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Administrative Law Symposium Debate

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ADMINISTRATIVE LAW SYMPOSIUM DEBATE

A CONVERSATION BETWEEN AKRAM FAIZER AND STEWART HARRIS OF THE LINCOLN MEMORIAL UNIVERSITY’S DUNCAN SCHOOL OF LAW FOR THE BELMONT LAW REVIEW SYMPOSIUM

AKRAM FAIZER & STEWART HARRIS*

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I. HARRIS – A NOT-SO-MODEST PROPOSAL

I rarely disagree with my good friend and colleague, Akram Faizer, which makes our conversations rather predictable and dull. “You’re so right!” and “Well said!” can be pleasant and affirming for only so long. So imagine our delight when we realized that we disagree—passionately—about a rather unpassionate subject: administrative law. Professor Faizer teaches it. I practiced it. He supports it. I would like to burn it down.

Well, not quite. I do think some very serious reforms are needed—reforms that I freely admit, are unlikely to happen. Administrative law is,

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for better and worse, an established part of our constitutional landscape.¹ But it shouldn't be, at least not in its present form.²

The Administrative Procedures Act of 1946 (the "APA"),³ as amended and interpreted by the courts, empowers unelected officials to make, enforce, and adjudicate law with little accountability to the electorate and very little oversight by the federal courts.⁴ This is positively Kafkaesque:⁵ One is reminded of the *The Trial*,⁶ or, perhaps, the famous line from *Butch Cassidy and the Sundance Kid*: "Who are those guys?"⁷

Fundamentally, the issue is the separation of powers. In Federalist 47, James Madison wrote:

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.⁸

1. See, e.g., *Whitman Trucking's* broad reading of the "intelligible principle" aspect of the nondelegation doctrine, *Whitman v. American Trucking Assocs.*, 531 U.S. 457 (2001); see also *Chevron's* mandate that federal courts must generally defer to agency decisions, *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. I am not alone in thinking so. For a recent and influential discussion of the many problems with the administrative status quo, see PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (Univ. Chicago Press 2015). But, of course, not everyone agrees with Hamburger, e.g., Adrian Vermeule, who answers Hamburger's question with the single word, "No." Adrian Vermeule, *Is Administrative Law Unlawful? By Philip Hamburger*. Chicago, Illinois: The University of Chicago Press, 2014. 648 Pages. \$55.00, 93 TEX. L. REV. 1547 (2015).

3. Administrative Procedures Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) [hereinafter APA].

4. *Chevron*, 467 U.S. at 837 (citing the Clean Air Act Amendments of 1977, 42 U.S.C. § 7502(b)(6) (2006)).

5. Franz Kafka's work is characterized by nightmarish settings in which characters are crushed by nonsensical, blind authority. Thus, the word Kafkaesque is often applied to bizarre and impersonal administrative situations where the individual feels powerless to understand or control what is happening.

6. *THE TRIAL* (Astor Pictures Corp. 1962).

7. *BUTCH CASSIDY AND THE SUNDANCE KID* (20th Century Fox 1969).

8. *THE FEDERALIST NO. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter *FEDERALIST 47*].

Madison was not the first to come up with this idea—Montesquieu⁹ is most often given credit—but Madison was the first to put it into a written constitution.¹⁰ Indeed, the separation of powers was arguably the most innovative and important part of the original seven articles of the United States Constitution.

Then along came emergencies, like the Civil War and the Great Depression, and more gradual but significant changes, such as the rise of railroads and interstate commerce. Congress began creating federal agencies, especially in the 1930s. As concern over these agencies' powers grew, the APA¹¹ was eventually born.¹²

The APA may have been a worthy effort to systematize and constrain federal agency power, but it did not go far enough: it permitted, and continues to permit, executive agencies to exercise both legislative¹³ and judicial¹⁴ functions, thereby creating the very tyrannies that Montesquieu and Madison feared.

The fundamental reform of administrative law is not a liberal or conservative issue, although it is currently championed by a number of prominent conservatives who oppose regulations generally and sometimes call for “deconstruction” of something they call the “Deep State.”¹⁵ I insist, however, that liberals, especially those who favor, e.g., environmental regulation, and who are concerned about agency capture or presidential corruption, have just as much reason to oppose the status quo. Power is power and too much of it is likely to be abused, in one direction or the other.¹⁶

9. Although divided government has been discussed since ancient times, and arguably implemented in some forms by various states, French Enlightenment philosopher Baron de Montesquieu is generally credited with identifying the three basic functions of government and advocating separation of powers on that basis: “There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.” CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* 81 (1st Am. from the 5th London ed. 1802).

10. FEDERALIST 47, *supra* note 8, at 301.

11. APA, 60 Stat. 237.

12. DANIEL HALL, *ADMINISTRATIVE LAW: BUREAUCRACY IN A DEMOCRACY* (Pearson 2020).

13. Administrative Procedures Act, 5 U.S.C. § 551(4)–(5) (2006).

14. *Id.* § 551(6)–(7).

15. Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018); see also Virgil, *The Deep State Becomes the Obvious State*, BREITBART (Sept. 28, 2020), <https://www.breitbart.com/politics/2020/09/28/virgil-the-deep-state-becomes-the-obvious-state/> [<https://perma.cc/LLD8-R5NU>].

16. Okay, I guess I have to quote Lord Acton, “Power tends to corrupt and absolute power corrupts absolutely.” Letter from Lord Alfred Acton to Mandell

Therefore, I propose what I admit is a radical solution: take away agency rulemaking and adjudicative authority from executive agencies and return these powers to Congress and the federal courts.

Rulemaking can be fixed statutorily by requiring congressional enactment of proposed agency regulations. Similarly, adjudication can be fixed through a federal statute that deauthorizes all quasi-judicial authority in executive agencies and replaces administrative law judges with an expanded federal judiciary.¹⁷

If my proposal were adopted, Congress, aided by agency expertise but accountable to the people, would enact laws. Executive agencies would enforce them. And aggrieved parties would have access to impartial, life-tenured judges in the Federal Judiciary to resolve any resulting disputes. Just as James Madison intended.¹⁸

II. FAIZER – A DETAILED REBUTTAL

My friend and LMU Law colleague Stewart Harris's position is ostensibly summed up by the father of our constitution, James Madison, whose creation enshrined the separation of powers vesting by legislative power in the Congress, executive power in the President, and judicial power in the federal courts.¹⁹ But these powers were never intended to be entirely

Creighton (Apr. 5, 1887), reprinted in LORD ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (G. Himmelfarb ed. 1957). On a more positive note, I'll also quote Spiderman's gentle Uncle Ben, "With great power comes great responsibility," *SPIDER-MAN* (Columbia Pictures 2002). Hmm. As an interim measure, perhaps we should post Spiderman posters all throughout the federal bureaucracy.

17. In general, the enforcement functions of most agencies present no separation-of-powers issue, at least when those agencies are firmly located within the executive branch, so my proposal leaves them with all of their current executive powers. Independent agencies that exist outside the three branches of the national government, somewhere in the ether, I suppose, present constitutional issues that lie beyond the scope of this article. But their constitutionality is also well-established: *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) ("The authority of Congress, in creating *quasi*-legislative or *quasi*-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted, and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.").

18. *FEDERALIST* 47, *supra* note 8, at 301.

19. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); U.S. CONST. art II, § 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Examples of power overlap include that of impeachment and removal of executive and judicial officials, the President's power to veto duly enacted Congressional legislation, the Congress's power to, in turn,

separate, a point Madison famously made in the Federalist Papers and which is acknowledged by the Constitution's deliberate decision to overlap separate spheres of competence in crucial areas.²⁰ As Wurman has written, "[t]he brilliance of the constitutional design was that although the powers would be separate, they would not be entirely separate. Each branch would have some hand in the exercise of power by the others, its own ambitions and institutional interests serving as checks on those of the other branches."²¹

Two issues are before us. First, is the modern American administrative state consistent with Madison's constitutional framework? Second, regardless of its compatibility with Madisonian principles, is it desirable? After all, many aspects of Madison's constitutional design are flawed. Its countenance of slavery was a crime both then and now and its archaic and Byzantine amendment procedure has led inexorably to judicial activism and the hyper-politicization of the judicial branch. Before we go any further, a detailed and forthright defense of administrative law, the administrative procedure act, and Chevron Deference is required.

A. Administrative Law and the Administrative Procedure Act

Administrative law can be defined as the law of the government. Although it might sound tautological at first reading, it actually is quite profound because its enunciated goal is to legally constrain government employees charged with enforcing duly enacted laws consistent with the U.S. Constitution. Indeed, though much is made of our system of checks and balances, this Presidential Administration has evidenced that the constitutional framework is an insufficient check on maladministration. Examples of this include the inordinately high threshold for removing a President from office and how this has facilitated Presidential impunity in office and evidenced that the Courts and media lack the resources, political capital, and institutional legitimacy to deter Presidential abuses of power. It is true that maladministration is constrained by political culture. For example, our political culture would definitely preclude a President from even contemplating a directive to kill a political rival, as is the case with Russia's President Vladimir Putin and the obvious poisoning of his political rival Alexei Navalny.

