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Conversations and speeches that push the envelope of discussion on today's most important policy issues.

Why Congress Must Confront the Administrative State

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Abstract
The triumph of the administrative state has been made possible by the emasculation of the legislative power. Washington's problem is not merely federal spending and debt; it is the arrogance of centralized power. The time is therefore ripe for a major national discussion not only about the size of government, but also about the processes of government. Americans have a choice: to be governed by the rule of law, as hammered out in open legislative debate carried on by elected representatives who are directly accountable to us, or the rule of administrators who are most certainly not accountable to us. The rule of regulators is arbitrary and unaccountable government—exactly what the Founders wished to prevent in crafting the Federal Constitution.

This paper, in its entirety, can be found at **http://report.heritage.org/cpi_lecture_5**

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Steve Kroft of CBS recently interviewed President Barack Obama. In response to a question on his job performance, the President ranked himself fourth among America's chief executives (behind Lyndon Johnson, Franklin Roosevelt, and Abraham Lincoln) in the production of policy initiatives.[1]

Critics quickly ridiculed his self-assessment as narcissistic nonsense. They're wrong.

President Obama *is* transforming American government. Few Presidents have enjoyed more success in enacting such a large policy agenda in such a short period of time.

- Within weeks of his inauguration, the President signed into law a major expansion of the State Children's Health Insurance Program (SCHIP) and Medicaid.

- He quickly followed this up with the enactment of the American Recovery and Reinvestment Act of 2009 (the "stimulus" bill), adding $831 billion to our deficits.

- In 2010, Congress passed the Wall Street Reform and Consumer Protection Act (Dodd–Frank bill), providing for massive and far-reaching financial regulation.

- And on March 23, 2010, he signed into law the 2,800-page Patient Protection and Affordable Care Act (PPACA). It is the largest single piece of social legislation in American history, expanding federal control over one-sixth of the American economy and the personal lives of more than 300 million citizens.

Combine this massive legislative production with his zealous regulatory program. While Washington's bureaucratic regime has been growing since the early 1900s, under President Obama its growth has exploded. In 2009 and 2010 alone, federal agencies issued 7,076 final rules.[2]

While the President insists that his regulatory output is less than that of President George W. Bush, a closer look reveals that his "major" regulations—those having an annual

impact of at least $100 million each—were more numerous. Since President Obama took office in 2009, federal agencies issued 106 major regulations with an annual additional cost to the economy of $46 billion.[3] In 2010, economists with the Small Business Administration estimated that the total cost of America's regulatory burden reached $1.75 trillion—more than twice what Americans pay in individual income taxes.[4]

The U.S. Departments of Agriculture, Commerce, Treasury, and Health and Human Services (HHS) and the Environmental Protection Agency (EPA) are at the center of this regulatory storm. They alone account for 43 percent of all rules in the federal pipeline.[5] Of the 43 *major* rules issued in 2010, 10 were based on EPA mandates.[6] With the President's health and environmental initiatives alone, the Obama White House has dwarfed the regulatory agenda of its predecessors.

The national health law expands the administrative power of the HHS Secretary beyond anything previously attempted. The Secretary is required to act—indicated by the statutory language "shall"—1,563 times in the final language of the legislation, and 40 specific provisions of the law mandate or permit the issuance of regulations.[7] Senate Republican Policy Committee staff estimate that the new law creates 159 new agencies or entities, but the Congressional Research Service says that the exact number is "unknowable" inasmuch as certain powerful federal offices are created administratively without direct congressional authorization.

TODAY, MORE THAN AT ANY OTHER TIME IN OUR HISTORY, WE ARE LESS AND LESS GOVERNED BY THE RULE OF LAW, HAMMERED OUT IN LEGISLATIVE DELIBERATIONS AS THE FOUNDERS INTENDED, AND MORE AND MORE GOVERNED BY THE RULE OF REGULATION.

While the law's schedule of implementation stretches out over eight years, the most far-reaching provisions—the mandates on individuals, employers, and states—take effect in 2014. Nonetheless, in less than two years, the national health law has already generated over 11,000 pages of rules, regulations, and guidelines and related paperwork in the *Federal Register*.

Just consider the law's 15-member Independent Payment Advisory Board (IPAB). The powerful board will make its initial recommendations for detailed and specific Medicare payment cuts in January 2015, and the Secretary is empowered to put them into effect *unless* Congress enacts an alternative set of payment cuts to meet statutory Medicare spending targets.[8] The board's automatic recommendations are subject to neither administrative nor judicial review, and the law further requires a three-fifths Senate majority to block IPAB's prescriptions.

