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The REINS Act: Unbridled Impediment to Regulation

by

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The Regulations from the Executive In Need of Scrutiny Act, or REINS Act, is a legislative proposal that would greatly increase congressional control over administrative agency rulemaking. Under the bill, no “major rule” (a rule with a large economic impact) could go into effect unless Congress affirmatively approved it by adopting a joint resolution. The resolution would have to be passed by both houses of Congress and signed by the President (or repassed by two-thirds votes in each chamber in the event of a presidential veto). The House of Representatives passed REINS Act bills in 2011 and 2013 on near-party-line votes, and the 114th Congress, under unified Republican control, is likely to take up the proposal again.

*This article criticizes the bill on the basis that it would create an unmanageable workload for Congress, as well as unacceptable risks of stalemate in the development of important regulations. The article also questions the constitutionality of the bill. Some authors contend that the REINS Act would be valid, because Congress does not have to grant rulemaking power in the first place. In contrast, this article argues that the bill’s provisions would bear a fatal resemblance to a one-house legislative veto, which the Supreme Court held unconstitutional in *INS v. Chadha* (1983). In addition, the article draws on experiences with comparable legislation at the state level.*

I am pleased to participate in this symposium marking the fiftieth anniversary of the founding of the Administrative Conference of the United States (ACUS). As I have recounted elsewhere, the activities of the Conference have loomed large for me since the very earliest days of my professional career, including my law school days.¹ In this anniversary year, we have much to celebrate, as well as much to ponder, as the Conference carries on its work as the country’s preeminent source of ideas and recommendations about reform of the administrative process.

The Conference has, however, never maintained a monopoly on initiatives to reshape the administrative process. Periodically, such initiatives engage the interest of Congress itself,² and we now seem to be living through one of those periods. In particular, the House of Representatives has recently taken up a variety of bills to promote a “regulatory reform”

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¹Ronald M. Levin, *Our History: Told By You -- Ronald Levin*, ADMIN. FIX BLOG, Mar. 19, 2014.

²See generally Ronald M. Levin, *Statutory Reform of the Administrative Process: The American Experience and the Role of the Bar*, 83 WASH. U. L.Q. 1875 (2005) [hereinafter Levin, *Statutory Reform*].

agenda.³ This article is devoted to an analysis of one such proposal – a bill known as the Regulations from the Executive In Need of Scrutiny Act, or REINS Act.⁴

In brief, the REINS Act would require that any “major rule” be approved by an affirmative vote of Congress – as opposed to the present situation under the Congressional Review Act,⁵ in which a proposed agency rule will go into effect unless Congress votes to nullify it. More specifically, a proposed major rule would go into effect only if the two houses voted for it, and the resolution of approval was then signed by the President or adopted by a two-thirds vote in each chamber in the event of a presidential veto.

In tangible effect, the REINS Act bears a close resemblance to the “legislative veto” provisions that the Supreme Court held unconstitutional thirty years ago in *Immigration and Naturalization Service v. Chadha*.⁶ Proponents of the bill believe that its structure would distinguish it from the traditional legislative veto scheme and would give it a good chance of surviving constitutional review. I will address the constitutional issue below. For now, suffice it to say that the substance of the matter, with regard to major rules, is that the system would function very much like the one-house veto approach that was struck down in *Chadha*, because a vote against the rule by either house of Congress would kill the rule. Proponents of the bill contend that administrative rulemaking suffers from insufficient oversight. Therefore, the argument goes, Congress should assert responsibility for the most important rules by taking an affirmative vote, instead of by merely acquiescing in the decisions of an unelected agency.

In some respects, the REINS Act proposal must be seen as an exercise in political theater. The House of Representatives has twice voted to pass it, but in each case the votes were divided almost exactly on party lines. All Republicans who cast a vote voted in favor, and virtually all Democrats voted against it. Moreover, there was no serious prospect that the 112th or 113th Congress would enact it, in part because the Senate was controlled by Democrats. Indeed, Republican leaders have been open about their use of the bill to play up their party’s anti-

³See, e.g., Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014, H.R. 4874, 113th Cong. (2014) (proposing an ambitious program for retrospective review of existing regulations); Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (2011) (proposing extensive revisions to the Administrative Procedure Act). I have written or joined in criticisms of both of these bills. See Ronald M. Levin, *Congress Considers Creating Independent Commission for Retrospective Rule Review*, ADMIN. & REG. L. NEWS, Spring 2014, at 7; ABA Sect. of Admin. L. & Reg. Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619 (2012).

⁴The bill was first introduced by Rep. Geoff Davis as H.R. 3765, 111th Cong. (2010). Later versions have included H.R. 10, 112th Cong. (2011), and H.R. 367, 113th Cong. (2013). Parallel bills have been introduced in the Senate, although no proceedings on them have been held. S. 15, 113th Cong. (2013); S. 299, 112th Cong. (2011). Citations in this article to “REINS Act” refer to H.R. 367 as originally introduced, except where otherwise specified.

⁵5 U.S.C. § 801 et seq. (2014).

⁶462 U.S. 919 (1983).

regulation platform. They have even promoted it as a “jobs” bill,⁷ although the asserted connection between enhanced congressional oversight and employment growth is speculative, to put it mildly.⁸ In response to these congressional proceedings, the mass media and the blogs have published a host of articles praising⁹ or condemning¹⁰ the REINS Act. Up to a point, these are exactly the kinds of fora in which one should expect the controversy to play out.

On the other hand, the controversy does implicate judicial case law, political science, and interesting theoretical issues concerning the separation of powers between the legislative and executive branches. These are matters that typically occupy the pages of the law reviews, and indeed there is already an academic literature about the Act.¹¹ In this light, I believe further scholarly commentary is in order. Several of the points that I will make here have not been advanced in past legal scholarship about the Act.

As this symposium essay is written, the 113th Congress has adjourned, but the REINS Act proposal is by no means dead. Indeed, now that control of the Senate will shift to the Republicans in the 114th Congress, attention to the proposal may well increase. The Senate has taken no action on a REINS bill in the past, but the incoming Republican leadership is laying

⁷*Congressman Boehner: REINS Act Is Great Example of How the House Is Listening & Acting on Jobs* (Blog post, Rep. John Boehner, Dec. 7, 2011), <http://boehner.house.gov/congressman-boehner-reins-act-is-great-example-of-how-the-house-is-listening-acting-on-jobs/>.

⁸In their statement dissenting from the 2013 House report supporting the REINS Act bill, committee Democrats argued forcefully, and with substantial documentation, that “[r]egulations do not hinder job creation.” H.R. REP. 113-160, 113th Cong., at 60-61 (2013) (dissenting views) [hereinafter *2013 House Report*]. The majority’s assertions to the contrary were, by comparison, quite thinly supported. *Id.* at 9-10 (Committee majority). The dissenters’ view appears to accord with the weight of independent opinion. *See, e.g.*, Daniel E. Walters, *Analyzing the Job Impacts of Regulation*, REGBLOG, Apr. 15, 2014; Eric Lorber, *Do Federal Regulations Impede Economic Growth?*, REGBLOG, Apr. 13, 2013. Even if one takes the majority’s view, it is quite a stretch to conclude that enactment of the REINS Act – which would apply only to major rules, and would not necessarily prevent more than a handful from being approved – would have a palpable impact on unemployment levels.

⁹*See, e.g.*, Christopher DeMuth, *The Regulatory State*, NATIONAL AFFAIRS, Summer 2012, at 70, 84-89; Wayne Crews, *Reining in the Executive Branch Bureaucracy, Part 9: Congress Must Affirm Final Agency Rules before They Are Law*, OPENMARKET.ORG, Feb. 26, 2014; James Gattuso, *Taking the REINS on Regulation*, WEBMEMO [HERITAGE FOUND.], Oct. 13, 2011.

¹⁰*See, e.g.*, Dan Farber, *REINS or SPURS?*, LEGAL PLANET, Aug. 5, 2013; Sidney Shapiro, *The REINS Act: The Conservative Push to Undercut Regulatory Protections for Health, Safety, and the Environment* (Ctr. for Progressive Reform, Backgrounder, Feb. 2011); Noah M. Sachs, *When it REINS, It Pours*, NEW REPUBLIC, Feb. 10, 2011.

¹¹Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131 (2013); Jonathan H. Adler, *Placing “REINS” on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2013); Sally Katzen with Julian Ginos, *A Response to Professors Adler and Siegel Addressing the Constitutionality of the REINS Act*, 2013 N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 13 [hereinafter *Katzen, Response*]; David Schoenbrod, *How REINS Would Improve Environmental Protection*, 21 DUKE ENVTL. L. & POL’Y FORUM 347 (2011); *see also 2013 Hearing, supra note **, at 47 (prepared statement of Professor Eric Claeys) [hereinafter *Claeys*].

plans to give it priority.¹² Not surprisingly, the Obama administration has threatened a veto if the bill were to reach the President's desk.¹³ Nevertheless, the bill might well be used as a bargaining chip in negotiations over legislation that the two branches do intend to pass,¹⁴ just as has occurred in the past.¹⁵ Thus, discussions about the REINS Act are likely to remain topical for some time to come. It would be rash to predict that academic commentary about the Act will play a major role in that debate. Still, I hope the analysis in this essay will, at the least, provide helpful backdrop for the more ground-level political debate that seems to lie ahead.

Part I of this essay summarizes the main features of the REINS Act. Part II highlights a few disadvantages of the proposal. It would impose on Congress the responsibility to review far more proposed rules than it can realistically expect to consider in a responsible fashion. Moreover, even if the scope of the bill were limited to a manageable number of major rules, it would create far too much of an impediment to the adoption of rules on which the success of a regulatory program may depend. Part II also casts doubt on whether the bill could achieve its declared objective of promoting congressional accountability. Part III questions the constitutionality of the bill. A number of commentators have maintained that a scheme for congressional approval of regulations, whether or not wise as a policy matter, can at least be constitutionally valid. I offer a contrasting perspective here, in light of the specific manner in which the REINS Act seeks to implement an approval requirement. For example, notwithstanding proponents' argument that the Act would treat major rules as equivalent to mere "proposals" for congressional action, a congressionally approved major rule would not acquire the same legal status as an ordinary regulatory statute; rather, courts would be allowed to entertain challenges to the rule on the same grounds as they would use in reviewing other rules. Finally, Part IV of the essay examines some of the states' experiences with smaller-scale versions of the legislative veto and the REINS Act.