However, political cultures evolve and the sad reality is that nearly all western democracies have seen a startling degree of democratic retrogression and authoritarianism seep into their political cultures since the

override a Presidential veto, the Senate's power to ratify treaties and confirm Presidential high executive officials.

20. THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST 51]; FEDERALIST 47, *supra* note 8, at 321–22.

21. Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 369 (2017).

Cold War and the attendant increase in global migration.²² The many reasons for this are beyond the scope of this paper. Suffice it to say that, though constraining at times, political culture is not a fixed concept that ensures a democracy remains faithful to the rule of law. More is needed, especially since, as Francis Fukuyama has persuasively demonstrated, countries, unless forced to go through a process of institutional renewal, tend to succumb to institutional sclerosis and the patrimonial trap.²³ The patrimonial trap refers to the natural tendency to prioritize the well-being of one's family over the broader society.²⁴

According to Fukuyama, this lamentable reality, was first overcome by the world's first great civilization, Imperial China, which created a government structure that rewarded merit over birthright and developed institutions, such as a professional civil service, to insure against patrimonial mediocrity.²⁵ Institutional sclerosis refers to the tendency of interest groups to, over time, effectively control state institutions and eventually undermine institutional renewal and overall well-being by using their relative power to veto needed change.²⁶ This is what has happened in the U.S. and other mature democracies since the Cold War's end. To illustrate its consequences, compare the Kennedy Administration's "Best and Brightest" with the "Friends and Family" Trump Administration. Or, more broadly, compare the equalization and integration of public schooling that began with *Brown v. Board*²⁷ and continued, albeit at snail's pace, until the mid-1980s, with the schooling framework we see today due to growing socioeconomic inequality that commenced with the Reagan tax cuts of 1981.²⁸ With respect to institutional sclerosis, compare the U.S. Senate's relative bipartisan approach to foreign policy and the confirmation of Presidential cabinet secretaries and judicial nominees during the Cold War with today's scorched earth partisanship.²⁹

22. Examples include the rise of authoritarian populism in the United States; the United Kingdom with Brexit; France with the collapse of the traditional political parties and the rise of the Le Front National; Italy with the rise to power of a far-right populist government; far-right governments in Poland and Hungary; and, of course, China's move away from a relatively pluralistic CCP to an authoritarian cult of personality under President Xi.

23. FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* (Profile Books 2015).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See generally* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

28. *See, e.g.*, Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013).

29. *See for example* the U.S. Senate's confirmation of former Judge Antonin Scalia to be an associate Justice on the Supreme Court by a U.S. Senate vote of 98-0 in 1986 as compared to the U.S. Senate's refusal to grant a confirmation hearing

According to Fukuyama, political order in liberal democracies, such as the U.S., rests on three pillars: political accountability, a strong effective state, and the rule of law.³⁰ Accountability involves making rulers responsive to electorates, which means not only free and fair multiparty elections but institutions of accountability supplemented by a central government that can get things done with rules and regulations that apply equally to everyone.³¹ U.S. political development has gone into reverse becoming weaker, less efficient, and more corrupt.³² One cause of the weakening political order is growing economic inequality and the geographic concentration of wealth, which has allowed elites to purchase immense political power and manipulate the system to further their own interests.³³ Another cause is the permeability of American political institutions to interest groups, allowing an array of factions that “are collectively unrepresentative of the public as a whole” to exercise disproportionate influence and, in effect, control the government.³⁴ The result, according to Fukuyama, is a vicious cycle whereby the government is rendered incapable or unwilling to deal with national problems in a way that breeds a cynicism in the electorate that, in turn, leads to the state being starved of resources and authority, which leads to even poorer performance.³⁵

Fukuyama’s thesis is that although liberal democracy is the best form of government, it is, absent continuous reform, susceptible to the patrimonial trap, institutional decay, and sclerosis. This is what currently bedevils the U.S. government, which has failed to address a growing trend of socioeconomic immobility and low voter turnout that has undermined the quality of American democracy and vitiated the rule of law.³⁶ It is what happened at the turn of the previous century when the concentrated power of trusts and local corporate interests exploited traditional social hierarchies to undermine individual freedom and the liberty enhancing promise of the Madisonian framework, namely federalism. Government had become

to President Obama’s nominee to replace Justice Scalia, Judge Merrick Garland, after Scalia died unexpectedly in February 2016.

30. See FUKUYAMA, *supra* note 23.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See, e.g., THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Belknap Press of Harvard Univ. Press, 2014), <http://dowbor.org/blog/wp-content/uploads/2014/06/14Thomas-Piketty.pdf> [<https://perma.cc/R4BR-8BJH>] (demonstrating that socioeconomic mobility in the United States has dropped dramatically with growing income and wealth inequality); see also M. Akram Faizer, *The Privileges of Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN. ST. L. REV. 61, 93 (2016).

sclerotic and institutionally incapable of ensuring the majority of Americans have the ability to fully participate in all aspects of American life. The enactment of progressive social welfare legislation and administrative rules, designed to move the government away from patronage in the direction of professionalism and independence, enabled Americans from heterodox backgrounds to find acceptance and opportunity that had, hitherto, been lacking.³⁷ Thanks to administrative law enactments, the public interest was finally given a voice when challenged by organized corporate and business interests that would otherwise use their lopsided power to overwhelm what previously had been a sclerotic and incapable federal government.

While opponents of administrative law are nostalgic for an era of small government, it is useful to remind oneself that it was not administrative law that grew government. That was a direct concomitant of industrialization and capitalism on a continental scale, as well as the U.S.'s emergency as an industrial and military superpower. Opponents of the administrative state, who call for its deconstruction, argue that anything that deviates from a Schoolhouse Rock narrative is constitutionally infirm and undemocratic.³⁸ Schoolhouse Rock, after all, never mentions anything about the administrative state. This is for a good reason—it is a cartoon written for school-aged children.

As Rahman has written, the upheavals of industrialization generated not only economic dislocation, but provoked a deep political crisis because late nineteenth century thinkers, lawyers, and reformers saw industrial capitalism as a “fundamental threat to existing institutions and political ideals” because it, aided by a recalcitrant federal judiciary, created new forms of corporate power that tended to capture, corrupt, or otherwise immobilize existing institutions of government.³⁹ This, in turn, spawned social movements across the country that sought new institutions and governing frameworks to both empower the broader public and provide a check against the excesses of industrialization.⁴⁰ The issue that confronted

37. What I mean by this is access to schools, colleges, universities, government, workplaces, businesses and places of public accommodation. I also mean the provision public goods such as national parks, environmental protections, clean air, clean water, etc.

38. See, e.g., Steve Bannon's call for deconstruction of the administrative state. Gregory Krieg, *What the 'Deconstruction of the Administrative State' Really Looks Like*, CNN POLITICS (Mar. 30, 2017), <https://www.cnn.com/2017/03/30/politics/trump-bannon-administrative-state/index.html> [<https://perma.cc/EJ9H-2MCL>].

39. K. Sabeel Rahman, *Book Review: Reconstructing the Administrative State in an Era of Economic and Democratic Crisis: Constitutional Coup: Privatization's Threat to the American Republic* by Jon D. Michaels, 131 HARV. L. REV. 1671, 1683 (2018).

40. *Id.* at 1684.

Progressive era and New Deal technocrats was the problem created by industrial economic power in the hands of the few that shaped market forces and altered the culture without either the checks and balances or norms of public justification that typically accompany the use of governmental power. Rahman, convincingly, writes that the administrative state and administrative law, which implements checks and balances to assure accountability, legitimacy, and non-arbitrariness, is not solely about checking government power to accommodate the modern American state to founding principles, which were, even in Madison's time, belied by slavery, gender hierarchy, concentrated corporate power, legislative malapportionment, and a Byzantine amendment procedure. The checks and balances we find in administrative law are there to preserve what Rahman labels the "deeper mission of modern democracy" by enabling people "to effectively remake social and economic systems that are beyond the scope of individuals, associations, or ordinary common law" to address substantive challenges of "systemic economic and social inequality and exclusion."⁴¹

Progressive reformers and those who drafted the Administrative Procedure Act sought to accommodate the necessary growth of government in a manner consistent with both pluralism and the rule of law and did this by constraining government civil servants by means other than political culture alone. The goal was for civil servants and the administrative agencies in which they worked to address the complexities of the modern economy and industrial society by harnessing their expertise, professionalism, and independence to serve the public interest.⁴²

According to Jon Michaels, the administrative state encapsulated by the APA is nothing less than an attempt to provide legal structure to an endeavor designed to balance expertise, public participation, and presidential oversight.⁴³ Michaels calls it, an "administrative separation of powers," i.e., the tripartite system of presidential appointment, independent civil service, and public participation through notice-and-comment and other means. This provides tools to guard against tyranny, and complement the original Madisonian division of executive legislative and judicial functions within the administrative state.⁴⁴ Under this framework, appointed agency heads and cabinet secretaries stand in for the Executive, the civil service acts as an impartial adjudicator of agency actions, and civil society

41. *Id.* at 1675–76.

