

THE SECULAR DECLINE  
OF THE AMERICAN STATE

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*The Trump Administration's assault on the administrative state has received significant attention. But it is a mistake to interpret the weakening of the administrative state during the first or second Trump Administration as exceptional, or as a cyclical, asymmetric phenomenon that characterizes Republican administrations. Rather, we are in the midst of a period of secular decline of the American state, albeit one that has become more acute in the second Trump Administration. This Article outlines fifteen dynamics in American politics, law, policy, and society that all push in the direction of secular decline. Some of these dynamics have been at play for decades, contributing to the already comparatively weak American state. Others are recently emergent or systemic features of decline. The consequences of decline are significant: a rise in harms to consumers, increased economic instability, less innovation, weakened resilience in crises, weakening global power and the rise of the power of adversaries, and social fracturing within society. Disrupting decline will require not just a commitment to building state capacity but understanding and accepting the uncomfortable truth that many of the causes of state decline have been longstanding.*

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## INTRODUCTION

The Trump Administration's assault on the administrative state<sup>1</sup> has received significant attention.<sup>2</sup> My argument in this Article is that it is a mistake to interpret the weakening of the administrative state during the first or second Trump Administration as exceptional, or as a cyclical, asymmetric phenomenon that characterizes Republican administrations. Rather, we are in the midst of a period of secular decline of the American state, albeit one that has become more acute in the second Trump Administration. As Ernest Hemingway wrote of bankruptcy in *The Sun Also Rises*, the decline of the American state happened in two ways, "[g]radually and then suddenly."<sup>3</sup> Disrupting decline will require not just a commitment to building state capacity but understanding and accepting the uncomfortable truth that many of the causes of state decline have been longstanding.

First, let me clarify some terms. By "the American state," I mean the United States government's strength in four areas. First is the state's ability to operate according to principles of rationality and legality. Max Weber described this as rational-legal authority, as distinct from traditional or charismatic authority.<sup>4</sup> The critical components of this element are that state decisions are made based on reason and the rule of law, rather than cronyism, corruption, patrimonialism, or the personal whims or preferences of leaders and their staffs or allies.<sup>5</sup> For short, I'll call this the *rationality* element. The second element of "the American state" is its ability to deliver positive life outcomes to citizens.<sup>6</sup> This aspect of state power covers a range of substantive features from critical social services, like healthcare, food and clean water, and housing to personal and community security. A state that cannot deliver such benefits to its population is a state that will have few supporters among

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<sup>1</sup> For one part of this effort, see *Fact Sheet: President Donald J. Trump Reins in Government Overreach and Begins Deconstruction of Unconstitutional Administrative State*, WHITE HOUSE, (Feb. 19, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-reins-in-government-overreach-and-begins-deconstruction-of-unconstitutional-administrative-state> [https://perma.cc/668L-KUPD].

<sup>2</sup> See, e.g., Jonathan Rauch, *One Word Describes Trump*, THE ATLANTIC (Feb. 24, 2025), <https://www.theatlantic.com/ideas/archive/2025/02/corruption-trump-administration/681794> [https://perma.cc/DP79-UJ3X].

<sup>3</sup> ERNEST HEMINGWAY, *THE SUN ALSO RISES* 119 (1926).

<sup>4</sup> See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 329–41 (Talcott Parsons ed., A. M. Henderson & Talcott Parsons trans., Oxford Univ. Press 1947) (1920).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., Francis Fukuyama, *What is Governance* 3 (Ctr. for Glob. Dev., Working Paper No. 314, 2013), [https://www.cgdev.org/sites/default/files/1426906\\_file\\_Fukuyama\\_What\\_Is\\_Governance.pdf](https://www.cgdev.org/sites/default/files/1426906_file_Fukuyama_What_Is_Governance.pdf) [https://perma.cc/E866-5HUI] (defining governance as including the ability to "deliver services").

the population.<sup>7</sup> I call this the *delivery* element. The third element of “the American state” is its ability to prevent bad behavior by private actors in society. Many constitutional theorists and liberal- or libertarian-leaning commentators tend to focus on the constraints on state power,<sup>8</sup> but the affirmative power of the state is prior to the need for constraining state power: A state that has no power need not be constrained. As James Madison put it in Federalist 51, “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must *first* enable the government to control the governed; and in the next place oblige it to control itself.”<sup>9</sup> The state must be able to prevent not only violence and threats, but also exploitation, fraud, cheating, scams, and other harms between private persons.<sup>10</sup> Call this the *regulatory* element. The final element is the capacity for institutional reform and evolution. The political system and those within it must have a commitment to institutional capacity and statebuilding, while recognizing the need to improve structures and processes. Call this the *evolutionary* element. Because technologies, populations, and needs change, institutions must change as well in order to deliver and regulate and do so in efficient, effective rational-legal terms. A state that cannot adapt declines by definition. In sum, the American state, as I use the term, must be able to rationally and legally exercise the power to deliver benefits, regulate harms, and evolve with changing conditions.

I use the term “secular” in the economic sense.<sup>11</sup> So, by “secular” decline, I mean that the American state’s ability to do these four things is in decline and that this decline is not a short-term aberration or the result of some cyclical phenomenon, such as partisan control. It is a long-term trend that has been in process for many years and

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<sup>7</sup> See, e.g., Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185 (2023); WALTER LIPPMANN, PUBLIC OPINION 312 (1922); DAVID RUNCIMAN, HOW DEMOCRACY ENDS 169–71 (2018). For an overview from the statebuilding literature, see Claire McLoughlin, *When Does Service Delivery Improve the Legitimacy of a Fragile or Conflict-Affected State?*, 28 GOVERNANCE 341, 343 (2014).

<sup>8</sup> See generally, e.g., Randy E. Barnett, *Is the Constitution Libertarian?*, 2008–2009 CATO SUP. CT. REV. 9 (2009) (explaining the structural constraints placed on the states through the Constitution and other sources).

<sup>9</sup> THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). On the role of constitutional and international law constraints on the state, see DARYL J. LEVINSON, LAW FOR LEVIATHAN: CONSTITUTIONAL LAW, INTERNATIONAL LAW, AND THE STATE (2024) (explaining that the development of constitutional and international law has made the state subject to law, even though legal thought has understood law as the product of the state).

<sup>10</sup> Cf. Fukuyama, *supra* note 6, at 3 (recognizing the importance of making and enforcing rules).

<sup>11</sup> See, e.g., Will Kenton, *Secular Market: Definition vs. Cyclical, How it Works and Example*, INVESTOPEDIA (Sept. 25, 2021), <https://www.investopedia.com/terms/s/secularmarket.asp> [https://perma.cc/5XCW-TQRJ].

will continue for many years going forward, absent some exceptional disruption. Any discussion of “decline” should also proceed from some baseline. A reasonable baseline for American state capacity might be the late 1960s or early 1970s, a time in which state capacity and ambitions were high along a range of metrics. The exact date is arbitrary, of course, but perhaps the period of moon landings (1969–1972) can operate as a symbolic high-water mark.

The secular decline thesis differs in important ways from how legal scholars, commentators, and political leaders have described recent shifts in American governance. One group interpreted President Trump, during his first term, as an exception to the American tradition and to presidential norms.<sup>12</sup> As a presidential hopeful in 2019, Joe Biden famously said that the Trump years would be remembered as an aberration.<sup>13</sup> On this theory, the decline of the American state is Trump-specific. We might call this camp the Trump exceptionalists.

A second group does not see Trump himself as exceptional but instead interprets the battle over the administrative state as asymmetric and polarized. On this approach, Republicans are the party of small government and have an agenda to break down state capacity, while Democrats are, generally speaking, the party that supports government institutions. Views along these lines have been common for decades, as Republican leaders have decried federal power and conservative activists have sought to cut government to a size where it could be “drown[ed] . . . in the bathtub.”<sup>14</sup> Liberal legal scholars largely fall into this camp. Scholars have offered general theories of “structural deregulation,”<sup>15</sup> “administrative sabotage,”<sup>16</sup> and the rise of “anti-administrativism,”<sup>17</sup> while associating them with Republican presidents Nixon, Reagan, and Trump, as well as the conservative legal movement.<sup>18</sup>

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<sup>12</sup> See, e.g., Katherine Shaw, *Partisanship Creep*, 118 NW. U. L. REV. 1563, 1599–1600 (2024) (arguing that although efforts to “undermine norms of independence, nonpartisanship, and expertise” of the civil service did not begin with the first Trump Administration, prior presidents were not as ambitious in targeting the civil service nor did they have so much judicial support).

<sup>13</sup> Matthew Yglesias, *Joe Biden’s Surprisingly Controversial Claim that Trump Is an Aberration, Explained*, Vox (May 13, 2019, 8:30 AM), <https://www.vox.com/2019/5/13/18535239/joe-biden-trump-aberrant-aberration> [https://perma.cc/J8A3-LPH5].

<sup>14</sup> Morning Edition, *Conservative Advocate*, NPR, at 07:31 (May 25, 2001, 12:00 AM), <https://www.npr.org/2001/05/25/1123439/conservative-advocate> [https://perma.cc/4PDX-JUNK] (quote from Grover Norquist).

<sup>15</sup> Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

<sup>16</sup> David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022).

<sup>17</sup> See Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

<sup>18</sup> See Freeman & Jacobs, *supra* note 15, at 588–89 (discussing Nixon, Reagan, and Trump); Noll, *supra* note 16, at 783 (discussing the conservative legal movement). For a

They have, in particular, described in great detail the ways in which the first Trump Administration deregulated agencies,<sup>19</sup> broke down the powers and capacities of those agencies, and attempted to achieve what Trump advisor Steve Bannon once called the “deconstruction of the administrative state.”<sup>20</sup> We might think of this group as largely aligning with the cyclical story of decline: Decline might occur in Republican administrations, but rebuilding can occur in Democratic ones.<sup>21</sup>

Another group, mostly composed of conservatives, admits and celebrates its opposition to the administrative state as currently constituted and believes that such a position is not declinist.<sup>22</sup> Rather, the group thinks shrinking and restricting the capacity of the state will make government operations “better” and “more legitimate.”<sup>23</sup>

The secular decline thesis differs from each of these perspectives. It holds that decline is neither exceptional nor cyclical and that recent anti-administrativist efforts have meaningful consequences when placed in the broader context of secular decline.<sup>24</sup>

To show that we are in a period of secular decline of the American state, Part I outlines fifteen dynamics in American politics, law, policy, and society that all push in the direction of secular decline. Some of these dynamics have been at play for decades, contributing to the already comparatively weak American state. Others are recently emergent or systemic features of decline. All of them, however, will on balance likely lead to a decline in the rationality, delivery, regulatory, or evolutionary abilities of the state. In Part II, I turn to the consequences of decline and argue that decline is significant and problematic in at least six

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discussion that focuses on Trump, but also discusses the precursors in the Republican Party, see RUSSELL MUIRHEAD & NANCY L. ROSENBLUM, *UNGOVERNING: THE ATTACK ON THE ADMINISTRATIVE STATE AND THE POLITICS OF CHAOS* (2024).

<sup>19</sup> See Freeman & Jacobs, *supra* note 15, at 592–93; Noll, *supra* note 16, at 811 (arguing that propaganda and disinformation are tools of sabotage that are difficult for other branches to check and a sign of things to come).

<sup>20</sup> Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for ‘Deconstruction of the Administrative State,’* WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html) [<https://perma.cc/G46U-TT2C>].

<sup>21</sup> See Metzger, *supra* note 17, at 69 (framing anti-administrativism within “an ongoing national struggle between conservatism and progressivism”).

<sup>22</sup> See, e.g., Aaron L. Nielson, *Deconstruction (Not Destruction)*, 150(3) DÆDALUS 143, 143 (2021) (“The types of reforms realistically on the table . . . should not enfeeble the federal government but may produce better policy in a fairer, more legitimate way.”).

<sup>23</sup> *Id.*

<sup>24</sup> There are some scholars who have taken an approach more aligned with the secular decline thesis, and I draw upon their work throughout. Francis Fukuyama’s work is perhaps most notable for its scope and scale. FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY* (2014). Other scholars have tackled specific topics and are cited in the appropriate sections.

ways: a rise in harms to consumers, increased economic instability, less innovation, weakened resilience in crises, weakening global power and the rise of the power of adversaries, and social fracturing within society. In Part III, I identify four emergent futures for the administrative state: the deconstruction of the administrative state, neopatrimonialism and crony capitalism, the abundance agenda, and the antimonopoly state. I show that these emergent futures are either admittedly declinist, likely to lead to decline in one or more of the elements of state ability, or unlikely to be implemented successfully given the broader trends already identified (again, barring some exceptional disruption).

Given these downsides, can anything be done about secular decline? In Part IV, I consider the possibility of disrupting decline. Disrupting decline would realistically require a significant crisis or backlash that creates pressure for reviving a state defined by the rule of law, delivery of services, regulatory capacity, and evolutionary ability. It would also require a sea-change in how political leaders wield political power. A brief conclusion follows.

## I

### THE DYNAMICS OF SECULAR DECLINE

The secular decline of the American state is the function of a variety of factors. No single one is the sole determinant of decline, and many of the factors are interconnected. In this Part, I describe fifteen dynamics that contribute to the secular decline of the American state. After first discussing some generally applicable principles about the nature of state capacity building and persistence, this Part turns to longstanding trends contributing to secular decline and ends with a discussion of more recent developments. This account is not necessarily comprehensive. There may be other factors that also contribute to secular decline. But it is an extensive list, and it is long enough that it should flip the burden of proof to those who think decline is exceptional or cyclical.

#### A. *General Principles*

*The Asymmetry of Building and Breaking.* Building is harder than breaking. The development of the state was a multi-century project that ultimately resulted in the replacement of patrimonial forms of governance with expert, rational-legal bureaucracies.<sup>25</sup> This process required time, resources, the development of expertise, and the creation

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<sup>25</sup> There are many accounts of the rise of the state, but all take place over a long period of time. See, e.g., FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION* xii–xiii (2011); CHARLES TILLY, *COERCION, CAPITAL, AND*

of institutions that could persist over time and operate according to those rational-legal principles.<sup>26</sup> Breaking such institutions is comparatively easy. One can fire experts, eliminate positions, outsource government operations, and privatize public resources. But it is difficult to rapidly recruit new hires with decades of specialized experience and expertise or to insource privatized functions.<sup>27</sup>

To see why, consider an analogy from construction. Demolition requires comparatively little precision or skill. One can wield a sledgehammer indiscriminately, take a wrecking ball to a structure, or simply blow it up with explosives. Building, however, requires planning, in addition to extraordinary skill and precision. There needs to be a comprehensive plan for the building's design, one that considers dozens of factors, from climate and topography to the location and flow of rooms to the needs of users. Construction itself requires attention to detail: ensuring right angles, seamless water connections, and the like. The process also involves coordinating many different participants: In addition to general construction workers, there are electricians, plumbers, landscapers, and others involved, and the timing of when they arrive is critical to project management. As projects get bigger and more complicated, more advance planning is needed to keep them on time and on budget.<sup>28</sup> The work of statebuilding—and state demolition—is not so different.

The asymmetry of building and breaking renders cyclical theories of decline implausible. If one administration severely weakens state capacity, the next administration cannot just snap its fingers and undo that weakness immediately.<sup>29</sup> It may take years to undo the damage, rehire experts or develop new talent, and rebuild or refashion capacities that are essential.<sup>30</sup> The asymmetry of building and breaking thus reverses the old idiom about progress. Rather than two steps forward and one step back, state capacity may move two steps backward and, at

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EUROPEAN STATES, AD 990–1990, at 2 (1990); Hendrik Spruyt, *The Origins, Development, and Possible Decline of the Modern State*, 5 ANN. REV. POL. SCI. 128–29 (2002).

<sup>26</sup> Spruyt, *supra* note 25, at 129.

<sup>27</sup> For a discussion of the difficulties, see JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER 39–43 (2023).

<sup>28</sup> See BENT FLYVBJERG & DAN GARDNER, HOW BIG THINGS GET DONE 17–19 (2023).

<sup>29</sup> See, e.g., Charlie Savage, *Justice Department to Recharge Civil Rights Enforcement*, N.Y. TIMES (Aug. 31, 2009), <https://www.nytimes.com/2009/09/01/us/politics/01rights.html> [<https://perma.cc/Q5WK-HP8V>] (quoting Attorney General Eric Holder seven months into the Obama Administration as saying that “the wounds that were inflicted on [the civil rights] division were deep, and it will take some time for them to fully heal”).

<sup>30</sup> See, e.g., Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. TIMES (Oct. 6, 2021) (explaining that many of Trump’s rollbacks cannot be unilaterally reinstituted by another president as many rollbacks were carried out by putting in place new regulations).



best, one step forward. The result is neither slow progress nor tit-for-tat cyclical stagnation, but secular decline.

*Contagion in Systems.* After the financial crisis in 2008, scholars and commentators pointed out that one of the problems in the U.S. financial system was the degree of interconnection between institutions.<sup>31</sup> The metaphorical disease in one institution could spread to others, which commentators called “contagion.”<sup>32</sup> Thus, when Lehman Brothers collapsed, the crisis could not be contained within the boundaries of the firm. Rather, the failure of Lehman itself created problems that spread throughout the financial sector, in part due to the interconnections in the sector.<sup>33</sup>

The withdrawal of state capacity can create similar dynamics. State programs are often deeply interconnected into other parts of society: state and local governments, non-profit organizations, corporations, and individuals.<sup>34</sup> These other entities often rely on state programs, not just for funding or services, but for the infrastructure needed to operate. For example, if the government weakens the air traffic control system, that does not just mean a reduction in federal spending. It would also severely impact passenger airlines, air freight shipping, tourism, commerce, and a range of other services in the economy. The collapse of one feature of the system can thus have secondary and tertiary effects within society. These effects might even further weaken state capacity, creating a downward spiral as they erode other aspects of state delivery or regulation. Consider the consequences of weakening the postal system by cutting back frequency of service or the number of post offices. This might seem inconsequential as it would slightly

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<sup>31</sup> See, e.g., Ganesh Sitaraman, *Unbundling ‘Too Big to Fail,’* 3 CTR. FOR AM. PROGRESS 3 (July 2014); Alice Rivlin, *Systemic Risk and the Role of the Federal Reserve*, PEW TASK FORCE ON FIN. REFORM (2009), [https://www.brookings.edu/wp-content/uploads/2016/06/0729\\_systemic\\_risk\\_rivlin.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0729_systemic_risk_rivlin.pdf) [<https://perma.cc/HC68-VPEG>]; Sheri Markose, *Too Interconnected to Fail*, Presentation to IMF Workshop on Operationalizing Systemic Risk Monitoring (May 26–28, 2010), available at <https://www.imf.org/external/pubs/ft/wp/2012/wp12282.pdf> [<https://perma.cc/V4R5-3FF4>].