I should note that, for several years after being introduced in Congress in 2010, the bills that would institute the REINS Act remained largely unchanged by their sponsors. Before passing the latest bill in 2014, however, the House amended it to expand the number of rules it would cover.¹⁶ Presumably, the terms of the bill will be susceptible of further evolution if and when it moves forward in the legislative process. In this article I will discuss primarily the original version of the bill, which has been the subject of virtually all of the existing

¹²See Press Release, *Portman Announces Jobs for America Proposal*, Mar. 11, 2014 (announcing Senate Republican program that would include "Requir[ing] Congressional Approval of Any Federal Rule That May Affect the Economy by at Least \$100 Million"); see also Albert R. Hunt, *The Big Deal if the Senate Turns Right*, N.Y. TIMES, Mar. 30, 2014 (reporting that, under Republican control, "[t]here would be a big push for the [REINS] Act").

¹³OMB, Statement of Administration Policy: H.R. 10 – Regulations from the Executive in Need of Scrutiny, Dec. 6, 2011, http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr10h_20111206.pdf.

¹⁴Stuart Shapiro, *The regulation election*, THE HILL, Oct. 29, 2014.

¹⁵See, e.g., Lori Montgomery, *Conditions for a debt-ceiling deal*, WASH. POST, Sept. 26, 2013 (noting that House Republicans' "long list of demands for raising the federal debt limit" included the REINS Act).

¹⁶See *infra* notes 17-21 and accompanying text.

commentary, but I will make occasional allusions to the 2014 amendments where relevant. In any event, readers should bear in mind that future iterations of the bill may prove to be a moving target.

I. The Bill

The REINS Act would apply to virtually any “major rule” proposed by a federal agency.¹⁷ In its original form, the bill would have defined a “major rule” to include, roughly speaking, any rule that the Office of Information and Regulatory Affairs concludes would have an annual effect on the economy of at least \$100 million or another significant impact on the economy.¹⁸ This is a common usage in administrative law parlance.¹⁹ On the floor of the House of Representatives in 2014, however, an amendment lowered the dollar figure that would bring the Act into play from \$100 million to \$50 million.²⁰ A few specially targeted provisions were also added to the definition of “major rule,” including one that would apply the definition to every rule made under the Affordable Care Act.²¹

The key requirement of the Act is that “[a] major rule shall not take effect unless the Congress enacts a joint resolution of approval described under section 802.”²² The rule will also fail if Congress does not pass an approval resolution within seventy days of when an agency forwards the proposed rule to the House and Senate for consideration.²³ Accordingly, the Act

¹⁷See REINS Act § 802. *But see id.* § 806 (exempting Federal Reserve Board monetary policy rules). Technically, the Act also contains provisions relating to nonmajor rules. *Id.* § 803. However, these provisions will not be discussed here, because they simply incorporate existing requirements in the Congressional Review Act.

¹⁸REINS Act § 804(2). Specifically, the definition included:

(2) . . . any rule, including an interim final rule, that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget finds has resulted in or is likely to result in--

(A) an annual effect on the economy of \$ 100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

¹⁹The bill’s definition was nearly identical to the definition of “major rule” in the Congressional Review Act. 5 U.S.C. § 804(2) (2014). That definition, in turn, is quite similar to the category of “economically significant regulatory actions,” which OIRA uses to determine which rules proposed by executive agencies must be subjected to a cost-benefit analysis. Exec. Order 12,866, 58 Fed. Reg. 51,735, § 3(f) (1993).

²⁰See Cong. Rec., Aug. 1, 2013, at H5329.

²¹*Id.* at H5320-21; see REINS Act (as amended), § 804(2)(B)-(D).

²²REINS Act § 801(b)(1).

²³*Id.* § 801(b)(2). However, a house that has not yet taken a vote after seventy days would be required to do so. *Id.* § 801(g).

provides for expedited procedures in both the House and Senate.²⁴ Committee consideration would be tightly constrained, and floor procedures would be streamlined (for example, no Senate filibusters would be allowed).²⁵ Floor debate would be limited to two hours in the Senate and one hour in the House.²⁶ Any joint resolution to approve the rule would have to be bare-bones, with no explanatory language or amendments allowed.²⁷

Finally, § 805 of the REINS Act addresses the issue of judicial review. Notably, it provides that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review,”²⁸ and that the enactment of a joint resolution of approval, so as to allow a major rule to go into effect, “shall not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule.”²⁹

II. Some Consequences of the REINS Act

The REINS Act is intended to serve principled, idealistic ends, at least if one credits the aspirations written into § 2 of the bill. That section is captioned “Purposes”:

The purpose of this Act is to increase accountability for and transparency in the Federal regulatory process. Section 1 of article I of the United States Constitution grants all legislative powers to Congress. Over time, Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes. By requiring a vote in Congress, the REINS Act will result in more carefully drafted and detailed legislation, an improved regulatory process, and a legislative branch that is truly accountable to the American people for the laws imposed upon them.³⁰

The emphasis in § 2 on the desire to make Congress more accountable – repeated three times in the space of four sentences – is curious. Politicians are not usually known for going out of their way to invite blame for decisions that may go badly. Indeed, as I will discuss later, certain specific provisions in the REINS Act seem to have been drafted in such a manner so as to reduce the extent to which Congress might be called to account for the way in which it would use its newly acquired authority. One suspects, therefore, that the language of accountability is essentially an effort to put a positive spin on an initiative that could be more straightforwardly described as giving Congress more *control* over major agency rulemaking.

²⁴*Id.* §§ 801(a), 801(b)(2). In cases of national emergencies and the like, the bill allows for immediate effectiveness for ninety days, but does not waive the congressional approval procedure for the longer run. § 801(c).

²⁵*Id.* §§ 802(c)-(e).

²⁶*Id.* §§ 802(d)(2), 802(e)(1).

²⁷*Id.* § 802(a).

²⁸*Id.* § 805(a).

²⁹*Id.* § 805(c).

³⁰REINS Act § 2.

Would such increased control be a good thing? In this section I will discuss several practical objections to the REINS Act, including ways in which it might serve to *reduce* accountability for solving the problems that major rules are designed to address.

It is well to bear in mind at the outset that the current rulemaking system incorporates a variety of controls over potential misuses of the rulemaking process. These controls reside both inside and outside Congress. Although the Congressional Review Act itself has not proved to be a particularly potent weapon in the legislature's armory, Congress retains broad opportunities to influence the course of administrative rulemaking and, when it chooses, to override the executive branch's choices. Periodic statutory reauthorization cycles, the annual appropriations and budget processes, investigations, and oversight hearings are only a few of the devices the legislative branch can employ.³¹ Moreover, agencies are also subject to vigorous oversight from the judicial branch. And ultimately the executive branch, through the presidency, is answerable to the electorate.

I do not mean to say that any of these sources of accountability is incapable of improvement, nor that they always are sufficient in the aggregate to overcome bad administrative decisions. Much of the ongoing work of the Administrative Conference seeks to spread awareness of best practices and contribute to further evolution in agency procedures. However, we do have a functioning system that manages over time to provide both effective action and political accountability. Indeed, its comparative flexibility serves to balance off the inherent inertia of the legislative process. Congress should be circumspect about entertaining proposals for drastic changes in this system.

A. *Unmanageability*

A good starting point for consideration is the sheer magnitude of the task that Congress would be setting for itself if the REINS Act bill were to become law. In the Judiciary Committee's report on the REINS Act in the last Congress, the dissenting statement made the point that in 2010 the House had 116 legislative days, yet 100 major rules that would have been subject to the REINS Act were issued during that period.³² (This figure was based on the \$100 million benchmark for "major rules" in the Act as it then stood; if the subsequent amendment lowering the threshold to \$50 million were to stand, the problems I am about to discuss would be greatly magnified.) To say the least, Congress should not take on such a burden without careful consideration as to whether this new task would be worthwhile.

One might suppose that any regulation that meets the definition of "major rule" would by definition raise important public policy questions that Congress has a natural interest in

³¹See generally JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* (1996); Jack M. Beermann, *Congressional Administration*, 43 *SAN DIEGO L. REV.* 61 (2006).

³²2013 *House Report*, *supra* note 8, at 54 (dissent).

answering, but in reality many involve relatively narrow, fact-bound questions.³³ Requiring Congress to master these rules in order to give them affirmative approval would be a dubious burden, at least if legislators are going to study the issues carefully enough to make their votes meaningful.³⁴

Indeed, much of the work of modern rulemaking (“major” and otherwise) is to engage in very detailed analysis of legal, factual, and policy issues, many of them highly technical. This work is better suited to the subject matter specialists in the respective agencies than to the generalists who serve as our elected representatives. Roughly speaking, that is the very reason why Congress delegated responsibility for these issues in the first place.

Not long ago, William Ruckelshaus, who was administrator of EPA under Presidents Nixon and Reagan, was asked about the proposal that Congress should affirmatively approve regulations:

“I think that’ll last about 60 days,” Ruckelshaus said, suggesting members of Congress would toss the measure the first time they had to wade through the political minefield of reviewing or drafting complicated environmental regulations. “It makes no sense for Congress to try to do that.”³⁵

Many of these major rules may be unlikely to elicit broad congressional opposition, yet may be so arcane as to consume substantial time if they are to be handled seriously. The fact that the REINS Act provides for expedited procedures is not a complete answer to this concern. A chamber would have to allow floor time for consideration of an approval resolution, even if only a few members wanted to discuss it.³⁶ Even though the REINS Act contains exemptions from the filibuster, floor time is a scarce asset, and should not readily be committed to a substantial workload without a justifying payoff. On the other hand, if the assumption is that most members would vote to rubberstamp a rule without paying much attention, what would be the benefit of insisting on affirmative approval?

It has been argued that Congress could make time for the burdens of the REINS Act by meeting on more days and by curtailing ceremonial or symbolic votes.³⁷ In a sense that may be

³³For detailed descriptions of the manifold varieties of major rules, see Curtis W. Copeland & Maeve P. Carey, *REINS Act: Number and Types of “Major Rules” in Recent Years*, Cong. Research Serv. R41651 (Feb. 24, 2011).

³⁴See Philip A. Wallach, *An Opportune Moment for Regulatory Reform*, Ctr. for Effective Public Mgmt. at Brookings, April 2014, at 11 (“The 112th Congress (2011-2012) passed 283 laws, 242 of which were less than 10 pages long. During that same time, agencies promulgated 148 major rules—nearly all of which are (at least) dozens of pages long and dense. . . . [G]iving anything like a careful reading to even the summaries of 150 major rules per Congress would require a huge investment of time, not to mention an extremely broad base of knowledge.”).

³⁵Erica Martinson, *Mitt Romney’s EPA would likely look familiar*, POLITICO, May 7, 2012.

³⁶REINS Act § 802(d)(2), 802(e).

³⁷See, e.g., Claeys, *supra* note 11, at 59; Schoenbrod, *supra* note 11

true, but I don't believe that those choices are the ones that Congress actually would make. Nor do I believe that members would eliminate casework, calling potential donors, or attending fundraising events. The political incentives that lead members of Congress to make all of these choices are too great. Incentives to work on law improvement and oversight are much lower, and that is where I expect the tradeoffs would be made, to the detriment of the overall legislative output.

