

# The REINS Act: Unbridled Impediment to Regulation

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## ABSTRACT

*The Regulations from the Executive In Need of Scrutiny Act (“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 a two-thirds vote in each chamber in the event of a presidential veto). The House of Representatives has repeatedly passed REINS Act bills during the past four years on near-party line votes, and the 114th Congress, under unified Republican control, may give even more impetus to the proposal.*

*This Article criticizes the REINS Act bill on the basis that it would create an unmanageable workload for Congress, as well as unacceptable risks of stalemating the development of important regulations. The Article also questions the constitutionality of the bill. Some authors contend that the REINS Act would be valid, arguing that Congress may treat new major rules as mere proposals that have no legal force unless Congress affirmatively adopts them. In contrast, this Article argues that the proposal theory is a fiction that does not accurately describe the status of rules under the Act; and when the fiction is stripped away, the bill’s provisions bear a fatal resemblance to a one-house legislative veto, which the Supreme Court held unconstitutional in *INS v. Chadha*. Finally, the Article discusses experiences with comparable legislation at the state level.*

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## INTRODUCTION

I am pleased to participate in this special issue 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.<sup>1</sup> 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 reforming 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,<sup>2</sup> and we now seem to be living through one of these periods. In particular, the House of Representatives has recently taken up a variety of bills to promote a “regulatory reform” agenda.<sup>3</sup> This Article is devoted to an analysis of one

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<sup>1</sup> Ronald M. Levin, *Our History: Told By You—Ronald Levin*, ADMIN. FIX BLOG (Mar. 19, 2014, 4:11 PM), <http://www.acus.gov/newsroom/administrative-fix-blog/our-history-told-you-ronald-levin>.

<sup>2</sup> See 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).

<sup>3</sup> See, 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 American Bar Association Section of Administrative Law and Regulatory Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 621 (2012); Ronald M. Levin, *Congress Considers Creating Independent Commission for Retrospective Rule Review*, ADMIN. & REG. L. NEWS, Spring 2014, at 7–8.

such proposal—a bill known as the Regulations from the Executive In Need of Scrutiny Act, or REINS Act.<sup>4</sup>

In brief, the REINS Act would require that any “major rule” (a specially defined term) be approved by an affirmative vote of Congress—as opposed to the present situation under the Congressional Review Act, in which a proposed agency rule will go into effect unless Congress votes to nullify it.<sup>5</sup> 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.<sup>6</sup>

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 *INS v. Chadha*.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

In some respects, the REINS Act proposal must be seen as an exercise in political theater. The House of Representatives has repeatedly voted to pass it,<sup>10</sup> but in each case the votes were divided almost exactly on party lines—all Republicans who cast a vote voted

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4 The bill was first introduced by Rep. Geoff Davis (R-KY) as H.R. 3765, 111th Cong. (2009). Later versions have included H.R. 10, 112th Cong. (2011); H.R. 367, 113th Cong. (2013); and H.R. 427, 114th Cong. (2015). Parallel bills have been introduced in the Senate, although no proceedings on them have been held. See S. 299, 112th Cong. (2011); S. 15, 113th Cong. (2013); S. 226, 114th Cong. (2015). Citations in this Article to “REINS Act” or “Act” refer to H.R. 367, 113th Cong. (2013), as originally introduced, except where otherwise specified.

5 5 U.S.C. §§ 801–808 (2012).

6 See REINS Act § 801(b).

7 *INS v. Chadha*, 462 U.S. 919, 959 (1983).

8 See, e.g., Jonathan H. Adler, *Placing “Reins” on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 24–29 (2013).

9 See *id.* at 33–34.

10 See 159 CONG. REC. H5353–60 (daily ed. Aug. 2, 2013); 157 CONG. REC. H8209–37 (daily ed. Dec. 7, 2011).

in favor, while virtually all Democrats voted against it.<sup>11</sup> Moreover, there was no serious prospect that the 112th or 113th Congress would enact it, in part because Democrats controlled the Senate. Indeed, Republican leaders have been open about their use of the bill to play up their party's antiregulation platform. They have even promoted it as a "jobs" bill,<sup>12</sup> although the asserted connection between enhanced congressional oversight and employment growth is speculative, to put it mildly.<sup>13</sup> In response to these congressional proceedings, the mass media and the blogs have published a host of articles praising<sup>14</sup> or condemning<sup>15</sup> the REINS Act. Up to a point, these are exactly the kinds of forums 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.

