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Presidential Primacy Amidst Democratic Decline

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PRESIDENTIAL PRIMACY AMIDST DEMOCRATIC DECLINE

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Especially I want to show that it could be different, that it was different, and that there are alternatives.
— Natalie Zemon Davis[1]

Fifty years ago, when the *Harvard Law Review* asked Professor Harry Kalven, Jr., to take stock of the Supreme Court's 1970 Term,[2] Kalven faced a task not unlike Professor Cristina Rodríguez's. That Term's Court had two new members, Justices Harry Blackmun and Warren Burger. The Nixon Administration was young, but clearly bent on making its own stamp on American law, including via the Supreme Court.[3] Kalven thus expected to see "dislocations" when he reviewed the Court's recent handiwork.[4] He reported the opposite. Surveying a Term that included such cases as *Palmer v. Thompson*,[5] *Younger v. Harris*,[6] *Boddie v. Connecticut*,[7] and *Citizens to Preserve Overton Park v. Volpe*,[8] Kalven noted significant doctrinal developments, but ultimately found "the continuities" more striking than "the discontinuities."[9] Perhaps he hoped to assuage fears that the Court was becoming "a political agency and nothing more."[10] In any event, he underscored the Court's institutional "stamina" and the "powerful pressure towards continuity."[11]

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[1] Interview by Rob Harding & Judy Coffin with Natalie Zemon Davis (1981), *in* VISIONS OF HISTORY 97, 114–15 (Henry Abelove et al. eds., 1983).

[2] Harry Kalven, Jr., *The Supreme Court, 1970 Term — Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3 (1971).

[3] *See Transcript of the President's Announcement on Two Nominees for Supreme Court*, N.Y. TIMES (Oct. 22, 1971), https://www.nytimes.com/1971/10/22/archives/transcript-of-the-presidents-announcement-on-two-nominees-for.html [https://perma.cc/AA4G-NHS8].

[4] Kalven, *supra* note 2, at 4.

[5] 403 U.S. 217 (1971).

[6] 401 U.S. 37 (1971).

[7] 401 U.S. 371 (1971).

[8] 401 U.S. 402 (1971).

[9] Kalven, *supra* note 2, at 5.

[10] *Id.* at 3.

[11] *Id.* at 5.

By contrast, Rodríguez's Foreword emphasizes discontinuity — not in the output of the Supreme Court from Term to Term but in the legal and policy orientations of the executive branch as it has transitioned from President Trump to President Biden and as it will transition to other leadership in the future. In her telling, because the Court *is*, in important respects, a political agency (although also something more), she urges it not to impose undue impediments on Executive-led change.

We read Rodríguez's Foreword as a compelling and nuanced defense of presidential primacy (although, importantly, she does not claim that exact term).[12] She offers a description of the contemporary legal and political landscape in which the inauguration of a new President sometimes initiates a political "regime change," marked by Executive-led efforts to make consequential changes in law and policy (that is, to instantiate a new "legal regime").[13] She then urges readers to be comfortable with both types of change — to accept that electoral victories bring with them "control of the machinery that turns political visions into everyday realities" and, moreover, to *want* a government that can be nimble and energetic, even when a new regime does not align with one's personal preferences.[14] Put simply, she offers a vision of contemporary democratic governance in which "regime change," emanating from the

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[12] Cristina M. Rodríguez, *The Supreme Court, 2020 Term — Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021). In places where she might have used the term "presidential primacy" (or perhaps "presidential administration"), Rodríguez instead uses phrases like "the concerted effort by executive officials to instantiate a new legal and political order," *id.* at 9; an executive branch with an "assertive orientation to [its] powers," *id.*; and "executive policymaking," *id.* at 90. Nevertheless, she appears to accept as fact that "the President sits atop a massive administrative state with responsibilities for its supervision and forward motion," *id.* at 58, and throughout she emphasizes the value of an energetic presidency. We use the term "presidential primacy" to make clear how this type of argument relates to long-running scholarly debates over who controls, and who ought to control, the administration of federal law. We understand presidential primacy to refer to a family of theories, including Rodríguez's "regime change" and presidential administration, that are committed to presidential supremacy over the administrative state on pragmatic and democratic grounds. We have no wish, however, to distort or take nuance from Rodríguez's position and hope we have not done so. We also want to distinguish Rodríguez's model, and presidential primacy more broadly, from unitary executive theories, which take a more sweeping view of executive power. In administrative law, these theories tend to focus on the constitutional foundations of presidential power over agencies, with some exceptions. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 10 (2010) (arguing on functional grounds); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549 (1994) (advancing a constitutional argument). Whereas unitarians typically turn to constitutional text and history to justify their position, presidential primacy depends on underlying norms about executive power, namely strong assumptions about the scope of executive power absent explicit congressional authorization. *See* Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. (forthcoming 2022) (manuscript at 29–31) (on file with the Harvard Law School Library) (explaining the nature and function of constitutional norms).

[13] Rodríguez, *supra* note 12, at 16–17.

[14] *Id.* at 109.

executive branch, is both what we have and what we need.[15] That one regime will undo some of the work of a previous regime is not an argument against presidential primacy,[16] but rather an argument in its favor.

Our Response makes one major point: however appealing we may find Rodríguez's argument from a pragmatic and presentist perspective, we should recognize that it exists amidst — and sometimes draws its appeal from — troubling historical developments in the workings of our democratic institutions. The urgency of our current problems, the relative ease of government by "pen" and "phone"[17] — these are reasons to be attracted to Rodríguez's vision, but they are also arguably symptomatic of structural failings. They should be recognized as such, alongside a recognition of forces that now threaten democracy itself. A broader theoretical and historical view makes this clear.

Our Response proceeds as follows. Drawing on Rodríguez's frequent references to democracy, Part I seeks to bring her theory of democracy into sharper relief. How, in theory, does her version of presidential primacy further or embody democracy? Also, how does the theory map onto what we have seen thus far of presidential primacy? This exercise leads us to conclude that the greatest appeal of Rodríguez's model is probably not its democratic justification (although that certainly helps) — but rather something else. Diagnosing the exact nature of that "something else" goes beyond the scope of this Response and is sure to consume scholarly energies for years to come. But we hope the second Part of our Response contributes to this effort, in a way that also connects fruitfully to the focus of this law review issue. Part II discusses two historical developments that implicate the Supreme Court and that shed light on the rise, and limits, of presidential primacy: (1) the declining viability of private enforcement of federal law, a modality of enforcement that, since the late 1960s, Congress has often preferred to exclusively public enforcement; and (2) the conservative drift of federalism doctrine, made more dramatic by developments in constitutional rights doctrine. To be clear, these are not the only historical developments that

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[15] Although Rodríguez portrays "executive governance as necessary to fulfilling the goals of democratic politics," *id.* at 10, she does not consign Congress to irrelevance. She recognizes that statutes constrain executive branch choices; that Executive-led regime change will be most successful if it includes a "legislative strategy," *id.* at 54; and that "[t]he service of democracy revolves around respect for and deference to the legislature," *id* at 64.

[16] *But see* Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 114 (2021) (criticizing presidential administration on account of how easily a President can undo the work of their predecessor); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 608–10 (2018) (suggesting that, to the extent presidential administration now entails the "Sisyphean doing and undoing of the same policies," *id.* at 610, that is a strike against its "normative worth," *id.* at 608).

[17] Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR (Jan. 20, 2014, 3:36 AM), https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone [https://perma.cc/3P7U-TJXB].

merit inclusion in a conversation about presidential primacy; they may not even be the most important ones. But they are ones that are visible in the Supreme Court's 2020 Term, that help contextualize the model of governance we see at the heart of the Foreword, and that the Foreword touches on only lightly. Part III takes up the historical development that Rodríguez surfaces in her Coda: a declining judicial commitment to the right to vote, paired with persistent efforts to diminish or overwhelm the political agency of the nonwhite and the nonwealthy. In our view, this development is worrisome enough to deserve center stage in any conversation about American governance — lest we look up one day and find that the nation's democratic foundation has eroded beyond recognition and repair. Ultimately, we want the good governance that Rodríguez's model promises, but we need democracy,[18] and at this juncture, democracy may require much more than an empowered and energetic executive branch.