Peter Orszag, President Obama's former director of the Office of Management and Budget (OMB), has observed that the extraordinary power of this new board is "the

1. Said the President: "As you said yourself, Steve, you know, I would put our legislative and foreign policy accomplishments in our first two years against any president—with the possible exceptions of Johnson, FDR and Lincoln—just in terms of what we've gotten done in modern history." For the interview, see "Interview with President Obama: The Full Transcript," *60 Minutes*, December 11, 2011, at *http://www.cbsnews.com/8301-18560_162-57341024/interview-with-president-obama--the-fulltranscript-/#exzzlkzEjHMNu*.
2. Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, 2011, at *http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202011.pdf*.
3. James L. Gattuso and Diane Katz, "Red Tape Rising: Obama-Era Regulation at the Three-Year Mark," Heritage Foundation *Backgrounder* No. 2663, March 13, 2012, at *http://heritage.org/research/reports/2012/03/red-tape-rising-obama-era-regulation-at-three-year-mark*.
4. James L. Gattuso and Diane Katz, "Red Tape Rising: A 2011 Mid-Year Report on Regulation," Heritage Foundation *Backgrounder* No. 2586, July 25, 2011, at *http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report*.
5. Crews, *Ten Thousand Commandments*.
6. James L. Gattuso, "Taking the REINS on Regulation," Heritage Foundation *WebMemo*, No. 3394, October 13, 2011, at *http://www.heritage.org/research/reports/2011/10/taking-the-reins-on-regulation*.
7. Christopher J. Conover and Jerry Ellig, "Beware the Rush to Presumption, Part A: Material Omissions in Regulatory Analyses for the Affordable Care Acts Interim Final Rules," George Mason University, Mercatus Center *Working Paper* No. 12-01, January 2012, p. 3, at *http://mercatus.org/sites/default/files/publication/Beware_the_Rush_to_Presumption_PartA_ConoverEllig.pdf*.
8. Robert E. Moffit, "Obamacare and the Independent Payment Advisory Board: Falling Short of Real Medicare Reform," Heritage Foundation *WebMemo* No. 3102, January 19, 2011, at *http://www.heritage.org/research/reports/2011/01/obamacare-and-the-independent-payment-advisory-board-falling-short-of-real-medicare-reform*.

largest yielding of sovereignty from the Congress since the creation of the Federal Reserve."[9]

In 2010 alone, Congress enacted 217 bills that became law, but that same year, federal agencies issued 3,573 final rules covering a wide variety of economic activities.[10] Today, more than at any other time in our history, we are less and less governed by the rule of law, hammered out in legislative deliberations as the Founders intended, and more and more governed by the rule of regulation. We are subject to edicts promulgated by administrators—persons we do not know and will never know, persons protected by civil service law and tenure who are not accountable to us and will never be accountable to us. Nonetheless, the administrators' detailed decisions have the force of law.

Regulation, as law, can and does directly affect whether or not we can start or run our businesses, determine how many persons we can or cannot afford to hire, how we may or may not use our land or dispose of our property. Not only do administrators publish thousands of pages of regulations, but sometimes our fellow citizens can also be subjected to criminal prosecution and jail terms for violating their rules.

THE TRIUMPH OF THE ADMINISTRATIVE STATE

Ladies and gentlemen, we are witnessing the triumph of the administrative state, but that conquest is only possible because of the emasculation of the legislative power. The Founders made Congress the lawgiver, as clarified in Article I, Section 1 of the Federal Constitution. So much of their focus, reflected in *The Federalist* and other writings, was on how to check and balance the *predominant* legislative power, to channel and contain personal ambition and factional interest, to restrain potentially tyrannical majorities and safeguard the rights of beleaguered minorities, to secure personal liberty and protect the rights of property.

AMERICANS ARE INCREASINGLY THE SUBJECTS OF AN ADMINISTRATIVE REGIME RATHER THAN THE FREE CITIZENS OF A DEMOCRATIC REPUBLIC WITH A LIMITED GOVERNMENT.

Though federal power has grown steadily since President Washington took the oath of office, today the relationship between the individual and the government is changing in a qualitative way. Americans are increasingly the subjects of an administrative regime rather than the free citizens of a democratic republic with a limited government.

Picking Winners and Losers. This steady transfer of legislative power to administrators has another inescapable consequence: arbitrary rule. The champions of administrative power invariably couch their arguments in appeals to expertise. The more complex the economic sector to be planned or regulated, the more that strict uniformity in the application of the rules becomes problematic.

In broad congressional grants of power, lawmakers give administrators wide latitude in the development and enforcement of the rules, so those who make the rules can also unmake them by granting waivers and exemptions. In the case of the health care law, HHS has already granted over 1,722 temporary waivers to certain businesses, unions, and gourmet restaurants in San Francisco that don't have to comply with national coverage rules that apply to other companies throughout the country.

Treating similarly situated Americans differently, either as individual citizens or as citizens of a particular state, amounts to arbitrary rule; and arbitrary rule is inherently unjust.