B. Stalemate

I do not want to rest my critique on workload considerations alone. In principle, the sponsors of the REINS Act bill could revise it to apply to fewer rules than the current draft contemplates. Such a revision could potentially solve the manageability objection. Even if this were to occur, however, there would be a further objection: the REINS Act would give rise to enormous risks of impasse.

One virtue of the existing rulemaking system is that it does usually permit the executive branch to take some action to carry out its legislative mandate and be judged by the results. The process of major rulemaking is protracted, and the safeguards of administrative law serve to constrain the agency's choices; but these hurdles have evolved in a manner that generally allows business to go on. In contrast, the REINS Act requirement that a major rule would need to secure the affirmative approval of the agency, the Senate, the House of Representatives, and the President would cause the risks of debilitating stalemate to increase exponentially.

It would be all too easy for a house of Congress to say "no" to the agency's proposed solution without having to take a position as to what alternative solution would be better, or even any certainty that there *was* a better solution. Indeed, the members' reasons for objecting might be mutually inconsistent. The expedited procedures of the Act might ensure that a vote would be *taken*, but not that the approval resolution (or any plausible substitute rule) would be *adopted*.

Usually, when the two houses wish to bridge their disagreements, they look for a compromise. For a major rule to survive scrutiny under the REINS Act, however, it would have to survive an up-or-down vote in each chamber, with *no amendments allowed*. Moreover, an agency would often be unable accommodate political objections from one chamber, or both of them, without jeopardizing its ability to defend the rule in court as a rational application of the existing statute.

Years ago, addressing the legislative veto, Assistant Attorney General Antonin Scalia discussed some of these challenges in terms that could equally well be applied to the REINS Act:

. . . [I]s it not a common practice for a congressional conference committee to bury a fundamental disagreement between the two houses by simply leaving the point unaddressed in the final bill? What is the agency to do when it must develop regulations

, at 357-59.

pertaining to that particular issue? If it handles the problem one way, the regulations will be vetoed in the House, and if it handles it the other way, they will be vetoed in the Senate. What happens to a piece of legislation which thus cannot be implemented in either direction? What does a court do with a law suit seeking to require an agency to issue regulations mandated by statute? Suppose the agency has tried three times, only to be met with three congressional vetoes? Does the court then mandamus the Congress? . . .

. . . I invite you private attorneys to consider how altered your function will be in the brave new world of congressionally reviewable rulemaking. Currently, having finished your arguments before the agency, you carry them before the courts. In the future there will be an intermediate process of congressional lobbying. It will be not merely an additional step, but a step of an entirely different character, strangely out of tune with the remainder of the process into which it has been inserted. The present system of administrative action followed by judicial review has been accurately described as an essentially unitary process. The agency makes its decision, which must be based upon rational and analytical factors established with greater or lesser specificity (usually lesser) by the Congress, and then the courts review its success in performing that rational and analytic task. Under the new system, the agency will first consider the matter on a rational and analytic basis. The Congress will then decide whether, even though the agency decision may be rationally and analytically correct, it should be abandoned for what may be purely political reasons. But if the agency action survives that test, it will again be reviewed in the courts to see whether it is rationally and analytically correct. . . . Such a system, it seems to me, is madness. . . .³⁸

The challenges of securing agreement from all relevant actors (the agency, the Senate, the House of Representatives, and the President) would be daunting enough if they all basically agreed about the purposes to be achieved. In today's ideologically polarized environment, however, one could not assume even that much. Recently, after all, the public has witnessed extraordinary levels of partisan and ideological divisions in Congress, including brinksmanship, political hardball, and just plain unwillingness to compromise.³⁹ In fact, the 112th Congress passed nearly a hundred fewer public laws than any other Congress during the preceding sixty years,⁴⁰ and the output of the 113th Congress was almost as meager.⁴¹ In this light, now is hardly a propitious time to consider a substantial *increase* in the responsibilities of the legislative

³⁸1976 *Bicentennial Institute -- Oversight and Review of Agency Decisionmaking, Part II*, 28 ADMIN. L. REV. 661, 692-93 (1976) (remarks of Assistant Attorney General Scalia).

³⁹The dysfunction haunting the legislative process at present is a familiar theme in current commentary. *See, e.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

⁴⁰Amanda Terkel, *112th Congress Set To Become Most Unproductive Since 1940s*, HUFFINGTON POST, Dec. 28, 2012, <http://mrand.us/ETkU>. For the official figures, see Office of the Clerk, U.S. House of Reps., *Résumé of Congressional Activity*, <http://library.clerk.house.gov/resume.aspx>.

⁴¹Drew DeSilver, *In late spurt of activity, Congress avoids 'least productive' title*, FACT TANK [PEW RESEARCH CTR.], Dec. 29, 2014.

branch. The upshot of the REINS Act could be that the dysfunction that now afflicts Congress in the *enactment* of laws would spread to the *implementation* of the laws. Meanwhile, the ensuing standoff would leave the agency unable to implement the most important building blocks in a program that it has been directed to put in place. This is a decidedly unattractive prospect.

To be sure, a conspicuous reason for the lack of productivity in the past two Congresses was the fact that the House was controlled by Republicans and the Senate by Democrats. As this essay is being written, the 114th Congress is about to take office under unified Republican control. Its future cannot be predicted with certainty, but it would scarcely be surprising if many of the disagreements that divided the two chambers were to recur in the new garb of conflicts between the executive and legislative branches. That disagreements over regulatory policy will be prominent in such conflicts also looks like a safe bet.

It may be thought that I am being unfair by using the current polarization in our political system to criticize legislation that might work better in the long run than in the short run. Indeed, it's true that some national elections result in the selection of a President and two houses of Congress from the same party. In fact, however, this has happened in only seven of the past twenty-four elections.⁴² Divided government, not unified government, is the norm in the modern era.

I do not want to leave the impression that my critique of the REINS Act is simply a brief for stricter rules. "Major rules" may result either in affirmative regulation or in deregulation, and the REINS Act, by its terms, would apply to both. If Mitt Romney had been elected President in 2012, and the REINS Act had been effect during his administration, the tangible impact of the Act would have been different, but the arguments for opposing it would still stand up. It's true that, as a candidate, Governor Romney endorsed the REINS Act,⁴³ but I suspect that President Romney, had he attained that status, would have felt compelled to reexamine that position, because the Act would have directly interfered with his administration's ability to adopt regulations that would carry out the policies that he had been elected to pursue.

Reflection on that hypothetical situation brings to mind an article that Professor Antonin Scalia wrote shortly after Ronald Reagan was elected President. The future Justice argued that, now that the Republicans were poised to take office as the "in" party, they needed to jettison their support for various "supposed regulatory reform devices" that they had considered attractive while they were the "out" party. Such measures would now interfere with *their* ability to pursue their political agenda. Prominent among the devices he mentioned was the one-house legislative veto, because it would, if instituted, obstruct their ability to bring about deregulation. As he wrote, such "[e]xecutive-enfeebling measures . . . do not specifically deter regulation.

⁴²The respective elections are listed in *Divided government in the United States*, WIKIPEDIA (as of Jan. 1, 2015). The number of unified governments drops to six if one excludes the 107th Congress, in which the House, Senate, and President were all Republican for several months, but the defection of one Republican senator thereafter resulted in divided government during most of the two-year period.

⁴³*Believe in America: Mitt Romney's Plan for Jobs and Economic Growth* 63 (2011).

What they deter is change.”⁴⁴ In short, governmental paralysis is not an attractive vision, regardless of which political party is in power at any given time.

C. Accountability?

The preceding analysis should inform our evaluation of whether, as § 2 of the REINS Act asserts, enactment of the Act would foster congressional “accountability.” The sponsors’ point seems to be that the Act would require Congress to take responsibility when a major rule is *adopted* – as though the rule itself would be a problem for which someone should have to bear the blame.⁴⁵ That perspective is not surprising when one recalls that many of the Act’s supporters wear their strident antipathy to administrative agencies as a badge of pride. But what about the public’s need to be able to hold someone accountable when rules are *not* adopted?

David Schoenbrod, a longtime critic of congressional delegations of authority to administrative agencies,⁴⁶ supports the REINS Act on the basis that it “would force legislators to assume responsibility for regulating or not regulating through highly visible votes for or against major regulations.”⁴⁷ I am less optimistic. As discussed above, the risks of impasse would be high, because the agency, the House, and the Senate, and the President would all have to concur. Today’s political polarization would often make such agreement unlikely. In this respect the Act would serve to *diffuse* accountability, because when multiple entities are jointly responsible for fulfilling a task, no one of them will be fully accountable for getting the job done. Advocates on each side of a contested issue could blame the other side for the lack of agreement. Contrast that state of affairs with the existing system in which the executive branch is much more squarely responsible for implementing mandates that have been assigned to it, and therefore is accountable for achieving actual solutions. Moreover, one would expect that, in some instances, discussions between the agency and congressional committees or their staffs would convince the agency that it would be futile to propose a rule at all. In those circumstances, the legislative branch could exert influence without leaving any clear fingerprints, thus avoiding accountability even more successfully.⁴⁸

⁴⁴Antonin Scalia, *Regulatory Reform — The Game Has Changed*, REGULATION, Jan-Feb. 1981, at 13.

⁴⁵Even in that sense, the Act would not necessarily enable voters to hold any particular member accountable for a given rule, because the approval could be by voice vote.

⁴⁶See DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993) (urging reinvigoration of the nondelegation doctrine).

⁴⁷Schoenbrod, *supra* note 11, at 359. For a similar line of argument, see DeMuth, *supra* note 9, at 86-88.

⁴⁸See Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1409 (1977) (explaining how, during the era of the legislative veto, Congress sometimes used that device to “avoid taking the political responsibility for its actions,” in part because “[t]o the extent that committee suggestions on the content of acceptable rules or legislative vetoes of proposed rules receive less publicity than the passage of the implementing statute, Congress can hide behind the structure it has created”).

Schoenbrod's argument also seems to be predicated on the assumption that the House and Senate would be sufficiently motivated to ensure that the agency would be able to get major rules approved on some terms.⁴⁹ That premise, however, does not seem compatible with the antipathy to regulation that pervades the rhetoric of so many of the bill's congressional backers. Those pronouncements suggest that, for many of the rules governed by the REINS Act, supporters of the Act would not consider impasse to be a particularly unwelcome outcome. The point may be best illustrated by the 2014 floor amendment in which the House voted to subject *all* regulations promulgated under the Affordable Care Act (ACA) to REINS Act approval. As is well known, the House repeatedly voted during the last two Congresses to repeal the ACA in its entirety.⁵⁰ One is entitled to doubt, therefore, that congressional supporters of the REINS Act would be committed to making health care reform work effectively.