I. THE DEMOCRATIC THEORY AND PRACTICE OF RODRÍGUEZ'S MODEL OF GOVERNANCE

Rodríguez's image of enterprising and enlightened executive branch leadership has long been a compelling one, especially during periods of congressional stalemate.[19] Yet the attraction of such leadership is not simply the promise of competent administration, Rodríguez emphasizes. Undergirding her vision is an argument about democracy. Indeed, democracy and its cognates appear over one hundred times in the Foreword. In her own words, she portrays "executive governance as necessary to fulfilling the goals of democratic politics."[20] While acknowledging the pull of "political stare decisis,"[21] she urges readers to understand assertive Executive-led changes in law and policy as vindications of "two basic principles" of democracy: (1) that the government

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[18] By democracy, we mean government by majority rule (with constitutional limitations) with regular, fair, and free elections and regular, peaceful transitions of power. These are necessary conditions, not sufficient ones.

[19] *See, e.g.*, FRANK J. GOODNOW, POLITICS AND ADMINISTRATION 118–19 (1900) (underlining the unique role of the presidency in party politics); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 67–68, 215 (1908) (justifying presidential leadership on the basis of a national constituency); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (announcing an "era of presidential administration"); Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, COLUM. L. REV. (forthcoming) (manuscript at 4–6) (on file with the Harvard Law School Library) (tracing the intellectual history of early twentieth-century presidentialism); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608–11 (2016) (arguing for wide presidential discretion due to the executive branch's epistemic advantages).

[20] Rodríguez, *supra* note 12, at 10; *see also id.* at 8 (arguing that by charting a new course, a presidential administration "ultimately . . . help[s] to sustain a connection between government and democratic politics").

[21] *Id.* at 77.

should be made to "work for the people" and (2) that members of the polity should "accept the outcomes of democratic processes, even when they are outcomes with which [we] disagree."[22]

This Part of our Response takes seriously Rodríguez's invocations of democracy. We begin by searching out her underlying theory of democracy and highlighting how it supports her vision of governance. We then compare theory to practice. Based on what we have seen of presidential primacy, how strong are its democratic bona fides? We emerge not fully convinced that democracy can bear the weight the Foreword puts on it. This preliminary assessment lays the foundation for Part II, where we seek a more historically grounded understanding of the model's appeal and limits.

A. Democratic in Theory?

Those who have followed scholarly debates over presidential primacy will recognize a well-worn path between ideas about executive branch leadership and the idea of democracy.[23] The most common means of connecting presidential primacy to democracy begins by depicting the administrative state as a "headless fourth branch."[24] The next move is to observe that regulation often involves political decisions as much as it does technocratic ones.[25] Because the President represents the only branch with the requisite agility and national constituency to guide these decisions, the White House must lead.[26]

Rodríguez wisely avoids the weakest element of that chain — the idea of the President's national constituency[27] — and offers instead her

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[22] *Id.* at 9.

[23] This was not always the case. *See generally* JOHN DUNN, DEMOCRACY: A HISTORY (2005). And there remain rare exceptions. *See, e.g.*, Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/CCR7-MF4H] (arguing for "common-good constitutionalism").

[24] *See* PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 32, 40 (1937).

[25] *See, e.g.*, Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L. J. 451, 451–53 (1979); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L. J. 1395, 1395–97 (1975).

[26] *See generally* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985). In sketching the democratic justifications for presidential administration, we do not intend, of course, to suggest that these are the only justifications.

[27] In Rodríguez's words, the "representativeness of the presidency of a national polity" is "a contested and incomplete formulation." Rodríguez, *supra* note 12, at 63–64. The notion of a national constituency is dubious for a few reasons. First, minoritarian Presidents have become increasingly common and, given the skew of the Electoral College, likely will continue to be. *See* Damon Linker, Opinion, *The GOP's Minority Rule*, THE WEEK (July 20, 2018), https://theweek.com/articles/785710/gops-minority-rule [https://perma.cc/YH7U-VFDG]. Second, the President's incentives do not always point toward adopting a more representative set of policy

own, multipronged democratic justification of assertive Executive-led governance. In our reading, she emphasizes effectiveness, tolerance for competing views, and responsiveness. To preview our argument, we conclude that although these are all democratic desiderata, only responsiveness offers the model significant democratic justification.

1. Effectiveness. — Democracies are routinely ineffective, at least as measured by their ability to avoid crises,[28] and they have often fielded disagreement over what the standards for "effectiveness" should be.[29] Moreover, even if we could agree on metrics, it is not clear that effectiveness is an intrinsically democratic principle. One version of it is simply technocratic: an effective government is one that successfully uses the means at its disposal to achieve its desired ends.[30] Possibly Rodríguez is invoking effectiveness in the sense of utility: energetic Executive-led governance produces better outcomes. But even if this were true,[31] it would not suggest that effectiveness makes a system more democratic than an alternative. Indeed, if our priority is effectiveness, we might prefer a different form of government altogether. Effectiveness can easily point away from the United States and toward Singapore.[32]

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positions than the median member of Congress. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress,* 53 UCLA L. REV. 1217, 1231–42 (2006).

[28] *See generally* DAVID RUNCIMAN, THE CONFIDENCE TRAP: A HISTORY OF DEMOCRACY IN CRISIS FROM WORLD WAR I TO THE PRESENT (2013).

[29] Amy Gutmann & Dennis Thompson, *Moral Disagreement in a Democracy*, SOC. PHIL. & POL'Y, Winter 1995, at 87, 87 (discussing how two approaches to democracy, procedural democracy and constitutional democracy, emphasize different values).

[30] Rodríguez's emphasis on good governance mirrors other increasingly prominent arguments in favor of an energetic technocracy, such as central banks taking on a more direct role in combating climate change. *See, e.g.*, Lev Menand, Administering the Banking System: Towards a Theory of the Federal Reserve 3–14 (Oct. 17, 2021) (unpublished manuscript) (on file with the Harvard Law School Library) (reviewing such arguments).

[31] For reasons to doubt this proposition, see as examples PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); and David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. (forthcoming 2022) (on file with the Harvard Law School Library).

[32] *See* Graham Allison, *The Lee Kuan Yew Conundrum,* THE ATLANTIC (Mar. 30, 2015), https://www.theatlantic.com/international/archive/2015/03/lee-kuan-yew-conundrum-democracy-singapore/388955 [https://perma.cc/HZ9J-TUNV]. Some theorists argue that democracy is the best form of governance because it pools and uses knowledge in ways that lead to better outcomes — that is, they claim that democracy *is* the most effective. *See, e.g.*, DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 6–9, 15–18 (2007) (arguing that the justification of democracy partly depends on its epistemic advantages). *See generally* ROBERT E. GOODIN & KAI SPIEKERMANN, AN EPISTEMIC THEORY OF DEMOCRACY (2018); HÉLÈNE LANDEMORE, DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY (2012). But these arguments only buttress our point: they justify democracies on the grounds that they are effective; they do not suggest that effectiveness somehow makes a system more democratic than an alternative. To what extent effectiveness can promote democracy is an important empirical question. Historical scholarship on administrative law and American political development suggests that ineffective administration can hinder democratization. *See, e.g.*,

2. Tolerance. — Central to Rodríguez's defense of concerted executive action is the norm of "mutual tolerance": her model envisions "'[t]reating rivals as legitimate contenders for power,' which must entail accepting the legitimacy of their exercise of power."[33] "Mutual tolerance" clearly sustains democracy, even if it does not help constitute it: while democracy can involve and indeed benefit from agonistic politics,[34] a prolonged friend-enemy distinction[35] can endanger the peaceful transition of power that democracy promises.[36] We also see democratic value in the thicker notion of tolerance that Rodríguez invokes — whereby a new administration's critics treat the day-to-day work of regime change as legitimate and its formal output as authoritative (if also legally contestable). What is less clear is the relationship between mutual tolerance and the vision of governance that Rodríguez advocates. Do energetic, Executive-led changes in law and policy produce mutual tolerance? In our view, successful "regime change" might be a sign that a given democracy is mutually tolerant, but no causal relationship is clear (whereas political and legal regime change does occur alongside intolerance and distrust[37]).

3. Responsiveness. — This idea entails a continuing correspondence between politics and administration. Rodríguez argues that by "weaving political judgment into administration and all that [it] entails," her model of governance offers "the best way to consistently sustain a relationship between the democratic sphere and state governance."[38] This argument reprises a key element of the traditional argument for presidential control — the notion that administration is itself political[39] —

AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, at 8-10 (2013); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 2–4 (2013).

33 Rodríguez, *supra* note 12, at 9 n.33 (internal citation omitted) (quoting STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 212 (2018)).

34 *See* BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 2–3 (1993); ED WINGENBACH, INSTITUTIONALIZING AGONISTIC DEMOCRACY, at xi–xxi (2011); Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?*, 66 SOC. RSCH. 745, 745 (1999); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1730 (2017).

