A Hiatus in Soft-Power Administrative Law: The Case of Medicaid Eligibility Waivers

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By David A. Super*  

Administrative law, more than any other branch of public law, always has been characterized by a delicate mix of hard and soft power. Political appointees can overrule career staff, but the system makes that cumbersome and they rarely do. In part that is because career staff can substitute their own policy preferences for those of their agencies’ political leaders, but the system makes that difficult and they rarely do. Congress can override agencies’ interpretations of statutes, but it lacks the resources to do so routinely and it rarely does.

Courts, too, have developed a nuanced approach toward exercising soft power to vindicate important norms. To be sure, courts have maintained a formidable arsenal of hard-power weapons, but they make a point of rarely using them. Many of the most celebrated administrative law cases involve courts deferring to the substantive or procedural judgments of agencies. Even in those relatively rare cases where courts do interfere with an agency’s actions, the Court has made a point of not precluding the agency from persisting in its chosen course. The Court rejected the SEC’s first foray against the Chenerys, but it allowed the second. And agencies typically can take the hint: although the Court did not construe the statute to prohibit building a highway through Overton Park, but its strong skepticism was enough to get the Department of Transportation to change course.

The maintenance of a soft power regime of administrative law depends on a certain broad structural consensus. Career staff must accept the legitimacy of political appointees; political appointees must assume that career civil servants will take seriously their directions, subject to constraints of law and feasibility but not personal ideological disagreement. Courts must believe that agencies’ actions reflect the considered judgment of career officials making good-faith efforts to follow the law.

In several ways, this structural consensus depends significantly on the repetitive nature of administrative law interactions. Career staff know that, over time, they will have to work with political appointees of both parties; their success and longevity depends on being perceived as honest brokers by whomever the political process sends their way. In addition, to the extent they find one set of political guidance distasteful, they can look forward to new political masters whose preferences are more to their liking. Congress refrains from overturning every action it dislikes because it does not want to demoralize agencies it needs to carry out its initiatives in other areas. Courts assume that agencies will not act outlandishly lest they damage their reputation and imperil their chances in their inevitable future litigation.

It follows, then, that when this structural consensus frays, the soft-power regime of administrative law will become unworkable. This is particularly true where key actors cease to be, or cease to regard themselves as, long-term repeat players. Instead of a heavily iterated prisoner’s dilemma, in which the incentives to defect selfishly are quite powerful.

This essay argues that we have entered such a period of dissensus about the structure of the administrative state. The current Administration, in word and deed, has rejected the broad structural consensus about the means and limits of administrative law that has existed since the New Deal. Perhaps even more crucially, it has acted, and has come to be regarded by other important actors, as temporally discontinuous from its predecessors and from any successors that do not share its policy views. With a President often sharply estranged from much of his own party, facing catastrophic polling from its early days, and under

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1 SEC v. Chenery Corp., 318 U.S. 80, 95 (1943).
4 See Citizens to Preserve Overton Park v. Brinegar, 494 F.2d 1212 (6th Cir. 1974) (affirming agency’s subsequent rejection of road).
an investigation that poses a threat to its ability to serve out its mandate, only the naïve would believe that it expects sufficient repeat interactions with other important actors to constrain its behavior.

This collapse in structural consensus requires a suspension, although not a termination, of the soft-power model of administrative law. In particular, the two main institutional guardians of administrative legality and continuity—the courts and career civil servants—can and should adopt a far less deferential approach to this Administration’s actions of questionable legality. Fortunately, the system of administrative law that we have been bequeathed provides ample means both for responding to this extraordinary situation while it lasts and for returning to the soft-power regime of administrative law when the emergency passes. This course is far superior either to ignoring the current Administration’s fundamental discontinuity from its predecessors, on the one hand, or making permanent changes to a basically sound regime of administrative law, on the other.

