Restoring Congress's role in the modern administrative State*

Restaurando a função do Congresso no Estado administrativo moderno

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Congress's Constitution: legislative authority and separation of powers. By *Josh Chafetz*. New Haven; London: Yale University Press, 2017.

ABSTRACT

In Congress's Constitution, Josh Chafetz provides a timely and compelling historical account of the powers Congress possesses to compete with the other branches of government in our separation-of-powers framework. This Review makes two main observations. Particularly in light of the rise of the regulatory state, Part I explains how the toolbox of congressional powers Chafetz assembles can play a critical role in overseeing and influencing federal agency regulatory activities. Part II then offers a word of caution concerning Congress's use of this toolbox without also passing

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laws. To restore Congress's proper role in the modern administrative state, it is not enough for members of Congress to effectively oversee regulatory lawmaking. Congress must regularly legislate — to reauthorize and modernize the statutes that govern federal agencies, to respond to regulatory activity with which Congress disagrees, and to preserve the separation of powers between legislation and regulation.

KEYWORDS

Congress — administrative law — congressional oversight — separation of powers

RESUMO

Na obra *Congress's Constitution*, Josh Chafetz apresenta um relato histórico oportuno e convincente dos poderes que o Congresso possui para competir com os outros ramos do governo em nosso cenário de separação de poderes. Esta revisão faz duas observações fundamentais. Particularmente à luz da ascensão do estado regulador, a parte I explica como a caixa de ferramentas dos poderes do Congresso sugerida por Chafetz pode desempenhar um papel crítico na supervisão e influência das atividades reguladoras das agências federais. A parte II oferece uma palavra de cautela sobre o uso que o Congresso faz dessa caixa de ferramentas sem aprovar leis. Para restaurar o papel apropriado do Congresso no estado administrativo moderno, não é suficiente que os membros do Congresso supervisionem efetivamente o processo legislativo regulador. O Congresso deve legislar regularmente — reautorizar e modernizar os estatutos que governam as agências federais, responder à atividade regulatória com a qual o Congresso discorda e preservar a separação de poderes entre a legislação e a regulamentação.

PALAVRAS-CHAVE

Congresso — direito administrativo — fiscalização do Congresso — separação de poderes

Introduction

We live in a modern regulatory world, vastly different from what the framers could have imagined. As I have noted, "the focus and function of

lawmaking have shifted from judge-made common law, to congressionally enacted statutes, and now to agency-promulgated regulations."[1] For instance, by the end of 2016, the Code of Federal Regulations exceeded 175,000 pages and included tens of thousands of rules.[2] That's more than one hundred million words and one million regulatory restrictions; it would take over three years for one employed full time to read the entire Code.[3] In 2016, federal agencies reached a new regulatory record by filling over 95,000 pages of the Federal Register with adopted rules, proposed rules, and notices—nearly 20% more than the 80,000 or so pages published in 2015.[4] Roughly two-fifths of those pages in 2016 were devoted to 3,853 final rules, an increase from the 3,410 final rules federal agencies promulgated in 2015.[5]

By contrast, the 114th Congress, over that same two-year period, enacted just 329 public laws for a total of 3,036 pages in the Statutes at Large.[6] In January 2014, Senator Mike Lee took to Facebook to visually depict the shift in lawmaking from legislation to regulation:

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1 Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1000 (2015).

2 *See* Clyde Wayne Crews Jr., Competitive Enter. Inst., Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State 19, 20 fig. 14 (2017), https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf [https://perma.cc/6TDC-3JPR] (reporting the total pages at the end of 2016 as 185,053).

3 *See* Mercatus Center, *QuantGov Regulatory Clock*, QuantGov, https://quantgov.org/charts/the-quantgov-regulatory-clock/ [https://perma.cc/X37W-CRK3] (reporting statistics as of February 7, 2018, with time based on reading 250 words per minute in a full-time job).

4 Crews, *supra* note 2, at 59 (reporting the total pages at the end of 2016 as 97,069, compared to 81,402 pages at the end of 2015). Of the 97,069 pages in 2016, 1,175 were blank. *Id*.

5 *See id.* at 17, 75. *See generally* Maeve P. Carey, Cong. Research Serv., R43056, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the *Federal Register* 18 tbl.6 (2016) (providing year-by-year statistics on the content of the Federal Register by pages and actual numbers of proposed and final rules).

6 *Compare* Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, 129 Stat. 3 (2015), *with* American Innovation and Competitiveness Act, Pub. L. No. 114-329, 130 Stat. 2969, 3038 (2017) (reflecting the number of pages taken up with public laws).



Behold my display of the 2013 Federal Register. It contains over 80,000 pages of new rules, regulations, and notices all written and passed by unelected bureaucrats. The small stack of papers on top of the display are the laws passed by elected members of Congress and signed into law by the president.[7]

Counting words, pages, and laws is by no means a flawless method for capturing the extent of this trend in federal lawmaking. But there is no serious debate that Congress's legislative role has diminished as the bureaucracy has sprawled. Indeed, outside of the tax reform legislation enacted at the close of the year, Congress's most significant legislative achievement in 2017 may well not be a new law at all. Instead, it is arguably Congress's invocation of the Congressional Review Act to invalidate a dozen or so major federal agency rules promulgated at the end of the Obama Administration.[8]

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[7] U.S. Sen. Mike Lee, Facebook (Jan. 10, 2014), https://www.facebook.com/senatormikelee/photos/a.182532975111737.42198.178081365556898/684070008291362/?type=3&theater [https://perma.cc/5UHQ-94RN].

[8] *See* Geo. Wash. U. Reg. Stud. Ctr., Congressional Review Act Tracker 2017 (last updated Oct. 25, 2017), https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/CRA%20Tracker%2010-25-2017.pdf [https://perma.cc/5GDT-Q2BS]. *See generally* Note, *The Mysteries of the Congressional Review Act*, 122 Harv. L. Rev. 2162, 2162-64 (2009) (describing process under the Congressional Review Act including that the statute only requires a simple majority in both chambers to pass the joint resolution of disapproval).

In light of the modern realities of federal lawmaking, it is no surprise that calls for reform of Congress's role in the administrative state amplified during the latter years of the Obama Administration. For instance, some Republicans in Congress established the Article I Project: a "conservative reform agenda" to "[r]eclaim[] Congress's power of the purse," "[r]eform[] legislative 'cliffs,' " "[r]eassert[] congressional authority over regulations and regulators," and "curb[] executive discretion."[9] In November 2015, the Federalist Society started a similar Article I Initiative, with the mission "to restore Congress to its rightful place in the Constitutional order."[10]

One might expect that the 2016 election, with Republicans gaining control of the presidency and Congress, would cause an undoing of a fair amount of the Obama Administration's regulatory actions as well as muted calls by congressional Republicans and conservatives for Article I reform. Deregulation is happening, but the Article I Project and Article I Initiative have continued. And calls for restoring Congress's place in the modern administrative state may now find more allies from the other side of the aisle.

