THE INSIDER

Education Savings Accounts Grow

The Real Solution to Fake News

The Fundraising CEO

What to Do About the Administrative State

FALL 2017

Failing to Grasp the Lowest-Hanging Fruit

ALEX ADRIANSON edits The Insider. Have a story idea? Want to connect with him? Email insider@heritage.org

WHEN REPUBLICANS FAILED TO fulfill their promise to repeal Obamacare this summer, they gave up not only an opportunity to improve health care policy but also an opportunity to show that someone in elected office has taken notice of the problem of the growth of arbitrary government power.

Certainly, retethering our government to constitutional constraints will require much more than just repealing the Affordable Care Act, but, as they say, you have to start somewhere. And the ACA was as good a place as any to start because of the myriad ways the law did damage to the presumption that political power in America is limited in scope, institutionally checked, and answerable to voters.

By now quite a number of constitutional and legal disputes about Obamacare are familiar: Can the power to tax be used not merely for raising revenue but to control behavior, for example, to induce purchase of the "right" kind of health insurance? Does "established by a State" mean "established by a State or the federal government"? Does a directive of an executive agency trump a provision of the law governing what health insurance is available to Congress itself? Can one Congress hand over decisions about health program reimbursements to an independent agency and put that delegation beyond the power of future Congresses to reclaim? Can the government provide subsidies to insurers for which Congress never appropriated the funds?

So far the answers to those questions, unfortunately, have been yes. But consider some even more basic matters. The Constitution gives all legislative powers to Congress, yet the ACA instructs the Department of Health and Human Services to write all manner of rules about how insurance markets are to function. These include rules about what health care services must be in employer plans, what services must be in individual plans, and what proportion of their revenues insurers must spend on health services and what counts as health services toward satisfying that requirement. Do we elect members of Congress merely so that they can tell the executive branch to achieve good things?

For a statute to operate as a law, it must contain rules that are clear enough for people to know what their legal obligations are. But Obamacare instructs HHS to exercise authority over matters that will defy the setting of clear standards. These include figuring out what insurance prices are reasonable and how to measure plan value, quality, and performance. Beyond those provisions, HHS may certify or not certify a plan for participation in the exchanges according to what it judges the public interest to be. Health insurance providers have no way of knowing for certain what they must do to ensure that they will be allowed to compete in the market.

Then there are the various administrative delays and suspensions of ACA provisions. These actions constitute another kind of intrusion on the lawmaking power. That is true even where the statute provides an authority to waive or suspend a requirement, because laws that are selectively enforced are not laws. When the Obama administration realized that Obamacare's insurance market rules were going to deprive too many voters of insurance options that they valued, they began delaying the law's requirements. The end dates for non-compliant plans were pushed back. The insurance mandate on employers was delayed—twice. Enforcement of the individual mandate was suspended. According to the Galen Institute's count, the Obama administration unilaterally altered Obamacare over 40 times.

Obamacare's assaults on the rule of law were made possible by a century of constitutional norms breaking down. That story is the story of progressive efforts to replace the Constitution's design for self-government with an administrative state run by experts. We can start thinking about how to recover the Founders' design by reading Adam Gustafson's article at page 22 and our interview with Joseph Postell at page 15.

THE INSIDER
CONSERVATIVE IDEAS FOR ADVANCING LIBERTY

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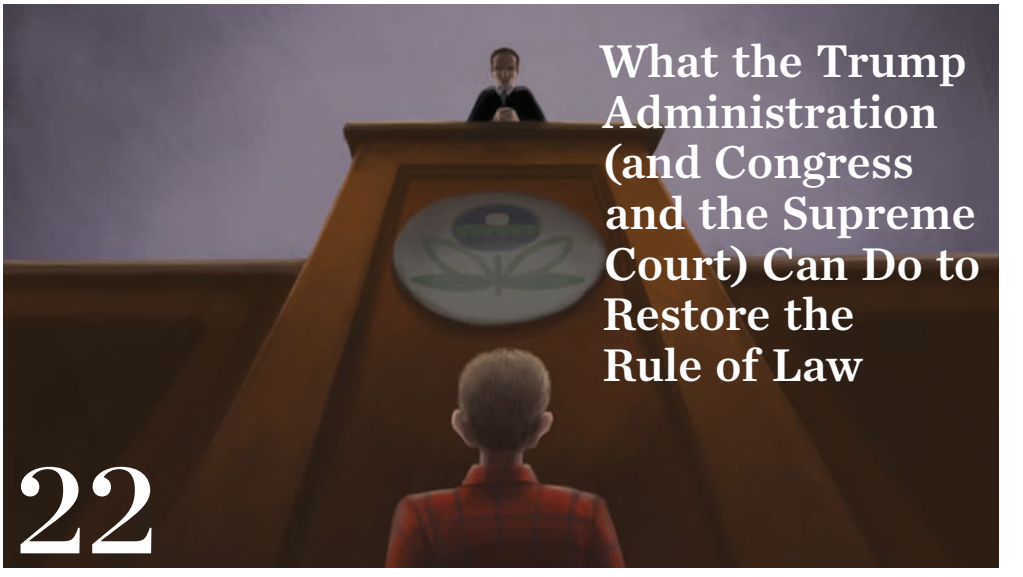

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Contact the editor: insider@heritage.org

AN ABANDONED FACTORY IN DETROIT.

What Policy Changes Would Do the Most Good for the Economy Right Now?

ARTHUR LAFFER:

The most pressing policy change today is a reduction in the maximum federal corporate income tax rate. If all corporate income that is taxed at the current 35 percent tax rate were to be taxed at 15 percent, as has been proposed by the President, we would experience incredible economic growth, and the budget deficit would decline.

It's imperative that this tax reform applies to the top rate. The historical record shows that reductions in the maximum rate produce the greatest economic effects. The 1981 Reagan tax cut took effect literally on January 1, 1983, (legislated tax cuts were fully phased in). From January 1, 1983, through June 30, 1984, U.S. real GDP growth was 12 percent, or a little less than 8 percent on an annual basis. It is amazing what an economy can do with a 12 percent increase in output over a very short period of time.

Cutting the corporate income tax rate to 15 percent, in static terms, would be a 57 percent reduction in tax revenue (20 ÷ 35). But that isn't the whole story. There are domestic and international supply-side economic, behavioral, and reporting responses that do and will occur:

Productivity, employment, and the volume of corporate profits: Quite simply, existing companies will find profits more attractive at a 15 percent tax rate than they do at a 35 percent tax rate. Incentives do matter after all. People don't invest in businesses to pay taxes; they invest in businesses to earn after-tax profits. I believe that, along with other pro-growth policies, a corporate tax rate cut to 15 percent will also increase annual productivity growth by something like 1 to 2 percentage points per year over the coming decade, and a higher employment-to-population ratio will come with that.

Decreased sheltering and tax evasion: If the tax rates were lower, the incentives to shelter income

BENJAMIN BEYTEKIN/NEWSCOM

would also be lower, and effective taxes would fall by much, much less than the fall in the highest tax rates. If it suddenly becomes cheaper to just pay the tax than to pay an attorney to find a way around the tax, you can guess what will happen. The same logic is true for the illegal version, tax evasion.

Choice of business form for tax purposes: In effect, when corporate tax rates are low, profitable businesses choose the most general business form they can, which is probably a "C" corporation. But as corporate and business tax rates rise, profitable businesses shift out of the highest taxed "C" corporations and move to more restrictive yet lower taxed forms of business entities. The opposite is true for unprofitable businesses.

Location: If the United States were to cut its corporate tax rate à la President Trump's plan to 15 percent from 35 percent, inversions from the United States into foreign tax jurisdictions would not only disappear as they did after the 1986 tax cut, bringing back gobs and gobs of U.S. companies' profits and jobs, but we would also attract lots and lots of foreign companies to seek U.S. domicile for tax purposes (reverse inversions), thereby adding hugely to our corporate tax base.

All in all, a reduction in the corporate income tax rate from 35 percent to 15 percent would create enough real economic growth that the tax cut would pay for itself.

Mr. Laffer is the Founder and CEO of Laffer Associates in Nashville, Tenn. He is one the founders of the supply-side school of economic thought.

SALIM FURTH:

You've asked what's good for the economy, but I'm going to tell you what's good for Americans.

With historically low rates of investment, American investors have earned excellent returns since the Great Recessions; wages have been left in the dust. Paradoxically, the solution for workers is more investment. Framed another way, it makes more sense: Workers and capital investments are complements, and when one is scarce, the other suffers. Boosting the amount of investment will lower the (pre-tax) return on each dollar of investment and increase the return on each hour of human labor.

Two policies that would dramatically increase investment are corporate tax reform and local land-use regulatory reform.

Corporate tax reform is a big-ticket federal debate that attracts a lot of attention. Local land-use regulations comprise a forest of restrictions on investments. Restoring American investment opportunities—and, hence, job opportunities—is a decentralized project that can start without waiting for Congress and must continue long after Congress takes care of tax reform (knock on wood).

> "Restoring American investment opportunities—and hence job opportunities—is a decentralized project that can start without waiting for Congress and must continue long after Congress takes care of tax reform.

At the federal level, corporate tax reform should be judged by its likely effects on all participants in the economy, not its direct impact on specific corporations. That means that creating a complete and immediate deduction for all new investment—something wonks like me call "expensing"—is the first priority. Lowering the tax barrier to starting and growing a business will increase the after-tax return on each dollar of investment. As more investment crowds in, the pre-tax return will drop and average wages will rise. Investors will be no worse off—their after-tax return will be the same or better than before the reform.

Land-use regulations, such as zoning, parking minimums, and height limits are a pervasive source of waste and a barrier to growth. The most productive cities in the United States are usually also the most expensive—and the cost is out of all proportion to the productivity. America's Silicon Valley ought to be a global megacity built around the world's most dynamic industry; instead it's a club for the already-successful. That is largely a result of barriers to physical investment that would add not just more software companies, but also the full gamut of service industries that employ most middle-class Americans.

Restoring investment would boost worker productivity and wages. It would keep innovative, fast-growing companies in the United States. It would make government finance less of a headache: more taxpayers, fewer people on unemployment insurance or welfare. It would boost competition in the growing number of sectors where just a few mega-corporations dominate.

Americans need a boost. Policymakers at the highest and lowest levels of government can deliver it.

Mr. Furth is a research fellow in macroeconomics at The Heritage Foundation.

KYLE POMERLEAU:

Lawmakers hope to reform the tax code comprehensively by the end of the year for the first time in more than 30 years. One of their many goals in reforming the code is to promote economic growth. House Ways and

FACTORY IN TACOMA, WASH.

Means Chairman Kevin Brady has argued over the past few months that tax reform can create jobs, boost wages, and grow the economy. Indeed, reform can accomplish those things. However, tax reform needs to be done right. If lawmakers hope for improved economic growth and living standards for Americans through tax reform, there is one policy they should prioritize: full expensing of capital investments.

Under current law, the corporate income tax is biased against new investment. When a company purchases a new machine, or builds a factory, it is required to deduct or write off that investment cost over several years or decades in stages, determined by schedules defined by the Internal Revenue Service. Because companies need to delay, sometimes for more than three decades, deducting the cost of major capital purchases, they effectively lose recovering the full cost through the tax code. This is because inflation and the time value of money greatly erode the value of deductions in the future. What this means is that not only are the profits from an investment taxed, but a portion of the investment itself is taxed by the corporate income tax.

> “If tax reform is to meaningfully grow the economy and improve Americans’ living standards, it should include full expensing of capital investments for all businesses.

Enacting full expensing would eliminate the bias against investment and grow the economy. At the Tax Foundation, we estimate that enacting full expensing for corporations alone would increase economic growth by 0.3 percentage points over the next decade. More importantly, that higher output would boost productivity and thus wages by 2.7 percent by the end of the decade. This means a worker earning $40,000 a year would see an additional $1,000 per year by the end of the decade in today’s dollars. To give a sense of scale, that is twice the benefit a similarly-sized corporate tax rate cut would provide to workers over the same period.

Lawmakers could grow the size of the economy if they reform the tax code. However, reform must be done right and include the right reforms. If tax reform is to meaningfully grow the economy and improve Americans’ living standards, it should include full expensing of capital investments for all businesses.

Mr. Pomerleau is the Director of Federal Projects at the Tax Foundation.

NORBERT MICHEL:

In financial markets there all sort of things that can be done. At The Heritage Foundation, we have modeled undoing the damage that the 2010 Dodd-Frank Act did, and while it’s only one estimate, the results suggest the impact would be huge: Undoing Dodd-Frank would grow the economy by a full 1 percent, on average over the next 10 years, with higher investment leading to higher wage growth.

The only question, really, is how do you start undoing the Dodd-Frank Act, and Heritage has offered many ways to do that. A good place to start is repealing the Financial Stability Oversight Council (FSOC). The FSOC is basically a super-regulatory body that’s made up of existing regulators. It imposes a needless regulatory layer in an already over-crowded field of federal regulators, and it identifies the firms that the federal government views as too-big-to-fail. Then, we could move on to getting rid of the Orderly Liquidation Authority (OLA). The OLA is essentially a taxpayer-supported alternative to bankruptcy, and it perpetuates the too-big-to-fail problem.

The law also imposes harmful government mandates on the derivatives market. Contrary to popular belief, these derivatives markets were regulated prior to the crash, and the overwhelming majority of these deals were done through commercial banks, the most heavily regulated of all the financial firms.

JETTA PRODUCTIONS/NEWSCOM

THE APPLE CAMPUS 2 is under construction in Cupertino, Calif.

NOAH BERGER/ NEWSCOM

Then there's the Consumer Financial Protection Bureau (CFPB). Dodd–Frank granted the CFPB unparalleled rulemaking, supervisory, and enforcement powers over virtually every consumer financial product and service. It needlessly restricts access to credit without meaningful oversight from Congress or the executive branch, and it imposes compliance costs across the consumer financial sector.

Outside of Dodd-Frank, there are many other reforms that could expand the economy. Americans collectively shoulder more than $18 trillion in debt exposure from federal loans, loan guarantees, and subsidized insurance provided by some 150 federal programs. This redistribution of taxpayers' money erodes the nation's entrepreneurial spirit, increases financial risk, and fosters cronyism and corruption. Fannie Mae and Freddie Mac, the government-sponsored mortgage giants, represent two of the worst examples, and these entities should be shut down completely and permanently.

Both entities distort the market by issuing mortgage-backed securities with subsidized government guarantees, and they have consistently made housing more expensive and increased Americans' risky debt. To begin winding down the GSEs, Congress should prohibit them from purchasing mortgages for non-owner-occupied homes or for "cash out" refinances. Congress should also ensure that the GSEs purchase only smaller loans and charge higher guarantee fees that adequately price the risks of the loans, and that bank capital requirements no longer provide preferences to the GSEs' mortgage-backed securities.