To make this argument more concrete, this essay will focus upon one of countless, broadly similar, historically exceptional actions this Administration has taken: using the demonstration project authority of section 1115 of the Social Security Act to encourage and approve states to impose “work requirements” on Medicaid recipients. This essay begins with a brief description of that action and the rather salient questions concerning its legality. It then moves on to consider the tools available to the judiciary to check this action. From here, it assesses how civil servants might plausibly respond. Finally, it looks ahead to how various courses of action will position administrative law when the present conditions pass and a return to normalcy is in order.

I. Medicaid, Section 1115, and “Work Requirements”

On January 11, 2018, the Trump Administration released policy guidance announcing its receptivity to states’ requests for waivers to impose “work requirements” on Medicaid recipients. The next day, it approved the first such waiver, for Kentucky. It subsequently approved a similar one for Indiana and has at least eight more expected imminently. The Medicaid statute does not allow otherwise eligible people to be denied coverage for non-compliance with work requirements in most circumstances and prohibits either federal or state agencies from narrowing statutory eligibility criteria.

A. Section 1115

Congress added section 1115 to the Social Security Act in 1962. Subsection (a)(1) provides that for “any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [the Act’s cash assistance, child support enforcement, or Medicaid titles] in a State or States … the Secretary may waive compliance with any of the requirements of [many of the eligibility-creating sections of those titles], as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project.” Section 1115(a)(2) also allows states to claim federal matching funds for expenditures on these projects that would not otherwise qualify under programmatic rules.

Wilbur Cohen, Secretary of Health, Education and Welfare at the time, described it as a minor administrative provision that would facilitate research. For its first quarter century, that is all it was. Late in the Reagan Administration, however, some enterprising White House officials recognized section 1115’s potential for allowing states to change the Aid to Families with Dependent Children (AFDC) program in ways the Democratic Congress was unlikely to approve. The George H.W. Bush Administration con-
continued and expanded section 1115’s role in circumventing recipient protections in the AFDC statute. President Clinton, having campaigned on “welfare reform” but having great difficulty crafting legislation that reconciled his various promises, felt unable to restrict the availability of waivers and indeed hoped they could buy-off disgruntled governors who were pressing for enactment of Republican welfare bills. By the time the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 repealed AFDC, its rules were still in effect in a shrinking minority of states.

Several administrations relied on 1115 waivers to promote Medicaid managed care. The George W. Bush Administration encouraged states to seek 1115 waivers to subsidize employer-sponsored coverage for low wage workers, to expand pharmaceutical coverage for the elderly, and to narrow benefits to fund expanded coverage. The Obama Administration briefly explored granting 1115 waivers to expand the range of activities that could meet cash assistance work requirements but quickly backed down when Congress objected. All these waivers, however, operated within the basic frameworks of the programs: to promote self-sufficiency (in the case of cash assistance programs) and to expand access to health care (in the case of Medicaid).

Indeed, even within those purposes, these administrations refrained from using section 1115 as a substitute for legislation. Thus, either the Clinton or Obama Administrations could have established near-universal health coverage regimes under section 1115 similar to those they were asking Congress to enact: although administrations customarily have required waivers to be budget-neutral to the federal government, section 1115 does not require that.

B. Medicaid Work Requirements

Although most people assume that a “work requirement” is designed only to punish those who refuse to work, the term has changed dramatically over the years. Section 6(o) of the Food and Nutrition Act, which the Administration’s letter praises, is entitled “work requirement” but in fact imposes a firm three-month cut-off of food assistance to unemployed recipients without any requirement that recipients be offered a chance to work off further assistance. Despite generous financial incentives to do so, only a handful of states have committed to offering time-limited recipients work slots.

Even where the state ostensibly commits itself to provide opportunities to work for those unable to find private-sector jobs, bureaucratic errors cause large numbers of people to be sanctioned improperly. Since state fiscal crises brought on by the Great Recession, states have radically shrunk their eligibility staffs and closed numerous local offices. The highly automated and centralized agencies that remain lack the capacity to match recipients with work sites, determine qualifications for exemptions based on physical or mental limitations, sort out problems caused by lost, stolen, or lost mail, and perform the rest of the labor-intensive chores required to run work programs. Kentucky estimated that tens of thousands of people would lose eligibility under its waiver.