Against this political backdrop, the Yale University Press could not have chosen a better time to publish Cornell law professor Josh Chafetz's[11] important new book, *Congress's Constitution: Legislative Authority and the Separation of Powers*. In *Congress's Constitution*, Chafetz provides a roadmap for Congress to (re)assert its powers in federal policymaking and governance. Chafetz explains that "Congress is certainly not at a necessary disadvantage across the board as against the other branches" (p. 42). Instead, Congress possesses many powerful tools to compete with the other branches of government. These tools have deep historical roots. Chafetz exhaustively chronicles their evolution from seventeenth-century English parliamentary practices, to the codification of Article I of the U.S. Constitution, to the development of congressional practice in American governance over the centuries to the present day. To the extent Congress has lost its ability to utilize the tools

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9 U.S. Sen. Mike Lee, *The Article I Project*, U.S. Sen. Mike Lee, https://www.lee.senate.gov/public/index.cfm/article-one-project [https://perma.cc/ZN9V-FDVY].

10 *Article I Initiative Division*, Federalist Soc'y, https://www.fed-soc.org/practice_groups/detail/article-i-initiative [https://perma.cc/UCJ9-H93M]; *see also* David M. McIntosh, *NLC: The Article I Initiative*, Federalist Soc'y (Nov. 14, 2015), https://fedsoc.org/commentary/blog-posts/nlc-the-article-i-initiative [https://perma.cc/NS9Q-H8ZM] (noting that the initiative launched at the Federalist Society's 2015 National Lawyers Convention).

11 Josh Chafetz is a Professor of Law at Cornell Law School (not to be confused with Jason Chaffetz, former Chair of the U.S. House Committee on Oversight and Government Reform).

effectively, Chafetz argues that such loss of power "is a contingent fact, and one that can be reversed" (p. 42).

Congress's Constitution is a commanding exposition of Congress's powers vis-à-vis the other branches of the federal government. It is an important read for scholars of administrative law, legislation, and the separation of powers, and it should be required reading for new congressional staffers and federal agency legislative affairs personnel. As Philip Wallach observes, "Chafetz's presentation of this material is masterful, pitched so as to be accessible to the novice and yet genuinely informative even to the expert."[12] *Congress's Constitution* fulfills Chafetz's "hope that the reader will be surprised, both by the efficacy with which some of these tools have been (and are being) used, and also by their potential for use in future interbranch conflicts" (p. 42).

In this Review, I focus on two observations. In Part I, I summarize and analyze the "potent toolbox" of "hard powers" and "soft powers" that Congress can wield to play its proper role in our separation-of-powers framework (pp. 3, 6). Whereas Chafetz primarily frames these powers in relation to the second and third branches of government—the president and the courts, respectively—this Review explores how the toolbox is and can be used to constrain what some call the "fourth branch": the modern administrative state.[13] To be sure, Chafetz does not ignore federal agencies; they are, after all, creatures of statute and subject to varying degrees of presidential control. But *Congress's Constitution* is less focused on addressing Congress's role in response to "the rise and rise of the administrative state."[14] The tools Chafetz has identified are quite powerful in shaping the principal-agent relationship between Congress and federal agencies and thereby influencing the vast regulatory activity discussed at the outset.

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[12] Philip A. Wallach, *Congress's Constitution — If They Can Keep It*, L. & Liberty (May 1, 2017), http://www.libertylawsite.org/2017/05/01/congresss-constitution-if-they-can-keep-it/ [https://perma.cc/EE4D-9LBS]; *accord* Matt Glassman, *Congress's Death Is Greatly Exaggerated*, LegBranch.com (Sept. 20, 2017), http://www.legbranch.com/theblog/2017/9/20/if-you-better-understood-congress-youd-like-it-more [https://perma.cc/EJ8V-5VRT] ("The structural analysis is clear, methodical, and insightful. While some of the territory will be well known to those familiar with separation of powers, the presentation is top-notch and the connections to early English democracy make for striking revelations.").

[13] *See, e.g.*, Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 Duke L.J. 387, 403 (citing President's Comm. on Admin. Mgmt., Report of the Committee with Studies of Administrative Management in the Federal Government 39–43 (1937)) ("This failure to address the distinctive constitutional position of the administrative agencies—their status as a 'fourth branch of government'—robbed structuralism of its power to legitimate administrative government.").

[14] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

In Part II, I turn to what *Congress's Constitution* expressly does not address: Congress's core function of passing laws.[15] Chafetz limits his book to Congress's other tools. This limitation is no doubt a reasonable decision, as the book is already quite ambitious. And, as Chafetz acknowledges, "[b] roadening the scope beyond legislation is essential if one truly hopes to understand Congress's ability to have an impact on our national political life" (p. 2). But for someone like me who studies congressional control of federal agencies, it is hard not to fixate on the point that all of these tools exist principally to help facilitate Congress's core legislative activity. If Congress is not regularly engaged in passing laws, it seems that the wisdom—and perhaps even legitimacy—of these tools are called into question.

In raising this concern, I'm not writing on a blank slate. Political scientists have spent decades examining the costs of legislating clearly and how members of Congress and congressional committees have incentives to encourage (or at least not discourage) statutory ambiguity and then influence agency implementation of that ambiguity through oversight tools and other pressures[16]—many of which Chafetz documents in *Congress's Constitution*. As Neomi Rao and I have explored in the contexts of the nondelegation doctrine and *Chevron* deference, respectively, these incentives could lead to "administrative collusion" between members of Congress and the federal agencies they oversee.[17]

This observation is not a criticism of *Congress's Constitution*. Instead, it serves as a word of caution about Congress's use of this potent toolbox without also engaging in a regular and sustained agenda of passing laws.

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[15] Adam White makes a similar observation in his review of *Congress's Constitution*. Adam White, *The Least Dangerous Branch*, Wall Street J. (Aug. 8, 2017, 7:18 PM), https://www.wsj.com/articles/the-least-dangerous-branch-1502234290 (on file with the *Michigan Law Review*) ("But without considering Congress's fundamental legislative power, the reader can never fully grasp the implications of its increasing failure to use that power to legislate reforms to the laws that govern us today.").

[16] *See, e.g.*, Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243, 254 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va. L. Rev. 431, 468-81 (1989); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 Am. J. Pol. Sci. 165, 166, 174-75 (1984).

[17] Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1504 (2015) ("By fracturing the collective Congress and empowering individual members, delegation also promotes collusion between members of Congress and administrative agencies."); Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. 1377, 1415-16 (2017) (exploring the problem of "administrative collusion" with respect to the role of federal agencies in the legislative process).

