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The Diffuse Executive

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SYMPOSIUM

THE DIFFUSE EXECUTIVE

*Anya Bernstein & Cristina Rodríguez**

A unitary executive is an exacting ideal. It asks that all power in an administration be gathered in the person of the President, who should have full authority to determine the actions of officials and employees.¹ Even if the President does not directly control every executive action (how could he?), when officials fail to implement presidential preferences, the unitary theory dictates that the President must have the power to remove them.² The model posits a tightly organized hierarchy—every rung implementing the substantive decisions of the rung above, with orders flowing from the top: a command-and-control structure for government action.³ And, even if the top rung does not make every little decision, every rung should know and implement the President’s preferences.⁴

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1. See Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 131–32 (2022).

2. See, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) (“The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote.”); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197–98 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501–02 (2010); *Myers v. United States*, 272 U.S. 52, 131 (1926). For scholarly defenses of a robust removal power, see Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1227–30, 1241–42 (2014); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 44 (1986).

3. See Christine Kexel Chabot, *The President’s Approval Power*, 92 FORDHAM L. REV. 373, 375 (2023) (discussing unitary executive theorists’ claims about the President’s power to remove, supplant, or retain approval and veto power over congressionally authorized executive officials); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 568–69 (1994). See generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (reviewing historical practices and attitudes related to the unitary executive during each presidency).

4. See Peter L. Strauss, *Overseer, or ‘the Decider’?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 715–38 (2007) (listing ways in which Presidents communicate their preferences and oversee agencies without making the final decisions); see

The appeal of this model comes from a conception of democratic rule that highlights the President's electoral bona fides: as the only representative with a national electorate, the President is supposed to be both loyal to the people's will and beholden to it.⁵ But our own qualitative empirical research into decision-making within the executive branch poses a descriptive and normative challenge to this model. In our study of the work of dozens of agency administrators from across the state, we found an executive branch in which policymaking power is not unified but diffuse. Our findings suggest that an actual unitary executive is neither extant nor feasible in our mass democracy. Given this reality, anyone interested in the structure of the state must evaluate the institutional forms that *do* exist to determine which combination of them will best advance democratic values. The answer cannot simply arise from the Constitution; choices must be made. And as we spell out below, we think the diffusion we find in our research in fact promotes democratic values like accountability and responsiveness to the governed—some of the very values that make the ideal of a unitary executive appealing to its proponents.⁶ These various forms of diffusion, therefore, ought to be nurtured rather than resisted.

As part of a project that explores how agencies work with statutes, we interviewed thirty-nine current and former administrators from eleven agencies across the administrative state, including from executive agencies, independent agencies, and the Executive Office of the President (EOP). Some of our subjects focused on benefits management, others on industry regulation, some on law enforcement, and a couple on the governance of the government itself. The officials we interviewed included political appointees and career civil servants, lawyers and subject matter experts. Our open-ended, semi-structured interviews asked about the respondents' experiences working in the administrative state; their relations with the President, Congress, courts, and the public; and the practices through which they produced regulations and other policies. Although we initially set out

also Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 53–60 (2017) (summarizing the oversight-decision distinction and critiquing reasons commentators give for distinguishing presidential oversight from overreach).

5. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001) (arguing that presidential administration promotes accountability); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 67 (1995) (arguing that the President is “the conscious agent[] of . . . a national majority coalition”); see also Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1739 (2009) (characterizing the unitary executive as ensuring a “more sophisticated sampling of the popular will” as well as “informed voting . . . by focusing accountability on one official”). A few things remain somewhat unclear. For instance, how is a second-term President subject to sanction by elections? Election to a second term may legitimate executive action, but it cannot constrain it with the threat of electoral sanction. And where does the Vice President, also nationally elected, fit in? We leave these puzzles aside for now.