35 *See generally* CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., Univ. of Chi. Press 1996) (1932); CARL SCHMITT, THE CRISIS OF PARLIAMENTARY DEMOCRACY (Ellen Kennedy trans., MIT Press paperback ed. 1988) (1923).

36 Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, *in* DEMOCRACY'S VALUE 23, 23–55 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

37 *See generally* Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

38 Rodríguez *supra* note 12, at 65; *see also id.* at 64 (describing agency action as fundamentally "driven by a principle of responsiveness, to changed circumstances and preferences").

39 Advocates of presidential control in the late 1970s and 1980s, the era when modern presidential governance was forged, insisted that because regulation involved value choices, it required greater political supervision of agencies. Professor Jerry Mashaw, for instance, famously argued for

but puts it on firmer footing via evidence about how executive branch actors do their jobs. A powerful example emerges in section II.A.2, where Rodríguez draws on ongoing empirical work with Professor Anya Bernstein to depict a vast, porous, and dynamic bureaucracy "responsive[] to evolving circumstances and public inputs on the ground, not just or even primarily to center-directed mandates."[40] The political officials who lead these agencies "create venues for democratic politics and agitation to inform administration and policymaking."[41] Such examples show that presidential administration is responsive not only in the thin sense of a President governing with an electoral mandate, but also in a thicker sense, by virtue of the "political layer" of officials that interfaces with affected communities and interest groups, gathers information, and executes the law on the President's behalf.

We are persuaded that responsiveness is an obvious, essential element of any democratic regime.[42] For the earliest theorists of mass democracy, the correspondence between public opinion and legislation defined a regime as democratic.[43] Later skeptics of democracy attacked that linkage, questioning the very notion of "public opinion"[44] or characterizing political parties as directed by elites and free from political control.[45] The pattern of debate underlines the importance of responsiveness to democracy.[46]

Yet responsiveness does not, on its own, amount to a theory of democracy.[47] Insofar as responsiveness is important to Rodríguez's model,

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broad statutory delegations to agencies that would allow administrators to make political decisions. These delegations, when coupled with a presidential control, forged a link between public opinion and agency action. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96 (1985) ("[T]he flexibility that is currently built into the processes of administrative governance by relatively broad delegations of statutory authority permits a more appropriate degree of administrative, or administration, responsiveness to the voter's will than would a strict nondelegation doctrine.").

40 Rodríguez, *supra* note 12, at 75.

41 *Id.* Rodríguez importantly notes that there are nearly 4,000 political appointees throughout the agencies. *Id.* at 74 n.265.

42 *See generally* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION (Adam Prezworski et al. eds., 1999).

43 *See generally* GREGORY CONTI, PARLIAMENT THE MIRROR OF THE NATION: REPRESENTATION, DELIBERATION, AND DEMOCRACY IN VICTORIAN BRITAIN (2019); WILLIAM SELINGER, PARLIAMENTARISM (2019).

44 *See generally* WALTER LIPPMANN, PUBLIC OPINION (1922).

45 *See generally* ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY (Eden Paul & Cedar Paul trans., The Free Press 1968) (1911); GAETANO MOSCA, THE RULING CLASS (Hannah D. Kahn trans., McGraw-Hill Book Co. 1989) (1939); VILFREDO PARETO, THE MIND AND SOCIETY (Arthur Livingston ed., Andrew Bongiorno & Arthur Livingston trans., Harcourt, Brace & Co. 1935) (1916).

46 Even a minimalist conception of democracy, one that limits it to the regular and peaceful alternation of power through elections, requires responsiveness. *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 250–51 (1942); Przeworski, *supra* note 36, at 31–39.

47 *See generally* DAVID HELD, MODELS OF DEMOCRACY (Stanford Univ. Press 3d ed. 2006) (1987).

it seems to matter either because we have an underlying expectation that the administrative state be subject to a dynamic form of democratic control (making it problematic if the model were *not* responsive) or because we think the presidential primacy model is *more* responsive — more democratic — than some other model of governance that is compatible with our constitutional system. Is it?

We do not have an answer to this question — of whether presidential primacy is more democratic than alternatives — but thanks to historical and empirical work on modern administrative governance, it is possible to offer some observations about presidential primacy in practice and how it has conformed, or not, to democratic desiderata. We turn to that task now. Again, our overarching goal is to gain a better understanding of why energetic, Executive-led governance seems necessary at this moment and whether *democracy* supplies the answer.

B. Democratic in Practice?

Rodríguez has offered cogent examples of how, in practice, presidential primacy can serve democracy. We add to the picture another well-recognized aspect of presidential primacy: centralized oversight of the administrative state, animated by some version of cost-benefit analysis. This is a feature that Rodríguez does not discuss in depth but certainly acknowledges. In her account, centralized oversight of the administrative state gives the executive branch an "institutional advantage" that it is unlikely to relinquish; likewise, she identifies cost-benefit analysis as a "tenet" of "persistent presidentialism," albeit one that might continue to evolve.[48] When we look at this nexus — of centralized oversight and cost-benefit analysis — is presidential primacy democratic in practice?

Other scholars have ably chronicled the rise of centralized oversight, the structures that support it, and the frameworks that animate it.[49] The following points seem uncontroversial and will suffice for what follows:

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[48] Rodríguez, *supra* note 12, at 76–77. The Biden Administration has expressed interest in "modernizing regulatory review," using language that acknowledges persistent criticisms, but there are no indications that the Administration will abandon centralized review or cost-benefit analysis. Memorandum on Modernizing Regulatory Review (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review [https://perma.cc/JQH3-LNY8].

[49] *See generally, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENV'T. & ADMIN. L. 209 (2012); Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37 (2011); Murray Weidenbaum, *Regulatory Process Reform*, REGULATION, Winter 1997, at 20. Since 1980, the institutional hub of this work has been the Office of Information and Regulatory Affairs (OIRA), housed within the Office of Management and Budget. But the White House has also exerted direct influence on agencies. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 48–52 (2006).

(1) some form of centralized oversight has existed since at least the Nixon Administration;[50] (2) Presidents of both parties have embraced it;[51] and (3) although centralized oversight need not entail cost-benefit analysis,[52] in the U.S. context, this has been its most prominent decisional framework.[53] To be sure, there have been variations in how different administrations have implemented cost-benefit analysis, and "impurification" has appeared over time.[54] But, to borrow the words of former "regulatory czar" Professor Cass Sunstein: "The American administrative state has become a cost-benefit state . . . ."[55]

Centralized review is in tension with democracy, even apart from cost-benefit analysis. As Professors Lisa Schultz Bressman and Michael Vandenbergh argue, drawing on interviews with top environmental protection officials in different presidential administrations, agency officials are arguably the most politically accountable and responsive to the American public, and yet centralized review routinely overrides their judgments.[56] Yes, the results of centralized review may reflect input from particularly impacted members of the public, but empirical research raises concerns that, in practice, the most powerful interests tend to be the ones that receive a hearing at this level.[57] Centralized review also poses transparency problems. Studies suggest that White House involvement in agency decisionmaking has seldom been open to public view,[58] despite longstanding expressions of concern.[59] Disclosure requirements technically apply to the Office of Information and Regulatory Affairs (OIRA), but those requirements are limited in scope and have been imperfectly observed.[60] Today, many citizens have no

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[50] Tozzi, *supra* note 49, at 44. Tozzi argues that the roots of centralized regulatory review go even deeper, to the review of Army Corps of Engineers regulations during the Johnson Administration. *Id.* at 42–43.

[51] Steinzor, *supra* note 49, at 238–60.

[52] *Cf.* Rodríguez, *supra* note 12, at 76 ("Recognizing persistent presidentialism does not require unthinking acceptance of its tenets, such as cost-benefit analysis, in their current form.").

[53] Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, DÆDALUS, Summer 2021, at 33, 41–42.

[54] Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1865–67 (2016) (describing President Obama's efforts to incorporate into the methodology values like "equity, human dignity, fairness, and distributive impacts," *id.* at 1867).

[55] Cass R. Sunstein, *Some Costs & Benefits of Cost-Benefit Analysis*, DÆDALUS, Summer 2021, at 208, 208; *see also* CASS R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION, at ix–xi (2002).

[56] Bressman & Vandenbergh, *supra* note 49, at 83–84.

[57] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1175 (2014).

[58] Bressman & Vandenbergh, *supra* note 49, at 78–82.

[59] *See, e.g.*, Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 234–47 (1981).