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11 *Final Vote Results for Roll Call 901*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2011/roll901.xml> (last visited Aug. 31, 2015). Editors' note: On July 28, 2015, when this Article was in the final stages of production, the House of Representatives once again voted to adopt the REINS Act. As in past years, the votes were divided almost entirely along party lines. See 161 CONG. REC. H5545–72 (daily ed. July 28, 2015).

12 *Congressman Boehner: REINS Act Is Great Example of How the House Is Listening & Acting on Jobs*, 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/>.

13 In 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. NO. 113-160, pt.1, at 60–61 (2013) [hereinafter *2013 House Report*] (dissenting views). The majority's assertions to the contrary were, by comparison, quite thinly supported. *Id.* at 9–10 (report of committee majority). The dissenters' view appears to accord with the weight of independent opinion. See, e.g., Eric Lorber, *Do Federal Regulations Impede Economic Growth?*, REGBLOG (Apr. 3, 2013), <http://www.regblog.org/2013/04/03/03-lorber-economic-growth-paper/>; Daniel E. Walters, *Analyzing the Job Impacts of Regulation*, REGBLOG (Apr. 15, 2014), <http://www.regblog.org/2014/04/15/15-walters-job-impacts-regulation/>. 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.

14 See, e.g., JAMES L. GATTUSO, THE HERITAGE FOUND., WEBMEMO NO. 3394, TAKING THE REINS ON REGULATION (2011), <http://www.heritage.org/research/reports/2011/10/taking-the-reins-on-regulation>; Christopher DeMuth, *The Regulatory State*, NAT'L AFF., Summer 2012, at 70, 84–89; Clyde Wayne Crews, *Reining in the Executive Branch Bureaucracy, Part 9: Congress Must Affirm Final Agency Rules Before They Are Law*, COMPETITIVE ENTERPRISE INST. (Feb. 26, 2014), <https://cei.org/blog/reining-executive-branch-bureaucracy-part-9-congress-must-affirm-final-agency-rules-they-are>.

15 See, e.g., SIDNEY SHAPIRO, CENTER FOR PROGRESSIVE REFORM, THE REINS ACT: THE CONSERVATIVE PUSH TO UNDERCUT REGULATORY PROTECTIONS FOR HEALTH, SAFETY, AND THE ENVIRONMENT, (2011), [http://www.progressivereform.org/articles/Reins\\_Act\\_EdMemo\\_FINAL.pdf](http://www.progressivereform.org/articles/Reins_Act_EdMemo_FINAL.pdf); Dan Farber, *REINS or SPURS?*, LEGAL PLANET (Aug. 5, 2013), <http://legal-planet.org/2013/08/05/reins-or-spurs>; Noah M. Sachs, *When it REINS, It Pours*, NEW REPUBLIC (Feb. 10, 2011), <http://www.newrepublic.com/article/politics/83195/reins-act-congress-veto-gop>.

These are matters that typically occupy the pages of the law reviews, and indeed there is already academic literature about the Act.<sup>16</sup> 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 Article 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 plans to give it priority.<sup>17</sup> Not surprisingly, the Obama administration has threatened a veto if the bill were to reach the President's desk.<sup>18</sup> Nevertheless, the bill might well be used as a bargaining chip in negotiations over legislation that the two branches do intend to pass,<sup>19</sup> just as has occurred in the past.<sup>20</sup> 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 Article will, at a minimum, provide a helpful backdrop for the more ground-level political debate that seems to lie ahead.

Part I of this Article summarizes the main features of the REINS Act. Part II highlights a few of its disadvantages. It would impose on

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<sup>16</sup> See, e.g., Adler, *supra* note 8; Sally Katzen & 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; David Schoenbrod, *How REINS Would Improve Environmental Protection*, 21 DUKE ENVTL. L. & POL'Y F. 347 (2011); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131 (2013); see also 2013 *Hearing, supra* note \*, at 47–62 (prepared statement of Professor Eric R. Claeys).

<sup>17</sup> See Press Release, Senator Rob Portman, Portman Announces Jobs for America Proposal (Mar. 11, 2014), <http://www.portman.senate.gov/public/index.cfm/press-releases?ID=2e4d426c-1d5b-4424-ba9c-f4da9f13f81d> (announcing a Senate Republican program that would include “[r]equir[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*, INT'L N.Y. TIMES, Mar. 31, 2014, at 2 (reporting that, under Republican control, “[t]here would be a big push for the [REINS] Act”).

<sup>18</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 10—REGULATIONS FROM THE EXECUTIVE IN NEED OF SCRUTINY ACT OF 2011 (2011), [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr10h\\_20111206.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr10h_20111206.pdf).

<sup>19</sup> Stuart Shapiro, *The Regulation Election*, THE HILL (Oct. 29, 2014, 7:30 AM), <http://thehill.com/blogs/pundits-blog/the-administration/222159-the-regulation-election>.