<sup>32</sup> See Jeffrey N. Gordon & Christopher Muller, *Confronting Financial Crisis: Dodd-Frank’s Dangers and the Case for a Systemic Emergency Insurance Fund*, 28 YALE J. REGUL. 151, 160 (2011).

<sup>33</sup> See HAL S. SCOTT, CONNECTEDNESS AND CONTAGION 5–14, 67–78 (2016).

<sup>34</sup> On federalism, see, for example Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1556–60 (2012) (discussing cooperative federalism). For a discussion of federal programs that operated through civil society, non-profits, and local governments, see, for example, Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1272–78 (1986) (describing Great Society programs). For a particular example, consider Head Start, which operates through public, non-profit, and for-profit entities. See KAREN E. LYNCH, CONG. RSCH. SERV., IF11008, HEAD START: OVERVIEW AND CURRENT ISSUES (2018).



extend delivery times for junk mail, holiday cards, and packages. But it could also severely impact a wide range of other activities: passport and driver's license renewals, receipt of Social Security and benefits checks that are essential for paying bills or for food. Indeed, a former Lehman Brothers executive has observed that exactly this pattern is likely to happen in the international aid and development sector with the shuttering and withdrawal of funding from the U.S. Agency for International Development.<sup>35</sup> In short, decline in one aspect of state capacity can, because of contagion, lead to decline in others.

*The Fragility of Credible Commitments.* One of the great achievements of the modern state was its ability to make credible commitments to members of society.<sup>36</sup> As an institution, the modern state solves important interpersonal and intertemporal problems. Individuals might change their minds on a whim, or leave the country, or die. The modern state doesn't have these problems. It lasts longer than any individual, and it has rational-legal rules and bureaucracies that ensure that decisions do not change at the whimsy of a person with a brief tenure in office.<sup>37</sup> States are thus able to make commitments about all kinds of important things: rules of property ownership and the enforceability of contracts, investments in the future, and the repayment of debts. A state whose commitments will credibly be respected and enforced benefits from the stability that comes with commitment.<sup>38</sup> A state that cannot make credible commitments will suffer: After all, who would want to invest in, contract with, or even support a state that cannot keep its promises?

Building credibility of commitment is difficult because it requires self-restraint and trust. This is why it was such an achievement in the 17th century.<sup>39</sup> It is also one reason why post-conflict reconstruction is so difficult and particularly why statebuilding under situations of foreign occupation and counterinsurgency is rarely successful.<sup>40</sup> Once

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<sup>35</sup> David Davies, *The Global Aid Industry is Repeating the Mistakes that Caused the 2008 Financial Crisis: A Warning from a Former Leader at Lehman Brothers*, NEXTBILLION (Mar. 3, 2025), <https://nextbillion.net/global-aid-industry-repeating-mistakes-that-caused-2008-financial-crisis-warning-from-former-leader-lehman-brothers> [<https://perma.cc/JD82-P82X>].

<sup>36</sup> Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HIST. 803, 817 (1989).

<sup>37</sup> DAVID RUNCIMAN, *THE HANDOVER* 23 (2023).

<sup>38</sup> North & Weingast, *supra* note 36 at 806.

<sup>39</sup> *Id.* at 805.

<sup>40</sup> See Christopher J. Coyne & Peter J. Boettke, *The Problem of Credible Commitment in Reconstruction*, 5 J. INST. ECON. 1 (2009) (arguing that sustainable reconstruction will fail and be distrusted by the populace if there is a lack of credible commitment); see also GANESH SITARAMAN, *THE COUNTERINSURGENT'S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* (2012).

established, credibility of commitments is fragile. It is easy to lose because the failure to keep a commitment raises questions of whether the state can be trusted in the future. The failure to keep a single, major commitment could lead to a crisis. Repeat failures could doom the state.

In light of the fragility of credible commitments, the Trump Administration's decision to cancel hundreds of U.S. government contracts with third parties, across multiple domains—international development,<sup>41</sup> university funding,<sup>42</sup> and other areas—is particularly worrying. If the U.S. government is not a credible partner in contracts or grants, counterparties in the future will not want to rely on it. That reliance matters because it gives the state, which outlasts one person or administration, the ability to achieve longer-term goals, from economic growth and development to technological innovations and breakthroughs.

*The Red Queen Effect.* In evolutionary theory, the “red queen hypothesis” is that species that cohabit in an ecosystem may need to evolve together.<sup>43</sup> If one species fails to evolve, evolution in others or the ecosystem may lead to that species's decline. In other words, the failure to change leads to decline. The hypothesis's name comes from the Red Queen's observation in *Alice in Wonderland* that in Wonderland, “it takes all the running you can do to keep in the same place.”<sup>44</sup>

State capacity is similar. States must grow and evolve with changes in society. Preserving the status quo is decline. As social conditions, technology, and behaviors change, state capacity to regulate and deliver must also do so.<sup>45</sup> Since the 1950s, to take the post-World War II period as a baseline, the population of the United States has more than doubled.<sup>46</sup>

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<sup>41</sup> See Jennifer Hansler & Kit Maher, *Rubio Says Trump Administration Canceling 83% of Programs at USAID and Intends to Move Remaining Ones to State Department*, CNN (Mar. 10, 2025, 9:19 AM), <https://www.cnn.com/2025/03/10/politics/rubio-usaid-contracts-state-department> [<https://perma.cc/S3VG-6SDJ>] (“The Trump administration is canceling 83% of programs at the US Agency for International Development . . .”).

<sup>42</sup> See Jennifer Peltz, *Trump Administration Cancels \$400M in Grants and Contracts with Columbia University*, AP (Mar. 7, 2025, 5:10 PM), <https://apnews.com/article/columbia-university-protests-antisemitism-palestine-israel-9c209ce040e4b60d2702b40b9c2fb321> [<https://perma.cc/PP6H-WR9A>].

<sup>43</sup> See Leigh Van Valen, *A New Evolutionary Law*, 1 *EVOLUTIONARY THEORY* 1, 17–21 (1973). For an application to businesses, see WILLIAM P. BARNETT, *THE RED QUEEN AMONG ORGANIZATIONS: HOW COMPETITIVENESS EVOLVES* (2008).

<sup>44</sup> LEWIS CARROLL, *THROUGH THE LOOKING GLASS: AND WHAT ALICE FOUND THERE* 38 (Harper & Bros. 1902) (1871) (emphasis omitted).

<sup>45</sup> Cf. FRANCIS FUKUYAMA, *supra* note 24, at 462–63; Samuel P. Huntington, *Political Development and Political Decay*, 17 *WORLD POL.* 386 (1965).

<sup>46</sup> See *Historical Population Change Data (1910–2020)*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html> [<https://perma.cc/5GZ5-XGJL>].

Industrial production has fundamentally transformed, with increased automation and offshoring.<sup>47</sup> Old industries like finance have become far more complicated. Entirely new industries have emerged—such as technology platforms—with no dedicated regulator. New challenges, like climate-change-driven extreme weather events and cyberattacks, are common.

From the perspective of such changes, the American state has been eroding for decades. As public administration scholars have pointed out,<sup>48</sup> federal civilian-agency employment levels have been largely stagnant since the Eisenhower Administration<sup>49</sup> and the share of U.S. workers employed by the federal government has declined significantly, even though the population and economic complexity have increased.<sup>50</sup> Far from being lazy or ineffective, scholars have shown that federal workers are overworked,<sup>51</sup> and many are underpaid.<sup>52</sup> And rather than being overfunded, government agencies are actually severely underfunded to achieve their missions.<sup>53</sup> The rise

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<sup>47</sup> See ANDRE BARBE & DAVID RIKER, THE EFFECTS OF OFFSHORING ON U.S. WORKERS: A REVIEW OF THE LITERATURE, J. INT'L COM. & ECON. 2 (2018), [https://www.usitc.gov/publications/332/journals/offshoring\\_and\\_labor\\_final.pdf](https://www.usitc.gov/publications/332/journals/offshoring_and_labor_final.pdf) [<https://perma.cc/3R5A-B6QQ>]; Richard Baldwin, *Globalisation, Automation and the History of Work: Looking Back to Understand the Future*, CTR. FOR ECON. POL'Y RSCH. (Jan. 31, 2019), <https://cepr.org/voxeu/blogs-and-reviews/globalisation-automation-and-history-work-looking-back-understand-future> [<https://perma.cc/N97M-WR5Y>].

<sup>48</sup> See Paul C. Light, *The True Size of Government*, VOLCKER ALLIANCE, 3–4 (2017) (examining federal workforce employment over the decades to show periods of rise and decline).

<sup>49</sup> See *Executive Branch Civilian Employment Since 1940*, U.S. OFF. OF PERS. & MGMT. <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940> [<https://perma.cc/PF5Z-Y4S4>].

<sup>50</sup> See Elaine Kamarck, *Is Government Too Big? Reflections on the Size and Composition of Today's Federal Government*, BROOKINGS (Jan. 28, 2025), <https://www.brookings.edu/articles/is-government-too-big-reflections-on-the-size-and-composition-of-todays-federal-government> [<https://perma.cc/LGA7-AUWJ>].

<sup>51</sup> Lily Petrucelli & Mike Ritz, *What Is Driving Federal Government Burnout?*, GALLUP (Mar. 25, 2024), <https://www.gallup.com/workplace/612518/driving-federal-government-burnout.aspx> [<https://perma.cc/U9U2-GU2F>].

<sup>52</sup> See CONG. BUDGET OFF., COMPARING THE COMPENSATION OF FEDERAL AND PRIVATE-SECTOR EMPLOYEES IN 2022, at 16 tbls.2 & 3 (2024), <https://www.cbo.gov/system/files/2024-04/59970-Compensation.pdf> [<https://perma.cc/NC5W-5N6V>] (explaining that workers in the public sector with professional or doctorate degrees receive less compensation, on average, than similar private-sector employees).

<sup>53</sup> See, e.g., Lisa Friedman, *Depleted Under Trump, a 'Traumatized' E.P.A. Struggles with Its Mission*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2023/01/23/climate/environmental-protection-agency-epa-funding.html> [<https://perma.cc/C7AT-44X3>] (discussing how lack of funding has forced staffing cuts that leave remaining employees unable to keep up with their usual level of polluter prosecution); Steven Greenhouse, *US Labor Leaders Say Underfunding at Federal Agency Has 'Reached Crisis Stage'*, GUARDIAN (Aug. 17, 2022, 7:00 AM), <https://www.theguardian.com/us-news/2022/aug/17/us-labor-agency-union-activity> [<https://perma.cc/>]

of outsourcing and contractors is no substitute: In some cases, it has meant higher costs and worse quality services, which some have argued affirmatively weakens state capacity and expertise.<sup>54</sup> Comparative stagnation over time, rather than growth and evolution, has meant a decades-long decline in state capacity that was underway well before the late 2010s.<sup>55</sup>

The American political system has some tendencies toward the Red Queen Effect. Even while the nation's challenges become more complex, neither presidents nor Congress have much incentive to invest in the hard work of public administration. As David Lewis and Nicholas Bednar have observed, presidents have "few incentives to invest effort in capacity building in most agencies."<sup>56</sup> Presidents tend, for example, to prioritize appointing policy staff over managerial and operational staff, and to focus on agencies with responsibility for presidential policy priorities.<sup>57</sup> Congress, too, has few incentives to invest in state capacity or effective public administration.<sup>58</sup> Voters generally focus on substantive policy issues, like the economy, not on state institutions.<sup>59</sup> Members of Congress have limited time to allocate, so they often do not prioritize state capacity. And oversight generally is backwards looking, after a crisis, rather than ongoing, in part because there are few benefits from preventing crises.<sup>60</sup> The result is that political leaders systematically neglect public administration.

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JK7H-42QJ] (explaining how inflation and a long freeze on the NLRB budget has led to staffing cuts and an inability to handle union cases).

<sup>54</sup> See generally JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* (2017); MARIANA MAZZUCATO & ROSIE COLLINGTON, *THE BIG CON: HOW THE CONSULTING INDUSTRY WEAKENS OUR BUSINESSES, INFANTILIZES OUR GOVERNMENTS, AND WARPS OUR ECONOMIES* (2023).

<sup>55</sup> See David E. Lewis, *Deconstructing the Administrative State*, 81 J. POL. 767, 767 (2019) (positioning Trump's approach toward the administrative state in the context of years of previous presidents and governments neglecting the infrastructure of the United States government).

<sup>56</sup> Nicholas R. Bednar & David E. Lewis, *Presidential Investment in the Administrative State*, 118 AM. POL. SCI. REV. 442, 442 (2024).

<sup>57</sup> *Id.* at 455.

<sup>58</sup> Lewis, *supra* note 55, at 768–71.

<sup>59</sup> See *Most Important Problem*, GALLUP, <https://news.gallup.com/poll/1675/most-important-problem.aspx> [<https://perma.cc/BC3H-WHRS>] (showing the dominant importance of economic issues to voters over time). The 2024 election cycle was an outlier in this regard, with 21% of Americans surveyed telling Gallup in November 2024 that "[t]he government/[p]oor leadership" was the "most important problem facing the country today." *Id.* It is possible that this response was merely a proxy for President Biden.

<sup>60</sup> See Lewis, *supra* note 55, at 769. For the classic on this point, see Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

## B. Longstanding Trends

*American Skepticism of the State.* Americans have long feared state power. “When an American thinks about the problem of government-building,” Samuel Huntington once observed, “he directs himself not to the creation of authority and the accumulation of power but rather to the limitation of authority and the division of power.”<sup>61</sup> The American tradition of fearing state power inspired the original Madisonian system of checks and balances, which, as Francis Fukuyama has observed, has become a “vetocracy,” in which the difficulty of passing new legislation and executing on policy is high.<sup>62</sup>

Skepticism of state power has meant that the United States has often built state capacity in minimalist, convoluted, and complicated ways. Rather than develop consistent national policies that are executed by well-functioning federal bureaucracies, in many areas the United States pursues policy through complex “cooperative federalism” programs, in which federal directives and funding operate through state governments, with variation in policy design and execution.<sup>63</sup> In other areas, social programs operate through funding to civil society groups and private actors, rather than through public provision.<sup>64</sup> These programs often fail to achieve their aims, especially when compared to similar national programs.<sup>65</sup> And, notably, capacity at the subnational state and local levels is often weak.<sup>66</sup> This is not to say that there might not be some benefits to designing programs this way. But when compared to the alternative baseline of uniform, national governance, it does mean that even the supposedly strong American state is relatively weak. Social Security, Medicare, and the U.S. Postal Service are notable precisely because they are nationally-run, uniform public programs. This is unlike strong-state countries that have many national-level public programs and public enterprises.

Outright hostility to national power has also persisted even as the United States developed into a modern state in the 19th and 20th centuries and became more successful at rational-legal regulation and delivery.<sup>67</sup> The opposition to the New Deal never truly went away.

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<sup>61</sup> SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 7 (7th prtg. 1973).

<sup>62</sup> FUKUYAMA, *supra* note 24, at 488–505.

<sup>63</sup> For additional literature on cooperative federalism, see *supra* note 34.

<sup>64</sup> *Id.*

<sup>65</sup> For a theoretical discussion, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

<sup>66</sup> See Nicholas Bagley & David Schleicher, *The State Capacity Crisis* (U. Mich. Pub. L. Working Paper, Paper No. 24-057, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5188510](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5188510) [<https://perma.cc/322L-T72J>].

<sup>67</sup> Noll, *supra* note 16, at 776–77.

Rather, business interests and conservative opponents developed a multi-decade movement to overthrow its advances in bureaucratic management.<sup>68</sup> Critics on the left also feared state power and led campaigns to deregulate entire sectors of government, while adding new procedures to curtail bureaucratic autonomy.<sup>69</sup>

An appropriate amount of bureaucratic autonomy—not too much and not too little—is critical to the state working well.<sup>70</sup> “Agents who are not given sufficient leeway to exercise judgment in the crafting and implementation of policies will not perform their jobs well . . . .”<sup>71</sup> At the same time, too much leeway means that civil servants will not be democratically accountable. Fukuyama argues that there is a need for balance between the two poles of autonomy and subordination.<sup>72</sup> America’s skepticism of the state generally pushes toward imbalance, with insufficient autonomy, convoluted program designs, and an overloading of processes and hurdles—the “red tape” that makes efficient and effective execution of policies difficult.<sup>73</sup> The result is a state that has difficulty achieving society’s goals.

*Neoliberal Ideology and Policy.* For the last half-century, neoliberal ideas have dominated public policy.<sup>74</sup> I have defined neoliberal ideas elsewhere as a focus on deregulation, privatization, trade liberalization, and austerity.<sup>75</sup> Both Republicans and Democrats supported these policies from the late 1970s through the 2010s.<sup>76</sup> These policies

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<sup>68</sup> See *id.* (discussing how the post-World War II conservative movement’s commitment to economic liberty and free-market philosophy has resulted in opposition to federal regulation).

<sup>69</sup> See PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM* xiv–xv (2021) (arguing that critics from the political left were both suspicious of agency decision-making and also advocated for laws that would ensure the government would serve the public).

<sup>70</sup> See FUKUYAMA, *supra* note 24, at 511 (stating that bureaucratic autonomy is important for the government to function properly).

<sup>71</sup> *Id.*

<sup>72</sup> See *id.* at 522–23 (discussing how governments need resources and organizational capital to work effectively, and that democratic principals must grant bureaucratic agents a degree of autonomy according to their capacity).

