate, and just.”).⁷² It is authenticated by appeal to the wisdom of our ancestors, the plain meaning of our authoritative founding text, and the practice of our forefathers.⁷³ No wonder that, over the last thirty years, unitary executive theory as apologia for the modern “personal presidency” has grown from a sectarian constitutional creed to a mainstream civic religion.

II. IMPOSSIBLE PROMISES

Leaders, even bad ones, can provide a sense of order and certainty in a disordered and uncertain world.

—Barbara Kellerman, *Bad Leadership*⁷⁴

Overpromising is a danger at any time, but it is a particular danger now because the public mood is so unsettled.

—Peter McNamara, in *Divided Government*⁷⁵

By emphasizing singularity over multiplicity, absolutism over contingency, and established truth over emergent meaning, unitary executive theory displays the *formal* criteria of a particularly effective ideological resolution for the stress of modern civic uncertainty. At the same time, its principal *substantive* claims respond directly to core anxieties about the contemporary American enterprise of self-government. The “democracy claim” assures us that we *do* continue

⁶⁹ Calabresi & Prakash, *supra* note 3, at 570.

⁷⁰ CALABRESI & YOO, *supra* note 7, at 29 (emphasis added).

⁷¹ Calabresi, *supra* note 3, at 36.

⁷² Calabresi, *supra* note 3, at 67; accord Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1734 (2009) (“The President must answer to the entire nation and must consider all the effects and penumbras of executive actions.”).

⁷³ See *supra* text accompanying note 7.

⁷⁴ KELLERMAN, *supra* note 44, at 22.

⁷⁵ Peter McNamara, *Doing One’s Job: A Constitutional Principle and a Political Strategy for an Uncertain Future*, in *DIVIDED GOVERNMENT: CHANGE, UNCERTAINTY, AND THE CONSTITUTIONAL ORDER* 191, 207–08 (Peter F. Galderisi et al. eds., 1996).

to govern ourselves, even as our nation has become a global superpower, because we choose our leader through a process that yields a representative of the “entire American people.”⁷⁶ The “managerial claim” promises that this leader can supervise and control the vast federal domestic and foreign policy machinery that is largely beyond the ken of the normal citizen, aligning its outputs with the nation’s (our) interests.

Yet, as the following Parts explain, President-centered government cannot deliver what it promises—in part because of the very circumstances of modern life that make unitary executive theory so deeply appealing.⁷⁷

A. *The Democracy Claim: The President as Representative-in-Chief*

[P]eople now and always have wanted their President to be something bigger than life.

—Stephen Hess⁷⁸

Although the democracy claim is a key tenet of unitary executive theory, its proponents do not offer a single, completely specified model of exactly how the President comes to be the truest, best representative of all the people of the nation. Three possibilities are fair-

⁷⁶ Calabresi, *supra* note 3, at 36.

⁷⁷ A small but determined literature has challenged the claims of unitary executive theory; in addition to historical critiques cited *supra* note 7, it includes: Farina, *supra* note 7; Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227 (1998); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Thomas O. Sargentich, *The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. AM. U. 710 (1993); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596 (1989); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995) [hereinafter Shane, *Political Accountability*].

A more recent round of criticism of various aspects of unitary executive reasoning—perhaps sparked by the prominence of the theory in Bush Administration decision making includes: Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. (forthcoming 2009); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008). See also Thomas J. Cleary, *A Wolf in Sheep’s Clothing: The Unilateral Executive and the Separation of Powers*, 6 PIERCE L. REV. 265 (2007).

⁷⁸ Quoted in Alison Mitchell, *Campaign Trail or Garden Path?*, N.Y. TIMES, July 2, 1995, at E5.

ly inferred from the literature defending President-centered government:

(1) *Instructing our Representative*. This account of the representational rapport between President and people is the most straightforward—and the most democratically ambitious. It envisions presidential elections operating as, in effect, national policy referenda. During the months of campaigning, voters engage in an extraordinary period of nationwide reflection and debate on important domestic and international issues.⁷⁹ They then cast their ballots endorsing a particular policy agenda for the next four years.⁸⁰ The victorious presidential candidate thus emerges with a genuine popular mandate to accomplish specific programmatic objectives.

This account underlies the demand for enhanced presidential control over the content of domestic, as well as foreign, policy.⁸¹ It also can support the familiar political imagery of the President and the people working together to govern.⁸²

(2) *Wise and Faithful Agent of the “National Majority Coalition”*⁸³: A second, more democratically modest account, conceptualizes presidential elections as quadrennial occasions for a nationwide coalition of interests, representing at least 51% of the people, to select its chief political agent. This account does not depend on all (or even most) voters having a specific agenda of well-formed policy preferences. Rather, it sees the events that begin with the caucuses and primaries and culminate in the general election as a process wherein a majority of Americans discover the leader best suited (whether by character,

79 See, e.g., Calabresi, *supra* note 3, at 74; Steven G. Calabresi, “*The Era of Big Government Is Over*”, 50 STAN. L. REV. 1015, 1039 (1998) (reviewing ALAN BRINKLEY ET AL., *supra* note 63).

80 See, e.g., Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 508 (1985) (“Presidents are elected presumably because they share the policy preferences of a majority of citizens.”); cf. Paul R. Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779, 799 (arguing that independent agencies “can frustrate [the] democratic process” because “[t]he President is elected precisely to implement those policies on which he has campaigned”).

81 See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193–95 (1994).

82 Barbara Hinckley’s analysis of presidential speeches from Truman to Reagan, HINCKLEY, *supra* note 10, discovered a set of recurring political stories in Presidents’ public speeches. One of these is that the work of governing is “carried on primarily by the president, the American people, and the nation.” *Id.* at 131.

83 Calabresi, *supra* note 3, at 67; see also *id.* (“[M]ost presidents . . . will work every day they are in office to try to keep their policies in accord with the wise and benevolent preferences of the national majority . . .”).

political philosophy, experience, or substantive commitments) to realize their political goals and act consistent with their political beliefs (however specified or general those might be).

This account appears to be what fuels the strong unitary executive preference for presidential policy direction vis-à-vis that of Congress—which appears by contrast to be an inferior democratic institution, affording representation that is necessarily limited and partial.⁸⁴ This account can also support the political imagery of the plebiscitary President speaking, uniquely, for the people of the nation.⁸⁵

(3) *The Benevolent Dictator*⁸⁶: In this third account, presidential elections are a device for conferring formal authority on a leader while incentivizing him to exercise this power for the general good rather than narrow factional interests. This conception is the thinnest in democratic terms: *why* people vote as they do is unimportant; no particular proportion of popular support is required, so long as the constitutionally specified process is followed. The key is that selection of the President requires participation of the whole nation. This attunes him to “the general national will” and leads him to resist factional demands for “policies at variance with those the nation as a whole might want.”⁸⁷

⁸⁴ See, e.g., Calabresi, *supra* note 3, at 36–38; cf. Kagan, *supra* note 3, at 2336 (arguing that political actors other than the President have “a far more tenuous connection to national majoritarian preferences and interests”).

One of the clearest articulations of this idea appears, remarkably, in a 1918 article by the Director of the Commercial University at Munich, Dr. M.J. Bonn. In the article, Dr. Bonn attempted to explain the American political system to his countrymen, on the occasion of the U.S. entering World War I:

The President is the choice of the American people. He is far more so than the Senate or the House of Representatives. The Senate represents individual states. The members of the House represent particular electoral districts. The President represents the whole nation, both minority and majority. . . . If the President tries to exercise an authority superior to that of the Senate and House, this is not a despotic maneuver. His attitude is supported by a feeling that he alone is elected by the whole nation, which speaks in his name.

M.J. Bonn, *A German Estimate of American Opinion*, reprinted in 10 LIVING AGE 754, 757 (1918), available at <http://books.google.com/books?id=2wIuAAAAAYAAJ&lpg=PA754&ots=CMg44BGC0n&dq=Bonn%20%22A%20German%20Estimate%20of%20American%20opinion%22&pg=PA754#v=onepage&q=Bonn%20%22A%20German%20Estimate%20of%20American%20opinion%22&f=true>.

⁸⁵ A second political story Professor Hinckley found in modern presidential speeches, see *supra* note 82, is that the President, the American people and the nation are one, “linked by the word ‘we,’ and . . . indistinguishable from one another.” HINCKLEY, *supra* note 10, at 131.

⁸⁶ This characterization may seem disparaging but it comes directly out of a text important to unitary executive theory, THE FEDERALIST NO. 70 (Alexander Hamilton), quoted at *infra* text accompanying note 140.

⁸⁷ Calabresi, *supra* note 3, at 64 n.105; see, e.g., Kagan, *supra* note 3, at 2335 (“[B]ecause the President has a national constituency, he is likely to consider . . . the preferences of the

This account permits the simultaneous insistence that the President is entitled to virtually complete autonomy *and* is uniquely motivated to govern in the national interest. No one can direct presidential judgment because the Constitution gives the executive power to the duly elected President alone.⁸⁸ However, because he comes to power only on the vote of the whole nation, the President is motivated to exercise power in ways that further the interests of the national community as a whole.⁸⁹ This account also can support the political imagery of the “personal” President single-handedly carrying out the work of the government, often in the face of congressional irresponsibility and bureaucratic ineptitude.⁹⁰

general public, rather than merely parochial interests.”); Lessig & Sunstein, *supra* note 3, at 105–06 (“[B]ecause the President has a national constituency . . . [presidential control] appears to operate as an important counterweight to factional influence over administration.”); see also Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313, 320–21 (1993); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201 (1993) (both identifying the President as uniquely resistant to factional control).

88 *E.g.*, Memorandum from the U.S. Dep’t of Justice Office of Legal Counsel to William J. Haynes II, Gen. Counsel, Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees 14 (Jan. 9, 2002), available at <http://www.torturingdemocracy.org/documents/20020109.pdf> (“[T]he president is vested with all of the federal executive power . . .”); Online Discussion with Steven G. Calabresi, on WashingtonPost.com (June 27, 2008) (transcript available at http://www.law.northwestern.edu/news/article_full.cfm?eventid=3804) (“The executive power was understood as being quite broad in 1787, and it is given to the president. Moreover, the Constitution says Congress can act only when both houses concur and the courts can act only when there is a case and controversy. Anything the government does that does not involve bicameralism and presentment or adjudication of a case or controversy is executive and is in the president’s domain.”).

President George W. Bush expressed the idea most directly. See Interview by Sir David Frost with President George W. Bush (Nov. 16, 2003) (transcript available at <http://www.pbs.org/newshour/frost/transcript.html>) (“I don’t pay attention to polls.”); George W. Bush, News Conference (Mar. 21, 2006) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=65409>) (responding “Correct” to reporter’s question: “You’ve said during your Presidency that you don’t pay that much attention to the polls, but—”); *Bush: “I’m the Decider” on Rumsfeld*, CNN.COM, Apr. 18, 2006, <http://www.cnn.com/2006/POLITICS/04/18/rumsfeld/> (“I’m the decider, and I decide what is best.”); cf. BOB WOODWARD, BUSH AT WAR: INSIDE THE BUSH WHITE HOUSE 145–46 (2002) (“I’m the commander—see, I don’t need to explain . . . That’s the interesting thing about being the president. . . I don’t feel like I owe anybody an explanation.”).

89 *E.g.*, Calabresi, *supra* note 3, at 59 (emphasizing the President’s “unique claim to legitimacy” as the only representative “accountable to a national voting electorate and no one else”); *id.* at 36 (“The essential ingredient to combating the congressional collective action problem is the President’s national voice, because he, and he alone, speaks for the entire American people.”).

90 The third story that, according to Professor Hinckley, pervades modern presidential public rhetoric, see *supra* notes 82 & 85, is that Presidents work alone, with little help from Congress, advisers, or agency officials. HINCKLEY, *supra* note 10, at 131.

These three accounts differ in the *mechanism* that produces a leader in singular rapport with the people of the nation, but each insists that the President is the epitome of democratic representation. Each also resonates with particular aspects of the modern political phenomenon that is the “personal” plebiscitary presidency. And, on closer examination, each rests on a simplified and idealized version of the American political process that is more mythic than real.

1. “*Instructing our Representative*”

[T]he greater the size and scope of government, the more voters have to know if they are to control its policies through the ballot.

—Ilya Somin, *Voter Ignorance and the Democratic Idea*⁹¹

There is simultaneously too much information for any person to use competently, and most people are paying very little attention

—Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Nominations*⁹²

For presidential elections to function as occasions for citizens to specify the policy course of government, several conditions must exist: (i) voters have a coherent collection of preferences on important policy issues; (ii) the slate of presidential contenders includes candidates with clearly articulated policy agendas, at least one of which substantially coincides with voters’ preferences; and (iii) citizens successfully vote their preferences, casting their ballots for the candidate whose policy agenda in fact most closely corresponds with their own. This is the story-book account of how representative democracy works. Unfortunately, everything we know about voter and candidate behavior suggests that this story has little relation to what actually happens in presidential elections.

We can begin with what appears the strongest case for conceptualizing presidential elections as national policy referenda: the 1980s, which is, not coincidentally, the same political period in which unitary executive theory emerged as a fully formed, coherent ideology. Three consecutive presidential campaigns offered voters well-defined and sharply contrasting visions of the appropriate role of the federal government in regulating business and providing social services. And the people responded by giving decisive victories to Ronald Reagan twice (over incumbent Carter in 1980, then Mondale in 1984), and

91 Somin, *supra* note 35, at 431.

92 Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Nominations*, 85 VA. L. REV. 1533, 1544 (1999).

then to his Vice President and self-defined successor, George H.W. Bush (over Dukakis in 1988). This all seems evidence of a nation of voters using the quadrennial ballot to endorse the Reagan Revolution of scaled-back domestic programs, increased military spending, free market economics, and social conservatism.⁹³

Yet the facts are otherwise. Scholars of public opinion and voting behavior have repeatedly shown that most Americans in the 1980s did *not* support the new conservative agenda that included dismantling federal regulatory programs. Surveys throughout the period solidly establish that a majority thought the federal government should be spending *more* on education, the environment, healthcare, and the poor.⁹⁴ To be sure, the *size* of this majority was smaller in 1980 than at any previous time since the early 1950s.⁹⁵ Significantly, however, the majoritarian preference for activist regulatory government began to grow steadily and markedly from the time Ronald Reagan was first elected. By 1984, when Reagan was reelected by a larger popular vote than in 1980,⁹⁶ the proportion of Americans voicing “liberal” regulatory policy preferences had risen to levels considerably higher than when Jimmy Carter won the presidency in 1976.⁹⁷ By the 1988 election of George H.W. Bush, this proportion had risen to about the lev-

⁹³ George H.W. Bush’s 1988 platform was so conspicuously framed as a continuation of Ronald Reagan’s policies that 1988 has been called Reagan’s third election.

⁹⁴ *E.g.*, BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS’ POLICY PREFERENCES* 169–70, 373–74 (1992); MARTIN P. WATTENBERG, *THE RISE OF CANDIDATE-CENTERED POLITICS: PRESIDENTIAL ELECTIONS OF THE 1980S* 101–10 (1991); Scott L. Althaus, *Information Effects in Collective Preferences*, 92 *AM. POL. SCI. REV.* 545 (1998).

See also David E. RePass, *Searching for Voters Along the Liberal-Conservative Continuum: The Infrequent Ideologue and the Missing Middle*, *FORUM*, June 2008, at 16, 45, <http://www.bepress.com/forum/vol6/iss2/art5> (concluding from American National Elections Studies data, inter alia, that 1980 and 1984 victories did not reflect widespread voter support for Reagan’s new conservatism). *See generally*, Christopher Ellis & James A. Stimson, *Pathways to Ideology in American Politics: The Operational-Symbolic “Paradox” Revisited*, 3–4 (Apr. 7, 2005), *available at* www.unc.edu/~jstimson/Pathways.pdf (using data from 1970–2005 to show that Americans always on average “prefer policies through which the government does and spends more to solve social problems,” and that this “clear preference . . . varies within a relatively small range, never quite touching the neutral point even at its most extreme conservative moments”).

⁹⁵ JAMES A. STIMSON, *PUBLIC OPINION IN AMERICA: MOODS, CYCLES, AND SWINGS* 68 (2d ed. 1999).

⁹⁶ Both voter turnout and Reagan’s margin of victory were higher in 1984. *See* Dave Liep’s Atlas of U.S. Presidential Elections, 1984 Presidential General Election Results, <http://uselectionatlas.org/RESULTS/national.php?year=1984&f=0&off=0&elect=0> (last visited Jan. 29, 2010).