THE NEED FOR A HIGHER LEVEL OF PUBLIC DEBATE

Today's debate over the powerful bureaucracy is usually framed in terms of economic impact: How will federal rules affect economic growth and job creation, the price of gasoline or electricity, the cost of health insurance or the quality of medical care? While this level of debate is necessary, it is insufficient. Yes, we cannot neglect the trees, but it is really the health of the forest that matters.

The big question is this: How does this bureaucratic ascendancy affect ordinary Americans? My answer: Our very civic life is at stake, not just our prosperity.

The current trend is an affront to our self-government. The tacit assumption: Millions of us are not smart enough to make our own decisions for ourselves. Rather, we need to be closely supervised by

9. Orszag's comments were cited by Ezra Klein in "What Happens When Congress Can't Do Its Job?" WashingtonPost.com, March 29, 2010, at *http://voices.washingtonpost.com/ezra-klein/2010/03/what_happens_when_congress_can.html*.

10. Crews, *Ten Thousand Commandments*.

government officials. They will prescribe for us, for example, what kind of light bulbs and washing machines we should use. Now, there is even a federal mandate to provide nutritional or caloric information on restaurant menus, or food items dispensed through vending machines, as required by Section 4205 of the Affordable Care Act.

Our supervision, though distant and impersonal, becomes more precise and detailed. We are to become increasingly dependent on government for our well-being. Today, almost half of Americans (48.5 percent) live in households that are getting some form of government assistance, largely funded from federal revenues, but nearly half (49.5 percent) of our citizens pay no federal income taxes. But today's Progressives are still not satisfied. In their view, the many are to be even more dependent on the few, and the few (the hated "rich," however they are defined) should be paying even more in taxes than they do today.

Over time, these dynamics will change the character of our people, with corrosive consequences for our political culture and our economic prosperity. America will have a progressively larger class of dependent citizens, and that spirit of freedom and independence for which the Founders risked their lives and fortunes will be broken.

It does not have to be this way. Our task is to paint the big picture, the overarching framework of American civic life. The great medieval philosopher St. Thomas Aquinas, the "First Whig," defines law as an edict of reason, promulgated by the sovereign for the common good of the community.[11] The law instructs citizens in their rights and duties, and thus has a teaching function. That being the case, as lawmakers, you must become teachers of the Constitution, carriers of our rich political culture of republican government.

THE LAW INSTRUCTS CITIZENS IN THEIR RIGHTS AND DUTIES, AND THUS HAS A TEACHING FUNCTION. THAT BEING THE CASE, LAWMAKERS MUST BECOME TEACHERS OF THE CONSTITUTION, CARRIERS OF OUR RICH POLITICAL CULTURE OF REPUBLICAN GOVERNMENT.

What must we do to preserve and protect the constitutional traditions of limited government, individual liberty, the separation of powers, and the unique advantages of federalism? James Madison, "the Father of The Constitution," was not a lawyer, but he was a Congressman. And in that role, he was also a teacher: He routinely employed his formidable talents in the education of his colleagues and fellow citizens on the first principles of government.

In my reading of the public mood, you also have an eager audience. More and more Americans hunger for the wisdom of the Founders, are reading their biographies, and seek to understand their tightly reasoned arguments for the adoption of our Constitution. They are also becoming aware that there is something deeply wrong with the way in which they are being governed and that this process deviates from the intentions of the Founders. They correctly sense that modern government is ever more distant and disconnected from them. They are right.

HOW WE GOT HERE

President Obama, like President Woodrow Wilson, is a real "Progressive," but what does that mean? In his recent speech at Osawatomie, Kansas, he recalled President Theodore Roosevelt's "New Nationalism."[12] A genuine Progressive, TR favored the imposition of inheritance taxes and the income tax and became the standard bearer of the Progressive Party in 1912.

Reflecting that tradition, President Obama and his ideological allies are also vigorous champions of aggressive executive power.[13] Commenting on President Obama's

11. On Aquinas's philosophy of law, see Thomas Gilby, *The Political Thought of Thomas Aquinas* (Chicago: University of Chicago Press, 1958), pp. 124–136.

12. "By turning to TR's 'New Nationalism' model, Obama has revealed once and for all that the intellectual antecedent of his administration is the progressive theory of governance … . His objective as president is to complete the progressive transformation of America, and define its next phase as assuring not equal opportunity, but 'fair' outcomes, by redistributing wealth and benefits through an ever more complicated and extensive government that regulates more and more of the economy and society." Matthew Spalding, "The String Pullers," *National Review*, December 31, 2011, p. 19.