42. *Id.* at 1671 (quoting Dean Joshua Landis of the Harvard Law School who declared in 1938, that the administrative process "is, in essence, our generation's answer to the inadequacy of the judicial and legislative process" because unlike generalist legislatures or formalist judges, administrative agencies could address the complexities of the modern economy and industrial society by harnessing their expertise, professionalism and independence to serve the public interest).

43. *Id.* at 1679.

44. *Id.*

participation in notice-and-comment and beyond provides public input in a manner akin to a democratic legislature.⁴⁵ Dismantling the administrative state, according to Michaels and Rahman, would facilitate unchecked and authoritarian executive power by removing necessary pluralism protecting procedural norms that guide agency conduct. A recent example is *Department of Homeland Security v. Regents of the Univ. of Cal.*,⁴⁶ which relied on the Administrative Procedure Act to invalidate the Trump Administration's procedurally infirm and authoritarian attempt to rescind President Obama's Deferred Action for Childhood Arrivals ("DACA") deportation deferral program. Procedurally infirm policy changes, driven by an authoritarian-minded White House and facilitated by a supine Congress, would resuscitate hegemony and factionalism by resurrecting traditional cultural and economic hierarchies from a bygone era.⁴⁷ This perhaps explains the true motive behind those who question the administrative state. Former White House chief strategist Steve Bannon has called for the deconstruction of the administrative state. He did so, most likely, based on instinctive awareness that such a result would shift the balance of "social, political and economic power" to make it harder to contest traditional hierarchies that have historically undermined national cohesion and are the hallmark preferences of authoritarians worldwide.

Recognizing that Professor Harris is an extremely well-intentioned progressive, I must first acknowledge that he does not recommend deconstruction of the administrative state. Rather, he takes issue with agency rulemaking in general and would have Congress enact legislation that would guide agency behavior with sufficient clarity and flexibility to govern a continent-sized superpower. Requiring this much more from Congress is clearly a nonstarter. First, 535 Congresspersons lack the resources and skill to write legislation in this manner. Professor Harris's proposal would unintentionally take the country back to the regressive framework of the Gilded Age. A foreboding counterfactual is evident with respect to Boeing, which pressured Congress and the Trump White House to work in tandem to undermine the Federal Aviation Administration's ("FAA") regulatory authority by way of the FAA Reauthorization Act. The Act purported to streamline the certification process for new technologies and therefore make Boeing more competitive with its European rival, Airbus. Problematically, though, it effectively gutted the FAA's ability to

45. *Id.*

46. *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, slip op. at 26 (591 U.S. ____ (2020)) (concluding that the Trump Administration's attempted revocation of the Deferred Action for Childhood Arrivals program initiated by Executive Order by President Obama failed to satisfy hard look review because there was nothing in the administrative record demonstrating DHS considered all the alternatives before it prior to issuing a rescission order).

47. Rahman, *supra* note 39, at 1674.

act as a regulator by forcing it to outsource its oversight obligations to Boeing itself.⁴⁸ Boeing's subsequent failure to train provide proper software for operation of its Boeing 737 Supermax airplane resulted in the Lion Air Flight 610 crash on October 29, 2018, the Ethiopian Airlines Flight 302 crash on March 10, 2019, and President's Trump's eventual nationwide grounding of the 737 Supermax on March 13, 2019, after the FAA failed to act, notwithstanding an international consensus to ground the plane. Depriving agencies of their power to issue legislative rules under the APA will only undermine government competence and worsen the problem of regulatory capture, exemplified by the Boeing example.

Professor Harris next takes issue with the deference currently given by the courts to agency rulemakings, adjudications, and enforcements. For purposes of traditional legislative rulemaking, subject to public participation, this is known as *Chevron* deference after the canonical (or anti-canonical depending on one's ideological inclination) U.S. Supreme Court decision in *Chevron U.S.A v. National Resources Defense Council, Inc.*⁴⁹ Professor Harris would then seek to democratically legitimize all agency rulemaking by requiring them to be approved via bicameralism and presentment prior to enactment. He takes this position in good faith, I suspect naively, in view of the sheer volume of rulemakings and unbelievable demands already made of the nation's 535 Congressmembers.

Finally, Professor Harris objects to agency adjudications and the requirement that agency litigants exhaust administrative remedies prior to commencing suit in an Article III court. Instead, he would eliminate all internal agency adjudications, having all federal adjudications commence in the nation's 94 U.S. District Courts, with no deference given to the agency by the court. Once again, Professor Harris's position is well-intentioned, but naïve. First, he misunderstands the reasons for agency deference. It is not to facilitate a power grab by the executive branch's agencies and undermine Article III's Vesting Clause. Rather, it accommodates agency expertise to effectuate broad Congressional rulemaking delegations consistent with the rule of law because agencies, unlike Article III courts, are politically accountable to Congress via the budgetary process and the Presidential Administration via its power to staff agencies and subordinate agency action to its policy preferences. Ending agency deference will not resuscitate American democracy by improving legislation or revitalizing a moribund judiciary. Instead it will further the process of institutional sclerosis already eating away at the nation's democratic norms.

48. Natalie Kitroeff & David Gelles, *Before Deadly Crashes, Boeing Pushed for Law that Undercut Oversight*, N.Y. TIMES (Oct. 27, 2019), <https://www.nytimes.com/2019/10/27/business/boeing-737-max-crashes.html> [<https://perma.cc/LP83-639L>].

49. *Chevron, U.S.A, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Professor Harris takes a very formalistic view of both separation and powers and democratic accountability. Under this approach, democracy is served by limiting agency deference doctrines. It is the elected members of Congress who should be enacting the legislative rules we live under, not unelected civil servants. In response, proponents of the administrative state argue the administrative process, when compared to the congressional analogue, is particularly well-suited to receive and process political inputs from a broad range of civil society. For example, as far back as 1985, Jerry Mashaw argued the President's ability to influence agency policy choices made agency action more politically accountable than legislation.⁵⁰ This, in turn, renders broad Congressional statutory delegations more politically legitimate than narrower ones that leave less room for administrative interpretation.⁵¹ Mashaw's position effectively rebuts Professor Harris's claim that ending rulemaking delegation would be more democratic. Concomitantly, the much-maligned agency deference doctrines are, as detailed below, more democratically legitimate because elected Presidents can guide agency actions. Congressional rulemaking delegation to politically accountable agencies is clearly preferable than heightened judicial scrutiny by politically unaccountable Article III judges who lack the resource base, expertise, and legitimacy to effectuate such a framework. It is to the subject of agency deference doctrines that this paper now turns.

B. *Chevron* and the Importance of Agency Deference

With the case for the administrative state and administrative law now made, the issue is whether reviewing federal courts owe any deference to administrative rulemakings, enforcement actions, and adjudications. We can easily accept that agencies, as a matter of necessity, must interpret Congressional statutes.⁵² Ideally, the statutes are written using language that is so precise and unambiguous that agencies know exactly what to do in the rulemaking process.⁵³ As Siegel has noted, since justiciability and administrative law principles normally ensure that a court will have an opportunity to encounter such a statute only after the agency has taken

50. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 81–82 (1985).

51. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2333–34 (2001) (“In defending broad delegations, [Professor] Mashaw contended that more extensive bureaucratic, as opposed to legislative, decision making actually would improve the connection between governmental action and electoral wishes.”).

52. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983).

53. Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 943 (2018).

some action under it.⁵⁴ Accordingly, by the time an Article III court has occasion to interpret a statute administered by a federal agency, the agency itself will typically have given some construction to the statute.⁵⁵ Going back to at least the nineteenth century, federal courts gave, what Siegel describes as, “respectful consideration” or “great respect” for an agency’s construction of a statute it administered.⁵⁶ The agency’s construction was, however, not controlling. The final interpretive power rested with the courts, such that courts were empowered to enforce their own interpretation of a statute if it differed from that of an administering agency.⁵⁷ As late as 1983—the year before *Chevron*—the Court reiterated the view that an agency interpretation of a statute is not controlling on the reviewing court.⁵⁸

Chevron involved the Environmental Protection Agency’s (“EPA”) definition of the term “stationary sources” under the Clean Air Act Amendments of 1977.⁵⁹ The statute required “new or modified major stationary sources” of air pollution to comply with certain permit requirements, and authorized the EPA to define the relevant terms by regulation.⁶⁰ The EPA, at first, determined that “stationary source” referred to each individual piece of pollution-emitting equipment.⁶¹ After the Reagan Administration took office in 1981, the EPA issued a new definition, after notice and comment, that changed its position and construed “stationary source” to mean an entire plant. This allowed firms to avoid permit requirements by offsetting the emissions from new equipment with reduced emissions from old equipment in the same plant.⁶² After the

54. *Id.*

55. *Id.*

56. *Id.* at 944.

