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2018 Bradley Symposium: The State of the Constitution

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Abstract

The huge expansion of government by Congress, aided by Presidents of both parties and rubber-stamped by the Supreme Court, has created a regulatory and administrative behemoth with enormous power over the lives of individual Americans. Judges use their authority to implement their own public policy choices as if they were superlegislatures or a superexecutive, usurping the role of Congress, and Congress has delegated significant authority to an administrative state that is now the fourth branch of government, composed of powerful agencies filled with bureaucrats who are unaccountable to the people through our election process. The vital question is this: How can we rein in an overbearing bureaucracy and reinvigorate the rule of law that is fundamental to a free people?

KIM R. HOLMES: I am Kim Holmes, the Executive Vice President of the Heritage Foundation. It is really a pleasure and a privilege to welcome all of you here today. Since 1981, The Heritage Foundation and the Bradley Foundation have enjoyed a very close and productive relationship. We have shared values, and we certainly have a deep and abiding love for the Constitution. We have worked in ways large and small that are doing much to preserve and strengthen a nation that all of us so dearly love.

You are here today for the State of the Constitution Symposium. We have two panels with an exciting roster of speakers, and we have the first speakers here already fired up and ready to go.

These and similar initiatives advance the mission of building an America where freedom, opportunity, prosperity, and civil society flourish. Now, as always, we must remain vigilant in our support of the Constitution

Key Points

- Today, the President and his subordinates—including innumerable regulatory and administrative agencies and multiple staffs in the Executive Office of the President—not only execute our laws, but also write laws in the form of rules and adjudicate disputes that arise under their rules.
- This administrative state has come into being not through executive seizures of power but rather through congressional grants of power through delegation.
- Beginning in the early 1970s, new health, safety, and environmental regulatory agencies were vested with de facto lawmaking powers far beyond those of the Progressive and New Deal eras.
- The threat to civil liberties from this consolidation of power includes issues concerning agency enforcement. Administrative agencies offer fewer due-process protections than courts do.
- Process rules like voter ID, recalls, redistricting, early voting, and same-day registration are critical. You transform a country by transforming the rules that govern the election process.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1302**

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About the 2018 Bradley Symposium

Each year, the Lynde and Harry Bradley Foundation sponsors a discussion of an important topic critical to the future of the nation before the annual awarding of the Bradley Foundation Prizes. On May 15, 2018, The Heritage Foundation was honored to host the symposium and the Bradley Foundation at its offices in Washington, D.C., with two panels of speakers. The subject of the 2018 Bradley Symposium was the never-ending expansion of the administrative state that has been enabled by Congress and the significant threat to liberty, freedom, and the rights of American citizens that this expansion poses. The failure to adhere to the structural limitations and assigned responsibilities of the Constitution by all three branches of the federal government has facilitated the breakdown of the rule of law. As a result, an out-of-control, unaccountable federal Leviathan is intruding more and more into every aspect of our society and the personal and business affairs of Americans. The Bradley Foundation invited six leading experts to discuss the extent of this problem and what must be done to restore a constitutional republic of limited government that provides freedom, liberty, and opportunity to all of its citizens.

as the foundation of the American experiment, a foundation that is constantly under attack, constantly being challenged, constantly being reinterpreted in ways that subvert the intentions of the Founders of this nation. There have been threats throughout the history of the nation, but we have faced them each time. We have risen to the occasion. So long as we have initiatives like this, I think we will continue to do so.

That is why it is certainly important to have this partnership, and that is why today's events are so important. I would like to offer a special thanks to the Bradley Foundation's team for making this possible. And please join me in a round of applause for Rick Graber, the President; Carl Helstrom, the Vice President; Jessica Dean, Vice President and former Heritage alum; and Dianne Sehler, the Special Assistant and the Conference Director. So, please join me in a welcome applause.

Now I ask Ed Feulner, the founder and former President of The Heritage Foundation, to come up and say a few words.

EDWIN J. FEULNER: Thank you, Kim. Welcome, everyone, to The Heritage Foundation, to our Douglas and Sarah Allison Auditorium.

This morning, it's my great pleasure to welcome you to this annual symposium. Those of you who are here for the first time should know that this is the seventh symposium in this annual series. Last year, the discussion was on "The Future of Education Reform;" 2016 was "The Future of Work in America;" 2015 was "The Future of Higher Education;" 2014 was "America's Prospects: Promise and Peril;" and 2013 was entitled "Are We Freer Than We Were Ten Years Ago?"

I would be remiss if I didn't note that 2013 was a particularly memorable year for the Bradley Prize and the Bradley Foundation for me personally since it was the 10th anniversary of the Bradley Prize celebration, and I was a winner of a Bradley Prize. So 2013 was very special.

In 2012, the Bradley Foundation held its inaugural symposium in honor of Bradley Prize winner James Q. Wilson, who had recently passed. To my mind, it is noteworthy that one of our key panelists here today on this first panel, Chris DeMuth, was the person who really pulled that first panel discussion back in 2012 together. So welcome back, Chris, my former colleague when we were both running our own institutions. I remember one time when Chris said to me he wished that the American Enterprise Institute had as many supporters as The Heritage Foundation had. I replied immediately, saying, "I wish we had the average-sized donation that AEI had."

It is an amazing and distinguished series of meetings that have been held over these last seven years, and I know that today's speakers will live up to the incredible standards of their predecessors as we enjoy an intellectual feast on the subject of the state of the Constitution. Regarding today's theme, again on a personal note, when I served as President of Heritage first time around, the most popular gift token that we offered to our 600,000 members was a free copy of the Constitution. As my colleagues here know, I always carry mine around.

Over those years, we distributed more than 4 million copies of the Constitution. I only had one concern. One year we were in Chicago, and one of our longtime

supporters came up to me and said, "Oh, Dr. Feulner, thanks so much for sending me a copy of the Heritage Constitution." I said, "No, ma'am. That's America's Constitution, not the Heritage Constitution." But we believe very strongly in it. That is why Hans von Spakovsky and everyone in our Edwin Meese III Center for Legal and Judicial Studies are such an integral part of everything we do here at Heritage.

This is an incredible and phenomenal panel of experts. Introducing them today and chairing the panels is my long-time senior colleague Hans von Spakovsky. The Honorable Hans von Spakovsky is a former member of the Federal Election Commission, former senior member of the Justice Department in the Civil Rights Division, an expert on the First Amendment to the Constitution, on election reform questions, and a host of other important policy issues. He is the author of several books with John Fund, who is here today, including *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk*, which was published by Encounter Books, an organization not unknown to the Bradley Foundation, and *Obama's Enforcer: Eric Holder's Justice Department*, published by HarperCollins in 2014.

HANS VON SPAKOVSKY: Welcome to The Heritage Foundation. This symposium is about the state of the Constitution. We should all remember that it was 231 years ago, September 17, 1787, that 39 very brave men signed a new charter organizing the government of a unique nation.

The Constitution is the greatest political document for freedom ever written. It is simple, powerful, elegant, and wise. William Gladstone, the great British Prime Minister, called it "the most wonderful work ever struck off at a given time by the brain and purpose of man."

The Constitution has endured for over two centuries, and it remains revered by Americans and admired by people around the world. It is the guardian of our liberty. When it is no longer adhered to, when Congress, the President, and the courts regard it with disdain, we lose our liberties as the rule of law breaks down and government grows ever stronger and restricts our rights, our liberties, and our freedom. Today, we face multiple, serious internal threats to our constitutional, republican form of government.

During the ratification process, many were worried that the new national government would be too powerful. James Madison said, however, that the Constitution would create only a government of strictly limited powers. Would James Madison recognize America today, or would he be horrified by a federal government far larger and far more powerful than the English Crown that he fought for eight years?

The huge expansion of government by Congress, aided and abetted by Presidents of both parties and rubber-stamped by the Supreme Court since the 1930s, has transformed us into a regulatory and administrative behemoth that has enormous power over the everyday lives and livelihoods of individual Americans. We all see the dangers posed by judges who do not recognize the limits on the power of government in the Constitution and who use their judicial authority to implement their own public policy choices as if they are superlegislatures or a superexecutive, usurping the role of Congress.

We had a President in place for eight years who refused to recognize any limits on his power or the power of the federal government and engaged in unilateral actions intended to transform America into his version of a Progressive utopia where we have a Constitution in name only.