<sup>73</sup> FUKUYAMA, *supra* note 24, at 514.

<sup>74</sup> See GARY GERSTLE, *THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA* 2 (2022) (discussing how the neoliberal order lasted from the 1970s to 2010s, grounded in beliefs in the free market, innovation, and freedom); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 10 (2005) (describing how neoliberalism emerged in the 1970s as a way to improve individual well-being through an institutional framework that advances private property, free trade, and free market economic policies).

<sup>75</sup> GANESH SITARAMAN, *THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA* 3 (2019).

<sup>76</sup> See *id.* at 3–4 (discussing how both conservatives and neoliberals supported the reduction of government size and believed market logic would regulate social interests).



consistently involved withdrawing state capacity to deliver services and to regulate private parties, and they were not replaced with effective alternatives. For example, deregulation in the transportation, banking, communications, and energy sectors were supposed to lead to lower prices and more competition without loss of service to rural areas or other high-cost consumers.<sup>77</sup> But the result has been the opposite in many places: loss of service, higher prices, and less competition than ever before.<sup>78</sup>

Privatization definitionally involved reducing state capacity: Rather than public actors operating public services directly, those services were outsourced to private corporations.<sup>79</sup> But the results of a generation of privatization have not been higher quality services, lower prices for consumers, and reduced costs for government.<sup>80</sup> In many cases, the consequences have been worse services, higher prices for consumers, and increased costs for government.<sup>81</sup>

Trade liberalization has also weakened state capacity, albeit in slightly more indirect ways. With the expansion of free trade agreements in the late 20th century, corporations moved manufacturing capacity outside of the United States. The result was not just losses in jobs and long-term economic distress for affected communities,<sup>82</sup> but also fragile supply chains.<sup>83</sup> When a crisis like COVID-19 occurs, the state's ability to provide for materials that have been offshored are weakened: It takes longer to spin up domestic production in the

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<sup>77</sup> See Ben Dinovelli, *Universal Service by Regulation* 6 (July 23, 2025) (unpublished manuscript) (draft on file with author).

<sup>78</sup> *Id.* at 8.

<sup>79</sup> See E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 3–4 (1987) (defining privatization as the act of reducing the role of the government in order to better satisfy people's needs).

<sup>80</sup> See DONALD COHEN & ALLEN MIKAELIAN, *THE PRIVATIZATION OF EVERYTHING: HOW THE PLUNDER OF PUBLIC GOODS TRANSFORMED AMERICA AND HOW WE CAN FIGHT BACK* 12 (2021) (describing how privatization rests on the assumption that it will be more efficient than the government while in reality providing worse alternatives that profit off of marginalized communities); MICHAELS, *supra* note 54, at 10–11 (discussing how many have assumed that a privatized government results in greater efficiency and lower costs).

<sup>81</sup> See COHEN & MIKAELIAN, *supra* note 80, at 12; MICHAELS, *supra* note 54, at 11–12 (arguing that a privatized government has resulted in a powerful and possibly abusive government with concentrated commercial power).

<sup>82</sup> See David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 234 (2016) (discussing how employment has fallen in US industries that are more linked to import competition).

<sup>83</sup> See Robert Kuttner, *China: Epicenter of the Supply Chain Crisis*, AM. PROSPECT (Feb. 1, 2022), <https://prospect.org/economy/china-epicenter-of-the-supply-chain-crisis> [<https://perma.cc/C6YE-9X8P>] (stating that the strategy of keeping domestic inventory and production minimal and relying on poorly connected global supply chains emerged in the 1970s).

post-industrial era.<sup>84</sup> The result of trade liberalization is a weakening of state capacity to ensure resilient responses to crisis—in addition to the broader destruction of social and economic well-being.

Additionally, fiscal austerity coupled with trickle-down tax policies have sapped state capacity. Rather than adopting policies that increase taxes and using revenues to improve public services, tax cuts have increased deficits and created political pressure for public sector spending cuts; this, in turn, weakens state capacity.<sup>85</sup> The state's inability to deliver effectively for people due to insufficient resources then leads to further antigovernment sentiments and advocacy.<sup>86</sup> The result is a reinforcing loop. Even in the cases in which tax-and-transfer schemes to subsidize those whom the market has left behind have been adopted, they have often failed to provide sufficient service, despite enormous sums of money that have been appropriated.<sup>87</sup>

Of course, all four of these trends also play into one another: Privatization gives more power and authority to corporations, while deregulation removes checks on those same companies. Trade liberalization hollows out communities, while austerity prevents economic and social programs from strengthening them. Neoliberal ideology and its attendant policies have thus contributed to the secular decline of the American state over the last half century.

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<sup>84</sup> See Gary Gereffi, *What Does the COVID-19 Pandemic Teach Us About Global Value Chains? The Case of Medical Supplies*, 3 J. INT'L BUS. POL'Y 287, 295–96 (2020) (discussing how ninety percent of domestic mask production had left the US in the past decade, and attempts to ramp up domestic production in response to COVID-19 faced contract and funding challenges).

<sup>85</sup> See Wesley Tharpe, *States' Recent Tax-Cut Spree Creates Big Risks for Families and Communities*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 30, 2023), <https://www.cbpp.org/research/state-budget-and-tax/states-recent-tax-cut-spree-creates-big-risks-for-families-and> [<https://perma.cc/TXY9-K6ZP>] (noting that where tax cuts weaken state revenues over time, limiting state ability to support public services); Robert Greenstein, *Commentary: With Tax Cuts for the Top, GOP Leaders Now Aim Budget Cuts at the Bottom*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 21, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/12-21-17tax-commentary.pdf> [<https://perma.cc/ULK7-W9RX>] (describing how the 2017 proposed GOP tax bill provides relief for wealth individuals and corporations while denying services and assistance to lower-income families); Paul Krugman, *The Tax-Cut Con*, N.Y. TIMES MAG. (Sept. 14, 2003), <https://www.nytimes.com/2003/09/14/magazine/the-tax-cut-con.html> [<https://perma.cc/6RSP-3F7P>] (discussing how there is a mismatch between expected government benefits and the revenues the government collects; tax cuts result in fewer benefits and assistance which frustrate taxpayers, who are also reluctant to pay more taxes).

<sup>86</sup> See Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185, 189–91 (2024) (arguing that failures to deliver effective government have led to continual dissatisfaction and political turbulence).

<sup>87</sup> See generally Dinovelli, *supra* note 77 (describing this failure across a wide range of cases).

Neoliberal-era alternatives have largely also been ineffective. Transparency policies not only tax bureaucratic capacity, but primarily benefit powerful interest groups that have the resources to use them to gain competitive advantages.<sup>88</sup> Regimes based on user-consent have failed to provide real alternatives to users, instead offering a patina of choice without its reality.<sup>89</sup> “Nudges” and other forms of libertarian paternalism rarely address significant policy questions, and are often designed poorly and evaded.<sup>90</sup>

Despite some nascent efforts and initiatives to move beyond neoliberalism to a post-neoliberal paradigm,<sup>91</sup> there remain leading policy commentators, including on the center-left, who not only defend but also recommend further neoliberal policies as the path forward.<sup>92</sup>

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<sup>88</sup> See David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 123–35 (2018) (describing how transparency policies have been used by interest groups to slow agency oversight and increase influence).

<sup>89</sup> See Daryl J. Levinson & David E. Pozen, *Disconsents* 16–17 (Col. L. Sch. Pub. L. Working Paper, Paper No. 5113308, 2025), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5113308](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5113308) (on file with author) (discussing how the neoliberal economic policies appear to give individuals greater choice but in reality create a more limited and exploitative environment).

<sup>90</sup> For the canonical statement on nudges, see RICHARD H. THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 252–53 (2008) (defining nudges as a form of libertarian paternalism that is unavoidable, and that libertarian paternalism can be useful in improving people's lives while also preserving the ultimate choice for individuals, not the state). For leading critiques, see Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims its Sails and Why*, 127 HARV. L. REV. 1593, 1597 (2014) (stating that behavioral law and economics approaches, including nudges, can lead to inappropriate policy unless they are “pursued more fully and completely”); Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 72–75 (2013) (discussing that nudges fail to be low-cost and effective when faced with opposition).

<sup>91</sup> See SITARAMAN, *supra* note 75 at 5–8 (considering how proposed responses to the crises of neoliberalism are inadequate when they fail to capture the popular will of the people); Felicia Wong, *Overview: Post-Neoliberalism at a Crossroads*, DEMOCRACY J. (Spring 2022), <https://democracyjournal.org/magazine/64/overview-post-neoliberalism-at-a-crossroads> [<https://perma.cc/5ZQ6-65NN>] (proposing a form of democratic post-neoliberalism that advocates for racial equality, direct investment in the public good, and adherence to democratic norms); Larry Kramer, *What Comes After Neoliberalism?*, LONDON SCH. OF ECON. BLOG (Oct. 16, 2024), <https://blogs.lse.ac.uk/politicsandpolicy/what-comes-after-neoliberalism> [<https://perma.cc/J8N5-UZ3B>] (advocating for a form of governance after neoliberalism that is more concerned with wealth distribution and the public, beyond economic needs); Robert Kuttner, *What Comes after Neoliberalism?*, AM. PROSPECT (Mar. 28, 2023), <https://prospect.org/economy/2023-03-28-what-comes-after-neoliberalism> [<https://perma.cc/2ULQ-5EX6>] (discussing how President Biden's promises of a post neoliberal approach are likely to be difficult to achieve as a result of corporate power, racial and cultural divisions, and appeal to regular people).

<sup>92</sup> See, e.g., Matthew Yglesias, *What Was Neoliberalism?*, SLOW BORING (July 11, 2024), <https://www.slowboring.com/p/what-was-neoliberalism> [<https://perma.cc/J9K3-AYS9>] (criticizing characterizations of neoliberalism and the anti-neoliberalism movement); Matthew Yglesias, *Neoliberalism and its Enemies*, SLOW BORING (July 23, 2024), <https://www.slowboring.com/p/neoliberalism-and-its-enemies> [<https://perma.cc/MYW5-VL6Q>]

These policies would continue to lead to a weak or weakening American state.

Importantly, as E.E. Schattschneider once observed, “[n]ew policies create a new politics,”<sup>93</sup> and a generation of neoliberal policies that unleashed corporations and transferred wealth upwards have shaped contemporary political dynamics. In particular, corporate power and the wealthy are extremely influential in politics.<sup>94</sup> Because their interests align with deregulation, privatization, and tax benefits or subsidies, we should continue to expect policy to be systematically skewed in this direction.

*Bureaucratic Reputation: Denigration, Disregard, and Decay.* In his study *The Forging of Bureaucratic Autonomy*, Daniel Carpenter shows that the development and sustenance of bureaucratic reputation was critical to the development of American state capacity.<sup>95</sup> Bureaucratic reputation allows agencies to have independent trust and power, separate from political whims and winds. This enables the state to operate in rational-legal ways to deliver and regulate, even if its actions are not salient or in vogue at any given moment in time. Bureaucratic power and autonomy along these lines need not be extra-legal: An agency could pursue its statutory mandate (e.g. prevent river pollution,

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(advocating for a “neo-neoliberal approach” to trade where trade remains economically beneficial); Matthew Yglesias, *Neoliberalism and its Enemies, Part III*, SLOW BORING (Aug. 7, 2024), <https://www.slowboring.com/p/neoliberalism-and-its-enemies-part> [<https://perma.cc/SME4-PEVG>] (stating that turning away from trade is an overcorrection to economic failures of the 1970s to 1990s).

<sup>93</sup> E. E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF* 288 (1935).

<sup>94</sup> See KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012) (discussing how money plays a large role in politics through lobbying and contributions); MARTIN GILENS, *AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012) (arguing that political equality is linked to economic equality and that corporations and affluent individuals are able to exert influence on government policy); LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2d ed. 2016) (noting where politics has become increasingly more expensive and lobbying by corporations and wealthy organizations has grown over time); CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2017) (discussing how American-policy making is influenced by interest groups and the wealthy); LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING* (2015) (stating that corporate lobbying has become pervasive in American politics, which in turn has become more welcoming to corporate lobbying); ALYSSA KATZ, *THE INFLUENCE MACHINE: THE U.S. CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE* xii–xiii (2015) (presenting how the U.S. Chamber of Commerce operates an “influence machine” that works on behalf of wealthy donors and corporations to influence policy).

<sup>95</sup> DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928*, at 14 (2001).

enforce bank regulations) even if some interest groups oppose that mandate or its specific applications and have powerful advocates in Congress and the press. Carpenter argues that bureaucratic autonomy emerges when political authorities “defer to agency action” because there are “publicly recognized benefits” or there are strong coalitions in civil society who support the agency’s action.<sup>96</sup>

Over the latter part of the 20th and early 21st centuries, leaders in both political parties have denigrated and disregarded bureaucracy, leading to decay in its reputation. Successive presidents regularly framed government and bureaucracy as needing to be shrunk, cabined, and constrained. Ronald Reagan famously declared that the “nine most terrifying words in the English language are: I’m from the Government and I’m here to help.”<sup>97</sup> Bill Clinton declared that the “era of big government is over,”<sup>98</sup> and pursued an aggressive “reinvent[ing] . . . government” agenda to cut bureaucracy, eliminate federal jobs, and outsource public sector work to contractors.<sup>99</sup> Barack Obama sought the power to reorganize government to ensure “more efficiency, better service, and a leaner government,” noting that the process would “reduce the number of government agencies.”<sup>100</sup> During his first term, one of Donald Trump’s cabinet nominees had previously argued that the very department he was nominated to run should be abolished,<sup>101</sup> and Trump himself has regularly attacked the civil service and bureaucracy

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<sup>96</sup> *Id.* at 17.

<sup>97</sup> Ronald Reagan, *The President’s News Conference*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Aug. 12, 1986), <https://www.reaganlibrary.gov/archives/speech/presidents-news-conference-23> [https://perma.cc/DBK8-CXKG].

<sup>98</sup> William Jefferson Clinton, *State of the Union Address*, CLINTON WHITE HOUSE ARCHIVES (Jan. 23, 1996), <https://clintonwhitehouse4.archives.gov/WH/New/other/sotu.html> [https://perma.cc/3M33-CKDN].

<sup>99</sup> Richard C. Kearney & Stephen W. Hays, *Reinventing Government, the New Public Management, and Civil Service Systems in International Perspective*, 18 REV. PUB. PERSONNEL ADMIN. 38, 39 (1998) (“Although wrapped in a blanket of reform and bolstered by a plethora of positive motives, reinventing government’s progress may bring with it a weakening of neutral competence, merit, professionalism, and related values . . .”).

<sup>100</sup> Office of the Press Secretary, *President Obama Announces Proposal to Reform, Reorganize and Consolidate Government*, WHITE HOUSE (Jan 13, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/01/13/president-obama-announces-proposal-reform-reorganize-and-consolidate-gov> [https://perma.cc/Y9SA-WJCU] (internal quotations omitted); *Obama Takes Aim at Government Bureaucracy*, CBS NEWS (Jan. 13, 2012), <https://www.cbsnews.com/news/obama-takes-aim-at-government-bureaucracy> [https://perma.cc/7LHA-3Y2Z].

<sup>101</sup> Brad Plumer, *Rick Perry Once Wanted to Abolish the Energy Department. Trump Picked Him to Run It*, VOX (Dec. 13, 2016), <https://www.vox.com/energy-and-environment/2016/12/13/13936210/rick-perry-energy-department-trump> [https://perma.cc/A8HL-M9WL].

as the “deep state.”<sup>102</sup> Such rhetoric and policies are not designed to build up bureaucratic reputation or autonomy.

The centralization of presidential authority—what then-professor Elena Kagan called presidential administration—may also have contributed to the decline of bureaucratic reputation. Confronted with divided government and the frustration of his legislative agenda, President Clinton increasingly took credit for agency policy and regulatory decisions.<sup>103</sup> Future presidents, Kagan thought, would do the same. The trouble is that as presidents become more intertwined with agency action, it becomes reasonable for the general public, interest groups, and political actors in Congress to take agency actions to be politically motivated and directed, rather than based on legislative direction and expertise. If agencies are merely arms of a president, their ability to retain respect from members of both parties will invariably decline, especially as partisan polarization increases. Presidential control of cabinet and agency policies, regulations, and even press appearances may have furthered this trend. As agencies have less prominence and independent voice in the public sphere, the public knows less about their work.

Finally, when agencies *lose* their reputation for accuracy and precision, their capacity to operate appears to decline. Consider the Centers for Disease Control and public health agencies during the COVID-19 pandemic. Poor messaging choices like telling people not to mask early on (in order to preserve masks for healthcare workers) and downplaying the possibility of a lab leak (even though there was no certainty as to the source of the virus) both backfired: Public health agencies lost credibility and public confidence.<sup>104</sup> A weakened reputation certainly did not help the agency slow or stop

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<sup>102</sup> For a discussion, see STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* 2 (2021) (noting how President Trump branded the deep state as administrators who advanced their own interests and beliefs ahead of the president’s).

<sup>103</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2248–50 (2001).

<sup>104</sup> See Lena H. Sun & Joel Achenbach, *CDC’s Credibility Is Eroded by Internal Blunders and External Attacks as Coronavirus Vaccine Campaigns Loom*, WASH. POST (Sept. 28, 2020), <https://www.washingtonpost.com/health/2020/09/28/cdc-under-attack> [<https://perma.cc/7BJ6-6VXD>] (discussing how the CDC’s coronavirus response made technical mistakes and poor messaging that eroded its credibility); Dylan Scott, *The Most Consistently Botched Part of the US Pandemic Response*, VOX (Jan. 14, 2022), <https://www.vox.com/coronavirus-covid19/22870268/cdc-covid-19-guidelines-isolation-boosters-masks> [<https://perma.cc/8Q8N-N7KA>] (citing the failure of effective communication as the repeated problem throughout the pandemic response); Selena Simmons-Duffin, *Poll Finds Public Health Has a Trust Problem*, NPR (May 13, 2021), <https://www.npr.org/2021/05/13/996331692/poll-finds-public-health-has-a-trust-problem> [<https://perma.cc/5SC3-9RPA>] (finding that declining trust in federal health agencies is part of a period of distrust in government generally).



the rise of anti-vaccine views,<sup>105</sup> as people had less reason to trust the agency. In short, bureaucratic reputation matters a great deal to state capacity—and it has regularly been questioned and criticized.