If further evidence is needed to support skepticism about the idea that the REINS Act is intended to promote congressional accountability, it can be found in the judicial review section of the bill. That section provides that enactment of an approval resolution "shall not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule."⁵¹ In other words, all grounds for attacking a major rule in court, such as APA challenges, would remain viable notwithstanding the fact that Congress had approved the rule.⁵² This extraordinary proviso in the Act certainly does not sound as though legislators have any desire to take full responsibility for the measures that their votes would approve.⁵³

⁴⁹Schoenbrod, *supra* note 11, at 361 ("Experience shows that environmental interests often fare better when Congress makes the final choice."); *see* Adler, *supra* note 11, at 30.

⁵⁰*See* Ed O'Keefe, *The House has voted 54 times in four years on Obamacare. Here's the full list*, WASH. POST, March 21, 2014 (listing more than fifty House votes to repeal, defund, or weaken the Act in whole or in part, including multiple votes for full repeal).

⁵¹*See* REINS Act § 805(c) ("The enactment of a joint resolution of approval under section 802 . . . shall not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule. . . .").

⁵²Note that the bill differs in this regard from proposals for congressional approval statutes by Verkuil and Rosenberg, each of whom did contemplate that an approved rule would have the same force as a statute. Morton Rosenberg, *Whatever Happened to Congressional Review of Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1085 (1999); Paul R. Verkuil, *Comment: Rulemaking Ossification – A Modest Proposal*, 47 ADMIN. L. REV. 453, 457-58 (1995). Indeed, the main idea behind Verkuil's proposal was that Congress should *substitute* political review for hard look judicial review.

⁵³Fortifying this understanding of the real nature of REINS review is the curious provision in § 805(c) that "the enactment of a joint resolution of approval . . . shall not form part of the record before the court in any judicial proceeding concerning the rule except for purposes of determining whether or not the rule is in effect." Why this limitation? An enacted joint resolution is *law* and thus can always be cited to a court regardless of whether it is physically inserted into an administrative record. *See* 1 U.S.C. § 112 (2014) ("the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress . . . shall be legal evidence of laws . . . in all the courts of the United States"). Perhaps, therefore, the purpose of § 805(c) is to instruct a reviewing court to give no *weight* to the enactment of an approval resolution under the REINS Act. If so, this prohibition would appear to represent a striking effort to *avoid* taking responsibility for the act of approving a major rule. *Cf.* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 105-06 (1997) (criticizing an analogous provision in the CRA on this basis).

Incidentally, as noted above, § 2 of the REINS Act claims that its purpose is not only to promote congressional accountability, but also to “increase . . . transparency in the Federal regulatory process” and to “result in more carefully drafted and detailed legislation.” These aspirations also seem highly unlikely to be fulfilled. Reasons why the Act’s congressional review mechanisms could actually serve as an obstacle to transparency have just been discussed. Even with regard to major rules that would actually be approved by joint resolution, the high volume of rules to which the Act would apply could be expected to result in perfunctory consideration of many of them, rendering the supposed benefits of transparency rather illusory.

As for the goal of inducing Congress to delegate authority more narrowly, it is worth noting that one reason why the Administrative Conference recommended against general legislation that would provide for a legislative veto was that it could have the opposite result: “[I]n the belief that each agency’s work product would have to undergo later scrutiny by Congress or its committee staffs, Congress might be more ready even than at present to delegate power in broad terms and to avoid specificity and precision in formulating legislative policies that guide agency discretion.”⁵⁴ This prediction was based on research showing that legislative veto provisions in specific enabling statutes had indeed sometimes had this effect.⁵⁵ Because of the functional similarities between the legislative veto and the REINS Act, one could expect to find the same dynamic in the REINS context as well.

III. Constitutional Concerns

Probably, the preceding discussion in this article has been largely an exercise in preaching to the choir. The Administrative Conference took a stand in opposition to the legislative veto a generation ago,⁵⁶ and presumably most readers of a symposium marking the anniversary of the Conference would have a similar reaction to its lineal descendant, the REINS Act. Now, however, I turn to an issue on which one can foresee a potential for more disagreement – the constitutionality of the bill.

There is a substantial law review literature contending that, whether or not desirable, the REINS Act would be constitutionally valid. Jonathan Adler and Eric Claeys have written at length on this theme.⁵⁷ These are scholars whose libertarian leanings resonate with those of the congressional sponsors of the bill – but they are not alone. A more eye-catching analysis is by Jonathan Siegel,⁵⁸ who considers the bill “perfectly constitutional” even though he strongly opposes it on policy grounds. In addition, other scholars who could by no means be considered unsympathetic to regulation have written that they see nothing unconstitutional about certain

⁵⁴ACUS Recommendation 77-1, *Legislative Veto of Administrative Regulations*, 42 Fed. Reg. 54,251 (1977).

⁵⁵Bruff & Gellhorn, *supra* note 48, at 1427-28.

⁵⁶See *supra* note 54 and accompanying text.

⁵⁷Adler, *supra* note 11; Claeys, *supra* note 11.

⁵⁸Siegel, *supra* note 11.

proposals for congressional approval statutes that bear at least a superficial resemblance to the REINS Act.⁵⁹ Most notably, in the immediate wake of *Chadha*, Judge (now Justice) Stephen Breyer delivered an entire lecture predicated on the assumption that a plan of this nature would survive constitutional scrutiny.⁶⁰

In contrast to these scholars, I will argue here that the REINS Act might not survive constitutional scrutiny. The regime that the Act would establish is, in concrete respects, largely equivalent to the one-house legislative veto model that the Court held unconstitutional in *Chadha*. There is a formal difference between the two, but I do not take it for granted that courts would look only to formal details and ignore the underlying realities.

This similarity would not have been lost on Representative Elliott Levitas of Georgia, who was Capitol Hill's most enthusiastic promoter of the legislative veto during the 1970s. Shortly after *Chadha* was decided, he and a coauthor proposed that "legislative action should be required," through enactment of a joint resolution, for "the more significant regulations, those with an economic impact of \$100 million or more per year." They called this proposal, which bears an obvious resemblance to the REINS Act, the "son of legislative veto."⁶¹ As they candidly acknowledged, "if one House fails to pass the resolution of approval, in effect a one-House veto will have been exercised."⁶² Perhaps, however, this "son" would inherit the same constitutional disorder that afflicted its "parent." At least, that will be the proposition advanced in this article.

This is not the only line of argument that can be deployed to challenge the validity of the REINS Act. Sally Katzen has developed the thesis that the Act would offend separation of powers principles by, in the language of the Court's opinion in *Morrison v. Olson*,⁶³ "impermissibly interfer[ing] with the President's exercise of his constitutionally appointed functions," including the function of executing the law.⁶⁴ I myself find Katzen's application of *Morrison* persuasive.⁶⁵ However, the *Morrison* methodology is somewhat indeterminate.

⁵⁹See, e.g., Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. LEGIS. 1, 19 (1984), discussed *infra* note 104 and accompanying text. This might also be said of Rosenberg, *supra* note 52, at 1083-90, but I will not analyze the constitutionality of Rosenberg's proposal here, because he envisions a revision of congressional rules that diverges significantly from the approach of the REINS Act.

⁶⁰Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984).

⁶¹Elliott H. Levitas & Stanley M. Brand, *Congressional Review of Executive and Agency Actions After Chada [sic]: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801, 805-06 (1984).

⁶²*Id.* at 806.

⁶³487 U.S. 654 (1988).

⁶⁴*Id.* at 685; see Sally Katzen, *Why the REINS Act is Unwise If Not Also Unconstitutional*, REG BLOG, May 3, 2011 [hereinafter cited as Katzen, *Unwise*].

⁶⁵The House Judiciary Committee took issue with Professor Katzen's argument on the basis that the REINS Act would not interfere with any "core executive function," such as the prosecutorial power. H.R. REP. 112-278, pt. 1, at 14 (2011) [hereinafter *2011 House Report*]. This argument rests on a mistaken understanding of executive power. See *infra* notes 98-102 and accompanying text.

Whether a law is an *impermissible* interference with the prerogatives of the executive branch can be in the eye of the beholder.⁶⁶ The goal of this Part, accordingly, is to set forth an alternative analysis that proceeds from a body of doctrine that tries to draw relatively bright lines. This latter approach is compatible with the relatively formal modes of analysis that characterizes much of the Supreme Court’s recent case law on separation of powers.⁶⁷

A. *INS v. Chadha and its Implications*

In *Chadha*,⁶⁸ an alien filed a petition for suspension of deportation, which the Attorney General. The Immigration and Nationality Act provided for a “one-house legislative veto,” meaning that the Attorney General’s suspension decision would be cancelled if either house of Congress voted to nullify it. The House of Representatives exercised that power in *Chadha*’s case. He sought judicial review, and the Court held that the legislative veto violated Article I, § 7 of the Constitution. That section requires that a bill may not become law unless it is approved by both houses of Congress (bicameralism) and signed by the President or repassed by two-thirds of each house if he vetoes it (presentment).

Writing for the Court, Chief Justice Burger highlighted the importance that the authors of the Constitution had attached to these formalities as restraints on potentially arbitrary legislative action. As to presentment, the Court wrote that “[t]he President’s role in the lawmaking process . . . reflects the Framers’ careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures.”⁶⁹ And as to bicameralism, the Court pointed to the framers’ “belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials.”⁷⁰ Burger quoted James Wilson’s warning at the constitutional convention: “If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.”⁷¹

⁶⁶Other language from *Morrison* is vulnerable to the same critique. See *Morrison*, 487 U.S. at 691 (whether a statutory provision “*unduly* trammels on executive authority”) (emphasis added); *id.* at 693 (whether the legislation “*unduly* interfer[es] with the role of the Executive Branch”) (emphasis added). The dissent in *Morrison* scolded the majority for this indeterminacy. See *id.* at 724-27 (Scalia, J., dissenting).

⁶⁷See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). The Court’s very recent decision on recess appointments, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), is a more ambiguous case. The majority, in an opinion by Justice Breyer, certainly adopted a more flexible interpretation of the Recess Appointments Clause than the concurring Justices did. Yet the majority did set forth some fairly clear guidelines: such appointments are categorically impermissible during a recess of three days or less, and “presumptively” impermissible during a recess of up to ten days, except in unusual circumstances.

⁶⁸*INS v. Chadha*, 462 U.S. 919 (1983).

⁶⁹*Id.* at 947-48.

⁷⁰*Id.* at 948-49.

⁷¹*Id.* at 949.