We have had a Congress in place for decades that has acted the same way, passing laws far beyond the scope of the limited powers it was granted in the Constitution. It has delegated much of its authority to an administrative state that is now the fourth branch of government, composed of powerful independent agencies. These agencies are filled with bureaucrats with the equivalent of lifelong tenure who are unaccountable to the people through our election process.

All of these developments share a common characteristic: a view of federal power that is unlimited, unconstrained, and unrestricted. The Bradley Foundation has assembled some of the foremost scholars and practitioners in the country to discuss how far we have strayed from the Constitution and the structural system it set up both to govern our nation and to protect the liberty of its people.

The vital question for our speakers today is this: What can we do to rein in the power of an overbearing bureaucracy and reinvigorate the rule of law that is fundamental to a free people?

*—**Hans von Spakovsky** is Manager of the Election Law Reform Initiative and a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.*

Panel I: Drowning in Bureaucracy

The Administrative State: Congress as Coconspirator

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

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

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

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

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

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

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

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

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

Far from being neutral and aloof, the agencies were mini-legislatures with partisan balance, highly porous to interest-group influence, reporting directly to Congress and supposedly "independent" of the executive branch. When Theodore Roosevelt and Wilson arrived on the scene, they provided strong rhetorical support but continued to leave the heavy policy lifting to Congress. For example, President

Wilson's greatest Progressive triumph, the Federal Reserve Act, was a thoroughly congressional measure with designed-in roles for private banks and regional interests.

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

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

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

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

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

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

The congressional reform movement has generated many concrete ideas for helping Congress reassert its lawmaking and financial powers and reinvigorate its oversight of executive branch activities. These include returning internal authority from party leaderships to authorizing and appropriating committees and reempowering their chairmen, beefing up professional staffs, creating specialized offices for regulatory oversight and scientific assessment on the model of the Congressional Budget Office, replacing the toothless 1974 Budget Control Act with more disciplined budgeting procedures, and reforming the Senate's filibuster and other rules that have transformed it into a 60-vote assembly for most legislative business.

In the regulatory sphere, the Big Bertha of congressional reengagement is the Regulations from the Executive in Need of Scrutiny Act (the REINS Act), which would require that major agency rules be approved by both houses under expedited procedures and up-or-down floor votes before they could take

effect. Before 1983, Congress subjected many executive branch decisions to a "legislative veto" by vote of either chamber or both concurrently. In that year, in *INS v. Chadha*, the Supreme Court held the procedure unconstitutional on grounds that Congress could change federal policy only through formal legislation—that is, by affirmative vote of both chambers and presentment to the President.[2]

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

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

The fact is that most Members of Congress are uninterested in, or positively averse to, reclaiming their Article I powers. Passing laws and budgets and maintaining fiscal discipline is hard, often thankless work. One must pay attention to colleagues with differing and often conflicting views and interests, forge compromises that no one is entirely happy with, and explain one's half-a-loaf votes to disappointed, single-minded donors and supporters.

But today's representatives wish to be recognized as individuals, not as participants in a murky process of collective choice. They have discovered that it is more gratifying—and safer to their electoral prospects—to toss political hot potatoes to the executive branch, quietly lobby the agencies from case to case, and then loudly cheer or condemn the agencies' decisions for the delectation of their supporters. Not actually paying for the programs they have championed and voted for is another means of easing the burdens of office.

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

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

Since the early 1970s, Congress has been overwhelmed by many more policy demands than a representative legislature can possibly manage. An old-fashioned Congress might simply have rebuffed many of the new importunings, but today's Congress is populated by Members who are technologically equipped to "represent" the proliferating new causes as individual activists. Their essential technique has been to create a new agency for every new cause. Executive agencies, in contrast to Congress, are specialized, hierarchical, and focused. Because each one is concerned with a much narrower range of policy disagreement than Congress as a whole, they can make law with greater dispatch, and they can be multiplied essentially without limit. The administrative state has permitted our federal government to grow apace with the growth of political demands.

The difficulty for the reformer is that Congress has enormous formal powers but no duties other than to represent. The President is directed to faithfully execute the laws and protect the Constitution, judges to resolve cases and controversies that come

before them and explain their decisions, but Members of Congress take direction only from voters, sufficiently to get reelected. They hold most of the constitutional marbles but don't have to do anything with them. Holding hearings, passing laws, setting budgets, checking and balancing or just rubber-stamping the Executive—these are all options, not duties. Congress is a purely reactive, discretionary institution.

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

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

In many of those cases, the Administration on its own will be constrained by statutory or case law from adopting rules that are as clear and beneficial as it would like. Here a REINS-like procedure could have an additional attraction. A rule that has been enacted by Congress and signed by the President will be statutory law, and courts will be most unlikely to strike it down on other than constitutional grounds. In this manner, REINS could be a vehicle not only for congressional accountability, but also for incremental legal reform.

The procedure I suggest is open to several objections. Congress would not take kindly to the initiative: For a foretaste, consider the outraged reaction to President Trump's having referred a few minor spending rescissions for congressional approval under an established statutory procedure. In the absence of the congressional precommitments of a REINS statute, Congress would be under no obligation to bring rules directly to the floor for votes or to refrain from amending them. The Administration's choice of rules to refer to Congress would surely involve political and partisan considerations, and charges of opportunism would provide an excuse for ignoring the referrals.

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

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

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

*—**Christopher DeMuth** is a Distinguished Fellow at the Hudson Institute and past President of the American Enterprise Institute. He is a recipient of the 2017 Bradley Prize.*

The Administrative Threat to Civil Liberties

ROBERT ALT: In *Federalist* 47, James Madison observed, "the accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few or many...may justly be pronounced the very definition of tyranny."[3] To protect against this risk, the Founders drafted a Constitution that divided powers, granting to Congress *enumerated* legislative power, to the President the executive power, and to the courts the judicial power. The constitutional

system devised by the Founders was not built to promote efficiency. It was built to protect liberty.

Students familiar with America's constitutional history are then faced with a conundrum provided by the countless acronyms that populate this town. Take, for example, the granddaddy of federal agencies: the FTC, or Federal Trade Commission, founded in 1914. The FTC promulgates regulations that have the force of law to bind individuals—the exercise of legislative power. But the members of the FTC are not elected pursuant to requirements of Article I of the Constitution, which sets the qualifications for those who exercise legislative power—i.e., Members of Congress. Furthermore, the regulations issued by the FTC do not meet the Constitution's requirements for legislation—namely, of bicameralism and presentment. The FTC then investigates violations of the very regulations that the FTC itself drafted and brings enforcement actions for alleged violations—quintessentially executive powers. Finally, the FTC hears complaints issued by the commission for violations of regulations drafted by the commission—the exercise of judicial power—despite the fact that the administrative law judges lack life tenure, fixed compensation, or confirmation to a court established to exercise the judicial power under Article III of the Constitution. And thus, in one agency, we have legislative, executive, and judicial powers comingled.

Or take the Bureau of Consumer Financial Protection (better known as the Consumer Financial Protection Bureau, or CFPB), an agency designed to be so independent that it is funded not by Congress directly, but by the Federal Reserve, and its head is removable only for cause. Indeed, it is so independent that when Acting Director Mick Mulvaney recently appeared before Congress, he took the opportunity to remind both the House and the Senate that given his independence, he could ignore any and all of their questions should he choose to do so.[4]

The Founders knew that such a gradual slide to consolidation of power was a risk. In *Federalist* 51, the Founders argued that "[t]he great security against a gradual concentration of the several powers in the same department consist in giving to those who administer each department, the necessary constitutional means and personal motives to resist encroachments of the others."[5] Or, to put it more bluntly, "[a]mbition must be made to counteract ambition."[6]

But as Chris DeMuth has ably demonstrated on this panel, Congress has become a coconspirator rather than a zealous guardian of its own prerogatives, and the Supreme Court, through deference to agency determinations of the law, has done little better. Indeed, Congress and the courts have developed a level of codependency that, to use the parlance of modern times, requires therapy.