[60] Farber & O'Connell, *supra* note 57, at 1184.

idea what OIRA is or who runs it.[61] Those who are better informed recognize OIRA as secretive and largely insulated from public oversight.[62]

The cost-benefit framework that has long animated centralized review is also in tension with democracy. To be sure, one can cast the rise of cost-benefit analysis as a democratically inspired response to economic crisis. But as Professors Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczyinski, and K. Sabeel Rahman persuasively argue, there is also a more political or ideological story, in which critics of the New Deal order sought to alter the location and basis for "judgments about distribution and economic ordering."[63] Such decisions must be shielded from the "political," these critics argued, and placed in the hands of hardheaded technicians (that is, economists); via market-based models of decisionmaking, they would make sure that agencies pursued their statutory mandates in the most efficient way.[64] In other words, the embrace of cost-benefit analysis is at least in part a reflection of dissatisfaction with previous "judgments about distribution and economic ordering" and of fears about where democracy would lead without technocratic oversight.

If democracy is our evaluative criterion, there are also concerns about how cost-benefit analysis has operated in practice. There are live debates regarding who has tended to benefit from executive branch cost-benefit analysis and whether these results deviate from democratic judgments.[65] Less debatable is a critique that Professor Lisa Heinzerling,

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[61] Leif Fredrickson, Perspective, *The Federal Agency that Few Americans Have Heard of and Which We All Need to Know*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/09/28/the-federal-agency-that-few-americans-have-heard-of-and-which-we-all-need-to-know [https://perma.cc/ZU5P-WVA8] ("The Office of Information and Regulatory Affairs (OIRA) is foreign to most Americans. It had no cameos in 'The West Wing' or 'House of Cards,' and rarely makes news headlines.")

[62] Bagley & Revesz, *supra* note 49, at 1282. A full evaluation of centralized review is beyond the scope of this essay. We acknowledge other arguments in its favor, such as its ability to resolve interagency conflict.

[63] Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1811 (2020); *see also id.* at 1811–12.

[64] *Id.*

[65] *See, e.g.*, Bagley & Revesz, *supra* note 49, at 1269 (arguing that "OIRA's use of cost-benefit review operates as a one-way ratchet," allowing "[l]ax agency regulations" to emerge "unscathed," while posing serious risks to "more stringent rules"); Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 63, at 1823–24 ("Through its elevation of wealth as an orienting public value, it has reinforced a very non-neutral drift toward elite control of government . . . ."); John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 398, 494 (2008) (arguing that as to OIRA's review of "lifesaving regulations," *id.* at 398, the "evidence for systematic bias" in such regulation is "weak," *id.* at 494); Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1650–58 (2018) (arguing that if one applies cost-benefit analysis in the way that economists urge, the policies that appear most efficient will also tend to be biased towards the rich and against the poor); Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1498

among others, voices: even in presidential administrations that have invited a softer and arguably more humane version of cost-benefit analysis, the dominance of this methodology has resulted in administrators imposing a market logic on problems that democratic citizens likely would not want to cede to that framework (for example, the problem of prison rape).[66] Similarly, Professors Daniel Farber and Anne Joseph O'Connell find "at least some reason to think that OIRA can sometimes demand consideration of cost-benefit analysis even under statutes where the decision must be based on other factors."[67] Finally, cost-benefit analysis is vulnerable to the same critique as centralized review more generally: despite arguments that cost-benefit analysis "promotes accountability and transparency" and thereby serves democracy,[68] much of the analytical work occurs behind closed doors. Citizens can attempt to influence the inputs but have no meaningful role in the subsequent calculus.

To sum up our argument so far, we think Rodríguez is correct to see democracy at work in her vision of presidential primacy, but we also find reason to ask whether presidential primacy is the best that democratic citizens can hope for. We turn now to other considerations that help us understand presidential primacy's appeal, as well as its implications for democratic governance.

II. PRESIDENTIAL ADMINISTRATION IN HISTORICAL CONTEXT

As Rodríguez defends concerted, Executive-led "regime change," she wisely notes some contingencies: "[T]he tools a given President and his regime have available or feel well placed to exploit will depend a lot on the distribution of power across the branches as a whole, *as well as the*

(2018) (noting that the executive branch currently lacks tools for evaluating the significance of distributional claims and proposing a framework for remedying this problem); Melissa J. Luttrell & Jorge Roman-Romero, *Regulatory (In)Justice: Racism and CBA Review*, Y.J. REG. NOTICE & COMMENT BLOG (Oct. 27, 2020), https://www.yalejreg.com/nc/regulatory-injustice-racism-and-cba-review-by-melissa-j-luttrell-and-jorge-roman-romero [https://perma.cc/4AXZ-5XMY] (arguing that cost-benefit analysis "maintains and worsens . . . racially inequitable disparities").

66 Lisa Heinzerling, *Cost-Benefit Jumps the Shark*, GEO. L. FAC. BLOG (June 13, 2012) https://gulcfac.typepad.com/georgetown_university_law [https://perma.cc/Z52W-XYLC]; *see also* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 1–12 (2005); *cf.* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, LAW & CONTEMP. PROBS., 2014, at 1, 3–4 ("Democratic citizens tend to hold a set of expectations about economic and political life that may go beyond or even contradict market logic: for instance, a reasonable level of economic opportunity, distributive fairness, workplace security, community and solidarity, and civic equality.").

67 Farber & O'Connell, *supra* note 57, at 1168.

68 Dudley, *supra* note 53 at 40 (quoting OFF. OF MGMT. & BUDGET, REGULATORY IMPACT ANALYSIS: A PRIMER 2 (2011), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf [https://perma.cc/6CZB-LVE8]).

place the new regime occupies in history . . . ."[69] Taking inspiration from this passage, this Part attempts to historicize presidential primacy itself, including Rodríguez's nuanced iteration of it.

A natural starting point is then-Professor Elena Kagan's famous *Presidential Administration*, which appeared two decades ago in the pages of this law review. It described a mode of administrative governance that gives primacy to the President and defended that model as more "energetic" and "democratic" than its predecessors, including congressional and judicial supervision.[70] In retrospect, the argument was clearly a product of its time — Kagan drew her case studies of effective governance entirely from the Clinton Administration, which she served in various capacities, and she conceded that presidential administration was especially attractive during periods of congressional gridlock, like those that began with the Gingrich Revolution in 1994.[71] But her article's confident tone made presidential administration seem obvious and natural — as if modern conditions required it.[72]

Rodríguez's Foreword shares many of Kagan's normative conclusions but, drawing on the lessons of intervening decades (and presumably, Rodríguez's experience in the Obama Administration), it innovates in important ways. For example, attentive to fears of creeping authoritarianism, Rodríguez emphasizes that concerted executive action does not require an all-powerful President or a highly centralized government.[73] Acknowledging concerns about intractable officials in some corners of the administrative state (such as immigration agents at the southern border), she highlights the "need for politically accountable officials to provide a counterweight."[74] In the wake of a presidential administration that seemed to devalue bureaucratic expertise, she casts such expertise as a necessary complement, rather than solely an antagonist, to political control.[75]

One can learn from history, however, while also being caught in its currents. This Part highlights historical developments that have shaped the operation and implications of presidential primacy in ways that give us pause, even as we admire the internal improvements that Rodríguez has made to this model. To be clear, there is much we could discuss here, or discuss more fully.[76] Given space constraints and the issue's

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[69] Rodríguez, *supra* note 12, at 56 (emphasis added) (internal citations omitted).

[70] Kagan, *supra* note 19, at 2251–52, 2341, 2350.

[71] *See id.* at 2282-2284.

[72] *Id.* at 2246 ("We live today in an era of presidential administration.").

[73] Rodríguez, *supra* note 12, at 76–77 (noting the compatibility of her model with "strengthening the civil service," *id.* at 76, and diffusing power to state and local governments). *But see id.* at 70 ("The picture I have presented thus far does require appetite for some centralization and high-level direction within the administrative state.").

[74] *Id.* at 76.

[75] *Id.* at 75–76.

[76] Perhaps most obviously, the rise of political polarization.

focus, we have limited ourselves to two historical developments that implicate the Supreme Court and that are visible in the 2020 Term: (1) the rise of doctrines that show disregard for Congress's administration and enforcement choices, in ways that naturally funnel power toward the executive branch; and (2) the continued unfurling of a "new federalism," which has combined with a deregulatory rights jurisprudence to affect the type of partnerships different "regimes" will encounter. In some ways, each of these developments helps explain the attraction of presidential administration; each also raises concerns about the limits of what even an energetic presidency can do.