13. Senior Fellows at the Center for American Progress are explicit: "Concentrating on executive power presents a real opportunity for the Obama Administration to turn its focus away from a divided Congress and the unappetizing process of making legislative sausage." Center for American Progress Staff and Senior Fellows, *The Power of the President: Recommendations to Advance Progressive Change*, November 2010, at *http://www.americanprogress.org/issues/2010/11/pdf/executive_orders.pdf*.

governance, *New York Times* columnist David Brooks predicts, "When historians look back on this period, they will see it as another progressive era.... It's a progressive era based on faith in government experts and their ability to use social science analysis to manage complex systems."[14]

Welcome to the "100 Years War" of American politics. Progressivism, after all, was America's dominant political movement from 1890 to 1920. While the Progressives are identified with social reform and the reining in of corporate interests and trusts, they focused intensely on structural reform of government, particularly civil service reform and the democratization of our politics.

No modern American political movement has been more successful. Within a relatively short span of time, progressives backed the adoption of four transformative amendments to the Constitution. They fostered the income tax (Sixteenth Amendment) and secured direct election of U.S. Senators (Seventeenth Amendment); many backed Prohibition (Eighteenth Amendment); and they allied with the suffragettes (Nineteenth Amendment). In the several states, they broke the power of the political bosses and enacted initiatives and referenda and the recall of public officials.

Long before the New Deal of the 1930s, Progressives concentrated power in Washington. With the backing of the Progressives, Congress created the Federal Reserve System (1913) and the Federal Trade Commission (1914). Federal employment soared.[15] During the Great War, Congress (in the Overman Act of 1918) gave President Wilson enormous discretionary power to consolidate and rearrange executive offices and agencies. Meanwhile, dissent, especially criticism of America's entry into the war, was suppressed.

UNDER THE RULE OF THE NEW PROGRESSIVES, YOU WILL BEHAVE. YOU WILL CONFORM. YOU WILL COMPLY. YOU WILL *NOT* MARCH TO A DIFFERENT DRUMMER.

"Permissiveness," the hallmark of the Sixties, was never welcome among Progressives, old or new. Under the rule of the new Progressives, if you want to just "do your own thing," you won't. You *will* do what you are told. If you think you can just "turn on, tune in, and drop out," think again. You *will* be forced, for example, to buy government-approved health benefits—including federally certified abortifacients—or pay a fine. You will behave. You will conform. You will comply. You will *not* march to a different drummer.

The old Progressives were earnest and well-intentioned—old-fashioned "do gooders." They were also stern and sober social reformers. During the Progressive Era, Congress suppressed the lottery business and interstate prostitution. They enforced prohibition on the sale and manufacture of alcohol,[16] and they imposed taxes on narcotics. Personal vice had become a public enemy. Professor Charles Beard, a leading Progressive historian, wrote in 1930: "Perhaps no country in the world, except Russia, places so many restraints on what is called 'personal liberty,' the right to do as one pleases in personal conduct and on the use of property."[17]

Because Progressivism is an old and recurrent stream in our public life, its influence on public policy is so immense that it is a given: part of our national landscape. Progressive intellectuals generally had—and still have—a profound faith in social science, a conviction that scientific expertise was the key to social progress, especially in a social and economic order that was increasingly complex. Administration was to be the change agent. Again, Beard: "Thus, in our day, a new social science is being staked out and developed—the science of administration in a 'great society.' If the 'great society' is to endure, then it must make itself master of administration."[18]

For Progressives, true liberty was not merely freedom from, or "negative" liberty, meaning freedom from arbitrary rule or tyrannical coercion, as embodied in the venerable natural rights tradition of the American

14. David Brooks, "The Technocracy Boom," *The New York Times*, July 19, 2010.

15. From 1870 to 1924, America's population increased threefold, but federal employment jumped tenfold, from 50,000 to 500,000 employees. Charles A. Beard, *American Government and Politics* (New York: The Macmillan Company, 1930), p. 4.

16. "One main goal of the Progressive movement was purification of government, as Progressives tried to eliminate corruption by exposing and undercutting political machines and bosses. Many (but not all) Progressives supported prohibition in order to destroy the political power of local bosses based in saloons." James H. Timberlake, *Prohibition and the Progressive Movement, 1900–1920* (New York: The Macmillan Company, 1970), pp. 1–7.

17. Beard, *American Government and Politics*, p. 8.

18. *Ibid.*, p. 41.

Revolution. True liberty was the freedom to be, to act, to grow personally and to fulfill one's potential.

This was "positive" liberty. It was to be achieved by the removal of economic and customary restraints, creating fairness in social and economic relations, liberating all persons, regardless of class or condition, from the unwelcome vicissitudes of the market and providing child care, education, universal health care, and pensions: in short, security. Justification for government action would be grounded, as Beard argued, not in *power*, but in *service*. This new liberty would be secured through broad-scale central planning and social and economic regulation.

Positive liberty, therefore, was to be achieved through the positive state. Think personal "growth" in a straitjacket.