Why is such a strong remedy necessary? Going back to Madison, because the concentration of power leads to tyranny. Now, words like "tyranny" sound a little strange and extreme to our modern ears, and so instead let us say it leads to the denial of civil rights and civil liberties. The examples are myriad. Take, for example, free speech. The Federal Election Commission (FEC) promulgates and enforces regulations that have the effect of restricting the freedom of speech. Just last month in *Federal Election Commission v. Jeremy Johnson and John Swallow*, a district court struck down an FEC regulation purporting to create aiding and abetting liability that the FEC sought to use against advisers, despite the fact that Congress did not authorize the agency to create such liability.[7]

Or take, as another example, freedom of religion. In *Burwell v. Hobby Lobby Stores*,[8] the Supreme Court found that a mandate requiring employers to provide no-cost coverage for contraception for female employees violated the Religious Freedom Restoration Act—a law designed to prevent the government from substantially burdening the exercise of religion. But the mandate was not a "law" issued by Congress, but rather was a regulation promulgated by a federal agency: the Department of Health and Human Services (HHS).

In each of these instances, the regulations were shielded from the political checks provided by the formal legislative process—those of bicameralism and presentment—by virtue of their being adopted through agency rulemaking. That result, of course, is a function of design and not an accident. After all, it is much easier to impose burdens on civil liberties if those burdens do not need to be approved by those accountable to the voters.

The threat to civil liberties from the consolidation of power in administrative agencies is not limited to those instances where the text of the regulations impairs rights, but also includes issues concerning agency enforcement. Administrative agencies offer fewer protections than courts do with regard to due process. Defenders of such agency action often argue that due process is simply a limit on the courts, the weight of Anglo–American law on the subject to the contrary notwithstanding.

They further argue that lesser process is acceptable in the administrative context despite the fact that fines and penalties are issued in these administrative proceedings, oftentimes mimicking some sort of quasi-criminal prosecution. Even more disturbing is the fact that jury rights both guaranteed by the Constitution and existing as a fixture of Anglo–American law are nonexistent within the agency context and are available only in the courts.

These threats to liberty are exacerbated by the courts' subsequent deference to agency interpretations. Under the *Chevron* Doctrine,[9] courts defer to agencies' interpretation of arguably ambiguous statutes. Even worse, under *Auer* deference, the courts functionally allow agencies to change the rules of the game midstream by granting deference to ambiguities the agencies find in regulations which they themselves drafted.[10]

The threat administrative law poses to civil rights and civil liberties is not limited to federal law: States have gotten in on the fun as well. To give but one notable example, one of the biggest cases before the Supreme Court this term, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[11] which concerns antidiscrimination law, religious liberties, and free speech, was originally decided by an administrative law judge in Colorado acting on an enforcement action brought by the Colorado Civil Rights Commission.

After this bleak assessment of the state of constitutional affairs, I offer something one rarely receives in Washington, let alone from a lawyer: hope. There is growing skepticism about judicial deference to agency interpretation. I say this standing on the same stage where in 2015 Judge Carlos Bea of the United States Court of Appeals for the Ninth Circuit delivered the Joseph Story Distinguished Lecture in which he offered this modest proposal: "Let's junk *Chevron*."[12]

Justice Neil Gorsuch's placement on the Supreme Court adds another skeptical voice about *Chevron* to that court. The intellectual case has been greatly advanced by Bradley Prize Winner Philip Hamburger. In 2014, Hamburger wrote the provocative *Is Administrative Law Unlawful?*[13] At the risk of hurting Professor Hamburger's book sales, I'll offer you a spoiler: *Yes*. But Hamburger's interest in this topic was not merely academic. He formed the New Civil Liberties Alliance to litigate such questions and to advance the cause of reforming the administrative state.

Perhaps the most promising possibilities exist because of the moment in time in which we find ourselves. While judicial nominations have become increasingly partisan, the one area where Progressives praised then-Judge Gorsuch during his confirmation hearings was his skepticism about judicial deference to executive agency interpretation. And the very same Members of Congress who were quite enamored by the independence of the CFPB under prior Administrations find such independence exercised by Mr. Mulvaney to be disturbing.

It took Nixon to go to China. Perhaps it will take Donald Trump to prompt Congress and the courts to act as coequal branches rather than codependent ones.

*—**Robert Alt** is President and Chief Executive Officer of the Buckeye Institute, where he also serves on the Board of Trustees, and a former Director of Rule of Law Programs and Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.*

Constitutional Decline

CHARLES R. KESLER: Let me add my thanks as well to the Bradley Foundation for convening this symposium and to The Heritage Foundation for hosting it. It's always good to be back in the house that Ed Feulner built with the able assistance of Ed Meese. As they like to say around here, two Eds are better than one.

My topic today is "Constitutional Decline," which is pretty sexy, I think you'll have to admit. From Plato to Publius (the pseudonymous author of *The Federalist Papers*), the old political scientists were keen students of political change, including, perforce, political decline. Some of them you might even call connoisseurs of decline.

For example, after the long discussion of the founding of the just city (famously ruled by philosopher-kings) in his *Republic*, Plato came to explain how that city had given way to the flawed, inferior regimes we see around us. He traced the gradual descent from the just city to the most unjust regime, tyranny, through stages involving rule by honor-loving warriors, wealth-besotted oligarchs, and freedom-mad democrats. From the best to the second best, third best, fourth best (democracy), and finally the worst of cities, Plato offered no glimpse of a way back. He saw decline all the way down. He exaggerated, of course, but he had a point.

That isn't the way political science today sees the problem, however. Until recently, most of our experts

had paid very little attention to the subject of political decline. In the final three decades of the 20th century, they had been impressed by what appeared to be—and was for a while—a sweeping advance for liberal democracy all around the world. What Harvard University's Samuel Huntington called "the third wave of democracy" had swept over country after country, each seemingly more unlikely than the last to become democratic. Russia, Turkey, Mongolia, South Korea, the Philippines, Nigeria, South Africa, Argentina, Chile, Brazil—scores of countries that had not been democratic (or reliably democratic) suddenly became functioning and proud democracies.

Philosophical observers like Francis Fukuyama discerned what he called the "end of History," a process of Hegelianization (I wanted to get that word in) whereby liberal democracy would prove to be the final, most just and satisfactory form of human government. It would be democracy all the way out to the end of time. Political scientists, being less imaginative than Fukuyama, turned this optimistic moment into a theory they called "democratic consolidation," which purported to explain how these new democracies would gradually and more or less inevitably mature into stable, prosperous, and liberal societies even as the Anglophone and Western European democracies had done in the 19th and mid-20th centuries.

But the 21st century has not been kind to this new theory. The democratic tide, as tides will, has started to ebb. Young liberal democracies have lost their way, most spectacularly in Russia, Iraq, and Turkey, but elsewhere as well. Although China was never clearly in the democratic camp, for several decades after Mao's death it could plausibly be imagined to be heading in that direction, following more or less the 19th century pattern of turning liberal and capitalist first, then democratic, but now China has a president for life and a Communist ruling party apparently forever.

What's more, political scientists discovered a powerful wave of "populism," or what is sometimes called "authoritarian populism," rushing in as the democratic one went out. A young Harvard political scientist, Yascha Mounk, writes now of what he calls "democratic deconsolidation,"[14] of seemingly solid liberal democracies slipping gradually away, as in Hungary, Poland, and the Philippines. It isn't only at Harvard that the alarm has sounded over ominous or at least perplexing developments among quite mature free governments: shocks like Brexit in Britain, Marine Le Pen in France, and, above all, Donald Trump in the White House.

The older political scientists would not have been surprised by the need to measure decline as well as advance, to deal with decay as well as growth, disease as well as health. Plato and Aristotle and many others taught that everything that comes into being passes sooner or later out of being. Rousseau asked: If Sparta and Rome perished, what state can hope to survive? Bear in mind that Sparta lasted about seven centuries and that the Roman republic (leaving aside the preceding kingdom and the succeeding empire) managed to survive almost 500 years.

Political regimes differ in their strengths and their weaknesses, but often their deepest weakness is another feature of their greatest strength or their most obvious characteristic. Every regime has a view of justice that it holds and incorporates into its laws, but this is a partial view that gives a pronounced bias to the habits, opinions, and ordinances of each country. Accordingly, a great legislator's or statesman's task was thought to be at least partly to correct his society's bias, to make more complete its partial view of justice, and thus to stabilize its politics and make its regime more enduring because it would be less partisan.

What Aristotle and Cicero sought in a "mixed regime" that explicitly combined and balanced classes and claims to rule (mainly of the rich and poor), George Washington and our other Founders tried to achieve in America's constitutional republic, incorporating both the few and the many but resting on a broad and broadening middle class.