*Legislative Gridlock.* The United States Congress has, in recent years, been unable to pass significant regulatory legislation or programmatic regulation except under exceptional circumstances.<sup>106</sup> Political party sorting coupled with asymmetric polarization have led to increased partisanship.<sup>107</sup> When government is divided, it is difficult for either party to pass significant legislation because the party opposed to the president is inclined to arrest any presidential priorities.<sup>108</sup> Even when government is unified and one party controls the presidency and both houses of Congress, passing significant regulatory or programmatic legislation is difficult because the filibuster imposes a de facto supermajority requirement for legislation.<sup>109</sup>

These same factors also make legislative oversight of the executive branch difficult and largely toothless. In times of unified government, the president's co-partisans place party loyalty above oversight and accountability,<sup>110</sup> thereby giving deconstructive efforts, corruption, or governmental failures more of a pass than they should get. In times of divided government, oversight hearings and investigations proliferate, but the inability to pass remedial legislation to address abuses of power, deconstructive efforts, or

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<sup>105</sup> See *Vaccine Confidence Falls as Belief in Health Misinformation Grows*, ANNENBERG PUB. POL'Y CTR., UNIV. OF PA. (Nov. 1, 2023), <https://www.annenbergpublicpolicycenter.org/vaccine-confidence-falls-as-belief-in-health-misinformation-grows> [https://perma.cc/Y23G-8X4Q] (finding that belief in vaccine misinformation has risen and confidence in vaccine safety has fallen since 2021).

<sup>106</sup> For one recent account, see Moira Warburton, *Why Congress Is Becoming Less Effective*, REUTERS (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq> [https://perma.cc/DG73-E42C] (discussing how polarization, lack of communications among Congressional members, and partisanship have hampered government efficiency).

<sup>107</sup> Rachel Kleinfeld, *Polarization, Democracy, and Political Violence in the United States: What the Research Says*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 5, 2023), <https://carnegieendowment.org/research/2023/09/polarization-democracy-and-political-violence-in-the-united-states-what-the-research-says?lang=en> [https://perma.cc/B5FM-9KMH] (discussing how political asymmetry is causing the country to be torn apart).

<sup>108</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2340–41 (2006) (citing studies that have found divided governments more frequently fail to pass significant legislation).

<sup>109</sup> See generally ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY 10–11 (2021).

<sup>110</sup> See MOLLY E. REYNOLDS & NAOMI MAEHR, HOW PARTISAN AND POLICY DYNAMICS SHAPE CONGRESSIONAL OVERSIGHT IN THE POST-TRUMP ERA 19 (2023). Cf. Levinson & Pildes, *supra* note 108, at 2352–53 (discussing unified government and partisan loyalty).

governmental failures remains.<sup>111</sup> These partisan dynamics have rightly been described as frustrating the separation of powers theory of the Constitution.<sup>112</sup>

Importantly, they also push in the direction of secular decline. The inability to legislate is, perhaps definitionally, a problem leading to the decline in state capacity: New problems require new solutions and the failure to address those programmatically or regulatorily, or to reform institutions to address new conditions, means the state fails in its mission. The failures of accountability and oversight contribute to decline as well. As violations of law and norms go unpunished and unaddressed, they invite further violations. Rational-legal governance becomes more difficult when there are no consequences for those who flaunt the rules.

The response to legislative gridlock has been twofold. The first response is what Jonathan Gould has termed the “republic of spending.”<sup>113</sup> Given the inability to pass legislation, both parties have shifted their policy efforts toward reconciliation bills, which are exempt from the filibuster’s supermajority requirement.<sup>114</sup> The spending strategy, however, has significant downsides. By the terms of the Byrd Rule, budget reconciliation cannot include “extraneous” provisions, which the Senate parliamentarian has interpreted as including new regulatory requirements, programs, or institutional reforms.<sup>115</sup> This means that the regulatory, delivery, and evolutionary aspects of the American state are frozen even amidst this second-best policymaking strategy. Existing program-delivery can receive more or less funding, but where such programs are irrelevant to the problem or inefficient, bold new programs or significant reforms are not possible.

The second response has been the rise of “presidential regulation.”<sup>116</sup> Presidents have, in recent years, leveraged broadly delegated national security and foreign affairs powers to regulate economic affairs, including domestic affairs.<sup>117</sup> To date, most of these efforts have been tied to national security and have not extended to purely domestic

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<sup>111</sup> See Levinson & Pildes, *supra* note 108, at 2363 (discussing how attempted oversight during times of divided government could result in an “oversight arms race” between the executive branch and Congress (internal citations omitted)).

<sup>112</sup> *See id.*

<sup>113</sup> Jonathan Gould, *A Republic of Spending*, 123 MICH. L. REV. 209, 211–12 (2024) (discussing how Congress has begun to spend in record amounts).

<sup>114</sup> *See id.* at 212.

<sup>115</sup> *Id.* at 232–33.

<sup>116</sup> See Timothy Meyer & Ganesh Sitaraman, *Presidential Regulation*, 42 YALE J. REGUL. 803, 807 (2025) (describing presidential regulation as executive orders that impose regulatory mandates).

<sup>117</sup> *See id.* at 806–07.

regulatory or social provision issues.<sup>118</sup> But even if applied more widely and ambitiously than it has been to date, presidential regulation is insufficient as a pathway to arrest the decline of the American state because it is subject to changing presidential preferences and a variety of other problematic dynamics.<sup>119</sup>

Some might argue that legislative gridlock has *enhanced* state capacity because it allows federal agencies to take the initiative, even based on tenuous statutory authority, to solve policy problems. While this dynamic has undoubtedly been true to some extent, it faces three severe limits. First, some policies simply cannot be implemented without statutes. For example, Congress has passed only one significant pollution control statute since 1990,<sup>120</sup> and as a result, climate change regulations have proceeded in piecemeal, limited ways. Second, executive actions are often easily reversible, creating policy uncertainty and unreliability. The Obama Administration, for example, agreed to the Paris Climate Accord, only for President Trump to withdraw from it,<sup>121</sup> Biden to rejoin it,<sup>122</sup> and Trump to withdraw again.<sup>123</sup> Third, as noted below, the rise of judicial ideologies and doctrines focused on severely restricting agency action increasingly limits the ability of agencies to operate in the absence of clear legislative direction. Piecemeal policies, frequent political reversals, and judicial restrictions on action do not demonstrate the strength of the state but its weakness.

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<sup>118</sup> *But see id.* at 847–49 (describing an Executive Order on artificial intelligence with a largely domestic focus); Annie Karni & Emily Cochrane, *Biden Invokes Defense Powers in a Bid to Ease Formula Shortage*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/05/18/us/politics/biden-baby-formula-shortage.html> [<https://perma.cc/E4R8-LQ3V>] (describing the use of the Defense Production Act to procure baby formula to ease a domestic shortage).

<sup>119</sup> *See* Meyer & Sitaraman, *supra* note 116, at 861–67 (describing the lack of procedural hurdles slowing presidential regulation, lack of informal institutional constraints, and presidential will as reasons for instability).

<sup>120</sup> *See* Michael P. Vandenbergh, *Environmental Law in a Polarized Era*, 38 J. LAND USE 51, 63 (2022). The law was the Lautenberg Chemical Safety Act of 2016, amending the Toxic Substances Control Act. *See* Michael P. Vandenbergh, David J. Vandenbergh & John G. Vandenbergh, *Lamarck Revisited: The Implications of Epigenetics for Environmental Law*, 7 MICH. J. ENV'T & ADMIN. L. 1, 28–29 (2017).

<sup>121</sup> *See Statement by President Trump on the Paris Climate Accord*, TRUMP WHITE HOUSE ARCHIVES (June 1, 2017), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-trump-paris-climate-accord> [<https://perma.cc/JT6N-USNC>].

<sup>122</sup> *See* Anthony J. Blinken, *The United States Officially Rejoins the Paris Agreement*, U.S. DEP'T OF STATE (Feb. 19, 2021), <https://2021-2025.state.gov/the-united-states-officially-rejoins-the-paris-agreement> [<https://perma.cc/LW36-E3A9>].

<sup>123</sup> *See* Nate Perez & Rachel Waldholz, *Trump Is Withdrawing from the Paris Agreement (Again), Reversing U.S. Climate Policy*, NPR (Jan. 21, 2025), <https://www.npr.org/2025/01/21/nx-s1-5266207/trump-paris-agreement-biden-climate-change> [<https://perma.cc/N5YN-YS88>].

*Submerged and Technocratic Policymaking.* Many who support the state and seek to deliver, regulate, and reform the state perhaps unwittingly contribute to secular decline. There is a tendency among some policymakers, particularly Democrats, to hide their policies and the role of the state in advancing those policies—what Suzanne Mettler has called the “submerged state.”<sup>124</sup> For instance, Jack Meserve has observed that the Obama Administration’s stimulus program funded many small improvement projects with temporary signs that said the funding came from the decidedly non-Madison-Ave named American Recovery and Reconstruction Act.<sup>125</sup> In contrast, the New Deal included building massive public works that were notable—and its projects have permanent signage taking credit for the effort.<sup>126</sup> As another example, both the Trump and Biden Administrations sent out stimulus checks to Americans. President Trump put his name on them, whereas Biden did not.<sup>127</sup> This was still an improvement on the Obama Administration, which hid their stimulus payments in miniscule increases spread across paychecks, rather than offering a one-time, salient check in the mail.<sup>128</sup> The tendency toward submerged policymaking may be appealing to some policy technocrats, but it ignores political psychology. People need to know that the state provides and regulates; they need to see it and experience it in order to give credit to those who acted and to support further actions with confidence. As Meserve puts it, the better approach is to “keep it simple and take credit.”<sup>129</sup>

A second challenge is that some policymakers, particularly Democrats, are committed to complicated, technocratic policies that are hard to understand, hard to explain, and hard to implement easily, quickly, and effectively. Such policies are also easy to nitpick in the courts and they favor powerful private actors that can hire dozens of lawyers to navigate the thicket of complicated regulations.<sup>130</sup> But as importantly, these policies can fail—and fail spectacularly. The best

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<sup>124</sup> See SUZANNE METTLER, *THE SUBMERGED STATE* 3–4 (2011) (presenting that “submerged state” policies are those that operate indirectly and opaquely).

<sup>125</sup> See Jack Meserve, *Keep It Simple and Take Credit*, DEMOCRACY (Feb. 3, 2017), <https://democracyjournal.org/arguments/keep-it-simple-and-take-credit> [<https://perma.cc/Y52J-6NJW>].

<sup>126</sup> See *id.*

<sup>127</sup> See Maegan Vazquez, *Biden’s Signature Won’t Appear on Third Stimulus Check, White House Says*, CNN (Mar. 9, 2021), <https://www.cnn.com/2021/03/09/politics/joe-biden-stimulus-payments-signature/index.html> [<https://perma.cc/228K-VSE2>] (discussing how President Biden did not think including his signature was necessary).

<sup>128</sup> See Meserve, *supra* note 125.

<sup>129</sup> *Id.*

<sup>130</sup> Consider the battle over Dodd-Frank rulemakings. For a discussion, see Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 364–65 (2020) (discussing the extent of lobbying, meetings, and resource imbalances).

recent example is, perhaps, the Dodd-Frank financial reform law, minus the creation of the Consumer Financial Protection Bureau. The rest of the Dodd-Frank law was built on complex, technical ground. The theory of macrostabilization policies and programs, like the Financial Stability Oversight Council (FSOC), was that financial regulators could turn the dials on the economy up and down carefully to prevent financial instability.<sup>131</sup> The theory itself made little sense, as these same regulators failed to prevent the 2008 crash.<sup>132</sup> In practice, more than fifteen years later, not a single nonbank firm is designated as a systemically important financial institution, under the oversight of FSOC.<sup>133</sup> Meanwhile, the largest financial institutions have only gotten bigger than they were when they were “too big to fail.”<sup>134</sup> Indeed, financial regulation policymakers have not revisited Dodd-Frank. There has been no effort to recognize the failure and adopt a simpler, structural set of rules that cannot be fought in the regulatory process or in the courts, despite the existence of blueprints for such an approach.<sup>135</sup>

Even when technocratic policies do not fail spectacularly, their complexity can lead to what Steven Teles has called “kludgeocracy.”<sup>136</sup> It is difficult for ordinary people to rely on complex policies and programs. Teles contrasts Social Security, an exceedingly simple program, with 401(k)s, IRAs, and other retirement vehicles.<sup>137</sup> The time and effort required to navigate and take advantage of these more complex investment programs is considerable and leads some not to do

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<sup>131</sup> See Daniel K. Tarullo, *Macroprudential Regulation*, 31 YALE J. REGUL. 505, 512 (2014).

<sup>132</sup> See Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 956 (2011).

<sup>133</sup> See Pete Schroeder, *US Regulators Agree to Ramp Up Oversight of Systemically Risky Non-Banks*, REUTERS (Nov. 3, 2023), <https://www.reuters.com/business/finance/us-financial-regulators-approve-process-revive-systemically-important-non-bank-2023-11-03> [<https://perma.cc/UT7Z-64Z9>]. For a discussion of the reasons for non-bank designation, see, for example, Jeremy C. Kress, Patricia A. McCoy & Daniel Schwarcz, *Activities Are Not Enough!: Why Non-Bank SIFI Designations Are Essential to Prevent Systemic Risk*, in SYSTEMIC RISK IN THE FINANCIAL SECTOR: TEN YEARS AFTER THE GREAT CRASH 165, 171–72 (Douglas W. Arner, Emiliós Avgouleas, Danny Busch & Steven L. Schwarcz eds., 2019).

<sup>134</sup> See Robert Kuttner, *The Failure of Dodd-Frank*, AM. PROSPECT (Sept. 19, 2023), <https://prospect.org/economy/2023-09-19-failure-of-dodd-frank> [<https://perma.cc/V5GC-VH2G>] (discussing how banks are larger and more concentrated than before, taking risks with the knowledge that government will have to bail them out to prevent widespread economic catastrophe).

<sup>135</sup> See, e.g., Lev Menand & Morgan Ricks, *Rebuilding Banking Law: Banks as Public Utilities*, 41 YALE J. REGUL. 591, 598–99 (2024) (presenting how the existing banking laws must be reformed).

<sup>136</sup> See STEVEN M. TELES, KLUDGEOCRACY: THE AMERICAN WAY OF POLICY 1 (2012).

<sup>137</sup> See *id.* at 2.

so. Policy complexity also advantages big business, as it can direct more resources to lawyers and staff to navigate byzantine rules.<sup>138</sup>

There have, of course, been some exceptions to the dynamics of submerged and technocratic policymaking. The IRS Direct File program is a good example of a simple, direct, easy to understand program that builds state capacity and delivers benefits to taxpayers.<sup>139</sup> But it is the exception that proves the rule. Indeed, some Democratic policymakers opposed the creation of Direct File<sup>140</sup> as have many Republicans and the Trump Administration.<sup>141</sup>

*Proceduralism.* A related challenge is what Nick Bagley has called the “procedure fetish.”<sup>142</sup> Many serious policymakers design policy in ways that incorporate significant procedural requirements to government activities,<sup>143</sup> or to government-encouraged private sector activities.<sup>144</sup> Procedures are important to ensuring rational-legal execution of government functions. But when taken too far, they can become so involved and complex that they weaken state capacity rather than improve its use. Overproceduralization means that it takes longer for the government to act, makes it hard for such actions to take effect, and makes it easier for those actions to be challenged in court, due to minor procedural violations.

The regulatory process offers a simple, cautionary example. Despite the Administrative Procedure Act requiring notice of merely

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<sup>138</sup> See *id.* at 3.

<sup>139</sup> See Emily Peck, *Turns Out People Like Filing Their Taxes for Free*, AXIOS (Apr. 30, 2024), <https://www.axios.com/2024/04/30/irs-direct-file-online-reviews-biden> [https://perma.cc/B5VW-LC8L] (discussing how reviews for the direct filing system are widely positive).

<sup>140</sup> See Justin Elliott & Paul Kiel, *Inside TurboTax's 20-Year Fight to Stop Americans from Filing Their Taxes for Free*, PROPUBLICA (Oct. 17, 2019), <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free> [https://perma.cc/G5ZU-682K] (explaining how Republicans have generally been supporters of TurboTax and its attempts to stop free tax filing, but some Democrats have supported the company's efforts).

<sup>141</sup> See Kelly Phillips Erb, *The One Big Beautiful Bill Act Didn't Kill IRS Direct File But It Sure Feels Like It*, FORBES (July 15, 2025), <https://www.forbes.com/sites/kellyphillipserb/2025/07/15/the-one-big-beautiful-bill-act-didnt-kill-irs-direct-file-but-it-sure-feels-like-it> [https://perma.cc/EA6B-XH4K]; Fatima Hussein, *Trump Administration Plans to End the IRS Direct File Program for Free Tax Filing, AP Sources Say*, ASSOCIATED PRESS (Apr. 17, 2025), <https://apnews.com/article/irs-direct-file-tax-returns-free-trump-4bb0bca02fab9b3d06ae6f45ac67b7ab> [https://perma.cc/X3PR-KA9A].

<sup>142</sup> Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

<sup>143</sup> See JENNIFER PAHLKA, RECODING AMERICA: WHY GOVERNMENT IS FAILING IN THE DIGITAL AGE AND HOW WE CAN DO BETTER 152 (2023) (examining how policymakers' overemphasis on procedure and desire for overly technocratic expertise hinder effective policy implementation).

<sup>144</sup> See EZRA KLEIN & DEREK THOMPSON, ABUNDANCE 126–27 (2025) (describing how excessive rules and regulations result in delay and high costs for private sector activities).