Such ideological assumptions justified a powerful federal role in health care and a national system of social insurance (based on the German model) for pensions in the Progressive Party platform of 1912. They explain the passion for centralization of power, particularly in the executive branch of national government, where scientific expertise would be able to work its will. "Progressivism," wrote Professor Ralph Gabriel of Yale University, "was an aspect of the rising cult of science."[19]

But Progressivism carries within it the seeds of contradiction. While Progressives long championed the democratization of our institutions, sunlight in government, and the elimination of the baneful influence of corporate interests, they clung stubbornly to a faith that public problems could be effectively solved through bureaucratic decision-making: little bands of experts appointed to an expanding number of government boards, commissions, or panels. The experts would somehow be immune from external political pressure. That is at the heart of the Progressive conception of modern government.[20]

THE REALITY OF PROGRESSIVE RULE IS PROFOUNDLY UNDEMOCRATIC, PRECISELY BECAUSE IT TAKES CRUCIAL DECISION-MAKING THAT DIRECTLY AFFECTS THE LIVES OF MILLIONS OF CITIZENS "OUT OF POLITICS." THUS, YOU HAVE THE ADMINISTRATIVE STATE: THE RULE OF ADMINISTRATORS.

Populist rhetoric notwithstanding, the reality of Progressive rule is profoundly undemocratic, precisely because it takes crucial decision-making that directly affects the lives of millions of citizens "out of politics." Thus, you have the administrative state: the rule of administrators.

Consider one more salient fact: Progressive intellectuals, yesterday and today, offer a direct and very public challenge to the Founders.

- While a sincere admirer of the Founders' practical wisdom and political experience, Professor Beard insisted that their constitutional handiwork was the fruit of narrow economic interests and celebrated the "changing spirit" of the Constitution that allowed the growth of government: "No longer do statesmen spend weary days over finely spun theories about strict and liberal interpretations of the constitution, about the sovereignty and the reserved rights of the states."[21]

- Frank J. Goodnow was critical of the constitutional separation of powers and insisted that the relevant division in modern government was between "politics" and "administration."

- John Dewey bemoaned the "paralytic effect" of the older natural rights tradition on necessary social change.

- Woodrow Wilson lamented the legislative supremacy embodied in the Constitution in his best-known work, C*ongressional Government* (1885).

Writing in 1915, Charles Merriam summarized the intellectual tendencies of American political science:

> It is evident that the modern idea as to what is the purpose of the state has radically changed since the days of the Fathers. They thought of the functions of the state in a purely individualistic way; this idea modern thinkers have abandoned, and while they have not reached

19. Ralph Gabriel, *The Course of American Democratic Thought* (New York: The Ronald Press Company, 1940), p. 337.

20. "The important governmental affairs at present, it may be argued, are also technically complicated matters to be conducted properly by experts." John Dewey, The Public and Its Problems (Chicago: The Swallow Press, 1954), p. 124. This is Dewey's masterwork of political theory, originally published by Holt, Rinehart and Winston in 1927.

21. Beard, *American Government and Politics*, p. 100.

> the paternalistic or socialistic extreme, have taken the broader social view. The protection theory of the state is on the decline; that of the general welfare is in the ascendant.[22]

Where the Founders were united by a philosophical conviction that a basic, constant, but flawed human nature was rationally governed by divinely ordained natural law, the source of natural and inalienable rights, Progressive intellectuals insisted that human nature was in constant flux. Real social progress depended not on conformity to a natural order, but was possible if, and only if, social analysis was rigorously scientific and properly applied to social problems.

Where the Founders argued that popular sovereignty was the supreme power of the state, expressed in the fundamental law of the Constitution, Progressive intellectuals favored the linear evolution of a new popular democracy, reflected in their "living Constitution" and guided and organized by scientifically trained experts.[23] Possessed of an allegedly superior understanding of the social and economic problems that beset "the great society," the experts should be well armed with the administrative power to correct its imperfections.

Since there are no fixed limits to government and the Constitution itself was to be understood as a "living" instrument, governing was ultimately a continuous exercise of well-intentioned power, a process of constant experimentation amidst the changing conditions of American life. The influential philosophy of Dewey and the political science of Charles Beard, Herbert Croly, Frank Goodnow, Charles Merriam, and Woodrow Wilson are must reading for anyone who wants to understand how and why we have the government we have today.

AN UNWISE AND UNREPENTANT AND CONTINUOUS CONGRESSIONAL SURRENDER OF LEGISLATIVE RESPONSIBILITIES FED THE GROWTH OF AN INCREASINGLY INDEPENDENT POWER CENTER.