In short, the Court saw great significance in “the profound conviction of the Framers that the powers conferred on Congress were the powers to be *most* carefully circumscribed.”⁷² Chief Justice Burger acknowledged that “some administrative agency action – rulemaking, for example – may resemble ‘lawmaking.’”⁷³ But he also saw differences between these two: “That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.” In contrast, a “one-House veto . . . is not so checked; the need for the check provided by Article I, §§ 1, 7 is therefore clear.”⁷⁴

Against this background, the Court held that the legislative veto device in the Immigration and Nationality Act was subject to these requirements because it “was essentially legislative in purpose and effect.” That is, it “had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch.”⁷⁵ More specifically, it prevented the Attorney General from utilizing the powers that Congress had previously delegated to him:

. . . Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. . . . Disagreement with the Attorney General’s decision on Chadha’s deportation . . . involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.⁷⁶

The problem with the REINS Act is that, with regard to major rules, it would accomplish virtually the same result as the “traditional” one-house veto – namely, it would enable a single house of Congress to nullify an agency rule, regardless of the wishes of the other house, let alone the President. The question, then, is whether the Supreme Court would accept what amounts to a 180 degree change of direction if the one-house veto were repackaged in a different format, even though the risks of unchecked action by the legislative branch would be as great in the later version as in the earlier one. My suggestion is that it would not. The Court emphasized in its opinion that “the purposes underlying the Presentment Clause and the bicameralism requirement . . . guide our resolution of the important question presented in this case,”⁷⁷ and those *purposes* are implicated just as much by the REINS Act as by the legislative veto in its previous forms.

⁷²*Id.* at 947 (emphasis added).

⁷³*Id.* at 953-54 n.16.

⁷⁴*Id.*

⁷⁵*Id.* at 954.

⁷⁶*Id.* at 954-55.

⁷⁷*Id.* at 946 (citations omitted).

Some scholars have criticized the *Chadha* opinion, contending that the Court was too quick to characterize the veto device as a “legislative” act and that the Court went overboard in tying Congress’s hands.⁷⁸ Other scholars staunchly defend the *Chadha* holding and the basic thrust of the opinion.⁷⁹ Regardless, the Court has not expressed second thoughts about its decision and in some ways has reaffirmed and extended its principles. In *Bowsher v. Synar*,⁸⁰ the Court invalidated a budget-cutting statute that provided for a version of what we would today call sequestration. The problem with the statute was that Congress left some aspect of the implementation of the sequestration to the Comptroller General, an official who, by statute, was removable by Congress. In rejecting this arrangement, the Court wrote broadly that “Congress may play no direct role in the execution of the laws.”⁸¹ Thus, the legislature could not remove, or even assert the power to remove, the Comptroller General, because his role under the statute made him, for constitutional purposes, an executive officer. Citing to *Chadha*, the Court noted that “[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.”⁸²

Later, in *Metropolitan Washington Airports Authority (MWAA) v. Citizens for Abatement of Aircraft Noise, Inc.*,⁸³ the Court struck down a statute in which Congress had, in effect, empowered a legislative committee to oversee the airports in the District of Columbia area. The Court explained that if the Board’s actions were considered legislative, it would have to comply with bicameralism and presentment; and if they were considered executive, an agent of Congress could not, under *Bowsher*, take such action at all. “In short,” the Court summarized (quoting from *Chadha*), “when Congress ‘[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of . . . outside the Legislative branch,’ it must take that action by the procedures authorized in the Constitution.”⁸⁴

⁷⁸E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 514-18 (1989); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789.

⁷⁹See, e.g., HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 237-42 (2006); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988).

⁸⁰478 U.S. 714 (1986).

⁸¹*Id.* at 736. This broad statement, of course, applies only to actions that would have the force of law (like the potential removal of the Comptroller General), not to Congress’s informal influences on administration, such as occurs during routine oversight. See Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 510-12 (2011); Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Distrust*, 95 MICH. L. REV. 1, 38 n.149 (1996).

⁸²*Bowsher*, 478 U.S. at 726.

⁸³501 U.S. 252 (1991).

⁸⁴*Id.* at 276 (quoting *Chadha*). Alan Morrison has recently argued that *Chadha* bars courts from ascribing constitutional significance to Congress’s failure to act. Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211, 1219-20 (2013). Presumably, a device that would allow a house of Congress to nullify a rule despite the *express opposition* of the other house should be at least as suspect, if not more so.

A separate criticism of *Chadha* in the law review literature is that the Court’s separation of powers precedents are inconsistent. The Court sometimes utilizes a “formalist” methodology, as in *Chadha*, *Bowsher*, and *MWAA*, and at other times it uses a more “functionalist” approach, as in *Morrison*.⁸⁵ Descriptively speaking, there is some truth to this appraisal. However, it should not matter for present purposes. The goal here is not to explore whether the logic of *Chadha* would be appropriate if applied to a wide range of separation of powers controversies. Rather, the goal is to apply this precedent in a context that, in practical terms, presents essentially the identical problem that the Court confronted in the earlier case.⁸⁶

Actually, the inconsistency in the case law is not as stark as it is sometimes depicted. In *Morrison* the Court remarked that the case at bar, in contrast to *Bowsher* and *Chadha*, did not “involve an attempt by Congress to increase its own powers at the expense of the Executive Branch.”⁸⁷ In general, the Court tends to allow Congress relatively little latitude in circumstances in which the legislature has a palpable conflict of interest.⁸⁸ By that benchmark, the REINS Act, which is designed for the very purpose of strengthening congressional control over agencies in important rulemaking proceedings, could be expected to elicit an analysis that does not place much weight on the ambitions of Congress.⁸⁹

B. Theories Advanced to Support the REINS Act

The most authoritative statement defending the constitutionality of the REINS Act is the report filed by the House Judiciary Committee in 2011.⁹⁰ For purposes of my analysis, I rely primarily on that report, read together with the commentaries on which the committee relied. The

⁸⁵See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225-56 & n.1 (citing sources); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

⁸⁶Of course, the subject matter of the REINS Act does fall outside the scope of the *Chadha* holding in the limited sense that Mr. Chadha’s case involved an individualized administrative action rather than rulemaking. However, the Court’s intention to make its decision applicable to rulemaking, including important rules, has never been in doubt. Indeed, only three weeks after *Chadha*, the Court summarily affirmed lower court judgments that did invalidate legislative vetoes of agency rules. *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983) (one-house veto of FERC rules on gas pricing); *United States Senate v. FTC*, 463 U.S. 1216 (1983) (two-house veto of Federal Trade Commission rules on used car warranties). The FERC rules, which shifted natural gas costs from residential users to industrial users, would undoubtedly have been “major” within the meaning of the REINS Act. (Whether the FTC rules would also have been “major” is less clear.) In subsequent years, moreover, *Chadha* has not been understood as applying only to adjudications or to minor matters. See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987).

⁸⁷*Morrison*, 487 U.S. at 694.

⁸⁸See Merrill, *supra* note 85, at 228 (noting a “readily discernible pattern” in the case law, whereby a “formal theory is regularly used in evaluating (and invalidating) attempts by Congress to exercise governmental power by means other than the enactment of legislation”).

⁸⁹Katzen, *Unwise*, *supra* note 64. For Siegel’s response, see *infra* note 109 and accompanying text.

⁹⁰See *2011 House Report*, *supra* note 65, at 13-15. The committee also issued a report supporting the Act in the 113th Congress, but the constitutional analysis in that report was perfunctory. *2013 House Report*, *supra* note 8, at 11.

committee's rationale was an amalgam of several interrelated theories. For clarity, I analyze those theories separately here.

1. *The "Actual Compliance With Bicameralism and Presentment" Theory*

One of the House committee's theories was that the REINS Act's preapproval process actually does comply with the Constitution as interpreted in *Chadha*, because it contemplates that Congress would act through a joint resolution, which implies bicameralism and presentment.⁹¹ This is correct as far as it goes, but it answers the wrong question. It is like saying that Congress could lawfully have used a joint resolution to *uphold* the Attorney General's decision to suspend Mr. Chadha's deportation. Presumably, it could have.⁹² But the far more significant holding in the case was that a vote to *override* the Attorney General's decision could not be validly effected by only one chamber of Congress (with no bicameralism or presentment). Here, similarly, the key question is whether a negative vote by one chamber, unaccompanied by concurrence from the other chamber and the President, should be allowed to nullify an agency rule. The committee's debating point does not answer that question.

2. *The "New Condition" Theory*

The House committee also argued that the REINS Act is constitutional because it "operates as a new condition on the delegation of legislative rulemaking authority."⁹³ This theory is also dubious. Congress has broad power to impose conditions on executive action, of course, but what if those limitations contravene the bicameralism and presentment safeguards that the framers of the Constitution purposely inserted as limitations on legislative action?

The "condition" that the bill would attach to an agency's exercise of rulemaking authority is that "[a] major rule shall not take effect unless the Congress enacts a joint resolution of approval described under section 802."⁹⁴ The "condition" that the immigration legislation in *Chadha* imposed, until the Court invalidated it, was that "if ... either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the substance of such deportation, the Attorney General shall thereupon deport such alien..."⁹⁵ I see little if any difference in principle between the two. Since Congress was not permitted to avoid the requirements of Article I, § 7 by imposing the "condition" of surviving a legislative veto, I doubt that it may avoid them through the "condition" of requiring a joint resolution of approval.

⁹¹2011 House Report, *supra* note 65, at 14; *see* Adler, *supra* note 11, at 25; Claeys, *supra* note 11, at 49.

⁹²But *see* *Chadha*, 462 U.S. at 963-67 (Powell, J., concurring in judgment). Justice Powell argued that the real problem in *Chadha* was that the House vote to override the Attorney General's order was adjudicatory and lacked procedural safeguards such as a right to counsel. He might have raised the same objection if Congress had acted through an actual statute. However, even if one sees force in arguments of this nature, they have no bearing on the REINS Act, which is about general policymaking through rules rather than adjudication of individual rights.

⁹³2011 House Report, *supra* note 65, at 13; *see* Claeys, *supra* note 11, at 48-50.

⁹⁴REINS Act, § 801(b)(1).

⁹⁵*See* *INS v. Chadha*, 462 U.S. 919, 925 (1983).