C. Legal Problems with the Administration’s Waivers

15 Michele Johnson & Kristen Ware, Medicaid Expansion by Any Other Name: Exploring the Feasibility of Expanded Access to Care in the Wake of NFIB v. Sebelius, 1 Belmont L. Rev. 119 (2014).
The Administration’s waiver policy, and the resulting state waivers, raise several serious legal problems. First, they do not seem to “promote[e] the objectives of” the Medicaid statute.

Second and related, the Administration’s embrace of these waivers represents a complete reversal of the agency’s prior interpretation of section 1115 as not allowing these waivers because they tend to reduce coverage.

Third, approving a waiver for Kentucky the day after the Administration announced that it would approve such waivers, and others soon afterwards, ensures that the waiver did not comply with section 1115(d)’s requirement for public hearings and engagement on proposed demonstration projects.

Fourth, these waivers are inconsistent with Congress’s resolution of the question of work requirements for Medicaid, which allows termination of Medicaid only for adults who received cash assistance under the Temporary Assistance for Needy Families (TANF) block grant, and even then only for “refusing to work” and only for so long as such refusal continues. Thus, instead of exploring new policies that might prove of interest to Congress, these waivers merely resuscitate policies Congress has already rejected. The Fifth Circuit held that these limitations reflected clear congressional intent to limit denials of health care.

Finally, the plausibility of these waivers as genuine demonstration projects is dubious: the Administration’s letter is gauzy about what sort of evaluation is required, and any research objectives likely could be served by changing the rules only for a modest number of people whom researchers wish to study rather than statewide. If all the Administration approves all pending waivers, it will have changed basic eligibility policy for states with 11% of Medicaid enrollment nationally, far more than is needed to test any research hypothesis. Because the waiver authority is limited to demonstration projects, the absence of a serious research design likely renders the waivers ultra vires.

II. Judicial Review in a Soft-Power Hiatus

Courts justify the general regime of deference to administrative agencies by relying on the assumption that the executive branch is ordinarily seeking to adhere to the law. In such situations, the executive generally should be given latitude to do so in the manner it thinks best. This only remains plausible, however, if the courts will rescind deference when the underlying assumption of good faith is violated. If the courts do not treat fidelity to law as a precondition to deference, they have little justification for retaining judicial review at all. At that point, they are not so much deferring to administrative interpretations and exercises of discretion as they are transferring legislative power from Congress to the President. This gives administrations little incentive to take the law seriously.

We are left with a variant on the formula Justice Jackson suggested in his Youngstown Sheet & Tube v. Sawyer concurrence. Agencies’ powers would be greatest when they demonstrate a serious effort to discern statutes’ meaning and generally engage in serious fact-finding with procedural openness. The Court effectively embraced this approach in U.S. v. Mead Corp., which limits Chevron deference to cases where the agency makes policy through inclusive procedures and those where Congress demonstrated a desire for the agency’s rules to have the force of law.

Shared structural norms are at least as important as specific legal rules in establishing the Rule of Law in the administrative state because legal rules invariably get written on the assumption of the then-prevailing ideology. Dangers possible under other normative frames either not considered or, if raised at all, dismissed as paranoid.

We have not previously seen anything resembling the current systemic rejection of the administrative state’s structural consensus. The closest analogies have come where individual agencies have sought to disregard the usual checks and balances. Perhaps the best-known of these is the Social Security Disability Insurance crisis of the early and mid-1980s. There, the Reagan Administration persuaded the courts, including the Supreme Court, that it was not making a sincere effort to administer the existing legal