A. The Decline of Private Enforcement

Governance entails making judgments about the kind of life that the "law on the books" should have. Rodríguez makes her case for an energetic Executive at a moment when Congress's ability to do that kind of governance work is at a historic low. One obvious reason for the ebb is that the Supreme Court has limited the tools Congress can use to control federal agencies. In 1983, for example, the Court eliminated the legislative veto.[77] More recently, the Court has expanded the President's authority to remove agency officials[78] and thereby constrained Congress's ability to insulate agencies from political interference.

During the same time period, the Court undermined another way in which Congress has tried to control the life of its laws: by enabling private citizens to enforce their statutory rights in court rather than making them rely exclusively on public enforcement officials.

With the distance of time, it is clear that the rise of private enforcement is one of the most important legal-historical developments of the twentieth century. According to political scientist Sean Farhang, the late 1960s and the following decades brought "an utterly unmistakable explosion of private lawsuits filed to enforce federal statutes."[79] This

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[77] INS v. Chadha, 462 U.S. 919, 959 (1983). The Congressional Review Act of 1996, 5 U.S.C. §§ 801–808, allows Congress "to overturn final rules . . . by federal agencies." *Congressional Review Act: Overview and Tracking*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 15, 2021), https://www.ncsl.org/ncsl-in-dc/publications-and-resources/congressional-review-act-overview-and-tracking.aspx [https://perma.cc/69QM-F5QE]. Congress, however, has only used the Act to repeal seventeen rules over the last twenty-five years. *Id.* It remains a potential source for congressional power over rulemaking, *see, e.g.*, Jody Freeman & Matthew Stephenson, Opinion, *How a Little-Known Law Might Help Protect the "Dreamers,"* WASH. POST (Aug. 6, 2021, 9:00 AM), https://www.washingtonpost.com/opinions/2021/08/06/how-little-known-law-might-help-protect-dreamers [https://perma.cc/B25B-FCVH], but the practical obstacles are significant and demand creative navigation, *see, e.g.*, Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387, 387–89 (2020).

[78] Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020).

[79] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 13 (2010). The private enforcement that is our focus involves private

trend reflects a legislative choice, Farhang underscores. In recognizing and protecting civil rights, consumer safety, the environment, and a range of other public concerns, Congress rejected "bureaucracy-centered enforcement regimes"[80] and instead "effectively deputized private litigants and their attorneys."[81] It did so by explicitly creating private rights of action, as well as by authorizing prevailing plaintiffs to recover attorney's fees and damages (sometimes double, triple, or punitive).[82] Such enforcement schemes appealed to conservatives and liberals alike. For conservatives, such as those involved in drafting Title VII, private enforcement was a preferred alternative to bureaucratic enforcement.[83] For liberal legislators, meanwhile, such as those operating during the Nixon Administration, private enforcement ensured that a statute's efficacy did not depend wholly on the whims of executive branch officials.[84]

Within short order, however, a countermovement against the "litigation state" emerged. The countermovement's strategy, explain Professors Stephen Burbank and Sean Farhang, "was to leave substantive rights in place while retrenching the infrastructure for their private enforcement."[85] Legislative efforts repeatedly failed (suggesting something about the democratic legitimacy of those efforts),[86] but in the judiciary, the countermovement succeeded spectacularly. This occurred through a fleet of decisions involving standing, pleading, class actions, private rights of action, attorneys' fees, damages, and arbitration.[87] The

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citizens suing to vindicate Congress's public commitments. It is distinct from the private enforcement regime that the Texas state legislature recently created to implement its six-week abortion ban. Under this state-level private enforcement scheme, private actors, with no rights of their own at stake, act as a substitute for, not a supplement to, public enforcement. They perform a function that state officials likely could not perform under governing Supreme Court precedents. *See* Sabrina Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, N.Y. TIMES (Oct. 2, 2021), https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html [https://perma.cc/3XWT-FRVT].

80 FARHANG, *supra* note 79, at 3; *see also id.* at 67.

81 *Id.* at 4.

82 *Id.*; *see also id.* at 27, 180–89.

83 STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 9 (2017).

84 *See* FARHANG, *supra* note 79, at 20, 34–37.

85 BURBANK & FARHANG, *supra* note 83, at 16; *see also* FARHANG, *supra* note 79, at 5 (describing private enforcement regimes as "a form of auto-pilot enforcement . . . that will be difficult for . . . errant bureaucrats pursuing their own goals, to subvert"). The authors also chart efforts to achieve retrenchment via revisions to the Federal Rules of Civil Procedure and find only modest and sporadic success. BURBANK & FARHANG, *supra* note 83, at 66.

86 *See* BURBANK & FARHANG, *supra* note 83, at 18.

87 *Id.* at 130–91. There were also, of course, some dramatic repudiations of substantive rights. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000). But much of the work of retrenchment occurred via procedure. For a striking example of such a decision, see *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), which refused to recognize a private right of action to enforce disparate impact regulations promulgated under Title VI.

result, after some four decades of judicial retrenchment, has been to make federal law "less and less friendly, if not hostile, to the enforcement of rights through private lawsuits."[88]

The Supreme Court continued on this path in the 2020 Term, with its decision in *TransUnion LLC v. Ramirez*.[89] The statute at issue, the Fair Credit Reporting Act,[90] is classic "litigation state": as amended, the Act provides a role to the Consumer Financial Protection Bureau but also allows consumers to sue for certain violations of the statute and makes violators liable for damages and attorney's fees.[91] After a class of over 8,000 individuals seized that opportunity, accusing TransUnion of "fail[ing] to use reasonable procedures to ensure the accuracy of their credit files" and, in some cases, "provid[ing] misleading credit reports to third-party businesses"[92] (specifically, a notice that the consumer was on a "terrorist list"[93]), the Supreme Court held that most of the class members lacked Article III standing because they could not show a concrete harm.[94]

It was a sharp repudiation of Congress, as Justice Thomas's dissent underscores: "[D]espite Congress' judgment that such misdeeds deserve redress, the majority decides that TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court."[95] Justice Thomas also highlighted just how significantly the majority's reasoning would constrain Congress, should it seek to allow private enforcement of new rights going forward. Suddenly, Congress was "constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots."[96] The result was ironic: "In the name of protecting the separation of powers . . . this Court has relieved the legislature of its power to create and define rights."[97]

The decades-long enervation of the litigation state, visible in *TransUnion*, connects directly to the kind of energetic, Executive-led governance that the Foreword envisions. In a world where statutes give rights, but citizens can't enforce those rights on their own (in spite of a legal culture that equates this practice with justice itself), pressure will

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[88] BURBANK & FARHANG, *supra* note 83, at 219; *see also* Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185–88; Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 782–85 (2011).

[89] 141 S. Ct. 2190 (2021).

[90] 15 U.S.C. § 1681–1681x.

[91] *TransUnion*, 141 S. Ct. at 2200–01.

[92] *Id.* at 2200.

[93] *Id.* at 2201.

[94] *Id.* at 2212–13.

[95] *Id.* at 2214 (Thomas, J., dissenting).

[96] *Id.* at 2221.

[97] *Id.*; *see also* Rodríguez, *supra* note 12, at 134 n.524.

shift to the executive branch and the administrative state.[98] Energetic executive branch leadership will seem all the more necessary, both for those who want to see rights vindicated and those who want to see particular rights underenforced or delegitimized (such that they are no longer "rights" at all).[99]

There are important opportunities here for responsiveness — for administrators to hear democratic citizens in ways that other governmental actors do not — but there is peril here, as well. As the builders of the "litigation state" understood, it is not ideal for democracy when Congress declares rights only to have those rights ebb and flow with changes in political administrations.[100] Yes, administrative control over rights enforcement offers vital opportunities for the (statutorily constrained) elaboration of rights, in ways that may facilitate democratic inclusion.[101] But one should also acknowledge the democratic potential of private litigation, especially when leveled at public institutions,[102] and register that loss. The decline of private enforcement also raises the possibility that congressionally articulated rights will suffer atrophy or neglect, as rights enforcement gets channeled down a path that was never meant to be the only route to justice.[103] Before long, even the basic guarantees of democratic citizenship may start to seem fragile and entirely political. And the stakes of presidential elections will grow even higher.[104]

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98 *See* Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1771–73 (2017) (associating agencies' increasing efforts to advance inclusion (circa 2017) with a recognition of "the limits of private enforcement and judicial remedies in addressing contemporary problems of exclusion," *id.* at 1773); *see also* Lynda G. Dodd, *The Future of Private Enforcement of Civil Rights*, *in* THE RIGHTS REVOLUTION REVISITED 322, 322–26 (Lynda G. Dodd ed., 2018) (listing the "wide range of innovative unilateral actions" that the Obama administration took as it became clear that the executive branch was the most viable forum for advancing civil rights).

