

## DEPLOYING THE INTERNAL SEPARATION OF POWERS AGAINST RACIAL TYRANNY

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**ABSTRACT**—The separation of powers in the federal government exists to ensure a lack of tyranny in the United States. This Essay grounds the separation of powers in tyranny perpetuated by racialized hierarchy, violence, and injustice. Recognizing the primacy of racial tyranny also reveals a would-be tyrant: the President. Engaging the branches of federal government—including the Executive herself—to empower agencies to check presidents’ base racist impulses would imbue the separation of powers framework with additional meaning and normative force.

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## INTRODUCTION

Separation of powers discourse should move beyond its typical engagement with an abstract and undefined concept of tyranny to focus on a real tyranny that both pervaded this country’s founding and continues to endure: tyranny borne of racial violence, domination, subjugation, hierarchy, and so on. Only then can there be a meaningful and particularized separation of powers framework—specifically, a division, diffusion, and balance of activity among the branches of government—that is adequately responsive to this manifestation of tyranny. Until then, the conversation will remain bereft of some theoretical mooring and lacking in normative force.<sup>1</sup>

Our nation abides by a separation of governmental powers as a means to stave off tyranny.<sup>2</sup>

From the Founding to the present, the central organizing principle of the structural constitution has been that power must be divided, diffused, or balanced to prevent — as Madison put it, in language that has become a maxim

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<sup>1</sup> See Daryl J. Levinson, *The Supreme Court 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 142 (2016) (noting that the narrow focus of separation of powers law and theory on “equalizing the power of government institutions”—without an effort to identify the power that requires equalizing—lacks normative force). Otherwise, “[t]he danger of tyranny is always present, yet it may develop in forms so insidiously subtle that its recognition will come at a point too late to avoid the ultimate danger.” Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 505 (1991). “[F]ar from representing a formal separation of law on the one hand and politics and morality on the other, the brand of formalism we advocate is adopted for the very purpose of implementing carefully reasoned political values.” See *id.* at 475–76 (arguing for “the use of pragmatic formalism” in regard to the separation of powers).

<sup>2</sup> “If the dominant aspiration of constitutionalism is to constrain government, avoid tyranny, and produce desirable public policy, then separation of powers . . . [is] surely [a] mechanism[] of choice in the United States.” Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 302 (2010).

of structural constitutional law — the “accumulation of all powers . . . in the same hands,” which “may justly be pronounced the very definition of tyranny.”<sup>3</sup>

“The eloquent idea that the combination of powers in the same hands is the very definition of tyranny has been repeated by prominent constitutional theorists, including Montesquieu, Blackstone,” and others.<sup>4</sup> Tyranny has been understood as the likely result of a concentration of power in either a monarch or other head of state in particular, or perhaps in a political institution.

Madison’s understanding of tyranny has been convincingly described as “domination [that] arises when a value is locked in through an institutional arrangement that denies or silences the articulation of other important values.”<sup>5</sup> This suggests that structural relationships, including power dynamics among the branches of government, incubate racial supremacy and other values that foster tyranny. And yet, the Supreme Court has long “treated separation of powers as an isolated area of the law, governed by its own glacial dynamic and insulated from the social changes that stimulate development of other constitutional doctrines”<sup>6</sup> —in particular, equal protection law. For their part, scholars of structural constitutionalism also conceive of the separation of powers in both abstract<sup>7</sup> and functionally limited ways.<sup>8</sup> In other words, the separation of powers is an ideal type.<sup>9</sup>

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<sup>3</sup> Levinson, *supra* note 1, at 33–34 (alteration in original) (advocating for attention to the mechanisms of power and power-shifting in institutions of public law). “The U.S. Constitution . . . adopts the Madisonian variant on separation of powers: dispersion of government authority, accomplished by allocating the functions of government or, equivalently, types of government power, into three branches . . . whereby one institution can raise the costs of action by another.” Gersen, *supra* note 2, at 302.

<sup>4</sup> Gersen, *supra* note 2, at 302 (footnotes omitted).

<sup>5</sup> See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 390 (2016).

<sup>6</sup> Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514 (1991).

<sup>7</sup> See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (arguing that “contrary to these understandings of functionalism and formalism, the Constitution adopts *no freestanding principle of separation of powers*”).

<sup>8</sup> See Huq & Michaels, *supra* note 5, at 349–51 (arguing that the common view that “the Court seems unmoored and unprincipled when it translates the separation of powers into legal doctrine” overlooks how the judiciary might “promote institutional contestation over conflicting normative values, encouraging salutary forms of confrontation, compromise, and cooperation within judicially imposed boundaries”).

<sup>9</sup> The ideal type “exhibits a ‘conceptual purity’ rarely found in reality.” Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 814 n.22 (2017); see also Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CALIF. L. REV. 1619, 1632 (2007) (noting the tension between “‘ideal types’ and ‘best ways’ of practicing” in the law (footnote omitted)). Structural constitutionalism rests on an ideal conception of the separation of powers. See M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 184 (1967) (drawing on the Weberian

It stands to reason that if the prevalent separation of powers framework is generalized, it proscribes the governmental perpetuation of, at best, a nonspecific concept of tyranny. Indeed, Professor Daryl Levinson, troubled by the indeterminacy of tyranny, advocates for greater attention to how societal groups wield power through the government.<sup>10</sup> While Professor Levinson gets us closer to the beneficiaries of tyranny who draw on the government for their own purposes, he does not identify a tyranny specific enough to transform the idealized separation of powers framework into a functioning safeguard. Put another way, Professor Levinson, like the canon he criticizes, fails to take a stand as to which tyrannies are most threatening and how those manifest, preferring instead to remain “relatively detached from actual problems of power — contemporary or historical.”<sup>11</sup>

This Essay, written for a symposium on “Reckoning and Reformation: Reflections and Legal Responses to Racial Subordination and Structural Marginalization,” suggests that unjust racial dynamics perpetuated by the government indicate the existence and persistence of race-based tyranny as a descriptive matter. In doing so, it takes a small step toward developing a critical theory of the separation of powers<sup>12</sup> and builds on recent scholarship

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concept of ideal types—class, status, and power—to identify the prototype for the ideal separation of powers where the three branches work in perfect equilibrium); *see also* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 597 (2021) (arguing that formalism “purport[s] to be positive rather than normative, objective, and apolitical, but both are in fact highly under-determined and thus open to manipulation in a way that makes them normative, subjective, and ideologically value-laden”); Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 148 (2003) (“According to [Max] Weber, instrumental rationality is the dominant principle of modern bureaucratic government.”).

<sup>10</sup> “It is one thing to ensure that power is divided between the President and Congress,” but “[i]t is quite another to ensure that power is divided between Democrats and Republicans, the rich and the poor, or racial or religious majorities and minorities, or to prevent one such group from tyrannizing the other.” Levinson, *supra* note 1, at 36; *see also* C. F. Abel & Arthur Sementelli, *Power, Emancipation and the Administrative State*, 24 ADMIN. THEORY & PRACTICE 253, 274 (2002) (noting the importance of “[u]nderstanding ‘power’ as only a society-wide phenomenon not attributable to any individual, as totally negative, and as totalizing in impact when exercised through public institutions”).

<sup>11</sup> Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 2 (2016) (arguing that Levinson’s ambition is not “to provide an account of how inegalitarian distributions of power affect ordinary people, nor to mine past or current political struggles to redistribute power. Rather, Levinson ultimately seeks to show that, in the abstract, ‘every law and policy . . . potentially serves to redistribute political power.’” (alteration in original) (quoting Levinson, *supra* note 1, at 138)).

<sup>12</sup> *See generally* Bijal Shah, *Toward a Critical Theory of Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (July 30, 2020), <https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah> [<https://perma.cc/BF6H-GB78>] (calling for more critical work in administrative and structural constitutional law including examination of administrative contribution to “subordination and marginalization” in the separation of powers framework); Levinson, *supra* note 1, at 40 (arguing that structural constitutional analysis of power “is not only dubious in accuracy but also

by Professor Richard Revesz<sup>13</sup> and others that have considered the distributional consequences of regulation.<sup>14</sup> Moreover, this Essay notes that an unconstrained Executive (who some Founders feared as a primary source—and who arguably poses the greatest modern threat—of tyranny) has exacerbated the racialized power structure that plagues our country today.

The logical corollary of this idea is a reconceptualization of separation of powers jurisprudence in a way that corrects for this tyranny and promotes racial justice. This Essay, however, does not offer a complete blueprint for what that constitutional doctrine might look like, as that project is outside the limited scope of this piece (although the author is pursuing this work). Rather, it focuses on a solution that draws from the new, internal separation of powers framework developed by Professor Jon Michaels and others in which agents check the president from within the executive branch.<sup>15</sup>

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superstructural in import. When the analysis is fully carried through, it reveals that the distribution of power at the structural level seldom bears any systematic relation to the distribution of power at the level of interests.”).

<sup>13</sup> See Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1490–92 (2018) (challenging the “dominant academic view with respect to regulatory policy [which] holds that individual regulations should not concern themselves with questions of distribution” for both “political” and “conceptual” reasons).

<sup>14</sup> See, e.g., CHARLES F. ABEL & ARTHUR J. SEMENTELLI, *JUSTICE AND PUBLIC ADMINISTRATION* 101 (2007) (suggesting that the conception of justice can make a true impact by “considering the complexities of [justice] rather than simply trying to drive them into hackneyed categories grounded exclusively in a moral ideology, a single philosophy, or politics or economics”); 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, 1784 (2020) (seeking to “amplify and catalyze scholarship and pedagogy that place themes of power, equality, and democracy at the center of legal scholarship”); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98 (2020) (noting that “demands for redistribution reflect the deepening of anticapitalist and antiracist critique in many of today’s movements and a shift in thinking about the nature of reform that creates greater self-determination for poor, working-class, Black, and brown people — and a more just and sustainable future for us all”); Richard M. Re, “*Equal Right to the Poor*,” 84 U. CHI. L. REV. 1149, 1153–54 (2017) (arguing that equal rights principles should further substantive economic equality); Andre L. Smith, *Race, Law, and the Free Market: A Critical Law and Economics Conception of Racism as Asymmetrical Market Failure*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSP. 39, 41 (2012) (arguing that “the government has a responsibility to ameliorate asymmetrical imperfections in the market relating to race”).