Many other regulatory impediments limit entrepreneurs' access to the capital they need to launch and grow new businesses, and Congress can fix this problem. For instance, Congress could expand the ability of sophisticated investors (by broadening the definition of "sophisticated investors") to invest in private offerings so that entrepreneurs can more easily fund new companies. Congress can also establish venture exchanges (special marketplaces for new, small company stocks) and replace the 14-plus different categories of securities-issuing firms with three simple disclosure regimes—public, quasi-public, and private.

Mr. Michel is the Director of the Center for Data Analysis at The Heritage Foundation.

Religious Liberty, Doctor Shortage, Obamacare, Budget Crises, Tax Burden

Religious institutions cannot be discriminated against merely because they are religious. On June 26, the Supreme Court ruled that Missouri violated the U.S. Constitution when it barred a preschool and daycare center from a program that provided funding for the replacement of playground surfaces with material made from recycled tires. The state's reason for denying the funding was that the center was affiliated with the Trinity Lutheran Church. According to the state, the Missouri Constitution prohibits the state from providing funds to religious schools.

That determination, said the Supreme Court, violates the U.S. Constitution's Free Exercise of Religion Clause. "There is no dispute," wrote Chief Justice Roberts, "that Trinity Lutheran is put to the choice between being a church and receiving a government benefit."

The decision, as Neal McCluskey points out, is "a blow against patently unequal treatment of religious Americans under state laws," but "it is not sufficient to throw open the doors to full freedom and equality in education."

> "Why should someone be barred from accessing otherwise generally available funding only because the profession he wished to follow was religious?

[A]s Justices Thomas and Gorsuch note in their concurring opinions, the *Trinity* decision keeps in place the ruling in *Locke v. Davey* (2004) that a state could deny a student a scholarship otherwise available to him because he planned to study to become a minister. *Trinity* supports the rationale of denying funding for someone to learn to propagate religion. But why should someone be barred from accessing otherwise generally available funding only because the profession he wished to follow was religious? From a school choice perspective, if a goal of sending your child to a religious school with a voucher is that he or she will learn to evangelize, precedent still stands in your way.

[Neal McCluskey, "Trinity Lutheran Ruling Only Gets Us Closer to Equality in Education," Cato Institute, June 26]

In order to get more health care, we need more doctors. By 2030, according to the Association of American Medical Colleges, the United States will face a physician shortage of at least 40,000 and the shortage could be as high as 105,000. The problem, as Kevin Dayaratna and John O'Shea write, arises because graduate medical education (GME) is largely controlled by government funding:

In the 1960s, the federal government became involved in postgraduate medical training when federal funding for GME became part of mandatory spending in the Medicare program. Federal support of GME was never intended to be permanent, yet has remained the primary funding source of residency programs for the past 50 years. [...]

Partially to address the rapidly rising costs of GME and in response to warnings of a physician surplus, the Balanced Budget Act of 1997 included several provisions relating to GME, most importantly the imposition of a cap on the number of Medicare-funded allopathic and osteopathic residency slots at 1996 levels. This cap has remained in place ever since. [...]

Because GME funding goes directly to the teaching institutions, this money is often focused on the narrow needs of the teaching hospital rather than the broader health care needs of the population as a whole. In general, the U.S. has not adequately supplied the training needed to meet the demand for, among others, primary

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care physicians and general surgeons, especially for rural areas of the country. [...]

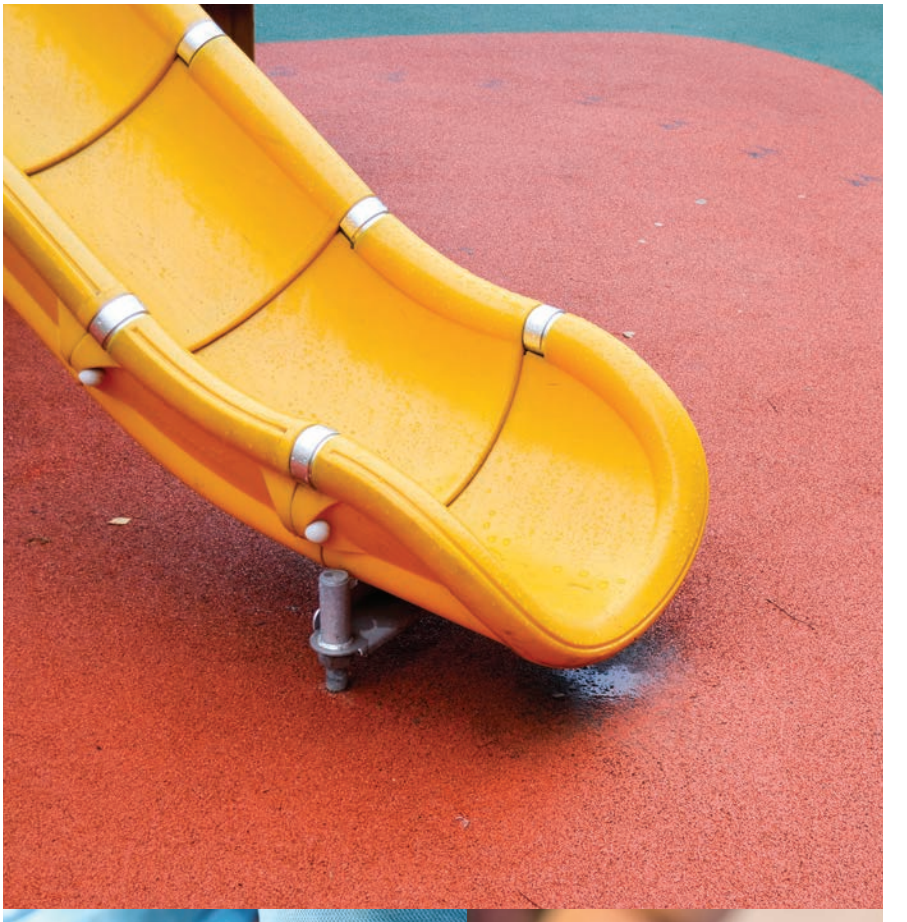
In a free market, resources are consistently adjusted in a manner that allows supply to be consistent with demand. When demand changes, supply also responds in a corresponding manner. The current GME system, on the other hand, is incapable of adequately responding to market forces, leaving many highly qualified medical school graduates without residency training positions in the main residency match.

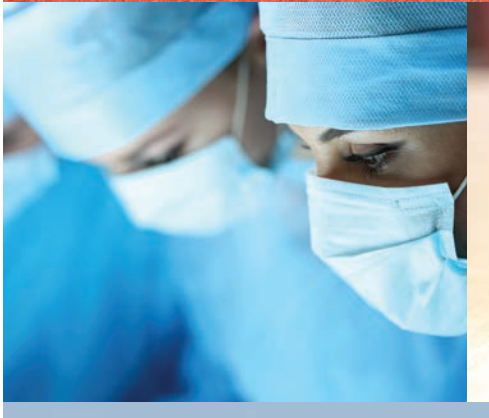
As a result, despite the growing physician shortage, many medical graduates are unable to enter the field and treat patients in any capacity. In 2017, there were nearly 5,000 medical graduates in the U.S. who did not place into a residency program during the main residency match."

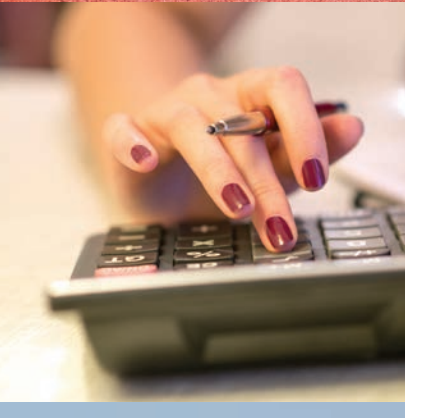
The solution, they write, is to create provisional medical licenses that allow medical graduates to enter the field of medicine:

To take advantage of the existing surplus of talent in the U.S., policymakers should allow medical school graduates to practice under provisional medical licenses. State governments could establish provisional licenses that would enable medical graduates to work under the supervision of a primary care physician or hospital to assist in care and acquire training. Medical graduates, both American and international, who have passed the United States Medical Licensing Exams, or equivalent proficiency examinations, should be eligible for this type of licensing.

[Kevin Dayaratna and John O'Shea, "Addressing the Physician Shortage by Taking Advantage of an Untapped Medical Resource," The Heritage Foundation, May 31]







ISTOCKPHOTO

Time to end Ex-Im once and for all. What's up with the Export-Import

Bank since July 1, 2015—after which point it lost the ability to extend loans above $10 million? Veronique de Rugy reports that the limits on Ex-Im have not hurt either Boeing or U.S. exports:

First, companies on the top 10 beneficiaries list haven't been doing any better or worse without Ex-Im. Take Boeing, for example. It is the No. 1 beneficiary of the bank and has continued to prosper and sell commercial planes all over the world. No surprise here, because 90 percent of Boeing planes were sold without any help from Ex-Im.

Boeing's market cap has also grown from $99 billion in June 2015 to roughly $120 billion. [...]

U.S. exports in general don't seem to have been affected by the end of Ex-Im, either. Monthly trade numbers from the U.S. Commerce Department show a downward shift in U.S. merchandise exports beginning in January 2015—six months before the bank's charter expired. The slowdown also seems to affect service exports, which would indicate that Ex-Im funding was not the explanatory variable.

Also, the 2017 data, when compared with the data from the same period in 2016, show exports rebounding without any change in the status of Ex-Im. As my colleague Dan Griswold, the co-director of the Mercatus Center's Program on the American Economy and Globalization [...] noted, "the bottom line is that U.S. export growth was decelerating beginning in 2012 and has picked up again in 2017, driven mostly by global growth rates. The Export-Import Bank's status was simply not a factor."

[Veronique de Rugy, "Celebrating Our Independence—From the Export-Import Bank," Reason*, July 6]*

Under Obamacare, unsubsidized individual insurance is going away. Doug Badger:

Despite $146 billion in federal subsidies to low-income households and well-capitalized insurers, 2.6 million fewer people had individual policies in March 2017 than in March 2016, a drop of nearly 15 percent.

> "There are now nearly 3 million fewer people with unsubsidized individual coverage than in 2013, the year before the government began doling out Obamacare premium subsidies.

The most precipitous decline has occurred among people who pay their own premiums without government help. The number of those with unsubsidized coverage fell by nearly one-fourth between March 2016 and March 2017, from 11 million to less than 9 million. There are now nearly 3 million fewer people with unsubsidized individual coverage than in 2013, the year before the government began doling out Obamacare premium subsidies. If the current trend persists through December, the individual market as a whole will insure fewer people this year than it did in 2014.

And the decline isn't limited to the individual market. There were 3.6 million fewer people with job-based coverage in December 2016 than in December 2013. While 8.4 million people received Obamacare premium subsidies last year, private coverage increased on net by only 1.7 million between December 2013 and December 2016. [...]

Obamacare is insuring more poor people and uninsuring millions of middle-income people. That suits the Democratic Party and many congressional Republicans just fine. They measure social progress in the number of people receiving government assistance. Those struggling to pay their own way evoke little sympathy. Lawmakers of both parties, whose consciences were lacerated by CBO's theory that millions would "lose" coverage under the GOP's "repeal and replace" legislation (most of those "losses" the result of people voluntarily dropping insurance once the individual mandate was repealed) are unmoved that millions actually have lost coverage under the law they fought to preserve.

Legislators do, however, grieve over insurance-company losses. The [New England Journal of Medicine] [...] urged Congress to "bolster insurers' confidence" through a "permanent reinsurance program"—a new entitlement to corporate welfare.

It is a familiar story: Corporations get bailouts, the poor get benefits, and those in between get the bill. Government will tax people to subsidize insurance companies whose product they themselves can't afford.

[Doug Badger, "Obamacare Is Uninsuring the Insured," National Review*, August 10]*

Tax increases were supposed to fix Illinois's budget woes in 2011—but they didn't. In early July, the Illinois Legislature—over the veto of Governor Rauner—raised the state's personal income tax by 32 percent. From Ted Dabrowski and John Klingner, here is a reminder of what happened last time Illinois tried to fix its budget mess with tax increases:

In 2011, Illinois politicians enacted a record 67 percent income tax hike on individuals and a 46 percent corporate income tax hike. Springfield politicians promised the additional revenue would stabilize the pension

crisis, pay down the state's unpaid bills and help the economy.

The tax hike took an additional $32 billion from taxpayers' wallets from 2011 through 2014. Yet none of the politicians' promises came true.

The state's bills weren't paid off. Instead, they were reduced by less than $2 billion. The state still had $6.6 billion in unpaid bills to go when the tax hike expired.

Illinois also suffered one of the weakest economic recoveries in the nation. The state's manufacturing base collapsed and never recovered as in neighboring states. In fact, Illinois still has fewer jobs now than it did in the year 2000.

And Illinois' pensions didn't get any better. The debt taxpayers owe worsened by more than $20 billion over the four-year tax hike period.

That $20 billion-plus increase occurred despite the fact that most, if not all, of the tax hike went to pay for Illinois' growing pension costs.

Prior to the tax hike, politicians had put off dealing with the state's growing pension crisis by borrowing. Blagojevich issued a massive $10 billion pension bond in 2003 to paper over the problem.

Quinn then borrowed a total of $7 billion to pay for pensions in 2010 and 2011. Required pension contributions jumped from 2007 to 2009, putting even more pressure on the budget in the absence of reforms.

And when borrowing was no longer an option, the General Assembly passed the temporary income tax hike under the pretense it would fix many of Illinois' woes.

According to Senate President John Cullerton, at least 90 percent of the tax hike revenues—out of a total of $32 billion—went to fund the state's growing pension obligations.

[Ted Dabrowski and John Klingner, "The History of Illinois' Fiscal Crisis," Illinois Policy Institute, June 28]

HENRYCK SADURA/ NEWSCOM

THE ILLINOIS STATEHOUSE.

No, taxes on the top 1 percent are not low by historical standards. Scott Greenberg writes:

How could it be that the tax code of the 1950s had a top marginal tax rate of 91 percent, but resulted in an effective tax rate of only 42 percent on the wealthiest taxpayers? In fact, the situation is even stranger. The 42 percent tax rate on the top 1 percent takes into account all taxes levied by federal, state, and local governments, including: income, payroll, corporate, excise, property, and estate taxes. When we look at income taxes specifically, the top 1 percent of taxpayers paid an average effective rate of only *16.9 percent* in income taxes during the 1950s.

There are a few reasons for the discrepancy between the 91 percent top marginal income tax rate and the 16.9 percent effective income tax rate of the 1950s.

- The 91 percent bracket of 1950 only applied to households with income over $200,000 (or about $2 million in today's dollars). Only a small number of taxpayers would have had enough income to fall into the top bracket—fewer than 10,000 households, according to an article in *The Wall Street Journal*. Many households in the top 1 percent in the 1950s probably did not fall into the 91 percent bracket to begin with.

- Even among households that did fall into the 91 percent bracket, the majority of their income was not necessarily subject to that top bracket. After all, the 91 percent bracket only applied to income above $200,000, not to every single dollar earned by households.