Now, there are many signs today—the intense polarization of our politics is only the most obvious—that in the United States, we live in an age of constitutional decline. The institutions of our government do not work as they once did, to divide and channel powers so as to prevent tyranny and secure the common good. One token of this is that the vast majority of our laws are made not by our elected representatives but by unelected officials in so-called administrative agencies or, even less accountably, by federal judges.

Worse, we no longer teach our children what Ronald Reagan once called the "unambivalent patriotism" we taught prior to the 1960s. We are of two minds, at least, about the justice and wisdom of our country's principles; and so our institutions cannot elicit what *The Federalist* called "the cool, deliberate sense of the community" on which republican government itself ultimately depends.[15]

Normally, we think of the health of our democracy resting on three pillars: on public opinion, habits, and

mores, which modify and shape our interests; on the laws that govern the pursuit and expression of those interests; and on the Constitution that modifies and restrains our laws. We presume that healthy public opinion culminates, that is, in a love of country and what James Madison and Abraham Lincoln called "reverence" for the laws and Constitution.

But if we cannot agree on the essentials of what the Constitution is or commands—and on why it is *good*—then it cannot serve as a standard for public opinion, and we cannot appeal to it and its principles for guidance. After all, deliberation is the activity of rationally choosing means to agreed-upon ends. If we don't agree more or less on the ends, there is little possibility of debating civilly about the means to those ends.

In the *Claremont Review of Books*, the journal I edit, we have described our current political life as a "cold civil war."[16] A cold civil war is better than a hot or shooting one, but it is not a good situation for a country to be in. Underlying our cold civil war is the fact that America is torn increasingly between two rival constitutions and ways of life.

Political scientists sometimes distinguish between normal politics and regime politics. Normal politics takes place within a political or constitutional order and concerns primarily means, not ends. By contrast, regime politics is about who rules and for what ends or principles; it questions the nature of the political system itself: Who has rights, who gets to vote, and what do we honor or revere together? I fear America may be leaving the world of normal politics and entering the dangerous world of regime politics, in which our political loyalties diverge more and more, as they did in the 1850s, between two contrary visions of the country.

One of these is based on what we may call the "original Constitution," as amended. This is the Constitution grounded in natural rights, the Constitution that was written and ratified in 1787–88 and has been transmitted to us with significant changes (some improvements, some not) but recognizable still. To simplify matters, we may call this the "conservatives' Constitution," though conservatives have never agreed perfectly on its meaning, and many nonconservatives remain loyal to it.

The other constitution is what first Progressives and then liberals for a hundred years have called candidly the "living Constitution." The living Constitution implies that the original is dead, or at least on life support, and that in order to remain relevant to our national life, it must be infused with new meaning and new ends and therefore with new duties, rights, and powers.

As a doctrine, the living Constitution originated not in law schools but in America's new departments of political and social science in the late 19th century. It was soon at the very forefront of Progressive politics. As understood by Woodrow Wilson and his fellow Progressives, the living Constitution was far more than an interpretive guide for judges. It afforded a way to bring hope and change to all three branches of government and eventually to American society as a whole.

As a young man, Wilson had contemplated a series of constitutional amendments to reform American national government into a kind of parliamentary system. He quickly realized that that plan was going nowhere. Plan B, however, was the living Constitution: While keeping the outward forms of the original, it would change utterly the spirit in which they were understood. The resulting Constitution—the liberals'—is not a constitution of natural right, but of historical or evolutionary right. Wilson called the spirit of the old arrangements "Newtonian" and that of the new ones "Darwinian." He meant by the latter a constitution which, far from being as unchanging or as difficult to amend as possible, would be mutable, amenable to experimentation, and adjustable to the Zeitgeist. The late Walter Berns had a neat formula for the change: The point of the old arrangements was to keep the times in tune with the Constitution. The purpose of the new is to keep the Constitution in tune with the times.

Until the 1960s or so, most Progressives and mainstream American liberals expected the living Constitution to replace the original Constitution gradually, almost imperceptibly. They expected progress, not revolution: a kind of conservative path to liberalism. They were evolutionists, remember. Then something unexpected happened—unexpected by the liberals, at least. What happened was that the defenders of the old Constitution began not merely to fight back, to try to slow things down, but also to call for a return to the first principles of the original Constitution. By seeking to revolve back to the starting point, they proved to be Newtonians (not to mention revolutionaries) of a sort after all.

Called by many names in many connections—the New Right, the Radical Right, Reaganites,

reactionaries, originalists, Straussians, and many others—the conservatives who began an epic campaign against the "inevitable" emergence of the living Constitution had in common the desire and the felt duty to oppose the gradual disappearance of limited government and republican virtue from American political life. When it became clear in the 1970s and 1980s that the surrender was off, the cold civil war was on.

Confronted by sharper, deeper, and more compelling accounts of the conservatives' Constitution, the Progressives had to sharpen—that is, radicalize—their own alternative. Rather than converging, the two accounts of our political being diverged; the gap between them became a gulf.

So today we are two countries or on the road to becoming two countries, each constituted differently. Consider a few of the contrasts. The prevailing liberal doctrine of rights traces individual rights to membership in various groups—racial, ethnic, gender, or class-based—undergoing a continual process of consciousness raising and empowerment. That was already a prominent feature of Progressivism a hundred years ago, though the groups have changed since then. The centrality of groups persists in the "identitarian" obsession on and off campus, in affirmative action policy, and in other large stretches of American law and mores.

Conservatives, too, treasure minority rights, but they regard the individual as the quintessential and most endangered minority. They trace individual rights to human nature, which lacks a race (other than the human race!), ethnicity, gender, or class. And they seek to vindicate this human equality and liberty (including majority rule) against the liberal Constitution's semifeudal alternative.

There's a liberal First Amendment and a conservative First Amendment. Nowadays, liberals are very interested in turning free speech into "equal speech," ensuring that no one gets more than his fair share of free speech. The new emphasis leads to trying to redistribute speech rights via limits on campaign contributions, repealing the *Citizens United* decision,[17] even amending the First Amendment to narrow it (this was the Democrats' official position in 2016). As you know, there's a big difference between the original Constitution's freedom *of* religion, and the competing Constitution's freedom *from* religion. Another glaring difference is that the liberals' Constitution has no Second Amendment.

As Chris DeMuth and Rob Alt were saying, the living Constitution is designed to overcome separation of powers and other checks and balances in order to coordinate, concentrate, and enhance governmental power. Because this power has flowed mainly through the hands of unelected administrators and judges, our elected Congress finds itself increasingly dispirited and unable to legislate. As the *Financial Times* put it recently, our Congress is "a sausage factory that has forgotten how to make sausage."[18]

How is it possible to resolve our cold civil war without turning it into something much worse? There are probably five paths forward. One is to change the political subject. Ronald Reagan used to say that when the little green spacemen arrive, all of our political differences will be transcended and humanity will stand united for the first time. Well, if that happens, we're off the hook for the cold civil war. If some other jarring event (for example, a large war) or natural calamity occurred, that might reset our politics too.

If we can't change the subject, then perhaps we could change our minds. That is, a second possibility is *persuasion* or some combination of persuasion and moderation. Perhaps one side will persuade a majority of the electorate to embrace its Constitution, and thus one side will *win* at the polling booth and in the legislature. For generations, Republicans have longed for a realigning election that would turn the GOP into America's majority party and political faith. Though certainly possible, it looks unlikely. Could we so moderate our disagreements as to learn to live with them more or less permanently? That too seems unlikely, given the embittered trajectory of the past two decades.

If we won't change our minds and can't change the subject, however, then there are only three other ways out of the cold civil war. One might be a vastly reinvigorated federalism. One of the reasons for constitutional federalism in the first place was that the states had a variety of interests and views that could not be pursued in common. If we had a reflowering of federalism, some of the differences between blue states and red states could be handled discretely by the states themselves. The disruptive issues could be denationalized. But the problem is, we have abandoned so much of traditional federalism that it's hard to see how it could come to our rescue at this late juncture. Economic and technological changes appear to militate against this solution too.

That leaves two remaining possibilities. One, alas, is secession, which is always a danger to any federal system. It's possible we could agree to disagree in separate countries. The Czech Republic and Slovakia have gone their separate ways peaceably, for example. But America is better at expansion than contraction, and George Washington's admonitions to preserve the Union continue to ring in our ears. Thus, secession would be extremely difficult for many reasons, not the least of which is that it could lead, as we know from experience, to the fifth and worst possibility: civil war, and not of the cold kind.