⁹⁷ STIMSON, *supra* note 95, at 68.

el of the 1964 election, when Lyndon Johnson and his proposed Great Society program beat Barry Goldwater in a landslide.⁹⁸

The 1980s are thus highly problematic for the “Instructing Our Representative” account of presidential electoral politics, but there is more. Political scientists Richard Lau, David Anderson, and David Redlawsk used data from the 1972–2004 presidential elections to measure the extent of “correct voting.”⁹⁹ They defined a vote as “correct” if it was cast for the candidate whose expressed issue positions most closely matched the voter’s collection of expressed, weighted preferences.¹⁰⁰ Averaging all the elections in this thirty-two year period, they found that “about *one-quarter of all voters voted incorrectly*, sending a misleading message about the direction of their preferences.”¹⁰¹ The range of “incorrect voting” in the period was set by two elections that seem particularly important to unitary executive claims: the highpoint of “incorrect” voting (49% of voters) came in the legendary 1980 victory of Ronald Reagan over incumbent Jimmy Carter; the low point (15%) came in the notorious 2000 election, when Al Gore won the popular vote only to lose to George W. Bush in the Electoral College.¹⁰²

The Lau, Anderson, and Redlawsk study is the most extensive on issue voting in U.S. presidential elections, but its conclusions are consistent with other, more time-limited studies.¹⁰³ Whether we look at issues that have been politically salient for decades, issues that become prominent in particular presidential campaigns, key political facts on which voter judgment depends, or simply background understanding of basic civics, crucial gaps and significant errors exist in voter knowledge.¹⁰⁴ Presidential elections may be times of extraordi-

⁹⁸ *Id.* Johnson made the Great Society programs the centerpiece of his domestic policy agenda in a speech given in the spring preceding the 1964 election.

⁹⁹ Lau, Andersen & Redlawsk, *supra* note 15, at 396, 400.

¹⁰⁰ Drawing data from the long-running American National Election Studies (ANES) survey, the researchers constructed a measure using (i) information about voter preferences on specific issues; (ii) information from which relative weight of preferences (i.e., how important each policy issue was to the particular voter) could be gauged; and (iii) information about candidate positions on the issues. *Id.* at 396–97.

¹⁰¹ *Id.* at 406 (emphasis added).

¹⁰² *Id.* at 401.

¹⁰³ *E.g.*, Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, POL'Y ANALYSIS (Cato Institute), Sept. 22, 2004, at 2, *available at* <http://www.cato.org/pubs/pas/pa-525es.html> (reviewing “the overwhelming evidence that the American electorate fails to meet even minimal criteria for adequate voter knowledge” on specific issues in 2004 election and on general political knowledge).

¹⁰⁴ For example, deregulation and decreased national government spending were prominent and consistent themes of Ronald Reagan’s campaigns and presidency. Yet, when the 1988 ANES asked about the pattern of federal spending on the environment, the

nary national political engagement, but a large proportion of voters still do not know enough to vote their preferences accurately.¹⁰⁵

From the cognitive perspective, this all makes sense. The federal policy agenda is wide-ranging, the “facts” about individual issues are often not only complex but controverted, and the various proposed solutions frequently involve complicated interdependencies and trade-offs among incommensurable values. Candidates, whether from deliberate strategy or less-than-optimal personal communication skills, are often unclear about their policy positions.¹⁰⁶ Mass me-

poor, and public schools during the Reagan Administration, fewer than 30% of respondents knew that federal government effort and spending had decreased in all three categories; indeed, in the areas of public schools and environmental protection, more respondents thought the level of federal activity had increased. See MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* 263–64 (1996); WATTENBERG, *supra* note 94, at 124–25. Of the remaining respondents, about half did not know, and half thought spending had remained stable. See *id.* at 125–26. In the area of assistance to the poor, a smaller but still remarkable 20.4% thought federal spending had increased under Reagan. *Id.* at 124–25. Consistent with the general pattern of public opinion discussed in the text, between 60% and 68% of respondents (depending on the issue) stated that they would disapprove of decreased federal activity in these policy areas. DELLI CARPINI & KEETER, *supra* note 104, at 263–64. A large majority of those who favored increased federal efforts and accurately perceived the Reagan record voted *against* Bush; a large majority of those who favored increased federal efforts but *inaccurately* perceived the Reagan record voted *for* Bush. *Id.* at 263–64.

For data from a more recent election, see Kate Kenski & Kathleen Hall Jamieson, *Issue Knowledge and Perceptions of Agreement in the 2004 Presidential General Election*, 36 PRESIDENTIAL STUD. Q. 243 (2006) (using ANES data, voters’ knowledge of candidates’ issue positions was higher than in 2000, but mistakes worked disproportionately to Bush’s benefit; more people agreed with Kerry’s actual issue positions than Bush’s positions on five of seven issues examined; controlling for gender, age, race, education, party identification, and ideology, each candidate knowledge item answered correctly was associated with a 16.8% decrease in the odds of voting for Bush).

On public ignorance about the basic structure and processes of our government, see SCOTT L. ALTHAUS, *COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS: OPINION SURVEYS AND THE WILL OF THE PEOPLE* (2003); DELLI CARPINI & KEETER, *supra* note 104, 62–104; John A. Ferejohn, *Information and the Electoral Process*, in *INFORMATION AND DEMOCRATIC PROCESSES* 3, 3 (John A. Ferejohn & James H. Kuklinski eds., 1990) (“Nothing strikes the student of public opinion and democracy more forcefully than the paucity of information most people possess about politics.”).

105 Political scientists have largely abandoned the simplistic account of presidential elections as national policy referenda that can be legitimately interpreted as issue mandates. In the words of one prominent scholar in the area, “[i]f voting-behavior scholarship were the Wild West, mandate would have been tarred and feathered, ridden out of town on a rail.” STIMSON, *supra* note 95, at 113.

106 See, e.g., Ian McAllister, *A War Too Far? Bush, Iraq, and the 2004 U.S. Presidential Election*, 36 PRESIDENTIAL STUD. Q. 260 (2006) (examining how “priming”—providing information in ways that plays into voters’ use of heuristics and other cognitive shortcuts—helped the Bush Administration compensate for majority disapproval of Iraq war in months leading up to the November 2004 election); Paul Waldman & Kathleen Hall Jamieson, *Rhetorical Convergence and Issue Knowledge in the 2000 Presidential Election*, 33 PRESIDENTIAL STUD. Q.

dia and the Internet have radically increased the amount of readily accessible relevant political information, but they have also increased the volume of irrelevant “noise” and created new challenges for assessing information accuracy, completeness, and currency.¹⁰⁷ Even if the only thing Americans did during presidential campaign cycles was think about politics—a state of affairs as undesirable as it is unlikely—the attentive and processing capacities of most voters would likely be overloaded. Some researchers have found evidence that many Americans do not adopt a systematic, consistent belief system that is either conservative or liberal.¹⁰⁸ Such a schema provides a cognitive framework within which to interpret political information efficiently; without one, people find it more difficult to assess competing policy positions and develop stable, consistent political opinions.¹⁰⁹ Other research has underscored that even knowledgeable citizens have difficulty voting their preferences as the political environment becomes more informationally complex. Lau, Anderson, and Redlawsk found that the level of education corresponded positively with correct presidential voting *unless* voting conditions proliferated the number of required choices—as, for example, when a large number of local referenda are presented in the same election as the presidential ballot. In such circumstances, the most educated voters were actually substantially *less* likely than the least educated voters to cast a “correct” vote for President.¹¹⁰

Moreover, there is evidence that knowledgeable voters sometimes deliberately “sacrifice” their preferred position on one or more issues

145 (2003) (concluding that rhetorical presentation of issues by both Bush and Gore in 2000 contributed to extremely low public knowledge of candidates’ actual position, a situation that particularly damaged Gore since the voters did not recognize that his issue stands were actually more aligned than Bush’s with public opinion).

107 Cf. Bruce W. Hardy, Kathleen Hall Jamieson & Kenneth Winneg, *Wired to Fact: The Role of the Internet in Identifying Deception During the 2004 U.S. Presidential Campaign*, in ROUTLEDGE HANDBOOK OF INTERNET POLITICS 131 (Andrew Chadwick & Philip N. Howard eds., 2009) (concluding that during the 2004 presidential campaign, citizens who used the Internet for political information had higher ability to distinguish deception from fact during the campaign).

108 E.g., RePass, *supra* note 94.

109 *Id.* Other studies have found that among voters with the least political knowledge, even the most basic political heuristics (e.g., political party) do not help; in fact, such voters are likely to make *more* errors when they employ these heuristics. See Lau, Anderson & Redlawsk, *supra* note 15, at 398, 404; Lau & Redlawsk, *supra* note 31.

110 The researchers commented: “It is as though the most educated try to make sense of every different choice they have, but when there are too many choices they become overwhelmed and cannot make a good decision in the presidential election (nor, presumably, on the referenda, although we have no data on this point).” Lau, Anderson & Redlawsk, *supra* note 15, at 405.

when they cast their ballot. Typically, such voters refuse to cross over to the candidate of the other party despite disagreeing with their party's candidate on one or more issues important to them.¹¹¹ That this happens is hardly surprising. Given the very large number of policy issues potentially within the President's sphere of influence, and the need to choose between only two (very rarely, three) serious contenders, the real surprise would be if many reasonably informed voters could find a candidate whose bundle of policy positions corresponds perfectly to their own set of issue preferences. Such voters may respond "correctly" to imperfect options—i.e., they may choose the candidate whose location in a multiple issue space is *closest* to their weighted preferences.¹¹² But the fact that they must select a candidate *despite* his position on one or more issues that matter to them is yet one more commonly observed fact of American political behavior that undermines the account of presidential elections as extraordinary democratic moments, when citizens instruct their government on their desired policies by choosing a Representative-in-Chief who mirrors their preferences.¹¹³

111 For example, responses from the 1992 ANES revealed that 54% of Republicans and 31% of Democrats held positions on abortion that clearly conflicted with the announced position of their party's candidate. See Alan I. Abramowitz, *It's Abortion, Stupid: Policy Voting in the 1992 Presidential Election*, 57 J. POL. 176, 179 (1995). This conflict produced defections by 17% of Republicans and 6% of Democrats—percentages that reveal abortion as one of the very few policy issues that have been dispositively salient for an appreciable number of voters in recent decades. *Id.* Indeed, Professor Abramowitz's analysis concluded that abortion had a stronger effect on candidate choice than any other specific policy issue including the Gulf War. *Id.* at 184–85. More significant for present purposes, the vast majority of pro-choice Republicans and pro-life Democrats cast their vote for a candidate whose position on the issue they rejected.

112 See Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 AM. POL. SCI. REV. 78, 78–79 (1980).

113 Steven Calabresi and Nicholas Terrell argue that being forced to prioritize one's preferences and make tradeoffs is an affirmative advantage offered by presidential elections because "we ought not only care about what viewpoints get majority support but also how intensely those viewpoints are held." Calabresi & Terrell, *supra* note 72, at 1725. Surely, though, this reasoning sensibly applies only for policy issues that have reasonably direct interdependencies. If I believe that government should act more aggressively to clean up the environment *and* that abortion should be illegal in all cases, what useful information to my representative comes from forcing me to choose between these preferences—unless one believes that responding to single-issue zealotry is the pathway to good government? Cf. Carmines & Stimson, *supra* note 112 (finding that voters who vote based on "easy" issues—issues that are symbolic rather than technical, deal with policy ends rather than means, and have been salient on the political agenda for a long time—resemble the relatively unknowledgeable and unengaged non-issue voter more than the relatively politically sophisticated "hard issue" voter). Even with respect to preferences that appear more directly interdependent—e.g., I prefer less government spending and more aggressive government protection of the environment—my choices will often be artificially constrained by the limited array of policy bundles offered by the candidates. I may also pre-

2. "Faithful Agent of the National Majority Coalition"

Presidential action thus becomes—in a symbolic sense—our action; a scattered, divided, uncertain people are made one and exercise their popular power through their surrogate.

—Bruce Miroff, in *Rethinking the Presidency*¹¹⁴

This second account of how all the people are represented in President-centered government appears more promising, for it does not make the high demands on citizen attention and judgment required in the "Instructing Our Representative" account. Rather, it relies on the democratic decision principle of majority rule: the prevailing presidential candidate is the one who can inspire the support of enough Americans to forge a national majority; after he is in office, he will work to remain responsive to a combination of individuals and groups "large enough to keep his approval rating above fifty-one percent."¹¹⁵ This account does not depend on voters having coherent, specific policy preferences that are accurately mapped onto unambiguously expressed, equally specific issue platforms offered by presidential contenders. The representational rapport between President and people rests on the formation and cultivation of a nationwide majority coalition, members of which determine who is best suited to exercise power on their behalf, and then maintain or withdraw their support as they assess his ongoing performance in office. The bases on which these judgments are made need not be consistent, or even specifiable; the make-up of the coalition need not remain stable. It is enough that a majority of Americans know what they want when they see it. The invisible hand of the national democratic marketplace does the rest.

But even this more modest account of presidential democracy founders on basic facts of contemporary presidential politics. Most fundamentally, modern Presidents are not chosen by anything close

fer significantly lower military and foreign aid spending (three possible, rationally coherent policies), but discover that no candidate offers this policy triad. This is one of the most fundamental logical criticisms of attempting to interpret presidential elections as issue mandates. See NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS* 263–64 (10th ed. 2000) (using non-mathematical application of Arrow's Theorem to show how "[i]t is possible for a candidate to get 100 percent of the votes and still have every voter opposed to most of the candidate's policies, as well as having every one of those policies opposed by most of the voters").

114 Bruce Miroff, *Monopolizing the Public Space: The President as a Problem for Democratic Politics*, in *RETHINKING THE PRESIDENCY* 218, 223 (Thomas E. Cronin ed., 1982).

115 Calabresi & Terrell, *supra* note 72, at 1702.

to a majority of the country eligible to vote. In recent decades, the successful candidate has won the presidency on the votes of, on average, *fewer than 30% of adult Americans*. This is not some complicated artifact of the Electoral College system.¹¹⁶ It represents simple (and routinely ignored) math: the reported popular vote must be adjusted by voter turnout, which has averaged 55.9% in the presidential elections since 1980.¹¹⁷ Doing the math requires some fairly significant readjustments in our thinking about presidential “majorities”: the 1980 “mandate” to Ronald Reagan was conferred by 27.5% of eligible Americans; in 1992, Bill Clinton defeated incumbent George H.W. Bush on the ballots of 25% of those who could vote; the controversial 2000 victory to George W. Bush rested on 26% of potential voters; in the historic 2008 election, Barak Obama received the largest proportion of popular support in more than forty years of presidential selection: 32.6%.¹¹⁸

These figures cast a very different representational light on presidential elections. Still, we could accept the “agent of the national majority coalition” account, in substance at least, if we could be assured that those who vote are themselves a representative cross-section of eligible Americans. Conventional political science wisdom was indeed that the preferences of presidential voters do not differ significantly from those of nonvoters. The benchmark study was Wolfinger and Rosenstone’s analysis of data from the 1972 presidential election, which concluded that the views of voters in the Nixon-McGovern race were “virtually a carbon copy” of the general population on a range

116 The impact of that system on presidential representation is discussed in the next Part.

117 This average uses the most generous calculation of turnout, removing noncitizens and felons disenfranchised by state law to include only those who *could* legally have voted. See United States Elections Project, Voter Turnout, http://elections.gmu.edu/voter_turnout.htm (last visited Jan. 29, 2010). Since 1980, both these categories have increased, so that the “voting *age* population” is about 9% greater than the “voting *eligible* population.” See Michael P. MacDonald, *Every Eligible Voter Counts: Correctly Measuring American Turnout Rates*, BROOKINGS INST., Sept. 29, 2004, http://www.brookings.edu/papers/2004/0909elections_mcdonald.aspx.

Turnout rates in the U.S. tend to be among the lowest in industrialized democracies. See Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997). The modern low point was 1996 (Clinton/Dole), in which only 51.7% of eligible Americans voted. See United States Elections Project, *supra*.

118 Reagan (1980): 50.7% of a 54.2% voter turnout; Clinton (1992): 43% of a 58.1% turnout; Obama: 52.9% of a 61.7% turnout. Data on turnout come from the United States Elections Project, *supra* note 117. Data on popular vote percentage come from HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2005–2006, at 12–13 (2005) and Dave Leip’s Atlas of U.S. Elections, <http://uselectionatlas.org/> (last visited Jan. 29, 2010).

of policy issues.¹¹⁹ Although other studies generally supported these results,¹²⁰ the conclusion that voters and nonvoters have the same policy preferences seemed counter-intuitive at best, for it is well-established that voters differ substantially from nonvoters on demographic dimensions that often have political significance: younger Americans, people of color, the poor, those who are less well educated, and those who are unmarried are consistently and markedly underrepresented among those who cast a ballot.¹²¹ More recent work is far more skeptical of the conventional wisdom. Studying data from the 1972–2004 national elections, Jan Leighley and Jonathan Nagler conclude that “after 1972, voters and non-voters differ significantly on most issues relating to the role of government in redistributive policies. . . . [V]oters are substantially more conservative than non-voters on class-based issues.”¹²² Studies disaggregating national opinion at the state and local level have similarly concluded that significant differences exist between the preferences of voters and nonvoters, typically skewed in a conservative direction.¹²³ Part I reviewed

119 RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 109 (1980).

120 A 2001 review concluded that “[o]ne of the least contested conclusions in the study of political behavior is that voters’ political attitudes and policy positions are fairly representative of non-voters.” Patrick Ellcessor & Jan E. Leighley, *Voters, Non-Voters and Minority Representation*, in REPRESENTATION OF MINORITY GROUPS IN THE U.S.: IMPLICATIONS FOR THE TWENTY-FIRST CENTURY 127 (Charles E. Menifield ed., 2001).