6. See Kagan, *supra* note 5, at 2334 (outlining the argument that bureaucratic decision-making is more democratic than legislative decision-making because the President has a national constituency); Calabresi, *supra* note 5, at 42–45 (explaining how a unitary executive promotes accountability to the electorate).

to study everyday practices of statutory interpretation, our discussions had a much broader range. They gave us a sense of how officials went about their jobs. We also learned about the sociological contexts of their work.

Our research reveals many empirical realities of our administrative state, which we began discussing in articles entitled *The Accountable Bureaucrat*⁷ and will continue to present in *Activating Statutes*,⁸ a work in progress. This empirical understanding can help us identify realistic means of supporting the normative values of democratic governance within our contemporary state. This connection, in turn, should inform and even shape our understanding of the Constitution and its distribution of powers.

The disaggregated executive branch we uncovered shines light on the mythical qualities of the unitary ideal in numerous ways. Although the unitary ideal imagines agency action as responding to the President's wishes,⁹ we found that, historically, a far wider range of sources have catalyzed agency work. Congress can obviously press agencies to act, through legislation, official oversight, or more informal attention from individual members.¹⁰ Litigation, similarly, can push agencies to change their policies, either through compliance with court injunctions or through more informal adjustments to legal doctrines.¹¹ And perhaps most importantly, many catalysts come from outside the government altogether. Publics affected by agency action, as well as the media, and, especially, the regulated world itself—with its ongoing technological development and social change—pushed agencies to adjust their policies to make sense of the statutory regimes for which they bore responsibility.¹² That happened

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

8. Anya Bernstein & Cristina Rodríguez, *Activating Statutes* (2023) (unpublished manuscript) (on file with authors).

9. See, e.g., Miller, *supra* note 2, at 58–59 (explaining the level of power that the President has over department heads under the unitary executive theory).

10. Bernstein & Rodríguez, *supra* note 7, at 5–6, 30–33; accord Jason A. MacDonald & Robert J. McGrath, *Retrospective Congressional Oversight and the Dynamics of Legislative Influence over the Bureaucracy*, 41 LEGIS. STUD. Q. 899, 901–02 (2016) (describing congressional oversight as a “multifaceted” political tool, especially in times of divided government).

11. Bernstein & Rodríguez, *supra* note 8 (manuscript at 15, 50–53); accord Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 387–89 (2019) (offering an example of how a series of court-issued injunctions in *Rapanos v. United States*, 547 U.S. 715 (2006), severely delayed agency action); Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1396–99 (2010) (showing how agencies might adopt weaker regulations than they otherwise would due to the litigation risk arising from burdensome procedural requirements).

12. We survey the various catalysts for agency action in our work in progress. Bernstein & Rodríguez, *supra* note 8 (manuscript at 8–21); accord Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Deliberative Rulemaking: An Empirical Study of Participation in Three Agency Programs*, 73 ADMIN. L. REV. 609, 674 (2021) (comparing different agencies' mechanisms of engaging in public deliberation, both formal and informal); Bernstein & Rodríguez, *supra* note 7, at 1647–62 (highlighting a range of agency practices that reflect the value of responsiveness); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 823–26 (2021) (finding that agencies often engage with their affected publics to develop policy ideas).

through lobbying and the frequent informal interaction that agencies have with their affected publics, as well as through agency research and internal reports.¹³

The President's own effects on policymaking, meanwhile, emerged in our interviews not as concentrated, but as diffuse.¹⁴ Administrators often understood *something* about the President's overarching values, but they rarely had a sense of his preferences on any specific policy question.¹⁵ Rather, interviewees agreed that the President likely had no particular preferences about many policy decisions made by his administration.¹⁶ There are, after all, many ways that overarching values can be expressed in any particular policy setting.¹⁷ Moreover, presidential values and priorities are not generally static, nor do they necessarily predate the policy process: respondents described how presidential values and priorities developed through policymaking itself.¹⁸