The late James Burnham, a prominent political scientist of a very different persuasion, described the emerging administrative state as the "Fourth Branch" of government and attributed its evolution to the steady decline of Congress.[24] An unwise and unrepentant and continuous congressional surrender of legislative responsibilities, Burnham insisted, only fed the growth of an increasingly independent power center: "The bureaucracy, like the Carolingian Mayors of the palace in 8th Century France, not merely wields its own share of the sovereign power but begins to challenge the older branches for supremacy."[25]

What Merriam called the "paternalistic or socialistic extreme" in 1915 has today been reached, but that path was long ago paved by a new political science that repudiated the tradition of natural law and natural rights, that rejected the philosophical assumptions embodied in the *Declaration of Independence* and the sophisticated political thought underlying the Federal Constitution.[26]

RESTORING CONSTITUTIONAL GOVERNANCE

Ladies and gentlemen, we must engage forcefully in this overdue national debate on the future of our personal and economic freedom. As Members of Congress, you alone can draw the line, confront and roll back the growing power of the "Fourth Branch" of government. By bringing it under control, you do more than help the economy. You can help revitalize America's civic life.

In undertaking this task, Members of Congress must explain to our fellow citizens in clear and plain language exactly why they are doing what they are doing. Remind them that excessive regulation is not simply about the impact of rules on economic growth or job creation, as important as those concerns

22. Charles Merriam, *American Political Theories* (New York: The Macmillan Company, 1915), pp. 321–322.
23. Surveying the fields of education, public health and welfare, transportation, and taxation, Dewey writes: "These are technical matters, so much so as the construction of an efficient engine for purposes of traction or locomotion. Like it they are to be settled by inquiry into facts; and as the inquiry can only be carried on by those especially equipped, so the results of inquiry can be utilized only by trained technicians. What has counting heads, decision by majority and the whole apparatus of traditional government to do with such things?" Dewey, *The Public and Its Problems*, p. 125.
24. James Burnham, *Congress and the American Tradition* (Chicago: Henry Regnery Company, 1959), pp. 157–169.
25. *Ibid*. p. 160.
26. For an excellent discussion of this intellectual counterrevolution, see Thomas G. West and William A. Schambra, "The Progressive Movement and the Transformation of American Politics," Heritage Foundation *First Principles Series* No. 12, July 18, 2007, at *http://www.heritage.org/research/reports/2007/07/the-progressive-movement-and-the-transformation-of-american-politics*.

are, but is directly destructive of our self-government. In planting the flag on the high ground of first principles, Members of Congress need to insist on their own responsibility for the policies and decisions that govern our people. Their task is nothing less than the restoration of democratic accountability to federal policymaking.

In one sense, Members of Congress have little or no choice in the matter. Government by administration is at variance with constitutional principles on a variety of levels.[27]

- In exercising broad discretionary powers, federal agencies are indeed acting as lawmaking agencies, encroaching on the responsibilities reserved to Congress under Article I.

- They combine executive, legislative, and judicial powers and thus concentrate powers in a fashion that Madison held as the "very definition" of tyranny.[28]

- They make rules with the force of law; but the rulemakers are unelected and thus unaccountable to the people, and if they are unrestrained, the result is to undercut the republican principles of popular sovereignty and the consent of the governed.[29]

- And, finally, they pump out reams of regulations in a process that is far removed from anything vaguely resembling legislative deliberations, and their edicts are often fickle and unfairly applied.[30]

This is arbitrary government, the very antithesis of constitutional order. But how, exactly, can we roll it back?

CONGRESS SHOULD CEASE DELEGATING EXCESSIVE LEGISLATIVE POWER TO ADMINISTRATIVE AGENCIES.

First, reaffirm the primacy of congressional authority. Under Article I, Section 1 of the Constitution, *all* legislative powers are to be vested in the Congress of the United States. Making the law is a sovereign act, and the sovereign, the people of the states united, through the Philadelphia Convention of 1787, delegated that specific power to the Congress. As elected representatives, Members of Congress are agents of the sovereign, the principal. Logically, no agent is or can be superior to the principal. Recall that the Founders assumed legislative supremacy in a republic;[31] that among the three branches of the federal government, the Congress would be the first among equals.

In the first place, Congress should cease delegating excessive legislative power to administrative agencies. Congress needs to stop passing vague laws, seeding bills with broad and even aspirational language and transferring to administrators untrammeled power to fill in the blanks. Congress needs instead to write clear and concise statutes to accomplish their 18 legislative obligations specified under Article I, Section 8.

Examining the issue of legislative delegation in 1928, Supreme Court Justice William Howard Taft declared that "It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch."[32] Since that time, however, the federal courts have routinely approved of congressional delegations of such power, treating these instances as "political questions." But that simply bounces the ball, so to speak, back to the congressional court.

When occasions arise when a *limited* delegation of legislative power to

27. See Gary S. Lawson, "Limited Government, Unlimited Administration: Is it Possible to Restore Constitutionalism?" Heritage Foundation *First Principles Series* No. 23, January 27, 2009, at *http://www.heritage.org/research/reports/2009/01/limited-government-unlimited-administration-is-it-possible-to-restore-constitutionalism*.

28. In No. 48 of *The Federalist*, Madison writes: "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 be justly pronounced the very definition of tyranny."