To restore Congress's place in the modern administrative state, it is not enough for members of Congress and congressional committees to more effectively oversee and influence regulatory lawmaking. The collective Congress must also regularly legislate. Congress must reauthorize and modernize the organic statutes that govern federal agencies, respond to regulatory activity with which the current Congress may disagree, and preserve the proper separation of powers between the legislative and executive (or, better said, regulatory) branches of government.

I. Congress's toolbox for constraining the regulatory State

In 2015, the Administrative Conference of the United States engaged me as an academic consultant to examine the role of federal agencies in the legislative process, with a particular emphasis on "technical drafting assistance."[18] It turns out that federal agencies play a substantial role in the legislative process. Agencies both propose legislation that advances agency or presidential objectives and provide technical assistance on legislation drafted by Congress. In fact, interviews at some twenty federal agencies revealed that agencies provide technical drafting assistance on the vast majority of the proposed legislation that directly affects them and on most such legislation that gets enacted.[19]

The agency officials interviewed also noted that few congressional requests for technical drafting assistance go unanswered by their agency—regardless of any factor including the party affiliation of the request or the likelihood of the legislation becoming law.[20] A predominant reason for such responsiveness concerns the tools Congress has to affect agency behavior. Congress's legislative power to change the agency's statutory mandate,

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[18] This engagement resulted in a report and a set of recommendations the Conference adopted. *See* Christopher J. Walker, Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting (2015), http://ssrn.com/abstract=2655901 [https://perma.cc/DZ45-FMHC]; Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,161-63 (Dec. 16, 2015) (summarizing findings and adopting recommendations from ACUS report).

[19] *See* Walker, *supra* note 18, at 13-16. *But see* James J. Brudney, *Contextualizing Shadow Conversations*, 166 U. Pa. L. Rev. Online 37, 39-45 (2017), https://www.pennlawreview.com/online/166-U-Pa-L-Rev-Online-37.pdf [https://perma.cc/2C2H-P5CH] (disputing the extent of agency involvement in technical drafting assistance based on author's personal involvement in the legislative process).

[20] Walker, *supra* note 18, at 16-20.

or at least the threat of such legislative action, is obviously one factor. But Congress's oversight powers also matter. As one agency official noted, when providing technical drafting assistance "oversight is always in the back of our minds."[21] As another put it, when a senior agency official is scheduled to appear at a congressional hearing, his agency always makes sure to respond to all technical drafting assistance requests beforehand.[22]

That congressional oversight affects agency behavior is not a novel observation. Any course on legislation or administrative law covers the basics of congressional oversight. *Congress's Constitution*, however, provides a historically richer and more comprehensive account of Congress's core powers on this front. Chafetz groups these powers into six main tools, divided between what he labels "hard powers" and "soft powers." As further discussed in Part II, Chafetz frames these tools broadly in relation to the other branches of government and the branches' competition for power in the public sphere. In this Review, I focus on the oversight role of this toolbox in constraining the regulatory state. The following table depicts this toolbox. Each tool will be briefly discussed in turn.

1. *The Power of the Purse (Chapter Three).* The first hard power is the power of the purse. As Chafetz notes, at first blush "[i]t may appear odd to begin the discussion of specific congressional powers with the power of the purse, given that this book focuses on mechanisms that are available to individual houses or members of Congress" (p. 45). But its appropriations authority might be its most powerful tool to oversee the administrative state. The appropriations tool is particularly powerful because each chamber of Congress has a veto on federal agency funding in the annual budget process. Congress's separate powers to legislate and appropriate are critical in our separation-of-powers framework. At the founding "the separation of purse and sword was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical president" (p. 57).

Chafetz justly emphasizes the importance of the annual nature of the appropriations process (pp. 61-66)—requiring federal agencies to be regularly concerned about the efficiency, effectiveness, and propriety of their regulatory activities. If an agency falls short of congressional expectations (or even just fails to be responsive to congressional requests for more information), Congress can punish the agency with "a not-so-gentle tug on the purse

[21] *Id.* at 17.
[22] *Id.*

strings" (p. 72). Congress has also been known, perhaps more so now than in prior eras, to insert substantive riders into appropriations legislation to forbid certain agency uses of appropriated funds.[23] Substantive riders and funding reductions are powerful ways of influencing agency behavior. *Congress's Constitution* introduces rich examples of the power of the purse at play over the centuries, including an important treatment of Congress's ultimate appropriations power: government shutdown (pp. 68-71).

Congress's Toolbox for Constraining the Regulatory State		
Tool		**Description**
Hard Powers	The Power of the Purse (Chapter Three)	Appropriations laws, spending authority, and annual budget process for federal agencies
	The Personnel Power (Chapter Four)	Various appointment powers over agency officials, limits on acting and recess appointments, ability to affect removal, and impeachment powers
	Contempt of Congress (Chapter Five)	Constitutional and statutory authority to hold agency officials in contempt of Congress
Soft Powers	The Freedom of Speech or Debate (Chapter Six)	Congressional immunity when criticizing agency officials and regulatory actions, including sharing nonpublic information about agency activities
	Internal Discipline (Chapter Seven)	Ability to internally discipline members of Congress for, inter alia, improperly influencing federal agencies
	Cameral Rules (Chapter Eight)	Ability to structure congressional rules to allow for, inter alia, committee hearings, investigations, document and testimony subpoenas, and other oversight tools

Unfortunately, Congress's power of the purse has weakened in at least three important respects, all of which have resulted in a shift of power toward

[23] *See* pp. 66-73; *see also* Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress 111-28 (2012) (explaining the evolution of the appropriations and budget processes into a prominent and "unorthodox" form of legislating). Indeed, federal agencies also play an important substantive and technical drafting role in appropriations legislation—a role that merits much further exploration and agency coordination. *See* Walker, *supra* note 18, at 10-11, 38-39; *see also* Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015) ("Appropriations legislation presents agencies with potential coordination problems as substantive provisions or 'riders' may require technical drafting assistance, but agency processes for reviewing appropriations legislation are channeled through agency budget or finance offices. It is crucial for the budget office to communicate with an agency's legislative counsel office to anticipate and later address requests for technical assistance related to appropriations bills.").

the regulatory state.[24] First, there has been a dramatic rise in "mandatory" spending, as opposed to "discretionary" spending; such mandatory spending is not subject to the annual appropriations process. Chafetz reports that mandatory spending made up 69% of the federal budget in fiscal year 2016. This means that "for 69 percent of the federal budget, Congress has ceded the institutional advantage of annual appropriations and surrendered the institutional gains of 1689" (p. 62; footnote omitted). Second, in the 1800s and early 1900s, the House took the lead on the budgeting front, but "the growth of the regulatory state put pressure on the fragmented manner in which Congress went about budgeting, and the era of 'legislative dominance' of the budget process came to an end shortly after World War I" (pp. 62-63; footnotes omitted). Third, though not covered in *Congress's Constitution*, Congress's decision to grant some agencies with fee-setting authority, which results in funding that goes directly to the agency, has similarly weakened the power of the purse.[25]

Although Congress's power of the purse remains forceful, the rise of the modern administrative state has weakened it.