99 For an example of this phenomenon, consider the ongoing battles over administrative interpretations of Title IX. *See* Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1848–54 (2017).

100 To stick with the Title IX example, consider the significant differences between the Obama Administration's approach to sexual violence and the Trump Administration's. Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations [https://perma.cc/76YF-6QSG].

101 Samuel R. Bagenstos, *This Is What Democracy Looks Like: Title IX and the Legitimacy of the Administrative State*, 118 MICH. L. REV. 1053, 1054–55 (2020) (book review); Johnson, *supra* note 98, at 1776–77.

102 Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016–21 (2004).

103 *Cf.* KAREN E. HOLT, WHEN OFFICIALS CLASH: IMPLEMENTATION OF THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT 2–3 (1998) (describing the Reagan Administration's relatively lax approach to enforcing the Civil Rights of Institutionalized Persons Act, which had grown more important amidst declining opportunities for disabled, institutionalized individuals to pursue their rights in court).

104 Private enforcement is, of course, no panacea. *See, e.g.*, Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1414 (2011). Our

B. "Administrative States" and the Tilt of Constitutional Law

Another historical development that we see as relevant is the "new federalism" jurisprudence that unfurled, often via 5–4 Supreme Court decisions, in the last several decades of the twentieth century and that continues to reverberate today.[105] It protects the states from what critics see as unfair conscription into federal government visions of the public good. Congress is the target of much of this doctrine.[106] Via the revival of the Tenth[107] and Eleventh Amendments,[108] as well as the narrowing of Congress's power under section 5 of the Fourteenth Amendment,[109] the Commerce Clause,[110] and, eventually, the Spending Clause,[111] the Supreme Court steadily curbed Congress's ability to shape state government behavior (and enhanced the federal judiciary's authority in the process).[112] The "clear statement rule" that the Court has applied to cooperative federalism schemes[113] has had a similar affect.[114]

These changes unfolded alongside (and were fueled by) the rise of ideologically cohesive and politically polarized parties, as Professor Jessica Bulman-Pozen demonstrates. Thus, at the same time that states gained power vis-à-vis the federal government, they often acted as appendages of the two major political parties. "Put in only slightly caricatured terms," Bulman-Pozen wrote in 2014, "Republican-led states challenge the federal government when it is controlled by Democrats,

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point is simply that where a law contemplates public and private enforcement, the diminishment of private enforcement raises the stakes of public enforcement.

105 Although Rodríguez is one of the nation's foremost scholars on the workings of modern federalism, *see, e.g.*, Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014), federalism plays a relatively understated role in the Foreword. She briefly mentions the role of state governments in concerted executive action. *See, e.g.*, Rodríguez, *supra* note 12, at 77, (noting that her defense of concerted executive action is compatible with the diffusion of power across different levels of government); *id.* at 106 n.399 (discussing the litigation choices of partisan state attorneys general).

106 Edward A. Purcell, Jr., *The Courts, Federalism, and the Federal Constitution, 1920–2000*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 127, 169–70 (Michael Grossberg & Christopher Tomlins eds., 2008).

107 *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

108 *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

109 *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

110 *See, e.g.*, *Morrison*, 529 U.S. 598; United States v. Lopez, 514 U.S. 549 (1995).

111 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

112 *See, e.g.*, Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 83 (2001).

113 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

114 Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 394 (2008); Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 157 (2004); Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism*," 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 22–28) (on file with the Harvard Law School Library).

while Democratic-led states challenge the federal government when it is controlled by Republicans."[115]

What states did not, do, however, was solve pressing national problems — which brings us back to presidential administration and its promise of a competent, energetic response to the nation's greatest threats.[116]

Presidential primacy is compatible with a robust role for states in American governance, federalism scholars have argued. These scholars note a long tradition of state officials partnering with the executive branch[117] and an emergent judicial tradition of weaving federalism concerns into administrative law.[118] Today's executive branch has a varied set of tools for influencing states without commandeering them, including waivers, grants, and "nonpreemption" ("permit[ting] state law to stand in areas also regulated by federal law").[119] In short, presidential primacy has appeared to offer a coherent, national vision for addressing big problems and the possibility of state collaboration in making that vision a reality.[120]

Importantly, however, influence runs both ways. As federalism scholars have long documented, state officials use whatever privileges and access they have to affect the federal agenda — sometimes to the point of open obstruction.[121] Arguably, this is a good thing, because it places a "check" on the executive branch and thereby safeguards the

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115 Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014).

116 *Cf.* Ernest A. Young, *Federalism as a Check on Executive Authority: State Public Litigation, Executive Authority, and Political Polarization*, 22 TEX. REV. L. & POL. 305, 309–10 (2017–2018) (noting that although polarization in theory leaves divisive policy questions to the states, in practice it has empowered the federal Executive).

117 Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 271 (2019). The COVID-19 pandemic offers stark examples of what the executive branch can and cannot do without participation from the states. Cary Coglianese & Daniel E. Walters, Opinion, *A Trojan Horse from the Court's Conservatives?*, REGUL. REV. (June 21, 2021), https://www.theregreview.org/2021/06/21/coglianese-walters-trojan-horse-from-courts-conservatives [https://perma.cc/72WQ-VQKR].

118 Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 1 (2011). *But see* Nicholas F. Jacobs & Connor M. Ewing, *The Law: The Promises and Pathologies of Presidential Federalism*, 48 PRESIDENTIAL STUD. Q. 552, 566 (2018) (arguing that contemporary "presidential federalism" is "directly at odds with the original design and commitment of keeping the compound republic").

119 Bulman-Pozen, *supra* note 117, at 306.

120 *See* Gillian E. Metzger, *Agencies, Polarization and the States*, 115 COLUM. L. REV. 1739, 1772 (2015) (noting how important the potential of state collaboration is "in a world of polarized national politics and a gridlocked Congress"). *See generally* Bulman-Pozen, *supra* note 117, at 306.

121 Bulman-Pozen, *supra* note 115, at 1078; Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1256 (2009); Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 443 (2014).

separation of powers.[122] But how should we judge the rise of presidential primacy if, in practice, the doctrines and practices of federalism now tend to favor a particular *type* of presidential administration? When it comes to states' relationships with presidential administrations — their ability to advance or temper a particular vision — how level is the playing field between an administration that has conservative preferences and an administration that has more progressive or liberal preferences?[123]

This question deserves careful, empirical study — more than we can offer here — but a preliminary scan of the landscape raises concerns about the ideological tilt of the "administrative states," at least when it comes to the vital domain of social welfare policy.[124] Although several states recently lost their latest bid to overturn the Affordable Care Act (ACA),[125] the states retain their right to limit the Act's reach, by declining to expand their Medicaid programs.[126] A dozen states continue to exercise that right, with Missouri legislators attempting to do so even in the face of a contrary voter-backed amendment to the state constitution.[127] Of the states that have expanded their Medicaid programs, some used the leverage they gained from *NFIB v. Sebelius*[128] to demand concessions from the Department of Health and Human Services, effectively pulling statutory implementation in a more conservative and exclusionary direction.[129] Looking beyond the ACA to the realm of income support, we see how, for decades, federal legislative judgments have

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[122] Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 462 (2012).

[123] Rodríguez is hardly oblivious to this point. *See, e.g.*, Rodríguez, *supra* note 12, at 126 (noting that "in the long run," the judiciary's antistatist rhetoric "is more likely to be damaging to regimes like the current one" that seek to "deploy[] the government and the bureaucracy to promote social welfare"); *id.* at 61 n.229 (discussing the point by referencing the work of Professors Jonathan Gould and David Pozen). But, in our view, she does not treat structural biases as central to her core claim.

[124] For a fuller exploration of the biases of today's federalism, see Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. (forthcoming 2022) (on file with the Harvard Law School Library), arguing that on net, today's federalism favors conservative agendas over progressive ones. *See also* K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1682 (2018) (book review) (emphasizing the substantive valence of certain structural visions of the administrative state).

[125] California v. Texas, 141 S. Ct. 2104 (2021).

[126] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 587 (2012).

[127] Sandhya Raman, *Medicaid Expansion Fight Resurfaces in States*, ROLL CALL (May 25, 2021, 10:21 AM), https://www.rollcall.com/2021/05/25/medicaid-expansion-fight-resurfaces-in-states [https://perma.cc/W9N8-49BP].

[128] 567 U.S. 519.