29. In No. 22 of *The Federalist*, Alexander Hamilton writes: "The fabric of American empire ought to rest on the solid basis of The Consent of The People. The streams of national power ought to flow from that pure, original fountain of all legitimate authority."

30. In No. 62 of *The Federalist*, Madison warns: "It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?"

31. In No. 51 of *The Federalist*, Madison affirms: "In republican government the legislative authority, necessarily, dominates."

32. Cited by Burnham, *Congress and the American Tradition*, p. 141.

an agency seems to make sense, then Congress must decide whether that delegation is or is not constitutional. While among some of your colleagues there is a prejudice that constitutional interpretation is somehow something that only federal judges do, you need to remind them that such a notion is factually incorrect. In 1789, in a speech on the floor of the House of Representatives, Madison was explicit on this point: "Nothing has yet been offered to invalidate the doctrine that the meaning of the Constitution may as well be ascertained by the legislature as by the judicial authority."[33] It is also historically inaccurate. As Burnham notes, "Throughout the 19th century the great constitutional debates raged, and for the most part were acted on, in the halls of Congress, not in the courts."[34]

In any case, it is not your responsibility to guess how the federal courts may or may not decide some future case. Members of Congress have taken an oath to uphold and defend the Constitution and to act and apply constitutional principles to any legislative measure at hand.

Second, take direct control of regulatory production. With the flood of mandates issuing from the executive branch, Members of Congress are often unpleasantly surprised by the products that are issued under their alleged authority. They discover, too late, that a rule allegedly flowing from a statutory provision is not what they intended, or exceeds the statutory objective, or may even directly contradict what Congress intended.

In enacting the REINS Act (Regulations from the Executive in Need of Scrutiny) sponsored by Representative Geoff Davis and Senator Rand Paul, Kentucky Republicans, the House has adopted a promising remedy for these problems. The bill would require that all major regulations—those having an annual economic impact of $100 million or more—be approved by a vote of Congress *before* they take effect.

WITH THE FLOOD OF MANDATES ISSUING FROM THE EXECUTIVE BRANCH, MEMBERS OF CONGRESS ARE OFTEN UNPLEASANTLY SURPRISED BY THE PRODUCTS THAT ARE ISSUED UNDER THEIR ALLEGED AUTHORITY.

The REINS Act would be transformational. If this bill became law, it would make Congress directly accountable for the biggest rules that impact the lives of millions of Americans. It would be compatible with the primacy of Congress as the lawmaking authority under the Constitution, and it would directly restore democratic accountability to government.

On December 7, 2011, the House of Representatives enacted the bill by a handsome margin of 241 to 184. While the Senate has become a graveyard of budget and reform initiatives, you should not let the matter rest. The public needs to be educated on the meaning and scope of what members of the House of Representatives are trying to accomplish.

Third, establish a Congressional Office of Regulatory Analysis. Model it after the Congressional Budget Office and, like the CBO, make the office report to you on the estimated costs and impact of major regulations that are pending, as well as regulatory authority embodied in bills that come before you. House and Senate rules should be changed to require a regulatory impact analysis for legislation similar to the existing requirement of a CBO score.

Fourth, use the Congressional Review Act of 1996. If it were law, the REINS Act would supersede existing statutory restraints on federal regulation, embodied in the Congressional Review Act of 1996. The law requires that federal agencies send their final ("major") rules to the Comptroller General of the United States and to the House and Senate before they take effect.[35] After final rules are published, Congress has 60 days to enact a joint resolution of disapproval of the rule and render it null and void. The effectiveness of the Congressional Review Act, however, has been compromised by lax agency compliance. As the Congressional Research Service (CRS) has found, federal agencies

33. Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (New York: Burt Franklin, 1888), Vol. IV, p. 399.
34. Burnham, *Congress and the American Tradition*, p. 114.
35. A "major rule," under the Congressional Review Act, is categorized as any rule that has an economic effect of $100 million or more annually on the economy. Beyond that, a major rule may also have negative consequences for state and local governments or for the competitive position of American companies in national or international trade. Heritage analysts would require that all "mega rules," those with an impact of $1 billion or more annually, be subject to the hearing process of formal rulemaking, including proceedings for the presentation of evidence and cross-examination of witnesses on all sides of a regulatory issue. See James L. Gattuso, "The Regulatory Accountability Act: A Step Toward Reform," Heritage Foundation *WebMemo* No. 3424, December 1, 2011, at *http://www.heritage.org/research/reports/2011/12/the-regulatory-accountability-act-a-step-toward-reform*.

have simply failed to abide by the law, citing over 1,000 instances where they have not reported major rules to Congress and the Government Accountability Office.[36] When federal officials are unable or unwilling to abide by the law, the Constitution gives you ample ammunition—like the power of the purse—to retaliate. Go for it.