<sup>15</sup> 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. DISCOURSE 418, 422 (2021) (explaining that “[c]ivic administration calls on the president to . . . redistribute authority centrifugally”); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 227–28, 290 (2016) (characterizing “the administrative sphere as a legitimate, largely self-regulating ecosystem,” recognizing “the capacity of three rivals—politically appointed agency heads, politically insulated civil servants, and members of the public—to internally police the administrative process,” and recasting “judges, presidents, and legislators as custodians of the administrative arena tasked with

More specifically, in order to foster “a paradigm that looks . . . toward power,” which allows conversation about “minority rule as a natural and integral aspect of our democracy”<sup>16</sup>—or at least one that better “mediates between the ideal and the real”<sup>17</sup>—this Essay moves beyond political interest in progressive policy as the primary driver of governmental anti-racism efforts to offer suggestions for how each constitutional branch might engage its authority at the highest levels to *empower agencies* to reduce and prevent the Executive’s perpetuation of race-based tyranny. Each prescription offers new avenues for each branch of government to reinforce the role of the bureaucracy in constraining tyrannical Executive’s behavior. These include the legislature arming the agencies against presidential influence through more sweeping legislation, the judiciary drawing on robust statutory and constitutional interpretation to hold agencies accountable to statutory norms in the face of presidential pressure, and the President herself employing directive and detailed initiatives that markedly and durably change the inner workings of agencies in order to better constrain efforts by future presidents to engage in racial tyranny. Note that this approach is based in a functional understanding of the separation of powers that empowers the branches to govern across varying administrative and regulatory domains.<sup>18</sup>

#### I. ACKNOWLEDGING RACE-BASED TYRANNY

The separation of powers literature’s focus on tyranny in the abstract ignores the government-fostered racialized dominance that manifests tyranny. As Professor Walter Stafford put it, “Globally and domestically, one of the major challenges of the next century is to reconceptualize the relationships of the dominant states and groups, who have shared the wealth of the twentieth century, with peoples of color, who by almost any standards have endured long and continuous suffering.”<sup>19</sup> Professor Stafford’s exhortation speaks to tyranny based in the racialized hierarchy, injustice, and

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preserving a well-functioning, rivalrous administrative separation of powers”); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (arguing that bureaucracy is a critical check on executive power).

<sup>16</sup> Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1799 (2019); *see also* Shah, *supra* note 12.

<sup>17</sup> Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983).

<sup>18</sup> *See* Gersen, *supra* note 2, at 303 (“In the United States, government functions are separated, but the functional authority of each branch includes the power to act over all policy domains . . .”). *See generally* Huq & Michaels, *supra* note 5 (articulating a functionalist vision of separation of powers jurisprudence).

<sup>19</sup> Walter W. Stafford, *Bringing Historically Marginalized Groups of Color into the Study of the Administrative State*, 5 J. PUB. AFFS. EDUC. 327, 327–28 (1999).

violence that has plagued the United States from its inception through today.<sup>20</sup>

Discussions of tyranny have long avulsed it of its racial dimensions. At worst, the danger of tyranny was understood to be exclusive to white people. Indeed, the Framers, so fearful of a tyrannical monarch, nonetheless supported slavery and other forms of racial tyranny.<sup>21</sup> At best, the specifics of racial injustice are considered to be peripheral to the debate's dominant stakes<sup>22</sup> and rendered a matter to be confronted by Congress and political actors as a matter of democratic policymaking alone.<sup>23</sup> This is not dissimilar to ways in which other subfields of law—traditionally oriented toward utilitarianism and efficiency—have long ignored concerns of justice and analyses of race-based power.<sup>24</sup> More generally, the separation of powers has also privileged government inactivity, which limits modern, representative government from stepping in to lessen private forms of racial subordination.

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<sup>20</sup> See generally Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005) (arguing that American political science deals inadequately with “racial orders”).

<sup>21</sup> Examples of popular work exploring this topic include NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* 104–32 (2010) and IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 79–161 (2016), both of which observe the racist views and motivations of Thomas Jefferson and other Founders.

<sup>22</sup> See Britton-Purdy et al., *supra* note 14, at 1791 (noting that the prevailing “vision of constitutional . . . liberty . . . enshrines structural inequality and economic power” instead of addressing “problems of distribution and power”).

<sup>23</sup> See John F. Manning, *The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5–6 (2014) (arguing that constitutional law should not recognize freestanding principles of separation of powers or federalism but should simply enforce the textually specified rules and otherwise defer to congressionally determined arrangements); see also sources cited *infra* note 87 and accompanying text (canvassing arguments that assert that the proper origin of anti-racist policies is in the legislature). *But see* Redish & Cisar, *supra* note 1, at 475 (“[F]ar from representing a formal separation of law on the one hand and politics and morality on the other, the brand of formalism we advocate is adopted for the very purpose of implementing carefully reasoned political values.”). In addition, a primary mode of constitutional interpretation employed by separation of powers scholars, originalism, has racist origins. *Cf.* Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 822 (2021). Indeed, if courts can be convinced of the fact that originalists gloss over the tyrannical basis of this mode of constitutional interpretation, this might render them more willing to expand anti-racist constitutional jurisprudence. As Professor Jeffrey Pojanowski has asked, “[T]he question for originalists remains whether meaningful separation of powers is possible in our polity today.” Jeffrey A. Pojanowski, *Reconstructing an Administrative Republic*, 116 MICH. L. REV. 959, 978 (2018) (reviewing JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* (2017)).

<sup>24</sup> See generally Matthew D. Adler, *Theory of Prioritarianism*, in *PRIORITARIANISM IN PRACTICE* (Matthew D. Adler & Ole Norheim eds., forthcoming 2022), [https://web.law.duke.edu/sites/default/files/centers/clepp/theory\\_of\\_prioritarianism\\_ssrn\\_posting.pdf](https://web.law.duke.edu/sites/default/files/centers/clepp/theory_of_prioritarianism_ssrn_posting.pdf) [<https://perma.cc/4G4F-HGZ9>] (advocating for “prioritarianism”—a refinement to utilitarianism that gives extra weight (“priority”) to the worse off); ABEL & SEMENTELLI, *supra* note 14 (advocating a focus on justice over other traditions of legal analysis); Britton-Purdy et al., *supra* note 14 (prioritizing issues of power and equality over the conventional fetishization of law and economics).

That the separation of powers canon has neglected to engage in justice studies may be either a cause or an effect of the fact that it is disconnected from equal protection doctrine. And yet, as Professor Rebecca Brown implies, the separation of powers is properly understood as a doctrine designed to protect the rights of individuals.<sup>25</sup> Professor Martin Redish responds that Professor Brown has conflated the interests of individual rights with the obligations of the branches of government under the separation of powers paradigm, which, as noted, is a separate arena of constitutionality.<sup>26</sup> But this criticism overlooks the fact that the same sordid U.S. history and dynamics that have given way to individual-rights jurisprudence also materialize into tyranny. More broadly, the assumption that the divide between the separation of powers and equal protection is justified on its own terms, simply because these fields happened to develop along distinct paths, lacks a critical dimension.

Instead, it is worth entertaining the idea that specific contexts and value judgments forced a separation between these two fields of constitutional studies. And in so doing, scholars might acknowledge certain similarities in the origin or facets of both. Put simply, the problems of racial subordination, subjugation, and violence undergird both. Therefore, when Professor Brown suggests that if “government action is challenged on separation-of-powers grounds, the Court should consider the potential effect of the arrangement on individual due-process interests,”<sup>27</sup> she is implying that the separation of powers framework be deployed to ameliorate the racial dynamics that give rise to individual-rights violations because those same forces also constitute tyranny.

Certainly, the oppression of minorities (in particular, the Black community) is foundational to the canon of constitutional individual and civil rights.<sup>28</sup> Moreover, racialized harm undergirds and pervades both the existence of the federal government and the various dimensions of tyranny that concern separation of powers scholars. As to the former, America “was ‘founded’ on an ideal that all men were created equal, while putting policies and practices in place to eradicate the existence of an Indigenous population

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<sup>25</sup> Brown, *supra* note 6, at 1515–16 (“[T]he Madisonian goal of avoiding tyranny through the preservation of separated powers should inform the Supreme Court’s analysis in cases raising constitutional issues.”).

<sup>26</sup> See Redish & Cisar, *supra* note 1, at 504–05.

<sup>27</sup> See Brown, *supra* note 6, at 1516.

<sup>28</sup> See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 994 (1998); see also Blackhawk, *supra* note 16, at 1791, 1792 n.7 (citing to literature and cases that situate “the Commerce Clause, substantive due process, the Eighth Amendment, the First Amendment, equal protection, fundamental rights, . . . and justiciability,” among others, in “the context of slavery or Jim Crow segregation”).

and perpetuate the transgenerational enslavement of persons of African descent.”<sup>29</sup> As Professor Maggie Blackhawk notes, “It was in the context of its engagement with Native peoples that the United States built and solidified its separation of powers between the branches of the national government.”<sup>30</sup>

As to the latter, the tyranny driving separation of powers discourse has been understood in several ways, all of which manifest in racialized dynamics. Some of the most prominent understandings of tyranny include tyranny of the majority, tyranny as it impacts the functioning of democracy, and tyranny originating in the government focused predominantly on the potential for authoritarian or monarchical rule. Regarding the tyranny of the majority, a white majority (as defined by legal majority, majority by percentage of population, and majority in the electoral college, to name a few) holds longstanding and continuing command over communities of racial minorities both on an individualized and structural basis.<sup>31</sup> As to tyranny as it impacts the functioning of democracy,<sup>32</sup> scholars of the Fourth

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<sup>29</sup> Brian N. Williams & Carmen Williams, *The Past and Present of Racism in the Administrative State*, REGUL. REV. (Oct. 29, 2020), <https://www.theregreview.org/2020/10/29/williams-williams-past-present-racism-administrative-state> [<https://perma.cc/AM38-CJWE>] (advocating for a race-focused “theory of regulatory agencies as protectors of the public”); see also Charles M. Blow, *Is America a Racist Country?*, N.Y. TIMES (May 2, 2021), <https://www.nytimes.com/2021/05/02/opinion/america-racism.html> [<https://perma.cc/7F7P-R3HB>] (stating that “there is no question that the country was founded by racists and white supremacists, and that much of the early wealth of this country was built on the backs of enslaved Africans” and that “much of the early expansion came at the expense of the massacre of the land’s Indigenous people and broken treaties with them”).

<sup>30</sup> Blackhawk, *supra* note 16, at 1816; see also *id.* at 1799 (“The paradigm of federal Indian law offers . . . lessons on which branch is best suited to protect against majority tyranny.”).

<sup>31</sup> Black, Latine, and poor communities, as well as women, are relatively powerless at the federal level compared with white people, men, and the wealthy, based on the understanding that a group is powerless if its policy choices are less likely to be enacted. See Eleanor Brown & June Carbone, *Race, Property, and Citizenship*, 116 NW. L. REV. ONLINE 120, 122 (2021) (arguing that “[t]his legacy [of the racial wealth gap] continues to this day—not just as a product of the continuing consequences of slavery, but also as a cause and consequence of the lack of political clout granted to African-Americans”); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1529 (2015) (arguing that suspect classes in equal protection law are based on an indeterminate concept of political powerlessness); Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1611 (2013) (“While Congress is directly elected by the people to represent their interests, the Constitution’s internal structure—particularly the separation of governmental functions—creates checks on lawmakers and their constituents that are meant to prevent tyrannical majorities from running roughshod over the rights of minorities.”).

<sup>32</sup> See K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552, 1555–56 (2018) (discussing “systemic and chronic ways in which current political and institutional dynamics make genuine democratic equality and participation impossible for many constituencies”).