121 See, e.g., Jan E. Leighley & Jonathan Nagler, Who Votes Now? And Does it Matter? 5 (Mar. 7, 2007), (unpublished manuscript, available at http://www.nyu.edu/gsas/dept/politics/faculty/nagler/leighley_nagler_midwest2007.pdf); see also ZOLTAN L. HAJNAL, AMERICAN’S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS (2009) (reviewing literature); U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, at 2–3 (2006), available at <http://www.census.gov/prod/2006pubs/p20-556.pdf> (reporting substantially higher turnout among older, married, well-educated, upper income, and non-Hispanic whites, as well as geographic differentials for the 2004 election).

122 Leighley & Nagler, *supra* note 121, at 18. The authors point out that some earlier studies did find evidence of policy preference differentials. For example, Bennet and Resnick’s 1990 study of data through 1988 found few voter/nonvoter differences on partisanship, ideology, and foreign policy, but discovered that nonvoters were “slightly more in favor of an increased government role in the domestic arena. They are more likely to oppose curtailing government spending for health and education services, and . . . to support government guarantees that everyone has a job and a good standard of living.” Moreover, nonvoters were significantly more likely to favor spending on core domestic programs. Stephen Earl Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 AM. J. POL. SCI. 771, 789–93 (1990).

123 See, e.g., HAJNAL, *supra* note 121, at 8 (focusing on local elections, to conclude that “low turnout results in losses in mayoral elections, less equitable racial and ethnic representation on city councils, and spending policies that are less in line with the preferences of racial and ethnic minorities and other disadvantaged groups”); Jean-François Godbout & Mathieu Turgeon, A Matter of Degree: Policy Preferences and the Probability to Vote 1 (Aug. 30, 2008), (unpublished manuscript, available from a link at

some of the profound social and cultural changes in the United States since the early 1970s; over that time, the population has become more racially heterogeneous,¹²⁴ disparities in economic well-being have increased,¹²⁵ and the proportion of married citizens has decreased while that of older Americans has increased.¹²⁶ In the same period, the policy agenda of the federal government has become even more ambitious, as such major regulatory initiatives as environmental, workplace, and consumer protection developed. Our understanding of whether and how the preferences of nonvoters differ from those of voters is still far from perfect, but what we do know should make us deeply wary of attempts to translate the votes of less than a third of eligible Americans into the democratic talisman of a “national majority coalition.”¹²⁷

Finally, two other modern political phenomena seem relevant to the attempt to locate the President’s representational superiority in the support of a majority of the electorate. The first is the post-World War II propensity of voters to saddle the President with a Congress controlled by the opposition party. Few questions of American electoral politics are more contentious than attempts to explain divided government.¹²⁸ Some scholars perceive voters engaged in “policy bal-

<http://sites.google.com/site/polgodbout/home/research>) (finding “significant, constant, and systematic difference in attitudes on a range of policy issues” and that “as the probability of voting increases, the likelihood of having conservative views increases”).

124 The proportion of whites and African Americans has declined relative to Latinos and Asian-Americans. Leighley & Nagler, *supra* note 122, at 2 (using 2000 Census data).

125 Between 1967 and 2001, the proportion of aggregate income held by the richest fifth of the population increased from 43.8 to 50.1%; the proportion held by the poorest fifth decreased from 4% to 3.5%. *Id.* at 2 (using 2000 Census data).

126 *Id.*

127 A more radical proponent of the national majority coalition account might insist that we should count only those citizens who actually exercise their right to choose their political agent. Even if this redefinition of the President’s true representational constituency were accepted, it runs up against the disturbing frequency of modern Presidents who have been *rejected* by the majority of voters. Since 1960, five Presidents have come into office on less than 50% of the popular vote: Kennedy 1960 (49.7%); Nixon 1968 (43.4%); Clinton 1992 (43.0%); Clinton 1996 (49.2%); Bush 2000 (47.9%). By contrast, in the first sixty years of the twentieth century, only three elections produced non-majoritarian winners: Wilson 1912 (41.8%); Wilson 1916 (49.2%); Truman 1948 (49.5%). Wholly apart from Electoral College effects, the presence of third party candidates can give us a President who falls substantially short of persuading a majority *of voters* that he is best suited to exercise power on their behalf. STANLEY & NIEMI, *supra* note 118, at 18–20 tbls. 1–7.

128 Important contributions in the vast literature include BARRY C. BURDEN & DAVID C. KIMBALL, *WHY AMERICANS SPLIT THEIR TICKETS: CAMPAIGNS, COMPETITION, AND DIVIDED GOVERNMENT* (2002); RICHARD S. CONLEY, *THE PRESIDENCY, CONGRESS, AND DIVIDED GOVERNMENT: A POSTWAR ASSESSMENT* (2003); MORRIS P. FIORINA, *DIVIDED GOVERNMENT* (1992); GARY C. JACOBSON, *THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946–1988*, at 115 (1990); *DIVIDED*

ancing”¹²⁹ or even “cognitive Madisonianism.”¹³⁰ This latter view—that voters are, at least to some degree, hedging their representational bets and consciously dividing power—receives apparent support from several years of various survey evidence in which a substantial number of Americans insist the country is better off if the same party does not control both the presidency and Congress.¹³¹ A strong dissenting view insists that divided government is an unintentional consequence of particular electoral circumstances, including the shift from a party-based system to candidate-centered politics, incumbency, and campaign financing.¹³² Noting the generally low level of political sophistication, the non-intentionalist view questions whether people really understand or mean what the survey evidence seems to be saying.¹³³

GOVERNMENT: CHANGE, UNCERTAINTY, AND THE CONSTITUTIONAL ORDER (Peter F. Galderisi, Roberta Q. Herzberg & Peter McNamara eds., 1996) [hereinafter DIVIDED GOVERNMENT]. Good summaries of the major positions appear in Richard G. Niemi & Herbert F. Weisberg, *Do Voters Prefer Divided Government?*, in *CONTROVERSIES IN VOTING BEHAVIOR* 271 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001); David Hill, Stephen C. Craig & Elizabeth Christie, *Separable Versus Nonseparable Preferences: Citizen Attitudes About Divided Government in the United States* (Jan. 8, 2004) (unpublished manuscript, available at http://www.allacademic.com/meta/p67989_index.html).

129 The basic idea is that voters use different considerations in voting for different types of offices. *E.g.*, FIORINA, *supra* note 128, at 65 (“Essentially, [the voters] have the Republicans bake the economic pie (and protect it from marauding bears and other dangers), but allow the Democrats to divide it up.”); JACOBSON, *supra* note 128, at 113 (stating that the public sees Republicans as better at national defense and handling inflation). These explanations fit the national political scene better in the 1980s, when Republicans controlled the presidency and Democrats the Congress, than the 1990s, when the pattern reversed, although variations have been suggested; *see, e.g.*, Niemi & Weisberg, *supra* note 128, at 276 (suggesting that voters might have needed Republican Presidents less once the Cold War ended).

130 *E.g.*, Michael S. Lewis-Beck & Richard Nadeau, *Split-Ticket Voting: The Effects of Cognitive Madisonianism*, 66 J. POL. 97 (2004). *See* Everett Carl Ladd, *Public Opinion and the “Congress Problem”*, 100 PUB. INT. 57, 66–67 (1990) (coining the phrase, and suggesting “[t]he public wants to set the two parties’ views of government’s role in creative tension”).

131 A version of the divided government question has been part of the ANES survey for many years. Gallup has asked about divided government since at least 2000. Lydia Saad, *Support Up for Divided Government and Major Third Party*, GALLUP, Sept. 14, 2006, <http://www.gallup.com/poll/24502/Support-Divided-Government-Major-Third-Party.aspx> (summarizing results from 2000–2006 of response to question: “Do you think it is better for the country to have a President who comes from the same political party that controls Congress, (or do you think it is better) to have a President from one political party and Congress controlled by another?”). A number of other popular and scientific polls have posed the question at various times.

132 *E.g.*, BURDEN & KIMBALL, *supra* note 128.

133 *E.g.*, Lee Sigelman, Paul J. Wahlbeck & Emmett H. Buell, Jr., *Vote Choice and the Preference for Divided Government: Lessons of 1992*, 41 AM. J. POL. SCI. 879, 883 (1997) (concluding that people who express the divided government preference on the ANES survey were only slightly more likely than the typical voter to split their ballots); John R. Petrocik & Joseph Doherty, *The Road to Divided Government: Paved Without Intention*, in *DIVIDED*

Still other researchers conclude that the survey data probably overstate the strength of popular support for deliberately dividing power but that flawed measurement and data inadequacies prevent a conclusive understanding of public attitudes.¹³⁴ Obviously, any conclusion on the “meaning” of divided government is well beyond my scope here, but the relative infrequency with which the President gets from voters a predictably “cooperative” Congress is another salient aspect of national electoral politics that calls into question the simplistic account of a majority coalition of Americans choosing the President as the one political agent who will reliably further their interests.

The second problematic phenomenon for this account is that modern Presidents in fact do *not* reliably manage to keep their policies attuned to the will of enough individuals and groups “to keep [their] approval rating above fifty-one percent.”¹³⁵ The overall average approval rating for the presidencies of Richard Nixon, Gerald Ford, Jimmy Carter, and George W. Bush all fell below the 50% mark.¹³⁶ Of the remaining Presidents over the last four decades, Ronald Reagan and Bill Clinton managed to keep their overall average above 50%, but each had extended periods when considerably fewer than a majority of Americans approved of the job they were doing; only George H.W. Bush succeeded in keeping his approval rating above 50% overall, and for most periods of his presidency.¹³⁷ These are not the patterns of a representative who sees himself as “the con-

GOVERNMENT, *supra* note 128 (finding non-sensible patterns in the survey responses and concluding that “[p]artisanship and situational rationalization” were more likely explanations than “strategic vision”).

134 See Hill, Craig & Christie, *supra* note 128.

135 Calabresi & Terrell, *supra* note 72, at 1702.

136 Presidential Approval Ratings—Gallup Historical Statistics and Trends, GALLUP, <http://www.gallup.com/poll/116677/Presidential-Approval-Ratings-Gallup-Historical-Statistics-Trends.aspx> (last visited Jan. 29, 2010). Public approval response to President George W. Bush has been a topic of particular interest. *E.g.*, Richard A. Brody, *The American People and President George W. Bush: The Fall, the Rise and Fall Again*, FORUM, June 2008 (looking at approval polls from ten polling organizations to conclude that Bush was unique in the sustained weakness of his level of public support); Waldman & Jamieson, *supra* note 106, at 161 (suggesting that the rhetorical framing of the 2000 election, which produced widespread voter misperception of Bush’s policy agenda vote, fueled public approval problems from the outset).

137 Graphs of the time series of Gallup poll data are helpfully collected at Wikipedia. Wikipedia, United States Presidential Approval, http://en.wikipedia.org/wiki/United_States_presidential_approval_rating (last visited Jan. 29, 2010). President George H.W. Bush’s approval ratings topped 50% until a relatively short period during the last year of his Administration.

scious agent[of] a national majority coalition.”¹³⁸ The next Part discusses why the constitutional design of the presidency itself defeats such a conception.

3. The “Benevolent Dictator” Model

[T]he rest of us ought to remember that the politics of winning and governing often collide.

—Robert Samuelson¹³⁹

Neither the informational, attentional, and communication obstacles to interpreting presidential election results as policy referenda, nor the multiple factors that undermine the claim of presidential majoritarianism, might be fatal to the “democracy claim” of unitary executive theory if the President is the one representative reliably motivated to act decisively for the national good and resist the distorting influence of faction. Alexander Hamilton sketches the idea in *Federalist 70*, one of the core texts of unitary executive theory:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of **dictator**, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.¹⁴⁰

In the “Benevolent Dictator” account, the President is incentivized by the very structure of the office to make policy decisions that benefit the whole rather than favoring any regional or interest-group part.

¹³⁸ Calabresi, *supra* note 3, at 67. In making this point, I accept the terms of the argument as framed by unitary executive theorists. My own view is that constitutionally appropriate representative behavior by the President falls in between using approval ratings as the measure of good public policy, and ignoring them.

¹³⁹ Robert Samuelson, *A Vote for McBama*, REAL CLEAR POL., June 11, 2008, http://www.realclearpolitics.com/articles/2008/06/vote_for_mcbama.html.

¹⁴⁰ THE FEDERALIST NO. 70, at 421–22 (Alexander Hamilton) (Clinton Rossiter ed., 1961). This Part is prominently featured in Professor Calabresi’s influential defense of the representational superiority of the unitary executive President. See Calabresi, *supra* note 3, at 37–38.

The least democratically demanding explanation of why President-centered government is representationally superior, it requires little more than that the President recognize the national identity of his constituency.¹⁴¹ No majority of citizens need vote for or continue to support the winning candidate; voters need have no particular understanding of the issues. The quadrennial election identifies the one individual who, from the unique vantage point of responsibility to represent the nation, will deploy power in the interests of all.¹⁴² This account is as close as it gets to representation without the people.

Yet even this thinnest of representational theories runs up against the facts. Popular and scholarly opinion may be divided over whether the Electoral College system is one of the Framers' best, or worst, political innovations,¹⁴³ but what cannot be disputed is its success in focusing the attention of would-be Presidents on geography. Because population is not evenly distributed across the country, any per-capita allocation of electors will make high-density regions presumptively most interesting to the candidate seeking electors. California alone offers one-fifth of the crucial votes needed for victory—more than the 15 electoral vote-poorest states *combined*. New York, Texas, and California, with about one-fourth of the nation's population, represent 44% of the magic 270 votes.¹⁴⁴ The constitutional formula tried to mitigate such geographical inequities by giving low population states a boost: electors are allocated on the basis of House *plus* Senate delegations. However, high-population states regained the advantage by adopting the winner-take-all "unit rule," which dangles an entire block of electors in front of presidential hopefuls.¹⁴⁵ The result is a

141 See, e.g., Calabresi, *supra* note 3, at 59 (asserting that the President's "unique claim to legitimacy" comes from his "being the only official who is accountable to a national voting electorate and no one else").

142 For discussion of the distinction unitary executive literature draws between "the general national will" and local, state, and national factional interests which advocate "policies at variance with those the nation as a whole might want," see Farina, *supra* note 7, at 989–90, 989 n.8 (citations omitted).

143 Compare, e.g., ROBERT M. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM* (1994), and Jeff Jacoby, *The Brilliance of the Electoral College*, BOSTON GLOBE, July 16, 2008, at A15, with, e.g., GEORGE C. EDWARDS III, *WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA* (2004), and Bradford Plumer, *The Indefensible Electoral College*, MOTHER JONES, Oct. 8, 2004, <http://www.motherjones.com/politics/2004/10/indefensible-electoral-college>.

144 See Federal Election Commission, *Distribution of Electoral Votes*, <http://www.fec.gov/pages/elevote.htm> (last visited Jan. 29, 2010).

145 Longley and Peirce's influential study links this to Jacksonian democracy. LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 2000, at 106 (1999).

system in which some voters are, by virtue of their location, worth a great deal more to presidential contenders than others.¹⁴⁶

Whether or not presidential *voters* are rational well-informed actors, presidential *candidates*—and their campaign advisers—certainly are: both anecdotal and empirical evidence confirm that campaign strategies are built around the geography of achieving 270 votes.¹⁴⁷ The precise nature of these strategies has been much debated and the strategies have evolved over time; here, once again, radical changes in the information and communications environment are having significant impact. Initially, attention focused on the extent to which high-population states reliably received more than their fair share of candidate visits, advertising, and other resources.¹⁴⁸ Then, the impact of political competitiveness was factored into the models constructed by elections researchers¹⁴⁹—and, as several of the traditional electoral mega-states have been relegated to “safe” status (e.g., New York to Democrats, Texas to Republicans), candidates indeed have focused on the relatively small group of “battleground” states in which the outcome is doubtful.¹⁵⁰ In the most recent elections, mass media communications and the ease with which information now can be collected, analyzed, and disseminated digitally, is enabling even more precise regional focusing: comparatively cheap, easy polling

146 See, e.g., Lawrence D. Longley & James D. Dana, Jr., *New Empirical Estimates of the Biases of the Electoral College for the 1980s*, 37 W. POL. Q. 157 (1984) (finding advantages in the 1980s to Hispanic, Jewish, urban, Far West, and Eastern voters, and disadvantages to voters in Mountain, Southern, and Midwestern states as well as to blue-collar, rural, and Black voters).