2. *The Personnel Power (Chapter Four).* The second hard power is Congress's personnel power. This power actually consists of a suite of tools that includes Congress's role in appointing agency officials, limitations on the president's ability to use acting officers or recess appointments, and Congress's ability to remove officials in the other branches of government.

Congress's appointment power is twofold. First, the Constitution requires "Advice and Consent of the Senate" for confirmation of any principal officers at federal agencies.[26] Second, as for any inferior officers, Congress has the power to decide in whom to confer the power to appoint those officers: "in the President alone, in the Courts of Law, or in the Heads of Departments."[27] This latter institutional design authority allows Congress to allocate personnel power closer or further away from the president or the federal agencies to increase political accountability or independence, respectively. Congress may have even greater institutional control over nonofficer agency employees,

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[24] There is also an important debate about the extent to which Congress can use the power of the purse to intrude on the president's Article II powers. *See, e.g.*, Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. (forthcoming 2018).

[25] *See generally* U.S. Gov't Accountability Office, Federal User Fees: A Design Guide (2008), http://www.gao.gov/assets/210/203357.pdf [https://perma.cc/N8RY-3HRP].

[26] U.S. Const. art. II, §2.

[27] *Id.*

though current litigation over the constitutionality of administrative law judges could result in redefining this officer-employee distinction.[28] It is worth noting that the federal government now agrees with the petitioner in that litigation that administrative law judges at the Securities and Exchange Commission are "officers" and not mere "employees" for purposes of the Appointments Clause.[29]

The reach of the Senate's advice-and-consent power extends beyond approving the president's choice to run a federal agency. For instance, the Senate holds a committee hearing on each nominee and can extract pledges from the nominee about how she will run the agency, including commitments concerning congressional oversight cooperation. Nominees often have one-on-one meetings with senators, during which additional discussions about the agency's regulatory activities can take place. Consent can be withheld to force the president to choose a nominee with a different regulatory agenda, or it can be delayed until the agency complies with certain oversight requests or completes (or commits to complete) certain regulatory activities. The Senate committee's advice-and-consent power is often also exercised in the form of refusing to hold the nomination hearing at all.

It is further worth noting that, under Senate rules, this advice-and-consent power for principal officers was even stronger before 2013—the year Senate Democrats eliminated the filibuster for nominations for administrative appointees (and lower-court judicial nominees).[30] The elimination of the filibuster strengthens the majority party in the Senate by reducing the number of senators needed for consent from effectively sixty to a simple majority. The Senate's collective power, however, is weakened by reducing the potential to negotiate for more moderate nominees—"mainstream" nominees, as the

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[28] *See, e.g.*, Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 454 (2018) (arguing that as an original matter the term "officers" would likely apply to thousands of agency officials currently considered mere "employees"); *see also* Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016), *petition for cert. filed*, (U.S. Sept. 29, 2017) (No. 17-475); Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016), *petition for en banc review denied*, 868 F.3d 1021 (Mem.) (D.C. Cir. 2017), *cert. granted*, (U.S. Jan. 12, 2018) (No. 17-130).

[29] *See* Jennifer Mascott, *New Government Position on the SEC's ALJs: They Are Article II "Officers,"* Yale J. on Reg.: Notice & Comment (Nov. 29, 2017), http://yalejreg.com/nc/new-government-position-on-the-secs-aljs-they-are-article-ii-officers/ [https://perma.cc/GG4P-KHL5].

[30] *See, e.g.*, Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, Wash. Post (Nov. 21, 2013), http://wapo.st/1c6f4AH?tid=ss_tw&utm_term=.eb1d7a2f35d1 [https://perma.cc/4U7K-MJ2E]; *see also* Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 Duke L.J. 1717, 1749–52 (2015) (detailing evolution of confirmation process for nonjudicial nominees).

Senate Democrats have framed the issue in the Trump Administration[31]—or for other concessions from the president. The elimination doesn't just weaken the collective Senate by excluding the minority party. It also weakens the moderates in the majority party. With the filibuster in place, moderates of the president's party in the Senate majority had more political capital to vote at the cloture stage to block more controversial nominees based on respect for the Senate's august procedural rules. Now, these senators cannot block controversial nominees without paying the costlier political price of voting down the president's nominee on merits.[32]

In addition to Congress's appointment powers, there are limits on the president's ability to bypass Congress's advice-and-consent power by designating acting officers or making recess appointments. As for the acting appointment power, Chafetz notes that presidents have used such appointments since at least 1801, but Congress has limited the scope of the tool by statute since at least 1795 (pp. 134-36). Last Term, the Supreme Court had the occasion to interpret the current version of the Vacancies Act, construing it to limit the president's power to designate nominees for an office who are serving as acting officers.[33] Controversy concerning acting officers is back in the news with the dueling-directors dispute at the Consumer Financial Protection Bureau (CFPB). Last year the outgoing CFPB director elevated an internal agency official to deputy director, such that by statute she would become the acting director upon the prior director's resignation.[34] The president responded by naming his own acting director of this so-called independent agency—the current director of the Office of Management and

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31 *See, e.g.*, Karoun Demirjian, *President Trump's Cabinet Picks Are Likely to Be Easily Confirmed. That's Because of Senate Democrats.*, Wash. Post (Nov. 18, 2016), http://wapo.st/2g4F0rS?tid=ss_tw&utm_term=.8f0318c16bbd [https://perma.cc/ZU96-D72C] ("The problem is, those [advice-and-consent] tools are now severely limited. It would fall to Republicans to join Democrats to stand in the way of any Trump appointment deemed objectionable.").

32 Chafetz addresses the elimination of the filibuster later in his book, when he discusses "[t]he [p]itfalls of [c]ameral [o]rganization." Pp. 296-301. As Chafetz observes, "if unified government does not result in filibuster reform, one would expect the use of minority obstruction to continue to serve as a justification for executive aggrandizement. In structuring its rules so as to allow for indefinite minority obstruction, the Senate costs itself power." P. 301.

33 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 935 (2017) (holding that statutory prohibition applies to "first assistants who have automatically assumed acting duties" as well as "to PAS officers and senior employees serving as acting officers at the president's behest").

34 *See* Charlie Savage, *Who's the Real Head of the Consumer Watchdog Agency? A Legal Fight, Explained*, N.Y. Times (Nov. 27, 2017), https://www.nytimes.com/2017/11/27/business/cfpb-mulvaney-leandra-english-legal-explained.html (on file with the *Michigan Law Review*).