Amendment,<sup>33</sup> due process,<sup>34</sup> and voting rights<sup>35</sup> have laid bare the extent to which the suppression of racial minorities impacts the democratic norms and values our nation holds dear. And regarding tyranny originating in the government, which is the subject of the rest of this Essay, the Framers purposely established three branches to destabilize the government in order to avoid a replication of the oppressive monarchy from which they had only recently escaped, and which was their main impetus for forming a new nation. The next Part discusses how the presidency engages the dynamics of racial tyranny.

## II. RACIAL TYRANNY FROM THE PRESIDENT

The Founders feared a tyrannical Executive. Arguably, racial tyranny not only forms the basis of the government<sup>36</sup> but also emanates from it<sup>37</sup>—and in particular, from the executive branch.<sup>38</sup> Racial injustice and violence

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<sup>33</sup> See Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 889, 935–42 (2015) (arguing that searches or arrests motivated by race are unreasonable under the Fourth Amendment). See generally Ronnie A. Dunn, *Race and the Relevance of Citizen Complaints Against the Police*, 32 ADMIN. THEORY & PRACTICE 557 (2010) (confronting W.E.B. Du Bois’s “problem of the color line” in policing); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that an analysis of excessive force “should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach”); *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (holding that deadly force may be used only to “prevent the escape [of a suspect] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”).

<sup>34</sup> See Balkin & Levinson, *supra* note 28, at 976–77; Blackhawk, *supra* note 16, at 1791, 1792 n.7.

<sup>35</sup> See, e.g., Jason Morgan Ward, *Georgia’s Voter Law Is Called ‘Jim Crow 2.0’ for a Reason*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/opinion/georgia-voting-law.html> [<https://perma.cc/4438-BX8N>]; Maegan Vazquez & Kate Sullivan, *Biden Calls Georgia Law ‘Jim Crow in the 21st Century’ and Says Justice Department Is ‘Taking a Look,’* CNN (Mar. 26, 2021, 6:31 PM), <https://www.cnn.com/2021/03/26/politics/joe-biden-georgia-voting-rights-bill/index.html> [<https://perma.cc/C4CN-QHGX>].

<sup>36</sup> See *supra* notes 29–30 and accompanying text.

<sup>37</sup> Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (explaining how judicial interpretation can perpetuate racial tyranny); see generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (providing examples of how the American government has imposed racial segregation).

<sup>38</sup> “[C]ritical theory argues that the administrative state is inherently dysfunctional, oppressive and conflict engendering. This is so because administrative organizations are not designed or operated to secure the interests of individuals or groups but to pursue ends and implement decisions originating in society-wide processes of domination.” Abel & Sementelli, *supra* note 10, at 254; see also Kyle Farmbry, *Introduction—Administrative Theory in a Post-Postracial America*, 32 ADMIN. THEORY & PRACTICE 520, 522 (2010) (“From a historical standpoint, how the *other* has been shaped in a broad social discourse has affected the development of policies related to slavery, immigration, Japanese internment, housing segregation, and educational access policies, to name a few areas.”); Jennifer Alexander, *Avoiding the Issue: Racism and Administrative Responsibility in Public Administration*, 27 AM. REV. PUB. ADMIN. 343, 347 (1997) (explaining how the government “can reflect and further legitimate racial hierarchies”);

have been leveraged by the President and his agencies in the name of colonization and expansion;<sup>39</sup> economic stability;<sup>40</sup> and safety,<sup>41</sup> including as it relates to providing security to white people through limitations on citizenship and migration<sup>42</sup> to name a few. (Note that restricting migration and citizenship based on racial criteria, while in the news recently,<sup>43</sup> is nothing new.<sup>44</sup>) The executive branch is supported in this endeavor by

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Philip Hamburger, *Administrative Discrimination*, AM. MIND (Sept. 11, 2020), <https://americanmind.org/memo/administrative-discrimination> [<https://perma.cc/5FLV-A3BL>] (“Though administrative power is shamefully discriminatory, there has long been a refusal even to discuss this . . . Little in America is as historically prejudiced or systematically discriminatory as administrative power.”).

<sup>39</sup> See Mohamad G. Alkadry & Brandi Blessett, *Aloofness or Dirty Hands?: Administrative Culpability in the Making of the Second Ghetto*, 32 ADMIN. THEORY & PRACTICE 532, 532 (2010) (arguing that “the combination of racism and public administration was used to subjugate and control [African-American communities] in British imperialized territories and in urban America”); see also Blackhawk, *supra* note 16, at 1793 (expanding the Black–white dichotomy in U.S. constitutional law to include Native communities).

<sup>40</sup> See Matthew Fowler, Vladimir E. Medenica & Cathy J. Cohen, *Why 41 Percent of White Millennials Voted for Trump*, WASH. POST (Dec. 15, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/15/racial-resentment-is-why-41-percent-of-white-millennials-voted-for-trump-in-2016> [<https://perma.cc/KW4K-Z7AE>] (“[W]hite millennial Trump voters were likely to believe in something we call ‘white vulnerability’ — the perception that whites, through no fault of their own, are losing ground to other groups. Second, racial resentment was the primary driver of white vulnerability — even when accounting for income, education level or employment.”).

<sup>41</sup> See Dunn, *supra* note 33, at 557–58 (analyzing race-based policing).

<sup>42</sup> Scholars have identified President Trump’s Executive Order “Protecting the Nation from Foreign Terrorist Entry into the United States” (which primarily restricts migration for people from Muslim-majority countries) as motivated by racial animus. See Ming Hsu Chen, *Race Masked in Colorblind Administrative Procedures*, REGUL. REV. (Nov. 2, 2020), <https://www.theregreview.org/2020/11/02/chen-race-masked-colorblind-administrative-procedures> [<https://perma.cc/A5GS-BT3Q>]; Aziz Huq, *The “Travel Ban” Executive Order as Separation-of-Powers Test Case*, JUST SEC. (Mar. 10, 2017), <https://www.justsecurity.org/38675/travel-ban-executive-order-separation-of-powers-test-case> [<https://perma.cc/S7L8-VN2C>].

<sup>43</sup> See generally sources cited *supra* note 42.

<sup>44</sup> See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (holding that descendants of slaves were not citizens of the United States); Gabriel J. Chin, *The Blueprint for Dred Scott: United States v. Dow and the Multi-Racial Jurisprudence of White Supremacy* 34 (Feb. 5, 2021) (unpublished manuscript), <https://papers.ssrn.com/a=3790810> [<https://perma.cc/87YH-USJM>] (describing how during World War II, “Asian appearance was made probable cause to arrest,” adding to the weight of immigration policy on Asian immigrants); see, e.g., *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214–15 (1923) (holding that Mr. Bhagat Singh Thind was not eligible for naturalization because, given his Indian ancestry, he did not qualify as a “free white person[]” under the Naturalization Act of 1906); *Ozawa v. United States*, 260 U.S. 178, 190, 195–98 (1922) (holding that Mr. Takao Ozawa was not eligible for naturalization because, given his Japanese ancestry, he did not qualify as a “free white person” under the Naturalization Act of 1906); see also Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 2 (2002) (arguing that the administrative state has origins in the enforcement of a federal policy of Asian exclusion); Mae Ngai, *Racism Has Always Been Part of the Asian American Experience*, ATLANTIC (Apr. 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/we-are-constantly-reproducing-anti-asian-racism/618647>

institutional design<sup>45</sup> and by the administrative policies and processes that govern the implementation and enforcement of law.<sup>46</sup> The head of the executive branch, in particular, has exacerbated the racialized power structures that plague our country today<sup>47</sup> even as agencies themselves have sought to do better.<sup>48</sup>

This Part isolates the tyranny of the President for consideration and also showcases the ways in which the Executive, in particular, serves as a vessel or mouthpiece for tyranny.<sup>49</sup> Presidents including Woodrow Wilson, George H.W. Bush, Ronald Reagan and Donald Trump have interfered with administrative structures to promote race-based dysfunction.<sup>50</sup> This Part focuses on examples from the Trump Administration, which throw into relief the presidency's potential as a source of racial tyranny.<sup>51</sup>

Recently, the President's considerable power of the pulpit and his authority to direct policies have been used to promote racial hierarchy and injustice to an effect that is sometimes at odds with agencies' anti-racism efforts. Examples include statements by President Trump vilifying the

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[<https://perma.cc/6QV8-ER63>] (explaining how Americans have viewed Chinese immigrants as posing a "racial danger").

<sup>45</sup> See Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 16, 2020), <https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani> [<https://perma.cc/BQC5-RJ3T>] (identifying relevant examples of agency design and points of contact between agencies and the public as central to understanding race in administrative law).

<sup>46</sup> "Remarkably little public administration scholarship has explored the dynamic of race as manifest in patterns of policy interpretation and discretionary judgments of individual administrators." Jennifer Alexander & Camilla Stivers, *An Ethic of Race for Public Administration*, 32 ADMIN. THEORY & PRACTICE 578, 578 (2010).

<sup>47</sup> See generally Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549 (2018) (noting that the benefits of presidentialism have been overstated, particularly as they relate to institutional and partisan unification within the executive branch and across the political branches).

<sup>48</sup> See *infra* notes 57–60 and accompanying text.

<sup>49</sup> See generally Emerson & Michaels, *supra* note 15 (cautioning against presidential authoritarianism).

<sup>50</sup> See Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 693–97 (2020) (discussing efforts by Presidents Trump, H.W. Bush, and Reagan to counteract the fostering of civil rights and employment equality); Dylan Matthews, *Woodrow Wilson Was Extremely Racist – Even by the Standards of His Time*, VOX (Nov. 20, 2015, 8:10 AM), <https://www.vox.com/policy-and-politics/2015/11/20/9766896/woodrow-wilson-racist> [<https://perma.cc/BZT9-B35K>] (noting the extensive measures President Wilson took to "re-segregate[] the federal government" and that he was "a vocal defender of the Ku Klux Klan").

<sup>51</sup> See Neil S. Siegel, *The Trump Presidency, Racial Realignment, and the Future of Constitutional Norms*, in AMENDING AMERICA'S UNWRITTEN CONSTITUTION (Richard Albert, Yaniv Roznai & Ryan C. Williams eds., forthcoming 2021) (manuscript at 7–9), <https://papers.ssrn.com/a=3744902> [<https://perma.cc/6FSZ-68KR>] (focusing on the Trump Administration as a racist inflection point); Anthony Michael Kreis, *The New Redeemers*, 55 GA. L. REV. 1483, 1501–05 (2021) (same).

Latine<sup>52</sup> community,<sup>53</sup> Middle Easterners,<sup>54</sup> and other marginalized people.<sup>55</sup> The racialized harm of these statements speaks, to some extent, for itself. Furthermore, the policies enacted as a result of such statements provide concrete evidence of the Executive's potential to exacerbate racial tyranny.