Paraphrasing the Court’s words: “Disagreement with [a proposed major rule] involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”⁹⁶

The committee’s “new condition” thesis resembles an argument rejected by Assistant Attorney General Scalia in discussing the legislative veto. He dismissed, as “contrived and hypertechnical,” reasoning that would

make[] the validity or invalidity of the one-house veto or the concurrent resolution depend upon whether the requirement for congressional approval is phrased in the statute as a condition precedent to the regulations’ becoming effective or, on the other hand, as a condition subsequent, which strikes down otherwise valid prescriptions. You remember conditions precedent and conditions subsequent from 15th Century property law. [This] theory would make them central to the interpretation of our Constitution. Surely, a decision bearing so closely on the very structure of our government does not depend on such technical refinements. Indeed, as I have noted above, the presidential veto power was set forth in two separate clauses to avoid precisely this sort of quibbling. It is not only when the Congress changes a law . . . that the veto power of the President applies, but whenever the Congress takes any action which has operative effect beyond the Hill. Preventing the issuance of a regulation, no less than destroying a regulation already in existence, comes within this description.⁹⁷

The House committee argued in its report, as some commentators have, that the REINS Act would not really impinge on the rightful province of the executive branch, because regulatory agencies are performing a *legislative* task when they make rules and regulations.”⁹⁸ That reasoning, however, rests on an overly narrow understanding of executive authority. In *Bowsher*, the Supreme Court took a directly contrary view: In constitutional terms, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very

⁹⁶*Id.* at 955. In this connection, Professor Claeys also cited to the Necessary and Proper Clause of the Constitution. Claeys, *supra* note 11, at 49. Presumably, however, that clause does not justify the REINS Act if, as I have been suggesting, Article I, § 7, as interpreted in *Chadha*, presents an affirmative obstacle. See *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (“Congress could not, merely because it concluded that such a measure was ‘necessary and proper’ to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.”).

⁹⁷1976 *Bicentennial Institute*, *supra* note 38, at 690-91. The “two separate clauses” to which Scalia referred were clauses 2 and 3 of Art. I, § 7. The former requires presentment for “Bill[s],” and the latter requires it for “[e]very Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary.”

⁹⁸2011 *House Report*, *supra* note 65, at 14 (emphasis added); see Claeys, *supra* note 11, at 50-51; Adler, *supra* note 11, at 27.

essence of ‘execution’ of the law.”⁹⁹ Less than two years ago, in *City of Arlington v. FCC*,¹⁰⁰ the Court reaffirmed this understanding: “Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of — indeed, under our constitutional structure they *must be* exercises of — the ‘executive Power.’”¹⁰¹ Implicit in these statements is the recognition that the “executive power” secured by Article II encompasses matters that would have been within Congress’s authority had it chosen to resolve them through legislation, but that become “executive,” in the constitutional sense, when Congress delegates power over them to an administrative agency. An eminent commentator puts it concisely: “Congress can decide an issue directly through legislation, or delegate it to the Executive Branch. To the extent it does the latter, the delegated discretion is executive until Congress legislates again.”¹⁰²

3. The “Withdrawal of Jurisdiction” Theory

A third theory, which I will call the “withdrawal of jurisdiction” theory, is suggested by the following comment by the Judiciary Committee: “With respect to major rules, Congress’ delegation would, under the REINS Act, no longer include a delegation to the agencies of authority to place legislative rules into legal effect. Instead, that final step would be reserved to Congress to take through a bicameral resolution with presentment to the President.”¹⁰³ According to this theory, Congress does not have to confer rulemaking authority in the first place. It can, therefore, withdraw each agency’s authority to issue major rules and instead empower its officials to “propose” a rule for Congress’s consideration. The legislature would then be free to accept or reject the proposal, but the bicameralism and presentment requirements of Article I, § 7 would have to be satisfied in order for this “proposal” to be converted into law.

This notion seems to be the premise that Laurence Tribe and then-Judge Breyer had in mind when they wrote that hypothetical congressional approval statutes could be constitutionally valid. However, Tribe devoted only a few sentences to the point, on a quite abstract level,¹⁰⁴ and Judge Breyer apparently just took it for granted instead of spelling out a doctrinal defense of it.¹⁰⁵ Jonathan Siegel’s article, on the other hand, expounds this analysis at length in the specific

⁹⁹*Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Professor Katzen relies on this precedent to similar effect. Katzen, *Response*, *supra* note 11, at 17-18.

¹⁰⁰133 S. Ct. 1863 (2013).

¹⁰¹*Id.* at 1873 n.4.

¹⁰²BRUFF, *supra* note 79, at 240; *see also* Beermann, *supra* note 81, at 499, 503 (“It is a fundamental reality of the U.S. government that more than one branch can create the identical substantive law. . . . [W]hen Congress acts it is legislating, and when an administrative agency acts it is executing the law, even if the action taken is, in substance, identical.”).

¹⁰³2011 *House Report*, *supra* note 8, at 13.

¹⁰⁴Tribe, *supra* note 59, at 19.

¹⁰⁵Breyer, *supra* note 60, at 789, 793.

context of the REINS bill.¹⁰⁶ I will, therefore, use his discussion as a main point of reference for my analysis.

Siegel maintains that the conversion of major rules to “proposals” changes the “constitutional baseline” by which such rules should be evaluated.¹⁰⁷ In this view, a major rule formulated by an agency should not be seen post-REINS as growing out of an existing delegation, which *Chadha* suggests may not be altered without Article I, § 7 formalities (or so I contend). Instead, it would grow out of a reconceptualized enabling statute that does not delegate the power to issue major rules at all.¹⁰⁸ Similarly, the REINS Act does not run afoul of the prohibition on congressional “aggrandizement,” because that principle “forbids only statutes that increase the power of Congress beyond the constitutional baseline.”¹⁰⁹ According to Siegel, that cannot be said of the reconceptualized enabling statute that does not authorize major rulemaking.

The problem with this theory is that it rests on a legal fiction that is so strained that the courts might not be willing to subscribe to it. Certainly, the REINS Act is not written in a manner that treats major rules as mere proposals. The Act’s definition of “rule” is essentially the same as the APA definition,¹¹⁰ and the “major rules” governed by the Act are referred to as “rules” – not “proposals” – throughout the Act itself. Moreover, the Act contains no language that purports to withdraw any jurisdiction from any agency. Rather, the language as written purports to impose a new condition on agencies’ exercise of their existing jurisdiction: “*A major rule shall not take effect unless the Congress enacts a joint resolution of approval described under section 802.*”¹¹¹ In substance, the condition is that either house of Congress may nullify the rule without bicameralism or presentment. I have just explained why I believe this aspiration is impermissible.

It might be argued that the language of the Act does not deserve much attention, because one should look through form to substance. That type of argument has led to spirited disagreement in other contexts.¹¹² The theoretical question need not be pursued here, however,

¹⁰⁶Siegel, *supra* note 11, at 150-57; *see id.* at 170-71.

¹⁰⁷*Id.* at 150.

¹⁰⁸*Id.* at 151-52.

¹⁰⁹*Id.* at 156; *see id.* at 162.

¹¹⁰The only difference is that the APA definition, 5 U.S.C. § 551(4) (2014), includes certain rules of “particular applicability,” which the REINS Act definition does not. REINS Act § 804(4). Such rules are customarily not subjected to external review anyway. *See* Congressional Review Act, 5 U.S.C. § 804(3)(A) (2014) (containing the same exclusion); Exec. Order 12,866, 58 Fed. Reg. 51,735, § 3(d) (1993) (limiting OIRA review to agency statements of *general* applicability).

¹¹¹REINS Act § 801(b)(1).

¹¹²*Compare* NFIB v. Sebelius, 132 S. Ct. 2566, 2597-98 (2012) (holding that the Affordable Care Act’s individual mandate could be upheld as a tax, although Congress called it a penalty, because “labels should not control here”), *with id.* at 2651 (Scalia, Kennedy, Thomas, & Alito, dissenting) (insisting that “there is simply no

because three very tangible aspects of the Act provide further evidence that the “withdrawal of jurisdiction” theory is a thinly disguised fiction. First, an agency’s authority would extend to exactly the same *subject matter* as before. The supposed rollback of jurisdiction would apply only to the issuance of major rules; the agency would retain full authority to promulgate non-major rules. Under this highly counterintuitive conception, it would be impossible for an agency to know in advance of rulemaking proceedings – let alone to describe in a coherent manner – what it does and does not have jurisdiction to regulate. Evidently, the agency would lack jurisdiction to promulgate a rule that OIRA expects would result in a \$120 million impact on the economy; but if the agency were to split the rule into three rules with an impact of \$40 million each, its authority would exist as before. The other components of the definition of “major rule”¹¹³ would be even more elusive, as they would depend entirely on OIRA’s completely unreviewable judgment¹¹⁴ as to what effects on costs or prices would be “major” or what adverse effects on competition, employment, etc., would be “significant.” The artificiality of the distinctions that the REINS Act would superimpose on longstanding grants of authority is readily apparent. Nobody who was not trying to make an argumentative point would ever describe this measure as withdrawing the underlying delegation, as opposed to placing a condition on the agency’s use of its existing jurisdiction.

Second, major rules would have to undergo the entire rulemaking process, with all the requirements prescribed by modern administrative law, before being placed before Congress. The agency would need to comply not only with the APA, but also with the Regulatory Flexibility Act, the National Environmental Policy Act, executive oversight orders, etc. This, obviously, is not the kind of process that one ordinarily associates with legislative “proposals.” Undoubtedly, the agency, legislators, and members of the public would continue to think of and treat these statements as “rules” for every purpose apart from the REINS Act itself.

Third, the Act provides that major rules would be subject to full judicial review under the APA on all grounds currently available.¹¹⁵ This is perhaps the most telling sign of all that, in reality, Congress regards the so-called “proposals” as agency rulemaking and aspires through this bill to assert congressional control over the *execution* of the laws. Under any other circumstances, Congress would expect that a measure that it has adopted through bicameralism and presentment would be evaluated in court by the highly deferential standards applied to economic legislation, like other exercises of congressional power. The fact that the Act provides for APA review (including, no doubt, review of the rule’s legality, factual basis, reasoned decisionmaking, and procedural validity) confirms that the sponsors of the Act think of these measures as executive actions, not legislative actions.

way, ‘without doing violence to the fair meaning of the words used,’ to escape what Congress enacted”) (citation omitted).

¹¹³For the text of the definition, see *supra* note 18.

¹¹⁴See REINS Act § 805(a) (forbidding judicial review of any determination made under the Act); *2011 House Report*, *supra* note 65, at 27 (stating that OIRA’s determinations would be unreviewable).

¹¹⁵See REINS Act § 805(c) (“The enactment of a joint resolution of approval under section 802 . . . shall not extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule. . .”).

Professor Siegel considers this aspect of the bill a defect that could be “easily fixed” with an amendment that would make an agency rule that has been approved through the REINS procedure “as impregnable from judicial challenge as any statute.”¹¹⁶ I do not think such an amendment is probable, however. For all of their talk about the Act as a means by which Congress should be “accountable” for major rules, Members of Congress surely know that they have no intention of studying those rules with such care that they would want to vouch for them as with other legislation. The courts do scrutinize these rules carefully, and legislators aren’t likely to trade their own limited scrutiny for the more careful job that courts can provide. Early experience with REINS-like mechanisms in the states tends to bear out this expectation, as I will explain below. Legislators know inwardly that what they really want is increased power over agencies, not full responsibility for the actual results.