Under present circumstances, then, American constitutional decline seems to point to some kind of approaching crisis: a crisis of the two Constitutions, the timing and exact dimensions of which remain obscure. Let us pray that our countrymen will find a way to reason together, to compromise our differences, which will allow us to avoid the worst of these dire scenarios. Here's to the better angels of our nature.

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Panel II: RULE OF LAW

The Backstory to Illegal Immigration

VICTOR DAVIS HANSON: I'd like to thank the Bradley Foundation for hosting this symposium as well as The Heritage Foundation. I just thought I'd speak for about 10 minutes on the backstory of the real-life experience of illegal immigration and the results of the absence of law firsthand.

I live in an area that is about 80 percent Hispanic and maybe 40 to 50 percent "undocumented." The per capita income of rural Fresno County is about $13,000. I have had the diverse experience of during the week working at Stanford University where the per capita income of San Mateo County is perhaps $130,000. So strictly economically speaking, the commute goes from the premodern to the postmodern world. I must say after 15 years of this asymmetry that I'm like a cartoon character: My head's exploding.

I write for the *Chicago Tribune* as well, and I noticed our confusion about immigration about eight years ago when I was advised that I should not use the term "illegal alien." Later, I was cautioned to not use "illegal immigrant," and then it seemed that the term had to be "undocumented immigrant." Finally, the protocol seemed something like "Let's get rid of the 'undocumented' and just say 'immigrant.'" Now I notice there's often the use in journalism of just the word "migrant."

So you have the Latin prefix "ex" or "in" left out, as if illegal immigration is now an organic and neutral process of cross-border traffic. This sort of elite linguistic manipulation does not reflect realities on the ground. A brief example. Two weeks ago, I was in town and a driver backed out and hit my car. What followed happens a lot and is known in the vernacular as "the three no's"—no license, no registration, no insurance. The other driver had suffered a lot more damage to his car than I did. With my broken Spanish and his poor English, he related that the police intervention would waste three hours of my time, and my time was more valuable, he said, than his time, and if I gave him $100, he'd leave.

I gave him $150, although confused that he must have had $2,000 or $3,000 in damage. I only had a couple hundred, and the police never came to determine culpability. But there is another entire off-the-record world of illegal immigration that makes irrelevant the normal reach of the law.

What I'd like to do is just walk through why we have such high levels of illegal immigration. Perhaps we can encapsulate the large numbers of illegal entrants by the Latin phrase "*qui bono?*" Who does it benefit? The answer is about five or six entities.

One, it benefits the Mexican government. They receive about $30 billion in annual remittances and the Central American governments perhaps about $25 billion. If you do the math and you still believe that archaic figure of 11 million undocumented immigrants inside the United States, the aggregate sum works out to $300 or $400 a month per immigrant.

Sometimes U.S. social services subsidize that largess. My experience is when I go shopping at the Walmart in rural Fresno County, I've started to notice over the last 10 years that the number of EBT cards—electronic benefits transfer cards—has increased. While in line, I am often struck by the size of the amount of funds used.

Then my next shopping stop is always the cleaners, which is next door to the local Western Union office. If I go into the Western Union office and talk to people, it is uncanny that the same amount of money subsidized by EBT cards each week seems to be sent to Mexico; remittances can approximate the funds subsidized

by American social services. Donald Trump talks a lot about a wall, but perhaps if he would slap a 10 percent tax on remittances sent by those without legal residence, then I think he would soon raise about $30–$50 per person remitting per month, and he could begin to build his wall. Remittances work hand in glove with Mexico's interest in immigration as a safety valve of exporting its own poor in lieu of much-needed social and political change.

Another entity that benefits from illegal immigration obviously are employers. As a farmer, I might first blame "AG" as the culprit, but due to mechanization, AG now only accounts for about 20 percent of the work of those residing in the U.S. illegally.

More likely, jobs held by illegal immigrants are in meatpacking, manufacturing, and especially construction, landscaping, and hospitality industries, hotels and restaurants. The way it works is that the employer doesn't just enjoy superb laborers; he also utilizes some of the best physical labor in the world. But the people who are coming now are not from the northern provinces of Mexico as they had in the past or near the border, often with a high school education.

More likely, this generation of immigrants are often indigenous people from southern Mexico and Central America with far less money, education, English, and without legality. So while the employer thinks that this is a wonderful development, to enjoy cheap labor from an industrious young man 18 to 40, these were traditionally considered entry-level jobs. Yet when an entry-level job becomes a permanent, lifelong job, then the state must step in to help when inevitably people get hurt, or they do not learn English, or they don't get an education. Then the labor does not seem so inexpensive after all from a societal viewpoint.

Often, the children of illegal immigrants, whom I taught at Cal State Fresno for 21 years, understandably become embittered as they point to their father and say, "He worked 25 years on a ladder, and now he has a bad arm and can't work, and it all wasn't fair." So they do not appreciate the contrast between an impoverished Oaxaca and a wonderful America, but rather they see a different aspect of their parents' odyssey, and they don't think it worked out all that well.

Naturally, the second generation can become embittered, and understandably they're not willing as Americans to do the same type of job for the wages that their parents did. It's sort of an endless cycle, and the answer the employer has is, "Bring me more people from Oaxaca, so we can recycle them through this process and have the state subsidize the health care cost, etc." It is an endlessly tragic cycle that you can see firsthand.

A third beneficiary is what I call the ethnic industry. These are often academics and journalists. What we're seeing happen is a process of what I would call reverse assimilation—at least superficially so.

Emblematic is Kevin de León. He's currently in the California State Senate, former Speaker of the Assembly and now a U.S. Senate candidate. I always had heard of him as Kevin Leon, yet abruptly not long ago he added the "de" and added an acute accent on his "o" and became Kevin de León. This process of ethnic emphatics is very common in California; essentially, people rebrand themselves as part of becoming more authentically ethnic champions of those suffering from collective poverty or as self-appointed ethnic advocates of the aspirations of illegal immigrants. It's very disingenuous in that careers become invested in this system of collective poverty that is a direct result of open-borders advocacy. Besides the Mexican government, we have an ethnic lobby.

Then there's the Democratic Party. I think it was about 10 years ago at my local polling place—we don't have driver's license for ID—that I started to see multiple people in voting booths. I would say to the monitors, "Well, is this illegal?" or "You're not supposed to put Obama stickers near a polling place," or "You're not asking for any IDs?" At the same time, absentee balloting and motor-voter registration had begun to play an increasingly important role in local elections and without the safeguards to ensure citizens alone were voting in the past.

Then there were demographic and Electoral College concerns. Just as California will never again become a red state and New Mexico and Nevada likewise may not become red, so, too, Arizona is targeted next to flip from red-state status. The apparent idea is that if you can have people come *en masse* and illegally without high school educations and then you can offer them generous entitlements, perhaps their political fealty will be ensured at the ballot box in perpetuity, or for at least two or three generations. That successful alteration of southwestern states in political terms is undeniable.

There's another group of beneficiaries, and that's the upper middle class. When I was growing up, only aristocrats and wealthy people had what we called

"help." But over the last 30 years, the upper middle class or the middle class in California has developed this idea they need maids, nannies, and landscapers, in most cases undocumented immigrants from Mexico.

I never quite understood the middle-class idea of hiring servants because I'll go to Palo Alto and I'll see people come sweating onto campus, and they'll tell me they're working an hour a day at the gym. I'll say, "Why not just mow the lawn?" Or "Why not do the dishes?" Or "Why not replace that shingle?" But why would you go and work six, seven hours and more a week and then hire somebody to do physical labor? Usually, the anecdotal answers are very odd. I don't want to be too critical, but they're paternalistic. "Well, Herlinda's a great person. We give her all our used clothes." Or "Juan does such a good job trimming the bushes that we gave him our used car." And "I have no problem with illegal immigration."

I usually answer, "Well, where does Juan live, and where do his children go to school, and how well does he speak English, and do you have any experience with him outside this master–servant relationship?" And the answer is, "No." But the paradox sort of squares a circle that people in the abstract can be for illegal immigration because it helps them in the concrete, and then they don't worry about the larger social and economic consequences.

The proverbial "us" in the middle classes is another constituency of illegal immigration: We've created a new quasi-aristocratic class that thinks it needs hired help—at least in the American Southwest.
So besides all these groups—the Democratic Party, the ethnic lobby, the corporate employers, Mexico—there is this final group of "us."