- Finally, it is very likely that the existence of a 91 percent bracket led to significant tax avoidance and lower reported income. There are many studies that show that, as marginal tax rates rise, income reported by taxpayers goes down. As a result, the existence of the 91 percent bracket did not necessarily lead to significantly higher revenue collections from the top 1 percent. [Internal citations omitted.] *[Scott Greenberg, "Taxes on the Rich Were Not That Much Higher in the 1950s" Tax Foundation, August 4]*

PHIL TRULUCK, JOHN VON KANNON, AND ED FEULNER in 1994.

The Fundraising CEO

BY ANN C. FITZGERALD

WHY DO PEOPLE ESTABLISH NON-profits? Motivating factors range from making a difference in people's lives, to addressing an unmet need, to supporting a cause that stirs the passions.

How about: "To spend my day asking people for money"? Said no one ever.

Yet fundraising is the lifeblood of nonprofits, and regardless of the institution's size and success, the CEO must play an essential role in securing necessary funds. When we ask successful CEOs how much time they spend on fundraising, a typical response is 50 percent or more.

This fact often comes as a shock to newly minted nonprofit leaders: How can they carry out the missions of their organizations if they must devote so much time to asking for money? Moreover, of all the new skills a CEO must acquire, from marketing to financial management, fundraising seems to be the least popular.

But that doesn't have to be the case. I was fortunate to start my nonprofit career at The

CHAS GEER/ THE HERITAGE FOUNDATION

Heritage Foundation in the mid-1990s under the leadership of Ed Feulner, a prime example of a CEO who embraced his role in leading the fundraising effort. Since then, I've had the opportunity to work with well over 130 nonprofits in the freedom movement. Along the way, I've discovered that successful fundraising CEOs share a number of characteristics.

Set the tone. The CEO has the opportunity to shape the entire organization's perspective on fundraising and philanthropy. Words matter. If the CEO says "We have to hit up that donor for money," for example, then he encourages a shortsighted, transactional view of fundraising. If he speaks of donors as respected partners, his fundraising team will build long-term relationships that increase in value over time.

Prioritize it. Heritage board member, leadership expert, and international speaker Brian Tracy often tells his audiences to "eat a frog first thing each morning." In other words, do the most difficult or distasteful task first so that you can be more productive the rest of the day. Some nonprofit leaders view fundraising as a frog. They worry about the results of fundraising on a daily basis but avoid fundraising activity like the plague! If that's your case, then put fundraising at the top on your agenda each day. If you have to eat a frog, do it first thing in the morning. If you have to eat two, then eat one after the other.

Play to your strengths and be authentic. A successful CEO once told me that while she enjoys meeting donors, she dislikes speaking to them on the telephone. Since she could meet with donors at most annually, this created a challenge: How do I keep in close contact? She solved this dilemma by writing notes by hand. She keeps cards with her at all times and jots personal notes to donors or prospective donors whenever she has a free moment.

Have the courage to ask. Like public speaking, asking donors for money makes many people weak in the knees. I like to keep in mind that we are asking friends for money—not people who are hostile to our nonprofit missions. If that still makes you nervous, then get the training you need to overcome your fear. Fundraising may never come naturally, but you can acquire essential skills to improve your outcomes.

Expect your role in fundraising to grow and change. As the stakes get higher, the CEO plays a more strategic role with a smaller pool of donors. He will also spend more time cultivating board members and raising the visibility of the organization. Ask your fundraising team or outside counsel to evaluate your time and commitments so that you can focus on the highest-value activities.

> "As the stakes get higher, the CEO plays a more strategic role with a smaller pool of donors.

Keep focused on a key asset. Building a strong board is a CEO's central role and can pay many dividends to the nonprofit in the years ahead. A board of directors that is engaged and willing to connect your nonprofit to its networks is a valuable fundraising commodity. If your board isn't committed to securing the necessary financial assets, then it's time to make some changes.

Seek out other CEOs. Connect with CEOs who are positive and forward thinking about fundraising and learn from them. Most of today's movement leaders did not start their careers in fundraising but have found ways to excel at it. Learn from the best.

Build a team—but not of "yes men." Let's face it: Bosses have a way of avoiding assignments suggested by their staff. A good CEO hires a chief development officer who has a bias for action and pushes the CEO out of his comfort zone when necessary. While I was at Heritage, Ed Feulner relied on the late John Von Kannon to fill that role. John was a talented fundraiser and traveled with Ed many times. Once, after a successful meeting with a donor during which Ed asked for a gift, John congratulated him. Ed replied that he had felt nervous about asking for the gift but more nervous about facing John if he didn't ask!

Make an investment. A new CEO once shared his operating budget with me. It included all the typical expenses for personnel, programs, and marketing but omitted a line item for fundraising. As they say, it takes money to make money. A well-established nonprofit spends at least 10 percent of its revenue on fundraising. A newer entity might invest much more as it works to acquire new donors. Make sure you are spending enough to reach your goals.

Have the right expectations. One fundraiser alone will not magically achieve your financial goals. It takes a clear vision, impactful programs, a compelling message, a talented team, and consistent execution of tasks. Above all, it takes the CEO's leadership and engagement at every step of the way.

Be willing to test and innovate. In the early days of The Heritage Foundation, direct-mail fundraising was still in its infancy among think tanks, but Heritage invested in it and con-

ANN FITZGERALD (right) at The Heritage Foundation booth at the 1999 Resource Bank in Philadelphia.

tinued to experiment and innovate, building one of the movement's most successful direct-mail programs. In hindsight, the decision looked easy, but it was a risk back then. Today's leaders should take calculated risks to acquire new donors, using new techniques available today including social media and email.

Know what questions to ask. Invest in training for yourself to better understand fundraising techniques and how to measure results. Over the years, I've heard CEOs say that particular techniques "never work," but the reality is that they don't know how to use those techniques. Whether you are working with a fundraising team or with outside vendors, you need to know the questions to ask to get the best return on investment. For instance, how much should you expect a major gift officer to raise in the first year? Answer: One-and-a-half times his salary. Or, what percentage of first time donors will make a second gift in a successful high-dollar direct mail program? Answer: Fifty percent.

Take the long view. When trying to reach budget goals, it may be difficult to put fundraising in perspective. Patience can be in short supply when we see the pressing needs in our society. It's easy to fall into the trap of thinking, donor X or Y should give us a gift so that we can address these problems. However, few if any successful fundraising programs are built on donors willing to make huge cash infusions from day one. Be ambitious, but commit to gradually cultivating and soliciting donors for a matter of years.

Focus on the why. When you receive a "no" in fundraising—and there are a lot of noes—it's easy to get discouraged or feel that fundraising is "begging." At times like that, remind yourself of your nonprofit's vision, why it's important, and how donors help to fulfill that vision. More important, consider how the work you are doing helps donors achieve something meaningful.

Have the courage to say no. Every so often, a donor wants to make a gift for a project that strays from the nonprofit's core mission. This may create a dilemma, especially if the gift is large. The temptation is somehow to "make it work." Ed Feulner always reminded us that programs drive fundraising, not the other way around. If we had to reject this type of gift, we knew that we had the complete support of leadership. This kind of courage kept every fundraiser focused on the mission, not just on the money.

Share the "so what?" Effective fundraisers explain to prospects and donors why their work makes a difference: How is a particular part of the world better for this work? What bad things will happen if this work cannot happen? Why does that difference matter?

Be a philanthropist. Make a personal gift to your organization to set an example for staff and show your commitment to donors. It's much easier to ask for a gift if you have experienced the joy of giving yourself.

As the old saying goes: No money, no mission. The flip side of that is: No mission, no money. Fundraising cannot work in isolation. It must be woven into the organization's culture and programs. The successful CEO not only builds a successful fundraising operation, but also creates a culture of philanthropy that infuses every corner of the nonprofit. IN

Ms. Fitzgerald is President of A.C. Fitzgerald & Associates.

CHAS GEER/ THE HERITAGE FOUNDATION

PRESIDENT THEODORE ROOSEVELT DEPICTED AS a Roman emperor, 1905.

WORLD HISTORY ARCHIVE/ NEWSCOM

Taking on the Administrative State with Joseph Postell

AMERICANS LOVE TO COMPLAIN about bureaucrats, especially those who have real power—the power to say no when you want to start a new business, market a new product, or merely build on your own property. Where did bureaucrats get so much power to tell us what we can and can't do? We talked about the power of administrative government, where it came from, and what to do about it with Joseph Postell.

Postell is Associate Professor of Political Science at the University of Colorado at Colorado Springs and a visiting fellow at The Heritage Foundation. His book, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government,* was published earlier this year.

THE INSIDER: In your work—especially in your new book—you have written that the administrative state is a threat to constitutional government in America. What do you mean by the term "administrative state" and why is it inconsistent with our constitutional values?

JOSEPH POSTELL: In the administrative state, legislative power is shifted from Congress to administrative agencies. Most laws today are made by administrative agencies instead of by Congress. Congress still passes bills, but most of those bills don't really have any rules in them that you have to follow. They actually give the power to make those rules over to administrative agencies. So now the state that is making the rules you have to live by isn't an elected, representative,

republican form of government. It is now an administrative state where the administrators are telling you what to do and what rules you have to abide by.

Compounding that problem is the problem of having legislative powers, executive powers, and judicial powers all combined in the same agency. Agencies today adjudicate disputes about their own rules—through administrative law judges—as opposed to having to make their case to an independent Article III court.

Instead of Congress—elected representatives—writing laws, and the executive agencies investigating, prosecuting, and enforcing, and then adjudication happening in independent courts like our constitution envisions, we have a system in which unelected bureaucrats and administrators make rules, then they investigate whether people violated those rules, they prosecute, they enforce, and even in many cases they adjudicate.

So now instead of a constitutional system of separated powers and elected representation, we have a system of consolidated powers and unelected bureaucrats making rules. That's a widespread constitutional problem. In environmental law, in labor law, and in health care law, to take a few examples, that same basic structure threatens the constitutional system.

TI: How did we end up with this setup that's so unmoored from the Constitution?

JP: Three things happened. The first is, our country grew massively. The types of problems that we had to deal with seemed to be new problems and they seemed to require some radically new solutions. Industrialization, urbanization—those sorts of problems—seemed to require a brand new form of government.

The second thing that happened was that certain political theorists around the later part of the 19th century and early part of the 20th century—Woodrow Wilson, Frank Goodnow, Herbert Croly, and even political actors like Theodore Roosevelt—made the argument that the old system of government really wasn't working anymore and we needed a new system of government, that we needed to reject the separation of powers and we needed to reject the idea that our elected representatives make the laws. They wrote these things openly. They didn't revere the Constitution. They said the Constitution needed to be remodeled in light of new circumstances.

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> Most laws today are made by administrative agencies instead of by Congress. Congress still passes bills, but most of those bills don't really have any rules in them that you have to follow.

The third thing that happened, after the administrative state had become a reality, was that people started to see that it was a great threat to Constitution-based principles. The progressive approach had been to say openly that the Constitution was outdated and that it was time to find a new path.

More recently, scholars and theorists have been saying that if you interpret the Constitution in a certain way and if you interpret the administrative state in a certain way that it actually could fit with the Constitution that we have. What's going on, these theorists say, is that these agencies have really just been executing law, not making it. Under this theory, when the Department of Health and Human Services makes a mandate about what essential health benefits insurance plans have to provide, they're really just executing the Affordable Care Act.

So the third thing that happened was that there was this creative, semantic game that a lot of political and legal theorists played to try to retrofit the administrative state into the Constitution. But that semantic move doesn't really fit the Constitution as it was understood by the people who wrote it and the people who ratified it.

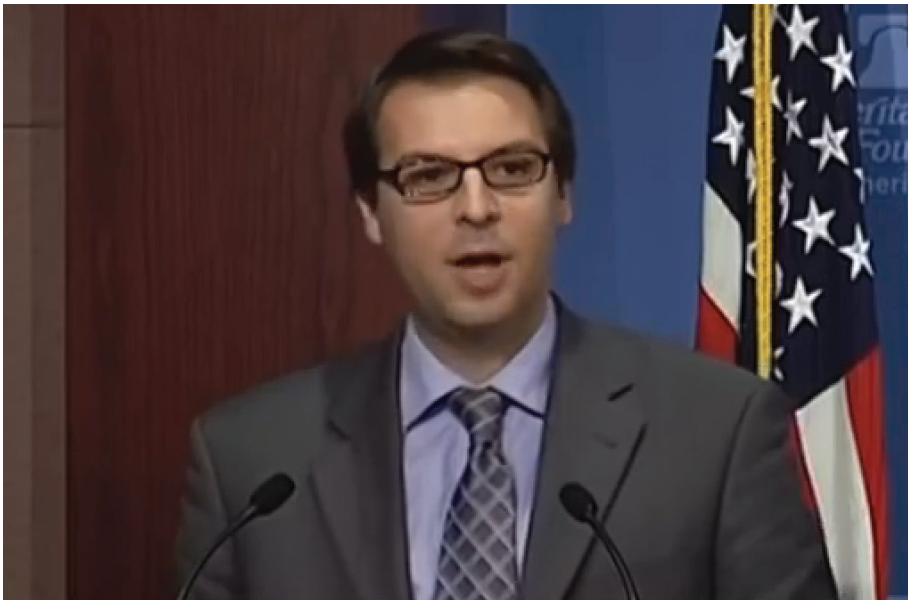
TI: You used the word "seem" a few times there to describe the supposed necessity of administrative government. It seems you are skeptical of the idea that a bigger society can't stick to the constitutional design of 1776. Right?

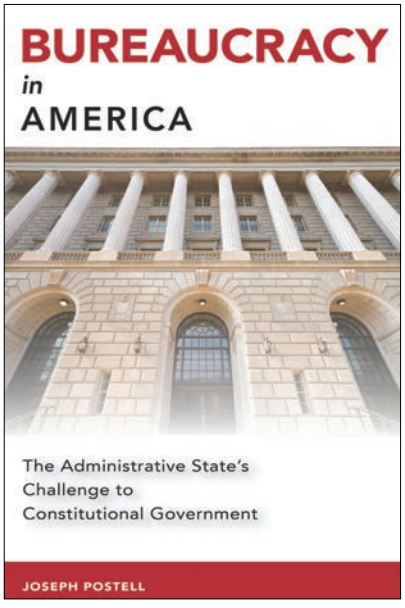
JP: One of the arguments that people make today—probably the most powerful argument in favor of the administrative state—is simply the argument from necessity.

According to this view, you can't have members of Congress who aren't really experts making decisions about air quality, pollution levels, workplace safety standards, the regulation of drugs, and so forth.

In other words, the necessity argument says times have changed, society is more complicated now and we need experts to be in charge. I am skeptical of that argument because I think it overstates the change in circumstances between the time the Constitution was written and ratified and where we are today.

Society was really complicated even at the time the Constitution was written. The Founding generation had to solve all kinds of difficult problems. One of the things I do in my book is to show that the kinds of problems that they had to solve were extremely complicated even in the 18th century and the early part of the 19th century.





JOSEPH POSTELL, Associate Professor of Political Science at the University of Colorado at Colorado Springs, and Visiting Fellow in American Political Thought at The Heritage Foundation.