Budget within the Executive Office of the President.[35] Federal courts are now left to sort out who is the real acting director and whether the Constitution places limits on either possible acting director.[36]

Recess appointments, like acting officer designations, "have a long pedigree in American constitutional practice—just to take a few examples, Jefferson recess appointed the Washington justices of the peace while awaiting their Senate confirmation; Jackson recess appointed Roger Brooke Taney as secretary of the treasury; and Eisenhower recess appointed Lewis Strauss as secretary of commerce" (p. 137). The Constitution confines recess appointment power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[37] In 2014, the Supreme Court answered three key questions about the scope of the president's recess appointment power. In *NLRB v. Noel Canning*, the Court held that (1) the recess appointment clause applied to both intersession and intrasession recesses; (2) the phrase "vacancies that may happen" does not limit appointments to vacancies that first arise during the recess; and (3) *pro forma* sessions of Congress count for purposes of eliminating a recess, such that three days between *pro forma* sessions, for instance, "is too short a time to bring a recess within the scope of the Clause."[38] *Noel Canning*'s practical effect is that "[a] president whose party controls neither house of Congress can be prevented from making recess appointments altogether; a president whose party controls at least one house will be able to make recess appointments at least some of the time" (p. 142).

The remaining tools within Congress's personnel power concern its ability to remove government officials. To what extent Congress can statutorily condition the president's removal authority of agency officers is a complicated question that exceeds the scope of this Review.[39] But, as Chafetz underscores,

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35 *See* Daniel Hemel, *For Better or Worse, Mick Mulvaney Probably Is the Acting Director of the CFPB*, Yale J. on Reg.: Notice & Comment (Nov. 26, 2017), http://yalejreg.com/nc/for-better-or-worse-mick-mulvaney-probably-is-the-acting-director-of-the-cfpb/ [https://perma.cc/KT9Q-GYB8]; *see also English v. Trump*, No. CV 17-2534, 2018 WL 358777, at *1 (D.D.C. Jan. 10, 2018) (denying the CFPB deputy director's motion for a preliminary injunction to enjoin the OMB director from displacing her as acting director of the CFPB).

36 *See* Hemel, *supra* note 35.

37 U.S. Const. art. II, §2, cl. 3.

38 134 S. Ct. 2550, 2556-57 (2014).

39 *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) (holding that "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President"). *See generally* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1209 (2014) (advocating for "a formal framework of removal as necessary and sufficient for presidential control").

there are at least two other ways for Congress to affect removal (pp. 142-51). Although the Court has held that Congress cannot have a "direct" role (short of impeachment) in the removal of officers over which the president has constitutional removal authority, Congress may be able to indirectly remove officers by eliminating the office and creating a new office (p. 143). Of course, this would require legislation and thus supermajority support to overcome the likely presidential veto (p. 145).

The second path to removal—Congress's impeachment power[40]—does not require legislation but historically has been limited to "malfeasance, not just political disagreement or even incompetence" (p. 149). Additionally, "although in theory impeachment applies to 'all civil Officers of the United States' in addition to the president and vice president, in practice it is likely to remain limited to presidents, vice presidents, and federal judges—in other words, officers whom there is no other way to remove" (p. 148; footnote omitted). Although Congress's various removal powers may not have much effect on constraining the regulatory state, its appointments powers certainly do when used effectively.

3. *Contempt of Congress (Chapter Five).* Congress's final hard power is its contempt authority. Chafetz dedicates nearly thirty pages (almost a tithe) of *Congress's Constitution* to detailing the historical foundations—both in England and in early American governance—of these contempt powers (pp. 153-79). This historical account is important because the Constitution itself does not expressly grant Congress any contempt power, yet "it has been widely accepted from the earliest years of the Republic that the houses do, in fact, have such a power" (p. 179). Chafetz also carefully chronicles the use of Congress's contempt authority with respect to federal agency officials, including the executive branch's resistance through the invocation of executive privilege as well as the decision to enforce contempt and subpoena powers through congressional enforcement mechanisms or through the courts (pp. 181-98).

Congress's contempt power is critical for overseeing the federal bureaucracy—whether members of Congress "are pondering impeachment, judging the elections, returns, and qualifications of members, conducting

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[40] *See* U.S. Const. art. II, §4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); *cf. id.* art. I, §§2-3 (providing that the House "shall have the sole Power of Impeachment," whereas "[t]he Senate shall have the sole Power to try all Impeachments").

oversight, appropriating, considering legislation, or carrying out any of their other functions" (p. 180). Yet Congress's contempt power has not been as effective in the post-Watergate era (p. 189). Through numerous historical examples, Chafetz details how the threat of contempt can be a heavy stick to encourage federal agencies to turn over information, testify before committees, or otherwise cooperate with their legislative principals (p. 198).

4. *The Freedom of Speech or Debate (Chapter Six).* The first of Congress's soft powers is the freedom of speech and debate.[41] The freedom of speech and debate may appear most helpful in inserting members of Congress into a public debate with the president, which is no doubt an important separation-of-powers tool. But Chafetz brilliantly focuses more on a subtler advantage: how this speech immunity helps Congress publicly release information about what the regulatory state is doing "without the threat of prosecution by and in front of the other branches" (p. 231). This power is at its zenith "with regard to [congressional] views on matters that the other branches do not wish to have aired, matters they have chosen to label as 'secret'" (p. 231). We see this soft power at play in debates this year regarding public disclosure of dueling memoranda from the House Permanent Select Committee on Intelligence on government surveillance of Trump campaign officials.[42] Indeed, the mere threat of making sensitive agency information public, which is bolstered by this power, allows Congress to better control regulatory processes and outcomes.

5. *Internal Discipline (Chapter Seven).* Congress's second soft power concerns its authority to internally discipline its members. As Article I details, "[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[43]

It is intriguing that Chafetz identifies Congress's internal discipline authority as a congressional power vis-à-vis the other branches, as opposed to just an internal self-governance tool. He details how Parliament and Congress

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41 *See* U.S. Const. art. I, §6, cl. 1 ("The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

42 *See, e.g.*, Marty Lederman, *It Is Up to the House Intel Committee, Not Trump, Whether to Release the Democratic Memo on the Page FISA Application*, Just Security (Feb. 9, 2018), https://www.justsecurity.org/52081/hpsci-trump-release-minority-memo/ [https://perma.cc/6MMW-AERH].

43 U.S. Const. art. I, §5, cl. 2.

have used internal discipline, including Congress's more recent emphasis on "ethics" matters. One might consider such self-policing more of a duty than a power, but Chafetz argues that "it can also be a source of soft power: when exercised responsibly, it can build or restore public trust in the institution, thus enhancing its ability to engage successfully in the public sphere" (p. 232; footnote omitted). Chafetz laments that Congress has failed to use this soft power effectively, though he finds some hope in the House's creation of an Office of Congressional Ethics "that the chambers will begin to take more advantage of this means of building public trust" (p. 266).