A political climate has been created in which if you were to question the legality, the morality, the ethics, or the practicality of allowing half a million people to come in annually without what we would call papers or to argue with a host that believes in the salad bowl rather than the melting pot, or to question any of these pretenses, then you're called a racist, nativist, restrictionist. The result is that many of us just seethe privately because they see the rule of law overturned or at least contextualized and have no wish to be defamed for speaking the ostensible truth.

When I wrote about the problems with illegal immigration, I was often criticized by elites who felt it was illiberal to do so. Yet my kids all went to the public schools. My family is intermarried with Hispanics. The neighbors across the street are exclusively from Mexico, often in illegal trailers, shacks, and Winnebagos. There is, in fact, a veritable neighborhood exempt from zoning and regulatory laws.

The exemptions even extend to dog licenses and vaccination. I can attest, when one is bitten by an unlicensed dog whose owner is from Mexico, it can be an existential question of what to do next. When I have been bitten, I don't know whether to go through the vaccinations or just take my chances, on the theory the odds are rare that dogs in the U.S. have rabies—if the dogs actually were born in the U.S.

I want to finish by not being too pessimistic—well, a little bit pessimistic. My wife and I walk around our farm, and we pick up about once a month a carcass such as a dead dog, often a disemboweled casualty of local paid dog fights. We have seen a beautiful nest of red-tailed hawks disappear. Every once in a while, somebody comes and shoots one. Trespassing is normative, and the results are often frightening. Garbage is routinely tossed on roadsides and on farms. We even have the names of those who dump, from their junk mail that is tossed into the garbage. Nobody's subtle about it, because law enforcement has no time to enforce antidumping laws. You become exasperated when you see a car drive in, toss out tires, car seats, TVs, and appliances in your orchard and then speed off and know that the authorities will do nothing if called.

I was getting very depressed about this. Yet there are untold bright spots as well. I recently went into the stacks of the Madden Library at CSU Fresno. There was only one person not eating or talking. She was walking about the shelves in the section of classical literature, a young Mexican American girl by herself with a backpack of books. I walked up to her and asked, "Can I help with the books? Or if you're lost in these stacks, may I help you?"

She said, "Not really, I'm getting books on Thucydides."

I said, "What are you looking for?"

She said, "I'm looking for the *Landmark Thucydides*."

I said, "You've met the right guy."

Then she said, "I'm studying the Melian Dialogue, and I want to know about Alcibiades. Do you think he was involved?"

I said, "Well, let's discuss this. We've got to go through all of our available sources from Diodorus to Plutarch." So we sat down and talked for two hours.

When I came home, my wife said to me, "Well, did you get over your pessimism over all the dumped garbage, Eeyore?[19] Did you get over your bleak worldview?" And I said, "You know, I think the glass is not always half empty, but it may sometimes be halfway full."

In all of this tragedy, there are encouraging things to look for if we just return to the idea immigration is a positive for the United States—if it's measured and legal and diverse and meritocratic. The problem is not with the immigrant; it's with us, the host. We lost confidence in our ability to assimilate and integrate people and convey the idea we are proud of the United States and want to help people to make the necessary adjustments to become Americans. If we don't change that attitude, then we deserve what follows.

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Obstruction Confusions

ANDREW C. McCARTHY: It's an honor to be here, and I'm very grateful to the Bradley Foundation and The Heritage Foundation for inviting me. I'm here to talk about the Trump–Russia investigation, so I won't be quite as brimming over with optimism as Victor was.

It's interesting that when I was first invited to speak, the topic we came up with was "Obstruction Confusions" because that was what was going on in the investigation at that moment in time, but it seems that the one thing we have learned about this investigation is that every hot topic has a shelf life of about six hours. Had we known about Stormy Daniels back then, we probably would have come up with a better title than "Obstruction Confusions," but I won't speculate on what that might have been.

I think it is worth it in terms of an overview and also trying to tie it into what we're here to talk about today, which is the Constitution, to ask what does the Trump–Russia investigation say about the state of the Constitution? That calls into question the matter of how is a President supposed to be reined in in our system?

We've been operating under the assumption for really more than a year now that with a special counsel—the newest iteration of what in our recent history has been called "an independent prosecutor," "a special prosecutor," "independent counsel," all different iterations of the same thing—an inferior executive branch official can conduct a coercive investigation of the chief executive. I would suggest that it's a perversion of the system that the Framers gave us in the first place, that there is no way conceivably that the Framers would have thought, if they had any idea at all about what a federal prosecutor was, that a federal prosecutor would have been the way to rein in a President.

If you think about it, we did not have a Justice Department as we know it until, really, the beginnings of it in 1870 or so, and clearly even then, not anything like what we know it to be today. The FBI did not exist until 1908. So it's pretty clear that the Framers certainly did not conceive of this idea of a big federal executive branch law enforcement–intelligence investigation of the President.

Then you have the nature of executive power. On that score, probably nothing better in modern history has been written about the nature of executive power than Justice Scalia's dissent presciently, famously in *Morrison v. Olson* in the 1980s.[20] He explained that in our system, all executive power is reposed in one official, the President of the United States. What that means as a practical matter is that every single other officer of the executive branch does not exercise his own power. Every other officer of the executive branch is actually a delegate who is permitted to exercise the President's power at the President's pleasure, which is why they can be removed at will.

The bottom line of what that means in terms of structural protections, in terms of the nature of executive power, is that no prosecutor in his right mind would go into an investigation such as the one that Robert Mueller was appointed to take over in May of 2017. No prosecutor would go in believing he could indict the President. Indeed, there are opinions of the Office of Legal Counsel, the lawyers' lawyers at the Justice Department, which flatly state that when a President is in power, the President can't be indicted.

Because Mueller actually answers to executive branch supervision, those opinions, in theory at least, are binding on him as well. Practically speaking and constitutionally speaking, this investigation from the beginning has been about one thing and one thing only, and that is can Mueller assemble enough proof to show high crimes and misdemeanors such that Congress might consider filing articles of impeachment in the House and ultimately conducting an impeachment trial in the Senate?

The investigation's been about impeachment from the beginning. Now let me be clear. I don't know that Robert Mueller wants to impeach President Trump, but he is about the business of conducting as comprehensive an investigation as can be imagined in order to find out if there is a basis to argue that there are high crimes and misdemeanors.

That brings us to the way that the investigation was structured. All independent counsel investigations that we've seen in modern history have this problem of becoming ultimately if not unguided missiles, probes that begin in one place and often end years later some place very much removed from where they started in the first place. In other words, the original rationale for the investigation is rarely what the dispositions of whatever cases get brought are relevant to.

That's a problem when you follow the regulations. The normal regulations for appointing an independent prosecutor say that the Justice Department has to articulate the parameters, the factual basis of a criminal investigation. That's not just rhetoric in the regulations. The purpose of having them articulate the grounds, the crimes that the special counsel is authorized to investigate, is because that description becomes the jurisdiction, the boundaries of the investigation of the special counsel.

It's not a perfect way, obviously, of going about it because the special counsel can always go back to the Justice Department and ask for his jurisdiction to be expanded. That's why these investigations take so long and seem to bounce far away from where they originally start. But in this investigation, because the rules were not followed, what is seemingly inevitable in every other investigation became a certainty, which is that we had no idea what the boundaries of the investigation are.

To be specific about that, what Mueller was appointed to take over was an investigation that former FBI Director James Comey had described in testimony before the House in March of 2017. That is what he rather shockingly publicly announced as an investigation of Russia's interference in the 2016 election. That was shocking because you never confirm the existence of an investigation by the Justice Department. It's just not done. It's against regulations.

But then he added that in addition to the Russian interference piece, they were investigating any Trump campaign coordination in that interference. This was shocking on two grounds: one, that he would confirm the investigation and, secondly, we now know that Director Comey had repeatedly told President Trump that he was not a suspect and wasn't under investigation. Yet he gave a statement publicly that anyone with an IQ over 11 would have known would make everybody in the country suspect that the President was a criminal suspect. As a result of that, since March if not before, the President has been, despite what they were telling him privately, under the cloud of a criminal investigation.

This is the investigation that Mueller was given by Rod Rosenstein, the Deputy Attorney General, after Director Comey was removed. The reason that it's so problematic is that the investigation is a counterintelligence investigation. A counterintelligence investigation is not a criminal investigation. The purpose of the counterintelligence investigation is to divine the intentions and activities of foreign powers, usually hostile ones, to the extent that they may compromise American interests. To the extent that American citizens get involved in them, it is to determine whether they are furthering the interests of a foreign power without disclosing that to the Justice Department as they're supposed to under federal law.