As his clinching argument, Siegel asks the reader to imagine Congress setting up a brand new agency that would not have rulemaking authority but would have the authority to propose statutory prescriptions to Congress. Siegel submits that this scenario would unquestionably be constitutional, and the REINS Act is indistinguishable from it.¹¹⁷ To make the analogy closer, however, let us suppose that (a) the new agency’s statutory charter consistently refers to the agency’s “proposals” as rules; (b) whether a given “proposal” would be deemed a rule would depend on whether OIRA finds that it would have a major impact on costs or prices; (c) the “proposals” would be adopted through full rulemaking procedure; and (d) the “proposals” would be subject to the same judicial review as any normal rule despite their congressional ratification. It does not seem obvious to me that a court would uphold this arrangement in the face of *Chadha*.

In the end, the disagreement between Siegel and myself comes down to competing analogies. Is the REINS Act mechanism more like empowering an agency to “propose” rules or more like the traditional legislative veto? Both analogies are tenable, and neither is a perfect fit. Only the latter analogy, however, serves the purposes of the bicameralism and presentment clauses as outlined in *Chadha*.

The “withdrawal of jurisdiction” theory strikes me as, at best, a contrivance that courts might conceivably embrace in order to find a colorable justification for upholding the Act. However, I see little reason to believe that they would be inclined to do so.¹¹⁸ I suspect that proponents of the REINS Act have overestimated the extent to which courts are likely to share the goals that have led many members of Congress to favor a statute of this type. It is easy for

¹¹⁶Siegel, *supra* note 11, at 182.

¹¹⁷*Id.* at 152.

¹¹⁸In *Chadha* itself, Justice White, in dissent, tried to defend the legislative veto by claiming that (in the majority’s paraphrase) “the Attorney General’s action under § 244(c)(1) suspending deportation is equivalent to a *proposal* for legislation.” *Chadha*, 462 U.S. at 958 n.23; *see id.* at 997 (White, J., dissenting). The majority dismissed this ingenious but artificial theory in a footnote, remarking that “[t]he legislative steps outlined in Art. I are not empty formalities.” *Id.* at 958 n.23 (opinion of the Court).

members of a legislative body to persuade themselves of the need for broader or easier legislative oversight of the executive branch. But judges, situated as they are in a separate and independent branch of government, recognize that such assessments may be influenced by institutional self-interest; they will not necessarily accept those perceptions at face value.¹¹⁹ As I will show below, state law cases offer further support for the same conclusion.¹²⁰

C. *The REINS Act and Today's Court*

But, it can be asked, doesn't the above analysis pay too little attention to Judge Breyer's defense of a congressional approval device in his lecture delivered shortly after *Chadha* was decided? Members of Congress, and others, have cited the Breyer lecture as an important datum in its own right.¹²¹ Indeed, it is tempting to assume that if Justice Breyer, who by some measures is more deferential to administrative authority than any of his colleagues,¹²² has kind words to say about a measure that resembles the REINS Act, there is a good chance that the Court as a whole would follow. However, this reasoning would read too much into Breyer's lecture and also would make a dubious extrapolation to the rest of the Court.

It is easy to see why Breyer would have been dissatisfied with the *Chadha* opinion. Throughout his career, Justice Breyer, the "quintessential justice of standards,"¹²³ has advocated pragmatic approaches to legal problems, including separation of powers analysis.¹²⁴ He has, accordingly, been skeptical of broad generalizations and bright-line rules. This perspective is readily discernible in his dissents in *Clinton v. City of New York*¹²⁵ and *Free Enterprise Fund v. PCAOB*,¹²⁶ and he articulates it in the lecture itself: "[O]ne might wonder at the formality of the [*Chadha*] decision. Is the logic of the Constitution here so compelling that one can ignore the purposes, the effects, the practical virtues of the legislative veto?"¹²⁷ Clearly, he was

¹¹⁹See *supra* notes 87-89 and accompanying text.

¹²⁰See *infra* notes 143-146 and accompanying text.

¹²¹See, e.g., 2013 House Report, *supra* note 8, at 12; 2013 House Hearing, *supra* note *, at 78 (statements by Rep. Goodlatte and Professor Claeys); Adler, *supra* note 11, at 24-25. Regarding Professor Tribe's position, also cited by these sources, see *supra* note 104 and accompanying text.

¹²²See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy?: An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826, 833 (2006) (reporting that, in a sample of Supreme Court cases decided between 1989 and 2005, Justice Breyer voted to uphold agency interpretations of law under *Chevron* more frequently than any other Justice). The authors add that "deferen[ce] to administrative expertise and regulatory judgment [is] a theme that runs throughout Justice Breyer's writing," *Id.* at 838 & n.27.

¹²³Linda Greenhouse, *The Competing Versions of the Role of the Court*, N.Y. TIMES, Jul. 7, 2002 (ascribing that description of Justice Breyer to Professor Kathleen Sullivan).

¹²⁴See, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 80-82 (2010)

¹²⁵524 U.S. 417, 473-84 (Breyer, J., dissenting).

¹²⁶*Free Enter. Fund v. PCAOB*, 561 U.S. 477, 519-23 (2010) (Breyer, J., dissenting). Regarding Breyer's less easily categorized opinion in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), see *supra* note 67.

¹²⁷Breyer, *supra* note 60, at 790.

unconvinced that it was. He suspected that *Chadha* would prove to be “a judicial tree that bears little fruit.”¹²⁸

While objecting to the *reasoning* of the Court in *Chadha*, however, Judge Breyer made clear that he was not saying that Congress necessarily *should* enact such a statute in the context of agency rulemaking. On the contrary, he expressed “a strong note of skepticism as to the need for the veto in the regulatory area.”¹²⁹ He also discerned “powerful if not overwhelming practical considerations” militating against creation of such a device.¹³⁰ For example, he said, it might allow politically influential groups to escape regulation, impair agencies’ ability to plan, and undercut the procedural regularity of agency practice.

Indeed, a few months after his lecture, at an ACUS forum on *Chadha*, he suggested that he might be having second thoughts about having even raised the possibility of a statutory fix: “I could tell how I worked out a device some time ago which I think would largely replicate the legislative veto. But I feel at this point that discussing it is rather like the people who worked at Los Alamos describing the atom bomb.”¹³¹ This quip, typical of Justice Breyer’s characteristic good humor (the transcript noted “Laughter”), may have been simply an acknowledgment that he was probably in the minority at that forum. Possibly, however, he was wondering whether his lecture might have opened a Pandora’s box that would better have been left shut.

We should not take it for granted that Justice Breyer’s assessment of *Chadha* would be the same today as it was in 1983. Times have changed, and his expectation that *Chadha* would be confined within narrow limits has not been borne out. Perhaps he could be persuaded that in this specific context, in which legislative self-interest is so plainly implicated, a broad prohibition should prevail.¹³² However, his 1983 essay and his usual inclinations do suggest otherwise. Even if he were to reject the broad reading of *Chadha* advanced in this article, however, it does not follow that he would vote to uphold the REINS Act. It could simply mean that he would vote to strike it down (or to invalidate a particular exercise of it) on a narrower, more situation-specific basis, somewhat like Sally Katzen’s argument based on *Morrison v. Olson*.¹³³ His serious reservations about the merits of his own hypothetical veto substitute suggest a strong possibility that the latter might occur.

¹²⁸*Id.* at 792.

¹²⁹*Id.* at 798.

¹³⁰*Id.* at 797.

¹³¹Admin. Conf. of the U.S., *Legislative Veto Of Agency Rules After INS v. Chadha*, Twenty-Seventh Plenary Session Discussion, Dec. 15, 1983, at 38 (remarks of Judge Breyer).

¹³²See Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 785 (2007) (“The Constitution often demands broad assurances against arbitrary action or of broadly majoritarian action. ... [T]he Court, lacking a practical way to distinguish between harmful and beneficial uses of a one-house veto, chose overprotection rather than underprotection. This is a legitimate and justifiable choice, even if not the only one.”).

¹³³See *supra* notes 63-65 and accompanying text.

Regardless, Justice Breyer is not the only Justice with a relevant track record. A look at some of his colleagues' past positions indicates that the REINS Act might be a hard sell within the Court as a whole:

- Chief Justice John G. Roberts, Jr., while working as Associate Counsel to President Ronald Reagan, criticized a then-pending regulatory reform bill for “hobbling agency rulemaking by requiring affirmative Congressional assent to all major rules.”¹³⁴
- As seen above, Justice Scalia, while an Assistant Attorney General, was scathingly critical of the legislative veto on both constitutional and policy grounds. Later, he became a coauthor of the ABA’s amicus brief asking the Supreme Court to invalidate the legislative veto in *Chadha*.¹³⁵
- Before her appointment to the Court, Professor Elena Kagan’s major work of scholarship advocated an innovative model of “presidential administration,” according to which any regulatory statute should be presumed, in the absence of contrary evidence, to have conferred decisionmaking authority directly on the President.¹³⁶ Her article “suggested reasons to welcome some substitution of presidential for congressional influence over administration.”¹³⁷
- In 2000, recalling his days working in the Office of Legal Counsel during the Reagan administration, then-Judge Samuel Alito related that OLC lawyers “were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the President. And I thought then, and I still think, that this theory best captures the meaning of the Constitution’s text and structure. . . .”¹³⁸ He went on to say that the Court has not always enforced executive prerogatives in subsequent cases, but he added, with approval, that when it “has been confronted with something that seems to fall within a very specific provision of the Constitution, like the Appointments Clause, or the Presentment Clause, it has taken a rather strict approach.”¹³⁹
- Justice Anthony Kennedy wrote the Ninth Circuit opinion that the Supreme Court affirmed in *Chadha*. Indeed, he relied on much of the same historical language that the Court later invoked, such as its emphasis on the need for bicameralism:

¹³⁴Ctr. for Effective Gov’t, *Roberts Showed Prudence in Reg Reform Initiative*, Sept. 6, 2005, <http://www.foreffectivegov.org/node/2652>.

¹³⁵*ABA Files Amicus Brief in Supreme Court Review of Legislative Veto*, ADMIN. L. NEWS, Wint./Spring 1982, at 7, 10.

¹³⁶Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹³⁷*Id.* at 2348.

¹³⁸*Presidential Oversight and the Administrative State* (panel discussion), ENGAGE, Nov. 2001, at 11, 12 (remarks of Judge Alito).

¹³⁹*Id.* at 13.

From a reading of the Federalist Papers as a whole, the point emerges with singular clarity that bicameralism was deemed to be one of the most fundamental of the checks on governmental power. The critical function of bicameralism as a restraint on power was explained in the Federalist Papers explicitly, early, and at length. It was one of the principal arguments used, particularly by Madison, to convince the people that the federal government would operate responsibly.¹⁴⁰

The other members of the Court have not spoken as directly to this set of issues. Justice Thomas has expressed interest in curbing broad delegations to agencies.¹⁴¹ To that extent, he could be considered a good candidate to support the REINS Act. On the other hand, he did (like Scalia and Kennedy) join the Court's opinion in *MWAA*, which relied on and arguably extended *Chadha's* rationale. Meanwhile, Justices Ruth Bader Ginsburg and Sonia Sotomayor have been strong supporters of the regulatory state.¹⁴² If proponents of the Act are counting on them as potential allies, they are indeed optimists.