I'll return to this power in Part II when considering how Congress could better utilize its internal discipline powers to discourage administrative collusion between individual members of Congress (or congressional committees) and the federal agencies they oversee.

6. *Cameral Rules (Chapter Eight).* The final soft power is Congress's ability to determine its own rules for its proceedings. As Chafetz notes, "[w]ithout that authority, the chambers would not be able to structure their budget deliberations, issue subpoenas for testimony or documents, issue contempt citations when those subpoenas were defied, create an Office of Congressional Ethics, or, indeed, do much of anything" (p. 267). This power is what sets the rules of the game for Congress's oversight of the regulatory state, including the delegation of such oversight to various congressional committees.

As Chafetz chronicles, Congress's cameral-rules power allows each chamber to structure its interactions with the president and the administrative state without requiring the consent of the other chamber, much less the president, as would be the case for regular legislation. Cameral rulemaking can be powerful. Perhaps the best example of the cameral-rules power, as Chafetz recounts, relates to the rise of the Republican War Hawks in the early 1810s, which resulted in Henry Clay becoming speaker of the House. Clay then organized powerful standing committees in the House to conduct hearings and investigations as well as issue reports on their findings (pp. 283-84). The Senate followed suit shortly thereafter by creating additional standing committees in the Senate and shifting the Senate's legislative activities to those committees (pp. 284-85). In addition to creating more congressional oversight by committee, this standing-committee innovation shifted legislative power away from the president and back to Congress by encouraging standing committees to be the primary initiators of significant legislation.[44]

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[44] *See generally* Walter Kravitz, *Evolution of the Senate's Committee System*, 441 Annals Am. Acad. Pol. & Soc. Sci. 27, 29-30 (1974) ("Until James Madison's administrations, the legislature

Unfortunately, with the exponential growth of the administrative state in the twentieth century, Congress did not use its cameral rules to keep pace: "Just as the chambers in their earliest years lacked institutional infrastructure and were therefore forced to rely on the executive branch, so too the expansion of the administrative state led to the chambers' having insufficient resources to form an effective counterweight" (p. 291). In 1946, the same year Congress struck the "fierce compromise" in enacting the Administrative Procedure Act to govern the regulatory state,[45] Congress also passed the Legislative Reorganization Act, which strengthened congressional committees, increased congressional staffing, and created the nonpartisan Offices of Legislative Counsel and the now-named Congressional Research Service (pp. 292-93). This reform had its flaws. For instance, as Chafetz explains, reforms in the 1970s attempted to cut back on the excessive power of committee chairs (pp. 293-96).

This final tool regarding Congress's power to determine the rules of its own proceedings should not be understated. It plays a critical role in organizing Congress's oversight activities of the regulatory state. Indeed, among its more powerful uses today, both chambers of Congress have used their cameral-rule authority to empower committee staff with certain investigative powers to take depositions and subpoena documents and information.[46] As Brian Feinstein, among others, has documented, in the modern era predominated by lawmaking by regulation, "congressional oversight of agency action is one of the most powerful tools that Congress has to exercise some measure of control over administrative policymaking."[47]

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habitually relied upon the chief executive and his associates for the initiative on much significant legislation. Congress lost its traditional agenda-maker . . . because of the deep and bitter estrangement between Madison and his Congresses and turned to standing committees to fill the vacuum.").

45 *E.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1560 (1996).

46 Michael Bopp expanded on this observation at the 2017 American Bar Association Administrative Law Conference. *See generally The Power to Investigate: Table of Authorities of House and Senate Committees for the 115th Congress*, Gibson Dunn (June 1, 2017), http://www.gibsondunn.com/publications/Pages/Power-to-Investigate-Table-of-Authorities-of-House-and-Senate-Committees—115th-Congress/ [https://perma.cc/ME3M-S29Y] (detailing the investigative powers set by cameral rules of each congressional committee).

47 Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 Admin. L. Rev. 259, 265 (2017); *see also id.* at 265-66 ("An empirical examination of the consequences of congressional oversight reveals that bureaucratic issues discussed in committee hearings are 19.7% less likely to reoccur than are similar bureaucratic issues that are not subject to hearings.") (citing Brian D. Feinstein, *Congress in the Administrative State*, 95 Wash. U. L. Rev. (forthcoming 2018)).

II. The perils of congressional oversight without legislation

As detailed in Part I, *Congress's Constitution* assembles a potent toolbox, and lays a resounding historical foundation, for Congress to assert a coequal role in our separation-of-powers framework.

For Chafetz, this framework is not formalist, much less constitutionally fixed in time. Instead, it is a fluid, multiplicity-based approach: "a dynamic, inter-institutional competition for public support, played out on a field that is given form and structure by the written Constitution" (p. 26). Chafetz also resists a separation-of-powers framing that is merely one of separation of parties.[48] The influence of political parties, for Chafetz, is but "one factor that goes to the *judiciousness* of the exercise of congressional power" (p. 35).

Put differently, "institutional authority is something built by successful public engagement through time. It neither arises nor disappears instantaneously" (p. 314). Matt Glassman provides an apt assessment of Chafetz's conception of separation of powers:

> *Congress's Constitution* beautifully portrays a legislature not only well-equipped to compete with the modern presidency but, indeed, already competing more forcefully than casual observation would reveal. It forces the reader to consider that perceived failings of legislative government in a modern separation of powers system are part illusory and part consequence of poor strategic choices, rather than simply systemic failure of an outmoded system. . . . [T]he tools of power are available for Congress to compete in the public sphere, and as the 115th Congress unfolds, the equilibrium has been disturbed enough that the dust has been shaken off many of them.[49]

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[48] *Cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2312, 2314 (2006) (arguing that "the invisibility of political parties has left constitutional discourse about separation of powers with no conceptual resources to understand basic features of the American political system").

[49] Glassman, *supra* note 12. This Review does not attempt to do justice, much less respond, to Chafetz's conception of the multiplicity-based separation of powers, which he sets forth in the first two chapters of the book (pp. 15-42) and in his prior writing. *See* Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 Yale L.J. 1084 (2011); *see also* Josh Chafetz, *Congress's Constitution*, 160 U. Pa. L. Rev. 715, 768-78 (2012).