But the idea of the investigation is not to build a criminal case. It happens sometimes. I worked on terrorism cases. In those cases, you can investigate a terrorist organization as a foreign power. If it turns out that criminal evidence rolls out of that, that evidence can be used by the Justice Department to prosecute. But that's the rare counterintelligence investigation. Indeed, in the 1990s, it was thought to be quite the scandal that the Justice Department could, even in theory, use its counterintelligence powers as a pretext to conduct criminal investigations.

Now we've gone from that being a big scandal—at least the thought of it being a scandal in the mid-1990s—to today where a prosecutor is actually given a counterintelligence investigation and essentially told, "Go on and see if you can find some crimes and maybe then charge the President." But, again, it won't be to charge the President in an indictment; it'll be to charge the President in an impeachment proceeding.

Let me close by just saying a few words about impeachment. When I said at the beginning there was no way that a prosecutor would think that he could rein in a President with a criminal proceeding in court, the way that the Framers conceived of reining in a rogue President was mainly by the power of the purse and the power of impeachment. The power of

the purse over time, especially the dysfunctional way that we legislate that the first panel was quite effective in covering—the power of the purse is really not, as a practical matter, much of a threat to the executive branch anymore.

What you're left with is impeachment. As Madison said in the debates over including an impeachment provision in the Constitution, impeachment is an indispensable remedy. If this system is going to work properly, the only way it can work is if people who wield awesome executive power understand that if they abuse the power they can be removed. Of course, that has not been something that's been invoked very often in our history, and it has never been invoked successfully.

I guess Nixon would have been impeached, but the point is, over time, it seems like less and less of a remedy. But the important thing to remember in terms of where we are now and where we go forward as this investigation unfolds is that impeachment is a political remedy and not a legal one. This is in fact why you see pushback by the White House on the conduct of the investigators during the investigation and whether they abused their powers, because they understand, now at least, that they are not in a legal battle. They are not formulating a legal defense to a court case. They're actually in the court of public opinion in what effectively is eventually either going to be an impeachment proceeding or nothing.

Because impeachment is a political remedy and not a legal one, what that means in the end is you can have proof of a thousand high crimes and misdemeanors, but if there is not a consensus in the country that is enough to force two-thirds of the Senate, that supermajority, to want to remove the President from power, the President is not going to be removed. What you'll see over time is, it seems to me, it's becoming clear already that the President is not going to be impeached. If the Democrats win the midterms, it's possible in the House they could file articles of impeachment, but the President will never be removed from power, not only because he shouldn't be, but just because the political reality will be that he can't be.

What that means is that as we go forward, you're going to see more of our attention shifted from Trump and Russia, which seems to be a dry hole at this point, to exactly how the investigators wielded the awesome powers that we trust them to wield. That's an investigation that has to happen.

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Election Integrity: How the Left Uses Fights over Rules to Transform the Nation

J. CHRISTIAN ADAMS: It's very humbling to be invited by the Bradley Foundation to speak at Heritage, and it's also challenging to follow everyone you've already heard from and to wrap up the show. So it's great to be here and to see so many friends.

The topic I've been asked to talk about is "How the Left Uses Fights over Rules to Transform the Nation." Specifically, I will talk about election issues. First of all, I'm going to discuss some of the rule of law issues you've heard a good deal about. I'm not sure if I'm on the pessimist, civil war, Eeyore side or not, but I will then talk about some of the election issues that are very specific to the work that I'm involved in. Others have used the term "post-constitutional," that we live in a post-constitutional era, and most of us remember a time not long ago when the rule of law and the Constitution weren't under open attack by so many institutions.

But what do I mean by post-constitutional? There are a couple of characteristics. First of all, law is used by those in power, often bureaucrats, to advance their ideological views through their power. Law is no longer a fixed, largely agreed-upon principle. Instead, it becomes something elastic, subjective, defined by the latest, best argument cooked up at Harvard Law School or Yale. In the good old days, law was the great leveler. We could all agree on the basics.

In my field, everybody essentially agreed that election law was designed to ensure the integrity of the process. For example, if we learned that a large number of noncitizens, of aliens, were registering to vote (something I will discuss shortly in the presentation), then all sides—Democrat, Independent, and Republican—would look for fixes. Nobody would cook up excuses to defend the practice, excuse the practice, or minimize the practice. It would be confronted and fixed by everybody.

But now law professors in the academy use law largely as a means to keep and enhance power. Law schools and law professors sometimes seem busier dismantling the Constitution because of their dislike of it and the people who wrote it than they are teaching what it actually says. After all, why teach what it actually says when you aim to replace it?

Do I overstate the case? Is this a conspiratorial fantasy that enemies of the Constitution are seeking to replace it and that Machiavellian bureaucrats and lawyers manipulate the law to achieve partisan ends? Well, in 2010 when I left the Justice Department, I thought such a claim might be hard to swallow, but the perpetrators of these views have obliged us by being very explicit in the last few years. Foes of the Constitution now hide in plain sight.

Let me briefly note two examples among many, many others. Who can forget Georgetown Law Professor Louis Seidman's editorial in *The New York Times* called, "Let's Give Up on the Constitution"?[21] After all, as he put it, "a group of white propertied men who have been dead for two centuries, knew nothing of our present situation, acted illegally under existing law and thought it was fine to own slaves disagreed" with what Progressives want to do.

Getting closer to my area of expertise, election law, there was a law review article in the *Stanford Law & Policy Review* by a very esteemed election law professor from the University of Michigan named Ellen Katz called "Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All."[22] So when I say they hide in plain sight, these are the things that I mean. There are many, many more examples of hostility to our Constitution and the rule of law becoming mainstream.

These are threats to our constitutional order that, I will submit to you, our old means of defense are largely ineffective against. We have entered a new battle space between the Left and the Right. No longer do we have gentle disagreements about public policy. Instead, the Left has sought to criminalize many disagreements, has weaponized the law to attack their foes both personally and substantively, and is pouring hundreds of millions of dollars into a multifront war to transform the remaining institutions that they have not already transformed and silence the opposition.

I'm afraid that the scholarly voices that have been so effective in the past will no longer be an effective rebuttal. Hence, I believe you can explain one reason why President Trump was elected, where the American public who believe in this Constitution, who believe in the rule of law, saw it under attack from so many places.

Now let me turn to the few examples where this is happening in my own field of election law. The transformative Left understands that process drives policy. What do I mean by that: "process drives policy"? Well, processes are the rules, the boring things if you will. Conservatives are often very interested in policy issues, and rightfully so. They care about the issues, the policies, the plans, whereas the Left is spending hundreds of millions of dollars to destroy your policies through the use of process.

What are some of these examples? We've all heard of redistricting. That's one of the process rules where the Left is pouring tens of millions of dollars into redistricting fights. How they draw the lines makes a difference. Thankfully, there's sort of an equilibrium between the two sides in the area of redistricting—not entirely, but to some extent.

My organization, the Public Interest Legal Foundation, is involved in litigation all around the country where the Left is engaged in changing the process rules. Let me take you to Nevada in a brief mention of a case there. Nevada has, like some states, a recall election provision where if somebody wins, they can be recalled after a sufficient number of signatures are obtained to seek a recall. Three Nevada senators faced a recall petition. The law firm Perkins Coie, who some of you know has been involved in these process issues all over the country, filed a challenge to Nevada's recall law under the Voting Rights Act claiming that any recall is discriminatory.

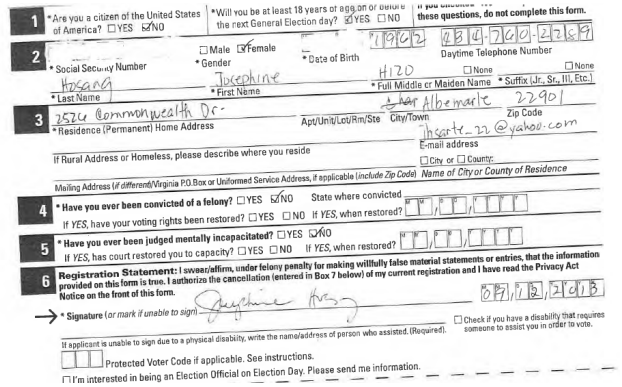
How does this work? Bear with me. They say that if you have to go and vote in a recall election, it discriminates against people who don't speak English well because they tend not to follow the news. That is literally in the complaint. We helped defend the State of Nevada, but ultimately the case was mooted because the recall petitioners didn't get enough signatures.