One example of a relevant presidential directive is a Trump-era Executive Order denigrating federal agencies for engaging in diversity and inclusion efforts in order “to combat offensive and anti-American race and sex stereotyping and scapegoating.”<sup>56</sup> Examples of agency efforts that were denounced by this directive included, among others, a Department of the Treasury training on systemic racism,<sup>57</sup> a Smithsonian Institution educational exhibit revealing race-based dynamics underlying the concept of meritocracy,<sup>58</sup> and information from the military suggesting that the United States is “fundamentally racist.”<sup>59</sup> The latter was condemned, in part, because “[s]uch teachings could directly threaten the cohesion and effectiveness of our Uniformed Services.”<sup>60</sup>

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<sup>52</sup> Note that this Essay uses the gender-inclusive term “Latine” instead of the more common “Latinx” because the former is arguably more likely to be used by Spanish-speaking communities themselves. See Jose A. Del Real, *‘Latinx’ Hasn’t Even Caught on Among Latinos. It Never Will.*, WASH. POST (Dec. 18, 2020, 10:31 AM), [https://www.washingtonpost.com/outlook/latinx-latinos-unpopular-gender-term/2020/12/18/bf177c5c-3b41-11eb-9276-ae0ca72729be\\_story.html](https://www.washingtonpost.com/outlook/latinx-latinos-unpopular-gender-term/2020/12/18/bf177c5c-3b41-11eb-9276-ae0ca72729be_story.html) [<https://perma.cc/AS3P-R96C>].

<sup>53</sup> Alexander Burns, *Choice Words from Donald Trump, Presidential Candidate*, N.Y. TIMES: FIRST DRAFT (June 16, 2015, 2:01 PM), <https://www.nytimes.com/politics/first-draft/2015/06/16/choice-words-from-donald-trump-presidential-candidate> [<https://perma.cc/9ZQD-9NLU>] (quoting President Trump: “When Mexico sends its people, they’re not sending their best . . . They’re bringing crime. They’re rapists”); Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants ‘Animals’ in Rant*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html> [<https://perma.cc/HD2K-UK78>].

<sup>54</sup> Jenna Johnson & Abigail Hauslohner, *‘I Think Islam Hates Us’: A Timeline of Trump’s Comments About Islam and Muslims*, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims> [<https://perma.cc/ZB7Y-XQK9>] (noting President’s Trump’s description of Muslim people, ostensibly from the Middle East, as “sick people,” among other disparaging remarks).

<sup>55</sup> See Laignee Barron, *‘A New Low.’ The World Is Furious at Trump for His Remark About ‘Shithole Countries’*, TIME (Jan. 12, 2018, 8:23 AM), <https://time.com/5100328/shithole-countries-trump-reactions> [<https://perma.cc/9B2S-5AZ6>] (describing Haiti, El Salvador, and some African nations as “shithole countries”); Leila Fadel, *Critics Accuse Trump of Using Race to Divide Americans*, NPR (Oct. 9, 2020, 12:01 PM), <https://www.npr.org/2020/10/09/921284261/critics-accuse-trump-of-using-race-to-divide-americans> [<https://perma.cc/HMC3-PT7D>] (noting President Trump’s Tweet referring to COVID-19 as the “Chinese virus”).

<sup>56</sup> Executive Order on Combating Race and Sex Stereotyping, Exec. Order No. 13,950, 85 Fed. Reg. 60,683, 60,683 (Sept. 28, 2020) (characterizing theories recognizing structural racism as “malign ideology [that] is now migrating from the fringes of American society and threatens to infect core institutions of our country”) [hereinafter Exec. Order No. 13,950].

<sup>57</sup> *Id.* at 60,684.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Furthermore, this order led to a memorandum from the White House Office of Management and Budget (OMB) directing agencies to

begin to identify all contracts or other agency spending related to any training on “critical race theory,” “white privilege,” or any other training or propaganda effort . . . [A]ll agencies should begin to identify all available avenues within the law to cancel any such contracts and/or to divert Federal dollars away from these un-American propaganda training sessions.<sup>61</sup>

These directives, deemed the “1776 Commission,” were part of a larger effort to crack down on anti-racism protests.<sup>62</sup> To accomplish this objective, they rejected the assertion that the United States “is grounded in hierarchies based on collective social and political identities.”<sup>63</sup> Instead, these directives declared,

This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country . . . [and] grounded in misrepresentations of our country’s history and its role in the world.<sup>64</sup>

On this basis, these White House initiatives inhibited administrative efforts to root out racial hierarchies and inequality.

In addition, former President Trump established a “Commission on Law Enforcement and the Administration of Justice” (Commission) to “study issues related to law enforcement and the administration of justice.”<sup>65</sup>

<sup>61</sup> Memorandum from Russell Vought, Dir., Off. of Mgmt. & Budget, Exec. Off. of the President, to the Heads of Exec. Dep’ts and Agencies 2 (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf> [<https://perma.cc/W9RK-QVZP>] (“The divisive, false, and demeaning propaganda of the critical race theory movement is contrary to all we stand for as Americans and should have no place in the Federal government.”).

<sup>62</sup> See Michael Crowley & Jennifer Schuessler, *Trump’s 1776 Commission Critiques Liberalism in Report Derided by Historians*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/18/us/politics/trump-1776-commission-report.html> [<https://perma.cc/SL2A-TW9T>]; Brianna Rauenzahn, *Whose American History?*, REGUL. REV. (Dec. 29, 2020), <https://www.theregreview.org/2020/12/29/rauenzahn-whose-american-history/> [<https://perma.cc/XH2F-QHRT>].

<sup>63</sup> Exec. Order No. 13,950, 85 Fed. Reg. at 60,683.

<sup>64</sup> *Id.* Shamefully, this directive draws on the protests and marches at Montgomery and Selma, the words of Dr. Martin Luther King, Jr., and other notable history to distort the goals of racial justice and equality, which include a reckoning with longstanding and systemic oppression. *See id.*

<sup>65</sup> Executive Order on Commission on Law Enforcement and the Administration of Justice, Exec. Order No. 13,896, 84 Fed. Reg. 58,595, 58,595–96 (Nov. 1, 2019) [hereinafter Exec. Order No. 13,896]. The Commission is authorized, among other things, to:

[H]ost listening sessions and otherwise solicit input from a diverse array of stakeholders in the area of criminal justice, including State, local, and tribal law enforcement agencies and organizations; government service providers; businesses; nonprofit entities; public health experts; victims rights’ organizations; other advocacy and interest groups; reentry experts; academia; and other public and private entities and individuals with relevant experience or expertise.

*Id.* at 58,596.

Based on its research, the Commission is authorized to “make recommendations to the Attorney General . . . [and] the President on actions that can be taken to prevent, reduce, and control crime, increase respect for the law, and assist victims.”<sup>66</sup> Despite the historical, ongoing, and brutally violent treatment of the Black community by law enforcement at all levels of the government—a dramatic manifestation of racial tyranny, to be sure—not once in the memo do the words “race,” “racial,” “Black,” “equality” or even “equal justice” appear. In other words, this presidential directive neglects to pursue solutions to the racialized violence, inequality, and injustice rife in criminal law enforcement, choosing instead to focus on the protection of law enforcement officers at the expense of justice for racial minorities. For example, the directive advocates for “the use of targeted deterrence approaches to reduce violent crime,”<sup>67</sup> notwithstanding the ways in which targeted deterrence, such as “stop-and-frisk” measures, increase race-based violence from law enforcement.<sup>68</sup> The directive also emphasizes “the recruitment, hiring, training, and retention of law enforcement officers,” condemns “refusals by State and local prosecutors to enforce laws or prosecute categories of crimes,” and advocates for both a “need to promote public respect for the law and law enforcement officers,” and “efforts to reduce crime and ease the burden on law enforcement.”<sup>69</sup>

The demonstrated administrative benefits of diversity and inclusion<sup>70</sup> cast doubt on the value of President Trump’s antiawareness initiatives<sup>71</sup> and suggest as well that his Commission exacerbates race-based exclusion and subordination as a result of a lack of transparency in its proceedings.<sup>72</sup> Indeed, the former President neglected to appoint diverse members to the Commission,<sup>73</sup> including advocates of racial justice. Rather, the Commission “consists entirely of current and former law enforcement officials,” none of whom have “a criminal defense, civil rights, or community organization background,”<sup>74</sup> despite the Attorney General’s own claim that “diversity of

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<sup>66</sup> *Id.* at 58,595–96.

<sup>67</sup> *See id.* at 58,596.

<sup>68</sup> Trevor George Gardner, *Police Violence and the African American Procedural Habitus*, 100 B.U. L. REV. 849, 872–76 (2020).

<sup>69</sup> Exec. Order No. 13,896, 84 Fed. Reg. at 58,596.

<sup>70</sup> *See, e.g.*, U.S. SEC, DIVERSITY AND INCLUSION STRATEGIC PLAN, FISCAL YEARS 2020–2022, at 4, [https://www.sec.gov/files/2020\\_Diversity\\_and\\_Inclusion\\_Strategic\\_Plan.pdf](https://www.sec.gov/files/2020_Diversity_and_Inclusion_Strategic_Plan.pdf) [<https://perma.cc/76WT-WHZ9>] (“Research demonstrates that organizations with a diverse workforce, especially within the senior management ranks, outperform their peers over time.”).

<sup>71</sup> *See supra* notes 56–64 and accompanying text.

<sup>72</sup> *See* NAACP Legal Def. & Educ. Fund, Inc. v. Barr, 496 F. Supp. 3d 116, 122–23 (D.D.C. 2020) (noting that “Commission proceedings have been far from transparent”).

<sup>73</sup> *See id.* at 122.

<sup>74</sup> *Id.*

backgrounds and perspectives” is important to the Commission’s mandate.<sup>75</sup> According to one district court judge:

Especially in 2020, when racial justice and civil rights issues involving law enforcement have erupted across the nation, one may legitimately question whether it is sound policy to have a [Commission] with little diversity of experience examine, behind closed doors, the sensitive issues facing law enforcement and the criminal justice system in America today.<sup>76</sup>

Beyond their consequences for expert and sound administration and policy, these purposeful efforts by former President Trump to diminish awareness and equal access also contribute to the perpetuation of racial tyranny.

### III. GALVANIZING THE INTERNAL SEPARATION OF POWERS

Racial tyranny may result, as the previous Part suggests, from both presidential animus and the President’s exacerbation of unequal power structures in society. Professor Daryl Levinson argues that “[e]qualizing power among interests and groups in society is a more worthwhile project than checking, balancing, and equalizing power among governmental institutions. In the latter, [Levinson] concludes, ‘it is hard to see any spark.’”<sup>77</sup> However, when it is a governmental institution—in particular, the presidency—that perpetuates racial tyranny, the latter (intergovernmental checks and balances) could improve the former (unequal power among groups in society). In other words, the “idealizing dimension” of structural constitutionalism could be applied to “transform reality.”<sup>78</sup>

More specifically, this Part suggests the need for powerful judicial and legislative action to empower *agencies* to check the Executive through measures that strengthen the capacity of the administrative state to stave off presidents’ base impulses. The U.S. bureaucracy is relatively representative and diverse,<sup>79</sup> and there are perhaps as many pathways in the executive branch for ameliorating racial subordination as there are for perpetuating it. In contrast, the presidency’s ability to resist engagement in racial tyranny is highly dependent on who the President is and the values that person

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<sup>75</sup> *Id.* at 124 (quoting Implementation Memorandum from William Barr, U.S. Att’y Gen., DOJ, to Heads of Dep’t Components 2 (Jan. 21, 2020), <https://www.justice.gov/ag/page/file/1236906/download> [<https://perma.cc/J9AE-NSXS>]).