“the terms or substance of the proposed rule or a description of the subjects and issues involved,”<sup>145</sup> agencies now routinely provide long and complicated explanations and must go through multiple rounds of notice and comment, plus an additional review by the Office of Information and Regulatory Affairs (OIRA). Commentators have long worried that the regulatory process is “ossified,” given how long it can take.<sup>146</sup>

In recent years, a number of scholars on the progressive left have argued that one way to make the state more representative and responsive to popular will and interests is to increase democratic participation in bureaucratic and administrative processes. Many of these scholars have thus argued for democratizing the administrative state by increasing forms of contestation in administrative policymaking and expanding avenues for citizen participation, among other things.<sup>147</sup> The Biden Administration pursued some policies along these lines. For instance, it revised Circular A-4, which provides guidance to federal agencies on rulemaking, including provisions asking agencies to consider the impacts of rules on equity and competition.<sup>148</sup> The Biden Administration also pushed agencies to consult more with groups affected by regulations.<sup>149</sup>

Democratic proceduralism is well-intentioned, but it is still a form of proceduralism. Indeed, this approach might create more hurdles—processes, analyses, consultations—for government agencies. This can make it harder for agencies to act swiftly or even at all. And by increasing

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<sup>145</sup> 5 U.S.C. § 553(b)(3).

<sup>146</sup> See, e.g., Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493 (2012). But see Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421 (2012) (“[E]vidence that ossification is either a serious or widespread problem is mixed and relatively weak.”).

<sup>147</sup> See, e.g., Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1 (2022); Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021); Reeve T. Bull, *Making the Administrative State “Safe for Democracy”: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611 (2013); Joshua D. Blank & Leigh Osofsky, *Democratizing Administrative Law*, 73 DUKE L.J. 1615 (2024); Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647 (2024).

<sup>148</sup> OFF. MGMT. & BUDGET, CIRCULAR NO. A-4 (Nov. 9, 2023), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/11/CircularA-4.pdf> [<https://perma.cc/4RCL-NM4B>].

<sup>149</sup> See Steven J. Balla & Sarah Hay, *New Goals, Old Tools: Broadening Public Participation in the Regulatory Process in the Biden Administration*, GEO. WASH. REGUL. STUD. CTR. (Nov. 28, 2023), <https://regulatorystudies.columbian.gwu.edu/new-goals-old-tools-broadening-public-participation-regulatory-process-biden-administration> [<https://perma.cc/6T9A-JCRV>] (explaining the administration’s emphasis on broadening the voices involved in the regulatory process in its National Action Plan).

the inputs into rulemaking, it also increases the opportunities for judicial review. Because arbitrariness review requires making rational decisions based on facts, considering alternatives, and following processes,<sup>150</sup> further impositions on agencies create opportunities for regulated parties to challenge regulations as not complying with such procedures and for courts to side with challengers, even when agency errors are minor and immaterial.<sup>151</sup>

Democratic proceduralism suffers from a second problem, too. It assumes that there are people or groups with whom agencies can consult and that such consultations will lead to better policymaking from a delivery and regulatory perspective. But this is not at all evident. The public's views are not fixed, but subject to change and influence.<sup>152</sup> And they do not exist naturally, exogenous from politics; rather, there is an ongoing, active contest for shaping the public's views.<sup>153</sup> Even if democratic consultation can engage the general public or affected groups for policies (rather than just activists or elites within those groups, who may not be representative of the public at large), it is possible that those groups may simply want to bring about the deconstruction of the administrative state. If organized groups are anti-statist, consulting them will lead to further decline. Democratic proceduralism, in other words, does not have a theory of the interests in society; it merely channels them.<sup>154</sup> In sum, democratic proceduralism might reduce the capacity of the state to evolve, deliver, and regulate because of additional red-tape that agencies must follow and the attendant risk of judicial review for violating those procedural requirements. But it might also simply end up channeling anti-statist

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<sup>150</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing how the Court conceptualizes “arbitrary” rulemaking under the APA).

<sup>151</sup> Cf. Jack Malich, *The Judiciary's Arbitrary and Capricious Problem*, 128 W. VA. L. REV. (forthcoming 2025) (discussing the rise of more stringent arbitrariness review, including for minor and immaterial errors).

<sup>152</sup> See ACHEN & BARTELS, *supra* note 94, at 1–2 (describing how the majority of citizens “are swayed by how they feel about ‘the nature of the times,’ especially the current state of the economy” when voting in elections).

<sup>153</sup> At a philosophical level, this is an implication of Gramsci's concept of cultural hegemony. For an overview, in the American context, see T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567 (1985); for an application to contemporary politics, see Nathan Sperber & George Hoare, *How the Right Hijacked Antonio Gramsci*, JACOBIN (Mar. 15, 2025), <https://jacobin.com/2025/03/right-gramsci-de-benoist-trump> [<https://perma.cc/S54R-3TD6>]. For a rebuttal of the point that voters have rational policy preferences which shape elections, see CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2016).

<sup>154</sup> Cf. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 37 (2016) (describing legal theories that seek to look through public institutions to underlying powers in society).

preferences. Some might say this is desirable; it is democratic, after all. But it would continue the process of state decline.

*Elite Institutional Norms, Culture, Incentives, and Biases.* Elite norms, culture, incentives, and biases are one of the most important contributors to secular decline. While many elected officials and political appointees believe in institutions and in rationality, delivery, and regulatory ability, some are unwilling to take on bold endeavors to reform processes or adopt necessary policies.<sup>155</sup> A wide range of factors explains this unwillingness. A risk averse culture is part of it. Careerist political appointees may worry about their future political appointments and fear upsetting people in the ecosystem by being seen outside the conventional wisdom.<sup>156</sup> In the foreign policy context, the thick networks of appointed U.S. officials has been called “the Blob,” as the group is so undifferentiated in its views that it cannot be disaggregated.<sup>157</sup> Elected officials have long been criticized as blowing with the wind, and indeed, politicians often prefer not to take on ideas or policies that are outside the conventional wisdom or that will upset one group or another, because they assume playing it safe is the easiest way to get re-elected.<sup>158</sup> A second issue is the focus on following institutional norms and returning to “normalcy,”<sup>159</sup> without asking

<sup>155</sup> See Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 84–85 (1959) (describing the approach of “muddling through” via incremental policy change); Jennifer Pahlka, *Culture Eats Policy*, NISKANEN CTR. (June 21, 2023), <https://www.niskanencenter.org/culture-eats-policy> [<https://perma.cc/QFQ7-H6JA>].

<sup>156</sup> See Pahlka, *supra* note 151 (“Public servants who play it safe tend to get promoted. . . . [P]romoting someone who operates outside of norms, even someone who operates legally and ethically, can tarnish reputations and make enemies.”).

<sup>157</sup> See David Samuels, *The Aspiring Novelist Who Became Obama’s Foreign-Policy Guru*, N.Y. TIMES MAG. (May 5, 2016), <https://www.nytimes.com/2016/05/08/magazine/the-aspiring-novelist-who-became-obamas-foreign-policy-guru.html> [<https://perma.cc/X87V-ZUM7>] (referring to the American foreign-policy establishment during the Obama Administration, including Hilary Clinton, Robert Gates, and other Iraq-war promoters, as “the Blob”).

<sup>158</sup> See, e.g., Peter Nicholas, Natasha Korecki, Monica Alba & Matt Dixon, *Harris is Playing it Safe. Some Democrats Worry That Could Doom Her Campaign*, NBC NEWS (Oct. 4, 2024), <https://www.nbcnews.com/politics/2024-election/harris-playing-safe-democrats-worry-doom-campaign-rcna173504> [<https://perma.cc/S3JD-MSQR>] (discussing former Vice President Kamala Harris acting “with a measure of risk aversion” in her 2024 presidential campaign, avoiding “freewheeling interactions with voters like town hall-style events or interviews” and “fail[ing] to separate from her opponent”); Elizabeth Crisp, *Walz: Democrats Shouldn’t Have Played ‘So Safe’ in 2024*, HILL (Mar. 10, 2025), <https://thehill.com/homenews/5185472-tim-walz-democrats-2024-election> [<https://perma.cc/4PXH-U38Y>] (reporting Governor Tim Walz’s reflections that he and former Vice President Kamala Harris “probably should have done the town halls, where [voters] may say . . . ‘I don’t believe in you’”).

<sup>159</sup> E.g., Ezra Klein, *Joe Biden’s Promise: A Return to Normalcy*, VOX (May 20, 2019, 3:00 PM), <https://www.vox.com/policy-and-politics/2019/5/20/18631452/joe-biden-2020-presidential-announcement-speech> [<https://perma.cc/42ES-RLAK>].

why norms exist and whether practices have already violated those purposes. Seeking a return to a golden age of norm-following may not be possible, especially because norm-breaking was not just a feature of the first Trump presidency; it had become routine over a long period of time.<sup>160</sup> Asymmetric norm-adherence also leads to a classic game theory problem, in which one side are the chumps who adhere to norms while the other does not.<sup>161</sup> A risk-averse culture and over-adherence to norms can contribute to secular decline because political leaders may be timid in providing effective, rapid, delivery of social goods, afraid to regulate bad behavior in the private sector and simply unwilling to prioritize essential reforms.

*The Collapse of Countervailing Powers.* Historically, social and political movements in the United States pushed for statebuilding as a way to counteract the power of oligarchs and their associated corporations. The populists—farmers, workers, and others—in the late nineteenth and early twentieth centuries advocated for expanded federal government authority to regulate and provide social programs.<sup>162</sup> The Progressive movement championed professionalism and expertise as part of creating a rational-legal bureaucracy to replace the party-crony approach that had dominated.<sup>163</sup> Lawyers used the common law and courts to impose liability for corporate harms, including on new technologies, and then transformed those common law rules into state and federal laws.<sup>164</sup> These groups had a kind of countervailing power in society, pushing back on the power of the oligarchs.

In recent years, and in some cases over the last few decades to half-century, these countervailing powers have collapsed. There is no mass mobilization of radical farmers pushing to regulate railroads or other infrastructural businesses, in part because the farm sector

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<sup>160</sup> See Matthew Yglesias, *Donald Trump, the Resistance, and the Limits of Normcore Politics*, Vox (July 3, 2018, 10:05 PM), <https://www.vox.com/2018/7/3/17379766/trump-norms-democracy> [<https://perma.cc/DK9B-J2UP>].

<sup>161</sup> Cf. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) (describing the dynamics of asymmetry in constitutional politics).

<sup>162</sup> See CHARLES POSTEL, *THE POPULIST VISION* 17–18 (2007).

<sup>163</sup> See MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920* at 68 (2003) (describing the Progressives' desire “to use association and the state to end class conflict and the other problems of industrial capitalism”).

<sup>164</sup> See CORPORATIONS & AMERICAN DEMOCRACY 147–52 (Naomi R. Lamoreaux & William J. Novak, eds., 2017) (explaining the shift from common law to statute in nineteenth-century economic regulation); WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* 109–10 (2022) (same).

has significantly diminished since industrialization.<sup>165</sup> Labor union membership dropped in 2024 to an all-time low, to less than ten percent of U.S. workers.<sup>166</sup> Expertise and professional experience is less valued today than in recent decades, as bothsidesism, cherry-picking evidence, and misinformation have become common and found virality on social media platforms. Indeed, there is a well-intentioned movement to dismantle meritocracy.<sup>167</sup> It rightly points out the downsides of elitist institutions and leadership, but that movement may have unintended side-effects, such as contributing to the weakening of the independence of American universities.<sup>168</sup> Finally, legal enforcement is in decline. Public enforcement at the federal level has become dominated by the “chickenshit club” of corporate defense lawyers-turned-prosecutors who do not go after white collar criminals.<sup>169</sup> And private enforcement has been hampered by mandatory arbitration and contracts of adhesion.<sup>170</sup> The common law as regulator is thus weaker perhaps than it has ever been, even as public enforcement is in decline.

The collapse of these countervailing powers is important because statebuilding needs a constituency. The general public that might prefer a well-functioning state is diffuse, hard to organize, and unlikely to focus on more abstract causes of state-institutional reforms.<sup>171</sup> Farmers and labor unions in past eras organized constituencies and mobilized them toward statebuilding. Academics brought reason and expertise to policymaking. Lawyers forced change in the common law, thereby proving the case for statutory regulation and incentivizing companies to come to the political table and at least get uniformity in the law. The collapse of these countervailing powers makes it harder to build political support for regulatory, programmatic, and evolutionary state actions.

<sup>165</sup> See Katherine Lacy, *The Number of U.S. Farms Continues Slow Decline*, ECON. RSCH. SERV. (Mar. 12, 2025), <https://www.ers.usda.gov/data-products/chart-gallery/chart-detail?chartId=58268> [<https://perma.cc/9U24-SZAR>].

<sup>166</sup> Michael S. Derby, *US Labor Union Membership Slips in 2024 to Record Low*, REUTERS (Jan. 28, 2025, 12:14 PM), <https://www.reuters.com/world/us/us-labor-union-membership-little-changed-2024-government-says-2025-01-28> [<https://perma.cc/39XG-W8YB>].

<sup>167</sup> E.g., DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* (2019); MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* (2020).

<sup>168</sup> Cf. Meghan O'Rourke, *The End of the University as We Know It*, N.Y. TIMES (Mar. 16, 2025) (discussing conservative efforts to dismantle universities), <https://www.nytimes.com/2025/03/16/opinion/university-defunding-trump-rufu.html> [<https://perma.cc/BK62-HT9L>].

<sup>169</sup> JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017).

<sup>170</sup> See, e.g., KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 3–5 (2015).

<sup>171</sup> Cf. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985) (observing that diffuse groups will have less political power than discrete and insular ones).

### C. More Recent Developments

*Judicial Politics and Ideology.* The dynamic that has probably received the most scholarly attention relates to judicial politics and ideology. Over the past generation, and in particular, in the past decade, the conservative legal movement and judges appointed by Republican presidents have increasingly adopted positions that involve limiting the power and authority of the American state.<sup>172</sup> In the administrative law context, they include the invention of the major questions doctrine,<sup>173</sup> the overturning of *Chevron* deference,<sup>174</sup> and the adoption of strict construction textualism and rejection of purposivist inquiry.<sup>175</sup> In the constitutional context, they include the revival of the nondelegation doctrine,<sup>176</sup> restricting Congress's necessary and proper powers,<sup>177</sup> constraining Congress's Section Five powers under the Civil War Amendments,<sup>178</sup> transforming the Take Care Clause from a duty to an affirmative grant of power,<sup>179</sup> and restricting Congress's ability to set conditions on removal of administrative officials.<sup>180</sup> In a given case, the relevant doctrinal shift might operate symmetrically between administrations of different parties, but by and large, the purpose and effect of these doctrines is to weaken and reduce the independence of the rational-legal administrative state which has capacity to efficiently, swiftly, and

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<sup>172</sup> See Metzger, *supra* note 17, at 3 (describing the resurgence of attacks on the administrative state spurred by the national regulatory and administrative expansion that took place under the Obama Administration).

<sup>173</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *West Virginia v. EPA*, 142 S.Ct. 2587, 2610 (2022). For a discussion of the “old” and “new” major questions doctrines, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

<sup>174</sup> *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (“*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.”).

<sup>175</sup> See Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube, at 8:29 (Nov. 17, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/ECR5-5CTD>] (“We’re all textualists now.”).

<sup>176</sup> See *Jarkesy v. SEC*, 34 F.4th 446, 449 (5th Cir. 2022), *reh’g denied*, 51 F.4th 664 (5th Cir. 2022), *aff’d on other grounds*, 144 S. Ct. 2117 (2024).

<sup>177</sup> See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 560 (2012).

<sup>178</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

<sup>179</sup> Compare *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 (2020) (arguing that a President must have the power to remove executive officers in order to “take care that the laws be faithfully executed”), with *id.* at 2228 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (arguing that the Take Care Clause “speaks of duty, not power”).

<sup>180</sup> See *id.* at 2191–92 (asserting that the President enjoys “unrestricted removal power,” subject to two exceptions).



effectively deliver programs and regulate private behavior, and replace it with either presidential discretion or judicial decision.<sup>181</sup>

As with legislative gridlock, the shift toward a set of anti-administrative-state legal doctrines contributes to secular decline, rather than exceptional or cyclical decline. When Democrats are in power and attempt to exercise the powers of the state, they run into the buzzsaw of conservative courts wielding anti-administrativist doctrines. Consider the Biden Administration, for example. The Biden Administration issued regulations or executive orders on banking discrimination, greenhouse gases, student loans, minimum wages for federal contractors, ghost guns, credit card late fees, non-compete provisions, overtime eligibility, and auto retail scams, among others.<sup>182</sup> Corporations have inundated these initiatives with lawsuits, and many have been struck down by conservative judges.<sup>183</sup> If the decline of the state were cyclical, Democrats would be able to “build back better” when in power.<sup>184</sup> But in practice, they cannot do so. This contributes to decline not only because problems remain unsolved but also because people may come to believe that the state cannot solve problems at all.

Some might argue that such doctrines are formally neutral and apply equally to Republican administrations. But there are two problems with this response. First, Republican administrations are likely to have substantive policy preferences that are anti-statist—Republicans tend to prefer deregulation and are opposed to social programs.<sup>185</sup> These preferences will align more frequently with doctrines that make regulation and program delivery more cumbersome or less viable. Second, it may be that conservative judges themselves have substantive views that align with anti-administrative policy preferences or that they side with their co-partisans in hot-button cases. If this is true, then judicial opinions will also systematically disadvantage

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<sup>181</sup> For these arguments applied to one doctrine, see, for example, Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55 (2023).

<sup>182</sup> For one list, see *Corporations vs. the People*, AM. ECON. LIBERTIES PROJECT (June 23, 2025), <https://www.economicliberties.us/corporations-v-the-people> [<https://perma.cc/BKZ5-CWEA>].

<sup>183</sup> *Id.*

<sup>184</sup> Cf. *The Build Back Better Framework: President Biden's Plan to Rebuild the Middle Class*, WHITE HOUSE, <https://bidenwhitehouse.archives.gov/build-back-better> [<https://perma.cc/Z7N9-CV6R>] (outlining the Biden administration's investment plan in social, infrastructural, and environmental programs).