Let me take you to citizenship verification issues. You recall the President made a statement about aliens participating in the elections. We don't know how many did because nobody's ever really looked at it, but I can tell you that all around the country there are defects in the motor-voter registration system that are allowing noncitizens to participate in our elections.

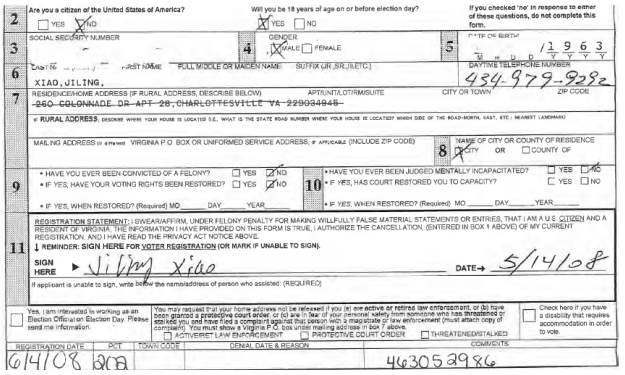
Since I'm the last speaker, I will try to keep everybody alert by having some audiovisual aids. If you don't know how many noncitizens are participating, it's probably because nobody's been asking. So what we started doing is litigating to get some data.

Let me show you some of the documents that we have found in this litigation. This is a motor-voter registration form under the Motor-Voter Law of 1993.

This is of an actual registered voter, I believe, in Albemarle County in Virginia.

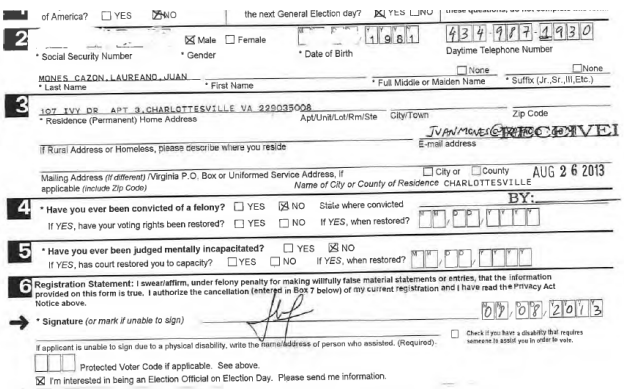


Take a look at the very top left: "Are you a citizen of the United States of America?" Answer: "No." This person was registered to vote for quite some time. And this isn't the only one.



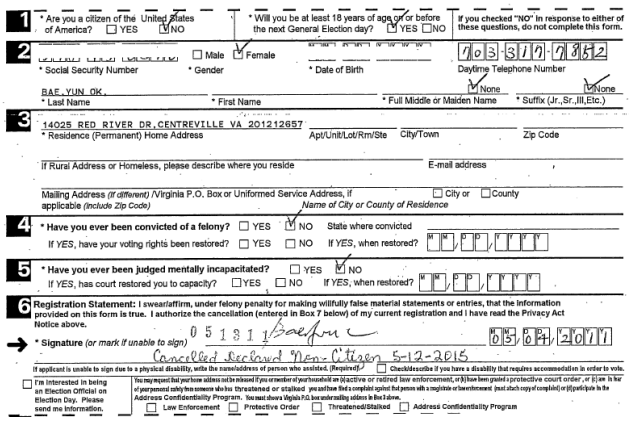
This is Jiling Xiao. "Are you a citizen of the United States?" "No." Registered to vote in the Commonwealth of Virginia.

There's more:



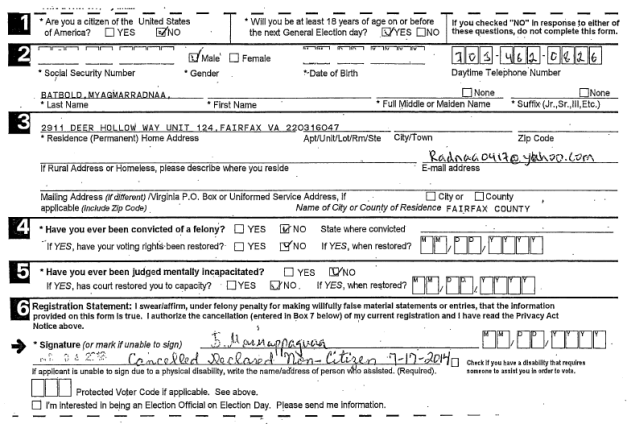
"Are you a citizen of the United States?" "No." Registered to vote in the Commonwealth of Virginia.

More:



Yun Ok Bae. "Are you a citizen of the United States?" "No." These are actual registered voters. You'll notice "cancelled for non-citizenship in 2015" oftentimes is decades after they're registered.

Here's another one:



I won't hazard what the name is, but it's right there. "Are you a citizen of the United States?" "No."

These are not the only five examples that we've found. These are the only five that I brought with me today.

As I said, in the old days, everybody would agree: Let's fix this problem. Democrats, Independents, Republicans would all agree. I can tell you there is litigation around the country in multiple federal courts fighting to preserve these defects, cases brought by Common Cause, the ACLU, and League of Women Voters to preserve these defects in the system.

We have a case here in the District Court in the District of Columbia where the federal government

simply approved a change to that voter registration form that you all just saw that allowed Kansas, Alabama, and Georgia to implement their state verification of citizenship requirements. Yet the League of Women Voters sued and said, "You can't do that." That case is still going on.

Many of you have heard about voter ID. That's normally what people associate with process fights. Those are the voter ID fights. I was in the Justice Department around these folks in the Civil Rights Division long enough that I'm going to clue you in on a little secret why voter ID is so opposed. Most people that I talk to say, "You have to have voter ID to do everything, right?" They like to say "get on a plane." I like to say "buy alcohol." Hans and I came up with the argument "to get married." That's a fundamental right, to get married, and you need ID to do that in most places.

The dirty little secret why folks oppose voter ID is because they believe that their political constituency will lose it or forget it. I'm quite serious about this, and they may well be right. I don't know. I haven't done the social science. But they believe that if you have a voter ID law, too many people will misplace it or lose it, and it will hurt their electoral prospects. So that's what's going on.

You can see it manifest in places like North Carolina and Texas where litigation was brought against those states for changes involving voter ID and early voting. Hans and I have both written about the expert used by the United States. This will tell you everything you need to know about this sort of collectivist dehumanizing approach. They hired an expert who literally testified that black voters are "less sophisticated" and therefore don't know that they need things like voter ID. That was the United States expert who you all paid for, substantial sums of fees.

Identity politics is the jet fuel that's driving all of this. The transformation that these folks are seeking is being driven by identity politics. At its core, identity politics is essentially a dehumanizing, collectivist approach that doesn't look at the individual worth of people, where it assumes you're part of the group and you must behave like a group.

I'll close with this last example. I wrote a piece for *The Washington Times* criticizing moves toward early voting.[23] Remember the old days when elections were on Election Day? Now, of course, we have early voting in some states. In Wyoming, I think it starts almost at the end of September. So you have this month-long process.

I wrote a piece saying, remember the presidential election with George Bush in 2000 where there was that weekend bombshell? Early voting does not allow for fully informed voters. You can't make your decision on Tuesday if you don't know what happens on the weekend before. There is a lot of criticism on the Left of that view, and here's how they framed it: "People on that side of the aisle [namely, me] do not view politics as an expression of collective will. They think that it's contemplative, rational, and reflective." I can tell I describe many of you here.

We view politics as contemplative, rational, and reflective. They view politics as a muscular collectivistic expression that represents interest groups as opposed to individual choices. The attacks on criticism of early voting really illustrated this to me. We're dealing with a movement that's attempting to transform the country through a very dehumanizing, collectivist approach.

I think the process rules that I'll close with are critical such as voter ID, recalls, redistricting, early voting, and same-day registration. Same-day registration, by the way, facilitates glitches like in Minnesota where you can just walk in and register and vote without pre-registering. You had 1,200 ineligible felons participate in the 2008 election in Minnesota, and that election gave us Al Franken, and that gave us Obamacare.

So it makes a difference. You transform a country by transforming the rules and the process of those rules.

*—**J. Christian Adams** is President and General Counsel of the Public Interest Legal Foundation and a former lawyer at the U.S. Department of Justice.*

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