[129] Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1729 (2018); Nicole Huberfeld, *Federalism in Health Care Reform*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 197, 197 (Ezra Rosser ed., 2019).

combined with federalism doctrine and state balanced budget requirements[130] to incentivize "laboratories of suffering"[131] rather than laboratories of human flourishing. Consider, for example, President Obama's attempt to use executive branch authority to mitigate some of the harshness of the 1996 welfare reform. When his Administration invited states to seek waivers to statutory work requirements, only one state applied and no waiver resulted.[132] Now add to the picture what we know about who speaks for "the state" in negotiations with federal officials: in some instances, Professor Miriam Seifter finds, it is regulated entities "cloaking private agendas in the name and legitimacy of the states,"[133] not unlike how the American Legislative Exchange Council (ALEC) has succeeded in translating its probusiness, antiregulatory agenda into state law.[134]

There are, of course, states whose current legal and policy regimes align with a more progressive policy agenda, but importantly, they face challenges from developments in the Supreme Court's rights jurisprudence, as Rodríguez notes.[135] The nonalarmist reading of cases like *Cedar Point Nursery v. Hassid*,[136] *Americans for Prosperity Foundation v. Bonta*,[137] *Fulton v. Philadelphia*,[138] and the various COVID-19 restrictions decisions[139] is that each represents but a small incursion on states' police power. But as a set, these cases and their recent predecessors send a coherent message. Writing in 2015, Professor Elizabeth Sepper noted how trends in free exercise jurisprudence appeared to invite "deregulation through exemption," while simultaneously expanding the class of litigants capable of demanding exemption.[140] According to Professors Cary Coglianese and Daniel E. Walters, the Court's 9–0

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130 David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2627 (2005).

131 Monica Bell, Andrea Taverna, Dhruv Aggarwal & Isra Syed, *Laboratories of Suffering: Toward Democratic Welfare Governance*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY, *supra* note 129, at 40, 40.

132 *Trump Administration Reverses Little-Used Welfare Waivers*, AP NEWS (Aug. 30, 2017), https://apnews.com/article/c95boca56d46441ea306aodoabf81463 [https://perma.cc/YU7W-SG52].

133 Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 1009–10 (2014).

134 ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES — AND THE NATION, at ix–xiv (2019).

135 Rodríguez, *supra* note 12, at 32 (discussing "constitutional litigation designed to curb the regulatory state").

136 141 S. Ct. 2063 (2021).

137 141 S. Ct. 2373 (2021).

138 141 S. Ct. 1868 (2021).

139 *E.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

140 Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1459 (2015); *see also* Jedediah Purdy, Essay, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2162–63 (2018).

Fulton decision dramatically widens the invitation.[141] Ruling in favor of Catholic Social Services while avoiding unsettling the framework of *Employment Division v. Smith*,[142] the Court emphasized that the local antidiscrimination policies at issue contained an exemption. That is, they were not the kind of "neutral and generally applicable law" described in *Smith*.[143] This categorization allowed the Court to limit its strict scrutiny analysis to the City Council's denial of an exemption — and allowed many civil rights advocates to breathe a sigh of relief.[144] According to Coglianese and Walters, however, the regulatory landscape is rife with the possibility of exemption, exception, and waiver; "general applicability" is less common than one would think.[145] *Fulton* thus "would seem to have opened the barn door for anyone with religious objections to escape from their duty to obey vast swaths of the law."[146]

Rodríguez uses the term "counter-regime" to describe this trend[147]: although much of the Foreword characterizes the Supreme Court as institutionally embedded in a struggle between an Executive-led regime and its immediate predecessor, she also recognizes *this* Court as "product and avatar" of a different political regime, with roots extending back to the Reagan Administration.[148] And yet this observation, coming in Part III of the Foreword, does not seem to shake her commitment to the vision of governance she limns in Parts I and II. We ask whether it should — or if at least it urges a reordering of priorities for scholars like Rodríguez, who value both democracy and good governance. If the "rules of the game" have evolved so as to disadvantage the implementation of one type of political vision, even when that vision commands support from a majority of voters, what are the implications of continuing to accept the game as is (while arguing that whoever is taking their "turn" be allowed to proceed energetically and without undue interference)? At what point do we identify the game as unfair? At what point do we give primacy to reforming the rules? And what happens to our political and legal imaginations as we keep these questions at bay?

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141 Coglianese & Walters, *supra* note 117.

142 494 U.S. 872 (1990).

143 *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

144 *See id.* at 1877, 1881 (majority opinion); Coglianese & Walters, *supra* note 117.

145 Coglianese & Walters, *supra* note 117. In support of this proposition, the authors cite their recent empirical study (with Professor Gabriel Sheffler), which found that of the most significant regulations issued by federal agencies from 1982 to 2016, "97 percent of these rules contained at least one obligation-alleviating word." *Id.* (citing Cary Coglianese, Gabriel Scheffler, & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885 (2021)).

146 *Id.*

147 Rodríguez, *supra* note 12, at 128–30.

148 *Id.* at 126–31.

III. DEMOCRATIC DECLINE: CODA OR CORE?

A final historical trend we discuss is one that Rodríguez also highlights, in a closing section titled "Coda: Who Votes and Who Counts."[149] Here, Rodríguez concedes that the vision of governance she advances "depends on [a] crucial assumption[]: that regime change will be possible and even regular."[150] Unfortunately, "developments within American political culture in recent years have begun to challenge [this] assumption[] and now threaten to make democratic regime change incomplete, elusive, asymmetrical, or even impossible."[151] The Court, Rodríguez recognizes, has exacerbated these problems through its "skepticism of the need for federal intervention (by Congress or the courts) to protect the democratic process and voters themselves from racial discrimination."[152] We offer here a longer view, starting with the interbranch dynamics that once made an inclusive, racially egalitarian democracy seem possible and then briskly reviewing how this fragile arrangement collapsed.

Without being overly romantic about the history of American democracy, one can fairly say that circa 1966, all three branches of the federal government were committed to a relatively egalitarian and inclusive vision. Congress had passed the Voting Rights Act[153] (VRA), which gave the executive branch a central enforcement role. The VRA's main enforcement mechanism — preclearance under section 5 — required jurisdictions that historically restricted the right to vote or had low voter registration or turnout to seek approval for any changes to their elections laws with either the Attorney General ("administrative preclearance") or a three-judge panel in the U.S. District Court for the District of Columbia ("judicial preclearance").[154] This system represented an explicit choice by Congress to subject the political process to federal oversight, with the understanding that the executive branch and the resources of the Department of Justice were vital to the system's success.[155] The Supreme Court upheld preclearance under an expansive view of congressional power under the Fifteenth Amendment.[156]

The last decade has revealed how precarious that achievement was. In retrospect, the seeds of its undoing may have been planted in the

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149 *Id.* at 139–56.

150 *Id.* at 139.

151 *Id.*

152 *Id.* at 146. And as we show below, the Court's attack on congressional power also effectively limits executive action in this realm, too.

153 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

154 52 U.S.C. § 10304.

155 *See* Samuel Issacharoff, *The Supreme Court, 2012 Term — Comment: Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 99 n.22 (2013).

156 *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

executive branch during the first Reagan Administration. There, a young John Roberts, then a special assistant to Attorney General William French Smith, wrote a series of memos opposing the introduction of an effects test into the Voting Rights Act. He contended that there "was no evidence of voting abuses nationwide supporting the change."[157] Roberts lost that battle — in 1982, Congress enacted the changes to the Voting Rights Act that he opposed[158] — but as Chief Justice of the Supreme Court, Roberts is now winning the war.

In analyzing the relevant suite of Supreme Court decisions, it is common to see Congress's authority as the casualty. Less appreciated, in this era of expansive executive branch authority, is that presidential power also took a hit.

Shelby County v. Holder[159] is the most important example. There, the Chief Justice relied on the principle of equal sovereignty — a constitutional rule of questionable historical pedigree[160] — to hold section 4 of the Voting Rights Act unconstitutional.[161] Importantly, section 4 worked in tandem with preclearance under section 5 by identifying the jurisdictions subject to federal supervision.[162] By ruling section 4 unconstitutional, the Roberts Court turned the VRA's preclearance regime into a dead letter. Jurisdictions that were previously covered no longer had to seek permission before implementing changes to voting laws.[163] Predictably, without executive branch approval as a prophylactic, state legislatures passed a raft of more restrictive laws.[164] *Shelby County* is thus a prime example of a problem Rodríguez only briefly mentions: the limits of executive power given "[t]he question of congressional capacity."[165] "[I]f we believe in government problem-solving," she continues, this problem "is . . . a serious one," because "the Executive will always be constrained by the law's limits, and its innovation will eventually run into those limits."[166] By picking apart the VRA, the Supreme Court has effectively extinguished presidential energy in this domain.

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[157] JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 73 (2019).