<sup>76</sup> *Id.* at 122.

<sup>77</sup> Andrias, *supra* note 11, at 1 (citing Levinson, *supra* note 1, at 142–43).

<sup>78</sup> See Gewirtz, *supra* note 17, at 681 (suggesting that legal ideals can be used to transform reality).

<sup>79</sup> See Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1655, 1661 (2018) (arguing that “the American bureaucracy serves an important, salutary, and quite possibly necessary role in safeguarding our constitutional commitments and enriching our public policies”).

espouses. Notably, the incubation of anti-racism in agencies may be thwarted by the fact that the President is a unilateral, single actor who enjoys significant enforcement discretion and deference from the judiciary particularly on matters important to race.

Nonetheless, agencies have endogenous capacity to maintain checks against the President.<sup>80</sup> Instead, the problems of racial injustice, including those aggravated by the President, have long been left to the legislature—via the passage of marginalized legislation—and to the judiciary—via increasingly weak defenses of the Constitution.

To better constrain the President despite the perils of drift, Congress could move beyond isolated moments of progressive policymaking to engage and empower agencies with greater permanence across areas of regulation. Courts could engage more in identifying the racialized intent<sup>81</sup> and repercussions of presidential statements and directives, including their impact on administrative action, and revitalize their efforts to limit the consequences. In addition, the White House itself has untapped capacity to fortify the administrative state against future presidents' engagement in race-based tyranny.

#### A. *Legislating an Anti-Racist Bureaucracy*

The legislature has been, perhaps, the branch most consistently involved in the furtherance of racial equality.<sup>82</sup> Courageous advocacy and moments of dire crisis have led to hard-won, watershed civil rights legislation which in turn has created agencies and agency subcomponents that nurture, albeit imperfectly, progressive values in certain quadrants of

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<sup>80</sup> See Bijal Shah, Response, *Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. ONLINE 1, 6 (2017).

<sup>81</sup> See Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1372–73 (2019) (advocating for a framework by which courts might evaluate presidential intent).

<sup>82</sup> One notable example is the Voting Rights Act, which the Supreme Court has gutted. See Nina Totenberg, *The Supreme Court Deals a New Blow to Voting Rights, Upholding Arizona Restrictions*, NPR (July 1, 2021, 4:37 PM), <https://www.npr.org/2021/07/01/998758022/the-supreme-court-upheld-upholds-arizona-measures-that-restrict-voting> [<https://perma.cc/5GCU-E57V>]; Ian Millhiser, *The Supreme Court Is About to Hear Two Cases That Could Destroy What Remains of the Voting Rights Act*, VOX (Mar. 2, 2021, 8:59 AM), <https://www.vox.com/22286213/supreme-court-voting-rights-act-arizona-brnovich-democratic-national-committee-republican-party> [<https://perma.cc/WQ42-2AVU>]; Mark Sherman, *Supreme Court Could Put New Limits on Voting Rights Lawsuits*, AP NEWS (Feb. 28, 2021), <https://apnews.com/article/supreme-court-voting-rights-lawsuits-c9ab7a4b332667f2858936f5cc133748> [<https://perma.cc/4Z86-Y94Z>]; Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html> [<https://perma.cc/K3G9-5RDG>].

public law and society.<sup>83</sup> And yet, intense advocacy by private citizens in the wake of catastrophe has led, in some cases, to a network of agencies that are either wholly, but only narrowly, focused on inequality,<sup>84</sup> ignore it altogether, or even appear facially neutral but enshrine racial hierarchy.<sup>85</sup> The account of Congress as the rightful originator of policy furthering racial equality<sup>86</sup> also obscures periods in which a racist “stranglehold on Congress diverted the response from the legislative to the executive branch.”<sup>87</sup>

This Section argues that Congress’s responsibility to battle the entrenchment of racial tyranny in the government requires a more widely dispersed approach—and notably, one that arms sentries within the executive branch. For this reason, Congress must engage in lawmaking that cuts across various areas of regulation instead of focusing only on passing topical, blockbuster legislation alone. More sweeping exercises of legislative power could create impetus and elbow room for a concerted administrative effort to root out and eradicate racial tyranny—in particular, by forcing agencies to prioritize matters of racial injustice across areas of governmental regulation

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<sup>83</sup> Examples include the Civil Rights Act of 1957, which led to the creation of the Commission on Civil Rights and the Civil Rights Division of the Department of Justice, and the Civil Rights Act of 1964, which led to the creation of the Equal Employment Opportunity Commission. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 U.S.C., 42 U.S.C., and 52 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). Another example is the Fair Housing Act of 1968. This legislation, which was meant to be a direct follow-up to the Civil Rights Act of 1964, was passed “through a racist Congress” only as a result of the outcry in the wake of the assassination of Martin Luther King, Jr. DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST (Apr. 11, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed> [https://perma.cc/5US7-YRJL]. The Fair Housing Act created the Office of Fair Housing and Equal Opportunity. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619). Other examples include the Clean Air Act, which empowered the Environmental Protection Agency, and the Department of Housing and Urban Development, which was established as a cabinet department by the Department of Housing and Urban Development Act as part of President Lyndon B. Johnson’s “War on Poverty.” Air Pollution Control Act of 1955, ch. 360, 69 Stat. 322 (codified as amended at 42 U.S.C. §§ 7401–7671q); Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965) (codified as amended at 42 U.S.C. §§ 3531–3537c); *Questions and Answers About HUD*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.hud.gov/about/qaintro> [https://perma.cc/4XDC-SHPF].

<sup>84</sup> Some examples of these agencies are the Commission on Civil Rights and the EEOC.

<sup>85</sup> See generally Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757 (2013) (recommending changes at the Environmental Protection Agency to improve its “dismal record” of enforcing Title VI of the Civil Rights Act of 1964).

<sup>86</sup> See sources cited *supra* note 23.

<sup>87</sup> Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1736 (2019) (first citing MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 82–83 (2000); and then citing IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA*, at x, xv (2005)).

instead of relegating them to the handful of administrative bodies enabled by civil rights law.<sup>88</sup> In addition, legislation that disperses the burden of ousting racial tyranny across agencies fortifies the administrative state against a presidential administration that exacerbates such tyranny.

Congress has previously enacted sweeping reform to pursue other goals. Such efforts offer a model for legislation that could stave off racial tyranny in the executive branch. For instance, “[i]n 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act . . . in response to concerns expressed by the small business community that Federal regulations were too numerous, too complex and too expensive to implement.”<sup>89</sup> As a result of this legislation, several agencies across disparate regulatory areas are required to consider whether their regulations and other policies will negatively impact small businesses.<sup>90</sup> This is the case even in regards to the implementation of laws that do not, on their face, concern interests of small businesses.<sup>91</sup>

Admittedly, the benefit of these policies to small businesses is unclear. For instance, it is possible that this type of legislation has lent itself to exploitation by large corporations at the expense of small business owners.<sup>92</sup> However, small business interests have become a metric by which agencies calculate the value of their policies, at least to some extent.<sup>93</sup> Congress could

<sup>88</sup> See *supra* note 83.

<sup>89</sup> *Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/smallbusiness/sbrefa> [<https://perma.cc/3TJL-GSXJ>].

<sup>90</sup> *Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., <https://advocacy.sba.gov/resources/reference-library/sbrefa> [<https://perma.cc/D8F3-ZD28>] (noting that the Consumer Financial Protection Bureau, Environmental Protection Agency, and the Occupational Safety and Health Administration must convene Small Business Advocacy Review panels before proposing rules that would have a substantial effect on a significant number of small entities).

<sup>91</sup> See, e.g., *id.* (noting that Small Business Advocacy Review panels have been convened for review of proposed rules like “Tuberculosis,” “Ergonomics Program Standard,” and “Arsenic in Drinking Water”).

<sup>92</sup> For instance, the “so-called Paycheck Protection Program was supposed to help prevent small companies — generally those with fewer than 500 employees in the United States — from capsizing as the economy sinks into what looks like a severe recession.” Jessica Silver-Greenberg, David Enrich, Jesse Drucker & Stacy Cowley, *Large, Troubled Companies Got Bailout Money in Small-Business Loan Program*, N.Y. TIMES, (May 13, 2020), <https://www.nytimes.com/2020/04/26/business/coronavirus-small-business-loans-large-companies.html> [<https://perma.cc/532M-2SYH>]. Instead, large companies have taken advantage of it, with some returning their loans after a public outcry. See *id.*; Stephen Gandel, *Paycheck Protection Program Billions Went to Large Companies and Missed Virus Hot Spots*, CBS NEWS (Apr. 20, 2020, 12:54 PM), <https://www.cbsnews.com/news/paycheck-protection-program-small-businesses-large-companies-coronavirus/> [<https://perma.cc/2K9F-STN7>].

<sup>93</sup> Bipartisan support for legislation supporting small businesses suggests it is perceived as effective. See Zachary Warmbrodt, *Lawmakers Strike Bipartisan Deal to Extend Small-Business Loan Program*, POLITICO (March 11, 2021, 6:38 PM), <https://www.politico.com/news/2021/03/11/congress-small-business-loan-program-extension-475294> [<https://perma.cc/N4LU-6GK3>].

engage in similar lawmaking to require agencies across the federal government to take stock of whether their actions exacerbate racial inequality.

Congress could also foster accountability measures similar to those required by the National Environmental Policy Act (NEPA) (commonly viewed as the “Magna Carta” of U.S. environmental law<sup>94</sup>). For instance, legislation could require “racial justice impact statements,” similar to the environmental impact statements that agencies must issue per NEPA to justify their actions (notwithstanding the potential and existing interest group and bureaucratic backlash against these sorts of requirements and both sets of broader goals).<sup>95</sup> Once compelled to issue such statements, agencies might more consistently seek to assess whether proposed actions would reduce or advance racial equality, which could, in turn, encourage those agencies to be more open to promoting racial justice (or at least, to not actively reinforcing injustice). In addition, transparent and detailed administrative statements and actions could give courts access to a record that allows for improved and increased judicial review.<sup>96</sup>

Finally, it is worth noting that Congress has made gentle efforts to further racial equality across areas of regulation.<sup>97</sup> For instance, under the

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<sup>94</sup> “Conservationists like to call the National Environmental Policy Act the ‘Magna Carta’ of environmental law” because “[i]t requires agencies to analyze and disclose the extent to which proposed federal actions or infrastructure projects affect the environment, from local wildlife habitat to the projected levels of greenhouse gas emissions that cause climate change.” Lisa Friedman, *Trump Weakens Major Conservation Law to Speed Construction Permits*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2020/07/15/climate/trump-environment-nepa.html> [<https://perma.cc/9KD8-CJCC>]; see also Amanda Jahshan, *NEPA: The Magna Carta of Environmental Law*, NRDC (July 26, 2013), <https://www.nrdc.org/experts/amanda-jahshan/nepa-magna-carta-environmental-law> [<https://perma.cc/YUB4-CPH5>] (demonstrating that NEPA is known internationally as the “Magna Carta” of environmental law).

