Our topic this morning is the administrative state. That does not mean we will be discussing the current state of administrative methods or the problems of administering state agencies. “Administrative state” is a constitutional pejorative. We use it to describe something we do not like: the migration of lawmaking from the Congress to the executive branch and of adjudication from the judiciary to the executive.

The President is charged by the Constitution with faithfully executing the law. But today the President and his subordinates—now including innumerable regulatory and administrative agencies and multiple staffs in the Executive Office of the President—not only execute our laws, but also write laws in the form of rules and adjudicate disputes that arise under their rules. This consolidation is an affront to the separation-of-powers scheme the Framers established. It has led to many proposals for constitutional restoration.

My argument is that the administrative state is primarily the creation of Congress. It has come into being not through executive seizures of power but rather through congressional grants of power, a procedure lawyers call “delegation.”

One could have been forgiven for not seeing this during the Barack Obama years. Every modern President and every regulatory agency has sometimes, in the heat of pursuing an urgent or cherished goal, overstepped the bounds of the authorities given to them by Congress in statutory law. But President Obama and his regulatory officials made it an open and notorious practice, a matter of routine, a critical component of many of the most important policy departures of his second term. During that period, it seemed that we might be witnessing a new stage of constitutional evolution: government by executive decree.

President Donald Trump, however, seems intent on restoring at least the status quo ante. His Administration has withdrawn several of the Obama Administration’s most brazen extra-statutory ventures, such as the Environmental Protection Agency’s Clean Power Plan and the Education Department’s campus sex and bathroom etiquette rules; it
is proposing to replace them with new policies that hew to the relevant statutes and to do so through the requirements of the Administrative Procedure Act that the previous Administration frequently ignored. And in two critical cases—President Obama’s Deferred Action for Childhood Arrivals (DACA) decree and his expenditure of billions of dollars on Obamacare cost-sharing without congressional appropriation—he has not only withdrawn the policies but sent them back to Congress where they belong. He has said that he would be happy to see these policies adopted in legislation so long as they were part of larger health care and immigration reforms that included some of his own priorities.

Now here is the interesting thing: President Trump’s steps toward legislative restoration have been at least as controversial—even on Capitol Hill—as were President Obama’s legislative seizures. President Obama’s actions were shocking to constitutional loyalists, yet they were also understandable. He was going with the flow of decades of congressional policymaking delegation. He was building on several immediate precedents in the Bush 43 Administration, such as using financial bailout funds from the Troubled Asset Relief Program created by the Emergency Economic Stabilization Act of 2008 to prop up automobile manufacturers.

In contrast, President Trump’s actions are unfamiliar: He is asking Members of Congress to make controversial, politically risky decisions that many of them would clearly prefer to leave to others.

A brief refresher in regulatory history will show how we have arrived at this curious state.

The regulatory agency, which first appeared in the late 19th and early 20th centuries, is often thought of as an embodiment of Woodrow Wilson Progressivism. The essential idea was that modern times demanded expert, detached, agile administration in place of the amateur, parochial, oafish decisions of elected legislatures. But that is academic storytelling. The early regulatory agencies, beginning with the Interstate Commerce Commission in 1887, were all creatures of Congress, conceived and enacted with little executive input or perspective.

Far from being neutral and aloof, the agencies were mini-legislatures with partisan balance, highly porous to interest-group influence, reporting directly to Congress and
supposedly “independent” of the executive branch. When Theodore Roosevelt and Wilson arrived on the scene, they provided strong rhetorical support but continued to leave the heavy policy lifting to Congress. For example, President Wilson’s greatest Progressive triumph, the Federal Reserve Act, was a thoroughly congressional measure with designed-in roles for private banks and regional interests.

When the Depression arrived, FDR and his New Dealers were actively involved in establishing the next generation of regulatory agencies, but they largely adopted the existing template for independent commissions, most prominently the Securities and Exchange Commission, Federal Communications Commission, and Civil Aeronautics Board. The big exception was FDR’s cherished National Industrial Recovery Act, a highly centralized executive enterprise that the Supreme Court unanimously held unconstitutional in *Schechter v. United States* (285 U.S. 495, (1935)), which remains good law even today.¹

Congressional delegation became dramatically more expansive beginning in the early 1970s. Richard Nixon established the Environmental Protection Agency by reorganizing existing agencies, but its statutes, such as the Clean Air Act, were thoroughly congressional in their authorship, as were those of the profusion of new agencies Congress created on its own, such as the National Highway Transportation Safety Administration, Occupational Safety and Health Administration, and Consumer Product Safety Commission. And the new health, safety, and environmental regulatory agencies were vested with de facto lawmaking powers far beyond those of the Progressive and New Deal eras.