And the people who were working in politics at that time managed to come up with regulations to solve the problems of a complex society without resorting to this brand new fourth branch of government with consolidated powers and unelected rule makers.

They still managed to fit regulation into the constitutional system. And they did it by believing in the principles that the Constitution set up and following those principles. They believed that if we are going to have regulations, then the people who write regulations have to be accountable and they have to be elected. And then if we are going to have enforcement of those regulations, the people enforcing and adjudicating have to be separate from the people who write the regulations.

So I am skeptical that the times have changed so much that we need to depart from the constitutional design we came up with.

TI: What does a regulatory state that is consistent with the Constitution look like? What agencies do we have now that would not exist or not exist as we know them if we adhered to the original design of the Constitution?

JP: There are a bunch of agencies that are not a constitutional threat. The Post Office is not a constitutional threat. Whether it's managed well is a separate question.

The Post Office isn't writing rules of conduct that we all have to follow lest we get fined or imprisoned. The Patent Office has been around for a long time and that's not really a constitutional threat.

It's modern agencies like the Federal Trade Commission, the Consumer Product Safety Commission, the Environmental Protection Agency, the National Labor Relations Board—all created since 1900—that are the problem and need to be radically altered.

I don't think any of those agencies needs to be eliminated completely. Probably what needs to happen is that they would need to become executive agencies again, meaning that Congress has to write a law that those agencies then enforce.

If Congress wanted to write a law that mandates there be no lead beyond a certain point in the ambient air and they say in the legislation how much lead we can have in the air, you'd still have to have the Environmental Protection Agency to investigate whether industries are violating that law.

But the Environmental Protection Agency wouldn't be setting the standard, and the Environmental Protection Agency would have to go through an independent federal court to get an enforcement of any of its prosecutions. That I think would look very similar to the early approach that fit within the constitutional system.

TI: How detailed does Congress need to make its laws in order to avoid unconstitutionally delegating its legislative powers?

JP: That is a very hard question to answer. In fact, many of the leading theorists can't give a bright-line response to that question. I would say, first, Congress would have to write the statutes in much greater detail than it

WHO WILL STAND UP TO THE ADMINISTRATIVE STATE? Among the leading critics in the Senate are Marco Rubio (R, Fla.) and Ted Cruz (R, Texas) (sitting on the left and right, respectively, of Secretary of Labor nominee Alex Acosta), Rand Paul (R, Ky.) (top right), and Ben Sasse (R, Neb.) (bottom right).

does now in order to meet any standard for delegation. Wherever we would draw that line, Congress is not even close to it today.

That said, it's very difficult to find out where the line is between enforcing a law versus making law. An example I like to use involves the signs with which we are all familiar in restaurant bathrooms that say: "Employees must wash hands before returning to work."

These signs are typically required to be posted in restaurant bathrooms by a law that says they must be "clearly visible." Is that sufficiently detailed? Can an agency make rules defining the dimensions of the signs, the font sizes, and so forth. Maybe an agency needs to make a rule about those matters. Does that mean that the agency is writing the law? No, we wouldn't say so in that case.

It's a really hard thing to define the difference between legislation and execution of the law. That said, today we have gone way over that line. We've been giving essentially wholesale legislative powers to executive agencies.

I think the right approach would be to start bit by bit and go piecemeal. Every five years, the Clean Air Act Requires the EPA to set National Ambient Air Quality Standards. Why couldn't we say that air quality standards have to be written by Congress? Those are clearly laws. Nobody knows what they have to do to comply with the Clean Air Act until the EPA writes the air quality standards. Right now the statute says that the EPA Administrator shall make air quality standards that protect public health. Nobody knows what that actually means until the agency makes the standards.

So maybe a good rule would be something like this: If you can read a statute and know what it is you have to do to comply with the law (not in every particular but in general), then it's not a delegation. But if you can read a statute and have no idea what your legal responsibilities are until after the agencies start making the rules, then you've got some sort of delegation problem.

TI: If laws had to become more detailed, wouldn't it be harder for Congress to find the majorities it needs to pass laws? Is there a danger that Congress would end up in gridlock if it couldn't delegate some of its rulemaking authority?

JP: That is a genuine concern, but the idea that members of Congress can't agree that we should not have lead in the ambient air doesn't give enough credit to our Congress and it doesn't give enough credit to the people who elect those members.

The argument that Congress can't do the job is a subtle and veiled criticism of self-government and representative democracy in general. What they're saying is that we can't trust the people and their elected representatives to make these decisions.

KEVIN DIETSCH/ MICHAEL BROCHSTEIN/ JEFF MALET/NEWSCOM

If that's what the defenders of the administrative state actually believe, then they should just come out and say so. But I think a lot of people still believe in this idea of self-government and of representative democracy.

If you try things piecemeal by following these principles in a few areas of law and see how that goes, then maybe that will begin to rebuild the kind of habits of self-government that we need to practice a little bit more than we've been doing over the past century.

Our Founders always talked about this country as an experiment in self-government and it's up to every generation to make sure that experiment is a success. And so it is really incumbent on us to at least try to work through these problems through the constitutional mechanisms we have instead of taking the easy way out and saying let's let the experts handle that.

TI: Under the current setup, congressmen vote for good-sounding stuff and then blame the bureaucrats when people don't like the resulting rules. congressmen like that arrangement, don't they?

JP: That's absolutely right. Members of Congress are very much aware of how dangerous it is for them to have to be accountable for the rules that our government makes people follow. You can attribute most of the delegation problem to members of Congress getting together and saying: Hey, we can't come together on a solution to this problem; therefore let's just have a bill that looks like a solution but really leaves it to some agency to construct the right solution. That way we can look like we solved the problem even though it's going to be some agency that really solves the problem while also incurring all the political blame that goes with that solution.

You can explain most of delegation through that simple structural incentive for members of Congress to duck responsibility but take credit.

TI: Then how do we get Congress to change its delegating ways?

JP: In large part it's up to us. We have to be able to follow the trail a little better than we have done over the past century. We love to chastise bureaucracy in this country. But we do need to understand that bureaucracies are largely beholden to our elected representatives.

The real problem here is a problem with our political branches, not just with our administrative state. In part we need better education about how our government works so that people can hold the right officials accountable for bad laws.

If the Food and Drug Administration behaves badly we should be aware that it's not just the FDA that's responsible. It's the members of Congress who are supposed to be overseeing that agency and more importantly supposed to be doing the work that they transferred to that agency.

TI: Are the courts an innocent bystander in the rise of the administrative state or have they played a role, too?

JP: The courts have played a massive role. This problem is one people don't pay enough attention to. The courts have played two major roles in the birth and then the expansion of the administrative state.

The first was a role of hands-off. The Constitution clearly says: "All legislative powers herein granted shall be vested in a Congress [...] ."

And if the Supreme Court wanted to enforce that rule, it could. It could say whether a statute unconstitutionally transfers legislative power instead of keeping it within Congress.

The courts had a role to play in policing how much power was going to be transferred to the bureaucracy. But the courts, largely because they were intimidated by the political branches—in particular by the presidents during the early part of the 20th century—decided that they could no longer police those boundaries. They decided it wasn't possible to stand up to people like Theodore Roosevelt and Franklin Roosevelt and win. So the Court stopped policing the constitutional boundaries that had prevented the administrative state from emerging.

The second thing the courts did with regard to the administrative state was to begin to police the agencies—not to police the boundaries between the powers but to police the agencies themselves. Courts today routinely supervise agency rulemaking and agency adjudications to make sure agencies are following the right procedures, that they are interpreting the laws correctly, and that they are making substantive decisions that are reasonable.

> "The argument that Congress can't do the job is a veiled criticism of self-government and representative democracy in general.

One prominent example occurred after the Bush administration's EPA determined that it didn't have the power to regulate greenhouse gas emissions from automobile tailpipes. Twelve states and the District of Columbia, along with numerous other entities sued the Environmental Protection Agency to get that rule overturned. The Supreme Court said, in *Massachusetts v. EPA*, that the Environmental Protection Agency has the power and the responsibility

to regulate greenhouse gas emissions related to climate change.

That's an example of the Court telling the agencies what to do. And the courts do this all the time. So today the courts are not hands off; they are actively pushing some of these regulations through, even when bureaucracies don't want to make them.

TI: Is the Supreme Court's Chevron Doctrine of deference to agency interpretations of law part of the problem?

JP: Yes. The Chevron Doctrine says as long as agency interpretations of the law are reasonable, they are going to be upheld by courts. When the law is written to give the agencies so much leeway, that means they get deference from the courts on how they interpret something like the Clean Air Act or the Affordable Care Act.

Chevron is wrong on constitutional grounds. The whole point of courts is to interpret the law. A judiciary that says "we're going to let the executive interpret the law and defer to the executive" gets the constitutional system completely wrong.

It's wrong as a matter of history. There is no historical foundation for the Chevron Doctrine.

And it's wrong as a matter of policy. The whole point of the constitutional system is to prevent the consolidation of power in the same hands. But courts basically say to agencies: OK you write the rules; you interpret the statutes that you have at your disposal through the writing of those rules, and we'll give you deference. That has consolidated government power in the hands of unelected bureaucrats.

So I think Chevron is wrong on constitutional grounds, on historical grounds, and on policy grounds. People are increasingly starting to see the problem with Chevron. I do not think Chevron, at least as we know it today, will be around for much longer.

> "The whole point of courts is to interpret the law. A judiciary that says "we're going to let the executive interpret the law and defer to the executive" gets the constitutional system completely wrong.

TI: Instead of deferring to agency interpretations, what should judges do when they are confronted with a law that is truly ambiguous?

JP: The whole point of a judiciary is to interpret the law. When the law doesn't have any meaning, how do you interpret the law? When the law says, go make the air clean, how do you interpret that as a judge? The problem here is that most statutes aren't laws.

But judges should exercise their own independent judgment about the meaning of the law based on what the people who passed that law were thinking when they passed it. There are a lot of laws where we know legislators meant X and not Y. Judges should be able to say that if the agency violates that presumption then they are not going to get deference. Judges should interpret the statute independently.

It's not going to be easy for judges to assume this role of interpreting statutes again, especially given how vague the statutes are. But at the same time, that's the responsibility of the courts. And maybe if judges exercise independent judgment more, they will force Congress to write statutes a little bit more clearly.

TI: If a law truly has no meaning, would it be appropriate for a judge to say: This is not a law that grants the executive branch any power to enforce anything?

JP: That is a situation where you see the interaction between the Chevron principle and the non-delegation doctrine. If we got rid of Chevron then the judges would interpret a law independently. But if the law doesn't have any meaning, the judges could then say it was a delegation of power and return the law to Congress for a statement on that question.

TI: Other than being in a different place in the government's flow chart, what's the difference between an administrative court and an Article III court?

JP: The paychecks of administrative law judges are paid by the agencies themselves, so they work for the agency whose rules and whose decisions they are supposed to be reviewing. Administrative law judges are protected from retribution by their superiors in certain ways. You can't reduce the salary of an administrative law judge if you don't like that he ruled against you.

But it's still the case that those judges are not independent of the agencies whose rules they are supposed to be applying, whereas an Article III judge actually has independence. The judge's salary is independent of the agency and, just as important, the judge's tenure in office is not subject to the agency's control.

Surveys of administrative law judges routinely show that they don't think they are independent of the agencies. And therefore when they are making decisions about the agency's rules, they are going to be siding with the agency.

Article III courts on the other hand are independent of the agencies; they will be willing to check an agency because they will have that freedom from supervision by the agency.

A critical feature of constitutional government is that you are not subjected to a judge who happens to be in cahoots with the prosecutor. The only way to get that is through independent Article III judges as opposed to these administrative law judges we have today.

TI: Is there anybody in politics right now who is a potential champion of rolling back the administrative state?

JP: I think we have a lot of senators right now who are potential champions of restoring constitutional government by taking on the administrative state. Four that come to mind are Marco Rubio, Ted Cruz, Rand Paul, and Ben Sasse.

Marco Rubio in particular has thought about these issues very carefully. He has proposed things like regulatory budgets for different agencies. All of these senators have, in their own ways, talked about the problems of the administrative state. I think we are in a better position now than we've ever been to understand the problem and to think about how to deal with it.

TI: Other than having Congress incrementally reclaim from the bureaucracy the authority to write the rules, what is your plan for bringing government back to its constitutional moorings?

JP: There are piecemeal, small-scale reforms; and then there are bigger reforms. In the category of bigger reforms I would suggest a couple of other ideas—more on the judicial side than the legislative side.

There is the REINS Act, which says that Congress has to actually write the rules. There is another bill that has suggested making cost-benefit analysis part of the judicial review process.

The best idea is to take the power of adjudication away from administrative law courts and give it back to independent Article III courts when a decision of an administrative agency affects actual rights of citizens.

ISTOCKPHOTO

Adjudications, for example, involving workplace safety standards or decisions by the National Labor Relations Board are the kinds of things that really need to be decided by independent judges. I think it might be even more important than getting Congress to write its own rules.

TI: Isn't this argument just a fussy hang-up over process? Voters care about things like the economy, health care, and the environment. Why should they care about the process by which the government reaches its decisions?

JP: Two reasons. The first is that process is politics. If you allow the government to use a process in which it's not accountable to the people, and if you allow the government to use a process in which the same person is lawmaker, prosecutor, judge, jury, and executioner, then you are going to get bad policy outcomes.

The economy is going to be worse if the regulations are not made by people who are accountable and if they are not enforced by independent judges.

There is an obvious relationship between the growth of the administrative state and the growth of regulation that potentially stifles the economy. So if you have bad process, you have bad policy.