[158] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended in scattered sections of 52 U.S.C.).

[159] 570 U.S. 529 (2013).

[160] *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1211 (2016).

[161] *Shelby Cnty.*, 570 U.S. at 544.

[162] Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (codified at 52 U.S.C. § 10303).

[163] *See Shelby Cnty.*, 570 U.S. at 557.

[164] *The Effects of* Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/KPG7-VNTD].

[165] Rodríguez, *supra* note 12, at 91; *see also* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 320–28 (2019).

[166] Rodríguez, *supra* note 12, at 91.

The problem only deepened this past Term. In *Brnovich v. DNC*,[167] the Court considered the proper legal standards for evaluating vote denial claims under section 2 of the VRA,[168] which, following *Shelby County*, became the vehicle of choice for civil rights lawyers and the Department of Justice to challenge restrictive voting laws.[169] Writing for the majority, Justice Alito crafted what Professor Rick Hasen calls an "impossible test,"[170] one that gives the largely conservative federal judiciary wide discretion in these cases. Notably, one of the opinion's guideposts instructs courts to compare new voting restrictions to those in place in 1982, when section 2 was amended.[171] This factor, as Justice Kagan recognized in dissent, took an enforcement tool that was "meant to disrupt the status quo" and "eradicate then-current discriminatory practices," and instead "set them in amber."[172]

Brnovich also has immediate consequences for any ambitious plans for executive protection of voting rights. Shortly before the Court's decision, the Department of Justice filed a section 2 lawsuit against Georgia for enacting S.B. 202, a law that imposed new restrictions on the right to vote.[173] Attorney General Merrick Garland called the lawsuit "the first step of many," suggesting that section 2 would be central to the Department's enforcement strategy.[174] The strategy looks less promising in *Brnovich*'s wake. Shortly after the decision was issued, the Department of Justice issued a statement "urg[ing] Congress to enact additional legislation" to protect the right to vote.[175] Republican State Attorneys General, by contrast, relied heavily on *Brnovich* in an amicus

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167 141 S. Ct. 2321 (2021).

168 *Id.* at 2336–37.

169 *Id.* at 2356 (Kagan, J., dissenting). Historically, section 2 has been used for racial vote dilution claims, with a well-developed body of law forming after the Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). By contrast, the legal test for vote denial claims under section 2 varied widely across circuit courts before *Brnovich*. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1569–74 (2019).

170 Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, SLATE (July 8, 2021, 10:16 AM), https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html [https://perma.cc/P3CD-7LDU].

171 *Brnovich*, 141 S. Ct. at 2338.

172 *Id.* at 2363–64 (Kagan, J., dissenting).

173 Complaint at 1–3, United States v. Georgia, No. 21-cv-02575 (N.D. Ga. June 25, 2021).

174 *See* Press Release, U.S. Dep't of Just., Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law (June 25, 2021), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-georgia-stop-racially-discriminatory [https://perma.cc/K7NS-8ASV].

175 Press Release, U.S. Dep't of Just., Department of Justice Statement on Supreme Court Decision in *Brnovich* (July 1, 2021), https://www.justice.gov/opa/pr/department-justice-statement-supreme-court-decision-brnovich [https://perma.cc/9K6M-5ZU9].

brief supporting Georgia's motion to dismiss the suit.[176] These divergent responses to the decision only underline how executive power is collateral damage in a broader war between Congress and the Court.

Brnovich thus continued down a doctrinal path that is deferential to states, skeptical of voting rights claims, and allergic to judicial supervision of the political process. Notably, each of those trends runs in exactly the opposite direction of the modern movement for African American freedom and the so-called Second Reconstruction (encompassing the landmark civil rights advancements of the 1950s and 1960s).[177] This Second Reconstruction depended on a robust deployment of congressional power,[178] a multibranch recognition of the right to vote as fundamental,[179] and judicial willingness to enter the political thicket.[180] Today each of these foundations is at risk, and with it the integrity of the democratic process as a whole.

It is an ironic story for Executive-led governance, which has arguably never been stronger and yet is enfeebled when it comes to protecting democracy. More than that, however, it is a deeply discouraging story — for presidential primacy and for any form of governance that aspires to be democratic. All of these models require a majoritarian democracy and a secure political process for their legitimacy. When the former erodes, so does the latter. Minoritarian presidencies are now common.[181] Electoral integrity is a sharply partisan issue.[182] States pass increasingly restrictive and targeted voting laws, now seemingly blessed by a laissez-faire Court. Given the weaponization of the political process, even the peaceful transition of power — the hallmark of even a minimalist theory of democracy — is at risk.[183]

We come then, to an uncomfortable juncture. In earlier parts of our response, we raised questions about whether a framework of presidential primacy, despite its democratic justifications, might be providing democratic citizens less than they deserve, or at least acceding to an

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176 Brief of Amici Curiae Ohio et al. in Support of the Defendants at 12, 15–16, 25, 29, 33, United States v. Georgia, No. 21-cv-02575 (N.D. Ga. Aug. 3, 2021).

177 Kevin K. Gaines, *The End of the Second Reconstruction*, 1 MOD. AM. HIST. 113, 114–15 (2018).

178 *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 308–09 (1966).

179 *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 667–70 (1966).

180 *See* Baker v. Carr, 369 U.S. 186, 226–29 (1962). While technically not a case on race and democracy, *Baker* opened the door for judicial supervison of the political process, which naturally extended to racial discrimination.

181 *See* Lawrence Lessig, *US: A(nother) Minoritarian Nation*, MEDIUM: LESSIG (Mar. 17, 2021), https://medium.lessig.org/us-a-nother-minoritarian-nation-fcee9d68605e [https://perma.cc/3AJ4-HPYD].

182 *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2335 (2021).

183 *See, e.g.*, Tom Scocca, *This Was the Coup*, SLATE (Jan. 6, 2021, 9:34 PM), https://slate.com/news-and-politics/2021/01/trump-coup-violence-capitol-national-guard.html [https://perma.cc/C3BW-F69S].

unfairly constrained understanding of the public good. Here we ask a more fundamental question: What are the implications of advancing a robust vision of Executive-led governance, however democratically inspired, when democracy itself is under threat and the executive branch has lost its best tool for defending it? To what extent should Rodríguez's thoughtful and clear-eyed Coda temper the Foreword's core claims?

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We opened this Response with a quote from the historian Natalie Zemon Davis, from an interview about her craft, politics, and ambitions: "Especially I want to show that it could be different," she told her interviewers, "that it was different, and that there are alternatives."[184] Rodríguez's project, as we understand it, is to show how our constitutional system allows changes and reversal, including the recovery of visions that a previous administration rejected. We are not stuck with bad policy merely because a President once put the weight of the executive branch behind it. There are alternatives, and our leaders may pursue them with as much boldness and energy as circumstances require and the law allows.

Our Response gives the prefatory quote a different valence. We have reminded readers that our current form of presidential primacy was not always with us and that certain forces made it so. We have also pointed to historical developments that have raised the stakes of presidential primacy, while also constraining the legal and policy visions that executive branch actors can pursue. And throughout this Response, we have tried to invite readers to remember different ways of governing and being governed. That is, we have tried to recall alternatives. Some of these alternatives are perhaps beyond the point of recovery. But as legal historians ranging from Risa Goluboff[185] to Nate Holdren[186] have argued, going back in time is not the point; the point is to rewiden our imaginations, unsettle assumptions, and encourage new ideas.[187]

Rodríguez is, of course, aware of all the general concerns we have raised. As an academic, she has written about them. As a former executive branch official, she has negotiated them. In this Foreword, she

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[184] Interview by Rob Harding & Judy Coffin with Natalie Zemon Davis, *supra* note 1, at 114–15.

[185] RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 5–6, 12–15 (2007).

[186] NATE HOLDREN, INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA 3–4, 6–13 (2020).

[187] For examples of recent work in this spirit (building on a rich body of older work), see Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL'Y REV. (forthcoming 2021) (on file with the Harvard Law School Library); Emerson & Michaels, *supra* note 16; Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. (forthcoming Dec. 2021) (on file with the Harvard Law School Library); Lisa Marshall Manheim, *Presidential Control of Elections*, 74 VAND. L. REV. 385 (2021); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743 (2019).

has understandably chosen to focus her gaze elsewhere — on how American government can meet the urgent challenges of the day without betraying core values. Our response is in some sense simply a reminder of the legal and political sediment upon which Rodríguez's energetic executive branch actors now tread as they do the essential work of governing. Our audience is those readers who may yet wish to disrupt that ground, searching out more fertile soil or digging out seeds of a different future.