Some of us, however, are also concerned about a different, perhaps more formalist separation of powers: the separation of lawmaking and law-execution powers. These principles are embedded in the Constitution and draw on rule of law values set forth long ago by Blackstone, Locke, and Montesquieu. Blackstone, for instance, proclaimed that "where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject."[50] By contrast, Montesquieu warned: "When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically."[51] We find a similar warning in Locke's *Second Treatise of Government*, in that it is "too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make . . . ."[52]

As detailed in the Introduction, federal agencies dominate lawmaking today, as Congress cedes more and more policymaking power to its bureaucratic agents. This consolidation of lawmaking and law-execution activity in the federal bureaucracy is troubling. While I do not fully embrace Philip Hamburger's provocative critique of the modern administrative state, many of his historical criticisms of extralegal lawmaking or "absolute power" have considerable force and merit careful consideration.[53] Yet, as discussed in Part I, the powerful toolbox assembled in *Congress's Constitution* addresses these distinct separation-of-powers concerns as well. Through an impressive number of historical examples, Chafetz teaches us how members of Congress can better use these tools to rein in the administrative state and prevent federal agencies from abusing their consolidated lawmaking and law-execution powers.

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[50] 1 William Blackstone, Commentaries *142.

[51] Montesquieu, The Spirit of the Laws 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1768).

[52] John Locke, Second Treatise of Government 76 (C. B. Macpherson ed., 1980) (1690).

[53] *See* Philip Hamburger, Is Administrative Law Unlawful? (2014). *But see* Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight*, Oxford L. Studs. Res. Paper No. 44/2016 (June 30, 2016), https://ssrn.com/abstract=2802784 [https://perma.cc/8XBH-NEYW] (criticizing Hamburger's account of English history); Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547 (2015) (criticizing Hamburger's account of American administrative law).

Separation-of-powers concerns remain, however, when members of Congress (as opposed to the collective Congress) serve as the oversight principals in the principal-agent bureaucratic model. Political scientists and economists have spent decades theorizing how members of Congress (and congressional committees) have incentives to delegate by statutory ambiguity distinct from an institutional desire to divide labor and leverage agency expertise or to otherwise minimize the costs of legislating.[54] As Neomi Rao has observed, "[t]his literature emphasizes the many benefits members of Congress can realize through delegation and demonstrates the strong incentives individual legislators have to continue delegating, even though this might weaken the collective lawmaking power of Congress."[55] These benefits include shifting blame to the agency for the negative consequences of policymaking while claiming credit for the positive outcomes; providing benefits for particular constituents to please donors and encourage campaign contributions; and avoiding specification where legislative compromise proves too costly.[56] This relationship between federal agencies and members of Congress can lead to what Rao has coined "administrative collusion": "By fracturing the collective Congress and empowering individual members, delegation also promotes collusion between members of Congress and administrative agencies."[57]

So how do members of Congress obtain these benefits? They learn to master the oversight tools chronicled in *Congress's Constitution*. Indeed, compare Chafetz's toolbox summarized in Part I with Rao's illustrative list of ex post oversight powers members of Congress possess to engage in administrative collusion: "committee oversight, threats to reduce appropriations, investigations of administrative conduct, reporting requirements, and the confirmation process for high-level officials."[58] It is based on this same oversight toolbox that Rao argues the "influence and

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[54] *See* David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers (1999) (offering extensive literature review); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1744 (2002) ("The ubiquity of delegation is due to the need for (a) authority and (b) division of labor, in any complex institution, whether public or private. All institutions must take direction from a person, or a small group of people, but the leader of an institution cannot possibly perform all of its tasks directly.").

[55] Rao, *supra* note 17, at 1477 (footnote omitted).

[56] *See* Epstein & O'Halloran, *supra* note 54, at 30-32.

[57] Rao, *supra* note 17, at 1504.

[58] *Id.* at 1482.

control of administration by members of Congress allows lawmakers to also serve as law interpreters, in contravention of basic separation-of-powers principles."[59] As I explain elsewhere, the substantial role of federal agencies in the legislative process further complicates the bureaucratic principal-agent model and may well heighten the risk of administrative collusion.[60]

The primary tool at the collective Congress's disposal to combat the risk of administrative collusion is one *Congress's Constitution* expressly does not address: Congress's substantive legislative power (p. 2). A return to passing laws on a regular basis would involve congressional reengagement in the reauthorization process for the statutes that govern federal agencies. This legislative engagement would include regular assessment of agency action and regular recalibration if the agency's regulatory activities are inconsistent with the collective Congress's policy objectives. Congress would update stale statutory mandates so that federal agencies could address new problems and changed circumstances. It would also include Congress refining and expanding the tools it has created by statute to monitor and constrain the regulatory state, including the Administrative Procedure Act[61] and the Article I agencies and related entities—the Congressional Budget Office,[62]

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[59] *Id.* at 1498.

[60] Walker, *supra* note 17, at 1416 ("That the agency confers with the member of Congress in the shadows at the outset of the legislative process further facilitates this risk of administrative collusion. Not only does the federal agency have incentives to suggest legislative language that is broad, flexible, or otherwise ambiguous in order to preserve or expand the agency's regulatory and interpretive authority, the individual member of Congress faces similar incentives. And both share incentives to collude to delegate policymaking authority to the agency through ambiguity.").

[61] *See generally* Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 Admin. L. Rev. 629 (2017) (tracing the statutory and judicial evolution of the Administrative Procedure Act since its enactment in 1946 and discussing current legislative proposals to reform the statute).

[62] The Congressional Budget Office (CBO), an Article I federal agency, was created by the Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297, to provide Congress with budget and economic information. Its CBO scoring of proposed legislation plays a critical role in the legislative process, including most recently in Republican legislative efforts to repeal and replace the Affordable Care Act. *See, e.g.*, Adam Cancryn, *CBO: Senate 'Repeal-Replace' Plan Would Leave 22 Million More Uninsured*, Politico (July 20, 2017, 12:30 PM), http://www.politico.com/story/2017/07/20/republican-health-care-bill-cbo-score-240761 [https://perma.cc/JJ8B-G6DP].

Congressional Research Service,[63] Government Accountability Office,[64] and Joint Committee on Taxation[65]—that help Congress gather information, leverage expertise, conduct investigations, and audit regulatory activities.

In a world where Congress regularly legislates, *Chevron* deference would be far less problematic because Congress would intervene if an agency used statutory ambiguity to pursue a policy inconsistent with current congressional wishes.[66] Indeed, my prior empirical work on agency rule drafters suggests that the mere threat of more searching review (or, here, the threat of congressional attention) would encourage federal agencies to interpret statutes less "aggressively."[67] Without regular legislative activity, by contrast, agencies may come to view congressional oversight as just the cost of doing business and not a real constraint on regulatory activity.[68]

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[63] Some version of the Congressional Research Service (CRS), an Article I federal agency, has existed since the early 1900s, with the Legislative Reorganization Act of 1970, Pub. L. 91-150, title II, § 321(a), 84 Stat. 1140, 1181, renaming it from the Legislative Reference Service to CRS, increasing its resources, and focusing its efforts on research and analysis to assist Congress in its primary mission of legislating. *See generally* Ida A. Brudnick, Cong. Research Serv., RL33471, The Congressional Research Service and the American Legislative Process (2011), https://fas.org/sgp/crs/misc/RL33471.pdf [https://perma.cc/F2NB-UART].