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22 Id. §§ 601-615.
23 Comacho v. Texas Workforce Comm’n, 408 F.3d 229 (5th Cir. 2005).
As a result, court developed a range of extraordinary deference-rejecting doctrines. Perhaps the most striking example of this was in Bowen v. City of New York, with the Court finding that SSA had adopted secret lawless policies rendering the formal review process all but meaningless. These extraordinary measures did not metastasize to damage the rest of administrative law, and indeed they were largely absent from SSDI law just a few years later once the agency discontinued its defiance. On a smaller scale, the D.C. Circuit came to regard the Bureau of Indian Affairs’ treatment of Native American trust accounts as utterly lawless and imposed startlingly intrusive remedial measures on the entire Interior Department. Many, although not all, federal circuits regarded the Bush Administration’s restructuring of the Board of Immigration Appeals as producing systematically lawless decisions and embraced special presumptions against agency regularity.

This Part examines three tools available to courts to restrain potentially lawless agencies that merit modification during periods of systematic disregard for the administrative state’s norms.

A. The Anti-Delegation Doctrine

Although the Court has not explicitly invoked the anti-delegation doctrine to decide a case since 1935, it has declined numerous opportunities to dispense with it altogether. Justices at both ends of the ideological spectrum have invoked it in separate opinions, with one of those providing the fifth vote for the outcome in an OSHA case.

The Court has kept this doctrine in reserve for addressing a serious emergency. That emergency has arrived. For the Court not to invoke the doctrine in these circumstances would raise the question of when ever it could be used – and whether its continuation is more than a judicial aggrandizement. Indeed, if it is regarded as a doctrine that no rational Court would invoke, its only role will be to empower some possible future irrational Court. Put another way, if the current situation is not sufficiently problematic to justify the invocation of these reserved judicial powers, any condition that would likely is so spectacularly rare as to not justify those powers’ existence.

Formally, the settlement of anti-delegation claims has been that a statutory standard sufficiently constrains executive action to avoid a delegation of legislative powers. Given the remarkable gauziness of the statutory provisions in question, a more nuanced understanding is that the normative administrative law consensus combined with these statutory limits combined to make the executive activity effectively non-legislative.

Many battles over the Anti-Delegation Doctrine have involved systemically important statutes: wage-and-price controls for the whole economy, the authority of major agencies like EPA and OSHA to act, sentencing in all federal criminal cases, and so forth. Yet some of the most sweeping delegations occur in numerous “safety valve” provisions of federal statutes that grant sweeping powers to executive agencies for use only in very limited circumstances, such as natural disasters, focused research projects, tariffs, or threats to national security. These provisions can serve valuable purposes at the frontiers of governance, where Congress’s capacity to anticipate needs is at its weakest.
Both Congress and the courts have taken some comfort from these provisions’ narrow substantive scope to worry less about administrative overreach. Their very open-textured character, however, can make them Trojan horses, allowing administrators effectively to transform the substantive law without congressional approval. When they do so, they prompt future Congresses to rethink those assumptions and thus threaten the sustainability of these safety valve provisions. A simple invocation of the Anti-Delegation Doctrine to invalidate such a provision would similarly deprive the country of one of the more valuable kinds of open-ended delegations.

Increasingly, however, the Court has sought to vindicate the concerns of the Anti-Delegation Doctrine through legal means. It has restricted who may exercise particularly broad, potentially problematic, delegated powers.\(^{41}\) It has read other constitutional provisions formally to block some sweeping delegations\(^{42}\) and make others politically uncomfortable by denying Congress any control in the execution of laws other than by enacting new statutes.\(^{43}\) And although the Court has said in dicta that agencies cannot save delegations with limiting constructions,\(^{44}\) the courts can certainly do so under the doctrine of constitutional avoidance.\(^{45}\) The Court has constrained delegations to prosecutors with various plain-statement rules;\(^{46}\) it could do so for executive officials more generally. Under this latter approach, the Court could require a plain statement that executive discretion is intended to reach the outer limits of its constitutionally permissible powers before assuming that a sweeping delegation was intended. Absent such congressional direction, the courts would interpret the statutory limits on agency discretion fairly, rather than deferentially. Thus, for example, the courts would actually seek to determine the purposes of Title XIX of the Social Security Act, and whether Medicaid work requirement waivers plausibly advanced those purposes, rather than assuming that that vague language was intended to empower the agency.