57. *Id.* at 943–44.

58. *Id.* at 944 (citing *Morrison-Knudsen Constr. Co. v. Director, Office of Workers’ Comp. Programs*, 461 U.S. 624, 635 (1983)).

59. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1997).

60. *Chevron, U.S.A, Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (quoting 42 U.S.C. § 7502(b)(6)). The permit requirements applied to states that had not attained national ambient air quality standards. Among other things, a new or modified source must comply with the “lowest achievable emission rate,” (quoting 42 U.S.C. § 7503(2)), and the applicant must show that all of the other sources under its control within the nonattainment state have complied with applicable emissions standards.

61. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 619–20 (1996).

62. *Id.* at 620, note 42 (after the Reagan Administration took office in 1981, the EPA promulgated the new definition after notice and comment); see 5 U.S.C. § 553. The EPA’s reasoning was as follows: The permit requirement was triggered, in relevant part, by the installation of a “new” or “modified” “stationary source.” 40 C.F.R. § 52 (2020). If an entire plant were a “stationary source,” then merely adding a new piece of equipment would not add a “new” source. Moreover, the Act

D.C. Circuit invalidated the rule, on the grounds it was inappropriate for a legislative scheme designed to improve air quality, the Supreme Court, in a decision by Justice Stevens, reversed. The Supreme Court concluded the statutory text was ambiguous, the legislative history was silent on the precise issue, and the general statutory purpose of improving air quality was too broad and self-contradictory to be decisive, i.e., the reviewing court was bound to accept the EPA's "reasonable accommodation of manifestly competing interests."⁶³

Chevron concluded when a court reviews a federal agency's interpretation of a statute it is charged with administering, it must follow a two-step process.⁶⁴ In Step One, the court must ask whether the statute at issue unambiguously addresses the precise question.⁶⁵ If so, both the court and the agency are bound by Congress's clear textual mandate. It is reversible error for an agency to do otherwise.⁶⁶ If, however, the governing statute is "silent or ambiguous" as to the specific agency rule at issue, the reviewing court is to move to Step Two. In Step Two, the court will uphold the agency's construction of the statute so long as it is reasonable or permissible, regardless of whether the court believes it was the best application.⁶⁷ This is based on the supposition that statutory ambiguity implicitly delegates legislative power to the agency.⁶⁸ Perhaps the best known legal scholar among *Chevron*'s critics is the eminent academician and public intellectual Philip Hamburger, who has influenced both Justices Thomas and Gorsuch. Hamburger argues that *Chevron* is incompatible with the courts' Article III duty to interpret the law impartially, and, in the case of broad Congressional delegations, violative of Article I's requirement that legislative power be vested in Congress and not the executive branch.⁶⁹ In short, Hamburger and *Chevron*'s critics posit that agency deference violates

defined a "modification" as a change that "increases the amount of any air pollutant emitted by such source or [that] results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). If an entire plant were a "stationary source," a firm could add or modify individual pieces of equipment without "modifying" the source, provided that it offset new emissions with equivalent reductions from other equipment in the plant. The EPA reasoned that such an approach would permit firms to update their plants with cleaner equipment, without triggering a heavy permit requirement. *See Chevron*, 467 U.S. at 858–59. The new approach also allowed the agency to simplify its rules in important respects. *See id.*

63. Manning, *supra* note 61, at 620.

64. *Chevron*, 467 U.S. at 843.

65. *Id.*

66. *Id.*

67. *Id.* at 844.

68. *Id.*

69. *See Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); Siegel, *supra* note 53, at 952–53.

the Madisonian constitutional structure and therefore poses an immediate threat to individual liberty.

Although Hamburger certainly has a sophisticated understanding of the subject, his characterization of agency deference as violative of Article III's vesting clause is altogether incredible. After all, the federal courts, as a matter of judicial doctrine, already take a deferential approach to socioeconomic legislation when challenged under the Fourteenth Amendment's Equal Protection Clause.⁷⁰ Going further, the federal courts, once again as a doctrinal matter, defer to the elected branches of government when adjudicating matters involving national security and military defense,⁷¹ and justiciability doctrines are consistently applied to enable courts to defer to the political branches. To illustrate, the Supreme Court recently concluded that partisan legislative districting, which dilutes citizen voting power and political speech, constitutes a nonjusticiable political question that is outside the competence of the federal courts.⁷² Would Hamburger and Justices Thomas and Gorsuch seriously contend the Court's justiciability doctrines violate Article III's Vesting Clause?

Hamburger's claim that *Chevron* violates the separation of powers between the legislative, executive, and judicial branches, more broadly, is also shortsighted and underinclusive. After all, Madison's constitutional framework gives the President a hand in legislative matters by means of presentment and veto; the legislature a hand in executive power by means of Reconsideration by two-thirds vote of each house, a further say in executive power by concurring in Treaties and providing Advice and Consent to the appointment of "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States," as well as Congress's power to Impeach and Convict the "President, Vice President and all civil officers of the United States," for "Treason, Bribery, or other high Crimes and Misdemeanors;" and, of course, the President's power in judicial matters "to grant Reprieves and Pardons for Offences [sic] against the United States."⁷³ The Constitution's deliberate decision to elide ostensibly separate spheres of competence gives "[e]ach branch . . . some hand in the exercise of power by the others, its own ambitions and institutional interests serving as checks on those of the other branches."⁷⁴ This principal is clearly carried forward by both the

70. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41–42 (1973); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

71. See, e.g., *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006); see also *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (discussing the Court's deference to Congress in military affairs). See generally *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (failing to find standing for challengers to the 2008 amendment to the Foreign Intelligence Surveillance Act).

72. *Rucho v. Common Cause*, No. 18-422, slip op. at 30 (U.S. June 27, 2019).

73. U.S. CONST. art. I, §§ 2, 3, 7; U.S. CONST. art. II, §§ 2, 4.

74. Wurman, *supra* note 21, at 369.

Administrative Procedure Act and its elucidation, in the case of informal rulemaking, of *Chevron* deference.

This deference is consistent with the Article III Vesting Clause, given that the federal courts consistently defer to the political branches in a whole host of areas. Moreover, per Henry Monaghan and later John Manning, binding deference is a function of Congress's modern authority to delegate broad legislative discretion to administrative agencies, such that politically accountable administrators have substantial responsibility for specifying the particulars of open-ended federal statutes.⁷⁵ This argument for broad rather than narrow delegations, as adumbrated by Justice Rehnquist and subsequently authoritatively demonstrated by Mashaw and Elena Kagan, is actually more, not less, consistent with democratic accountability. Presidential administrations are, unlike individual members of Congress, elected by a majority of the Electoral College and therefore, typically, by a plurality of the voting public. Congressmen, by contrast, tend to be elected based on parochial local interests and partisan districting.⁷⁶ Justice Rehnquist's concurring opinion in *Motor Vehicle Manufacturers Ass'n*, could well have been applied to *Chevron*. He writes:

[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.⁷⁷

Consequently, to borrow from John Manning, following *Chevron*, the reviewing court asks whether agency action—usually the promulgation of a rule, but sometimes an agency enforcement action, or an adjudication—is consistent with an authorizing statute. In such a circumstance, if the reviewing court is effectively bound by the agency's statutory

75. Manning, *supra* note 61, at 617, 621.

76. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Insur. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring and dissenting); *see also* Mashaw, *supra* note 50, at 95–96; Kagan, *supra* note 51, at 2311, 2332, 2383 (in defending broad delegations, Mashaw contends that more extensive bureaucratic, as opposed to legislative, decision making actually would improve the connection between governmental action and electoral wishes in view of the executive branch's responsiveness to a nationwide electorate, while Kagan argues for a Presidential administration being able to subordinate the regulatory agenda of “executive branch agencies” to the President's stated “policy and political agenda”).

77. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 57 (Rehnquist, J., concurring and dissenting) (footnote omitted).

interpretation, “separation remains between the relevant lawmaker (Congress) and at least one entity (the agency) with independent authority, subject to political accountability, to interpret the legal text.” In short, *Chevron* maintains a noteworthy separation of lawmaking from law exposition. Manning writes:

Three sources suggest that our constitutional structure places exceptionally high value on an effective separation of lawmaking from law-exposition at some point in the chain of governance. First, the separation of lawmaking from law-exposition explicitly figures in a central way in the Constitution’s careful scheme of structural protections. Second, the intellectual traditions underlying our constitutional structure emphasize such separation as a way of controlling arbitrary government. Third, even in the era of modern administration, the Court strictly enforces that norm of separation by insisting upon a separation of congressional lawmaking from executive and judicial implementation of federal statutes.⁷⁸

Manning goes further, attacking the claim that *Chevron* enables Congress to abdicate its obligation to legislate under Article I, Section 7 and the obvious concern the Framers had about separating law making from law exposition. He writes:

Although, in some sense, any form of delegation creates “legislative” policy without bicameralism and presentment, congressional control over its own delegations of power poses too grave a threat to that deliberative process, and hence is unconstitutional per se. If, however, Congress delegates authority to another branch, there is an inherent structural check on Congress’s ability to leave its policies undefined. Specifically, when Congress uses imprecision or vagueness to avoid the costs of investigating and agreeing on the precise policies it wishes to adopt, it does so only at the expense of ceding control over the particulars of its program to another branch of government. Of course, as *Chevron* itself illustrates, even with that structural incentive, Congress will at times, consciously or unconsciously, enact imprecise or vague laws that leave crucial legislative policies unspecified. Still, the separation of lawmaking from law-exposition constrains such a tendency, providing at least some degree of protection for

78. Manning, *supra* note 61, at 639.

bicameralism and presentment. If Congress omits to specify its policies clearly during the process of bicameralism and presentment, it does so only at the price of forfeiting its power of policy specification to a separate expositor beyond its immediate control.⁷⁹

Chevron is defensible not only because it addresses the Framers' concern to separate lawmaking from law exposition, but by deferring to politically accountable agencies, as opposed to politically non-responsive Article III judges; it is doctrinally more consistent with democratic pluralism and the rule of law. Beyond that, *Chevron* undoubtedly enhances the quality of American government by facilitating better policy outcomes based on agency expertise and enabling the federal courts to save scarce judicial resources for more pressing matters. Reversing *Chevron* will, if anything, undermine the responsiveness of American government and further the problem of democratic retrogression and authoritarianism. It will also, by ostensibly empowering the federal courts to adjudicate rulemakings, enforcement actions, and adjudications, *de novo*, further politicize the federal judiciary to the detriment of its institutional legitimacy and undermine national cohesion.⁸⁰

An obviously problematic adumbration of a *Chevron* reversal is *King v. Burwell*.⁸¹ *King* dealt with the legality of the IRS's continued provision of tax credits for health policies purchased on both state and federal exchanges under the Patient Protection and Affordable Care Act of 2010 ("ACA"), when the statutory text mandated provision of tax credits for policies purchased only on state exchanges ("IRS Rule"). In *King*, the Chief Justice rejected the use of *Chevron* and concluded that no deference should be granted to administrative rulemaking provisions such as this, which are of central importance to a statutory scheme.⁸² His decision, however, upheld the IRS Rule on the grounds that its invalidation would have undermined the insurance marketplaces, which Congress could not have intended in enacting a law designed to provide universal health insurance.⁸³

Perhaps, in *King*, the Chief Justice ingeniously found a means to narrow the power of administrative agencies without jeopardizing the Court's institutional legitimacy with political and jurisprudential liberals.

79. *Id.* at 653–54. .

80. For example, the U.S. Senate's abject failure to consider President Obama's nomination of Judge Merrick Garland to sit on the U.S. Supreme Court; conservative support for President Trump based on their goal to controlling the federal courts ideologically; and, most recently, the parlous spectacle of the Justice Kavanaugh's confirmation hearings before the U.S. Senate.

81. *See King v. Burwell*, No. 14-114, slip op. at 8 (574 U.S. ____ (2015)).

82. *Id.*

83. *Id.* at 7, 21.

More likely, he chose a mode of analysis that empowered the federal courts at the expense of agencies, thereby problematically politicizing the judiciary without increasing the scope of its institutional competence or resource base. The *King* outcome did not earn plaudits from conservatives thankful that the Chief Justice abjured *Chevron* when analyzing the IRS Rule. Rather, conservatives denounced the Chief Justice as a closet liberal, intent on saving the ACA regardless of the consequences.⁸⁴ Justice Scalia, no less, claimed the result to be so “absurd” that the ACA should now be called “SCOTUSCare” based on the Court’s use of “somersaults of statutory interpretation” to save the ACA from judicial invalidation.⁸⁵ If anything, rejecting *Chevron* and applying the “central importance to the statutory scheme” test will only further politicize the judiciary and undermine its independence.

Chevron should not be reversed. It enables administrative law to serve its intended goal of updating American institutions, avoiding institutional sclerosis by enabling Congress to enact legislation that is legitimately enforced by competent and politically accountable administrators with the expertise to do so. It avoids administrative oligarchy by requiring tentative rulemakings to undergo notice and comment under APA 553 before issuing final rules and, in the event of judicial review, a requirement that the agency satisfy “hard look” review under the arbitrary and capricious framework, which requires that the agency demonstrate that its decisions are fully supported in the record before the reviewing court.⁸⁶ Under the *Chevron* framework, Congress enacts legislation that delegates rulemaking authority to a politically accountable agency, and the agency writes the relevant rulemaking consistent with the statute. This rulemaking, which is democratically legitimated by the express rulemaking delegation from Congress, is further legitimized by incorporation of public input via notice and comment with subsequent judicial review to insure that the final rulemaking is consistent with the authorizing legislation and has considered the received public comments. This delegation framework is democratically legitimate and leads to better government outcomes because agencies have

84. See John Yoo, Opinion, *Chief Justice Roberts and His Apologists*, WALL ST. J., June 30–July 1, 2012, at A15; *WTH is Going on with the Supreme Court? John Yoo on the DACA Decision and the Dangerous Implications for Executive Power*, AEI (July 29, 2020), <https://www.aei.org/wp-content/uploads/2020/07/7.29.20-John-Yoo-transcript.pdf> [<https://perma.cc/67Y4-RQWT>].

85. *King*, slip op. at 1, 21 (Scalia, J., dissenting).

86. See, e.g., *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-597, slip op. at 8–9, 23, 25, 26 (591 U.S. ____ (2020)) (concluding that the Trump Administration’s attempted revocation of the Deferred Action for Childhood Arrivals program initiated by Executive Order by President Obama failed to satisfy hard look review because there was nothing in the administrative record demonstrating DHS considered all the alternatives before it prior to issuing a rescission order).

greater expertise and specialized knowledge in their jurisdictional area than either Congress or the courts. Broader delegations to the executive branch are consistent with democratic accountability, in that the President is elected by a majority of the Electoral College to implement a regulatory framework consistent with the President's policy objectives. It is also because agency deference empowers politically accountable agencies over courts which are designed to be unaccountable. Professor Harris's approach would inadvertently impose a crabbed reading of the Constitution to undermine American governmental capacity. In the long run, this will further the trend toward democratic retrogression and authoritarianism.

One proposal, that is well outlined in a previous piece I authored, recommends increasing the number of and improving the means of electing Representatives from single member plurality districts to a form of proportional representation, as used in much of Western Europe.⁸⁷ This will potentially free resources for Congress to facilitate administrative oversight in two ways. First, it would enhance Congressional resources to properly draft and effectuate bipartisan legislation with proper instruction given to adequately guide agencies as they undertake the rulemaking process. Second, it would increase the likelihood of Congress enacting, amending, or repealing legislation as needed and minimize the pressure on agencies to, in effect, fill the legislative void by way of agency rulemakings and guidance memos that, at times, undermine separation of powers and lead to administrative overreach. Examples of Congressional paralysis leading to ostensible administrative overreach include, among many items: 1) Congress's failure to adequately draft the ACA, which has resulted in perceived administrative overreach; and 2) failure to reach a bipartisan compromise on immigration, which precipitated President Obama's illegal Deferred Action for Childhood Arrivals ("DACA") Executive Order and President Trump's equally illegal purported DACA repeal.

With respect to the ACA, a Democratic Congress drafted and enacted the legislation without any Republican support in the House of Representatives that, at the time, had a 257-199 Democratic majority.⁸⁸ This lopsided majority was due to the 2006 and 2008 Democratic "wave" elections resulting from, among other things, public disapproval of the Bush Administration's response to Hurricane Katrina, its handling of the Iraq war, and the Financial Crisis that followed Lehman Brothers bankruptcy in

87. See Mohamed Akram Faizer, *Resurrecting Congress to Reduce Administrative Chaos: Redressing Administrative Overreach by Increasing the Number of Congressmen and Ending Single-Member Plurality Districting*, 14 TENN. J. L. & POL'Y 19, 34, 50 (2019).

88. Gary Price & Tim Norbeck, *A Look Back at How the President was Able to Sign Obamacare into Law Four Years Ago*, FORBES (Mar. 26, 2014), <https://www.forbes.com/sites/physiciansfoundation/2014/03/26/a-look-back-at-how-the-president-was-able-to-sign-obamacare-into-law-four-years-ago/?sh=64783199526b> [<https://perma.cc/S3ZU-EC9B>].