147 Cf. Lau, Andersen & Redlawsk, *supra* note 15, at 404–05 (including in multivariate analysis of “correct voting” the number of candidate visits and political ads in state, and finding that “[h]olding other variables [constant], this translates into an increased probability of a correct vote of about 12% in battleground states where both candidates are blanketing the airwaves with ads, compared to states that the candidates are largely ignoring”).

148 E.g., Steven J. Brams & Morton D. Davis, *The 3/2’s Rule in Presidential Campaigning*, 68 AM. POL. SCI. REV. 113 (1974) (modeling disproportionate impact of large-state voters and finding predictive fit with actual candidate behavior); Claude S. Colantoni, Terrence J. Levesque & Peter C. Ordeshook, *Campaign Resource Allocations Under the Electoral College*, 69 AM. POL. SCI. REV. 141 (1975) (reexamining the Brams & Davis data; agreeing that Electoral College affects campaign resource-allocation decisions, but concluding that strategic model is more complex and multi-factored).

149 E.g., George Rabinowitz & Stuart Elaine MacDonald, *The Power of the States in U.S. Presidential Elections*, 80 AM. POL. SCI. REV. 65 (1986) (employing a “pivotal player” analysis that adjusts size for “political competitiveness” and concluding that California, Texas, Illinois, and Ohio are substantially more important in presidential elections than warranted by simply population).

150 See David A. Hopkins & Darshan J. Goux, *Repealing the Unit Rule? Electoral Vote Allocation and Candidate Strategy* (Apr. 3, 2008) (unpublished manuscript, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/6/6/3/9/p266390_index.html).

plus targeted cable media advertising and Internet-based campaign outreach allow candidates to identify communities and interests that could decide key states.¹⁵¹

In sum, the constitutionally ordained method of selection itself assures that presidential candidates will be fully attuned to regional politicking, and modern information and communication technology has amplified this effect. As one observer puts it, “a wise presidential campaign strategist sees the political map as the intersection of battleground states and media markets.”¹⁵² A subsidiary (but, in the present context, especially important) consequence of most states’ adopting the unit rule for allocating their electors is that a plurality victory is as good as sweeping the state. Thus, the rational candidate knows he need not appeal to a majority of a state’s voters, so long as he can assemble a coalition of interests large enough to allow him to beat his closet rival.¹⁵³ With the growing ability to pinpoint the groups who can contribute to that coalition, and execute an outreach strategy targeted specifically to them, the would-be President comes into office thoroughly enmeshed in interest-group politicking.¹⁵⁴

151 See DARON R. SHAW, *THE RACE TO 270: THE ELECTORAL COLLEGE AND THE CAMPAIGN STRATEGIES OF 2000 AND 2004*, at 61 (2006) (account, by elections researcher and adviser to Bush 2000 and 2004 campaigns, of how campaigns routinely “calculated the relative cost efficiency of advertising for each of the media markets within our list of battleground states;” this ranking drove media expenditures); see also Darshan J. Goux, *A New Battleground? Media Perceptions and Political Reality in Presidential Elections, 1960–2004*, at 15–16 (Aug. 31 2006) (unpublished manuscript, available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/5/2/4/8/p152483_index.html) (finding that candidates have targeted “key states” for many years, but noting that technology—including “household-by-household computer analyses, targeted cable media buys, and other technologies”—provides targeting opportunities earlier campaigns lacked).

152 Michael John Burton, Book Review, 122 *POL. SCI. Q.* 511, 512 (2007) (reviewing SHAW, *supra* note 151).

153 See Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam’s Razor*, 28 *FLA. ST. U. L. REV.* 109, 125–30 (2000) (discussing reasons why a candidate perceives “a patchwork of potential interest coalitions, whose utility to him depends upon a combination of their geographical location and concentration, and their marginal value in assembling a plurality within the state”).

154 The Bush 2000 and 2004 campaigns found that the “media buys” and other campaign activity that resulted from calculating the “relative cost efficiency” of putting resources into the various “media markets” within their battleground states had a positive, often significant impact on both vote share and voter perception of candidate favorability. SHAW, *supra* note 151, at 137. See also Daron R. Shaw, *The Effect of TV Ads and Candidate Appearances on Statewide Presidential Votes, 1988–96*, 93 *AM. POL. SCI. REV.* 345 (1999) (finding evidence that candidate TV advertising and appearances from 1988, 1992, and 1996 campaigns affected statewide preferences as well as the Electoral College vote).

The Lau, Andersen & Redlawsk study, *supra* note 15, determined that “correct” voting correlated positively with the more heavily presidential candidates campaigned in the

It would be an heroic assumption indeed to believe Presidents, once they take office, shed the regional sensitivities and interest-group commitments that got them elected, as easily as a snake sheds a shabby and confining skin. Anecdotal evidence certainly suggests that they, and their close advisers, are specially responsive to the individuals and groups who helped “deliver” the previous election, or might be crucial to winning the next one.¹⁵⁵ Moreover, a growing body of modeling and empirical analyses confirms that Presidents tend to behave consistently with basic tenets of political economy.¹⁵⁶ Examination of use of the veto power,¹⁵⁷ grantmaking by executive agencies,¹⁵⁸ and other federal spending¹⁵⁹ has found evidence that re-

state, presumably because this increases the amount of salient information available to voters.

- 155 “You can’t beat an incumbent president. Remember, he’s got a hundred billion dollars at his disposal to distribute back to local governments, and he can send that money anywhere he wants. Everybody from Alabama to Alaska files for projects, and the administration decides which ones to approve. In an election year, they go where the votes are.” THOMAS P. O’NEILL, JR. & WILLIAM NOVAK, *MAN OF THE HOUSE: THE LIFE AND POLITICAL MEMOIRS OF SPEAKER TIP O’NEILL* 326 (1987); see e.g., Joseph A. Pika, *Interest Groups: A Doubly Dynamic Relationship*, in *PRESIDENTIAL POLICYMAKING: AN END-OF-CENTURY ASSESSMENT* 59 (Steven A. Shull ed., 1999); Joseph A. Pika, *Interest Groups and the Executive: Presidential Intervention*, in *INTEREST GROUP POLITICS* 298 (Allan J. Cigler & Burdett A. Loomis eds., 1983).
- 156 Under the incentive-based “battleground hypothesis,” Presidents favor states that are competitive between the parties, as a way to woo electoral votes in coming elections; under the reward-based “presidential-support” hypothesis, Presidents steer spending to states that provided relatively large proportions of popular votes in the previous election to cement future support. For an overview of the theoretical and empirical literature see Valentino Larcinese, Leonzio Rizzo & Cecilia Testa, *Allocating the U.S. Federal Budget to the States: The Impact of the President* 68 *J. POL.* 447, 447–49 (2006); Andrew J. Taylor, *The Presidential Pork Barrel and the Conditioning Effect of Term*, 38 *PRESIDENTIAL STUD. Q.* 96 (2008).
- 157 See Kevin B. Grier, Michael McDonald & Robert D. Tollison, *Electoral Politics and the Executive Veto: A Predictive Theory*, 33 *ECON. INQUIRY* 427, 428 (1995) (finding “significant evidence” that “presidential veto decisions are influenced by the floor votes of senators from . . . electorally crucial states” through a sample of bills from 1970–1988); see also Nolan M. McCarty, *Presidential Pork: Executive Veto Power and Distributive Politics*, 94 *AM. POL. SCI. REV.* 117, 118 (2000) (challenging the “assumption of presidential universalism when applied to budgetary politics” and modeling how the veto can affect both overall level of spending and the distribution across political jurisdictions).
- 158 E.g., Thomas A. Garrett & Russell S. Sobel, *The Political Economy of FEMA Disaster Payments*, 41 *ECON. INQUIRY* 496 (2003) (examining data from 1991–1999 to show that nearly half of Federal Emergency Management Agency disaster relief is politically motivated, with states that are politically important to the President receiving a disproportionately large share of disaster declarations and expenditures).
- 159 E.g., Larcinese, Rizzo & Testa, *supra* note 156 (using data from 1982–2000 to show a disproportionate flow of federal funds to those states that heavily supported the President in the prior election and states with governors of the President’s party); Walter R. Mebane, Jr. & Gregory J. Wawro, *Presidential Pork Barrel Politics* (July 13, 2002) (unpublished manuscript, available at <http://www-personal.umich.edu/~wmebane/targeting.pdf>) (finding that “presidents pursue strategies to target federal expenditures to local areas to

sources are allocated strategically to electorally crucial regions—as Bush Administration Deputy Chief of Staff Karl Rove put it, “asset deployment.”¹⁶⁰ Presidents, it seems, are not immune to the problem that plagues every other elected official: reconciling the representational duty of even-handed public-regardingness with the political need to reward past, and secure future, support. In this, as in most things having to do with the presidency, only the scale is different. For the President, the nation is his pork barrel.

B. The President as Manager-in-Chief: The Good Government Claim

What Presidents do every day is to make decisions that are mostly thrust upon them, the deadlines all too often outside their control, on options mostly framed by others, about issues crammed with technical complexities and uncertain outcomes.

—Richard E. Neustadt, *Presidential Power and the Modern Presidents*¹⁶¹

The second promise of unitary executive theory is that strong presidential leadership will bring informed coordination and purposeful efficiency to the unrestrained, chaotic sprawl of modern regulatory government. As with the democracy claim, the management claim is an assertion of *uniquely* presidential capacity vis-à-vis the other branches. Unitary executive theorists are wont to disparage congressional oversight as not only erratic but also riddled with parochial and other narrow factional bias.¹⁶² Even judicial review of agency action comes under fire for intermeddling with presidential prerogatives, except to the extent that the court is protecting traditional property and liberty interests from regulatory depredations.¹⁶³

promote their goals of reelection and preservation of a policy legacy” using 1985–1988 county-level data). See also John Mark Hansen, *Individuals, Institutions, and Public Preferences over Public Finance*, 92 AM. POL. SCI. REV. 513, 526 (1998) (using mid-1990s data to examine how different representative institutions reflect public preferences and concluding that “Electoral College mathematics works modestly to the advantage of defense spending”). But see Taylor, *supra* note 156 (finding no presidential electoral effect in distribution of procurement spending).

¹⁶⁰ John Solomon, Alec MacGillis & Sarah Cohen, *How Rove Harnessed Government for GOP Gains*, WASH. POST, Aug. 19, 2007, at A1 (reporting an alleged strategy of “staging of official announcements, high-visibility trips and declarations of federal grants” through the White House political affairs office “to ensure the maximum promotion of Bush’s reelection agenda and the Republicans in Congress who supported him”).

¹⁶¹ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 209 (1990).

¹⁶² E.g., Calabresi, *supra* note 3, at 34–36, 84–86; Easterbrook, *supra* note 87, at 318–19; Lessig & Sunstein, *supra* note 3, at 93–106.

¹⁶³ See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 785–92 (2009) (discussing emergence of this interpretation of Article II as a limit on

This Hamiltonian “good government” claim about President-centered government is distinct from the claim that the President should control regulatory policy because he alone represents all the people. Ultimately, however, the two merge. Few informed observers disagree that U.S. regulatory policy would benefit from coordinating related programs, rationalizing the exercise of overlapping statutory jurisdiction, minimizing conflicting regulatory requirements, and generally ensuring that agencies are working through problems in ways that most effectively deploy finite public and private resources. *This* sort of managerial rationality is not what fuels scholarly and political debates over the extent of presidential power. The controversy comes, as we move into the realm of setting regulatory priorities, determining how benefits, costs, and risks will be assessed, favoring (or disfavoring) certain regulatory objectives, and deciding whether and how resources will be allocated to enforcement. In these areas, “better” regulatory government becomes harder to define without reference to specific substantive preferences and political philosophies. Unitary executive’s managerial claim insists upon presidential control in these areas as well, building on the representational claim that the President’s policy agenda best expresses the people’s will and nation’s interests. In this way, the solution to how the people can meaningfully be represented in modern regulatory government becomes inextricably intertwined with the promise that presidential direction means coordinated, efficient, and effective regulatory policy.

1. *The Magnitude of the Task*

The President is the most overworked and underinformed decisionmaker in the American policymaking system.

—Rachlinski & Farina, *Cognitive Psychology & Optimal Government Design*¹⁶⁴

Information is to decision making what fuel is to fire. Too much or too little can be equally devastating.

—Review of *Groupthink or Deadlock: When Do Leaders Learn from their Advisors?*¹⁶⁵

review of agency action); *cf.* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing statutory attempts to confer standing to challenge agency action on persons other than those who suffered the “invasion of a legally protected interest” as invading the President’s Article II power).

¹⁶⁴ Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 601 (2002).

The impressive trappings of the office and the often deliberate cultivation of a larger-than-life presidential image¹⁶⁶ tend to obscure an elemental fact: the President faces the same cognitive challenges as the rest of us in managing information flows, prioritizing multiple demands for attention, and comprehending and analyzing novel situations. More accurately, these demands are vastly more onerous, relentless, and insistent on the President than on any other American—and, perhaps, on any other individual on the planet. He overlooks an issue universe that spans all substantive policy areas, extends to critical international as well as domestic problems, and presents an extraordinary number of high stakes decision points.¹⁶⁷

What is entailed in “managing” U.S. regulatory policy? At the formal level, thousands of statutes delegate regulatory power to hundreds of administrative units with formal policymaking authority.¹⁶⁸ These are located in fifteen Cabinet departments, dozens of independent commissions, and various other free-standing entities. These entities exercise their regulatory power through an array of procedural mechanisms. The most important, and public, of these include: promulgating regulations with the binding force of law (rulemaking); issuing “guidance” documents that state the agency’s interpretation of its statutes and rules and announce its policy on enforcement or other matters;¹⁶⁹ adjudicating charges of regulatory vio-

165 Bryan W. Marshall, Book Review, 33 *PRESIDENTIAL STUD. Q.* 251, 251 (2003) (reviewing PAUL A. KOWERT, *GROUPTHINK OR DEADLOCK: WHEN DO LEADERS LEARN FROM THEIR ADVISORS?* (2002)).

166 See *supra* notes 10–11 and accompanying text.

167 One of the best discussions of the complexity within which the modern President is embedded appears in BRADLEY H. PATTERSON, JR., *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 9–21 (2000).

168 Between 160 and 200 distinct regulatory entities have statutory authority to issue regulations. The White House E-Government Office regularly refers to “more than 160 rulemaking entities” with rulemaking authority, see, e.g., OFFICE OF MGMT. & BUDGET, *REPORT TO CONGRESS ON THE BENEFITS OF THE PRESIDENT’S E-GOVERNMENT INITIATIVES, FISCAL YEAR 2009*, at 11 (2008) available at http://www.whitehouse.gov/omb/assets/egov_docs/FY09_Benefits_Report.pdf, but this count excludes many independent commissions. The total number of federal entities with statutory missions is considerably larger than the number of entities with rulemaking authority. See OFFICE OF THE FED. REGISTER NAT’L ARCHIVES AND RECORDS ADMIN., *THE UNITED STATES GOVERNMENT MANUAL 2008/2009*, at 103–579, 657–65 (2009), available at <http://www.gpoaccess.gov/gmanual/browse-gm-08.html>.

169 For example, the National Highway Transportation Safety Administration issues six different varieties of regulatory guidance: Preambles, “generally applicable . . . interpretations or policy statements,” guidance letters to specific individuals or entities, “[o]ral [g]uidance [s]tatements by [s]enior [a]gency [o]fficials,” grant guidelines, and compliance guides. National Highway Traffic Safety Administration, About NHTSA, <http://www.nhtsa.dot.gov/portal/site/nhtsa/menuitem.c9b5cf87605c4e5033ed6830343c>

lations; and resolving applications for permits, licenses, benefits, and grants. Less public, but not necessarily less significant, exercises of authority include: ruling on petitions for rulemaking and requests for enforcement action, setting enforcement priorities, and allocating budget resources among programs. Although most agencies use most of these methods, cross-government harmonization of regulatory practices exists at only a fairly high level of generality. Even in rulemaking—the most public, legally specified, and formally significant exercise of regulatory authority—the terminology, procedural details, and information disclosure policies differ significantly from agency to agency.¹⁷⁰

Hence, the President attempting to manage regulatory government looks out over a vast enterprise comprising a huge portfolio of economic, health, safety, and social issues, being acted upon by hundreds of distinct entities composed of 2.1 million full-time civilian employees, and having distinctive internal structures and decision-making processes and largely unstandardized operating procedures and information reporting practices. This lack of uniformity, coupled with a dearth of meaningful government-wide reporting requirements, makes it difficult reliably to generate even basic measures of the amount of federal regulatory activity.¹⁷¹ The snapshot that follows therefore has an element of randomness (in, for example, which agencies are included and the time period of their data), but it gives at least an impressionistic sense of the magnitude of federal regulatory decision making to be “managed.” For several items, a per

44cc/. See generally OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007), available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf> (describing the nature of, and variations in, agency guidance).