In these cases, judicial intervention paradoxically increases executive flexibility in the long-term by obviating the need for Congress to purge statutes of the authority being abused. Courts often vindicate exercises of executive power more to keep free the hands of future administrations rather than because of any particular merit in the action at hand. Here, striking down abuses of these sweeping delegations can provide the reassurance for Congress to continue such powers for the future. Congress can only safely include them in statutes if it has confidence that executive officials will exercise this power with restraint and that, when they utterly fail to do so, courts will insist. The failure to do so will cause many of them to be withdrawn over time, which does not serve the public interest well at all. Thus, a judicial fallback against abuses of delegated authority will, in the middle- and long-term, actually expand executive power.

This approach also would have the salutary effect of inducing greater congressional involvement, with the likely effect that executive moves will be either ratified or rejected. This would be in keeping with Justice Jackson’s admonition in *Youngstown Sheet & Tube v. Sawyer*\(^{47}\) that the extent of executive power should depend on the extent of congressional support.

**B. Substantive Review**

The executive is permitted to adapt the legislative regime to different priorities and points of emphasis. It is not permitted to break with the regime it inherited, absent new legislation. Ordinarily, this is a difficult line to draw. No such difficulty exists, however, when an administration makes a major, high-profile effort to enact legislation, repeatedly fails, and then exploits a delegation of exception-making authority to make many of the same changes in law.

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\(^{46}\) U.S. v. Wagner, 382 F.3d 598, 610 (6th Cir. 2004).
\(^{47}\) 343 U.S. 579, 588-89 (1952).
The Court sometimes justifies Chevron deference by arguing that Congress likely intended for the agency, rather than the courts, to resolve ambiguities. This likely is true where the agency in question is playing the kind of role Congress could plausibly have envisioned. Congress knows that some future administrations will be of the opposite party and, when choosing ambiguous terms in legislation, surely takes into account the power it is granting to future administrations with divergent policy preferences. Congresses cannot so easily, however, be charged with the knowledge that an administration would take power that operates wholly outside the long-term structural consensus. Many of the administrative state’s implicit checks and balances working only over some extended period, e.g., agencies curbing their preferences to maintain credibility in the future. When an administration demonstrates a “short-timer” attitude that effectively frees it from those restraints, courts seeking to honor Congress’s expectations must replace them. Similarly, just as one basis for deferring to exercises of administrative discretion is the belief that they are informed by superior capacities for fact-finding, when fact-finding is found to be dishonest and distorted, exercises of discretion, even those not explicitly dependent on that fact-finding, should be questioned.

The simplest basis for scrutinizing waivers under section 1115 is to determine whether they are “likely to assist in promoting the objectives of” the Medicaid statute.48 Although courts operating within the post-New Deal structural consensus commonly shy away from seeking to ascertain the objectives of legislation, here the task is not difficult. The Administration claims that working promotes health and that the statute’s purpose is improving health. Neither of these assertions is straightforwardly true. In particular, Medicaid’s purpose is expanding health coverage, which seems contradictory to a plan expected to deny coverage to tens of thousands of people in one fairly small state alone. As amended by the Affordable Care Act, Medicaid is particularly focused on achieving as nearly universal coverage as possible to minimize the inefficiencies that uncompensated care causes. Increasing the ranks of the uninsured certainly does not accomplish that.

In addition, routine application of tools of statutory construction support a similar result. Section 1931 of the Medicaid statute shows that Congress knows how to craft work requirements and has chosen to do so in only a very limited way. Legislative silence ordinarily is entitled to little weight because it has no recognized standing within the terms of the Constitution and because any number of factors can lead to a bill’s failure (including the legislature’s failure fully to focus). The defeat of multiple efforts to repeal and replace the Affordable Care Act is the antithesis of this: it had extreme salience, and it was clearly defeated on the merits. This makes clear that the Administration is acting at the nadir of its power, in opposition to the Congress that enacted and amended the Medicaid statute over the years and with no support from the current Congress that chose not to disturb that statute.