<sup>95</sup> 42 U.S.C. § 4332(C).

<sup>96</sup> See Daniel B. Listwa & Lydia K. Fuller, *Constraint Through Independence*, 129 YALE L.J. 548, 600–01 (2019); Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 926–27 (2009).

<sup>97</sup> See, e.g., *Waters, Warren and Gillibrand Introduce Legislation Requiring the Fed to Close Racial Employment and Wage Gaps*, U.S. HOUSE COMM. ON FIN. SERVS. (Aug. 5, 2020), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406829> [<https://perma.cc/X2MX-ER2E>] (describing legislation introduced by Congresswoman Waters and Senators Warren and Gillibrand “to require the Federal Reserve to use its existing authorities to close racial employment and wage gaps”); *Booker Reintroduces Sweeping Environmental Justice Bill*, CORY BOOKER (July 24, 2019), <https://www.booker.senate.gov/news/press/booker-reintroduces-sweeping-environmental-justice-bill> [<https://perma.cc/XLP2-XBDU>] (describing legislation introduced by Senator Booker that addresses environmental injustice); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1541, 1543 (2010) (codified as amended at 12 U.S.C. §§ 5301–5641) (mandating that financial agencies including the SEC, Treasury, Federal Reserve, Consumer Financial

Federal Advisory Committee Act (FACA), “federal advisory committees [must] be ‘fairly balanced’ in the viewpoints represented,”<sup>98</sup> among other provisions that foster fair and transparent committee proceedings and outcomes.<sup>99</sup> At the very least, recent events suggest that this legislation may be employed to encourage adequate diversity and inclusion in policymaking that impacts racial justice.<sup>100</sup> More specifically, a presidential directive hampering diversity and inclusion efforts could be deemed unlawful in light of legislation mandating that agencies allow advocates seeking racial justice to be allowed a seat at the table,<sup>101</sup> which in turn suggests that such legislation furthers antityranny objectives.

Alas, the initiation of legislative efforts to improve racial parity will require progressive support under any rubric. After all, anti-racism is not yet a bipartisan value.<sup>102</sup> For the proposals in this Section to come to fruition, mechanisms of voting and representation must allow for the election of lawmakers who implement explicitly anti-racist and racial justice policies, and courts must defer to legislative enactments burdening politically powerful groups instead of primarily to democratically enacted laws that burden politically powerless minority groups.<sup>103</sup> Even then, there remain drawbacks to legislation that depend largely on the action of private actors.<sup>104</sup>

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Protection Board, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, and others “develop standards for . . . equal employment opportunity and the racial, ethnic, and gender diversity of the workforce and senior management of the agency,” as well as file yearly, publicly available reports with Congress on their activities on this front).

<sup>98</sup> NAACP Legal Def. & Educ. Fund, Inc. v. Barr, 496 F. Supp. 3d 116, 122 (D.D.C. 2020) (citing 5 U.S.C. app. 2 §§ 1–16).

<sup>99</sup> *Id.* (citing requirements such as “that meetings be open and publicly noticed, that a charter be prepared and filed, and that a designated federal officer be appointed to ensure compliance with FACA”).

<sup>100</sup> See *supra* notes 89–94 and accompanying text.

<sup>101</sup> See *infra* notes 110–114 and accompanying text.

<sup>102</sup> See Michael Tesler, *Republicans and Democrats Agree on the Protests but Not Why People Are Protesting*, FIVETHIRTYEIGHT (June 17, 2020, 6:00 AM), <https://fivethirtyeight.com/features/republicans-and-democrats-increasingly-agree-on-the-protests-but-not-why-people-are-protesting> [<https://perma.cc/3VHF-MTUF>] (noting that less than forty percent of Republicans think there is a problem with systemic racism in America compared with close to ninety percent of Democrats); Blow, *supra* note 29.

<sup>103</sup> See Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1609 (2013) (arguing that conservative constitutional decisions coming from the Supreme Court recently are the result of a public choice conception in which the Court presumes minorities to be too politically powerful, which has led to a judicial distrust of democratic politics).

<sup>104</sup> See Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1194 (2011) (suggesting that the fact that “civil rights gains . . . powerfully depend on the ability of private groups to harness a broad range of federal powers” has contributed to the inefficacy of the Fair Housing Act’s enforcement regime).

Regardless, the extent to which Congress fulfills its duty to check tyranny should ideally not be reliant on partisan advocacy. Perhaps some conservatives who are otherwise resistant to “burdening” the polity by expanding individual rights under the Constitution can be convinced that the Executive poses a salient threat of tyranny. If so, this contingent might be willing to break rank with unitary executive theorists and even anti-administrativists to allow for the possibility of buttressing agencies to constrain the President (as opposed to empowering agencies to increase their regulation of the public).

### *B. Judicial Harnessing of Executive Anti-Racism*

A continuing justification for deprioritizing or opposing judicial efforts to protect minorities contends that individual rights policies are the domain of the democratically accountable legislative branch, rather than the courts<sup>105</sup> even though this perspective may have roots in racial tyranny. Indeed, the judiciary may have been kept subservient to the political branches precisely to hinder its potential to serve as a strong bulwark against racial tyranny motivated by political self-interest.<sup>106</sup> In any case, the courts have not engaged in the type of oversight required to ensure that the law is administered with an eye towards racial equality<sup>107</sup> since the mid-twentieth

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<sup>105</sup> See Aaron Tang, *Rethinking Political Power in Judicial Review*, 106 CALIF. L. REV. 1755, 1825 (2018) (arguing that “legislative enactments burdening politically powerful groups hold a special kind of democratic and institutional pedigree that courts should take into account”); Manning, *supra* note 23, at 4–5; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2097 (2002). This view holds that courts may draw on constitutional equal protection law but only when the “first two lines of defense against majority faction could prove to be unavailing.” Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 541 (1994) (explaining that “[b]ecause both the legislative and executive authorities are still answerable to the electorate, these first two lines of defense against majority faction could prove to be unavailing” and thus “when the influence of majority faction manages to slip through the first two safety nets, the more politically independent federal judiciary steps in to ensure these constitutionally ‘entrenched’ rights of minorities”).

<sup>106</sup> See Blackhawk, *supra* note 16, at 1816 (explaining that “[w]ith respect to horizontal separation of powers, the growth of national power concentrated into the Congress and the Executive, leaving behind the only branch that did not follow the others out West — that is, the judiciary” and that “[a] weak federal judiciary ensured that the Court would not hold power against full-throated opposition by the political branches — especially in resolving questions of constitutional values”).

<sup>107</sup> See Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1135–36 (2021) (discussing how courts shifted from a benign view of agencies after the passage of the Administrative Procedure Act into a public choice conception of agencies in the 1960s based on the view that agencies had, at that point, “failed to discharge their respective mandates to protect the interests of the public in their given fields of administration,” and noting that strong judicial oversight of agencies in the 1960s and 1970s has since petered out (quoting Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975))); Tang, *supra* note 105, at 1765 (“[D]espite a clear opportunity to revive the political powerlessness doctrine as a tool for heightened judicial scrutiny,

century.<sup>108</sup> If Madison’s philosophy of division and balance is an exhortation to all the branches of government, the judiciary is both authorized and obligated to participate in limiting tyrannical entrenchments of power in the government. To be deployed effectively against racialized tyranny, the separation-of-powers framework must be rebalanced so that it no longer favors strengthening the political branches at the expense of the judiciary.<sup>109</sup>

To this end, the judiciary should reanimate a more controlling approach to agency oversight to center racial justice in the executive branch. The courts could assert that they are authorized by the Constitution to intervene on this front as they have in the past.<sup>110</sup> Complementarily, judicial efforts to counteract racial tyranny could also be accomplished via robust statutory interpretation that animates agencies to engage in behavior that induces greater racial parity. As noted earlier, the NAACP Legal Defense Fund recently brought suit arguing that the President’s Commission on Law Enforcement and the Administration of Justice fails to meet the requirements of FACA.<sup>111</sup> As of now, a federal court has granted summary judgment on this claim and ordered “that Commission proceedings be halted—and no work product released—until the requirements of FACA are satisfied.”<sup>112</sup> In this way, the judiciary has constrained, at least to some degree, the discretion of the President to choose not to foster an equality-based approach. More

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the Court has not recognized a new suspect class since the early 1970s.”); *see also* Ross, *supra* note 103, at 1565 (“A Court once active in structuring the democratic process to be inclusive of racial and other minorities, now views minority representation in the political process as essentially irrelevant.”); *id.* at 1590 (“[T]he Court’s equal protection jurisprudence was transformed: a doctrine reflecting greater trust of democratic institutions in their treatment of minorities replaced the earlier Courts’ doctrines of distrust.”).

<sup>108</sup> *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding that a Virginia statute preventing interracial marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding the Civil Rights Act of 1964 and its application to private businesses that affect interstate commerce); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that segregation in public education “is a denial of the equal protection of the laws”); *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948) (holding that restrictive covenants in housing based on race violated the Equal Protection Clause of the Fourteenth Amendment); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (overturning the conviction of the “Scottsboro Boys” and guaranteeing counsel in both federal and state courts).

<sup>109</sup> *See supra* note 106 and accompanying text.

<sup>110</sup> Shah, *supra* note 107, at 1166; *see also* Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 803–04 (2010) (using the history of equal employment rulemaking to illustrate how the agency’s constitutional practice was guided by courts).

<sup>111</sup> *See supra* notes 73–76 and accompanying text.

<sup>112</sup> NAACP Legal Def. & Educ. Fund, Inc. v. Barr, 496 F. Supp. 3d 116, 122 (D.D.C. 2020). More generally, the court disagrees with the government’s contention that the Commission is exempt from FACA. *Id.*

legislation of the sort prescribed in Section III.A would provide fodder for the judiciary to realize this goal.