<sup>185</sup> See Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSPS. ON POL. 25, 26, 35 (2011) (discussing how the Republican Tea Party's ideology reflects the longstanding anti-statist beliefs held by conservatives). See generally Eric Keller & Nathan J. Kelly, *Partisan Politics, Financial Deregulation, and the New Gilded Age*, 68 POL. RSCH. Q. 428 (2015).

Democratic administrations. Indeed, recent empirical research suggests that *Chevron* deference did constrain partisanship on the bench—and suggests that eliminating the doctrine risks enhancing partisan dynamics in the review of agency action.<sup>186</sup>

Anti-administrativists have suggested that administrative law reforms of the type adopted in the late 2010s and early 2020s will not lead to state decline.<sup>187</sup> Then-Judge Neil Gorsuch, for example, once wrote that getting rid of *Chevron* deference will change “very little . . . except perhaps the most important things.”<sup>188</sup> If the idea is that Congress will start legislating more frequently and with more specificity, that prospect seems unlikely given the dynamics of legislative gridlock discussed above. Some opponents of anti-administrativist changes suggest, in the alternative, that even without legislative resurgence, the changes will not be terribly significant because some kind of re-creation of *Chevron* deference will emerge post-*Loper Bright*.<sup>189</sup> From the perspective of state decline, the problem is that legal doctrines that shift discretion and authority from agencies to courts do, in fact, contribute to the decline of the power of the bureaucracy. Indeed, proponents of such doctrinal shifts support them precisely because they reduce bureaucratic autonomy.<sup>190</sup> Further discretion to judges will create uncertainty for agencies, “destabilizing” administrative law, as Steve Vladeck has argued.<sup>191</sup> If judges’ biases reflect political affiliation, they will have an asymmetric effect when Democrats attempt to expand state capacity. If these biases are linked to opposition to state capacity, they will contribute to decline neutrally when either party attempts to reverse it. But even if judges are not biased at all, the increased randomness and uncertainty in judicial outcomes will have a chilling effect on agency action.<sup>192</sup>

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<sup>186</sup> Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463, 1463–64 (2018).

<sup>187</sup> See Nielson, *supra* note 22, at 143 (“The types of reforms realistically on the table . . . should not enfeeble the federal government but may produce better policy in a fairer, more legitimate way.”).

<sup>188</sup> *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>189</sup> Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO. MASON L. REV. 499, 504 (2024) (predicting that reviewing courts will continue to give weight to an agency’s interpretation when the interpretive dispute amounts to a policy disagreement).

<sup>190</sup> See *Fact Sheet*, *supra* note 1 (emphasizing the second Trump Administration’s desire to end federal overreach in regulation and enforcement).

<sup>191</sup> Steve Vladeck, 89. *Destabilizing the Administrative State*, ONE FIRST, July 8, 2024, <https://www.stevevladeck.com/p/89-destabilizing-the-administrative> [<https://perma.cc/RX2V-RNS9>].

<sup>192</sup> See Meyer & Sitaraman, *supra* note 181, at 69.

*Oligarchic Influence.* While people have decried money in politics for decades, oligarchic influence has become especially brazen in recent years. Tech moguls have entered into politics with huge sums of money. Marc Andreessen thus explained in the *New York Times* that his shift away from the Democratic party was largely about regulating tech platforms.<sup>193</sup> Crypto moguls and companies have spent millions in campaigns in order to secure weaker regulation of their industry.<sup>194</sup> They were largely successful in 2024, getting several members of Congress to pre-commit to support the crypto industry, under the threat of super PAC spending flooding their race.<sup>195</sup> Elon Musk spent more than \$290 million in the 2024 election in support of President Trump,<sup>196</sup> and that spending earned him so much influence that he was, for a time, called “Shadow-President Musk.”<sup>197</sup> Musk’s \$290 million is the equivalent of \$35 for a person with a net worth of \$50,000.<sup>198</sup> In other words, it cost him very little. On the left, billionaires also try to wield political power. Mark Cuban bragged about pushing out of the Harris campaign an economic policy staffer who said that she supported taxing capital gains the same as ordinary income.<sup>199</sup> Reid Hoffman, board

<sup>193</sup> See Ross Douthat, *How Democrats Drove Silicon Valley Into Trump’s Arms*, N.Y. TIMES (Jan. 17, 2025), <https://www.nytimes.com/2025/01/17/opinion/marc-andreessen-trump-silicon-valley.html> [<https://perma.cc/KUQ4-83UR>] (decrying the “raw application of the power of the administrative state” over the tech industry).

<sup>194</sup> See David Yaffe-Bellany, *The Crypto Industry Spent Over \$130 Million on the Election. It Paid Off*, N.Y. TIMES (Nov. 8, 2024), <https://www.nytimes.com/2024/11/06/technology/crypto-industry-spending-election.html> [<https://perma.cc/AR9P-JR5N>] (explaining the crypto industry’s efforts to support candidates who favored softer regulations for the sector).

<sup>195</sup> See Jasper Goodman, *Crypto’s Cash-Heavy Campaign to Sway the Senate is Winning Converts*, POLITICO (Mar. 15, 2024), <https://www.politico.com/news/2024/03/15/crypto-super-pac-senate-00147262> [<https://perma.cc/WA8J-7DBT>] (noting the success of threatened or actual super PAC spending in causing congressional candidates to adopt pro-crypto platforms); Jasper Goodman & Zachary Warmbrodt, *Crypto’s Super Tuesday*, POLITICO (Mar. 5, 2024), <https://www.politico.com/newsletters/morning-money/2024/03/05/cryptos-super-tuesday-00144865> [<https://perma.cc/Z85S-VUSG>] (surveying widespread super PAC spending in Super Tuesday primaries).

<sup>196</sup> David Wright & Alex Leeds-Matthews, *Elon Musk Spent More Than \$290 Million on the 2024 Election, Year-End FEC Filings Show*, CNN (Feb. 1, 2025, 10:46 AM), <https://www.cnn.com/2025/02/01/politics/elon-musk-2024-election-spending-millions/index.html> [<https://perma.cc/3ZLG-5L6H>].

<sup>197</sup> Press Release, House Comm. on the Judiciary Democrats, Committee Democrats Sound the Alarm on Trump and Shadow-President Musk’s All-Out Assault on Americans’ First Amendment Freedoms (Feb. 12, 2025), <https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=5510> [<https://perma.cc/9ALG-UHWT>].

<sup>198</sup> See *The World’s Real-Time Billionaires List: Today’s Winners and Losers*, FORBES, <https://www.forbes.com/real-time-billionaires/#5dc47a8d3d78> [<https://perma.cc/6UQL-VKSR>] (listing Musk’s net worth at \$418.7 billion as of May 26, 2025).

<sup>199</sup> See Stephanie Murray, *Mark Cuban Pitches Harris as Better on the Economy, Says Trump ‘Asked Daddy for Money’*, ARIZ. REPUBLIC (Oct. 21, 2024, 4:04 PM), <https://www.azrepublic.com/news/2024/10/21/mark-cuban-pitches-harris-as-better-on-the-economy-says-trump-asked-daddy-for-money/>.

member at Microsoft and the founder of LinkedIn, advocated publicly against Biden's FTC Chair Lina Khan.<sup>200</sup> More broadly, billionaires are actively involved in lobbying government and seeking benefits from it. In Congress, Mark Zuckerberg's Meta and other tech companies worked to kill legislation in the House of Representatives that would help promote children's safety online—legislation that passed the Senate 98–0.<sup>201</sup> Some billionaires in the United States are also invested in businesses that are government contractors: Conservatives Peter Thiel and Joe Lonsdale's Palantir and Musk's SpaceX are two prominent examples.<sup>202</sup>

In his book *Oligarchy*, political scientist Jeffery Winters characterizes the United States as a civil oligarchy because oligarchs dominate governance but do so through legal means.<sup>203</sup> Winters argues that oligarchs use their power to ensure the defense of their wealth and income.<sup>204</sup> Examples of oligarchic influence even in the last few years suggest that private sector individuals and companies get involved in politics in order to protect their economic interests—through lower taxes, less regulation, government contracts, or other benefits. Social science research bears this theory out, and some studies show that the return on investment for corporate spending on lobbying is significant.<sup>205</sup> If that is true, the capitalist thing to do is invest more in

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azcentral.com/story/news/politics/elections/2024/10/19/in-phoenix-mark-cuban-talks-up-kamala-harris-says-trump-asked-daddy-for-money/75726147007 [https://perma.cc/Y646-NG42].

<sup>200</sup> Jody Godoy, *Two Billionaire Harris Donors Hope She Will Fire FTC Chair Lina Khan*, REUTERS (July 26, 2024, 3:47 PM), <https://www.reuters.com/world/us/two-billionaire-harris-donors-hope-she-will-fire-ftc-chair-lina-khan-2024-07-26> [https://perma.cc/CF5H-Q3BC].

<sup>201</sup> Georgia Wells, Kristina Peterson & Natalie Andrews, *Inside Big Tech's Bid to Sink the Online Kid Safety Bill*, WALL ST. J. (Nov. 17, 2024), <https://www.wsj.com/politics/policy/meta-google-lobbying-child-online-safety-bill-5ee63dcc> [https://perma.cc/79JP-KWKJ].

<sup>202</sup> Tabby Kinder & George Hammond, *Palantir and Anduril Join Forces with Tech Groups to Bid for Pentagon Contracts*, FIN. TIMES (Dec. 22, 2024), <https://www.ft.com/content/6cfdfe2b-6872-4963-bde8-dc6c43be5093> [https://perma.cc/P6XJ-9D6M]; Ateev Bhandari, *Palmer Luckey, Backed by Palantir's Lonsdale, to Launch Crypto-Focused Bank*, REUTERS (July 2, 2025, 12:26 PM), <https://www.reuters.com/business/tech-billionaires-led-by-palmer-luckey-launch-new-bank-rival-svb-ft-reports-2025-07-02> [https://perma.cc/9KDD-4N8B].

<sup>203</sup> JEFFREY A. WINTERS, OLIGARCHY 208, 211–12 (2011).

<sup>204</sup> *Id.* at 211.

<sup>205</sup> See Raquel Alexander, Stephen W. Mazza & Susan Scholz, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 428 (2009) (finding a 22,000 percent return for lobbying spending on a particular); Matthew D. Hill, G. Wayne Kelly, G. Brandon Lockhart & Robert A. Van Ness, *Determinants and Effects of Corporate Lobbying*, 42 FIN. MGMT. 931, 954–55 (2013) (finding that “firms with greater potential payoffs from favorable policy and regulations are those that lobby more actively”); Brian Kelleher Richter, Krislert Samphantharak & Jeffrey F. Timmons, *Lobbying and Taxes*, 53 AM. J. POL. SCI. 893, 893 (2009) (finding that

lobbying rather than research and development, better products, or business innovations.

Oligarchic influence contributes to secular decline in three ways. Oligarchs do not want regulations over their businesses. But regulations are a critical part of state capacity. If the state cannot regulate bad private behavior, then life becomes “nasty, brutish, and short,” albeit perhaps through white collar crime and social degradation, rather than outright violence. Oligarchs also do not want higher taxes.<sup>206</sup> But putting aside modern monetary theory, taxes are what fund social programs and other efforts of the government to provide society-wide benefits and public goods. Third, oligarchs will likely want contracts and subsidies for their own companies and not for their competitors. We should thus be worried about oligarchic influence leading to contracts and spending, given out on cronyist and corrupt bases, rather than based on rational-legal criteria.

*Factional Divisions on Right and Left.* The final contributing factors leading to secular decline are the current configurations of factional divisions and the balance of power within the right and left coalitions in the United States. On the right, there are multiple camps—nationalists, libertarians, religious fundamentalists, and billionaire tech and finance moguls. These groups have different views and priorities—from restricting immigration, to the deconstruction of the state, to radically changing family policies, to lower taxes, deregulation, and more government contracts.<sup>207</sup> While some factions on the right might be in favor of arresting the secular decline of the American state, their focus has largely been on strengthening the military and other aspects of state power that implicate national security. Few—and it is only few—have shown any willingness to advance policies that would regulate corporate

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“firms that increase their lobbying expenditures by 1% in one year reduce their effective tax rates in the range of 0.5 to 1.6 percentage points the following year”).

<sup>206</sup> WINTERS, *supra* note 203, at 212.

<sup>207</sup> See Robert Tait, *The Rise of Stephen Miller, the Architect of Trump’s Hardline Immigration Policy*, THE GUARDIAN (June 15, 2025, 8:00 AM), <https://www.theguardian.com/us-news/2025/jun/15/trump-immigration-stephen-miller-influence> [<https://perma.cc/J6SK-UJJR>]; Rucker & Costa, *supra* note 20; Jessica Winter, *J. D. Vance’s Sad, Strange Politics of Family*, NEW YORKER (July 25, 2024), <https://www.newyorker.com/news/daily-comment/j-d-vances-sad-strange-politics-of-family> [<https://perma.cc/2B9A-NJ55>]; *50 Wins in the One Big Beautiful Bill*, WHITE HOUSE (June 3, 2025), <https://www.whitehouse.gov/articles/2025/06/50-wins-in-the-one-big-beautiful-bill> [<https://perma.cc/2L25-U72X>] (listing “50 Wins,” including number one, “the largest tax cut in American history”; number thirteen, “revers[ing] electric vehicle mandates”; and number thirty-six, “provid[ing] funding to rebuild America’s military—including . . . \$20+ billion to bolster U.S. munitions production”).

power.<sup>208</sup> As a result, the likelihood that the new right will actually be populist on economic issues—in the sense of using government to deliver benefits for working people, controlling corporate power, or reforming institutions so they work more effectively—is unlikely. There is simply not a large chunk of that coalition committed to the task.<sup>209</sup>

The left, meanwhile, has long been a conglomeration of interest groups—environmentalists, labor organizers, racial justice advocates, and others. The blue-dog, center-left has, since the Clinton years, been pro-corporate, anti-regulation, and skeptical of government programs.<sup>210</sup> This in itself has fragmented the left, with some camps that are interested in arresting state decline and several that are not. Some on the left, at least since the first election of President Trump, have been focused on “democracy” concerns and the restoration of a bygone era’s norms and institutional processes.<sup>211</sup> They are fighting a rearguard action, rather than innovating for the future. Others on the left come from protest traditions that are skeptical of, or even reject, state power.<sup>212</sup> As a result, although the left contains meaningful interest groups advocating for state power, those groups are constrained by their co-partisans to the left and right, leaving no unified coalition in the two-party system committed to advancing state capacity.

## II

### THE CONSEQUENCES OF SECULAR DECLINE

In recent years, it has become fashionable on both right and left to imagine a stateless, government-less utopian society. On the right, tech billionaires and their allies fantasize about a world without government and create plans for floating, ocean-based, government-less jurisdictions (called “seasteads”).<sup>213</sup> On the left, anarchic utopians have posited that

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<sup>208</sup> See, e.g., *Corporate Actual Responsibility: A Conversation with Senator Josh Hawley*, AM. COMPASS (Aug. 5, 2020), <https://americancompass.org/corporate-actual-responsibility-a-conversation-with-senator-josh-hawley> [<https://perma.cc/L6XB-NZYV>]. In the conversation, Senator Hawley stated, “[M]arkets are not self-creating things, markets are the products of laws and legal frameworks. . . . We need to think in the present age when increasingly our economy is dominated by a handful of monopolistic or near monopolistic multinational corporations . . . [.] [H]ow do we continue to enact sensible reforms . . . ?” *Id.*

<sup>209</sup> SITARAMAN, *supra* note 75, at 69.

<sup>210</sup> See THOMAS FRANK, *LISTEN, LIBERAL: OR, WHAT EVER HAPPENED TO THE PARTY OF THE PEOPLE?* 57 (2016).

<sup>211</sup> See Yglesias, *supra* note 160.

<sup>212</sup> Madeleine Davis, *New Left*, BRITANNICA, <https://www.britannica.com/topic/New-Left> [<https://perma.cc/SHC3-BNWM>].

<sup>213</sup> See DOUGLAS RUSHKOFF, *SURVIVAL OF THE RICHEST: ESCAPE FANTASIES OF THE TECH BILLIONAIRES* 20–21 (2022) (“Unfettered and unregulated by the backwards thinking of nation-states, aquapreneurs will be free to reimagine civilization as an ultra-libertarian experiment.”);



early humans did not have government and had a cooperative society, as a way to justify hopes for a socialist-anarchist future.<sup>214</sup>

The reality, however, is that the creation of the modern, rule-of-law state has been one of the signal achievements of humankind. It built institutions that ensured stable provision of food, water, and basic resources; institutions that eliminated disease, improved public health, and transformed wellness; institutions that improved education, scientific progress, and global discovery; and institutions that could prevent or mitigate the consequences of crises. In other words, the modern, rule-of-law state has been critical to solving public problems. It has done this because it is rational-legal in its approach, because it regulates bad behavior, because it seeks to deliver better life outcomes, and because it is capable of adaptation over time.

The consequences of secular decline are therefore significant. At least six groups of harms result from secular decline. First is an increase in social and economic harms. Without regulatory policing, private individuals and corporations will take advantage of people. Fraud, scams, adulterated food, dangerous products, white collar crime, and corruption will all become more prevalent. And systemic deregulation or non-enforcement will make critical systems less stable. The financial sector, for example, historically suffered from boom-and-bust cycles until regulation tamed it and created economic stability (and deregulation, in turn, swiftly led to the 2008 financial crash).<sup>215</sup>

Second, the failure to regulate the powerful and deliver stability, growth, and progress across the population will mean rising inequality and social instability. Economic inequality has been a problem for republics since the ancient Greeks and Romans began theorizing about forms of government.<sup>216</sup> Secular decline means

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QUINN SLOBODIAN, *CRACK-UP CAPITALISM: MARKET RADICALS AND THE DREAM OF A WORLD WITHOUT DEMOCRACY* 13–14 (2023) (highlighting the appeal of seasteads, or “start-up nations,” to tech entrepreneurs, including the ability to escape the taxing and regulating state); JOE QUIRK WITH PATRI FRIEDMAN, *SEASTEADING: HOW FLOATING NATIONS WILL RESTORE THE ENVIRONMENT, ENRICH THE POOR, CURE THE SICK, AND LIBERATE HUMANITY FROM POLITICIANS* (2017).