170 This became apparent when the George W. Bush administration decided to build a government-wide online electronic rulemaking docket. The rulemaking process is heavily regulated by statutory and judicial administrative law, as well as presidential executive order. So, one might expect a fair degree of standardization. In fact, inter-agency variation has bedeviled efforts to create a cross-agency system with more than skeletal capabilities. See COMM. ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 17–19 (2008), available at <http://ceri.law.cornell.edu/documents/report-web-version.pdf>.

171 This fundamental data problem leads analysts to use the number of pages in the Code of Federal Regulations (CFR) or the Federal Register as a proxy for quantum of federal regulation. See, e.g., John W. Dawson, *Regulation and the Macroeconomy*, 60 KYKLOS 15, 16–17 (2007) (reviewing studies). For a rough sense of the amount of regulatory activity completely invisible to these measures, see the remarkable collection of resources on “administrative actions which are outside the scope of the CRF or [Federal Register]” maintained by the University of Virginia Library, Government Information Resources: Administrative Decisions & Other Actions By Agency, http://www2.lib.virginia.edu/govtinfo/fed_decisions_agency.html (last visited Jan. 29, 2010).

week average is included; this is an heuristic to make the problem of regulatory “information load” more concrete, rather than any sort of descriptive claim about the frequency or regularity of agency output.

- New agency regulations promulgated annually: 3500–4000 (67–77 per week).¹⁷² In the first 10.5 months of 2009, about 500 of these (11 per week) were considered important enough to be reviewed by the Office of Regulatory Information (OIRA) in the White House Office of Management & Budget (OMB).¹⁷³ Of this subset, about 100 (2 per week) are “economically significant” rules that require full OIRA review of costs, benefits, etc.¹⁷⁴
- Civilian full-time executive branch employees (FY2010 estimate): 2.12 million¹⁷⁵
- Number of bureaus, divisions, units, and programs listed in the directory of the Department of Health & Human Services: more than 3000¹⁷⁶
- Interpretive rules/other guidance:
 - Centers for Medicare & Medicaid Services (HHS): “thousands” annually;¹⁷⁷
 - FDA (2003): 105 (2 per week);¹⁷⁸

172 See OFFICE OF MGMT. & BUDGET, DRAFT 2008 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 7 (2008), available at http://www.whitehouse.gov/omb/inforeg/costs_benefits/2008_draft_cb_report.pdf; John Ashlin et al., *Regulations.gov Federal Regulatory Portal*, 30 J. GOV'T INFO. 81, 82 (2004).

173 See RegInfo.gov EO Review Counts, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (last visited Jan. 29, 2010). The numbers reported here are obtained by running the search with dates January 1, 2009 and November 15, 2009. Totals during the George W. Bush Administrations ranged from a low of 583 (in 2000) to a high of 715 (in 2003).

174 *Id.* “Economically significant” rules are those that “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Exec. Order No. 12,866, § 2(f), 50 Fed. Reg. 51,735 (Sept. 30, 1993). In 2009, average OMB review time has been thirty-two days for significant rules and forty days for others.

175 OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2010, at 335 tbl.17.1 (2009), available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2010-TAB/pdf/BUDGET-2010-TAB.pdf>.

176 PATTERSON, *supra* note 167, at 18.

177 U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVICES, EXECUTIVE ORDER GUIDANCE: OVERVIEW (2007), available at http://www.cms.hhs.gov/EOG/01_Overview.asp#TopOfPage.

178 Erica Seiguer & John J. Smith, *Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidances*, 60 FOOD & DRUG L.J. 17, 26 (2005).

- EPA (1996–1999): “over two thousand”;¹⁷⁹
- OSHA (2008): 66 interpretations¹⁸⁰ and 16 directives¹⁸¹ (1.5 per week)
- Enforcement Activity
 - EPA (2008): 20,000 inspections (384 per week); 2056 administrative complaints (39 per week); 280 cases referred for civil enforcement (5 per week); 319 environmental crime cases initiated (6 per week)¹⁸²
 - OSHA (2007): 39,324 inspections (756 per week)¹⁸³
 - FDA (2008): 15,245 inspections (293 per week); 17,907 import refusals (344 per week); 2,721 recall events (52 per week); 445 warning letters (8.5 per week); 369 convictions (7 per week); 8 seizures¹⁸⁴
- Administrative Orders
 - EPA (2008): 2084 penalty orders (40 per week); 1390 compliance orders (27 per week)¹⁸⁵
 - OSH Review Comm. (2007): 2058 cases disposed of (39 per week)¹⁸⁶

179 Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 399 (2007) (citing COMM. ON GOV'T REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H.R. REP. NO. 106-1009, at 5 (2000)).

180 U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., STANDARD INTERPRETATIONS (2008), available at http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=INTERPRETATIONS&p_toc_level=2&p_keyvalue=DATE_2008&p_status=CURRENT.

181 U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., DIRECTIVES (2008), available at http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=DIRECTIVES&p_toc_level=2&p_keyvalue=DATE_2008&p_status=CURRENT.

182 U.S. ENVTL. PROT. AGENCY, COMPLIANCE AND ENFORCEMENT ANNUAL RESULTS FY2008: NUMBERS AT A GLANCE (2009), available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2008/2008numbers.html>.

183 U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA ENFORCEMENT: STRIVING FOR SAFE AND HEALTHY WORKPLACES, available at http://www.osha.gov/dep/enforcement/enforcement_results_07.html.

184 U.S. FOOD & DRUG ADMIN., FISCAL YEAR 2008 ENFORCEMENT STATISTICS SUMMARY, available at <http://www.fda.gov/ICECI/EnforcementActions/EnforcementStory/default.htm>. 2008 figures are considerably lower in virtually all these categories than in prior years. See Eric F. Greenberg, *Checking in on FDA Enforcement Stats*, PACKAGING WORLD MAG., at 22 (Apr. 2009), available at <http://www.packworld.com/article-27319> (compiling and graphing earlier year FDA data).

185 ENVTL. PROT. AGENCY, *supra* note 182.

186 U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH REVIEW COMM'N, FY 2007 PERFORMANCE AND ACCOUNTABILITY REPORT, INDEPENDENT AUDITOR'S REPORTS AND

- Currently active agency requests to collect information from the public (each of which, under the Paperwork Reduction Act, must be approved by OMB initially, and every three years thereafter¹⁸⁷): 8780 (168 per week)¹⁸⁸
- Agency proposed draft bills cleared by OMB (per Congress): 350–500¹⁸⁹
- Proposed reports/testimony cleared by OMB (per Congress): 3500–4000¹⁹⁰
- Pages in the Federal Register: 80,700 (1552 per week)¹⁹¹

This is a rough, obviously incomplete picture of the basic information load generated by the federal regulatory enterprise, but it conveys the immensity of the task of supervision. Thanks to the Unified Regulatory Agenda,¹⁹² the White House now has a reasonably good tool for tracking rulemaking activity, and OMB is attempting to monitor the issuance of at least “significant” guidance.¹⁹³ But would-be managers of regulatory policy still have no mechanism for systematic, cross-agency monitoring of administrative adjudication, the granting of permits and licenses, the denial of petitions for rulemaking, enforcement practices, etc. To be sure, a great deal of this regulatory activity concerns (relatively) minor matters that may not merit White

FINANCIAL STATEMENTS (2007), *available at* <http://www.oshrc.gov/performance/07perfprt.pdf>.

187 *See* 44 U.S.C. § 3507 (2006).

188 U.S. OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS INVENTORY OF CURRENTLY APPROVED INFORMATION COLLECTIONS, *available at* <http://www.reginfo.gov/public/do/PRAReport?operation=5> (total as of December 2009). These produce more than 64 billion responses annually, at an estimated annual cost of more than \$57 billion. *Id.*

189 This range comes from summaries provided by OMB at the outset of the G.W. Bush and Obama Administrations, respectively. *See* Memorandum from Mitchell E. Daniels, Jr., Dir. to the Heads of Dep’ts and Agencies, Legislative Coordination and Clearance (Feb. 15, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/omb/memoranda/m01-12.html>; Memorandum from Peter R. Orszag, Dir. of Office of Mgmt. & Budget to Heads of Dep’ts and Agencies, Legislative Coordination and Clearance (Jan. 27, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-09.pdf.

190 This range comes from summaries provided by OMB at the outset of the G.W. Bush and Obama Administrations, respectively. *See* Memorandum from Mitchell E. Daniels, Jr., *supra* note 189; Memorandum from Peter R. Orszag, *supra* note 189.

191 73 Fed. Reg. 80,700 (Dec. 31, 2008), *available at* http://www.access.gpo.gov/su_docs/fedreg/a081231c.html.

192 *See* GPO ACCESS, THE UNIFIED AGENDA: MAIN PAGE (2009), *available at* <http://www.gpoaccess.gov/ua/index.html> (“[The Unified Agenda] summarizes the rules and proposed rules that each Federal agency expects to issue during the next year.”).

193 *See* OFFICE OF MGMT. & BUDGET, *supra* note 169.

House-level attention, but this simply increases the challenges of informational triage.

Moreover, managing the policy output of administrative agencies is by no means all that the modern President undertakes to do. As well as being head of the government, he is expected also to be head of state and leader of his party. The following are some indicators of the informational and attentive demands of those other roles:

- Relations with Congress (2008 unless otherwise noted)
 - Measures introduced in House and Senate: 4815 (92.5 per week)¹⁹⁴
 - Statements of Administration Position on pending legislation (2007): 142 (2.7 per week)¹⁹⁵
 - Votes: 472 House; 215 Senate¹⁹⁶
 - Measures Passed: 1588 (30.5 per week)¹⁹⁷
 - Vetoes: 4¹⁹⁸
 - Average annual Bush Administration signing statements issued: 19¹⁹⁹
 - Budget
 - Smallest Cabinet Department budget (Interior, 2010 est.): \$11.9 billion²⁰⁰
 - Largest Cabinet Department budget (Health & Human Services, 2010 est.): \$873 billion²⁰¹
 - Nominations
 - Civilian: 3632 (70 per week)²⁰²

194 154 CONG. REC. D1336 (daily ed. Jan. 2, 2009), *available at* http://www.senate.gov/reference/resources/pdf/110_2.pdf.

195 OFFICE OF MGMT. & BUDGET, STATEMENTS OF ADMINISTRATION POLICY INDEX, *available at* <http://www.whitehouse.gov/omb/rewrite/legislative/sap/110-1/index-date.html> (last visited Jan. 29, 2010).

196 154 CONG. REC. D1336 (daily ed. Jan. 2, 2009), *available at* http://www.senate.gov/reference/resources/pdf/110_2.pdf.

197 *Id.* These include bills and joint, concurrent, and simple resolutions.

198 *Id.*

199 *See* Joyce A. Green, List of All Signing Statements Issued by George W. Bush, <http://www.coherentbabble.com/listGWBall.htm> (last visited Jan. 29, 2010).

200 OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2010, at 409, tbl.27.1 (2009), *available at* <http://www.gpo.gov/fdsys/pkg/BUDGET-2010-PER/pdf/BUDGET-2010-PER-1-7-1.pdf>.

201 *Id.* at 288.

- Military: 18,674 (359 per week)²⁰³

- Foreign Affairs
 - Treaties and executive agreements: 136 (2.6 per week)²⁰⁴
 - Foreign personal appearances annually: 32 (2.6 per month)²⁰⁵
- Public
 - Presidential speeches: 23 (2 per month)²⁰⁶
 - News conferences: 18 (1.5 per month)²⁰⁷
 - Other non-partisan public appearances: 298 (25 per month)²⁰⁸
 - Partisan political appearances: 65 (5 per month)²⁰⁹
- Executive orders: 37 (3 per month)²¹⁰

In sum, the task of overseeing contemporary U.S. government is almost incomprehensibly huge. To monitor and assess the current stream of information relevant to policy formulation—let alone to interpret, synthesize, and formulate a position on this typically complex and often conflicting flow—is a task for an institution, not an individual. An institution is, accordingly, what the modern presidency has become.

2. *The Presidential Branch*

The Constitution includes not a word about the White House staff, and they are barely mentioned in statute. Staff members have zero legal authority in their own right, yet 100 percent of presidential authority passes through their hands.

—Bradley H. Patterson, Jr., *The White House Staff: Inside the West Wing and Beyond*²¹¹

202 154 CONG. REC. D1336 (daily ed. Jan. 2, 2009), available at http://www.senate.gov/reference/resources/pdf/110_2.pdf. Of these, 3229 were confirmed, and 403 withdrawn or rejected. *Id.*

203 *Id.* Of these, 18,556 were confirmed, and 118 withdrawn or rejected. *Id.*

204 RAGSDALE, *supra* note 10, at 427 (averaging data from 2001–2004).

205 *Id.* at 197 (averaging data from 2001–2007).

206 *Id.* at 190, 199 (averaging data from 2001–2007).

207 *Id.* at 194 (averaging date from 2001–2007).

208 *Id.* at 201, 203 (averaging data from 2001–2007).

209 *Id.* at 205 (averaging data from 2001–2007).

210 *Id.* at 453–54 (averaging data from 2001–2007).

With the bureaucratizing of the presidency, it is hardly surprising that the White House fell heir to all the problems of a bureaucracy, including the distortion of information as it passes through the chain of command

—Stephen Hess, *Organizing the Presidency*²¹²

In contemporary political and constitutional mythmaking about the presidency, the President works alone—a solitary leader who makes the hard choices, does what needs to be done, and bears by himself the weight of power and responsibility. Political scientist Hugh Hecllo contrasts the reality:

Our most familiar image of the presidency finds a man, sitting alone, in the dimly lit Oval Office. Against this shadowy background the familiar face ponders that ultimate expression of power, a presidential decision.

It is a compelling and profoundly misleading picture. Presidential decisions are obviously important. But a more accurate image would show a presidency composed of at least a thousand people—a jumble of personal loyalists, professional technocrats, and bureaucratic staff with one man struggling, often vainly, to stay abreast of it all. What that familiar face ponders in the Oval Office is likely to be a series of conversations with advisers or a few pages of paper containing several options. These represent the last distillates produced from immense rivers of information flowing from sources—and condensed in ways—about which the president probably knows little.²¹³

Stories about a cast of thousands do not capture the popular imagination in the same way as the struggles of a lone protagonist. But the managerial promises of unitary executive theory cannot be assessed without understanding the role of White House staff and other political appointees in constructing the modern presidency.

American Presidents have never tried to manage the information and expertise demands of government on their own. The original institution to assist them was the Cabinet. The Cabinet was also the first of many presidential support structures that, under the pressure of expanding federal government, outgrew their original objective to supply “a few loyal and intelligent individuals who would offer counsel when asked and would keep such consultations confidential.”²¹⁴ As the executive departments grew in magnitude and complexity over the late nineteenth and early twentieth century, it became obvious

211 PATTERSON, *supra* note 167, at 2.

212 STEPHEN HESS, *ORGANIZING THE PRESIDENCY* 5 (3d ed. 2002).

213 Hugh Hecllo, *The Changing Presidential Office*, in *THE MANAGERIAL PRESIDENCY* 23, 23–24 (James P. Pfiffner ed., 2d ed. 1999).

214 CONG. RESEARCH SERV., *THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW*, at CRS-1 (2008), <http://www.fas.org/sgp/crs/misc/98-606.pdf> [hereinafter “THE EXECUTIVE OFFICE OF THE PRESIDENT”].

that Presidents needed something other than their Cabinet to collect information, provide advice, and help them coordinate key areas and programs.²¹⁵ In 1937, the President's Committee on Administrative Management—the group of prominent political science and public administration experts known to administrative law scholars as the Brownlow Commission—warned, “The President needs help.”²¹⁶ Assessing existing support as “entirely inadequate,” it recommended:

[The President should] be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government. These assistants, probably not exceeding six in number, would be in addition to his present [Cabinet] secretaries, who deal with the public, with the Congress, and with the press and the radio.²¹⁷

The result of this and other recommendations was FDR's creation of the Executive Office of the President (EOP), a new institution that brought budget management into the White House and provided the capacity for additional staff support for the President.²¹⁸ At the time, the EOP was seen as the solution to “effective coordination of the tremendously wide-spread federal machinery.”²¹⁹

From its initial, fairly modest size, the EOP burgeoned rapidly.²²⁰ Today, the entity created to allow the President to manage the federal bureaucracy is itself the size of a small agency. Currently comprising about 1800 people (down from a high of 2000 in 1980),²²¹ the EOP under President Obama consists of thirteen major offices, boards, and councils, some of which have significant subunits.²²² The most relevant for present purposes is OMB, with about five hundred

215 Woodrow Wilson's Council of National Defense is generally identified as the first serious experiment in a special institution to assist the President in managing a policy domain. *See id.* at CRS-1 to CRS-2.