What we learned about how an administration's priorities are formed—and then communicated and diffused throughout the executive branch—demonstrates that they are often not the product of direct presidential thought or action but of something more constructive and political in a broad, coalitional sense. Political appointees, for instance, often came into office with agendas to further.¹⁹ But unlike in a unitary vision, in which appointees push forward a clearly delineated presidential agenda, our interviewees described appointees as independent agents. Appointees' actions were informed by the overall values that characterized a presidential administration, but the specific policy projects they pursued were often their own.²⁰ Specifics were largely left to the agency—specifics that were substantive, not interstitial or ministerial.²¹

The major exception in our study was the rulemaking process for the Affordable Care Act²² (ACA), which was highly directed by the bureaucracy of the EOP with a level of centralized intervention not matched by any other policy that our interviewees discussed.²³ Even in this unique context, however, White House control took the form mostly of scheduling²⁴ and intensively testing the agency's justifications for particular choices—with an

13. See Bernstein & Rodríguez, *supra* note 8; accord Bagley, *supra* note 11; Wagner, *supra* note 11.

14. See Bernstein & Rodríguez, *supra* note 7, at 1624–27 (identifying how policy priorities diffuse throughout all levels of the bureaucracy); Bernstein & Rodríguez, *supra* note 8 (manuscript at 17–19).

15. Bernstein & Rodríguez, *supra* note 7, at 1624–25.

16. See *id.* at 1626.

17. See *id.* at 1625.

18. *Id.* at 1617–27 (showing how White House involvement in agency processes can affect goal-setting and policy outcomes).

19. See *id.* at 1633 & n.133.

20. See, e.g., *id.* at 1626.

21. *Id.* at 1625–27.

22. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

23. See Bernstein & Rodríguez, *supra* note 7, at 1622–23.

24. See *id.* at 1620 n.62.

eye to likely future litigation. We did not hear of specific policy options mandated by the EOP, but rather of minute questions asked to ensure that every decision was defensible. The ACA's implementation thus supports several inferences. First, participants' emphasis on the exceptional nature of the process suggests that, although the presidential bureaucracy *can* take a direct part in the production of agency policy, it usually does not. Second, the specifics of White House control in this instance show that, even when the presidential bureaucracy does intervene in particular policy decisions, it may do so primarily to ensure the longevity and timeliness of the resulting rules, not to impose specific policy decisions. Finally, the process underscores that even centralized power over agency action can come not from the President individually but from the complex EOP bureaucracy.²⁵

We also found that, within the administration, the President, the EOP, and political appointees inside agencies were not the only agents of policy formation. Career employees within agencies confronting gaps or mismatches between existing regulations and realities on the ground could trigger an agency response.²⁶ These might be enforcement officials, subject matter experts, or lawyers, all working with the statutes and regulations in different ways. With their longer tenure, institutional memory, and immersion in the statutory regime, these government actors contributed epistemic and normative perspectives distinct from those of political appointees in ways that made the two types of officials complementary and interdependent.²⁷ Lawyers played a particular role in policy formation, ensuring that agency initiatives were grounded in plausible, even necessary, conceptualizations of statutory authority that often required policy modifications. These varied and substantive roles, although sometimes in service of presidential priorities, were not primarily driven by them, and certainly not by presidential direction. And agencies with related regulatory reach could nudge each other to produce policies to ensure coherence across regulations or to act on a particular distribution of responsibilities, further demonstrating agency employees' role in policy formation.²⁸

The decision-making process for creating policy in response to any one of these catalysts was no less diverse. It typically involved dozens of people with different training and backgrounds from every level of the agency hierarchy.²⁹ It drew in other agencies and members of Congress and

25. *See id.* at 1619–20.

26. Bernstein & Rodríguez, *supra* note 8 (manuscript at 16–17).

27. Bernstein & Rodríguez, *supra* note 7, at 1628–30.

28. *See* Bernstein & Rodríguez, *supra* note 8 (manuscript at 17); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134 (2012) (observing that agencies coordinate with one another through the Office of Management and Budget review process).