September 2008. Unfortunately, these wave elections came at the expense of moderate Republicans who might have cooperated with Democrats to enact an effective health care compromise. Eventually, 219 Representatives voted for the ACA while 212 voted against, with no Republicans voting for the measure.⁸⁹ This and the fact the law was enacted via reconciliation to avoid a Senate filibuster created the perception that the ACA was a hyper-partisan piece of social welfare legislation that was “shoved down the throats” of the American public.⁹⁰

If a larger House had been elected via proportional representation, many moderate Republicans would have been elected after the 2008 election who may well have constructively cooperated with Democrats to arrive at a final, better drafted, less mistake-prone piece of legislation. Two obvious errors are worthy of mention. First, Speaker Pelosi, Congressional Democrats, and the Obama Administration never anticipated states would refuse to cooperate with federal officials in effectuating the Medicaid expansion because it was almost entirely paid for by the federal government.⁹¹ As such, neither Congressional Democrats nor the Obama White House anticipated the provision requiring states to expand their Medicaid rolls to cover all individuals whose incomes are below 138% of federal poverty guidelines would be: (1) objected to by attorney generals in “red” leaning states; and (2) found to be improperly coercive on state governments and therefore in violation of state sovereignty, as confirmed by the U.S. Constitution’s Tenth Amendment.⁹² The Supreme Court’s decision to remedy this defect, allowing recalcitrant states to opt-out of the Medicaid expansion while leaving the rest of the law intact, led most “red state” legislatures to reject federal funding to expand their Medicaid programs due to political polarization on the issue.⁹³ This problematically

89. Shailagh Murrery & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST (Mar. 22, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html> [https://perma.cc/9BMQ-LBMX].

90. Price & Norbeck, *supra* note 88.

91. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 2001, 124 Stat. 119 (2010); *see also* 42 U.S.C. § 1396c (2012), *superseded* by Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Mark Hall, *Do States Regret Expanding Medicaid?*, BROOKINGS: USC-BROOKINGS SCHAEFFER ON HEALTH POLICY (Mar. 26, 2018) <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2018/03/26/do-states-regret-expanding-medicaid/> [https://perma.cc/L7K8-HD34].

92. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–82 (2012) (Roberts, C.J.).

93. *Id.* at 585. *See generally* Status of State Medicaid Expansion Decisions: Interactive Map, KFF (Nov. 2, 2020), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/>

created an adverse selection phenomenon in the ACA's "red state" healthcare exchanges, causing insurance companies to cease participation in and exit these marketplaces because high-risk, low income individuals Congress anticipated would be covered under the Medicaid expansion, lacked the ability to do and instead sought coverage under the exchanges.⁹⁴

The other drafting error in the ACA was seen textually when it authorized tax credits to be provided for insurance plans purchased "through an Exchange established by the State" when Congress's intent was to authorize tax credits for policies purchased on both state and federal exchanges.⁹⁵ The Supreme Court's resolution of this dispute, in the Government's favor, based on the "central importance to the statutory scheme" test is outlined above and posits a series of problems for the federal judiciary should it or Congress force an abandonment of *Chevron* in the future.

The ACA's enactment and implementation is a paradigmatic example of the difficulties in passing well-drafted social welfare legislation in a hyper-polarized and understaffed Congress. Had there been more Representatives elected via proportional representation, the first casualties of the Democratic "wave" elections of 2006 and 2008 would not necessarily have been moderate Republicans. Proportional representation-based districting would have left in place many moderate members of the G.O.P caucus who would have been feasible partners in a healthcare compromise. Additionally, the Democratic leadership would have, most likely, been less partisan and more inclined to work with Republican moderates to craft a bipartisan, tighter, and less error-prone piece of legislation. Had this been achieved, the issue of administrative overreach may never have arisen.

Another paradigmatic example of administrative overreach by Executive Order is DACA, which purported to defer deportation and grant lawful presence benefits to unauthorized migrants who were brought to the U.S. as minors.⁹⁶ The massive increase in unauthorized migration since the Immigration and Nationality Act of 1965 stemmed from the development of

[<https://perma.cc/G7P2-V26C>] (showing that, as of November 2, 2020, 14 states had not expanded their Medicaid programs in practice).

94. Olga Khazan, *Why So Many Insurers are Leaving Obamacare: How Rejecting Medicaid and Other Government Decisions Have Hurt Insurance Markets*, ATLANTIC (May 11, 2017), <https://www.theatlantic.com/health/archive/2017/05/why-so-many-insurers-are-leaving-obamacare/526137/> [<https://perma.cc/SJ6-UQCH>].

95. 26 U.S.C. § 36B (a)–(b) (2018).

96. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/PNZ9-GYU8>].

a world migratory route from Central America to the west and southwest of the U.S.⁹⁷ DACA was enacted only after the House of Representatives repeatedly failed to act on a Senate compromise, which would have regularized the status of many unauthorized migrants and even provided them an earned pathway to citizenship.⁹⁸ Congressional immobility was a concomitant of the political polarization and partisan districting that led House Republicans to effectively veto immigration compromises that were proposed during both the second Bush and Obama Administrations.⁹⁹ It also explains Congressional Democrats' refusal to enhance border security to minimize future unauthorized migration or expand the country's temporary guest worker program.¹⁰⁰ An immigration compromise, such as the one proposed by the Senate Gang of Eight, might have been feasible had there been a larger House of Representatives elected in a manner to protect, as opposed to, undermine moderates. Such a compromise would have, of course, preempted the DACA and any discussion of administrative overreach on the issue.

Department of Homeland Security v. Regents of the University of California,¹⁰¹ points to the importance of administrative proceduralism and the effectuation of "hard look" review to insulate the professional civil service from illegitimate political pressure. In *DHS*, the Court invalidated the DACA rescission order on the grounds it failed to satisfy "hard look" review, notwithstanding a change in Presidential Administration, because: 1) the agency's purported reasons for the rescission consisted primarily of "post hoc" rationalizations that undermine agency accountability; 2) DHS treated the Attorney General's illegality conclusion regarding DACA's provision of lawful presence benefits to unauthorized migrants as sufficient to rescind both benefits and forbearance of deportation, without explaining why it failed to consider only forbearance as an alternative policy; and 3)

97. See generally Immigration and Nationality Act, amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965); Chris Huber, *Central America migration: Facts, FAQs, and How to Help*, WORLD VISION (May 3, 2019), <https://www.worldvision.org/refugees-news-stories/central-america-migration-facts> [<https://perma.cc/7M66-URC3>].

98. *Key Provisions in "Ganga of Eight" Senate Proposal*, WASH. POST (Apr. 15, 2013), <http://www.washingtonpost.com/wp-srv/special/politics/senators-immigration-legislation-provisions/> [<https://perma.cc/LC68-9XFK>].

99. See generally *Why Immigration Reform Died in Congress*, CBS NEWS (July 1, 2014), <https://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276> [<https://perma.cc/ZUB5-BNKS>] (discussing the House Republicans blocking immigration reform in 2013–2014).

100. Peter Beinart, *How the Democrats Lost Their Way on Immigration*, ATLANTIC (Jul.–Aug. 2017), <https://www.theatlantic.com/magazine/archive/2017/07/the-democrats-immigration-mistake/528678/> [<https://perma.cc/XEF8-GJSE>] (discussing Democrats' immigration policy stances).

101. See generally *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, slip op. at 29 (591 U.S. ____ (2020)).

DHS arbitrarily and capriciously failed to consider legitimate reliance interests on the original DACA Memorandum by failing to weigh them against competing policy concerns.¹⁰²

DACA's travails, in short, demonstrate the public policy imperative of maintaining administrative law as a means of insulating agency administrators from the political whims of a hyper-polarized Congress and a uniquely unqualified, illiberal and authoritarian President. It also evidences the importance of the APA's purported tripartite division of administrative responsibilities into legislative, prosecutorial, and judicial spheres. The fact that DACA was implemented and purportedly rescinded via Presidential executive order evidences the attendant risks to institutional sclerosis and democratic retrogression demonstrated by Congressional immobility in conjunction with executive branch overreach on the immigration issue. The arbitrariness of the purported rescission points to the importance of judicial review as a means of supplementing agency deference doctrines and evidences agency deference is neither rule by agency fiat, nor a license to administrative overreach. Rather, it is designed to insulate agencies from improper political influence in effectuating methodical agency decision making consistent with the rule of law.

III. HARRIS – A DISMISSIVE REPLY

My good friend Professor Faizer presents several interesting arguments, none of which are ultimately persuasive. Our current administrative state is neither constitutional nor desirable.

First, Professor Faizer notes the Framers' own separation of powers was not complete, citing the impeachment power, the veto, the override of the veto, and the Senate's power to ratify treaties and consent (or not) to the appointment of high national officials.¹⁰³ True enough. But I must point out the provisions Professor Faizer cites are designed to operate as checks by one branch upon another. Far from combining powers, they proceed from the premise that "[a]mbition must be made to counteract ambition," as Madison famously said in Federalist 51,¹⁰⁴ to ensure that no one branch becomes ascendant.

Even if these constitutional provisions (or others) are interpreted as mixing legislative, executive, and judicial functions, the Framers implicitly forbade any further such mixing. As the Supreme Court noted when it rejected the legislative veto, the Constitution contains a "finely wrought" procedure for the legislative process, which neither Congress nor the President can change. *United States v. Chadha*.¹⁰⁵ Fifteen years later, citing

102. *Id.* at 15, 23, 26.