<sup>214</sup> See DAVID GRAEBER & DAVID WENGROW, *THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY* 3 (2021) (rejecting the Hobbesian premise that hierarchy, domination, and cynical self-interest have always been the basis of human society). See generally David Graeber, *A Practical Utopian's Guide to the Coming Collapse*, *THE BAFFLER* (2013), <https://thebaffler.com/salvos/a-practical-utopians-guide-to-the-coming-collapse> [<https://perma.cc/7KNP-ZA9M>].

<sup>215</sup> See ARTHUR E. WILMARTH, JR., *TAMING THE MEGABANKS: WHY WE NEED A NEW GLASS-STEAGALL ACT* (2020) (discussing the Glass-Steagall Act's stabilization of the highly volatile financial industry).

<sup>216</sup> See GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* 23–44 (2017) (discussing ancient Greek and Roman analysis of the inevitability that inequality would lead to conflicts between rich and poor).

increased inequality, as the state is the only actor that can regulate economic power in society or create the conditions for countervailing regulatory powers.

Third is a decline in innovation and technical progress. As Mariana Mazzucato has shown, the most important innovations in the last century were at least in part a function of state funding or support.<sup>217</sup> The private sector will systematically underinvest in basic scientific and technological research, for which there are unknown or unpredictable benefits.<sup>218</sup> State support for research and innovation, and state-run “missions” to achieve national goals, can thus have significant payoffs.<sup>219</sup> The decline in state capacity likely means less funding and support for such initiatives.

Fourth is reduced resilience in crises. In the coming decades, extreme weather events, like fires, hurricanes, draughts, and flooding; pandemics; cyberattacks; and economic crises from global competition and rising economic nationalism are all possible, perhaps even increasingly likely. Research has shown that increased state capacity leads to better resilience in a crisis.<sup>220</sup> States that are resilient in crises have well-resourced, professional, non-corrupt bureaucracies.<sup>221</sup> Indeed, in a crisis, detailed regulatory templates are more effective than flexible, in-the-moment planning and decisionmaking.<sup>222</sup> Building resilient systems, rather than breaking down state capacity, would thus be a better strategy for weathering these crises.<sup>223</sup>

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<sup>217</sup> See MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* 1–20 (2013) (describing role of state as an investor in the R&D that made technological innovations possible).

<sup>218</sup> *Id.*

<sup>219</sup> See generally MARIANA MAZZUCATO, *MISSION ECONOMY: A MOONSHOT GUIDE TO CHANGING CAPITALISM* (2021) (advocating for treating large societal problems as missions that require allocation of focus and resources to achieving goals).

<sup>220</sup> See Wei-Ting Yen, Li-Lin Yiu, Eunji Won & Testriono, *The Imperative of State Capacity in Public Health Crisis: Asia's Early COVID-19 Policy Responses*, 35 GOVERNANCE 777, 778–79 (2022) (arguing that Asian countries with greater organizational capacity were more successful in responding to the COVID-19 pandemic); Kiran Auerbach, Joshua Y. Lerner & Hannah M. Ridge, *State Capacity and COVID-19 Responses: Comparing the US States*, 24 STATE POL. & POL'Y Q. 349, 350 (2024) (finding that higher-capacity U.S. states experienced fewer deaths in early days of COVID-19 pandemic).

<sup>221</sup> For a summary of factors, see Frances Z. Brown, *Governance for Resilience: How Can States Prepare for the Next Crisis?* 3–12 (May 2022) (working paper), [https://carnegie-production-assets.s3.amazonaws.com/static/files/Brown\\_Governance\\_for\\_Resilience\\_final.pdf](https://carnegie-production-assets.s3.amazonaws.com/static/files/Brown_Governance_for_Resilience_final.pdf) [<https://perma.cc/4KM2-GXPD>].

<sup>222</sup> See David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1381, 1428–29 (2011).

<sup>223</sup> For a discussion, see Ganesh Sitaraman, *A Grand Strategy of Resilience*, FOREIGN AFFS., Sept./Oct. 2020, at 165.

Fifth, secular decline will increasingly weaken America's influence and power globally, and likely strengthen the influence and power of America's competitors and adversaries. In the process, it will likely accelerate the transition from a "unipolar" world<sup>224</sup> to a "post-American" one.<sup>225</sup> Global power has historically been a function not just of military capacity and prowess, but economic strength, stability, and resources.<sup>226</sup> Societies that are internally weak—with fragile economies, divided populations, and limited administrative capacity—are less likely to be able to mobilize the domestic resources needed to fight and win wars, or to credibly project power without a fight. Reductions in state capacity therefore have significant consequences for global power. More narrowly, reductions in state capacity can create openings for adversaries or competitors to increase their influence abroad. A country that, for example, withdraws aid and support for another country, leaves open the possibility that its adversary will offer it, and thereby gain that country's goodwill and backing.<sup>227</sup>

When a state is unable to solve society's problems, it raises the question of why a strong state is necessary. That, in turn, may lead to further decline and dismantling of the state. This "doom loop" of secular decline is the final downside. The failure to solve society's problems may also erode social trust between individuals and groups. This, in turn, can lead to social fracturing and a retreat into tribalism.<sup>228</sup> Indeed, extreme governance failures can lead to unrest, instability, and violence.<sup>229</sup>

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<sup>224</sup> Charles Krauthammer, *The Unipolar Moment*, FOREIGN AFFS., 1990/91, at 23.

<sup>225</sup> FAREED ZAKARIA, *THE POST AMERICAN WORLD* (2008).

<sup>226</sup> See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000*, at xv (1989) (arguing that leading states use both military and economic power to maintain their relative strength).

<sup>227</sup> See Emily Feng, *China Sees an Opportunity as the U.S. Cuts Aid to Groups Around the World*, NPR (Feb. 20, 2025, 5:00 AM), <https://www.npr.org/2025/02/18/nx-s1-5300108/aid-cuts-and-china-muscles-in> [<https://perma.cc/A8PG-FM6W>] (discussing China's attempts to fill gaps in international aid left by cuts to USAID).

<sup>228</sup> Cf. Fukuyama, *Against Identity Politics: The New Tribalism and the Crisis of Democracy*, FOREIGN AFFS., Sept./Oct. 2018, at 90, 91, 99–104 (discussing both liberals and conservatives turning to identity politics over unified economic messages).

<sup>229</sup> See, e.g., Carrie O'Neil & Ryan Sheely, *Governance as a Root Cause of Protracted Conflict and Sustainable Peace: Moving from Rhetoric to a New Way of Working*, STOCKHOLM INT'L PEACE RSCH. INST. (June 20, 2019), <https://www.sipri.org/commentary/blog/2019/governance-root-cause-protracted-conflict-and-sustainable-peace-moving-rhetoric-new-way-working> [<https://perma.cc/HJ5N-UHNU>] (arguing that inflexible, unresponsive governance systems contribute to violence and unrest); Jaimie Bleck & Kristin Michelitch, *The 2012 Crisis in Mali: Ongoing Empirical State Failure*, 114 AFRICAN AFF. 598 (2015) (discussing impact of weak state and infrastructure on violence in Mali).

## III

## ALTERNATIVE FUTURES OF THE AMERICAN STATE

There are alternatives for the future of the American state. In this Part, I describe four of the leading, emergent futures. I argue that three of these futures are unlikely to radically change the trajectory of state decline and the fourth has too little political support at the moment. This assessment lends further support to the secular decline thesis.

*Deconstruction and the Two American States.* The most prominent vision for the American state is the right's vision for the "deconstruction of the administrative state."<sup>230</sup> This future is admittedly and unabashedly declinist—the entire purpose is to minimize or eliminate the state's ability to regulate and deliver social goods. Leading Republicans have thus proposed getting rid of the Departments of Education<sup>231</sup> and Energy,<sup>232</sup> privatizing Medicare, cutting Medicaid,<sup>233</sup> reducing Social Security payments,<sup>234</sup> and eliminating healthcare regulations,<sup>235</sup> among other things. At the institutional level, the second Trump administration has attempted to shutter the US Agency for International Development (USAID) and the Consumer Financial Protection Bureau (CFPB), while attempting to slash the federal workforce.<sup>236</sup> Indeed, OMB Director Russell Vought has argued that the goal is not merely to reduce the civil service's size but to ensure that civil servants are "traumatically affected" so they don't want to work.<sup>237</sup>

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<sup>230</sup> Rucker & Costa, *supra* note 20.

<sup>231</sup> See Lindsey M. Burke, *Department of Education*, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE [Project 2025] 319, 319 (Paul Dans & Steven Groves eds., 2023).

<sup>232</sup> See Brad Plumer, *Rick Perry Once Wanted to Abolish the Energy Department. Trump Picked Him to Run It.*, Vox (Dec. 13, 2016, 12:10 PM), <https://www.vox.com/energy-and-environment/2016/12/13/13936210/rick-perry-energy-department-trump> [https://perma.cc/59XM-L98N]; William O'Keefe, *Go Big: Eliminate the Energy Department*, Manhattan Inst. (Dec. 1, 2016), <https://manhattan.institute/article/go-big-eliminate-the-energy-department> [https://perma.cc/LK8H-ZWJ7].

<sup>233</sup> See Roger Severino, *Department of Health and Human Services*, in MANDATE FOR LEADERSHIP, *supra* note 231, at 449, 464–65, 466–68.

<sup>234</sup> See Press Release, U.S. Senate Comm. on the Budget, Chairman, Raising the Retirement Age is a Benefit Cut, CBO Finds (Sept. 26, 2024), <https://www.budget.senate.gov/chairman/newsroom/press/raising-the-retirement-age-is-a-benefit-cut-cbo-finds> [https://perma.cc/RQA8-5P6Q].

<sup>235</sup> See Severino, *supra* note 233, at 469–70.

<sup>236</sup> Julia Reinstein, *Here Are All the Federal Agencies Where Federal Workers Are Being Fired from*, ABC NEWS (Feb. 24, 2025), <https://abcnews.go.com/US/agencies-federal-workers-fired/story?id=118901289> [https://perma.cc/7458-ERLB].

<sup>237</sup> Alice Herman, *Russell Vought: Trump Appointee Who Wants Federal Workers to Be 'in Trauma'*, THE GUARDIAN (Feb. 10, 2025), <https://www.theguardian.com/us-news/2025/feb/10/who-is-russell-vought-trump-office-of-management-and-budget> [https://perma.cc/8GTG-DA9L].

The more realistic future that is likely to emerge from this approach is not the full deconstruction of the American state because the right also wants to build up state capacity to deport immigrants and expand security services.<sup>238</sup> The actual result will be a dualist administrative state: a hollowed out social welfare and regulatory state and a robust security and surveillance state.<sup>239</sup> It is worth noting that this approach still contributes to secular decline. It is admittedly anti-regulatory and anti-delivery, except on a specific dimension of security.

*The Patrimonial, Crony Capitalist State.* Another possibly emergent future is patrimonial and crony capitalist. Patrimonial political systems are ones in which personal and familial connections to the leader matter a great deal.<sup>240</sup> These systems dominated in the pre-modern era, and one of the great achievements of the modern state was replacing them with rule of law, bureaucratic systems.<sup>241</sup> In recent years, patrimonialism has re-emerged, with Vladimir Putin's Russia reviving and modernizing the form. The Putin model has spread over time, and neo-patrimonial systems have emerged in a number of states.<sup>242</sup>

Crony capitalism is closely related to patrimonial politics, as it is a system in which close ties to the government benefit private actors, whether corporations or individuals.<sup>243</sup> The weak version of a patrimonial, crony-capitalist system arises as a form of capture. A captured government is one in which private actors dominate government decisionmaking and shape it to serve their ends.<sup>244</sup> Such regimes are often sustained through what some have called "political capitalism," a system in which private actors spend money through

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<sup>238</sup> Allison McCann, Alexandra Berzon & Hamed Aleaziz, *Trump Administration Aims to Spend \$45 Billion to Expand Immigration Detention*, N.Y. TIMES (Apr. 7, 2025), <https://www.nytimes.com/2025/04/07/us/politics/trump-administration-immigrant-detention-facilities-services.html> [<https://perma.cc/4BAU-4259>].

<sup>239</sup> Cf. Emily R. Chertoff & Jessica Bulman-Pozen, *The Administrative State's Second Face*, 100 N.Y.U. L. REV. 727 (2025) (observing that there are two administrative states, tracking this distinction).

<sup>240</sup> See MAX WEBER, *ECONOMY AND SOCIETY* 231–32 (Guenther Roth & Claus Wittich, eds. Univ. Cal. Press 1978) (1956).

<sup>241</sup> See FUKUYAMA, *supra* note 24, at 10.

<sup>242</sup> See generally STEPHEN E. HANSON & JEFFREY S. KOPSTEIN, *THE ASSAULT ON THE STATE* 65, 95 (2024).

<sup>243</sup> For discussions of the concept, see MINXIN PEI, *CHINA'S CRONY CAPITALISM: THE DYNAMICS OF REGIME DECAY* 6–7 (2016); LUIGI ZINGALES, *A CAPITALISM FOR THE PEOPLE* 140–41 (2012); Paul H. Rubin, *Crony Capitalism*, 23 SUP. CT. ECON. REV. 105, 105–07 (2016).

<sup>244</sup> See Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE 1, 13 (Daniel Carpenter & David A. Moss eds.) (2014) (discussing the meaning of regulatory capture).

campaign contributions, lobbying, or other means, to support public actors who then act in the interest of those contributors.<sup>245</sup>

Political observers have suggested that a patrimonial, crony capitalist regime might be emerging in the United States.<sup>246</sup> The relationship between President Trump and a wide range of billionaires and other wealthy actors with financial and business interests raises questions about the propriety of policy decisions, deregulatory efforts, personnel choices, and government contracts.<sup>247</sup> President Trump's alleged financial conflicts of interest add to the fears of this kind of regime emerging.<sup>248</sup> Weakening of anti-corruption rules, such as the firing of inspectors general,<sup>249</sup> ethics officials,<sup>250</sup> and non-enforcement of the Foreign Corrupt Practices Act,<sup>251</sup> all facilitate the emergence of this kind of state.

Patrimonial, cronyist systems undermine multiple aspects of the state. Most notably, decisions in such systems are made to preserve the power of the ruling leader and to advance the interests of family members and its allies. A system that is meant to give preferential treatment to some based on kinship or alliances fails the regulatory and delivery elements of state capacity—and by definition is not rational-legal. Fukuyama calls the decline of the modern state and return of kinship and alliance politics “repatrimonialism” and argues that it is a source of political decay.<sup>252</sup>

*De-risking, Industrial Policy, and Abundance.* In recent years, policymakers on both the right and left have embraced policies that will

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<sup>245</sup> RANDALL G. HOLCOMBE, *POLITICAL CAPITALISM* 1 (2018).

<sup>246</sup> See, e.g., Paul Krugman, Opinion, *Crony Capitalism Is Coming to America*, N.Y. TIMES (Nov. 25, 2024), <https://www.nytimes.com/2024/11/25/opinion/trump-tariffs-deportations.html> [https://perma.cc/33MB-P69D] (arguing that the Trump administration's tariff and deportation regimes present opportunities for discretionary enforcement and crony capitalism).

<sup>247</sup> See Sophie Alexander & Biz Carson, *The Billionaires Flocking to Trump's Mar-a-Lago: Zuckerberg, Musk, Bezos*, BLOOMBERG (Jan. 18, 2025, 9:00AM EST), <https://www.bloomberg.com/news/features/2025-01-18/billionaires-flocking-to-trump-s-mar-a-lago-zuckerberg-musk-bezos> [https://perma.cc/6NYS-T757].

<sup>248</sup> See Karen Yourish, Eric Lipton & Lazaro Gamio, *An Illustrated Guide to Trump's Conflict of Interest Risks*, N.Y. TIMES (Jan. 24, 2025), <https://www.nytimes.com/interactive/2025/01/17/us/politics/trump-conflicts-of-interest.html> [https://perma.cc/B2QV-QH5D].

<sup>249</sup> Danielle Caputo, *The Significance of Firing Inspectors General: Explained*, CAMPAIGN LEGAL CTR. (Jan. 31, 2025), <https://campaignlegal.org/update/significance-firing-inspectors-general-explained> [https://perma.cc/27HH-PG4V].

<sup>250</sup> Kathryn Watson, *Trump Ousts Director of Office of Government Ethics*, CBS NEWS (Feb. 10, 2025, 6:27 PM), <https://www.cbsnews.com/news/trump-office-of-government-ethics-director> [https://perma.cc/B5XN-G3FK].

<sup>251</sup> Exec. Order No. 14,209, 90 Fed. Reg. 9587 (Feb. 10, 2025).

<sup>252</sup> FUKUYAMA, *supra* note 24, at 27–28.



increase the supply of goods and services in the United States, including through industrial policy,<sup>253</sup> an “abundance” agenda,<sup>254</sup> and de-risking<sup>255</sup> policies to incentivize capital investment. Advocates for industrial policy and the abundance agenda are, in at least some prominent cases, also advocates for enhancing state capacity.<sup>256</sup> But it is unclear whether these efforts can lead to a revival of the state—or whether they might end up contributing further to secular decline.

For example, abundance advocate Ezra Klein has criticized the Biden administration’s approach to industrial policy as “everything-bagel liberalism.”<sup>257</sup> This approach to industrial policy involves giving subsidies or other benefits to sectors of the economy to incentivize domestic production, as the Biden administration did with subsidies for semiconductor manufacturing. Importantly, the approach also comes with conditions and constraints on the funding, such as limitations on stock buybacks or requirements for firms to provide employee benefits.<sup>258</sup> The reason for these constraints is to prevent the funding

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<sup>253</sup> See Marco Rubio, Opinion, *Why I Believe in Industrial Policy—Done Right*, WASH. POST (Apr. 2, 2024), <https://www.washingtonpost.com/opinions/2024/04/02/marco-rubio-industrial-policy-done-right> [<https://perma.cc/JM73-CLTP>] (advocating for investment in domestic manufacturing and critical industries including mining, oil, gas, and metallurgy); Jake Sullivan, Remarks on Fortifying the U.S. Defense Industrial Base (Dec. 4, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/12/04/remarks-by-apnsa-jake-sullivan-on-fortifying-the-u-s-defense-industrial-base> [<https://perma.cc/U4HB-76N2>] (calling for continued investment in and modernization of the United States’ defense industrial base); Brian Deese, Remarks on Executing a Modern American Industrial Strategy by NEC Director Brian Deese (Oct. 13, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2022/10/13/remarks-on-executing-a-modern-american-industrial-strategy-by-nec-director-brian-deese> [<https://perma.cc/QU6V-T24K>] (arguing for a “modern American industrial strategy” rooted in “strategic, long-term investments” into industries with high economic potential).