29. Bernstein & Rodríguez, *supra* note 7, at 1639–47; *see* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 99 (2016) (“[T]he bulk of discretionary rulemaking activity at the federal level seems to stem from the subtle interaction of a variety of interested actors.”).

responded to private parties likely to be affected by agency action.³⁰ The policy process rarely started out with a top-level decision about what a final policy should look like that was then communicated to lower levels for implementation. It might start with an overarching goal—increase access to loans for small businesses or protect children from online predation, for example.³¹ But it might also start with a more discrete objective—cohere two rules that seem incongruent or apply a reimbursement scheme to a new product.³² Ultimate decisions about how to pursue these ideas (what, for example, does protection from online predation actually look like?) would be made in an iterative, multiparticipant process of policy production.³³

The reality we found was thus much more dispersed, variegated, and multidirectional than the unitary executive's tightly structured hierarchy with a unidirectional flow of command.³⁴ Key policy values might emerge in the policymaking process itself rather than predetermine it. The impetus for change could come from below as well as above in the hierarchy. Decision-making itself was rarely unilateral or individual. It involved substantive input from many people who participated in making a decision, even if some hierarchical superior might ultimately have the responsibility for it.³⁵ Indeed, the picture we see includes the institutionalization of multiple relatively autonomous decisionmakers throughout the executive branch, many of whom are not part of the President's political regime.

It may be that the forms of diffusion we have described are organizationally required by the bureaucratization that characterizes a modern democracy.³⁶ Moreover, these organizational forms themselves

30. See Bernstein & Rodríguez, *supra* note 7, at 1639–47; Coglianese & Walters, *supra* note 29, at 99.

31. See generally Bernstein & Rodríguez, *supra* note 7, at 1625–27.

32. *Id.* at 1643–44.

33. *Id.* at 1649 (explaining how accountability arises from the “iterative, multinodal negotiations among administrators—working in different modalities, positioned at many hierarchical levels, engaged in ongoing deliberation with one another and the public, responding to the world around them”).

34. *Id.* at 1638–39 (describing the “spiderweb” of bureaucratic actors and its implications for policymaking).

35. *Id.* at 1633–37 (underscoring the diversity of individual bureaucrats' respective roles and comparative competencies within the bureaucracy).

36. See EVA ETZIONI-HALEVY, BUREAUCRACY AND DEMOCRACY: A POLITICAL DILEMMA 90 & n.3 (1983) (“[A] modern democracy cannot exist without a powerful and independent bureaucracy.”); cf. ERAN VIGODA-GADOT, BUILDING STRONG NATIONS: IMPROVING GOVERNABILITY AND PUBLIC MANAGEMENT 155 (2009) (explaining why “public administration is one of the highly *powerful institutions* in modern democracies” and addressing the interdependence of democracy and bureaucracy). The easy explanation for these developments is that the work of government now exceeds what any one person can keep track of, though that would almost certainly have always been true, even before the advent of the modern administrative state. See MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 19 fig.5 (2019) (showing the explosive growth of the number of pages in the *Federal Register* since 1936); *Executive Branch Civilian Employment Since 1940*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940> [<https://perma.cc/25DD-WFNY>] (last visited Oct. 6, 2023).

have arisen through the operation of a constitutional mechanism—the enactment of statutes by Congress. The people who shaped and ratified the Constitution might not have foreseen such a large and active federal government, just as they might not have foreseen the scope of the government’s concern extending from a small group of land-holding white men to a more diverse and pluralistic populace. But their inability to see into the future should hardly delegitimize the government’s evolution through the very decision and lawmaking mechanisms the Constitution provides. Our findings ultimately support Weber’s long-ago assertion that “[b]ureaucracy inevitably accompanies modern *mass democracy*.”³⁷