103. *Id.*

104. FEDERALIST 51, *supra* note 20.

105. *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983). This was no small matter. As Justice White noted, "the Court not only invalidates § 244(c)(2) of the Immigration

Chadha, the Court rejected the line-item veto in *Clinton v. City of New York*.¹⁰⁶ Between publishing its decisions in *Chadha* and *Clinton*, the Court rejected a federal statute which purported to re-open final federal judgments as violating the separation of powers.¹⁰⁷ Taken together, these cases stand for the broad proposition that, to the extent the Framers wanted one branch to impinge upon the powers of another, they said so—and if they didn’t say so, it’s unconstitutional.

Second, Professor Faizer points out the many strengths of the APA (and the Pendleton Civil Service Reform Act¹⁰⁸) in removing undue political influence from the rulemaking process. Good. My proposal would keep them in place—civil service protections, technical expertise, public input—but would add the ultimate requirement of congressional enactment and political accountability.

Third, Professor Faizer makes the point that (in my words) Madison was not a demigod, nor were the other Framers. Agreed. We should not slavishly follow the path laid out for us by rich, white, eighteenth-century men. Their Constitution was flawed, most notably in its denial of equality and its protection of slavery. But let’s not reject the good ideas because of the bad. Separation of powers was, and remains, a good idea, despite the fact that the men who came up with it wore knee breeches and wigs. As Madison said in Federalist 51:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a

and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’ For this reason, the Court’s decision is of surpassing importance.” *Id.* at 967 (White, J., dissenting).

106. “There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure.’” *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (quoting *Chadha*, 462 U.S. at 951).

107. *Plaut v. Spendthrift Trust*, 514 U.S. 211 (1995). The Court was clear about the dangers of mixing governmental powers: “The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression.” *Id.* at 219. The Court concluded by quoting Robert Frost: “Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.” *Id.* at 240.

108. Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883).

government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.¹⁰⁹

That's what separation of powers was designed to do, and, by and large, it has succeeded, despite the congressional and judicial abdications of the past 150 years.

It is true that our Constitution has not prevented many of the abuses of the current administration, but it has prevented some. The recent impeachment proceedings slowed those abuses, even if it did not stop them, and so have various federal court orders, including the DACA decision Professor Faizer cites above.¹¹⁰ By effectively eliminating *Chevron* deference, my proposal would make it even easier for the judiciary to check the executive, as Madison intended. Every system of government is subject to the imperfections of those who inhabit it. People are not angels.

Fourth, Professor Faizer cites Francis Fukuyama. At the risk of being glib, I stopped listening to Fukuyama in 1992 when he proclaimed the end of history.¹¹¹ It's been almost thirty years. Lots of history has happened since then, most of it hostile to liberal democracy.¹¹² And yes, I realize that Fukuyama was talking about competing ideologies, and his conviction that liberal democracy would emerge the eventual victor, at least in the long term. I hope he's right. But I note that long-term predictions are notoriously inaccurate (I'm still waiting for nuclear fusion and flying cars), and therefore of little value to the current generation. In the immortal words of John Maynard Keynes, "[i]n the long run we are all dead."¹¹³ In the meantime, authoritarian ideology is on the rise. Our own Republican Party recently declined to draft a specific platform for the 2020 election, instead issuing the blanket assertion "[t]hat the Republican Party has and will continue to enthusiastically support the President's America-first agenda."¹¹⁴ What is such a platform, if not an open-ended statement of

109. FEDERALIST 51, *supra* note 20.

110. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587 slip op. at 29 (591 U.S. ____ (2020)).

111. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (Macmillan 1992).

112. I was irritated then, and I am irritated now, with those who proclaim the triumphant victory of the West in the Cold War. The Soviet Union may be gone, but the Russian Empire remains, and it remains hostile to liberal democracy. And China is positively Orwellian.

113. JOHN MAYNARD KEYNES, *A TRACT ON MONETARY REFORM* 80 (Macmillan & Co. 1923).

114. *As Adopted by the Republican National Committee, Resolution Regarding the Republican Party Platform* (2020), https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf [<https://perma.cc/C8TH-GF79>].

nationalism as defined by one leader? One is reminded of the *Führerprinzip*.¹¹⁵

Fifth, Professor Faizer references the supposed enhancement of our democratic values by what Michaels calls “the administrative separation of powers” within the Executive Branch.¹¹⁶ If we were to observe the constitutionally mandated separation of powers, there would be no need to supplement it by further dividing the Executive Branch. In any event, my own (admittedly limited) experience with administrative practice suggests the opposite of democratic value enhancement. As a practitioner, I saw agencies dominated by the very industries they were supposed to regulate, staffed by bureaucrats whose sole ambition seemed to be a stroll through the revolving door to a cushy industry job, all of which was enabled by a byzantine structure largely invisible to the public. Who reads the Federal Register? Industry lawyers do; most common citizens do not even know what it is. This results in the Kafkaesque system we have, where, by the time the public learns of an agency action, it is a *fait accompli*, where challenges are not only lengthy and expensive but useless.

There are also major due process issues with the current system. The primary problem is the implicit biases of ALJs.¹¹⁷ Beyond that, the lack of uniformity in the procedures followed in administrative hearings, especially informal hearings, is an invitation to abuse by litigants and arbitrariness by tribunals. The Federal Rules of Civil Procedure, modified and improved over decades, exist for a reason. We should use them in federal court. In any event, my proposal would not eliminate what little good the APA may do for democratic values. My proposal would enhance those values by giving the public additional points of entry through both the political process and the federal courts.

Sixth, Professor Faizer defends *Chevron* deference. My proposal would effectively eliminate *Chevron* deference, and good riddance. I am all for agency expertise, so long as it is used only in an advisory capacity. If I have a medical condition, I will seek out expert advice, but the ultimate choice of treatment is mine. I might look for second or third opinions. I don’t want to be bound by the advice of a company doctor, or one who happens to be in my health insurance network. Similarly, we should not be bound by agency decisions. Our elected representatives should question, and in appropriate cases, reject them.

115. Geoffrey Megargee, *Hitler’s Leadership Style*, BBC (Mar. 30, 2011), http://www.bbc.co.uk/history/worldwars/wwtwo/hitler_commander_01.shtml [<https://perma.cc/P8NS-5R6P>].

116. See generally Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015) (referencing “the administrative separation of powers”).

117. Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2017).

Again, this is not a conservative or liberal issue. To cite just one timely example, we should all value the expertise of our federal health agencies in fighting the global pandemic—right up to the moment when they clearly have been corrupted by political forces.¹¹⁸ We should not cloak the actions of corrupted agencies with any kind of deference.

Seventh, Professor Faizer points out that, currently, Congress would not be able to effectively review the thousands of proposed rules that my proposal would send its way. I agree. Fortunately, Professor Faizer himself has suggested several solutions which would restore some of Congress' eroded powers and better enable it to perform its legislative function.¹¹⁹ Among them, I embrace the simplest: creating more House seats and significantly increasing Congress's budget and staff. Many hands make light work.

Moreover, some rulemakings are more important than others. I expect that many would end up on Congress' consent calendars, and appropriately so. Only the most important rules should receive extensive hearings and debate. But all such rules, even those approved by a largely *pro forma* procedure, would be fodder for the next election. Congress would have to answer for them.

One can make a similar lack-of-resources argument for the federal courts. My proposal would increase their caseload considerably. So what? Hire more judges. Build more courthouses. The federal judiciary is already understaffed and underfunded.¹²⁰ My proposal presents an opportunity to rectify that. As for the alleged lack of administrative expertise in the federal judiciary, I must point out that most federal judges are quite versatile, and administrative law is no more complex than contracts or torts, and no more challenging than constitutional law. Even if some areas of administrative law would benefit from specialized courts, well, then create them. We already have specialized tax courts, federal claims courts, and national security courts.¹²¹ We can do the same for, e.g., workplace safety or social security disability claims—if, again, such specialization is truly needed.

118. Laurie McGinley et al., *Inside Trump's pressure campaign on federal scientists over a covid-19 treatment*, WASH. POST (Aug. 30, 2020), https://www.washingtonpost.com/health/convalescent-plasma-treatment-covid19-fda/2020/08/29/e39a75ec-e935-11ea-bc79-834454439a44_story.html [https://perma.cc/WR89-4SWU].

119. Faizer, *supra* note 87.

120. Cara Bayles, *These Are The Nation's 27 Most Overworked District Courts*, LAW 360 IN-DEPTH (Mar. 18, 2019), <https://www.law360.com/articles/1139833/these-are-the-nation-s-27-most-overworked-district-courts> [https://perma.cc/WD5H-2WB7].

121. *E.g.*, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.