The Medicaid “work requirement” waivers also a neat fit to doctrines for reviewing exercises of discretion. Even absent the systemic failures we are now experiencing, Citizens to Preserve Overton Park v. Volpe49 encourages courts to infer purposes from legislative text and to override administrative actions that consider illegitimate factors or disregard mandatory ones. This approach is especially apt for applying a statute that specifically requires adherence to its “objectives”. The Administration’s desire to reverse its congressional defeat is about as illicit a purpose as one can readily imagine; its failure to consider the individual and systemic consequences of increasing the ranks of the uninsured is similarly unacceptable under Overton Park. This Administration’s 180-degree reversal of its predecessors’ determination of the appropriateness of waivers of this kind also runs afoul of the principle that changes in direction require clear explanations of what has changed and why the evidence relied upon in prior determinations should not dictate continuing the prior policy.50 And the absence of any explanation why these “demonstration projects” need to operate statewide, rather than with discrete treatment and control groups, is just the sort of irrationality that courts often find arbitrary and capricious.

C. Procedural Review

Procedural review of agencies’ actions balance the agency’s substantive goals with concern for fair and accurate processes. Under ordinary circumstances, courts assume that agencies can readily reconcile these goals. Where, however, the substantive needs are exceptionally strong, they may overwhelm procedural concerns such as the need for a pre-deprivation hearing or allowing the public time to adjust before a new regulation takes effect.

Although less explicitly established, the reverse should also be true: where procedural concerns are especially severe, they should overwhelm the usual deference to the agency’s choice of substantive goals. For example, although Vermont Yankee generally prohibits courts from mandating additional steps in notice-and-comment rule-making, it does make an exception for extraordinary circumstances. Compelling evidence that the agency is not acting in good faith is such a circumstance. For the Medicaid work requirement waivers, courts would not need to invoke this proviso in Vermont Yankee because Congress has established additional procedures for policy-making through section 1115.

HBO v. FCC similarly held that, where the volume and intensity of ex parte communications renders the formal agency record illusory, the Administrative Procedure Act’s judicial review provisions allow courts to demand that the agency give a full public airing of concerns. Where one waiver was approved one day after the Administration announced its new policy and others followed soon thereafter, the purported record of these actions obviously does not tell the real story.

The substantive needs of agencies constantly must be balanced with the mandate of procedural regularity. Courts recognize that sometimes exceptional substantive needs require subjugating procedural ones. The reverse should also be true: in situations where procedural irregularities are severe, those should override routine substantive objectives.

III. The Civil Service in a Soft-Power Hiatus

As Jon Michaels has powerfully demonstrated, the Administrative State’s separation of powers assigned to career civil servants responsibilities closely analogous to those of the courts in the constitutional separation of powers. With protected tenure, they are expected to uphold the rule of law and to protect systemic interests that transcend the agenda of any particular administration. Indeed, much of their power derives from the courts: not only do the courts enforce civil service laws shielding them from politically motivated dismissals, but the standard of review strongly favors administrative actions crafted by career bureaucrats over those thrown together by political appointees. When career bureaucrats write thorough notices of proposed rule-making and meticulously responding in the preambles to final rules to all comments received, courts commonly find adherence to the Administrative Procedure Act’s notice and comment requirements. More generally, bureaucrats amass the combination of data and arguments that persuade courts that decisions were not arbitrary and capricious.