Fifth, use formal rulemaking for major rules. Today, almost all federal rulemaking is what is called informal rulemaking. With this process, the agency gives notice of its intention to propose a rule and invites and receives comments in writing from interested parties. Not surprisingly, Washington's numerous lobbyists switch their focus from Capitol Hill to federal departments and agencies, where there is even less transparency. After the notice and comment period, the agency then publishes a proposed rule and then, after a specified period, a final rule.

A better idea is to return to formal rulemaking, as originally provided in the Administrative Procedure Act of 1946, for many, if not most, of the "major rules." [37] Before the 1970s, this was the norm. The formal process requires the presentation of evidence in an open hearing presided over by an administrative law judge. Contending parties have the right to make presentations before the ALJ, as well as a right of cross-examination. The ALJ would be authorized to issue a subpoena to secure factual information relevant to fashioning the rule. This public record, and only this public record, would become the basis of the rule. No backroom deals.

A NEW NATIONAL CONVERSATION

A reassertion of congressional authority, as outlined here, would change the way Washington works. Most of our fellow citizens would probably think that's a good thing.

But champions of the *status quo* would doubtless argue that more direct congressional control over regulation, such as reviewing and approving major rules, would unduly delay necessary action and thus undermine the efficiency of government. Ideologues, intent on using this process to advance an unpopular agenda, can also be counted on to oppose remedial legislation. And those with great, even childlike, faith in central planning will also oppose any such resurrection of congressional power.

TECHNICAL EXPERTISE IN A NARROW FIELD OF PUBLIC POLICY IS NO SUBSTITUTE FOR SOUND POLITICAL JUDGMENT, A JUDGMENT ENHANCED BY FULL AND OPEN DEMOCRATIC DEBATE.

Now and then, some prominent spokesman for that point of view will slip up and make a boldly elitist declaration that ordinarily the unwashed masses don't know what is good for them, and "we"—the enlightened ones—do. They would say that we simply cannot and should not depend upon democratically elected officials to intervene in those maddeningly mind-numbing details of public policy—particularly in health care, energy, or environmental policy. Congressmen simply do not and cannot have the requisite knowledge and judgment to make competent decisions.

Democratic decision-making in a legislative body must therefore give way to administrative decision-making, safely insulated from the parochial and partisan hubbub and properly informed by scientific and technical expertise. In Chapter 5 of his groundbreaking book *The Road to Serfdom*, the late Nobel Laureate Friedrich Hayek brilliantly describes the inevitable decline of democratic decision-making through the rise of central planning.[38]

Modern government, of course, does require genuine expertise, but technical expertise in measuring, say, the impact of a chemical substance on food or air or water or wildlife involves a limited number of variables. A technical solution to a particular technical problem, however, can have a broad general impact far beyond a limited number of variables in any given administrative calculation. Champions of the rule of experts often misunderstand or simply ignore the nature of political decision-making, the making of law, which necessitates a prudential balancing of competing goods and necessary trade-offs in certain costs or consequences for employment

36. Curtis W. Copeland, "Congressional Review Act: Rules Not Submitted to GAO and Congress," Congressional Research Service *Report for Congress*, August 2, 2010, p. 2, at *http://assets.opencrs.com/rpts/R40997_20091229.pdf*.

37. For a discussion of how, exactly, this could be done in the case of the health care rules, see Gary S. Lawson, "Reviving Formal Rulemaking: Openness and Accountability for Obamacare," Heritage Foundation *Backgrounder* No. 2585, July 25, 2011, at *http://www.heritage.org/research/reports/2011/07/reviving-formal-rulemaking-openness-and-accountability-for-obamacare*.

38. "The clash between planning and democracy arises simply from the fact that the latter is an obstacle to the suppression of freedom which the direction of economic activity requires." Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1967), p. 70.

that are elemental to sound public policy. Technical expertise in a narrow field of public policy is no substitute for sound political judgment, a judgment enhanced by full and open democratic debate.

Let us agree with the President on one thing: His agenda is transformative. It is also intrusive, unpopular, and hostile to personal liberty. His "living and breathing" Constitution is hyperventilating. The time is ripe for a big national discussion not only on the *size* of government, but also on the *processes* of government. There seems to be a popular understanding, fed by the Tea Party among others, that Washington's problem is not merely federal spending and debt; it is the arrogance of centralized power.

We have a choice. Do we want to be governed by the rule of law as hammered out in open legislative debate, carried on by our elected representatives, directly accountable to us? Or do we wish to be governed by the expanding rule of regulation, the rule of administrators who are most certainly not accountable to us? Once again, the rule of regulation is the rule of regulators. But today, the rule of regulators is arbitrary and unaccountable government. Arbitrary and unaccountable government is exactly that ugly and repulsive thing that incited the American Revolution.

Our Revolution liberated our people, initiated a peerless experiment in self-government, and transformed the world. Our great task is to be true to the Spirit of 1776, the Spirit that made Philadelphia the Cradle of Liberty.

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