The Interstate Commerce Commission would use laborious adjudicative procedures to decide, say, whether to permit a second trucking company to haul shoes from Lowell, Massachusetts, to Fort Wayne, Indiana (its decision would usually be “No”). In contrast, the EPA would use informal “notice-and-comment rulemaking” to issue complex, nationwide pollution controls costing hundreds of millions of dollars—rules that applied to entire industries and profoundly affected their operations, competitive structures, and prices.

From 1970 onward, most of the new agencies were headed, in place of a bipartisan commission, by a single administrator serving at the pleasure of the President; this
arrangement fostered much more efficient, discretionary, profuse regulating and kindled the transformation of the President into lawmaker in chief. The scope and autonomy of executive branch lawmaking grew over time, culminating (so far) in the Dodd–Frank and Affordable Care Acts of 2010.

These developments are celebrated as great civilizational advances by Progressive law professors and political activists, but they were accompanied by parallel developments in Congress’s exercise of its financial powers which almost no one celebrates. Also beginning in the early 1970s and gathering force over the decades, Congress abandoned regular budgeting and appropriations and permitted the federal government to operate deeply in the red, in good times as well as bad, for the first time in American history; eventually, it began to delegate even its taxing and borrowing powers to executive officials.

The comprehensiveness of Congress’s abdications suggests that something systematic is afoot and has prompted a wide range of research, scholarship, and advocacy in the academy and at the think tanks. Columbia’s Philip Hamburger received one of last year’s Bradley Prizes in part for his powerful work, Is Administrative Law Unlawful? George Mason’s Neomi Rao, who has shown how the Supreme Court’s lax “nondelegation doctrine” encourages congressional nonfeasance, is now President Trump’s regulatory policy czarina. The venerable Federalist Society, another Bradley Prize laureate, has launched an ambitious Article I Initiative for congressional reform, as has the feisty young R Street Institute. Heritage, Hudson, AEI, the Competitive Enterprise Institute, Cato, and others are pulling oars in these waters. Brookings has been promoting bipartisan budget-process reform for many years.

The congressional reform movement has generated many concrete ideas for helping Congress reassert its lawmaking and financial powers and reinvigorate its oversight of executive branch activities. These include returning internal authority from party leaderships to authorizing and appropriating committees and reempowering their chairmen, beefing up professional staffs, creating specialized offices for regulatory oversight and scientific assessment on the model of the Congressional Budget Office, replacing the toothless 1974 Budget Control Act with more disciplined budgeting procedures, and reforming the Senate’s filibuster and other rules that have transformed it into a 60-vote assembly for most legislative business.
In the regulatory sphere, the Big Bertha of congressional reengagement is the Regulations from the Executive in Need of Scrutiny Act (the REINS Act), which would require that major agency rules be approved by both houses under expedited procedures and up-or-down floor votes before they could take effect. Before 1983, Congress subjected many executive branch decisions to a “legislative veto” by vote of either chamber or both concurrently. In that year, in INS v. Chadha (462 U.S. 919 (1983)), the Supreme Court held the procedure unconstitutional on grounds that Congress could change federal policy only through formal legislation—that is, by affirmative vote of both chambers and presentment to the President.

REINS is a Chadha-compliant one-house legislative veto, achieved at the cost of Congress’s pre-committing itself to time-constrained floor votes on all major rules in place of the option to veto rules at its discretion. REINS has passed the House many times, and President Trump has endorsed it—but mainly as symbolic gestures, for the Senate has been indisposed even within the Republican Conference. Recently, Senator Mike Lee of Utah has proposed a targeted REINS-like procedure for President Trump’s revisions of import tariffs. He has found few takers even though many Republicans as well as Democrats claim to be strongly opposed to the President’s tariff campaign.

The congressional reform movement, impressive as it is on paper, has one serious problem: Congress wants no part of it. Most Members of Congress are content with the current arrangements, which is really not surprising because, as we have seen, it is Congress that has made those arrangements. Two years ago, Senator Lee launched an ambitious Article I Project dedicated to reviving Congress’s very own constitutional prerogatives and reestablishing separation-of-powers government. The project attracted a grand total of nine Senators and Representatives, some of whom have since announced their retirements; despite Senator Lee’s great energy and intelligence, it has gone nowhere.

The fact is that most Members of Congress are uninterested in, or positively averse to, reclaiming their Article I powers. Passing laws and budgets and maintaining fiscal discipline is hard, often thankless work. One must pay attention to colleagues with differing and often conflicting views and interests, forge compromises that no one is entirely happy with, and explain one’s half-a-loaf votes to disappointed, single-minded donors and supporters.
But today’s representatives wish to be recognized as individuals, not as participants in a murky process of collective choice. They have discovered that it is more gratifying—and safer to their electoral prospects—to toss political hot potatoes to the executive branch, quietly lobby the agencies from case to case, and then loudly cheer or condemn the agencies’ decisions for the delectation of their supporters. Not actually paying for the programs they have championed and voted for is another means of easing the burdens of office.