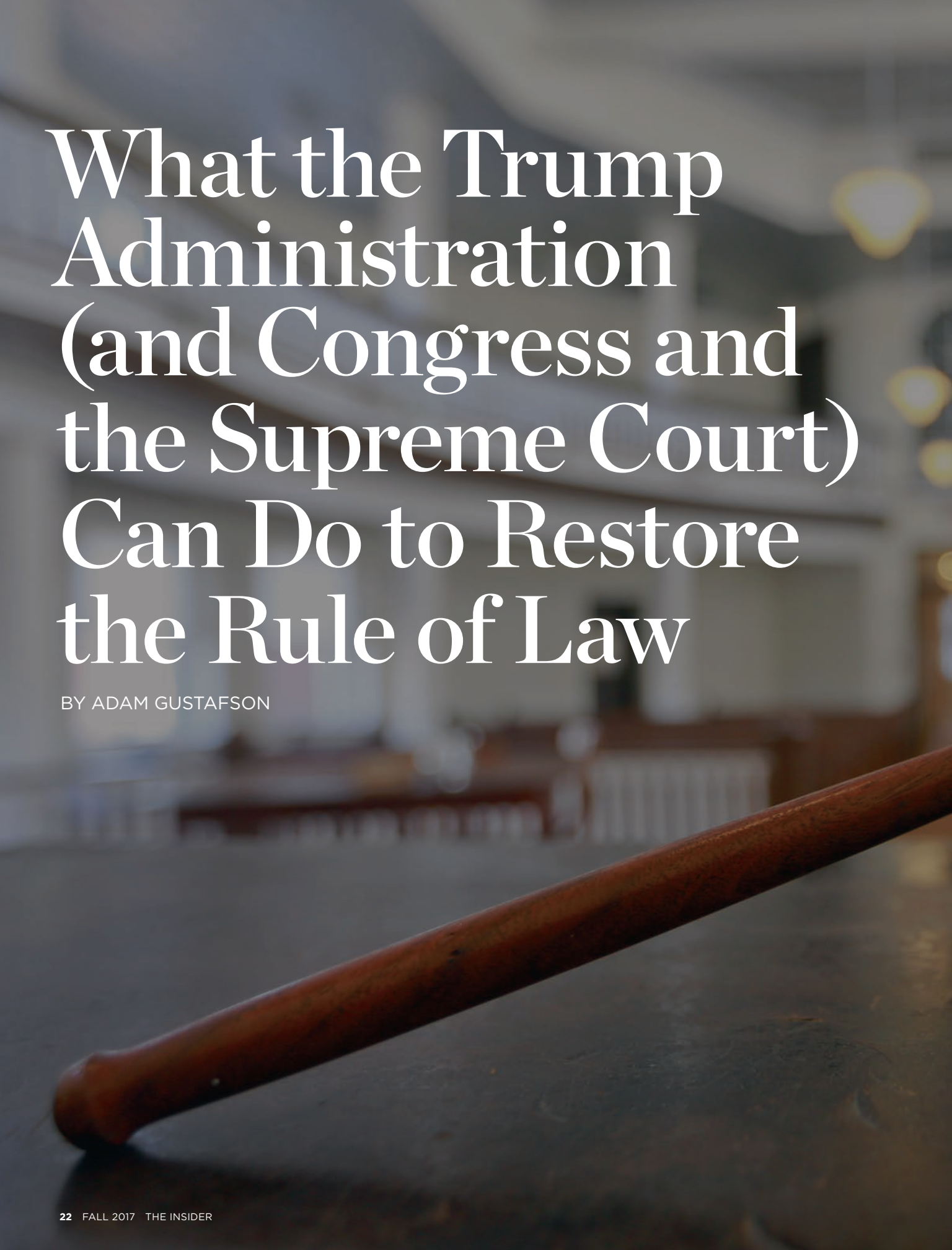
The second reason is that if you ever find yourself at the mercy of one of these administrative agencies, you will very quickly learn how dangerous it is to have government officials with the power to make arbitrary decisions.

People often talk to me about their run-in with some bureaucrat who didn't really have any checks on his power, and who got to make the law, who got to enforce the law, who got to prosecute the law, and then who got to adjudicate the law.

They realize very quickly that that is the definition of a lawless system. There is no law in that system. It's complete arbitrary will—namely the will of the administrator who can use the power of government to control your behavior.

So it's not just a question of process affecting policy. It's a question of process affecting your daily life and of whether you will be confronted with that situation at some point. Maybe you will need a building permit to renovate your home. Maybe you will want to open a business. Maybe it turns out you have an endangered species on your property.

Anything like that, you will very quickly realize you've run into arbitrary government and you have no rights whatsoever.



What the Trump Administration (and Congress and the Supreme Court) Can Do to Restore the Rule of Law

BY ADAM GUSTAFSON

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"A government of laws, and not of men"—that is how the founding generation described the new government it had established to replace what the Declaration of Independence called the "absolute Tyranny" of King George III. The "not of men" half of the formula may seem less apt in the age of celebrity politicians and the 24-hour news cycle. But the principle is more important now than ever as government's natural tendency to accumulate power is augmented by the potent tool of unmediated mass communication.

The diverse factions that installed President Donald Trump in the White House were reacting against the perceived lawlessness of the Obama administration at least as much as they were affirmatively voting for any part of Trump's platform. If Trump's administration stays true to the revolutionary impulse that elected him, he could be remembered as a great champion of the rule of law.

But what is the rule of law, and how is an administration staffed with human beings supposed to restore "a government of laws"?

The rule of law has no single fixed meaning but describes a constellation of features of good government that put law above raw power. And in our tripartite system each branch has a role to play within the fundamental limits placed on them by the Constitution: The rule of law demands the primacy of ordinary legislation by a representative Congress; faithful interpretation, public implementation, and even-handed enforcement of law by the executive branch; and a judiciary dedicated to applying the law as passed by Congress.

"The rule of law demands the primacy of ordinary legislation by a representative Congress; faithful interpretation, public implementation, and even-handed enforcement of law by the executive branch; and a judiciary dedicated to applying the law as passed by Congress.

Legislative Supremacy

The first of these elements—legislative supremacy—is fundamental to all the others. The Founders of the American republic recognized the "consent of the governed" as the sole font of legitimate government, and so vested all of the law-making power in the most broadly representative branch of government—Congress. It follows that governmental constraints on liberty may be enacted only by ordinary legislation. When the binding law of the land is generated outside the ordinary legislative process (whether by unelected bureaucrats or judges), the rule of law suffers because the People's conduct is constrained or compelled without their consent.

Violation of this elementary feature of our tripartite system of separated powers was a recurring criticism of the Obama presidency and a leading cause of President Trump's election. Although President Obama did not invent the Administrative State, his administration witnessed its rapid expansion to a breadth and depth of administrative power never before known. Witness the Obama administration's novel regulatory engagement with the financial sector, health care, the internet, private land, and greenhouse gas emissions, for example. Although Congress had sketched the boundaries of some of these new governmental endeavors with varying degrees of clarity, the past administration stretched new congressional delegations of rulemaking power to the breaking point—interpreting Congress's references to "state" health care exchanges to refer to a federal exchange, for example.

And the federal agencies claimed for themselves new grants of power in old statutes—the Clean Water Act of 1972, the Clean Air Act of 1970, and the Communications Act of 1934, for example—to regulate new entities and even new sectors of the economy that were foreign to any sensible understanding of congressional intent.

The unavoidable sense that unelected bureaucrats had broken into the cockpit of representative government and seized the controls was a powerful motivator of President Trump's election. The rallying cry of Obamacare repeal was as much about reining in an out-of-control bureaucracy as it was about curbing Congress.

To restore the rule of law, it will not be sufficient for President Trump simply to replace President Obama's regulatory priorities with his own policy agenda. Instead, the new administration must articulate an alternative vision of the executive branch's role—and, by implication, the legislature's role—in government. Agencies exist to execute the laws passed by Congress, consistent with the President's constitutional duty to "take Care that the Laws be faithfully executed." Federal agencies are not legislatures in disguise, free to enact the policy preferences of a regulatory elite.

Congress bears its share of the blame for the runaway growth of the administrative state. By passing broadly framed legislation with only vague standards to be implemented by agencies, Congress has all too often abdicated its lawmaking function to unaccountable bureaucrats, even though the Constitution vests all legislative power in Congress.

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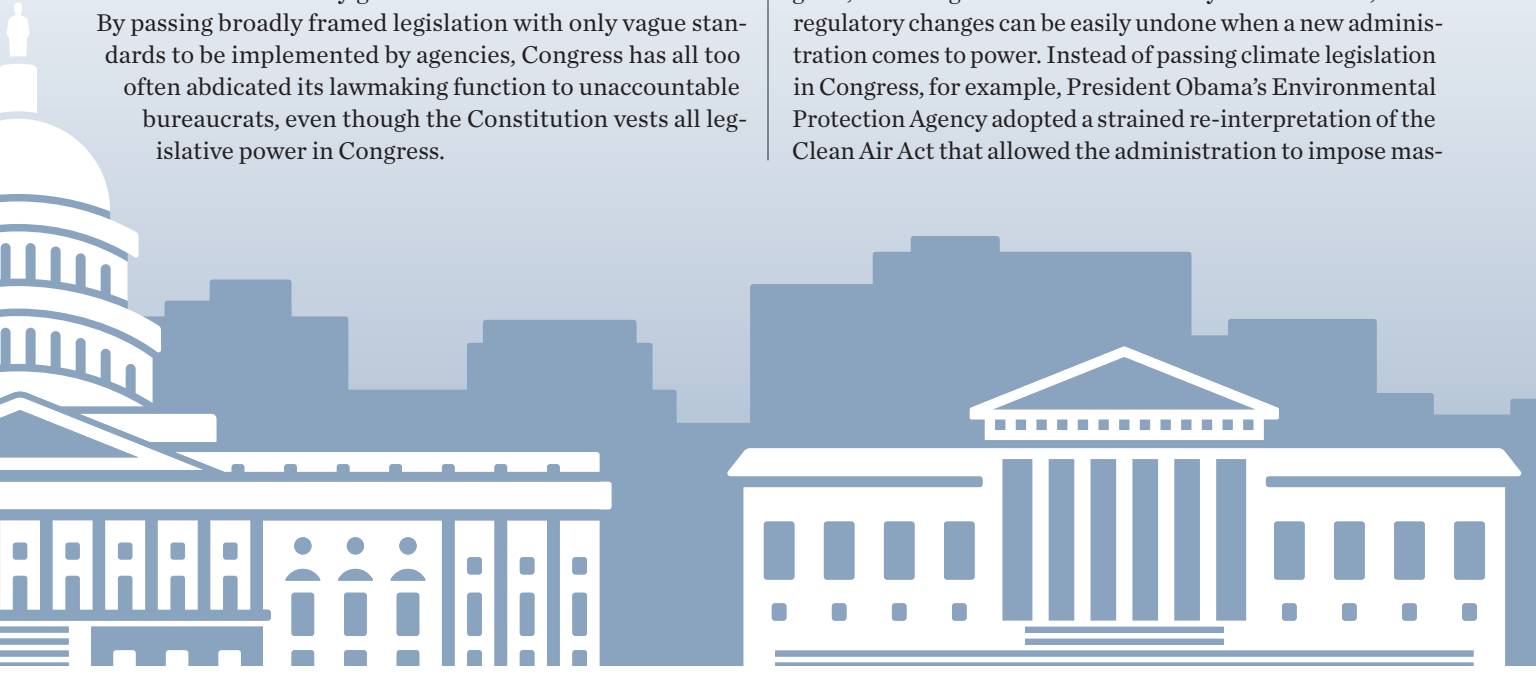
By passing broadly framed legislation with only vague standards to be implemented by agencies, Congress has all too often abdicated its lawmaking function to unaccountable bureaucrats, even though the Constitution vests all legislative power in Congress.

President Trump should be sensitive to Congress's responsibility, and demand that legislation clearly state not just Congress's broad purpose but the specific requirements of the law. The Courts have established an extremely permissive test for discerning excessive congressional delegation: they allow any legislation that offers the implementing agency an "intelligible principle" to follow in its regulation. But the President bears an independent duty to judge the constitutionality of the bills he signs into law. He can and should demand more than an intelligible principle from Congress.

Faithful Execution

Fidelity to legislative primacy also requires that federal agencies give statutes their best interpretation. Under the Supreme Court's *Chevron* doctrine and related administrative law doctrines, courts grant federal agencies broad latitude to interpret the acts of Congress that they administer. Especially when the underlying legislation is vague and open-ended, these doctrines give federal agencies inordinate power to say what the law is—a duty that rightly belongs to the courts.

The Trump administration will face many temptations to take advantage of *Chevron* deference for its own purposes. But the President would do well to work out his legislative agenda in Congress, not the agencies. As recent history demonstrates, mere regulatory changes can be easily undone when a new administration comes to power. Instead of passing climate legislation in Congress, for example, President Obama's Environmental Protection Agency adopted a strained re-interpretation of the Clean Air Act that allowed the administration to impose mas-



sive new costs on the energy sector to shift it toward energy sources that the administration preferred. Now President Trump's EPA appears poised to re-reinterpret the Act to undo President Obama's signature Clean Power Plan. A body of law that changes easily whenever a new faction comes to power is inconsistent with a robust rule of law. Its instability prevents members of the public from ordering their affairs with confidence and undertaking whatever investments are necessary to enable compliance and promote economic growth.

Public Implementation

A related feature of the rule of law is that members of the public must be allowed to know what law binds them. This is possible only with a functioning legislative process, and it is undermined when the operative law that compels obedience takes the form of interpretive rules or even less authoritative pronouncements that can be undone with the stroke of a pen.

The need for knowable law means that when regulations are required as an exercise of the executive's law enforcement function, federal agencies should regulate through public administrative processes that yield written rules that apply equally to all similarly situated parties.

The alternative approach was used all too often in the Obama administration—a system of informal guidance that may represent the opinion of a single unelected agency employee and may be addressed to only one party. Such "non-binding" guidance enables federal agencies to coerce desired behavior from regulated entities without really taking responsibility for regulation. Agencies often find informal guidance useful because it permits them to avoid the notice and opportunity for comment that are required of rulemaking, and it may allow them to avoid judicial review or to influence the outcome of pending litigation.

For example, the Department of Education effected a 180-degree shift in federal policy on which bathrooms schools must allow transgender students to use by issuing an informal guidance letter adopting a novel interpretation of "sex" in Title IX of the Education Amendments of 1972. Suddenly schools had to allow biological males to use girls' restrooms or lose federal funding. Even though the Education Department's guidance letter was issued in the course of pending third-party litigation, the courts deferred to the agency's new interpretation under the *Auer* doctrine. The Supreme Court agreed to hear the case, but dismissed it when the Trump administration withdrew the guidance in question.

> "Unstable law prevents members of the public from ordering their affairs with confidence and undertaking whatever investments are necessary to enable compliance and promote economic growth.

Even-Handed Enforcement

Legislation can order society only if the executive branch will enforce the duly enacted laws of Congress. In a forthcoming article, Gary Lawson notes that "the rule of law emphasizes rule-following as a, and perhaps as the, fundamental operation in the legal system." Without enforcement, there is no incentive to follow the law, and therefore no law in any real sense.

One of the Obama administration's greatest affronts to the rule of law was its policy of non-enforcement with regard to statutes that the President disfavored—most notably, federal immigration law and criminal law prohibiting the sale of marijuana. The administration's policy amounted to amnesty for favored classes of illegal immigrants and illegal drug dealers in states that opted to rescind their relevant state drug laws.

Such non-enforcement policies make a mockery of the legislative process and undermine public confidence in the law. As Richard Epstein has written, compared to outright governmental coercion, government by waiver is actually a more invidious assault on the rule of law: "Rather than setting the state and the private sector against each other in a healthy tension, it fuses them, making the private sphere dependent on the government's benevolence. And when currying the favor of capricious government officials is required for a person's well-being or a firm's very existence, government abuse becomes nearly impossible to oppose." The Trump administration should resist the temptation to pick and choose what laws to enforce, except when it comes to unconstitutional acts of Congress. Again, the President should work with Congress to repeal unwanted laws through the legislative process, as it is doing with Obamacare.