In another vein, a federal court granted in part a nationwide injunction against Trump’s Executive Order 13950 which shut down several agencies’ diversity initiatives.<sup>113</sup> The plaintiffs, who “provide advocacy and training to health care providers, local government agencies, local businesses, and their own employees about systemic bias, racism, anti-LGBT bias, white privilege, implicit bias, and intersectionality,” brought suit “to challenge the constitutionality of Executive Order 13950, which they contend has unlawfully labeled much of their work as ‘anti-American propaganda.’”<sup>114</sup> In granting the injunction, the court reiterated that doing so is in the public interest.<sup>115</sup> Finally, scholars have implied that judicial review, under the Administrative Procedure Act for instance, could be used to check presidential racial animus.<sup>116</sup>

### C. *Presidential Entrenchment of Internal Checks*

Thus far, this Part has argued that the bureaucracy may be galvanized against Executive actions that foster race-based tyranny by complementary legislative and judicial efforts. And yet, the presidency too has overlooked its potential to ameliorate racialized governmental dysfunction.<sup>117</sup> The President has the ability to entrench new administrative practices and shifts in agency culture, albeit slowly<sup>118</sup>—or at least, she can choose not to disable agency attempts to do so themselves<sup>119</sup>—in order to reinforce agencies as a bulwark against future wayward presidentialism. This Section suggests that instead of spouting vitriol,<sup>120</sup> neglecting to consider the diversity of

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<sup>113</sup> See *supra* notes 56–64 and accompanying text.

<sup>114</sup> Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 528 (N.D. Cal. 2020).

<sup>115</sup> See *id.* at 535 (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

<sup>116</sup> See Huq, *supra* note 42; Chen, *supra* note 42; Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1565 (1995).

<sup>117</sup> See, e.g., James Goodwin & Amy Sinden, *Progressive Regulatory Reform Recommendations for the Biden-Harris Administration*, REGUL. REV. (Dec. 21, 2020), <https://www.theregreview.org/2020/12/21/goodwin-sinden-progressive-regulatory-reform-recommendations-biden-harris-administration> [<https://perma.cc/SRZ8-ESXK>] (issuing a set of progressive recommendations for the Biden-Harris Administration, but nonetheless failing to highlight how those recommendations might improve racial justice).

<sup>118</sup> See Cass R. Sunstein, *Here’s How Executive Orders Actually Work (Hint: Slowly)*, BLOOMBERG: QUINT (Nov. 12, 2020, 11:37 PM), <https://www.bloombergquint.com/business/executive-orders-don-t-take-shape-overnight> [<https://perma.cc/DC9F-VC8M>].

<sup>119</sup> See Emerson & Michaels, *supra* note 15, at 418 (arguing that empowering the federal bureaucracy could render agencies “potential counterweights if and when the White House pushes reckless initiatives”).

<sup>120</sup> See *supra* notes 47–55 and accompanying text.

perspectives required to dismantle systemic racism,<sup>121</sup> or squandering the authority to direct the Attorney General to pursue racial justice,<sup>122</sup> presidents could both discontinue and even rebuke the pursuit of administrative policies that reinforce racial tyranny. In addition, the President could proactively issue directives and make personnel decisions to tamp down racial inequity.

On the surface, this recommendation is inconsistent with the goals of the separation of powers. Empowering the President for any reason, even to reduce racial dysfunction, may appear to encourage presidential unilateralism, which is arguably the antithesis of a healthy separation of powers. However, the intention of this prescription is not to produce, permanently, a more robust concentration of presidential power. Rather, this suggestion harnesses the President's capacity to distribute and diffuse power within the executive branch away from herself<sup>123</sup> in order to enhance executive agencies' potential to act as a check against him and any future resident of the White House.

Even if presidents do not take more active measures, at the absolute minimum, presidents should refrain from employing the bully pulpit or interfering in ground-level administrative policies in a manner that exacerbates racial injustice and should also engage in rhetoric in support of racial harmony. For instance, after the change in administration this year, President Joseph Biden issued statements that explicitly pursue improved racial equality and representative diversity including by abolishing the previous President's "1776 Commission,"<sup>124</sup> condemning racist rhetoric,<sup>125</sup> and supporting greater access to fair housing<sup>126</sup> and a reduction in incarceration,<sup>127</sup> both of which could also contribute to racial justice.

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<sup>121</sup> See *supra* notes 56–64 and accompanying text.

<sup>122</sup> See *supra* notes 66–77 and accompanying text.

<sup>123</sup> See Emerson & Michaels, *supra* note 15, at 422 (advocating for a move from presidential administration to "civic administration").

<sup>124</sup> Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf> [<https://perma.cc/E3VM-2G8F>].

<sup>125</sup> Memorandum on Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States, 86 Fed. Reg. 7,485 (Jan. 29, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02073.pdf> [<https://perma.cc/CP94-4YAS>].

<sup>126</sup> Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487 (Jan. 29, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02074.pdf> [<https://perma.cc/H2EY-68R3>].

<sup>127</sup> Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14,006, 86 Fed. Reg. 7,483 (Jan. 29, 2021),

This type of speech, similar to the language employed by previous presidents,<sup>128</sup> is a “decent but limited start.”<sup>129</sup> The White House could go further to entrench a changed administrative approach by directing administrative coordination, regulatory action, guidance, prioritized enforcement of the law, or through other policies.<sup>130</sup> By employing these capacities, the President could lead the effort to foster a “new administrative state . . . dependent on regulatory agencies and public administrators who are anti-racists and who seek to create and promote a fair, just, and equitable approach to public administration to safeguard those who have traditionally been seen as the least of these within our society.”<sup>131</sup> Examples include lifting the Trump administration’s restrictions on consent decrees<sup>132</sup> (court-ordered agreements between local law enforcement departments and the Department

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<https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02070.pdf> [<https://perma.cc/5VMW-YPZ6>].

<sup>128</sup> See, e.g., Executive Order to Prohibit Discrimination in Federal Employment Based on Genetic Information, Exec. Order No. 13,145, 65 Fed. Reg. 6,877 (Feb. 10, 2000) (prohibiting employment discrimination by President Clinton), <https://www.govinfo.gov/content/pkg/FR-2000-02-10/pdf/00-3331.pdf> [<https://perma.cc/GDH9-WQDE>]; Executive Order on Equal Employment Opportunity, Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965), [https://archives.federalregister.gov/issue\\_slice/1965/9/28/12315-12325.pdf#page=5](https://archives.federalregister.gov/issue_slice/1965/9/28/12315-12325.pdf#page=5) [<https://perma.cc/3CMG-F7N3>] (initiating affirmative action by President Johnson); Executive Order Establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Services, Exec. Order No. 9,981, 13 Fed. Reg. 4,313 (July 28, 1948) (desegregating military by President Truman).

<sup>129</sup> *Morning Edition: Unpacking Biden’s Executive Orders Advancing Racial Equity and Tribal Sovereignty*, (NPR radio broadcast Jan. 29, 2021), (transcript available at <https://www.npr.org/2021/01/29/961969970/unpacking-bidens-executive-orders-advancing-racial-equity-and-tribal-sovereignty> [<https://perma.cc/9MJA-J2X9>]); see Aamer Madhani, *Biden Orders Justice Dept. to End Use of Private Prisons*, AP NEWS (Jan. 26, 2021), <https://apnews.com/article/joe-biden-race-and-ethnicity-prisons-coronavirus-pandemic-c8c246f00695f37ef2afb1dd3a5f115e> [<https://perma.cc/8HYT-LGVG>] (noting statement by the director of the American Civil Liberties Union’s National Prison Project that the executive order ending the use of private prisons “is an important first step toward acknowledging the harm that has been caused and taking actions to repair it, but President Biden has an obligation to do more, especially given his history and promises”).

<sup>130</sup> See Revesz, *supra* note 13, at 1556–66 (noting that the President has significant powers to centralize, spend, and coordinate).

<sup>131</sup> See Williams & Williams, *supra* note 29.

<sup>132</sup> Katie Benner, *Justice Dept. Restores Use of Consent Decrees for Police Abuses*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/2021/04/16/us/politics/justice-department-consent-decrees.html> [<https://perma.cc/4U9S-QHYW>]; see also Braktkon Booker & Josh Gerstein, *How Biden’s Justice Department Is Trying to Root out Racist Policing*, POLITICO (May 25, 2021, 3:45 PM), <https://www.politico.com/news/2021/05/25/biden-justice-department-policing-george-floyd-490452> [<https://perma.cc/9KSZ-8VMD>].

of Justice to improve police practices)<sup>133</sup> and reestablishing two fair housing regulations that were previously gutted.<sup>134</sup>

One way in which the President could lead agencies to stand against racial tyranny by entrenching change is via directives. However, presidential directives can suffer from a lack of durability.<sup>135</sup> For this reason, centralization does not foster change, let alone serve to diffuse power in the long term, unless it engenders shifts in agency culture<sup>136</sup> and fosters nuance at the level of execution.<sup>137</sup> Only then are agencies able to produce and nurture consistent improvement from presidency to presidency.<sup>138</sup>

Scholars argue that any institutional efforts to improve distributional consequences would benefit from measures similar to those that have proliferated cost–benefit analysis in the administrative state.<sup>139</sup> For instance, Richard Revesz suggests that executive directives backed an institution such as “the now powerful Office of Information and Regulatory Affairs” (OIRA), which is part of the OMB, could improve distributional consequences by leveraging a cost–benefit analysis framework.<sup>140</sup> Relatedly, Cass Sunstein, perhaps the most celebrated administrator of OIRA, admits that cost–benefit analysis could focus more on welfare and distributional benefits.<sup>141</sup> Indeed, OIRA, or another White House-level office with the same

<sup>133</sup> Memorandum from Jeff Sessions, U.S. Att’y Gen., DOJ, to Heads of Civil Litigating Components and United States Attorneys (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109621/download> [https://perma.cc/8VMY-7F5X].

<sup>134</sup> Kriston Capps, *Trump Scrapped Two Fair Housing Rules; Biden Is Bringing Them Back*, BLOOMBERG: CITYLAB (Apr. 13, 2021, 11:21 AM), <https://www.bloomberg.com/news/articles/2021-04-13/biden-to-restore-two-obama-era-fair-housing-rules> [https://perma.cc/A73Y-Y6RU].

<sup>135</sup> Mashaw & Berke, *supra* note 47, at 608.

<sup>136</sup> Bijal Shah, *Investigating a Unitary Executive Model of Immigration*, BALKINIZATION (Dec. 4, 2020), <https://balkin.blogspot.com/2020/12/investigating-unitary-executive-model.html> [https://perma.cc/PV52-5VMY].

<sup>137</sup> See Peter Shane, *Shaping Administrative Process and Metrics of Ambition*, REGUL. REV. (Mar. 30, 2021), <https://www.theregreview.org/2021/03/30/shane-shaping-administrative-process-metrics-ambition> [https://perma.cc/UV38-VB2S].

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., Revesz, *supra* note 13, at 1499–50 (contrasting President Clinton’s highly influential executive order requiring all significant federal rules be justified on cost–benefit grounds to less impactful executive orders on environmental justice and federalism); Stuart Shapiro, *Regulatory Analysis Needs to Catch Up on Distribution*, REGUL. REV. (Feb. 15, 2021), <https://www.theregreview.org/2021/02/15/shapiro-regulatory-analysis-needs-distribution/> [https://perma.cc/8FPV-4WNG] (arguing for a more nuanced approach to regulations while recognizing the benefits of a cost–benefit-based approach).