The question we must ultimately answer, then, is what form we want the diffuse bureaucracy to take: we must ask not whether, but *how* power should be distributed within the administrative state. Even if one posits, arguendo, that the Constitution’s framers had a unitary executive ideal in mind, the mismatch of that understanding with the available workings of mass democracy make it imperative for our constitutional theory to adapt and to produce a vision of government that is both workable and normatively attractive. Whatever the historical validity of the unitary model,³⁸ we should choose interpretations today that are most likely to fulfill the underlying democratic values that we want the Constitution to serve, in the most

(demonstrating the growth of total Executive branch employment from approximately 700,000 employees in 1940 to almost 2.1 million employees in 2014). The U.S. Office of Personnel Management estimates are likely conservative. The Brookings Institution estimates that the “true size of government”—a headcount estimate that includes civil servants, postal workers, active-duty military, contractors, and grantees—was over ten million people in the Obama era and increased in the Trump years. Paul C. Light, *The True Size of Government Is Nearing a Record High*, BROOKINGS (Oct. 7, 2020), <https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high> [<https://perma.cc/37DQ-HR42>].

37. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 983 (Guenther Roth & Claus Wittich eds., 1978) (“Bureaucracy inevitably accompanies modern *mass democracy*, in contrast to the democratic self-government of small homogeneous units.”). As Professor Jed Stiglitz has pointed out, as long as a government is a tool for a small and insular minority to exert power over affected parties who have no say, it may be possible to keep governance decisions somewhat sociable and interpersonal. See EDWARD STIGLITZ, *THE REASONING STATE* 28–30, 46–50 (2022). But once a government’s concern expands to include a reasonable approximation of the pluralistic state it governs, bureaucracy becomes both necessary and useful. *Id.* This is not to say that a truly unitary executive was ever plausible in the American system, nor that it is constitutionally contemplated. See, e.g., Chabot, *supra* note 1, at 153–89 (collecting examples of early regulatory structures inconsistent with the unitary executive theory). It is just to say that governing a mass democracy—one that strives to take into account the pluralistic, often incongruent views and interests of its diverse populace, including interests in limiting private domination and negative externalities—requires a mass bureaucracy.

38. Of course, both history and scholarly debate show that there are many ways to interpret the constitutional setup. For constitutional and historical arguments against inferring that the President’s removal power is unlimited, see, for example, Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 *STAN. L. REV.* 175, 228 (2021); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 *COLUM. L. REV.* 1, 71 (2021); Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 *FORDHAM L. REV.* 2085, 2111–12 (2021); Chabot, *supra* note 1, at 196.

workable way. After all, the Constitution is a document that aims to produce not an idea, but a working, enduring government.³⁹ One of the necessary features of government is functionality: a government that doesn't work is hardly an ideal.

Those who find the unitary vision attractive despite its empirical impossibility might argue that we should still approximate that ideal as closely as we can.⁴⁰ One approach, reflected in recent U.S. Supreme Court doctrine, is to buttress the removal power of the President in theory, for use in practice when desired.⁴¹ Even recognizing that Presidents cannot have a view on or knowledge about most of what the government does, the Constitution should be understood as giving them strong unilateral removal authority to impose their will when they want to. Congress or even the courts, in turn, might limit the independent civil service to put administration as much as possible in the hands of the President or the EOP bureaucracy.⁴² The unitary aim could also be to keep the government's personnel and purview as limited as possible—to scale government down to give the President and the EOP more ability to effectively control it.

But these are not the only reasonable ways to deal with the disjuncture between the unitary ideal and realistic possibilities. Rather than pursue a poor imitation of the unitary executive fixated on centralizing power, we might focus instead on underlying values and determine which institutional

39. For scholarly interpretations of a workability approach to constitutional law, see generally BURKE MARSHALL, *A WORKABLE GOVERNMENT?: THE CONSTITUTION AFTER 200 YEARS* (1987) (collecting perspectives on the enduring workability of the U.S. Constitution in light of vast social, economic, and political change); cf. Richard H. Fallon Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 560 (1999) (identifying the idea of “workability” as a desideratum inherent in other democratic values); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (characterizing the Constitution as a pragmatic charter “intended to endure for ages to come”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[T]he Constitution . . . is not a suicide pact.”).