In ordinary times, this process is constructive: input from civil society and norms of legality filter through civil servants to affect decisions within the general terms set out by political appointees. In the current environment, however, the political appointees are driving an ideological agenda that does not respect either Congress’s legislative choices or the input of civil society. For bureaucrats to perform their usual roles in this environment is not to advance public policy development but rather to obscure its actual processes. Giving the appearance that public comments were considered when in fact they were not, or that expertise shaped a decision when it was not refuted but ignored, creates a false record that can

52 Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir. 1984).
53 To do otherwise would effectively concede that substantive needs are inherently superior to procedural ones, which makes little sense as a matter of either the APA’s text or sensible norms.
55 Id. at 542.
56 567 F.2d 9 (D.C. Cir. 1977).
only mislead courts and, ultimately, the electorate. Not only are bureaucrats not required to do this, but their oaths to uphold the Constitution and laws of the United States forbid them from doing so.

The Rules of Professional Responsibility provide an appropriate guide to the obligations of civil servants, even non-lawyers. This metaphor, of course, requires a judgment about whom should be regarded as the “client”, but civil servants’ oaths clearly are to the United States, not to their current political officials. Even to the extent that those political officials are seen as having authority to say what the goals of the Government are, attorneys may only pursue their clients’ goals through lawful means. To give a false aura of deliberation to politically pre-ordained decisions is tantamount to engaging in a cover-up.

In the case of the Medicaid waivers to disqualify unemployed persons, the courts’ belief that these are genuinely demonstration projects is crucial to those waivers being upheld. A part of making that case is designing credible evaluations. If a civil servant believes that these are not true demonstration projects because the officials approving them are not seeking to test new policy concepts but rather to change the law without involving Congress, developing a superficially plausible evaluation is essentially a cover-up of the true nature of these actions.

IV. Conclusion: The Way Back

At some point, this period will end. It is too disruptive and chaotic to serve even the deregulatory interests that helped set it in motion. Moreover, the electorate’s disposition is too conservative, and too wedded to social niceties, to tolerate this for very long. To be sure, the tumult of the Trump Era could give way to a more buttoned-down, organized pursuit of the same goals under a Mike Pence or a Paul Ryan. More likely, however, are a president and congressional leadership that resubscribes to the post-New Deal structural consensus, whatever its substantive goals.

The response courts and civil servants adopt to the current conditions should ideally provide as little impediment as possible to the revival of the prior order’s relatively efficient management of the administrative state. The approach advocated here – an explicitly temporary suspension of deference to political leaders who disregard their roles in the structural consensus – is most conducive to that goal. A weaker response that ignores the lawlessness of much of the current Administration could well lead to a search for perpetrators and collaborators once this moment is passed. The resulting upheaval would be messy, expensive, and sometimes unjust. As noted above, it would badly undermine the courts’ reputation as protectors of the rule of law and the rationale for judicial review. The goal, instead, should be the modern equivalent of the Act of Indemnity and Oblivion that Charles II enacted in 1660, voiding much of the law enacted during the interregnum but forgoing retribution against any but the bloodiest Cromwellians.

Conversely, a wholesale, permanent rejection of deferential judicial review would impede its reestablishment once the emergency has passed. Courts would have difficulty finding rationales for walking back their anti-deference rulings. Ironically, this hypervigilant judicial review could slow a restoration regime’s reversal of lawless actions undertaken during this period.

Available precedent, albeit limited, offers much hope that a temporary departure from deferential review is eminently reversible once the emergency passes. After savaging President Reagan’s Social Security Administration for disregarding substantive and procedural norms in its administration of disability benefits, once a new commissioner took office and explicitly committed the agency to adhering to the law, the courts rapidly receded back into their accustomed posture. Cases that would have prompted angry reversals a few years earlier received minimalist affirmances from the same courts. If anything, having trounced SSA during the period when it was behaving lawlessly, many judges seemed eager to mend fences with the new, more thoughtful agency.

Striking down the Medicaid “work requirement” waivers need not destroy future administration’s ability to conduct serious demonstrations of new policies that might enhance Medicaid’s performance in

any number of ways. Indeed, by removing the need for Congress to repeal section 1115 to prevent it from being similarly bypassed in the future,

Our system encourages courts and civil servants to exercise restraint, saving their powers and credibility for a rainy day. Today, it is raining.