Faithful Judicial Interpretation

As a presidential candidate, Donald Trump promised to "appoint strong and principled jurists to the federal bench who will enforce the Constitution's limits on federal power and protect the liberty of all Americans." His nominations to date have fulfilled that promise. They come from a wide array of professional and life experiences, but they share a commitment, in the words of Joan Larsen—a Michigan Supreme Court Justice, former clerk to the late Justice Antonin Scalia, and nominee to the Sixth Circuit—to "interpret the laws according to what they say, not according to what the judges wish they would say."

President Trump's most consequential judicial appointment is Supreme Court Justice Neil Gorsuch. Justice

MARGARET SMITH

Gorsuch used his first opinion for the Court, a thoroughly textualist interpretation of the Fair Debt Collection Practices Act, to reaffirm "the proper role of the judiciary" in our system of government—"to apply, not amend, the work of the People's representatives." As a Circuit Judge, Gorsuch was faithful to Supreme Court precedent, but articulated a healthy skepticism of the excesses of judicial deference to agency interpretations of law. Calling *Chevron* "a judge-made doctrine for the abdication of the judicial duty," that is "pretty hard to square with the Constitution of the founders' design," then-Judge Gorsuch pointed out that excessive deference to unelected agencies is a threat to liberty.

Every President comes to office with his own policy agenda and faces a temptation to stock the courts with judges who will support that agenda reflexively. In 2014, then-Senate Majority Leader Harry Reid suggested that "simple math" meant the D.C. Circuit would uphold President Obama's signature health care bill after the appointment of three judges he had nominated. But President Trump deserves credit for valuing judicial fidelity to the Constitution and laws above fidelity to any given presidential policy. If the rest of his appointments follow Justice Gorsuch's model of humility with respect to Congress's duly enacted statutes and caution with respect to unelected agencies' interpretations, the President will reshape the courts in the constitutional mold, preserving Congress's responsibility for making law, and restoring confidence in a judiciary motivated by fidelity to law, not the policy preferences of individual judges.

Conclusion

President Trump once wrote that "respect for the rule of law is at our country's core." When the President writes and speaks about the law, he is often referring to law enforcement. That is a critical component of the rule of law, for law is not truly law unless it is reliably enforced. But enforcement by itself is not enough, as the President's careful approach to judicial selection demonstrates. To further safeguard the rule of law, President Trump must cooperate with Congress to restore legislation as the source of binding government power, and he must see that his agencies faithfully execute the law without descending into unelected lawmaking. If the Trump administration succeeds in this project, it will have achieved more than simply unwinding the excesses of the past. It will have preserved for another generation the ordered liberty that our government—and indeed all lawful government—exists to protect.

Mr. Gustafson is a partner at Boyden Gray & Associates, PLLC, a constitutional and regulatory law firm in Washington, D.C. During the previous administration Boyden Gray & Associates represented parties challenging EPA's Clean Power Plan, the FCC's Open Internet Order, Homeland Security's DAPA immigration policy, and the constitutionality of the Affordable Care Act and the Consumer Financial Protection Bureau.

EDUCATION SAVINGS ACCOUNTS:

PARENTS LOVE THEM AND NOW THEY ARE EXPANDING

by MARIA SERVOLD

SCHOOL HAD NEVER BEEN EASY FOR 12-YEAR-old Elias Hines. The sixth grader, who lives in Arizona, is autistic. When he was in first grade, his mother, Holland Hines, went to his classroom and found him under his desk, hands over his ears, rocking back and forth.

Today, he can sit for one to two hours at a time, focused and learning.

During his first few years in the traditional public school system, Elias was bounced around between special needs programs. He had a mixture of great and "not so great" teachers, his mother says.

"I didn't see a lot of education happening," Hines says of the first-grade classroom. "I saw damage control. That's when I decided I needed to do something."

Not very many private schools had the resources or programming to help Elias, and the ones that did, Hines says, were "astronomically expensive," costing as much as $30,000 per year. She pulled Elias out of school and started homeschooling him, but soon found out about Arizona's Empowerment Scholarship Program. Elias was accepted into the program, which is one of a handful of education savings account programs in the country. Once a part of the ESA, Hines began to receive 90 percent of the funding that would go to a public school on Elias's behalf in a bank account from which she could spend on education for her son.

> "It was so liberating. For the first time since he received his autism diagnosis, I had hope. I can execute what will be right for my son. I don't have to go through a bunch of bureaucracy.

"I had the benefit of being able to help decide what kind of school environment would be good for him, what therapies he needed," says Hines. "It was so liberating. For the first time since he received his autism diagnosis, I had hope. I can execute what will be right for my son. I don't have to go through a bunch of bureaucracy."

Implemented in 2011, Arizona's Education Savings Account law was the first of its kind. For students accepted into the program, the state department of education deposits 90 percent of the funds the state would have allocated to a public school on the child's behalf into a private bank account. Parents can then use that money on a number of things, including tuition and fees at a private or online school, educational therapies or services, tutoring services, curriculum, testing fees, tuition and fees at an eligible post-secondary education institution, or to pay for bank fees charged for ESA management.

In early April, Arizona Gov. Doug Ducey signed a bill expanding the program, making every public school student in the state eligible. The bill is the latest in an ever-changing movement across the country to expand school choice at the state level.

Arizona Senate Bill 1431 changed the Empowerment Scholarship Account program, phasing in eligibility by grade over the course of four years. Previously, the program was open only to certain students, like those with special needs, those from failing schools, active duty military families, those adopted from the state foster care system, or Native American students living on reservations.

A 2013 study published by the Friedman Foundation for Educational Choice (known as EdChoice) found 71 percent of parents using ESAs in Arizona were "very satisfied" with the accounts. By contrast, only 21 percent were "very satisfied" with the school or program their child attended the year before joining the program. After using ESAs, no parent responded as "neutral" or any level of dissatisfied, while 30 percent were "very unsatisfied" before the switch.

Variations of the education savings account currently exist in three other states: Florida, Tennessee, and Mississippi. Nevada also created an ESA program, but the program is on hold there. In late 2016, the Nevada Supreme Court ruled that the law's funding mechanism is unconstitutional because it did not have its own funding source and drew from money allocated for public schools.

The programs in Florida, Tennessee, and Mississippi are currently available only to students with disabilities.

ESAs are the brainchild of the Goldwater Institute, a free-market think tank in Arizona. Jonathan Butcher, then Goldwater's education director and one of the authors of the 2013 EdChoice report, was instrumental in creating Arizona's program six years ago. Butcher, now a policy analyst with The Heritage Foundation, says the recent program expansion shows ESAs work.

"We've learned from experience, and the program shows that there will be demand from families. All kinds of families should have access to ESAs," says Butcher. "Families want this, and as long as students are using it and being successful, I hope we'd continue to give access to it."

One reason ESAs are so attractive, says Butcher, is that parents can pay for the specific kind of education they want for their child, including how and where they learn.

Tax-credit scholarship and voucher programs are more common forms of school choice, but in both of those program designs the state pays a private school tuition on behalf of a parent. With ESAs, parents receive and control the money themselves, so the state isn't directly paying for private school. That difference can matter in court.

Many states have constitutional prohibitions against the use of public money for private or religious education, often known as Blaine Amendments. Critics of school choice

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have succeeded in stopping some tax credit and voucher programs with lawsuits that allege violations of those constitutional provisions. However, they have had less success in making the same arguments against ESAs.

Not long after ESAs were first approved in Arizona, for example, several groups, including the Arizona Education Association, filed a lawsuit to stop the program from moving forward. The case eventually made its way to the Arizona Court of Appeals, which ruled in October 2013 that the accounts are constitutional.

"The ESA does not result in the appropriation of public money to encourage the preference of one religion over another, or religion per se over no religion," wrote Judge Jon W. Thompson. "The parents are given numerous ways in which they can educate their children suited to the needs of each child with no preference given to religious or nonreligious schools or programs."

The Arizona Supreme Court declined to review the case in 2014, allowing the appeals court ruling to stand.

Butcher says a dozen or more states have considered education savings account plans in recent years, with a handful of state legislatures currently looking at proposals.

The EdChoice report ("Schooling Satisfaction: Arizona Parents' Opinions on Using Education Savings Accounts") found the majority of families (65 percent) receiving funds through the Empowerment Scholarship program use at least some of the money to pay for tuition at a private school, like Hines does for her son Elias. Additionally, 41 percent use the money for education therapies, 33 percent for homeschooling curriculum, and 33 percent to hire a tutor.

Within these broad categories, parents reported using the funds for things like special science classes, braille and assistive technology, speech therapy, swimming therapy, and an aide or paraprofessional who can assist students who have special needs with their schoolwork.

Typically, parents participating in the program receive anywhere from $5,000 to $18,000 annually, with the higher amounts going to parents of children with special needs, according to data compiled by the Arizona Department of Education. Just more than 2,000 students participated in fiscal year 2016, and the state estimates 3,500 students will participate in fiscal year 2017.

A fiscal report by the Arizona legislature estimates that ESAs save the state $1,400 for every disabled student who formally attended a traditional public school and now participates in the ESA program.

Butcher says about half of Arizona's current ESA participants are students with special education needs.

Hines is a prime example. When people ask her if it is difficult to have a child with autism, Hines says she tells them: "It is really hard, but it is infinitely more difficult working with the school system."

Elias now attends AZ Aspire Academy. The school is suited for students with special needs. It boasts a one-

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to-one teacher-to-student ratio, according to Founder Sonia Gonzales.

About 50 percent of the school's 120 students (spread across three campuses) use education savings accounts to help pay for tuition, Gonzales says. What started with just one small school has blossomed into three locations with two more planned, Gonzales said.

"The growth that we've had has absolutely had to do with the ESAs," she says.

The growth of ESAs shows that parents want to be involved in their children's education, according to Gonzales.

"I think it's a direct response to parents knowing their children best and knowing their academic needs," she says. "We are definitely seeing incredible results. When there is collaboration, we see a lot of growth [in students], socially and emotionally."

Parents at AZ Aspire Academy help set goals and choose curricula for their children, though the school does use the Common Core for core academic classes. It also offers Advanced Placement courses. The flexibility and parent involvement the school allows are key to helping students with special needs succeed, Gonzales says. She is also the parent of a special needs child and worked in public school administration before opening AZ Aspire Academy.

> "Parents reported using ESA funds for things like special science classes, braille and assistive technology, speech therapy, swimming therapy, and an aide or paraprofessional who can assist students who have special needs with their schoolwork.

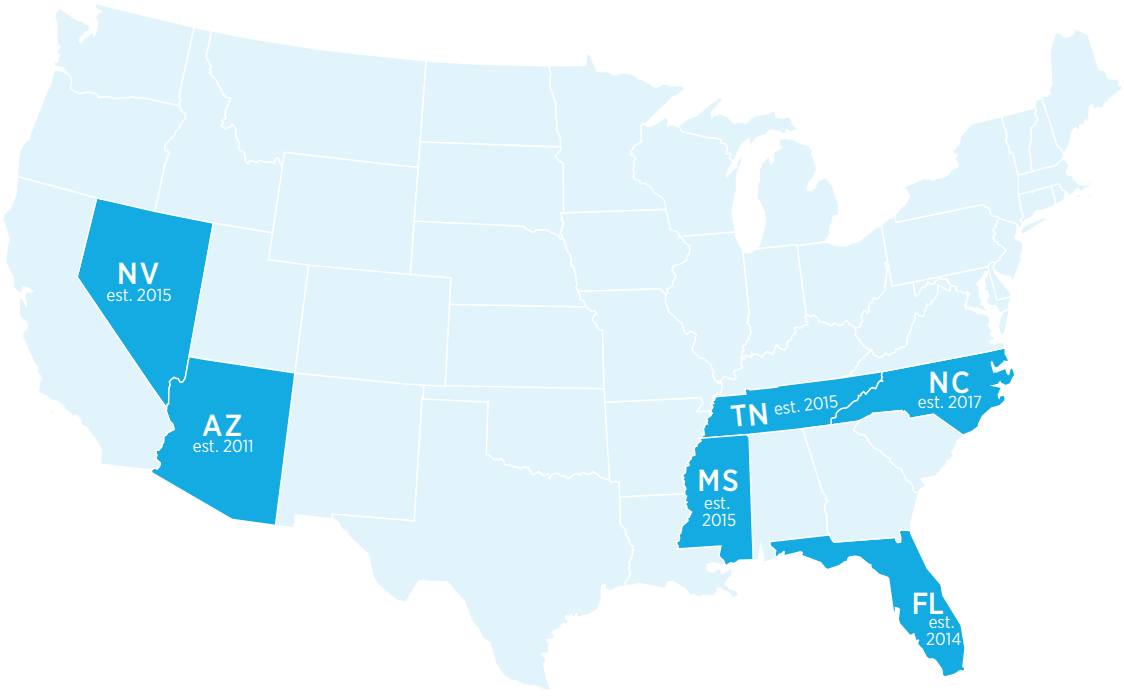
"I have a lot of hope for public education, but it doesn't meet the needs of every child," she says.

Hines says her son Elias now does two hours of concentrated academic work per day with his own teacher, and also has the chance to work with a behavior coach, something that became necessary as Elias grew, and that wasn't easily available through the public school system.

"It's the first place he's been successful," she says, noting she started to see changes in Elias' learning and behaviors immediately.

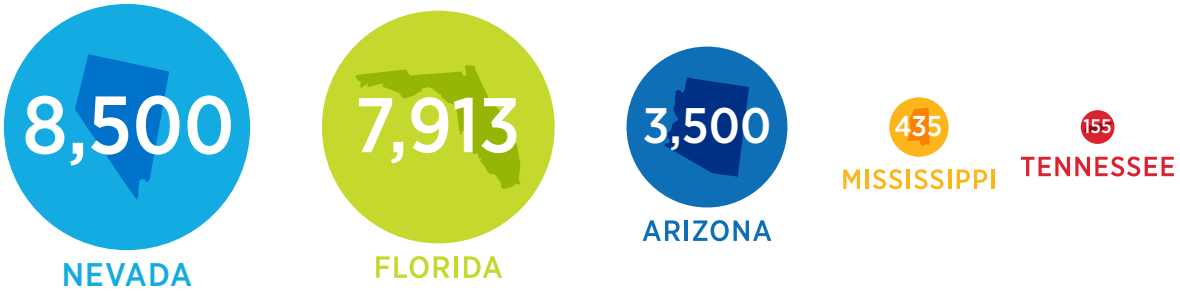
Prior to being able to attend AZ Aspire, she says, Elias could sit to learn for only 10 to 15 minutes at a time, instead of one to two hours. He used to come home from school stressed out and unwilling to discuss his day.

Education Savings Accounts in the States



SOURCE: THE GOLDWATER INSTITUTE

ESA Participation/Applications by State



Figures for Nevada and Tennessee represent the number of applications.
North Carolina will begin awarding accounts in 2018.

HOLLAND HINES has used Education Savings Accounts to give her son Elias a new outlook on learning.

GOLDWATER INSTITUTE/ASKAMOMAZ.COM

Now, he eagerly talks about what he's learned and is inquisitive about the world around him. He makes mostly A grades and his standardized test scores have also improved. But, most importantly, Hines says her son now enjoys learning.