[64] Established as the Government Accounting Office by the Budget and Accounting Act of 1921, Congress charged this Article I federal agency to "investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the [p]resident . . . and to Congress . . . report[s] . . . [and] recommendations looking to greater economy or efficiency in public expenditures." Pub. L. 67-13, §312(a), 42 Stat. 20, 25. In 2005, Congress changed the name to the Government Accountability Office to better reflect its current mission. *See* GAO Human Capital Reform Act of 2004, Pub. L. 108-271, 118 Stat. 811.

[65] The Joint Committee on Taxation (JCT) is a unique congressional committee established under the Internal Revenue Code, 26 U.S.C. §8001. The JCT is a bipartisan and bi-chamber committee that dates back to the 1920s and plays a critical role in investigating the executive branch's collection of internal revenue taxes and in reviewing any legislative or IRS proposal for a refund or credit of taxes in excess of two million dollars. *See generally* Amandeep S. Grewal, *The Congressional Revenue Service*, 2014 U. Ill. L. Rev. 689 (2014).

[66] For more on recent criticisms of the deference doctrine set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), see Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 15 Geo. J.L. & Pub. Pol'y (forthcoming 2018) (manuscript at 2-3, 9-21).

[67] *See* Walker, *supra* note 1, at 1048–65. The 128 agency rule drafters surveyed reported that they think about *Chevron* often when interpreting statutes and drafting rules. *Id.* They also think about subsequent judicial review, and believe the rule is more likely to survive judicial review under *Chevron* than under the less deferential *Skidmore* standard or de novo review. *Id.* at 1059-65. To a somewhat lesser extent, they also indicated that their agency is more aggressive in its interpretive efforts if it believes the reviewing court will apply *Chevron* deference (as opposed to *Skidmore* deference or de novo review). *Id.* at 1063. These findings are further explored in Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 Fordham L. Rev. 703, 715-28 (2014).

[68] This is a paraphrase of Philip Wallach's excellent observation at the 2017 American Bar Association Administrative Law Conference. Philip Wallach, Senior Fellow, Brookings Inst.,

Two related soft powers in Chafetz's toolbox may help address the threat of administrative collusion: Congress's authority to "determine the Rules of its Proceedings" and its authority to "punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[69] Using these soft tools, each chamber could establish cameral rules that prohibit members from unduly influencing federal agencies. The rules could model the recent innovations in "ethics" rules that Chafetz explores in great detail (pp. 253–64). Those ethics rules were primarily "attempts to prevent members from being influenced by factors that are believed to corrupt their judgment" (p. 253), whereas these ethics rules would attempt to minimize the risk of administrative collusion. For example, the rules could include certain disclosure requirements for congressional communications with federal agencies or disclosure requirements of contacts with interested parties that motivated the agency outreach. Each chamber of Congress could then use its internal discipline authority to publicly censure or otherwise punish members who are found to have violated these rules. Such use of these soft powers merits further exploration and experimentation.

Although using Congress's internal rules and exercising disciplinary powers could help mitigate the risk of administrative collusion, such measures are not a substitute for returning to a regular practice of legislating. The suggested cameral rules certainly would not reverse the shift in lawmaking from Congress to federal agencies.[70] As Adam White put it in his review of *Congress's Constitution*, "where Congress declines to pass laws setting national policy on national issues, the policy vacuum is filled inevitably by presidents, agencies or courts."[71] As discussed in the Introduction, the shift from lawmaking by statute to lawmaking by regulation surely is a result of Congress legislating less and delegating more.

Chafetz has advanced a compelling historical case for Congress's toolbox consisting of certain hard and soft powers to interact with the other branches.

Address at the American Bar Association Administrative Law Conference: Reinvigorating Congress's Oversight Role of the Federal Bureaucracy (Oct. 19, 2017).

69 U.S. Const. art. I, §5, cl. 2.

70 Nor, of course, would a return to regularly passing laws eradicate the risk of administrative collusion. Members of Congress and congressional committees would still face incentives to leave ambiguities in draft legislation. But at least the collective Congress would be more fully engaged in reauthorizing and updating the organic statutes that govern federal agencies, thus making federal agencies more responsive to the collective Congress and not just their committee overseers.

71 White, *supra* note 15.

That said, I cannot escape the conclusion that these powers are primarily in the Constitution to facilitate the first, core power Article I grants to Congress: the exclusive power to legislate.[72] After all, the annual appropriations process helps Congress ensure federal agencies faithfully implement their statutory mandates. The power of the purse is not a substitute for substantive legislation, which it has arguably become with the rise of substantive riders and the fall of regular legislating. Similarly, Congress's personnel and contempt powers, coupled with the various oversight tools made available by Congress's soft powers of freedom of speech, cameral rules, and internal discipline, should not exist as ends in themselves. Instead, they are powerful means for Congress to collect information and leverage expertise to pass effective legislation.

To be sure, as *Congress's Constitution* illustrates, Congress often uses hearings, information requests, investigations, audits, and so forth to compete with the other branches of government in the public sphere. But if Congress does not also use these oversight tools to regularly pass laws, I fear the legitimacy of the toolbox is called into question. Without the threat of legislative action, moreover, the efficacy of this toolbox in influencing agency action is severely diminished. These fears are heightened when members of Congress, or congressional committees, use these oversight tools to extract policy outcomes from federal agencies that are contrary to the wishes of the collective Congress.

Conclusion

Congress's Constitution provides a timely and cogent historical account of the collection of powers Congress possesses to compete with the other branches of government as well as to oversee and influence the thousands of regulatory actions undertaken by federal agencies each year. Congress must learn to effectively use this toolbox to restore a proper separation of powers between the government entities that make and execute federal law.

To restore Congress's proper role in the modern administrative state, however, Congress must also return to its core constitutional function of regularly passing laws. It is not enough for members of Congress and its

[72] U.S. Const. art. I, §1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

committees to influence regulatory lawmaking through oversight. Indeed, in some ways, Congress's use of its oversight tools without legislating heightens the risk of administrative collusion. The close of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* seems to apply with similar force in this context:

> I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.[73]

Having just taken academic leave to spend some time working in Congress, I cannot express much confidence that an Article I renaissance will take place anytime soon. But that doesn't mean we should give up. Scholars of Congress and the administrative state can certainly play an important role—through both theoretical and empirical work—to help frame the debate and make it accessible to the general public. But ultimately it is up to Congress to, as Justice Jackson put it, "prevent [lawmaking] power from slipping through its fingers."[74] Fortunately, as Chafetz demonstrates in *Congress's Constitution*, the Constitution provides Congress with all the power it needs to restore its proper role in the modern administrative state.

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