<sup>140</sup> See Revesz, *supra* note 13, at 1499; see also Richard L. Revesz, *A New Era for Regulatory Review*, REGUL. REV. (Feb. 16, 2021), <https://www.theregreview.org/2021/02/16/revesz-new-era-regulatory-review/> [https://perma.cc/45ZM-WRDL] (advocating for OIRA to “be seen as an integral part of the [Biden] Administration’s justice and equity mission”).

<sup>141</sup> Cass R. Sunstein, *Some Costs & Benefits of Cost-Benefit Analysis*, 150 DAEDALUS 208, 217 (2021).

level of clout, could create incentives for and consistency across administrative efforts—and across presidencies—to enact executive directives that require prioritizing racial justice and equality. Offices within agencies, such as offices of civil rights (currently both ubiquitous<sup>142</sup> and somewhat toothless) or newly created institutions, could be harnessed to encourage agencies on a more individualized basis to implement both presidential *and* legislative mandates to oust and prevent racialized tyranny. With the valuable backing of an OIRA-like agency, presidents could centralize, regularize, and entrench administrative efforts to reduce racial inequality, and in this way, defend against the racist impulses of future presidents.

Executive directives harnessing a central executive institution to entrench other regulatory goals serve as examples for similar efforts to reduce racial tyranny. Last year, former President Trump issued an Executive Order directing the “heads of all agencies” to address the COVID-19 pandemic as an “economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery,” particularly as those requirements impact small business.<sup>143</sup> A subsequent memorandum issued by OIRA provides guidance that applies to a wide variety of executive branch agencies<sup>144</sup> including “the Food and Drug Administration, the Securities and Exchange Commission (‘SEC’), the Federal Trade Commission, and agencies within the Department of Justice (‘DOJ’), among many others.”<sup>145</sup> President Biden has embarked on a similar initiative to confront the climate change crisis and created a “Special Presidential Envoy” to manage this monumental challenge.<sup>146</sup>

Presidents could issue similar extensive guidance requiring agencies across the government to engage in best practices to improve regulatory

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<sup>142</sup> See *Civil Rights Offices of Federal Agencies*, DOJ, <https://www.justice.gov/crt/fcs/Agency-OCR-Offices> [<https://perma.cc/899K-C7TS>] (listing an office of civil rights within almost all federal agencies).

<sup>143</sup> Executive Order on Regulatory Relief to Support Economic Recovery, Exec. Order No. 13,924, 85 Fed. Reg. 31,353, 31,353 (May 22, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-11301.pdf> [<https://perma.cc/R3SZ-KRGC>].

<sup>144</sup> Memorandum from Paul J. Ray, Adm’r, Off. of Info. & Regul. Affs., to Deputy Secretaries of Executive Departments and Agencies (Aug. 31, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf> [<https://perma.cc/L47Z-VB9B>] [hereinafter Memorandum from Paul J. Ray to Deputy Secretaries].

<sup>145</sup> Gregory A. Brower & Carrie E. Johnson, *OMB Guidance on Federal Enforcement Actions Reflects Respect for Civil Liberties*, WASH. LEGAL FOUND. (Oct. 15, 2020), <https://www.wlf.org/2020/10/15/publishing/omb-guidance-on-federal-enforcement-actions-reflects-respect-for-civil-liberties> [<https://perma.cc/3WRF-JAG8>].

<sup>146</sup> See Executive Order on Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Feb. 1, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf> [<https://perma.cc/F24T-28ZM>].

outcomes for racial minorities. The OIRA COVID-19 memorandum even offers a fair bit of language that could be repurposed in support of fairer and more equitable outcomes for minorities who face administrative action. For example, such guidance could require agencies to “read[] genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor” of outcomes that privilege the equal protection of and access to justice for racial minorities.<sup>147</sup> It could also require that “[a]dministrative enforcement . . . be prompt and fair,” that agencies “make the public aware of the conditions in which investigations and enforcement actions will be brought and provide the public with information on the penalties sought for common infractions,” and that “[a]ll rules of evidence and procedure . . . be public, clear, and effective”<sup>148</sup> to ensure accessibility and racial parity. The OIRA COVID-19 memo also includes provisions that concern independent, fair, and transparent administrative adjudication that could be applied for these purposes as well.<sup>149</sup> Ultimately, the mandate that “[a]dministrative enforcement should be free of improper Government coercion [and] [r]etaliatory or punitive motives”<sup>150</sup> and that “[a]gencies must be accountable for their administrative enforcement decisions”<sup>151</sup> could be adopted to constrain the exercise of administrative discretion that leads to systemic racial inequality.

Finally, the President could appoint policymakers that encourage the proliferation of civil servants with an interest in furthering anti-racist administrative policies. At least one previous President has abused this power.<sup>152</sup> Moving forward, however, presidents might install political leaders and experts with an interest in improving environmental justice in the Environmental Protection Agency;<sup>153</sup> with an interest in improving

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<sup>147</sup> Memorandum from Paul J. Ray to Deputy Secretaries, *supra* note 144, at 2–3.

<sup>148</sup> *Id.* at 2–4.

<sup>149</sup> *See id.* at 2–5.

<sup>150</sup> *Id.* at 4.

<sup>151</sup> *Id.* at 5.

<sup>152</sup> *See* Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 639–42 (2019) (noting that Trump battered civil servants who opposed Trump’s travel ban despite the opposition being lawful); *id.* at 643–45 (noting political retaliation against immigration judges under the Trump Administration); Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, N.Y. TIMES (July 29, 2008), <https://www.nytimes.com/2008/07/29/washington/29justice.html> [<https://perma.cc/BB6F-B9XK>] (noting that President George W. Bush installed partisanship in DOJ); *see also* Matthews, *supra* note 50 (explaining that President Wilson allowed his cabinet secretaries to segregate their departments, fired fifteen of seventeen Black supervisors in the federal service, and required photographs on federal job applications).

<sup>153</sup> Tyler Pager, Zack Colman & Alex Guillén, *Biden to Tap North Carolina Environmental Regulator Regan to Head EPA*, POLITICO (Dec. 17, 2020, 1:35 PM), <https://www.politico.com/news/2020/12/17/epa-administrator-michael-regan-447747> [<https://perma.cc/8V86-ULAE>] (explaining that

access to adequate healthcare across many areas of need (such as for Black pregnant women<sup>154</sup>) in the Department of Health and Human Services,<sup>155</sup> and others in the Social Security Administration,<sup>156</sup> the Departments of Education,<sup>157</sup> Housing,<sup>158</sup> Labor,<sup>159</sup> Agriculture,<sup>160</sup> and the Interior<sup>161</sup> that have an interest in deploying bureaucratic expertise to solve the core problems of systemic racism.

### CONCLUSION

This Essay seeks to ground the separation of powers framework in the realities of racial hierarchy and injustice in order to more effectively allow

President Biden's nominee for Administrator of the Environmental Protection Agency will be sensitive to issues of how climate change impacts minority and poor communities).

<sup>154</sup> Cf. Amy Roeder, *America Is Failing Its Black Mothers*, HARV. PUB. HEALTH (2019), [https://www.hsph.harvard.edu/magazine/magazine\\_article/america-is-failing-its-black-mothers](https://www.hsph.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers) [<https://perma.cc/28Y2-J2DH>] (noting disparities in maternal health faced by Black women and women living in poverty globally).

<sup>155</sup> Cf. Sheryl Gay Stolberg & Michael D. Shear, *Biden Picks Xavier Becerra to Lead Health and Human Services*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2020/12/06/us/politics/xavier-becerra-hhs-health-secretary.html> [<https://perma.cc/83KC-AFD6>] (explaining that the proposed head of HHS has been an “outspoken advocate of improved health care access”); Patti Neighmond, *Senate Democrats Call on Congress to Fix Racial Disparities in Health Care*, NPR (Oct. 1, 2020, 11:49 AM), <https://www.npr.org/sections/health-shots/2020/10/01/919063734/senate-democrats-call-on-congress-to-fix-racial-disparities-in-health-care> [<https://perma.cc/7FSG-52KV>] (explaining that Senate Democrats are concerned that COVID-19 has served as an “appalling reminder of the deep inequities” in health care across racial lines).

<sup>156</sup> Cf. Zach Parolin, *Welfare Money Is Paying for a Lot of Things Besides Welfare*, ATLANTIC (June 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/through-welfare-states-are-widening-racial-divide/591559> [<https://perma.cc/73DE-S564>] (noting disparities in access to welfare benefits—for instance, that a Black family in poverty is more likely than a white family to receive information or advice on family planning in place of direct cash payments).

<sup>157</sup> Cf. Kenneth Shores, Ha Eun Kim & Mela Still, *Categorical Inequalities Between Black and White Students Are Common in US Schools—But They Don't Have to Be*, BROOKINGS (Feb. 21, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/02/21/categorical-inequalities-between-black-and-white-students-are-common-in-us-schools-but-they-dont-have-to-be> [<https://perma.cc/R3PV-PQM4>].

<sup>158</sup> Cf. Elliott Davis, *How the U.S. Government Promoted Housing Segregation in America's Cities*, U.S. NEWS (Aug. 17, 2020), <https://www.usnews.com/news/cities/articles/2020-08-17/how-the-us-government-promoted-housing-segregation-in-us-cities> [<https://perma.cc/M7X2-V38K>] (discussing practices that led to racial disparities in housing today with *The Color of Law* author Richard Rothstein).

<sup>159</sup> Cf. Patricia Cohen & Ben Casselman, *Minority Workers Who Lagged in a Boom Are Hit Hard in a Bust*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/business/economy/jobs-report-minorities.html> [<https://perma.cc/X9CT-ASMC>] (noting that “Black Americans have always had a more difficult time in the job market” and the COVID-19 pandemic has exacerbated those inequities).

<sup>160</sup> See Sarah Krakoff, *Equity and Justice Should Begin at Home*, CPRBLOG (Apr. 6, 2021), <http://progressivereform.org/cpr-blog/equity-and-justice-should-begin-home> [<https://perma.cc/6XW6-AFE7>] (discussing Secretary of Agriculture Tom Vilsack's commitment to “root out generations of systemic racism” by addressing “discrimination in all its forms across USDA agencies”).

<sup>161</sup> See *id.* (arguing that equity must be modeled by changes within the Department of Interior first).

the three branches to harness the administrative state against this key form of Executive-origin tyranny extant in the United States. First, this Essay asserts that any parsing of the separation of powers must acknowledge the racialized distribution of power that has created and currently sustains systems of dominance. Second, it contends that deploying the separation of powers to dispel racialized tyranny could infuse this paradigm with a spark of normative force. A vision of the separation of powers that advocates for both interbranch tension and shared interbranch responsibility to reduce racial subordination and marginalization could foster a functional improvement in the execution of policy and ameliorate a central concern of formalists—the potential imposition of tyranny by our modern-day monarch. Indeed, the Executive has the potential to be a source both of racialized tyranny and of safeguards against it despite her conventional exclusion from conversations concerning the government’s role in confronting racial injustice. Her potential for unilateral rule, feared by the Founders, also offers an opportunity for the other branches of government to engage in an energetic animation of the bureaucracy to better confront the President’s imposition of racial domination.