IV. FAIZER – THE LAST WORD

Professor Harris's warm-hearted formalism is on display when he cites to *Chadha* and *Plaut*. Both decisions are extremely conservative and actually worsen the problem of agency unaccountability. To illustrate, *Chadha* was a Supreme Court decision that invalidated an ostensible separation of powers transgression by the legislative branch when Congress enacted a unicameral legislative veto to nullify administrative deferrals of deportation. Notice, however, the Court's formalism has needlessly corroded Congressional capacity to oversee the government. To his credit, Professor Harris is supportive of civil service retention and professionalism. That said, the benefits of a professional and highly capable civil service would be undermined by taking away rulemaking authority and procedural rules, including deference doctrines, that are designed to enhance the quality of government professionalism.

We agree on the current administration's parlous approach to the rule of law. While I do agree that the other branches of government have slowed down various White House abuses, my concern is that the current administration is, facilitated by its allies who oppose the administrative state, undermining bureaucratic competence and the rule of law. An obvious example is the U.S. Justice Department under Attorney General Barr, who has consistently used his power to further Presidential impunity. Barr systematically mischaracterized the Mueller Report's conclusions to Congress and the public to enable the President and his supporters to characterize the investigation into Russian Election Interference as a "hoax." They subsequently used Barr's mischaracterizations of the Report to avoid accountability for his subsequent abuses of power, including the Ukraine matter that led to the President's impeachment by Congress and the Administration's parlous, White House-coerced response to the COVID-19 pandemic.

Professor Harris derides my citation to Fukuyama. I certainly invited this because what has become paradigmatic in reading scholarship on the current state of western democracy and the rule of law is the frequency of incorrect criticisms of Fukuyama and his 1992 book, "The End of History and the Last Man," which posited that, at the Cold War's End, western democracy's lack of ideological competitors meant that we had collectively arrived at a Hegelian ideological endpoint.¹²² No doubt, his critics, including Professor Harris, point to worldwide authoritarianism, democratic retrogression, and ethno-nationalism to claim the passage of time has proven Fukuyama wrong. They, however, misrepresent Fukuyama, who never said that western democracy had achieved perfection. Rather, he concluded that liberal democracy would no longer face a serious ideological competitor as was the case with totalitarian communism during the Cold

122. See FUKUYAMA, *supra* note 111.

War.¹²³ Indeed, the evidence demonstrates that few westerners truly believe that ideologies hostile to western liberalism, such as the authoritarian nationalism found in China, Hungary, and Russia today, are indeed preferable to democratic liberalism and the rule of law.¹²⁴ Where Fukuyama's 1992 book arguably fell short is its failure to recognize that liberal democracy's lack of ideological competition risked leading to its own corrosion and decay. This is indeed what makes his more recent scholarship so illuminating and explains my reference to his work.

Professor Harris makes an excellent point about agency capture. A paradigmatic example is the Federal Aviation Administration under President Trump. The FAA's failures to protect passenger safety is directly attributable to Congress and the White House whittling down its autonomy to regulate under the FAA Reauthorization Act of 2018. In short, the source of the problem did not start with the FAA, but unbridled political and financial pressure brought on Congress and the White House to hamstring the agency and make it effectively beholden to Boeing.¹²⁵

Professor Harris's position adumbrates potential support of the Congressional Review Act ("CRA")¹²⁶ and the Regulations from the Executive in Need of Scrutiny ("REINS") Act.¹²⁷ Both are unworkable and ill-advised. The CRA was enacted in 1996 and requires agencies to submit all major regulations to Congress before they become effective.¹²⁸ Under the CRA, Congress has 60 legislative days to pass a joint resolution of disapproval, which would keep the regulation from going into effect.¹²⁹ This is a manifestly unworkable and illegitimate paradigm, largely because the Congressional coalition that enacted the original legislation may not be in place to veto an illegitimate final rulemaking. Also, it is entirely infeasible for the entire Congress to review all rulemakings, especially since there are nearly 4,000 rulemakings issued each year, compared to only 250 or so pieces of legislation that are annually signed into law.¹³⁰

123. *Id.*

124. Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 395 (2015).

125. Niraj Chokshi, *House Report Condemns Boeing and F.A.A. in 737 Max Disasters*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/business/boeing-737-max-house-report.html> [<https://perma.cc/6X2M-XQ8S>].

126. 5 U.S.C.A. §§ 801–808 (West, Westlaw through Pub. L. No. 116-193).

127. Regulations From the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. (2011).

128. Major regulations are those with an annual impact of at least \$100 million to the U.S. economy.

129. 5 U.S.C.A. § 802 (West, Westlaw through Pub. L. No. 116-193).

130. Clyde Wayne Crews Jr., *How Many Rules and Regulations Do Federal Agencies Issue?*, FORBES (Aug. 15, 2017), <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/?sh=358e75071e64> [<https://perma.cc/8Y2Z-UZD5>].

The CRA has been proven ineffective. To illustrate, between 1996 and 2008, agencies submitted nearly 48,000 final rules to Congress and a mere 47 joint resolutions of disapproval, regarding 35 rules, were introduced.¹³¹ A grand total of one regulation has been disapproved. This was OSHA's "ergonomics rule," which was finalized at the end of the Clinton Administration and jointly disapproved by both Houses of the subsequent Congress and President George W. Bush.¹³² The evidence demonstrates that agencies have adopted "an attitude of nonchalance" toward the CRA.¹³³

Recognizing infirmities with the CRA, and the infeasibility of requiring Congress to anticipate all issues facing agencies via legislative drafting, there is a temptation to have the newly empowered House of Representatives require responsible congressional committees to affirmatively approve proposed final rulemakings prior to implementation. The problem is sheer volume of agency rulemakings would easily overwhelm even a better resourced Congress.

Unlike the CRA, which requires joint disapproval of a proposed major regulation, the REINS Act reverses this presumption and instead requires affirmative joint bicameral approval for all proposed rulemakings prior to implementation. The problem, once again, is that Congress would be overwhelmed by the task, thereby creating a bottleneck effect that would preclude timely implementation of necessary rulemakings.

This country is well-served by what Michaels correctly describes as the tripartite division of administrative responsibilities under the Administrative Procedure Act. This division has updated American governmental capacity and improved upon the gaps in Madison's constitutional framework, which had resulted in an American government that was incapable of adapting to the industrial age. Should Professor Harris's positions be adopted—an end to agency rulemaking, adjudication, and deference doctrines—governmental incapacity will ensue. This would not result in some Rousseauian state of nature, but a brutal world where resources are allocated based on social hierarchy, economic insecurity, and the ever-present fear of retaliation by those in power. It is a result we must avoid.

CONCLUSION

Professor Faizer argues that Administrative law, the APA, and agency deference doctrines have been unfairly maligned by Professor

131. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 84 (7th ed. 2011).

132. *Id.*

133. *Id.* (quoting CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 141 (3rd ed. 2003)).

Harris. Big hearted liberal that he is, Professor Harris's concerns about the administrative state and agency deference, though understandable, cannot be feasibly addressed without enfeebling American government capacity to address the broader regulatory and administrative needs of a heterogeneous, continent-sized industrial democracy. If anything, the APA and agency deference doctrines need to be updated to account for the country's shift from the industrial superpower that it was at the time of the APA's enactment to the multiethnic, information-age country of today with pronounced inequalities that the government struggles to remediate.

Professor Harris, however, would argue that administrative law currently renders individual citizens powerless when confronting government power in the form of administrative agencies, emboldened by their vast budgets and adjudicatory powers. He would say that objecting citizens, who are caught in the maelstrom of administrative chaos, are treated as recalcitrant subjects, and not citizens, for daring to object to a monographic regulatory ratchet that is furthered by expensive, and often biased, agency adjudications and appeals that are reflexively affirmed by Article III courts based on agency deference doctrines. Professor Faizer would not disagree with Professor Harris that these are problems. Rather, he would conjecture, based on evidence and history, that Professor Harris's remedy, which is to end all agency rulemaking, adjudication, and deference doctrines, would create far more problems than anticipated. Professor Faizer would argue that Professor Harris's solution would unintentionally worsen the problem of governmental incapacity that is already undermining the quality of American democracy and explains much of the authoritarianism that has seeped into the political culture in recent years. It would also result in a regressive allocation of government and private sector resources based on traditional social hierarchies, corporate power, and an ever-present fear of retaliation and social exclusion, as opposed to an allocation based on inclusion and the rule of law.

At the end of the day, though, both Professors Harris and Faizer hope for a better and more inclusive world, one where Americans of all backgrounds, sexual identities, colors, and creeds are full and equal citizens with access to education, jobs, and resources consistent with living in the world's leading democracy. Their disagreement is born of a warm-hearted idealism and a hope for a better, more inclusive, and successful country. It is explained by the great abolitionist and Unitarian Minister, Theodore Parker, who in an 1853 sermon, wrote, "I do not pretend to understand the moral universe; the arc is a long one, my eye reaches but little ways; I cannot calculate the curve and complete the figure by the experience of

sight; I can divine it by conscience. And from what I see I am sure it bends towards justice.”¹³⁴

134. *Theodore Parker And The 'Moral Universe'*, NPR (Sept. 2, 2010), <https://www.npr.org/templates/story/story.php?storyId=129609461> [<https://perma.cc/5GWB-AS3E>].