All of this has shortened the legislative workweek to about two-and-a-half days. This leaves ample time for the legislators’ new business model: presenting a strong personality on talk shows and social media, networking with commercial and ideological affinity groups, fundraising, giving speeches and writing books, and in general strutting and fretting on the national stage as if they were running for President (which, in fairness, they often are).

What I have just said may sound terribly harsh, so let me emphasize that Members of Congress have been adapting to circumstances of modern society and politics over which they have little control. In our rich, educated, interconnected, technologically adept society, many more citizens have become politically engaged and organized. The range of issues they care about has expanded dramatically, as have the possibilities of effective political action on behalf of every cause. As a result, many more issues—involving personal health and safety, environmental quality, individual dignity, and group identity and participation—have crowded into the national public square.

Since the early 1970s, Congress has been overwhelmed by many more policy demands than a representative legislature can possibly manage. An old-fashioned Congress might simply have rebuffed many of the new importunings, but today’s Congress is populated by Members who are technologically equipped to “represent” the proliferating new causes as individual activists. Their essential technique has been to create a new agency for every new cause. Executive agencies, in contrast to Congress, are specialized, hierarchical, and focused. Because each one is concerned with a much narrower range of policy disagreement than Congress as a whole, they can make law with greater dispatch, and they can be multiplied essentially without limit. The administrative state has permitted our federal government to grow apace with the growth of political demands.
The difficulty for the reformer is that Congress has enormous formal powers but no duties other than to represent. The President is directed to faithfully execute the laws and protect the Constitution, judges to resolve cases and controversies that come before them and explain their decisions, but Members of Congress take direction only from voters, sufficiently to get reelected. They hold most of the constitutional marbles but don’t have to do anything with them. Holding hearings, passing laws, setting budgets, checking and balancing or just rubber-stamping the Executive—these are all options, not duties. Congress is a purely reactive, discretionary institution.

My conclusion is that congressional restoration will have to come from the outside. A less deferential attitude from the courts toward congressional delegation and agency discretion would certainly help. A less deferential attitude from the President toward congressional buck-passing would be even better. Mitt Romney, when he was running for President, vowed to follow the REINS procedure even if Congress had not enacted it as law: That is, he would send major new rules to Congress and issue them only if both houses approved.

President Trump has not gone this far, but in returning DACA and Obamacare appropriations to Congress on constitutional grounds, he has made an excellent start. He could follow up by sending Congress major regulations simply on grounds that their national importance merited congressional consent. He could say that he would issue the rules only if both houses approved them in 60 days or unless one or both houses had disapproved them. The Trump Administration is facing many regulatory decisions in the coming years that will be good candidates for formal congressional participation—on greenhouse gas policy, financial regulation, infrastructure permitting, energy efficiency rules, and automobile emissions, fuel, and mileage standards.

In many of those cases, the Administration on its own will be constrained by statutory or case law from adopting rules that are as clear and beneficial as it would like. Here a REINS-like procedure could have an additional attraction. A rule that has been enacted by Congress and signed by the President will be statutory law, and courts will be most unlikely to strike it down on other than constitutional grounds. In this manner, REINS could be a vehicle not only for congressional accountability, but also for incremental legal reform.
The procedure I suggest is open to several objections. Congress would not take kindly to the initiative: For a foretaste, consider the outraged reaction to President Trump’s having referred a few minor spending rescissions for congressional approval under an established statutory procedure. In the absence of the congressional precommitments of a REINS statute, Congress would be under no obligation to bring rules directly to the floor for votes or to refrain from amending them. The Administration’s choice of rules to refer to Congress would surely involve political and partisan considerations, and charges of opportunism would provide an excuse for ignoring the referrals.

The answer to these objections is that routine voting on consequential national policies is the *sine qua non* of congressional rehabilitation and that the President is in a better position than any other group or institution to get the training underway. Notice that the process *would* involve precommitment from the executive branch: The agencies would fashion their rules with an eye to attracting two legislative majorities, and the President would announce that he would issue the rules only if Congress approved them as written within a certain time period.

If the Administration were to do this as a regular practice and submit a steady flow of important regulations for legislative approval, a strategy of congressional passivity would eventually break down. If Members became acquainted with the experience of standing up and being counted and surviving the angry tweets and blogs of interest groups and ideological warriors to vote another day, they would eventually take an interest in setting the terms of the referrals in a REINS statute of their own.

The private sector has taught us in recent decades that genuine innovation often requires disruption from the outside. With a disrupter in chief in the White House, now would be a good time to apply that lesson to congressional revival.

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