216 THE PRESIDENT'S COMM. ON ADMIN. MGMT., THE EXERCISE OF RULE-MAKING POWER AND THE PREPARATION OF PROPOSED LEGISLATIVE MEASURES BY ADMINISTRATIVE DEPARTMENTS 5 (1937) [hereinafter “Brownlow Commission”].

217 *Id.*

218 The EOP was created after passage of a statute authorizing the President to propose reorganization plans. After Congress approved his plan by joint resolution, Roosevelt issued an executive order constituting the Executive Office.

219 THE EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 214, at CRS-8 (quoting the Brownlow committee).

220 Accounts of the evolution of the White House domestic policy staff include JOHN HART, THE PRESIDENTIAL BRANCH: FROM WASHINGTON TO CLINTON 26–129 (2d ed. 1995); PATTERSON, *supra* note 167; SHIRLEY ANNE WARSHAW, THE DOMESTIC PRESIDENCY: POLICY MAKING IN THE WHITE HOUSE 5–11 (1997).

221 *See* STANLEY & NIEMI, *supra* note 118, at 256–57.

222 See the list at WhiteHouse.gov, Executive Office of the President, <http://www.whitehouse.gov/administration/eop>.

career and political appointees.²²³ About half of these people work in the Resource Management Offices, currently five units defined by subject area²²⁴ and staffed with program examiners who “develop and support the President’s Budget and Management Agenda.”²²⁵ The remainder work in units that oversee procurement, financial management, and computing and information technology policy,²²⁶ that develop the Administration position on pending bills and clear agencies’ proposed legislation and congressional testimony,²²⁷ and that conduct rulemaking review.²²⁸ The EOP’s budget for the 2010 fiscal year is \$439 million.²²⁹

As the EOP grew in tandem with the job of managing the executive branch, Presidents needed a source of “immediate information and advice on pressing national problems that could not be readily obtained from the larger executive office.”²³⁰ As a result, the White House Office (WHO) emerged as the core of the current presidential support structure. Typically headed by the President’s Chief of Staff, the WHO is the part of the EOP most tailorable to the organizational and decision-making preferences of each individual President.²³¹ But the WHO has not been immune from the pressures of increasing information management and analytical demands, and growing presidential ambitions. In the Obama Administration, it comprises two

223 See OFFICE OF MGMT. & BUDGET, THE BUDGET FOR FISCAL YEAR 2010, at 1109, (2009), available at <http://www.whitehouse.gov/omb/budget/fy2010/assets/eop.pdf>.

224 These are: Natural Resource Programs; Education, Income Maintenance and Labor Programs; Health Programs; General Government Programs; and National Security Programs. Office of Management & Budget, Executive Office of the President, Organization Chart (2009), http://www.whitehouse.gov/omb/assets/about_omb/omb_org_chart.pdf.

225 OFFICE OF MGMT. & BUDGET, THE MISSION AND STRUCTURE OF THE OFFICE OF MANAGEMENT AND BUDGET, http://www.whitehouse.gov/omb/organization_mission/.

226 See OFFICE OF MGMT. & BUDGET, OFFICE OF E-GOVERNMENT & INFORMATION TECHNOLOGY, <http://www.whitehouse.gov/omb/e-gov/>; OFFICE OF MGMT. & BUDGET, OFFICE OF FEDERAL FINANCIAL MANAGEMENT, http://www.whitehouse.gov/omb/financial_default/; OFFICE OF MGMT. & BUDGET, OFFICE OF FEDERAL PROCUREMENT POLICY, http://www.whitehouse.gov/omb/procurement_default/.

227 Memorandum from Peter R. Orszag, *supra* note 189; Office of Management & Budget, Office of Management and Budget’s Legislative Information System, http://www.whitehouse.gov/omb/gils_lrd-gils/.

228 See OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION & REGULATORY AFFAIRS, http://www.whitehouse.gov/omb/regulatory_affairs/default/.

229 OFFICE OF MGMT. & BUDGET, *supra* note 200, at 409 tbl.27.1. The total budget for the EOP is shown as \$747 million, but \$308 million of this is the Iraq Relief and Reconstruction Fund.

230 RAGSDALE, *supra* note 10, at 321.

231 See *id.* at 343–45 (showing wide variation over time in number and function of units in WHO).

dozen different substantive and administrative units employing almost five hundred people.²³²

Thus, the trajectory of modern government has been mirrored within the presidency: constantly pressed by the expanding scope and complexity of the federal policy agenda and the entities charged with pursuing it, Presidents develop new structures to compile and analyze information, provide advice, and assert control. Those structures ramify, growing in size and specialization as the task of supervision grows. And Presidents come to need yet another institution, to mediate between them and the structures developed to give them help. The increasing appearance in recent administrations of “czars”—individuals appointed by the President to facilitate policy monitoring and development across traditional executive branch organizational units—may be the next iteration of this pattern.²³³

The evolution of this large, multi-layered structure to assist the President in understanding and controlling the government—which some political scientists are now calling the “presidential branch”²³⁴—has two significant consequences for the present discussion.

First, the contrast drawn by unitary executive theorists between the efficient, representationally direct singularity of presidential lea-

232 OFFICE OF MGMT. & BUDGET, *supra* note 223, at 1109; The White House, Executive Office of the President, <http://www.whitehouse.gov/administration/eop> (last visited Jan 29, 2010).

233 Although the practice dates back at least as far as the Nixon Administration’s “energy czar,” this has been a controversial point in the Obama Administration. The Senate recently held two hearings on the issue. See *Examining the History and Legality of Executive Branch “Czars” Before the S. Judiciary Comm., Subcomm. on the Constitution*, 111th Cong. (2009), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4098>; *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars Before the S. Comm. on Homeland Security & Governmental Affairs*, 111th Cong. (2009), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=5b22e173-5b74-46a0-b2ab-d300b6381de4.

A report published by the National Academy of Public Administration on the eve of the Obama Administration urged creation of a new Office of Federal Management to remedy perceived failures of OMB to “do[] an effective job of managing the executive branch in the President’s interests.” Ironically, its title echoed the assessment of the Brownlow Commission seventy years earlier. See Ronald C. Moe, *The President Needs Help: Proposed Office of Federal Management*, 4 (Nat’l Acad. of Pub. Admin., Issue Paper, 2008), available at http://www.napawash.org/pmc/papers/Moe_Proposed_Office_Federal_Management_9_08_08.pdf.

234 E.g., MATTHEW J. DICKINSON, BITTER HARVEST: FDR, PRESIDENTIAL POWER AND THE GROWTH OF THE PRESIDENTIAL BRANCH (1997); HART, *supra* note 220; NELSON W. POLSBY, THOUGHTS ON CONGRESS, NATIONAL SECURITY, AND THE RISE OF THE PRESIDENTIAL BRANCH (1988). Cf. Michael John Burton, *The Contemporary Presidency: The “Flying White House”: A Travel Establishment Within the Presidential Branch*, 36 PRESIDENTIAL STUD. Q. 297 (2006) (arguing for a broader “functional” definition of the phrase to include more than the EOP).

dership on the one hand, and the chaotic, democratically deficient collectivity of congressional action on the other, is over-simplified to the point of inaccuracy. In important ways, modern presidential leadership is constituted through, and carried out by, a large and diverse group of White House advisers and staff. This is not meant to imply that anyone in this group disputes who is really “the boss.” Rather, it is an effort to import into legal theorizing about the presidency a real world dynamic long recognized by organizational theorists and other social scientists: leaders need followers as much as followers need leaders.²³⁵ The President is dependent upon his advisers and supporting staff because he must be; his dependency increases as the demands of the office and the scope of presidential ambition grow. They identify the individuals, groups, and issues that merit his personal attention,²³⁶ determine the content and framing of the information he receives,²³⁷ and communicate “the White House position” on various policy matters to everyone else.²³⁸ None of these people, save the Vice President, is elected; most of them are invisible to the public.²³⁹

²³⁵ See, e.g., KELLERMAN, *supra* note 44; Edwin P. Hollander, *The Essential Interdependence of Leadership and Followership*, 1 CURRENT DIRECTIONS IN PSYCHOL. SCI. 71 (1992); Sumon Majumdar & Sharun W. Mukand, *The Leader as Catalyst: On Leadership and the Mechanics of Institutional Change* (CESifo, Working Paper No. 2337, 2008).

²³⁶ See, e.g., FRED I. GREENSTEIN, *THE PRESIDENTIAL DIFFERENCE: LEADERSHIP STYLE FROM FDR TO GEORGE W. BUSH 152–53* (2d ed. 2004) (describing the frustration of some of Reagan’s principal advisers when staff structure changed to hierarchical model under Chief of Staff Donald Regan, who rigorously controlled access to the President).

²³⁷ See, e.g., RICHARD M. PIOUS, *WHY PRESIDENTS FAIL 92–107* (2008) (arguing that Carter’s pollster Patrick Caddell was key in shaping his perception of the existence and nature of a crisis in his presidency); Andrew Rudalevige, “*The Decider*”: *Issue Management and the Bush White House*, in *THE GEORGE W. BUSH LEGACY 135, 139* (Colin Campbell et al. eds., 2008) (concluding that the “centralized politicization” of the George W. Bush Administration increased responsiveness to presidential policy preferences, but excluded analyses and alternatives that the President needed to calculate those preferences in an informed way).

²³⁸ For a vivid picture of how relations become strained between staff on the one hand and members of the Cabinet and other high-level presidential appointees on the other, see HESS, *supra* note 212, at 16–18. See also SHIRLEY ANNE WARSHAW, *POWERSHARING: WHITE HOUSE-CABINET RELATIONS IN THE MODERN PRESIDENCY* (1996) (describing increasing dominance of White House vis-à-vis Cabinet departments in policymaking since Nixon presidency).

²³⁹ The intense controversy over Dick Cheney’s role during the George W. Bush Administration, see, e.g., BARTON GELLMAN, *ANGLER: THE CHENEY VICE PRESIDENCY* (2008); SHIRLEY ANNE WARSHAW, *THE CO-PRESIDENCY OF BUSH AND CHENEY* (2009), underscores that Americans are not prepared to accept that even an *elected* presidential adviser has significant power in Administration policymaking. The scope of Cheney’s influence was surely atypical, but he is not the first modern Vice President to draw criticism for undue influence on policy. Dan Quayle’s role while chairing the Council on Competitiveness was a frequent bone of contention during the George H.W. Bush Administration. See CHARLES

Second, overseeing this multi-layered support structure is itself a formidable management imperative for the new President. A vast literature—authored by White House veterans, scholars of the presidency, and experts in public administration—is devoted to how the White House establishment has been, and ought to be, selected, organized and supervised.²⁴⁰ Much of this literature recounts the failures of previous chief executives: delegating too much to others, or not enough; allowing the President’s closest aides too great a power to filter whom he sees and what he hears, or attempting vainly to see and hear everything himself; establishing advising and decision structures that stifle questioning and disagreement, or trying to craft policy and take action based on infighting and ambivalent dithering. The advice on how to avoid these errors varies, but the basic lesson is the same: for the modern President, the quest to direct the federal government begins with the challenge of managing his own house.

The people on whom the President relies to help him control the government are not all in the White House. In appointing Cabinet Secretaries, agency heads, and various subordinate agency officials, the President in theory extends his influence throughout the executive branch by placing “his” people in key positions of responsibility. In actual practice, Presidents have mixed success using political appointments as instruments of organizational oversight and policy direction.²⁴¹ The sheer size of federal government creates an impossi-

TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION’S STRATEGY FOR GOVERNING WITHOUT CONGRESS* 61–88 (1994); Robert J. Duffy, *Divided Government and Institutional Combat: The Case of the Quayle Council on Competitiveness*, 28 *POLITY* 379 (1996).

²⁴⁰ In addition to works cited in previous notes, this literature includes: JOHN P. BURKE, *PRESIDENTIAL TRANSITIONS: FROM POLITICS TO PRACTICE* (2000); KOWERT, *supra* note 165; JAMES PFIFFNER, *THE STRATEGIC PRESIDENCY: HITTING THE GROUND RUNNING* (2d ed. 1996); THOMAS PRESTON, *THE PRESIDENT AND HIS INNER CIRCLE: LEADERSHIP STYLE AND THE ADVISORY PROCESS IN FOREIGN AFFAIRS* (2001); *THE NERVE CENTER: LESSONS IN GOVERNING FROM THE WHITE HOUSE CHIEFS OF STAFF* (Terry Sullivan ed., 2004); Samuel Kernell, *The Evolution of the White House Staff*, in *THE MANAGERIAL PRESIDENCY*, *supra* note 213, at 37.

²⁴¹ E.g., WARSHAW, *supra* note 220, at 117–44 (describing how, after departure of President Reagan’s Assistant to the President for Policy Development Martin Anderson, “[d]epartments began moving in their own directions, which often were at odds with the administration’s broad goals” even though a key strategy had been selecting appointees who shared Reagan’s conservative, deregulatory agenda); *id.* at 169–70 (describing specific instances during the George H.W. Bush presidency when appointed agency heads publicly took policy positions at odds with those of White House); *id.* at 185–210 (describing how lack of clear domestic policy goals coming into office and Clinton’s choice of an ideologically diverse Cabinet hampered consistent, effective domestic policy control); George A. Krause & Brent M. Dupay, *Coordinated Action and the Limits of Presidential Control over the Bureaucracy: Lessons from the Bush Presidency*, in *PRESIDENT GEORGE W. BUSH’S INFLUENCE OVER BUREAUCRACY AND POLICY* 81 (Colin Provost & Paul Teske eds., 2009)

ble management paradox. On the one hand, presidential appointees represent only a very thin layer at the top of the major regulatory entities.²⁴² This has been a source of frustration for Presidents, and recent administrations have sought to extend the influence of political appointees in the administrative policymaking process.²⁴³ On the other hand, the opportunity to select even a tiny fraction of the executive branch workforce translates into the President finding more than 3300 people to be his voice out in the government.²⁴⁴ Stephen Hess, staffer in Republican administrations and adviser to Republican and Democratic Presidents, describes how political reality compromises the theory of extended presidential control through appointment:

(presenting case studies of the New Source Review Program and the National Security Agency's domestic surveillance program as instances when political appointees either delayed implementation of or thwarted entirely the President's policy preferences).

242 For example, less than 0.5% of EPA's nearly 18,000 employees are presidentially appointed; of employees at the manager level, the percentage is 2.91%. See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 82, 105 (2008) (giving data for other agencies as well).

243 This has not occurred through an overall increase in the number of political appointees, see *id.* at 100 tbl.4.3, but rather through such strategies as heightened White House control over positions formally filled by agency heads, see note *infra* 244 (Schedule C appointments), shifting the proportion of political appointees among agencies depending upon the degree to which the agency's general policy orientation departs from the President's agenda, see note 268 *infra* (describing patterns in Clinton, and both Bush, presidencies); and "management" steps such as the Bush Administration's Executive Order 13,422 (2007), which required a presidentially-appointed regulatory policy officer to serve as the gatekeeper for agency rulemaking. LEWIS, *supra* note 242, at 103; see also *Amending Executive Order 12866: Good Governance or Regulatory Usurpation? Part I and Part II: Hearings Before the Subcomm. on Investigations and Oversight of the H. Comm. on Science and Technology*, 110th Cong. (2007), available at http://science.house.gov/Publications/hearings_markup_details.aspx?NewsID=1777 (testimony of numerous regulatory law experts criticizing this for extending White House political control over regulation).

244 This figure is based on 2004 data and includes three components: (i) just under 1000 PAS (presidential appointment, senate confirmation) executive policymaking positions, which include the very top of the management pyramid in agencies, plus US attorneys and ambassadors; (ii) about 700 positions in the Senior Executive Service, the senior management level that may, by statute, be up to 10% political appointees; and (iii) about 1600 Schedule C positions, which include special or confidential assistants to PAS appointees, directors of communications, and legislative liaisons. Although technically selected by the agency head, the White House has exercised significant control over Schedule C appointments since the Reagan administration. Gabriel Horton & David E. Lewis, *Turkey Farms, Patronage, and Obama Administration Appointments* 5 (Ctr. for the Study of Democratic Inst., Working Paper No. 09-03, 2009), available at <http://www.vanderbilt.edu/csdi/working%20papers/gabe%20and%20dave%20nov%202009.pdf> (analyzing biographical data of more than 1000 people appointed in first 6 months of Obama Administration). The figure given in the text is conservative. The total number may be as high as 9000 once judgeships and advisory commission appointments are included. See *id.* at 5 n.7.