IV. State Comparisons

Experiences at the state level have a direct bearing on a number of issues explored in the above pages. For example, I said earlier that federal judges tend to be wary of legislative actions that look like self-aggrandizement. Precedents at the state level are also illuminating. When state legislatures have instituted legislative veto schemes, the overwhelming majority of state appellate courts – nearly a dozen – have found them unconstitutional under their respective state constitutions.¹⁴³ Some of these holdings rested on enactment clause requirements, similar to the

¹⁴⁰*Chadha v. INS*, 634 F.2d 408, 434 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983).

¹⁴¹*See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (inviting reexamination of nondelegation precedents).

¹⁴²*See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) (Ginsburg, J.) (relying at length on *Chevron* to uphold EPA rule); *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 98-100 (2d Cir. 2007) (Sotomayor, J.) (requiring EPA to set Clean Water Act using the “best technology available,” regardless of what a cost-benefit analysis might show), *rev'd*, *Entergy Corp. v. Riverkeeper*, 556 U.S. 208 (2009).

¹⁴³Appellate cases in ten states and the District of Columbia have found legislative veto statutes unconstitutional. *Mo. Coalition for the Environment v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125 (Mo. 1997); *Blank v. Dept. of Corrections*, 564 N.W.2d 130 (Mich. Ct. App. 1997); *Gilliam County v. Dept. of Env'tl. Quality*, 849 P.2d 500, 505 (Ore. 1993) (en banc); *Commonwealth v. Sessoms*, 532 A.2d 775 (Pa. 1987); *Gary v. United States*, 499 A.2d 815 (D.C. 1985); *State ex rel. Stephan v. Kansas House of Reps.*, 687 P.2d 622 (Kan. 1984); *Legis. Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984); *General Assembly v. Byrne*, 448 A.2d 438 (N.J. 1982); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W.Va. 1981); *Opinion of the Justices*, 431 A.2d 783 (N.H. 1981); *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980). One other court upheld a statute that provided for temporary legislative committee suspension of a rule, pending further review, but stated expressly that “only the formal bicameral enactment process coupled with executive action can make permanent a rule suspension.” *Martinez v. Dept. of Indus. Relations*, 478 N.W.2d 582, 586 (Wis. 1992).

The only state appellate court that has squarely upheld a legislative veto scheme, in the absence of a special constitutional provision authorizing it, was the Supreme Court of Idaho. *Mead v. Arnell*, 791 P.2d 410, 414-20 (Idaho 1990). Even that court was not entirely deferential to the legislature, however. It went on to hold that, in the case at bar, the legislature's exercise of the veto had been unlawful. *Id.* at 420-21. Thus, even this case does not

reasoning of *Chadha*, and others on broader separation of powers themes. Either way, however, the pleas of legislators that they need more control over executive decisionmaking have not carried the day.

Particularly relevant to this discussion is *State ex rel. Meadows v. Hechler*,¹⁴⁴ a decision in which the West Virginia Supreme Court of Appeals unanimously found a violation of separation of powers in the face of arguments that strongly resembled the ones used to support the REINS Act. The state Board of Health finalized regulations to govern “personal care homes” that provided nursing care to impaired individuals. The agency submitted them to the legislature for approval, as required by the state’s APA. The APA provided that if the legislature failed to approve the rules, the agency could take no action to implement them.¹⁴⁵ However, a proposal to approve the rules died in the state senate. The court found, therefore, that “this unchecked legislative veto power over administrative agency rules impermissibly encroaches upon the functioning of the executive branch in violation of the separation of powers provision of our constitution.” Its reasoning is of particular importance:

[T]he legislative Respondents contend that: “The agency was never authorized to act, only to propose a rule. The agency has no power to promulgate the rule until such time as the Legislature . . . has authorized the promulgation.” Based on this view that the executive branch lacks authority to promulgate regulations, the legislative Respondents deny the existence of a legislative veto [in the state APA]. In other words, until the Legislature approves of proposed regulations, no delegation of executive authority has occurred and therefore, no separation of powers problem comes into existence.

Not only do we find this argument to be spurious, but as Petitioners observe, such a position “is the most extreme assertion of legislative authority.” As we explained in *Barker*, “When the Legislature delegates its rule-making power to an agency of the Executive Department, as it did here . . ., it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations.”¹⁴⁶

In other words, the court looked through form to substance and recognized that, in every essential feature, the agency had engaged in a standard rulemaking process. The legislature had sought to enable a subset of itself to nullify the agency’s rule without satisfying the prerequisites of bicameralism and presentment, and this was tantamount to a legislative veto. It seems reasonable to predict that federal judges might bring a similar perspective to their evaluation of the REINS Act.

Meanwhile, the Florida legislature amended its APA in 2010 (overriding the governor’s veto) to include a state-level version of the REINS Act. Under this measure, if the costs of a rule

fully support the constitutionality of the REINS Act, under which judicial review of Congress’s decisionmaking would be expressly precluded. REINS Act § 805(a).

¹⁴⁴462 S.E.2d 586 (W. Va. 1995).

¹⁴⁵*Id.* at 588-89.

¹⁴⁶*Id.* at 590 (emphasis added).

are projected to exceed one million dollars over a five year period, “the rule may not take effect until it is ratified by the Legislature.”¹⁴⁷ Since then, the legislature has ratified several “million dollar rules,”¹⁴⁸ but one cannot tell from a distance what rules have *not* been adopted because of this new hurdle. The constitutionality of the measure has apparently not yet been tested in court.

Although the Florida APA provision does not say that standard judicial review criteria should apply to a rule despite legislative ratification, the legislature has followed a standard practice of inserting such savings language into individual approval bills.¹⁴⁹ The same approach prevailed in West Virginia prior to *Meadows*: courts applied *Chevron* and arbitrary-capricious review to agency rules even though the rules had been endorsed by the legislature.¹⁵⁰

This pattern in the states of preserving full judicial review in REINS-type plans tends to confirm that the legislatures themselves understand that the affected rules are executive actions that agencies take within their existing jurisdiction. As a supporter of the Florida legislation candidly acknowledged, the state APA continues to apply because the legislature’s “action is better described as satisfaction of a statutory condition subsequent rather than legislative enactment of the rules.”¹⁵¹ Thus the legislature’s insistence on ratification of “million dollar rules” does not reflect any change in the underlying law, but rather is a means of intervening in the agency’s *execution* of existing law. As discussed above, such a move has troubling separation of powers implications.¹⁵²

Constitutionality aside, the states’ pattern of maintaining judicial review despite legislative ratification tends to bear out another observation offered above. Despite bold assertions about the need for the legislature to be accountable, legislators evidently recognize that they lack the time, inclination, and patience to dig deeply and regularly into the substance of complex, obscure, and often tedious regulatory decisions. Accordingly, they do not treat their own ratification as a substitute for the quality control that judicial review provides. This was particularly clear in West Virginia, where the legislature’s practice prior to *Meadows* was to

¹⁴⁷Fla. Stat. Ann. § 120.541(3) (2014); see Larry Sellers, *Florida Legislature Overrides Veto of “Million Dollar Rules” Ratification Requirement*, ADMIN. & REG. L. NEWS, Wint. 2001, at 25. One editorialist had a caustic appraisal of the bill while it was pending: “House Bill 1565 ... flew under the radar during spring’s legislative session. It passed both chambers unanimously due to misleading rhetoric that it would simply lessen government’s burden on businesses in a period of incredible economic distress. Lawmakers of both parties acknowledged, after the vote, that they had no idea what they had done. HB 1565 would cripple state government by making it impossible for executive agencies to carry out even noncontroversial new legislation.” *Bad bill will be Scott’s first test*, TAMPA BAY TIMES, Nov. 9, 2010.

¹⁴⁸See, e.g., Fla. Stat. Ann. chs. 2014-149, 2014-153, 2014-155, 2014-222 (2014).

¹⁴⁹Eric H. Miller, *HB 7253 & HB 993: The Legislature’s Policy of Economic Review and the 2011 Amendments to the APA*, 32 ADMIN. L. SEC. NEWSLTR. (Fla. B. Ass’n), June 2011, at 1, 12.

¹⁵⁰See *Swiger v. UGI/Amerigas, Inc.*, 613 S.E.2d 904, 910-11 (W. Va. 2005).

¹⁵¹Miller, *supra* note 149, at 12.

¹⁵²See *supra* notes 93-102 and accompanying text.

approve regulations in batches through omnibus bills.¹⁵³ This tendency to dispose of ratifications in bulk may foreshadow the manner in which Congress would manage the substantial volume of major rules that would land on its plate if the REINS Act were to become law.

V. Conclusion

Certainly there are constructive ways in which Congress could seek to improve the process by which it oversees agency rulemaking. For example, some years ago the American Bar Association endorsed a thoughtful and balanced package of proposals to revise the Congressional Review Act,¹⁵⁴ and these ideas still would merit congressional consideration.

I do not believe, however, that the REINS Act offers a promising alternative. No one can predict with certainty how the Act would fare if it were enacted and tested in the courts for constitutionality. I believe, however, that the sponsors have been overly confident about its viability. When I put the constitutional uncertainties together with doubts about the legislative workload that the Act would entail and the difficulties of forging consensus that would allow major rulemaking to go forward, I think there are ample reasons why Congress should not adopt it.

Undoubtedly, Congress sometimes does make satisfying and durable contributions to the goal of regulatory reform,¹⁵⁵ but its record over time has been uneven at best. This is one more reason why, in this anniversary year, we should appreciate and commend the manifold contributions to the administrative process that have resulted from the careful, balanced work of the Administrative Conference of the United States.

¹⁵³See *Kincaid v. Mangum*, 432 S.E.2d 74, 78 (W. Va. 1993) (“The omnibus bill authorized 44 rules of many different agencies. . . . [T]he members of the legislature did not have the actual rule before them when voting on the omnibus bill. Instead, the omnibus bill referred the members of the legislature to the state register for the contents of the rule.”). After *Kincaid* condemned this aggregation procedure as a violation of the state constitution’s “one-object rule,” the procedure was revised to provide for multiple bills, with groupings based on subject matter; and that process was upheld. *Swiger*, 613 S.E.2d at 909-10.

¹⁵⁴122-2 ABA ANN. REP. 465 (Aug. 1997), http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_107a.authcheckdam.pdf.

¹⁵⁵Levin, *Statutory Reform*, *supra* note 2, at 1882-84, 1889-90.