<sup>254</sup> KLEIN & THOMPSON, *supra* note 144; see also Brink Lindsey, *Abundance and the Permanent Problem*, NISKANEN CTR. (Apr. 25, 2025), <https://www.niskanencenter.org/abundance-and-the-permanent-problem> [<https://perma.cc/6LM8-YCTJ>].

<sup>255</sup> Daniela Gabor, *The (European) Derisking State* 17–11, 18, SocArXiv (May 15, 2023) (unpublished manuscript), [https://osf.io/preprints/socarxiv/hpbj2\\_v1](https://osf.io/preprints/socarxiv/hpbj2_v1) [<https://perma.cc/E6AW-E7KA>] (defining “de-risking”).

<sup>256</sup> *State Capacity*, NISKANEN CTR., <https://www.niskanencenter.org/policy/state-capacity> [<https://perma.cc/HD2Y-NPMT>].

<sup>257</sup> Ezra Klein, Opinion, *The Problem with Everything-Bagel Liberalism*, N.Y. TIMES (Apr. 2, 2023), <https://www.nytimes.com/2023/04/02/opinion/democrats-liberalism.html> [<https://perma.cc/WC8W-RAPF>].

<sup>258</sup> See FACT SHEET: *CHIPS Program Office Approach to Applicant Capital Allocation Policies*, NAT’L INST. OF STANDARDS & TECH. (Sept. 13, 2024), <https://www.nist.gov/system/files/documents/2024/09/16/ApproachToCapitalAllocationPolicies.pdf> [<https://perma.cc/7MZL-LJDU>] [hereinafter *Capital Allocation*] (describing federal capital allocation policies that attach conditions to semiconductor funding, such as restrictions on stock buybacks and limits on shareholder dividends); *CHIPS for America: Designing & Acting on Child Care Solutions*, NAT’L INST. OF STANDARDS & TECH., (Oct. 25, 2023), [https://www.nist.gov/system/files/documents/2023/11/08/CHIPS%20for%20America%20Webinar%](https://www.nist.gov/system/files/documents/2023/11/08/CHIPS%20for%20America%20Webinar%20)

from passing through to shareholders or to ensure a thriving workforce in the absence of a robust American welfare state.<sup>259</sup> But Klein and other critics argue that as more conditions are added, procedural delays and hurdles increase, which slows the process of making investments.<sup>260</sup> Some critics go even further and argue that adding such conditions is inefficient because it diverts some of the subsidies from the core investment activity, and redirects them to fulfilling the conditions.<sup>261</sup> (The early data, however, suggest that even with such conditions, the Biden administration's policies to encourage domestic building in multiple sectors were successful, at least as of the administration's end.<sup>262</sup>)

One might thus think that fewer conditions and fewer procedural regulations are preferable, so that building new facilities—whether factories, housing, energy resources or whatever else—can happen on a more rapid timeline.<sup>263</sup> This generally pushes the abundance camp toward advocating for subsidies with fewer conditions and toward deregulation in both processes and regulatory substance.<sup>264</sup> Abundance advocates thus argue for loosening zoning rules, reducing environmental permitting requirements, and other deregulatory actions.<sup>265</sup> As Ezra Klein has said, it requires a “deregulatory agenda.”<sup>266</sup>

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20Designing%20%26%20Acting%20on%20Child%20Care%20Solutions.pdf [https://perma.cc/BF4Y-HRQ7] [hereinafter *Child Care Solutions*] (explaining how CHIPS Act funding recipients are encouraged to provide employee benefits such as childcare as a condition for receiving federal subsidies).

<sup>259</sup> See *Capital Allocation*, *supra* note 258; *Child Care Solutions*, *supra* note 258.

<sup>260</sup> See, e.g., *State Capacity*, NISKANEN CTR., https://www.niskanencenter.org/policy/state-capacity [https://perma.cc/T8WT-L9Z6] (criticizing government “programs that are too unwieldy to be effective”).

<sup>261</sup> See Matthew Yglesias, *Every Policy Objective, All the Time, All at Once*, SLOW BORING (Apr. 26, 2023), https://www.slowboring.com/p/every-policy-objective-all-the-time [https://perma.cc/5B4P-X2A3] (arguing that “orthodox economics” would show that “multiple objectives will dilute the efficacy of a subsidy program”).

<sup>262</sup> Noah Smith, *Biden Did Stuff, and It Looks Like It's Working So Far*, NOAH PINION (Sept. 2, 2024), https://www.noahpinion.blog/p/biden-did-stuff-and-it-looks-like [https://perma.cc/R6GB-J832].

<sup>263</sup> See KLEIN & THOMPSON, *supra* note 144 (arguing that well-intended laws, including environmental regulations, are weaponized to block infrastructure, energy, and housing projects).

<sup>264</sup> See Ezra Klein, Opinion, *Fine, Call It a Comeback*, N.Y. TIMES (Mar. 10, 2024), https://www.nytimes.com/2024/03/10/opinion/biden-state-union-message.html [https://perma.cc/6989-HSAX] (arguing that a “deregulatory agenda” could have allowed Joe Biden to better effectuate his first term goals if reelected).

<sup>265</sup> See, e.g., *Abundance and Dynamism*, NISKANEN CTR., https://www.niskanencenter.org/policy/abundance-and-dynamism [https://perma.cc/57J4-K978] (focusing on “slashing unnecessary regulations” and “removing needless barriers to innovation”).

<sup>266</sup> Klein, *supra* note 257.

From the perspective of state capacity, this is potentially a problem. Taken seriously, it risks enhancing inequality of wealth and power, by subsidizing corporations but with limited conditions on using those funds. If abundance advocates would *not* restrict profits or stock buybacks, subsidies might merely expand profits, without leading to investments above and beyond what would have happened anyway. And if they would not place requirements on wages or employee benefits, then subsidies are likely to enrich corporate executives and shareholders disproportionately, deepening economic inequality and insecurity. The absence of conditions could even lead to a political backlash that undermines the broader project of increasing supply.<sup>267</sup>

One might argue that such social policies are better addressed through ex post tax-and-transfer mechanisms or alternative policies that advance social welfare, rather than being conditioned on subsidies. But such thinking would be largely wishful. For decades, policymakers have failed to build out an American social democratic welfare state along these lines, despite economists and policymakers making similar claims.<sup>268</sup> Indeed, further subsidizing powerful companies and their shareholders—while unleashing them from regulation—may even make ex post tax-and-transfer proposals less viable. This is because such policies are likely to increase the number and power of the opponents of taxation.

A second challenge is that a deregulation-plus-subsidies approach risks increasing the danger of capture and cronyism. So long as the focus is on subsidizing businesses and simultaneously cutting procedures and regulations, there are strong incentives for businesses to invest in lobbying to continue to receive—and to expand—those subsidies, even if they no longer benefit the national interest.<sup>269</sup> More broadly, the push for deregulation contributes to a broader deregulatory narrative, which may have spillover effects in the public and elite political consciousness and limit future support for regulation in other, essential arenas.

The result may be two suboptimal options: an everything-bagel approach that could lead to further proceduralism, complexity,

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<sup>267</sup> See Joel Dodge, *In Defense of Everything Bagel Liberalism*, WASH. MONTHLY (Apr. 24, 2025), <https://washingtonmonthly.com/2025/04/24/in-defense-of-everything-bagel-liberalism> [<https://perma.cc/NN3S-UVCX>] (describing political backlash to a “no strings attached” deal between New York and Amazon to build a second headquarters for the company).

<sup>268</sup> See Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 500–03 (2022) (arguing that the economic orthodoxy of exclusively redistributing through tax and transfer fails in practice).

<sup>269</sup> Cf. Lisa Friedman, *The Zombies of the U.S. Tax Code: Why Fossil Fuels Subsidies Seem Impossible to Kill*, N.Y. TIMES (Mar. 15, 2024), <https://www.nytimes.com/2024/03/15/climate/tax-breaks-oil-gas-us.html> [<https://perma.cc/8LR6-MZ8Z>] (describing the difficulty of eliminating oil and gas subsidies and tax benefits).

submerged state policies, and slower building, and thus, a loss of faith in the state's ability to deliver in a timely fashion. Or an abundance approach that risks widening inequality and unleashing and entrenching corporate power.<sup>270</sup> Neither approach builds up the autonomous power of the state. Both instead lead to private dependence on public subsidies that can easily bleed into corruption and capture instead of rational-legal investments. They also risk deepening oligarchy and cycles of deregulation that further sap state power to regulate bad behavior and deliver social benefits.

*The Antimonopoly State.* Leaders of the contemporary antimonopoly movement identify a range of policy tools that are part of the antimonopoly toolkit. These include antitrust law and enforcement; regulation and, in particular, sectoral regulation of networks, platforms, and utilities; public provision of goods and services, and corporate governance alternatives such as cooperatives.<sup>271</sup> The antimonopoly toolkit is, in many ways, well suited to ensuring state capacity. It has components related to delivery (public provision) and to regulatory ability (antitrust, regulation, corporate governance). It seeks to do so through rational-legal means, rather than cronyism or captured processes, because antitrust, regulation, and public provision all require a body of professional law enforcers, regulators, and public officials.

The main challenge with the vision of an antimonopoly state is political. Many of the essential components for modern antimonopoly remain out of favor, at least at the moment. While antitrust enforcement has had a revival on both right and left,<sup>272</sup> sectoral regulation has not yet seen a similar renaissance.<sup>273</sup> Nor has direct public provision, even after

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<sup>270</sup> Cf. Brent Cebul, *Bidenomics: Farewell to an Idea?*, N.Y. REV. OF BOOKS (Jan. 15, 2025), <https://www.nybooks.com/online/2025/01/15/bidenomics-farewell-to-an-idea> (discussing the Biden administration's use of tax credits and subsidies for companies to stimulate economic growth).

<sup>271</sup> See Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018) (describing the multiple tools of antimonopoly); Tejas N. Narechania & Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, 42 YALE L. & POL'Y REV. 95 (2024) (addressing challenges of AI market structure and applying multiple antimonopoly tools, including industrial policy, NPU regulations, public options, and cooperative governance, to the sector).

<sup>272</sup> See Peter Jamison & Cristiano Lima-Strong, *As Tech's Clout Grows, A Respected Antitrust Enforcer Heads to the DOJ*, WASH. POST (Feb. 20, 2025, 5:00 AM), <https://www.washingtonpost.com/politics/2025/02/20/trump-antitrust-chief-big-tech-regulation> [<https://perma.cc/EHW6-XY6N>].

<sup>273</sup> See Ramsi Woodcock, *After Antitrust*, PHENOMENAL WORLD (Jan. 30, 2025), <https://www.phenomenalworld.org/analysis/after-the-antitrust-revival> [<https://perma.cc/2KQ9-TKUK>] (arguing for prioritizing taxation and regulation as tools for addressing wealth inequality).

decades of privatization. While there are efforts underway to make the case for these other antimonopoly tools and expand interest in them,<sup>274</sup> it is unclear whether interest in these tools can overcome the strong pull toward neoliberal ideology that has dominated public policy and elite thinking for more than a generation.

#### IV DISRUPTING DECLINE

Is reversing secular decline possible? Perhaps, but it will be a challenge. Policy proposals for new institutional forms, structures, or policies may not be achievable precisely because the many factors above have created a system in which such policies cannot be adopted, or at least adopted easily.<sup>275</sup> Reversing secular decline will therefore likely require a larger scale social and political disruption—one that creates the space for political and policy change that can cut through the dynamics of decline.

Disruption on such a scale would most likely come from three sources: crisis, backlash, and generational change. A major crisis—war, economic depression or recession, pandemic, ecological crisis, or similar—could so disrupt society that it pushes elite political leaders and the population to demand the building of the American state in order to address the crisis. Indeed, this has been part of the story of statebuilding throughout history. As Charles Tilly once observed, “[w]ar made the state, and the state made war.”<sup>276</sup> Lincoln’s Republican Party and Roosevelt’s Democratic Party both engaged in significant statebuilding efforts in order to address the crises of their time: wars and depression.<sup>277</sup> On a more micro level, the Great Recession jolted policymakers out of the deregulatory mood and into passing the Dodd-Frank Act.

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<sup>274</sup> For my own work on these topics, see GANESH SITARAMAN & ANNE ALSTOTT, *THE PUBLIC OPTION* (2019); MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, *NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY* (2022).

<sup>275</sup> Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013) (arguing that proposals from an outside vantage point often fail because the internal dynamics they seek to reform would prevent the suggested reforms).

<sup>276</sup> Charles Tilly, *Reflections on the History of European State Making*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 3, 42 (Charles Tilly ed., 1975).

<sup>277</sup> See, e.g., HEATHER COX RICHARDSON, *THE GREATEST NATION OF THE EARTH: REPUBLICAN ECONOMIC POLICIES DURING THE CIVIL WAR* (1997) (describing statebuilding efforts during the Lincoln administration); Alan Brinkley, *The New Deal and the Idea of the State*, in *THE RISE AND FALL OF THE NEW DEAL ORDER* 85 (Steve Fraser & Gary Gerstle, eds., 1989) (describing the transformation of the state’s responsibilities during the Franklin Roosevelt administration).

A second possibility is backlash. Policymakers who undertake radical changes or engage in extremist behaviors often create a backlash to their efforts that catapult reforms over an entrenched status quo.<sup>278</sup> It is possible that efforts to “deconstruct” the administrative state or create a crony capitalist, patrimonial state will lead to a significant popular backlash that galvanizes voters and an elite backlash that pushes leaders to pay attention to state capacity and invest time and resources into it.

The third possibility is generational change. Throughout history, sweeping changes have taken place on roughly a generation or two-generation timeframe. In American history alone, consider the differences between the early republic and the Jacksonian Era; the Gilded Age and the Progressive Era; or the New Deal order and the neoliberal one—with each period lasting thirty to forty years.<sup>279</sup> At a higher level of periodization, roughly double in length, consider the republic before the Civil War; between the Civil War and the New Deal; and from the New Deal to the present. Of course, “periods” are constructed after the fact, difficult to discern, and never have clean breaks between them. But at a high level of generality, significant shifts in policy do seem to take place every generation or so.<sup>280</sup> On this theory, secular decline might simply be disrupted after a generation or two, when the need for new structures and policies have become so urgent as to overcome inherited constraints and conventions.

In each of these cases, reversing secular decline will require political leaders to change their approach. In particular, they will have to make three shifts. First, they will need to develop plans in advance for what institutional reforms they will undertake when the

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<sup>278</sup> Cf. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) (arguing that the backlash to “massive resistance” in the wake of the *Brown* case paved the way for civil rights).

<sup>279</sup> Cf. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 4 (1993) (identifying periods in American history as presidential eras).

<sup>280</sup> A long line of notable political leaders and historians have recognized this. Consider Jefferson’s views on generational and constitutional change. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 12 THE PAPERS OF JAMES MADISON, 2 MARCH 1789–20 JANUARY 1790 AND SUPPLEMENT 24 OCTOBER 1775–24 JANUARY 1789, 382–88 (Charles F. Hobson & Robert A. Rutland, eds.), <https://founders.archives.gov/documents/Madison/01-12-02-0248> [<https://perma.cc/2JE6-SFH9>]; Letter from Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval) (July 12, 1816), in 10 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES, MAY 1816 TO 18 JANUARY 1817, 222–28 (J. Jefferson Looney ed., 2013), <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> [<https://perma.cc/3QMF-F7R8>]; see also ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* (1999) (identifying a pattern of cyclical change in the American style of governance approximately every thirty years).



window of opportunity is open, and they will have to prioritize those institutional reforms over other substantive policy issues that might be demanded by interest groups or that seem appealing in the moment. Building is difficult and time consuming, and big projects like arresting and reversing state decline will be more complicated than run-of-the-mill policy implementation. Planning in advance allows policymakers to execute once in power, rather than losing critical time considering ideas, assessing challenges, and deliberating on options while in power and busy reacting to the issues of the moment. Waiting to develop plans will likely mean missing the political moment in which the mandate for change can be leveraged into action.<sup>281</sup>

Second, political leaders will need to be willing to act swiftly and boldly, and break some inherited institutional norms, in order to deliver reforms fast enough that people can see change taking place—and fast enough for that change to deliver for people before the next election. Political time is different from ordinary time, and the pace of elections means that political leaders have limited time to show they are acting and delivering on their promises. Valuable investments, as the Biden administration discovered, may not have political benefits if they do not take effect quickly enough. The result can be that they lose their durability and are reversed before they build a public constituency.

Third, political leaders will need to delegate power. Rather than centralizing authority in the White House, as presidents have increasingly done, rebuilding state capacity will likely require devolving authority to cabinet departments and agencies. Building state capacity in many places at once will happen more quickly if decentralized—and will contribute to restoring independent bureaucratic reputations. This does not mean that presidents who want to build state capacity need to abandon their policy views. It means that they will need to be clear about the direction but let subordinates in departments and agencies execute, without micromanaging them.

## CONCLUSION

Much has been made of “anti-administrativism” and the assault on the American administrative state. But the decline of the American state has been a secular one—it has been underway for decades, gradually eroding at rationality, delivery, regulatory capacity, and evolutionary ability. The Trump administration has made a sudden change to

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<sup>281</sup> Cf. FLYVBJERG & GARDNER, *supra* note 28, at 17–19 (discussing the importance of planning to accomplishing big projects).

accelerate this trajectory. Disrupting secular decline will likely require a major crisis, backlash, or generational change. But as importantly, it will require accepting that many factors contributed to the problem over decades—and that serious, worked out plans will be necessary to build state capacity anew.