40. “Despite the yawning gap between . . . normative instrumental claims for the unitary executive theory and reality, I share their belief that presidential control over agency policy making is highly desirable. . . . As in all other contexts, it is important not to allow the perfect to be the enemy of the good.” 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, 602 (2010) (book review).

41. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (positing that individual Presidents can always choose to restrain themselves when exercising their powers, but that the powers of the office itself ought not be restrained); *Myers v. United States*, 272 U.S. 52, 134–35 (1926) (emphasizing the importance of the President's discretion in choosing when to exercise the “unrestricted power to remove the most important of his subordinates”); see also Rao, *supra* note 2, at 1227, 1234 (focusing on the “possibility of control” rather than actual control since “[t]he focus on actual presidential control has led to a neglect of the constitutional framework for administration”).

42. See, e.g., John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1956–57 (2009); Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 943–45 (1976). President Donald J. Trump's “Schedule F” classification—which purported to convert many civil servants into at-will employees of the President—revived scholarly attention to similar concerns. See Daniel Moynihan, *Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174 (2022) (exploring how Schedule F was “a potential harbinger” for the decline of the independent civil service).

structures will most realistically promote them. The (inevitably incomplete) unitary strategies we have just described emphasize one form of democratic accountability: presidential control.⁴³ But they do so at the expense of structures that we think are vital for ensuring a broader, ongoing accountability to the governed populace. Single-minded efforts (through the courts or otherwise) to concentrate decision-making power in one person's hands can undercut the development of institutional frameworks that enable affected publics to engage in pluralistic and political competition. As our work shows, a diffused executive, which can accommodate presidential leadership without insisting on its dominance, helps us as a nation to better approximate the *democratic* ideal.⁴⁴

The empirical impossibility of a truly unitary executive might prompt a push to reform government to conform to one or another of the unitary executive models. But it can also prompt a reevaluation of the unitary executive theory itself—a search for ways to cohere normative ideals and empirical possibilities.⁴⁵ Our point is not that theory, whether normative or constitutional, should necessarily follow empirics. Rather, it is that a functional Constitution should be understood as making room for—perhaps even requiring—a workable government. The branches and officials that make up and superintend that government should thus be aware of the ways that the system's basic democratic values can be realistically advanced. Our approach thus interweaves the normative with the empirical: we must both identify the underlying values we wish to foster and recognize how and where they can best be nurtured.

43. See *supra* notes 40–41.

44. The point is not that centralization might never be useful or promote accountability, but that it is a mistake to demand it in all its forms, in part because of its limitations in creating accountable governance. For discussions about the virtues of presidential centralization, see Kagan, *supra* note 5, at 2331–45; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994); cf. Lisa S. Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 52–56 (2006) (summarizing scholarly debates about the merits and demerits of the presidential-control model). These sources indicate how the ideal of presidential centralization can manifest in many distinct ways. See also Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1816–17 (2023) (describing “constitutional teleology,” a rhetorical strategy of claiming that choices about power distribution are constitutionally required and therefore not subject to political debate, even though power distribution is the central question of politics).

45. See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. 865, 886 (2012) (critiquing an “approach to politics according to which we do ideal ethical theory first (a theory that abstracts from empirical particulars) and in which politics is then just a kind of applied ethics”); Richard H. Fallon Jr., *Author’s Response: Further Reflections on Law and Legitimacy in the Supreme Court*, 18 GEO. J. L. & PUB. POL’Y 383, 392 (2020) (defending a mode of constitutional interpretation that entails “reflective equilibrium”—measuring theoretical conclusions against the real world, but in turn revising pure theory through the consideration of reality).