"Instead of a fear and loathing for all things academic, he now has the one thing above all else that school is supposed to provide: a love of learning itself," Hines says. "For my son, the system all but demolished his spirit as well as his ability to take in and commit to memory the information they were trying to teach. Now, he understands the value of learning and is excited about it in every aspect of his life."

She says the Empowerment Scholarship and the ability for her to make choices about her son's education, like finding and being able to afford the program at AZ Aspire Academy, has been "absolutely life changing."

Hines says she thinks education savings accounts can help bridge the gap between what a child needs and what a school can offer.

"So much damage can be done when we don't put the child first and we put the institution of education before the needs of the child," she says. "That is something that's gotten completely turned around."

Ms. Servold is a freelance writer and the Assistant Director of the Dow Journalism Program at Hillsdale College in Michigan.

We Already Have a Solution to Fake News: It's Called the First Amendment

BY JARRETT STEPMAN

FAKE NEWS ISN'T SUDDENLY RUINING AMERica, but putting government in charge of deciding what news is fake will.

In the wake of President Donald Trump's victory in the 2016 election, numerous media outlets ran stories claiming that many websites had published false stories that helped Trump beat Hillary Clinton.

Since then Left-leaning opinion writers have called for a solution to this alleged epidemic. *The New York Times* reported in January that Silicon Valley giants Facebook and Google will team up with legacy media outlets to fact-check stories and curtail the proliferation of "fake news."

However, intentionally misleading news has been around since before the invention of the printing press. In fact, our Founding Fathers grappled with this very issue when they created our system of government. They saw that while it was tempting to censor fake stories, ultimately the truth was more likely to be abused by an all-powerful government arbiter than the filter of unimpeded popular debate. Attempts to weed out factually incorrect news reports can quickly morph into fact-checking and manipulating differences in opinion.

> "The Founders saw that while it was tempting to censor fake stories, ultimately the truth was more likely to be abused by an all-powerful government arbiter than the filter of unimpeded popular debate.

Fortunately, there have been few serious calls in the United States for official censoring of political news or media, in contrast to most of the world, including Europe. Freedom of thought, freedom of the press, and even the freedom to be wrong make America great and exceptional. In addition to preserving liberty, our free-wheeling tradition gives the United States an edge in adapting to the increasingly decentralized media landscape that is a natural product of the Internet Age. Most importantly, it produces a more critically informed populace in the long term.

The Founders and the Free Press

The Founding Fathers were well aware of the power of the press, for good or ill. After all, many of them, such as Samuel Adams, Benjamin Franklin, and Thomas Paine, were newspapermen and pamphleteers. The revolutionary ideas they disseminated throughout the colonies found eager readers, putting them high on King George III's enemies list.

Three years after the Constitution was ratified, the American people amended it by adding the Bill of Rights, which included the First Amendment and its protections of the media. However, the Founders understood that a free press was not an entirely unqualified blessing; some had reservations.

Elbridge Gerry, who was present at the Constitutional Convention, lamented how con artists in his home state were manipulating the people. "The people do not [lack] virtue, but are the dupes of pretended patriots," Gerry said at the convention. "In Massachusetts it had been fully confirmed by experience, that they are daily misled into the most baneful measures and opinions, by the false reports circulated by designing men, and which no one on the spot can refute."

Benjamin Franklin also warned about the power of the press, which the public must put so much trust in. In a short essay, Franklin explained how the press acted as the "court" of public opinion and wielded enormous unofficial power.

For an institution with so much influence, Franklin noted that the bar for entry into journalism is remarkably low, with no requirement regarding "Ability, Integrity, Knowledge." He said the liberty of the press can easily turn into the "liberty of affronting, calumniating, and defaming one another."

The Founders wrote constitutional protections for the press with open eyes, as their written remarks record. Yet, the evils that come through the occasional problems of a free press are heavily outweighed by its benefits. Lies may proliferate, but the truth has a real chance to rise to the top.

Thomas Jefferson said that the most effectual way for a people to be governed by "reason and truth" is to give freedom to the press. There was simply no other way. He wrote in a letter to Gerry:

> I am [...] for freedom of the press, and against all violations of the Constitution to silence by force and not by reason the complaints or criticisms, just or unjust, of our citizens against the conduct of their agents.

Liars and scandal mongers may occasionally have success in a system without censorship, but truth was ultimately more likely to be found when passed through the people as a whole. Jefferson wrote:

> It is so difficult to draw a clear line of separation between the abuse and the wholesome use of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the discrimination between truth and falsehood. And hitherto the public judgment has performed that office with wonderful correctness.

Despite full knowledge of the media's often unscrupulous power over public opinion, the Founders chose to grant broad

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protections to a decentralized press, opting to place their faith in newspapers checking one another with more efficacy and less risk of bias than heavy-handed government crackdowns.

When the Federalist Party passed the infamous Alien and Sedition Acts under President John Adams to clamp down on "false, scandalous and malicious writing" against the government in the midst of the "Quasi War" with France, there was an immense backlash. A few journalists were arrested, but the governing party was crushed in future elections and ceased to exist shortly thereafter. In the United States, press freedom would become an almost unquestioned element of American culture and policy.

Things worked out differently across the Atlantic. In France, a popular uprising, stoked by a rabid press, led to mob violence, tyranny, and oppressive censorship. Revolutionary scribblers initially brought an end to the Old Regime and the royal restrictions on speech, but freedom of the press didn't last. After the monarchy was crushed, the revolutionaries censored the press even more ruthlessly than had the Bourbon kings. The radicals argued that press freedom was leading people astray and impeding their revolution.

Maximilien Robespierre, leader of the Jacobin party, called journalists "the most dangerous enemies of liberty." Robespierre and his allies in the French government created a state-sponsored newspaper to counter what they saw as the media's lies. Then, seeing that even that was not enough to prevent alternative opinions from growing, began to arrest and execute those who opposed the policies of the government. Robespierre's "Reign of Terror" gripped France for more than a year, during which 16,594 official death sentences were handed out.

Calls for liberty ended with censorship and ultimately the guillotine for unbelievers. Clearly there was a difference between the American and French regimes and cultures, both nominally standing for liberty, but arriving at radically different ends.

A Frenchman who was a keen observer of both systems explained why freedom of the press worked out so differently in these sister republics.

Tocqueville, the United States, and France

Alexis de Tocqueville caught on to why liberty of the press worked so much better in the United States than in his home country. One system was almost entirely free from suggestions of government censorship and the other perpetually in danger of falling prey to the "instincts of the pettiest despots."

Americans understood, wrote Tocqueville in his book *Democracy in America*, that creating a government body with the power to assess the truth in media would be far more dangerous than any system of press freedom. They instinctively knew that:

> Whoever should be able to create and maintain a tribunal of this kind would waste his time in prosecuting the liberty of the press; for he would be the absolute master of the whole community and would be as free to rid himself of the authors as of their writings.

In other words, the creation of such an official "court" to oversee media truth would logically end in absolute tyranny. Tocqueville concluded that "in order to enjoy the inestimable benefits that the liberty of the press ensures, it is necessary to submit to the inevitable evils that it creates."

> "In the mid-20th century, the American press became more centralized and the country opened its media sector to many of the same problems that had plagued European media.

Fortunately, America had a diverse and highly decentralized press from the beginning. Not so in France, which had a highly centralized press both in terms of geography and number of media organizations. Therefore, Tocqueville wrote, in a centralized media environment such as France, "[t]he influence upon a skeptical nation of a public press thus constituted must be almost unbounded. It is an enemy with whom a government may sign an occasional truce, but which it is difficult to resist for any length of time."

France never really changed. It continued a cycle of crackdowns on the free press as new regimes took power. Instead of decentralizing the press of the monarchical regime, each successive set of revolutionaries seized the central apparatus for their own purposes. In 1852, when the Second Empire under Napoleon III took power, the government said that censorship would be implemented for public safety.

A petition message to the legislative body concluded: "As long as there exists in France parties hostile to the Empire, liberty of the press is out of the question, and the country at large has no wish for it."

Though President Trump has caused concern by calling members of the press "enemies of the people," his threats against the press come through mockery and rebuke rather than official sanctions. Presidential media hating has been around since George Washington was in office, but there have been few serious proposals to actually crack down on reporting.

By contrast, the press is treated quite differently in France, where citizens are placed on a 44-hour legal media blackout

ELECTION DOCUMENTS for French presidential candidates Emanuel Macron and Marine Le Pen.

ERIC GAILLARD/ NEWSCOM

on the eve of elections. As *USA Today* reported, in the days leading up to the French presidential election, the media were warned not to report on data leaks from candidate Emmanuel Macron's campaign. The French election commission said that the leaks likely contained some fraudulent data, i.e. "fake news," and any reporting on it or even passing it along on social media could lead to criminal charges.

Jim Swift of *The Weekly Standard* pointed out the obvious: "This is censorship, plain and simple. In the Internet Age, reporters and citizens around the globe can share information—be it about the Macron hack or not—on Twitter, Facebook, or on their websites. The French press and citizenry? Repressed."

But *The New York Times* praised the reporting ban, and emphasized the benefits of the centralized French system over the more freewheeling ones in Britain and the United States. In a recent article, The *Times* noted:

> The contrast may have been amplified further by the absence of a French equivalent to the thriving tabloid culture in Britain or the robust right-wing broadcast media in the United States, where the Clinton hacking attack generated enormous negative coverage.

"We don't have a Fox News in France," said Johan Hufnagel, managing editor of the Left-wing daily *Libération*, according to *The New York Times*. "There's no broadcaster with a wide audience and personalities who build this up and try to use it for their own agendas."

A similar scandal occurred in the United States when Wikileaks published thousands of emails from the Democratic National Committee that cast the Clinton campaign in a negative light. Yet, there was no censorship of the information; the American people would not have stood for it.

Who has the better system? Since the adoption of the U.S. Constitution, France has gone through five republics, two empires, and four monarchies. Despite the bumptious nature of American politics and media, it would be foolish to bet on France's fifth republic outlasting America's first.

Americans have been lucky to have a decentralized media through most of their history and a culture that strongly embraces the idea of a truly free press. Those arrangements have had a long-lasting impact on American institutions and have made the country resistant to authoritarian impulses. However, in the mid-20th century, the American press became more centralized and the country opened its media sector to many of the same problems that had plagued European media.

Some glamorize the era in which a few television companies and big newspapers became media gatekeepers, similar to the model that currently exists in France. This nostalgia for "more responsible" journalism ignores the fact that some of the most egregious fake news blunders were perpetrated by an unchecked centralized press. Perhaps the worst offense of all came from *The New York Times*.

THE HOLODOMOR MEMORIAL in Washington, D.C.

The New York Times and the Fraud of the Century

Today, a 30-foot-long bronze wall stands in Northwest Washington, D.C., and on this wall is the simple image of a wheat field. It is a monument to the victims of The Holodomor, a monstrous genocide committed by one of the most ruthless and authoritarian regimes in human history.

In 1932, Soviet dictator Joseph Stalin, frustrated that he could not crush Ukrainian nationalism, ordered that grain quotas for Ukrainian fields be raised so high that the peasants working the fields would not be left with enough food to feed themselves. NKVD troops collected the grain and watched over the populace to prevent them from leaving to find nourishment elsewhere.

As a result of these policies, as many as 7 million Ukrainians died of starvation in 1932 and 1933.

But while Stalin was conducting an atrocity with few equals in human history, *The New York Times* was reporting on the regime's triumphs of modernization.

Walter Duranty, the *Times* Moscow bureau chief, won the 1932 Pulitzer Prize for Correspondence for his 1931 series of articles on the Soviet Union. Pulitzer in hand, he proceeded to perpetrate perhaps the worst incident of fake news in American media history at a time when Americans relied on the *Times* and a handful of other large media outlets to bring them news from around the world.

> “Pulitzer in hand, Walter Duranty proceeded to perpetrate perhaps the worst incident of fake news in American media history.

Duranty's motivation for covering up the crimes taking place in Ukraine has never been fully ascertained. However, it undoubtedly gave the Bolshevik sympathizer better access to Stalin's regime, which routinely fed him propaganda.

While privately admitting that many Ukrainians had starved to death, Duranty sent numerous reports back to the United States praising the good work of the Soviet government. He reported that there had been some deaths from “diseases due to malnutrition,” but called the suggestion that a widespread famine was taking place “malignant propaganda.”

These reports were highly influential in the United States and had enormous impact on U.S.-Soviet relations. Historian Robert Conquest wrote in his book, *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine*, that due to the perceived credibility of *The New York Times*, the American people accepted the fraudulent accounts as true.

Sally J. Taylor wrote in her book *Stalin's Apologist* that Duranty's reports helped convince President Franklin D.

ALEX ADRIANSON

THE DISPOSSESSED KULAKS in front of their confiscated home, Ukraine.

ALBUM / FINE ART IMAGES / NEWSCOM

Roosevelt to extend official diplomatic recognition to the Soviet government in November of 1933. She wrote: "[A]lmost single-handedly did Duranty aid and abet one of the world's most prolific mass murderers, knowing all the while what was going on but refraining from saying precisely what he knew to be true."

Though Duranty's reporting was a lie, *The New York Times* never questioned its authenticity and dismissed charges that their reporter was cooking up false reports. Famed British journalist Malcolm Muggeridge wrote of this willful self-deception in his autobiography:

> If the *New York Times* went on all those years giving great prominence to Duranty's messages, building him and them up when they were so evidently nonsensically untrue [...] this was not, we may be sure, because the Times was deceived. Rather it wanted to be so deceived, and Duranty provided the requisite deception material.

In the more centralized national media landscape of the mid-20th century, a fraudulent story like that published in the *Times* was both more likely to be believed and less likely to be debunked.

The Truth Cannot Be Centrally Planned

But America's evolving media landscape is again moving toward decentralization. And, fortunately, the First Amendment is a mighty weapon against the suffocating and stultifying suppression of speech that frequently occurs in other nations.

The system the Founders created and intended for the United States was one that they hoped would lead our civilization to the truth. We have acquiesced to the fact that there will always be a great deal that the smartest and the wisest simply don't know. No earthly, impartial arbiter has the capacity, or *should* have the capacity, to determine absolute fact for us—especially in the realm of politics, philosophy, and man's relation to man.

For all the uncertainty and chaos that an unfettered media seem to engender, Americans have been best at ultimately veering closer to the truth than any other people. The First Amendment is one of the greatest of many gifts the Founding generation bequeathed us and has been a truly defining feature of American exceptionalism with few comparisons around the globe.

Through all the angst over fake news, fraudulent journalists, and media hyperbole, the American republic will survive. In the end, fake news peddlers will only damage their own reputations and bring doubt on their reporting. Fortunately, our freedom isn't dependent on the musings of the White House press corps. It hinges on the Constitution and the liberty it was created to protect. IN

Mr. Stepman is a contributor to The Daily Signal*, the multimedia news outlet of The Heritage Foundation.*

OCTOBER

2 **Fall Briefing Featuring Mark Steyn** Center of the American Experiment, Guthrie Theater, Minneapolis, 5:30PM

3 **The Fifth Annual Miguel Estrada Supreme Court Roundup** Federalist Society, Three Brickell City Centre, Miami, 5:30PM

8–11 **National Taxpayers Conference** Tax Foundation, Washington, D.C.