A president-elect has political debts and obligations, but they are not necessarily to those with the backgrounds he now needs. Thus he sometimes picks incompetents. Often he turns to strangers. With each appointment, he makes a contract to share his responsibilities. If it turns out that the appointee and the president disagree, the appointee can quit or the president can fire the appointee. Either action is a tacit admission of failure on the part of the nation's leader. More commonly, the president and the appointee split their differences and the president loses some part of the direction of his administration.²⁴⁵

In sum, although the President is a single individual, the modern presidency is a large and complicated institution. It is constituted from a mélange of people that includes substantive policy and technical experts, those with “insider” experience in Washington government, campaign and party loyalists, representatives of interest groups whose support helped the President get elected and/or is needed to advance his policy agenda, and nominees capable of surviving the confirmation process.²⁴⁶ These people bring widely varying skills and competency to their interaction with the career officials and front-line staff who hold the substantive and institutional knowledge to make things happen (or not) within agencies. Using them to accomplish the diffusion of presidential leadership through the executive branch poses considerable management challenges. More importantly, it involves substantial agency costs that advocates of President-centered government ignore.²⁴⁷ No strategy of selection and direction allows the President to fill several thousand (or even several hundred) vacancies with people who are his alter ego—that is, who will unfailingly give him the information he would want to have (if he knew it existed) and who will reliably convey to the people who do

245 HESS, *supra* note 212, at 13.

246 See RAGSDALE, *supra* note 10, at 321 (describing three strategies Presidents use in appointments: “Get the best people possible” (the bureaucratic strategy); “Get the people you know best” (the intimacy strategy); and “Get people from the party and interest groups” (the representation strategy)); Martha Joynt Kumar, *The White House as City Hall: A Tough Place to Organize*, 31 PRESIDENTIAL STUD. Q. 44, 47, 49–50 (2001) (describing four groups from which Presidents make appointments: Campaign people, who tend to “think in a short time span, see the world in black and white, and have a sense of attack”; personal presidential choices, “a handful of people to occupy positions [Presidents] consider to be crucial to the manner in which their presidenc[ies] function”; substantive policy people, “whose first thought is not the politics of it but the substance of it”; and people with White House experience, who know “how White Houses work and are structured, [and] how decisions get made” (internal quotations omitted)).

247 Political scientist George Krause helpfully conceptualizes these costs as problems of “vertical coordination between presidents and their subordinates”; “horizontal coordination among subordinates,” and “credible commitments arising from” relatively short tenure in office. George A. Krause, *Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics*, 39 PRESIDENTIAL STUD. Q. 74, 75 (2009).

the day-to-day work of government the message he would want them to hear.

3. *The Man Behind the Curtain*

Trends have made more difficult for presidents that which was always difficult but less aspired to—command of the instrumentalities of government and control over policy.

—Bert A. Rockman, *The Leadership Question: The Presidency and the American System*²⁴⁸

[Presidents] seek singular control of information and policy decisions but are forced to work through a collective apparatus. The pastiche of staffs, interests, and loyalties make it difficult for presidents to gain either the information or the control they seek. . . . The problem of control seems inherently unsolvable.

—Lyn Ragsdale, *Vital Statistics on the Presidency*²⁴⁹

Like the democracy claim, the “good government” claim of unitary executive theory lays a simplistic, reassuring veneer over a messy, disquieting reality. Its wise, well-informed, and deliberative Manager-in-Chief is ready and able to provide the hands-on leadership that can infuse rational coordination, sensible prioritization, and public-regarding direction into the sprawling and conflicted federal policy-making enterprise. In fact, however, when the ambition of a unitary executive President to control federal regulatory policy meets the massive scope and complexity of modern regulatory government, the results are very different from what unitary executive theory promises.

First, Presidents may aspire to comprehensive, coherent direction of regulatory policy but White House control is in fact sporadic, at times cacophonous, and often imperfectly realized. How could it be otherwise? It is costly for Presidents and their advisers to monitor the mass of agencies’ policymaking activities, to develop positions on the often complex underlying substantive issues, to communicate those positions to the people formally empowered to decide, and to actually get a decision implementing the President’s policy.

With respect to locating appropriate targets for presidential attention, the White House—like Congress—can use “fire alarm” signals from interest groups, influential constituents, and the media to iden-

²⁴⁸ BERT A. ROCKMAN, *THE LEADERSHIP QUESTION: THE PRESIDENCY AND THE AMERICAN SYSTEM* 168 (1984).

²⁴⁹ RAGSDALE, *supra* note 10, at 321–22 (emphasis omitted).

tify targets of interest. But formal modeling and empirical work confirm what intuition suggests about this solution to the costs of information gathering and expertise gaps: it cannot produce consistent, systematic oversight, and so introduces significant biases into the regulatory process.²⁵⁰ Moreover, identifying the regulatory targets of White House interest is only the beginning. The specific actions consistent with the President's policy agenda must be determined, and conveyed to the people in agencies with the authority to take them. As the power of the presidency has become (in the words of presidential scholar Hugh Heclo) "more extended, scattered and shared, . . . less of a prerogative, less unilateral, and less closely held by the man himself,"²⁵¹ the "President's" position may in fact be constructed, and delivered, by multiple voices. Academic and insider accounts of White House operations describe an intensely absorbed, highly energized atmosphere generated by staff units with distinct expertise and perspectives.²⁵² At their best, they robustly debate the multiple substantive and political implications of policy options; at their worst, they vie for advantage and influence.²⁵³ Even under the most optimistic assumptions of universal, disinterested competence and good judgment, the information flowing up to the President about implications and options will be imperfect—and the message

250 E.g., Barry R. Weingast, *Caught in the Middle: The President, Congress, and the Political-Bureaucratic System*, in *THE EXECUTIVE BRANCH* 312, 329–30 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (use of fire-alarm oversight creates incentives for political appointees to avoid actions that harm constituents of their Congressional or White House principals); see also Hugo Hopenhayn & Susanne Lohmann, *Fire-Alarm Signals and the Political Oversight of Regulatory Agencies*, 12 *J. L. ECON. & ORG.* 196 (1996); cf. Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 *ADMIN. L. REV.* 1, 9–10 (1994) (describing how Reagan Administration initiation of centralized OMB review of rules revealed shortcomings of fire alarm oversight that led Congress to change its strategy).

251 Heclo, *supra* note 213, at 30.

252 E.g., RAGSDALE, *supra* note 10, at 316, 345 (offering empirical data about WHO under various Presidents, and noting that during George W. Bush Administration, "the level of specialization, especially in the WHO, is striking"); WARSHAW, *supra* note 220, at 14 (describing how the "White House staff has become a series of separate, and generally institutionalized, units with different responsibilities, different constituencies, and different operating behavior").

253 See HESS, *supra* note 212, at 5 (identifying one characteristic of the modern presidency as "that presidential assistants have increasingly become special pleaders"); Robert Durant, *Back to the Future? Toward Revitalizing the Study of the Administrative Presidency*, 39 *PRESIDENTIAL STUD. Q.* 89, 106 (2009) (arguing that over time "presidential appointees tend to become just as stove-piped, jurisdictional, and imperialistic in their thinking and actions" as the agencies whose policy the White House is trying to direct).

flowing down to agency officials about “what the President wants done” will at times be ambiguous, even contradictory.²⁵⁴

And even when a clear policy position emerges, the White House is not alone in trying to control the regulatory outcome. A significant element of the unitary executive debate involves the true locus of authority to exercise the power delegated in regulatory statutes.²⁵⁵ Regardless of the formal allocation of power, however, presidential preferences must in fact compete with those of multiple congressional committees with jurisdiction over the issue; interest groups who can provide or withhold crucial political support to the President, as well as mobilize media and grassroots opinion; state governors and other local officials who feel the regional impacts of regulatory actions; and sometimes even the divergent views of the agency leadership he appointed.²⁵⁶ Even Presidents must pick their battles, and the White

²⁵⁴ See, e.g., GEORGE G. EDWARDS III & STEPHEN J. WAYNE, *PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING* 288–95 (6th ed. 2003) (discussing range of personal, political, and organizational factors that can impede transmission of clear, consistent policy directives from President to agencies); HESS, *supra* note 212, at 177–78 (discussing the serious potential for “distortion” as a major management problem: “Simple messages have the best chance of surviving intact. But presidential messages are rarely simple, and in the modern White House fewer and fewer aides hear directly from the president what he really wants done”); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 66–69 (noting that, in interviews, EPA political appointees from George H.W. Bush and Clinton Administrations described how multiple White House staff purported to speak for the President, at times with contradictory direction).

²⁵⁵ The strongest unitary executive position (not endorsed by all unitarians) is that, regardless of the identity of the official to whom a statute purports to delegate regulatory authority, the only true recipient of the power can be the President. Inasmuch as he is alone vested by Article II with the executive power, action by the statutory designee is at his sufferance, and he may at any point determine to take the action himself. Compare, e.g., Calabresi, *supra* note 3, at 82–85, with Pierce, *supra* note 6, at 520 (arguing that the President has the power to fire decisionmakers who disobey a presidential directive, but not to exercise the delegated authority himself).

²⁵⁶ Several empirical studies document how competition between presidential and congressional preferences in environmental regulation has produced fluctuating levels of EPA activity. E.g., B. Dan Wood, *Bureaucrats, Principals, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213 (1988); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 818–21 (1991). For evidence of the impact on attempted White House control from congressional and other sources of regulatory policy competition, see, for example, Wood & Waterman, *supra* note 256, at 806–07 (finding that early Reagan Administration success in cutting back on anti-discrimination enforcement by Equal Employment Opportunity Commission diminished after controversial General Counsel Michael Connelly resigned and was replaced by a “career-oriented” appointee who was “more palatable to the Congress and EEOC constituencies”); *id.* at 811–12 (finding competing congressional and presidential influence on number of safety violations cited by Nuclear Regulatory Commission inspectors); *id.* at 815–16 (finding decline in number of National Highway Transportation Safety Administration engineering evaluations, despite strong Administration interest in auto safety,

House will sometimes be forced strategically to refrain from policy direction. Capturing these complexities of policy leadership in contemporary U.S. government, White House veteran Stephen Hess describes how Presidents come to discover that:

the experience of being president was different from what [they] thought it would be or from what [they] learned in [their] civics textbooks. Four years or eight years seemed like a very long time from the outside, a very short time when [they were] in office. It is never long enough to do any real planning—to think about where the country ought to be, even in the next decade, and to design programs to get from here to there. [Their] time was consumed by crises and the demands of others, bargaining with legislators, waging feuds, performing small symbolic acts, worrying about getting reelected, finding people for jobs and getting rid of them (often by kicking them upstairs), approving budgets that [they] could only change around the edges. [They] never really “ran” the government, as [they] had expected.²⁵⁷

The second significant dimension on which the reality of presidential oversight differs from the unitary executive story is politics. Presidents since Ronald Reagan have unabashedly admitted that their “management agenda” involves not only coordination, rationalization, and conflict resolution, but also aligning regulatory outputs with “the President’s priorities.”²⁵⁸ So long as the story features a Representative-in-Chief who truly and distinctively embodies the voters’ mandate, the wishes of the national majoritarian coalition, or the interests of the whole nation, this expansive view of what counts as “management” can claim to be a virtue. Conflating management with the imposition of a particular set of policy preferences becomes far more problematic, however, once the President’s delphic claim to

during tenure of appointee whose regulatory philosophy was unexpectedly at odds with Administration’s); *id.* at 817–18 (finding impact on Reagan Administration pattern of deregulating surface mining after state government pushback); *see also* Durant, *supra* note 253, at 97–105 (case studies of Clinton Administration effort to increase military environmental compliance). For a broadbased model of the ways in which Presidents can unilaterally effect policy control, and the circumstances in which congressional and judicial action is likely to limit unilateral presidential policy direction, see WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003).

²⁵⁷ HESS, *supra* note 212, at 20.

²⁵⁸ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 4 (Sept. 30, 1993). *See also* OFFICE OF MGMT. & BUDGET, *supra* note 225 (OMB’s Resource Management offices exist to “develop and support the President’s Budget and Management Agenda,” which involves “provid[ing] ongoing policy and management guidance to federal agencies”). Since the formalization of centralized White House rulemaking review in the early months of the Reagan Administration, *see* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981), the proportion of rules as to which OMB required a change before designating “consistent” with White House criteria has risen from 5% (1981) to 72% (2007). RAGSDALE, *supra* note 10, at 317, 348–51.

channel the will of the people is called into question—and it is deeply disturbing when the account is fleshed out to include the central role of White House staff and other political appointees, who have no even colorable claim to oracular representational status.

A less simplistic and romanticized understanding of presidential politics would predict that presidential policy direction will reflect the jumbled mix we see elsewhere in the democratic political environment: disinterested conception of the public good; constituency service; rational strategy for consolidating and extending political influence; narrowly self-interested (if not actually unethical) behavior; and ordinary, garden variety ambivalence and equivocation. This is indeed what anecdotal and (limited) empirical evidence reveals. White House direction of regulatory policy sometimes takes the politically-tough high road of far-sighted wisdom; the rest of the time, it attends to some regulatory players more than others,²⁵⁹ responds to the wishes of groups that have been important to the President's political success,²⁶⁰ favors electorally significant interests and areas,²⁶¹ and furthers the personal interests of close presidential advisers.²⁶² This does not make presidential policy preferences *more* suspect than those of other major actors in the regulatory arena, but it should warn us against giving the President monopoly power over regulatory policy under the guise of “good government” management, rather than forcing the

259 See, e.g., Virginia Sapiro & David T. Canon, *Race, Gender, and the Clinton Presidency*, in THE CLINTON LEGACY 169, 170 (Colin Campbell & Bert A. Rockman eds., 2000) (discussing how Bill Clinton “focused substantial attention on the distinctive needs” of African Americans, Hispanics and feminist women’s groups through appointments, policies and “symbolic politics,” and received in return support at crucial moments in his presidency); Duffy, *supra* note 239, at 387–95 (discussing examples that fueled criticism of George H. W. Bush Administration Council on Competitiveness for “granting privileged access to industry groups, allowing them to push for [regulatory] concessions they were unable to attain from Congress or the EPA” while keeping public interest groups “at arms-length”).

260 Mark A. Peterson, *Still a Government of Chums: Bush, Business, and Organized Interests*, in THE GEORGE W. BUSH LEGACY 288, 313–15 (Colin Campbell et al. eds., 2008) (discussing a range of policy contexts and concluding that business and conservative interest groups and organizations “financed [George W. Bush’s] campaigns, provided a significant proportion of the personnel for his administration, granted the coherent coalitional resources to gain leverage over legislation and policymaking in support of their shared agendas, and were richly rewarded with policy outcomes not to be widely shared with anyone else”); cf. Mark A. Peterson, *Clinton and Organized Interests: Splitting Friends, Unifying Enemies*, in THE CLINTON LEGACY 140 (Colin Campbell & Bert A. Rockman eds., 2000) (discussing contradictions and failures of Clinton’s interest group strategies with respect to traditional Democratic supporters such as organized labor).

261 See *supra* notes 155–60 and accompanying text.

262 See, e.g., WARSHAW, *supra* note 239, at 132–58 (reviewing energy, environmental, and procurement contexts in which Vice President Cheney controlled policy outcomes to the benefit of former clients, associates, and future employer).

White House to compete in the democratic marketplace with all the other voices contending to define what regulatory policy best serves the people's interests.

The third significant area in which the reality of presidential "management" differs from unitary executive promises involves the cost to certain values that have been central to the growth of the regulatory state. One of these values is expertise. We no longer believe—if we ever did—that achieving good regulatory policy requires only assembling the right team of experts. But even before the science controversies of the George W. Bush Administration,²⁶³ informed observers of the regulatory process had become concerned that aggressive presidential directory efforts induce the opposite sort of error: treating regulation as if it were all (or mostly) politics.²⁶⁴ A philosophy of governing rooted in claims about the representational supremacy and superior managerial rationality of presidential control will predictably devalue the role of knowledge (and knowledge-holders) lying outside the President's purview.²⁶⁵ Even if the democracy and managerial claims of unitary executive theory *were* well-founded, a predilection for subordinating subject-area experience and scientific opinion to political judgment is a more serious threat to sound regulatory policy than overstating the value of expertise. Experts cannot give us the right answers when fundamental value choices must be made, but they can define the range of sensible regulatory options, bring to bear practical wisdom informed by experience, and prevent us from making costly cognitive errors of perception and judgment.²⁶⁶

Concerns that the unitary executive approach to management actually threatens sound regulatory decision making have been validated by David Lewis's recent analysis of bureaucratic performance during the George W. Bush administration, the presidency that built

263 See, e.g., Michele Estrin Gilman, *The President as Scientist-in-Chief*, 45 WILLAMETTE L. REV. 565 (2009); W. Henry Lambright, *Government and Science: A Troubled, Critical Relationship and What Can Be Done About It*, 68 PUB. ADMIN. REV. 5 (2008); Donald P. Moynihan & Alasdair S. Roberts, *The End of an Idea? The Bush Administration and the Exhaustion of the Politicized Presidency* (La Follette School Working Paper No. 2008-024), available at <http://www.lafollette.wisc.edu/publications/workingpapers/moynihan2008-024.pdf>.