10 **Welfare Policy and the Trump Administration: What Do Conservatives Think?** American Enterprise Institute, Washington, D.C., 4:30PM

10 **How Has a Decade of Extreme Monetary Policy Changed the Banking System?** American Enterprise Institute, Washington, D.C., 10AM

10 **Uncivil Discourse: Why the Left Is Wrong to Compare Traditional Marriage Supporters to Racists** The Heritage Foundation and Alliance Defending Freedom, The Heritage Foundation, Washington, D.C., Noon

10 **The WOTUS Debate Continues: From a New Rule to Amending the Clean Water Act** The Heritage Foundation and the Pacific Legal Foundation, The Heritage Foundation, Washington, D.C., Noon

10 **Scalia Speaks: Collecting the Wit and Wisdom of Justice Antonin Scalia** Hoover Institution, Washington, D.C., Noon

10 **Mizzou: Two Years Later** Show-Me Institute, Country Club of Missouri, Columbia, Mo., 7:30AM

11 **Sixth Annual AEI and CRN Conference on Housing Risk** American Enterprise Institute, Washington, D.C., 1:30PM

11 **Gender Dysphoria in Children: Understanding the Science and Medicine** The Heritage Foundation, Washington, D.C., Noon

11 **How Non-State Actors Export Kleptocratic Norms to the West** Hudson Institute, Washington, D.C., 10AM

11 **Second Annual Policy Banquet** James G. Martin Center for Academic Renewal, City Club Raleigh, Raleigh, N.C., 6PM–8:30PM

11 **War of Words: Free Speech Versus Tyranny on Campus** Show-Me Institute, Washington University, National Review Institute, Washington University School of Law, Saint Louis, 5:30PM

12 **Self Control or State Control: You Decide** Atlas Network, University Club of Boston, 6PM

12 **Opportunities for U.S. Indonesia Strategic Cooperation** The Heritage Foundation, Washington, D.C., 2PM

12 **U.S. Iran Policy: What Next?** The Heritage Foundation, Washington, D.C., Noon

12 **U.S. Attitudes on Immigration Reform** Hoover Institution, Washington, D.C., 10AM

12 **Pluralism and American Education** Texas Public Policy Foundation, Austin, Texas, 11:30AM

13 **U.S. Agricultural Policy in Disarray** American Enterprise Institute, Washington, D.C. 1:30PM

13 **U.S.-European Relations in the Age of America First** American Enterprise Institute, Washington, D.C., 10:20AM

13 **Architect of Prosperity: Sir John Cowperthwaite and the Making of Hong Kong** The Cato Institute, Washington, D.C., 11AM

13 **Washington Policy Center Annual Dinner** Western Washington, Bellevue Hyatt, 6PM

13–15 **Values Voter Summit** FRC Action, Omni Shoreham Hotel, Washington, D.C.

16 **Terror, Propaganda, and the Birth of the "New Man": Experiences from Cuba, North Korea, and the Soviet Union** Cato Institute, Washington, D.C., 11AM

17 **How to Think: A Survival Guide for a World at Odds** American Enterprise Institute, Washington, D.C., 10AM

17 **Modernizing U.S. Telecom Law: Lessons from Denmark** Mercatus Center, AT&T Forum for Technology, Entertainment & Policy, Washington, D.C., 8:45AM–11:30AM

17 **Wisconsin Policy Research Institute Annual Dinner** Wisconsin Club Ballroom, Milwaukee, 5PM–8PM

17 **The Coming Quantum Revolution: Security and Policy Implications** Hudson Institute, Washington, D.C., 9AM–3:45PM

18 **Acton Institute's 27th Annual Dinner** Devos Place, Grand Rapids, Mich., 6PM

18 **Criminal Justice at a Crossroads** Cato Institute, Washington, D.C., 9AM–5:30PM

19 **The Impact of the Bolshevik Revolution on the Scope and Size of Government in the West** Cato Institute, Washington, D.C., 11AM

19 **Goldwater Institute Annual Dinner** The Phoenician, Scottsdale, Ariz. 6:30PM–11PM

19 **Liberty Gala** Oklahoma Council of Public Affairs, Renaissance Hotel and Convention Center, Tulsa, Okla., 6:30PM

19 **October High School Conference at the Reagan Ranch** Young America's Foundation, The Reagan Ranch Center, Santa Barbara, Calif., 2PM

20 **A Pope and a President: John Paul II, Ronald Reagan, and the Extraordinary Untold Story of the 20th Century** Family Research Council, Washington, D.C., Noon

20 **Free Speech Victories: Sports, Bands, and Beer Win in the Courts** The Heritage Foundation, Washington, D.C., 5PM

20 **Stifling Free Speech on Campus (and What It Means for the Rest of Us)** Institute for Policy Innovation, Intercontinental Hotel, Dallas, Noon

24 **Irving Kristol Award and Annual Dinner** American Enterprise Institute, National Building Museum, Washington, D.C.

24 **Crude Nation: How Oil Riches Ruined Venezuela** Cato Institute, Washington, D.C., 4PM

24 **Keeping Our Military Ready, Why Radical Social Experimentation in Our Armed Forced Must End** Family Research Council, Washington, D.C., Noon

25 **The Joseph Story Distinguished Lecture** The Heritage Foundation, Washington, D.C., 5:30PM

25 **Vets and Pets: Wounded Warriors and the Animals that Help Them Heal** The Heritage Foundation, Washington, D.C., 10:30AM

25 **Humane Libertarianism: A New American Liberalism** Mercatus Center, Arlington, Va., 5PM

25 **William F. Buckley, Jr. Prize Dinner** National Review Institute, Gotham Hall, New York

26 **Renegotiating NAFTA: Prospects and Challenges** Cato Institute, Washington, D.C., 9AM–5:15PM

26 **Dinner for Western Civilization** Intercollegiate Studies Institute, University Club of New York

26 **Great Defender of Life Dinner** The Human Life Review, Union League Club, New York, 6:30PM

26 **Philanthropy Roundtable Annual Meeting** Fairmont Scottsdale Princess, Scottsdale, Ariz.

26 **2017 International Tax Competitiveness Index Reception** Tax Foundation, Washington, D.C., 5:30PM–8PM

26–28 **Cato University College of History & Philosophy** The Westin Philadelphia

27 **Andrew Jackson and the Miracle of New Orleans: The Battle that Shaped America's Destiny** The Heritage Foundation, Washington, D.C., 2PM

31 **The State of the Press Today: Whose Interest Does It Serve?** The Heritage Foundation, Washington, D.C., Noon

NOVEMBER

1 **Annual Sir Antony Fisher Gala** Pacific Research Institute, The Ritz-Carlton, San Francisco, 6PM

2–3 **Smart Financial Regulation Roundtable** Mercatus Center and The Institute for Financial Markets, The Willard InterContinental, Washington, D.C.

6 **How Do You Solve a Problem Like North Korea?** Cato Institute, Washington, D.C., 9AM

6 **Gerry Who? Making Sense of North Carolina's Ongoing Debate over Election Redistricting** John Locke Foundation, Raleigh, N.C., Noon

7 **Texas School Finance Summit: Providing Texans with a 21st Century Education** Texas Public Policy Foundation, Austin, Texas, 10:45AM–4PM

7 **Victims of Communism Centennial Commemoration** Victims of Communism Memorial Foundation, Union Station, Washington, D.C., 4PM

7–8 **Liberty Forum and Freedom Dinner** Atlas Network, Crowne Plaza Times Square and Capitale, New York

9 **Reason Media Awards** The Edison Ballroom, New York

9 **Annual Birmingham Dinner** Alabama Policy Institute, Birmingham-Jefferson Convention Center, Birmingham, Ala., 6PM

9 **America First Energy Conference** Heartland Institute, JW Marriott Galleria, Houston

10 **Fall College Conference at the Reagan Ranch** Young America's Foundation, The Reagan Ranch Center, Santa Barbara, Calif., Noon

13 **Growing Up in Forgotten America, Chris Arnade's Photographs and the Stories Behind Them** American Enterprise Institute, Washington, D.C., 4PM

13 **The Federal Farm Handout System: Anti-Market and Insulting to Farmers** John Locke Foundation, Raleigh, N.C., Noon

15 **Independent Women's Forum Annual Awards Gala** Union Station, Washington, D.C., 6PM

15 **Mercatus Center Annual Dinner** Mercatus Center, George Mason University, Va., 6:30PM

16 **35th Annual Monetary Conference** Cato Institute, Washington, D.C., 9AM

16 **Tax Prom 2017, Tax Foundation** The National Building Museum, Washington, D.C., 6PM

16–18 **National Lawyers Convention** Federalist Society, The Mayflower Hotel, Washington, D.C.

17 **Cato Institute Policy Perspectives 2017** InterContinental Barclay Hotel, New York, 10AM

20 **A Living History Event: Thomas Jefferson and John Adams Debate the Future of our Nation** John Locke Foundation, N.C. Museum of History, Raleigh, N.C., 6:30PM

23 **Annual Hayek Lecture: Is the World Over or Underpopulated and How Would We Know?** Institute of Economic Affairs, Church House Conference Center, Westminster, London, 6:30PM

29 **Cato Institute Policy Perspectives 2017** The Drake Hotel, Chicago, 10AM

30 **At the Crossroads IV: Energy and Climate Policy Summit** The Heritage Foundation and Texas Public Policy Foundation, The Heritage Foundation, Washington, D.C.

30 **Champions of Freedom Gala** Yankee Institute for Public Policy, Palace Theatre, Stamford, Conn., 6PM

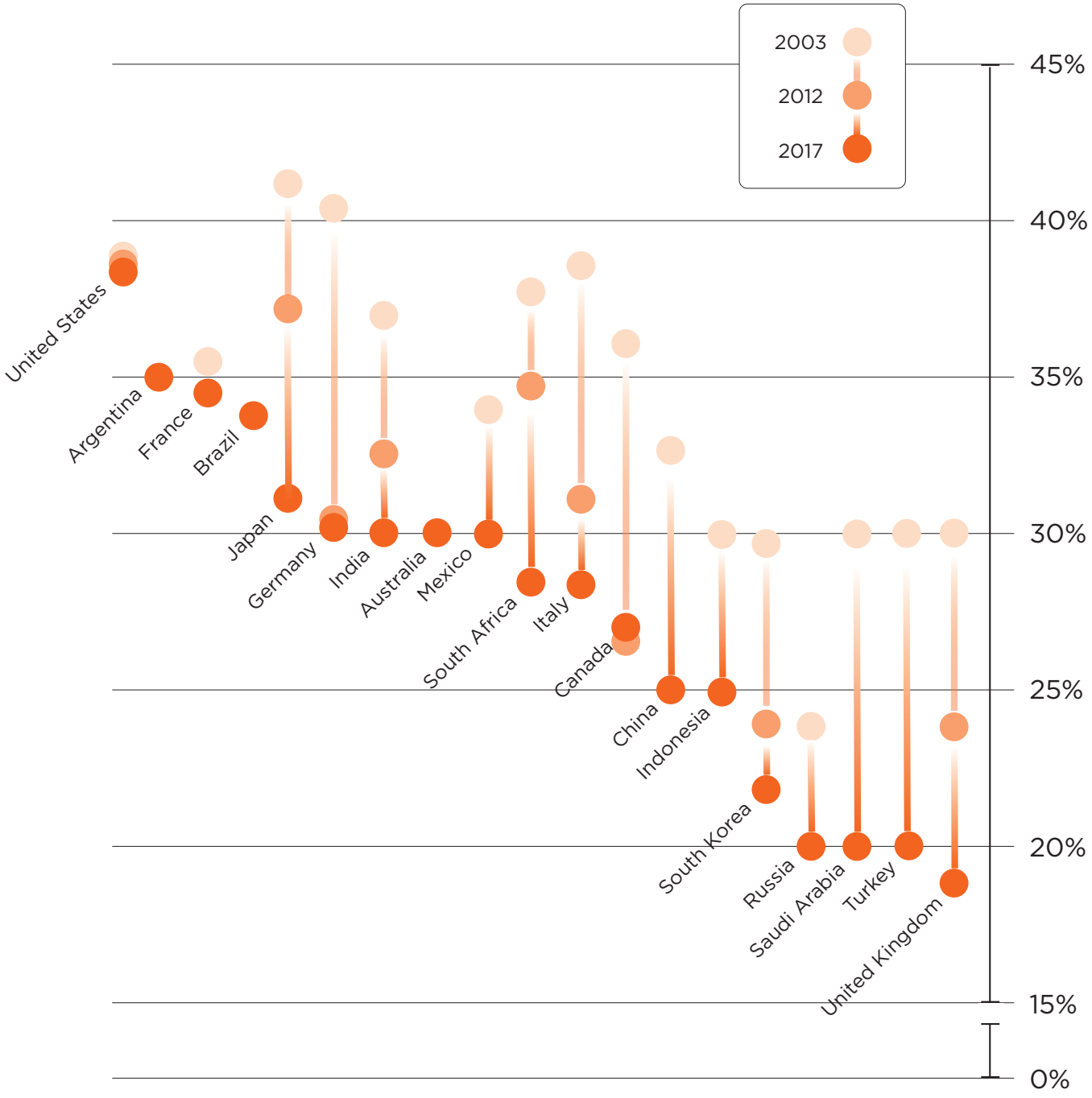
DECEMBER

4 **Conversations with Tyler: Ross Douthat** Mercatus Center, Founders Hall Auditorium, George Mason University, Arlington, Va., 6PM

6–8 **ALEC States and Nation Policy Summit** American Legislative Exchange Council, Omni Nashville May 2018

Becoming Uncompetitive Taxwise

Top Combined Statutory Corporate Income Tax Rates in G20 Countries



SOURCE: Congressional Budget Office, using data from KPMG International and the Organisation for Economic Co-operation and Development. OECD Tax Database, Table II.1 Corporate Income Tax Rate, https://stats.oecd.org/index.aspx?DataSetCode=Table_II1. KPMG Corporate Tax Rates Table, https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html

Rates in Argentina, Australia, and Brazil were the same in 2003 and 2012.

The Heritage Foundation
214 Massachusetts Ave., NE
Washington, DC 20002 | heritage.org

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In 1933, Soviet atrocities were considered fake news.

In 1932-1933, at least 3 million Ukrainians died of starvation as a result of deliberate policies of Soviet dictator Joseph Stalin. *New York Times* correspondent Walter Duranty knew the real story, but instead of reporting it, he smeared the work of reporters who did. He wrote: "Any report of a famine in Russia is today an exaggeration or malignant propaganda." Based on Duranty's reports, the U.S. government decided to normalize relations with the Soviet Union in November 1933.

Fake news is old news, but we've had a solution for it since the Founding: The First Amendment. To learn more, read our feature beginning at page 34.