264 See, e.g., Shapiro, *supra* note 250; Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745 (1996).

265 It does not seem coincidental that Ronald Reagan, in whose presidency unitary executive theory was born, was also known for the vehemence of his public derision of "the bureaucracy"—i.e., career federal executive employees.

266 See Rachlinski & Farina, *supra* note 164, at 575–77, 579–82, 601–03 (exploring the strengths and weaknesses of lay and expert decision making, and the resulting dangers of excessive political control over regulatory outcomes).

on and extended twenty years of determined politicization of administrative agencies.²⁶⁷ On the Program Assessment Rating Tool (PART)—the numerical measure devised by the Administration and administered by OMB to grade program performance—programs headed by political appointees got systematically lower grades than those led by career managers; higher *percentages* of appointees on the management team also produced lower PART scores.²⁶⁸ Analyzing demographic characteristics of careerists and appointees that might plausibly relate to management performance, Professor Lewis found that previous experience in the program and longer tenure in management positions were the systematic differences that had explanatory value.²⁶⁹

Programs managed by political appointees also fared badly in another Bush Administration measure of performance—the Federal Human Capital Survey, designed to measure “employees’ perceptions of whether, and to what extent, conditions characterizing successful

267 The study used government-wide data from government sources: the “Plum Book” (the list of presidentially appointed positions, officially titled United States Government Policy and Supporting Positions, available at <http://www.gpoaccess.gov/plumbook/>), the Central Personnel Data File of the Office of Personnel Management, the Program Assessment Rating Tool, and the Federal Human Capital Survey. See LEWIS, *supra* note 242, at 103, 189.

268 LEWIS, *supra* note 242, at 172–84. Analyzing how Presidents shifted the incidence of political appointees across agencies, Professor Lewis found that Presidents George H.W. Bush and George W. Bush targeted agencies with a “liberal” policy orientation for additional appointments, while President Clinton targeted those with a “conservative” orientation. *Id.* at 127–28 (finding, *inter alia*, that “[t]he advent of a Republican administration is estimated to increase the number of [Senate-confirmed] appointees by 50 positions in liberal or moderate agencies compared to only 10 in conservative agencies”). These results were robust even after controlling for differences among programs (e.g., type, budget), variations in management environment (size, executive or independent, internal organization), and policy content (liberal/conservative tilt, creation during divided government). *Id.* at 180–84.

269 *Id.* at 188–89. Professor Lewis observes that political appointees lack “site-specific knowledge[,] . . . expertise in specific policy areas, familiarly with key stakeholders, an understanding of the folkways and informal power relationship of the agency and its policy arena, and aspects of federal work as mundane as how the accounting, records, and personnel systems work.” *Id.* at 144. Even demographic characteristics that would seem to favor appointee managers in terms of program performance—higher levels of education, private management experience, and previous work in the White House or Congress—could not compensate. *Id.* at 185. The average tenure of top appointees (PAS) was only twenty-four months; that of lower level appointees was even shorter. *Id.* at 145. Professor Lewis points out that shorter management tenure has implications throughout the program: “Increased turnover creates leadership vacuums, sends mixed signals about agency goals, and diminishes an agency’s commitment to reform, resulting in generally poorer performance.” *Id.* at 145. It also “disrupts working relationships among functionally related agencies and programs.” *Id.*

organizations are present in their agencies.”²⁷⁰ Those programs got systematically lower employee ratings on leadership, management and work climate than programs run by careerists.²⁷¹ As the percentage of appointees on the management team increased, employees were less likely to respond that their agency’s management “generate[s] high levels of motivation and commitment in the workforce,” “review[s] and evaluate[s] the organization’s progress toward meeting its goals,” and “promote[s] communication among different work units.”²⁷²

The second core value at risk from the unitary executive management claim is most immediately conceptualized as legality—but might ultimately be understood as democracy itself. Peter Strauss has powerfully described how White House direction can disrupt the intricate network of statutory and judicially-imposed duties and constraints within which agencies must act.²⁷³ To be sure, legality is no more the sole guarantor of sound regulatory policy than expertise. But presidential judgment cannot supply all that is lost when politics supersedes administrative law. Our perennial focus on making regulatory processes faster, cheaper, and smarter tends to obscure one of the existing, most fundamental strengths of those processes: judged by the current top two metrics of democratic government—“transparency” and “participation”—administrative policymaking is clearly superior to any other type of federal government decision making. By law, most important regulatory actions must be publicly announced. Agencies do not have the presidential prerogative of making law by secret directive and unannounced modification.²⁷⁴ By

270 U.S. OFFICE OF PERSONNEL MGMT., ENSURING THE FEDERAL GOVERNMENT HAS AN EFFECTIVE CIVILIAN WORKFORCE, FEDERAL HUMAN CAPITAL SURVEY, <http://www.fhcs.opm.gov/>. The Survey was administered every other year by the Office of Personnel Management, an independent agency that manages the civil service. Professor Lewis analyzed 2002 and 2004 data.

271 See LEWIS, *supra* note 242, at 189–94.

272 *Id.* at 195. The quoted language comes from the Survey questions.

273 See Strauss, *supra* note 12; Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).

274 Although executive orders are now routinely published in the Federal Register, a significant number of presidential directives are not publicly available. See the lists maintained by the Federation of American Scientists. FED’N OF AM. SCIENTISTS, PRESIDENTIAL DIRECTIVES AND EXECUTIVE ORDERS, <http://www.fas.org/irp/offdocs/direct.htm> (last visited Jan. 29, 2010). The George W. Bush Administration OLC advised that no public notice was required when the President determined to modify or depart from a published executive order. While this advice seems consistent with existing law, commenters were quick to point out its implications with respect to, for example, Executive Order Number 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), which limits executive branch electronic surveillance of Americans traveling abroad, who are not covered by existing statutory protec-

law, any individual (even those disenfranchised from voting) can comment on a proposed rulemaking and is entitled to have his or her comment considered by the agency. Those who get to address congressional or White House policy makers do only as a matter of grace, and no one suggests such privileges are universally available or equitably distributed. Even in administrative adjudication, opportunities for participation are broader than in the federal courts, who hear only those with certain, legally cognizable types of injuries and interests. By law, most important regulatory decisions must be publicly justified, with reference to a contemporaneous factual record and reasons that are sensible and within the agency's statutory charge. The obligation to explain their exercise of public power is minimal on Congress²⁷⁵ and effectively nonexistent on the President.²⁷⁶ By law, agencies must open their deliberative meetings to any member of the public, and respond to requests for information about their activities from any individual or group. Congress, the President, and the courts are categorically exempt from the Freedom of Information Act (FOIA) and the Government in the Sunshine Act.²⁷⁷

To be sure, the *reality* of public engagement in regulatory decision making is nowhere near the level of legally-supported transparency and participation. However, not even the *potential* of broad-based citizen understanding and involvement exists if the processes of administrative law are short-circuited or overridden by White House direction.²⁷⁸ Here as well, unitary executive theory turns out to undermine, rather than advance, a constitutive ideal of the regulatory

tions. *See Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution, S. Judiciary Comm.*, 110th Cong. (April 20, 2008), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3305>; Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).

275 Unless the statute implicates a suspect class or fundamental right, or attempts to abrogate the states' sovereign immunity, Congress gets the benefit of judicial willingness to hypothesize "any state of facts [that] reasonably may be conceived to justify" its policy judgment. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

276 *See* Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1210–11 (2009) (discussing the "background presumption" of presidential exceptionalism and arguing that longstanding doctrines that exclude judicial review of presidential findings and determinations should be replaced).

277 5 U.S.C. §§ 552, 552b (2006). The exemptions of Congress and the judiciary are explicit. *See id.* §§ 551; 552(f). The exemption of the President is implicit. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). The Executive Office of the President is expressly included in these transparency statutes, but increasingly expansive claims of executive privilege temper the practical effect of the statutory inclusion. *See infra* notes 278–79 and accompanying text.

278 For a proposal to change this legal regime with respect to transparency at least, see Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. (forthcoming 2010).

state. Invoking the principle of executive privilege, the George W. Bush Administration routinely refused congressional requests for information relevant to agency and program oversight, substantially increased the number of classified documents as secret and the range of executive officials with authority to impose this classification, substantially increased the number of FOIA denials on grounds *other* than the national security exemption, and asserted power to prevent the release of a previous administration's records even if the former President disagrees.²⁷⁹ This assertion of presidential prerogative to control access to information is so extreme, in degree and comprehensiveness, that even those generally sympathetic to executive privilege conclude that the doctrine has been stretched almost beyond recognition.²⁸⁰ Yet, as the Conclusion develops further, the progression toward extremism is not surprising given the nature of unitary executive ideology.

CONCLUSION

Leaders and followers share responsibility for leadership, bad as well as good. . . . None of us is off the hook.

—Barbara Kellerman, *Bad Leadership*²⁸¹

The movement toward President-centered government is one of the most significant trends in modern American history. During most of this time, the shift has been incremental, *de facto*, and situational. The President was the natural beneficiary of leadership needs and opportunities created by the domestic growth of a massive federal regulatory enterprise and the international emergence of world-wide warfare and global geopolitics. This pragmatic evolution towards a balance of power decidedly in favor of the executive was immeasurably aided by communication technologies that allowed the President to reach out personally to the people, explaining and exhorting, framing events and seeking alliance.

These political and cultural developments maintained an uneasy relationship with the Constitution. When put to legal test, vigorous

279 See PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 121–32 (2009).

280 See, e.g., Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002) (assessment, by a scholarly defender of executive privilege, that the Bush Administration has weakened the principle of executive privilege by overreaching and departing from “recognized” executive privilege norms).

281 See KELLERMAN, *supra* note 44, at 226.

assertions of presidential power did not map well onto existing understandings of constitutional authority.²⁸² Then came the 1980s. Unitary executive theory appeared, to make an unapologetic, even aggressive, case for President-centered government. Presidential control over domestic policy and international affairs was elegantly and passionately shown to be not only the type of government Americans need in an increasingly dangerous world, but also the intended constitutional order of things.

Presidential behavior has not been the same since. Armed with unitary executive theory, Presidents of both parties (even those careful not to rely on its originalist constitutional reasoning) have gone on the offensive. They and their advisers have claimed directory authority over the people and the decisions involved in regulatory policymaking. They have asserted the prerogative to collect, hold close, and act unilaterally upon the information needed to preserve the security of the nation and the safety of its citizens. They have become hypervigilant to discover, and quick to protest against, perceived incursions on their power by Congress, the courts and even private parties. Unitary executive theory has given Presidents a new sense of entitlement to get their way in leading the nation.

As for the rest of us, unitary executive theory tells us a story we want to hear. The democracy claim promises a representative uniquely fitted by constitutional design to extract from the Babel of modern democratic politics the essence of what we truly desire, and the nation truly needs. The managerial claim promises that the President, if he can deploy all the powers the Constitution means him to have, will direct the process of national policymaking to fulfill these needs and desires. The rapidly changing complexity, and the newly appreciated precariousness, of modern American life make the simplicity, certainty, and assurance of this story deeply appealing. At the same time, the extraordinary demands of governing a large, heterogeneous nation with an ambitious regulatory agenda and globally defined interests make unitary executive theory's promises impossible for any President to fulfill.

My aim is not to suggest that some other government actor is better suited to play the part of Representative and Manager-in-Chief, or

282 See, e.g., *United States v. U.S. District Court*, 407 U.S. 297 (1972) (rejecting authority of Executive officials to order warrantless domestic wiretapping for reasons of national security); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting executive authority to enlist judicial process in forcing newspaper to suspend publication of classified information); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting presidential authority to seize private property in the absence of statutory authority).

to deny that the President has a unique, extensive, and central role to play in modern American government. Rather, as I and others have argued elsewhere,²⁸³ the essential point is that no one institution of government is authorized, or able, to speak for the people and to manage singlehandedly the enterprise of contemporary regulatory government. We must expect and challenge all the institutions of government—Congress, the President, the courts, and agencies themselves—to be part of an ongoing process through which democratic legitimacy is created and effective policy discovered, a process that must seek new and more effective ways to inform and engage citizens. A fundamental danger of unitary executive theory is that we will be lulled into thinking that this unwieldy, constant, and demanding work need not be done, so long as we select the “right” person to be President.

The other fundamental danger is that we will attribute excesses done in the name of unitary executive theory to the idiosyncratic failings of individuals, rather than recognizing them as intrinsic, largely uncontrollable risks of the theory itself. What we saw from unitary executive leadership during the period of severe societal stress following September 11 aligns disturbingly well with a pattern familiar to psychologists who study extremist groups and ideologies.²⁸⁴ Questions about the leader’s choices are constructed as attacks; disagreement is cast as disloyalty.²⁸⁵ The group’s authority structure becomes more suspicious and closed.²⁸⁶ No incipient challenge to the belief struc-

283 See Farina, *supra* note 7; Shane, *Political Accountability*, *supra* note 77; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

284 For discussion of the literature, see Hogg & van Knippenberg, *Social Identity*, *supra* note 44, at 38; Hogg, *Prototypicality*, *supra* note 44, at 21–22; Michael A. Hogg, *Uncertainty, Social Identity, and Ideology*, 18 ADVANCES IN GROUP PROCESSES 203, 211–19 (Shane R. Thye et al. eds., 2005); Christiane Schoel et al., *Self-Uncertainty and the Appeal to Authoritarian Leadership*, 3–5, 17 (unpublished manuscript, available at http://www.allacademic.com//meta/p_mla_apa_research_citation/2/4/5/7/9/pages245790/p245790-1.php).

285 The perception of an administration stifling and punishing criticism could be found at both ends of the political spectrum. See e.g., James Bovard, “Free-Speech Zone”: *The Administration Quarantines Dissent*, AM. CONSERVATIVE, Dec. 15, 2003, available at <http://www.amconmag.com/article/2003/dec/15/00012/>; Robert Fisk, *War Lords to Their Critics: “Just Shut Up”: Bush’s War and the Lapdog Press Corps*, COUNTERPUNCH, Apr. 10, 2004, available at <http://www.counterpunch.org/fisk04102004.html>. See also Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 903 (2007) (describing intolerance to criticism and retribution against critics as attributes of a “commitment to [the] unilateral [exercise of] power”).

286 See, e.g., CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 85–118, 160–76 (2007); Allen, *supra* note 285

ture is allowed to go uncontested.²⁸⁷ Any power the leader needs to meet the danger becomes his by right, for no ordinary rules can interfere with the duty—which is his alone and outweighs all his other responsibilities—to preserve the group.²⁸⁸ It turns out that the qualities of a group or belief system most effective at reducing the cognitive and psychological stress of uncertainty are also the seeds of fanaticism. Many of those sympathetic to unitary executive theory have been dismayed by its operationalization in the Bush Administration. They insist that President Bush and his advisers radicalized, even distorted, the theory.²⁸⁹ But the unitary executive presidency of that Administration *is* recognizably the presidency of the literature that argues the constitutional and normative case for unitary executive theory. The demands (and opportunities) of national crisis merely accelerated the trajectory of its development.

Unitary executive theory is politically and culturally powerful because of its uncomplicated, unconditional certitude. In the words of two prominent proponents, “The Constitution grants the President the authority to superintend the administration of federal law. There are no caveats. There are no exceptions.”²⁹⁰ Because of these same qualities, it is a philosophy for governing that contains no meaningful limits. Particularly in the rapidly changing complexity, and newly appreciated precariousness, of modern American life, this is comfort purchased at too dear a price.

(both describing Bush administration tendency to act in secret and otherwise control information).

287 Consider more than a thousand constitutional objections in signing statements, which ranged from attacking the legitimacy of core substantive provisions of the law being signed, to protesting such seemingly mundane provisions as defining the substantive expertise required for agency officials. See Peter M. Shane, *Presidential Signing Statements and the Rule of Law as an “Unstructured Institution”*, 16 WM. & MARY BILL RTS. J. 231 (2007).

288 Consider the reasoning advising the President that, in waging the war on terror, he was not bound by international agreements like the Geneva Convention, or domestic law like the statutory prohibition of torture. See, e.g., Memorandum from the U.S. Dep’t of Justice, Office of Legal Counsel, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legislative Affairs, Applicability of 18 U.S.C. §4001(a) to Military Detention of United States Citizens (June 27, 2002), available at <http://www.justice.gov/olc/docs/memodetentionuscitizens06272002.pdf>; Memorandum from the U.S. Dep’t of Justice, Office of Legal Counsel, *supra* note 6.

289 See, e.g., Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008); Richard Pierce, *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593 (2010).

290 Calabresi & Prakash, *supra* note 3, at 664.