<sup>20</sup> See, e.g., Lori Montgomery, *Conditions for a Debt-Ceiling Deal*, WASH. POST (Sept. 26, 2013), [http://www.washingtonpost.com/business/economy/conditions-for-a-debt-ceiling-deal/2013/09/26/abf72968-2638-11e3-b3e9-d97fb087acd6\\_story.html](http://www.washingtonpost.com/business/economy/conditions-for-a-debt-ceiling-deal/2013/09/26/abf72968-2638-11e3-b3e9-d97fb087acd6_story.html) (noting that House Republicans’ “long list of demands for raising the federal debt limit” included the REINS Act).

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 Article 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 2009 the bills that would institute the REINS Act remained largely unchanged by their sponsors. Before passing one such bill in 2013, however, the House amended it to expand the number of rules it would cover.<sup>21</sup> 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 unamended version of the bill, which has been the subject of virtually all of the existing commentary, but I will make occasional allusions to the 2013 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.<sup>22</sup> In its original form, the 2013 bill would

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<sup>21</sup> See *infra* notes 22–25 and accompanying text.

<sup>22</sup> See REINS Act § 802. *But see id.* § 806 (exempting Federal Reserve Board monetary policy rules). Technically, the Act also contains provisions relating to nonmajor rules. See *id.* § 803. These provisions, however, will not be discussed here, because they simply incorporate existing requirements in the Congressional Review Act.

have defined a major rule to include, roughly speaking, any rule that the Office of Information and Regulatory Affairs [“OIRA”] concludes would have an annual effect on the economy of at least \$100 million or another significant impact on the economy.<sup>23</sup> This is a common usage in administrative law parlance.<sup>24</sup> On the floor of the House of Representatives in 2013, however, an amendment lowered the dollar figure that would bring the Act into play from \$100 million to \$50 million.<sup>25</sup> 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 (“ACA”).<sup>26</sup>

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.”<sup>27</sup> The rule would also fail if Congress did not pass an approval resolution within seventy days of when an agency forwarded the proposed rule to the House and Senate for consideration.<sup>28</sup> Accordingly, the Act provides for expedited procedures

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<sup>23</sup> REINS 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.

<sup>24</sup> The bill’s definition was nearly identical to the definition of “major rule” in the Congressional Review Act. *See* 5 U.S.C. § 804(2) (2012). 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. *See* Exec. Order No. 12,866 § 3(f)(1), 3 C.F.R. 638, 641 (1994), *reprinted as amended* in 5 U.S.C. § 601 app. at 803 (2012). (The phrase “economically significant” does not appear in the executive order itself, but it is commonly used to refer to the first of four categories of “significant regulatory action[s]” governed by the order. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REGULATORY IMPACT ANALYSIS: FREQUENTLY ASKED QUESTIONS (FAQs) 1 (2011), [https://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4\\_FAQ.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf).)

<sup>25</sup> *See* 159 CONG. REC. H5328 (daily ed. Aug. 1, 2013).

<sup>26</sup> *Id.* at H5320–21; *see* REINS Act (as amended), §§ 804(2)(D). Editors’ note: The REINS Act bill that the House voted to adopt in 2015, *see supra* note 11, included a similar amendment regarding the ACA. *See* 161 CONG. REC. H5565 (daily ed. July 28, 2015).

<sup>27</sup> REINS Act § 801(b)(1).

<sup>28</sup> *Id.* § 801(b)(2). However, a house that has not yet taken a vote on the approval resolution after seventy days would be required to do so. *Id.* § 802(g).

in both the House and Senate,<sup>29</sup> Committee consideration would be tightly constrained, and floor procedures would be streamlined (e.g., no Senate filibusters would be allowed).<sup>30</sup> Floor debate would be limited to two hours in the Senate and one hour in the House.<sup>31</sup> Any joint resolution to approve the rule would have to be bare-bones, with no explanatory language or amendments allowed.<sup>32</sup>

Finally, section 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,”<sup>33</sup> and that the enactment of an approval resolution allowing 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.”<sup>34</sup>

## 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 section 2 of the bill. That section, captioned “Purpose,” states:

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.<sup>35</sup>

The emphasis in section 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 dis-

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<sup>29</sup> *Id.* §§ 801(b)(2), 802(a)(2)–(g). 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 long run. *Id.* § 801(c).

<sup>30</sup> *Id.* § 802(c)–(e).

<sup>31</sup> *Id.* §§ 802(d)(2), 802(e).

<sup>32</sup> *Id.* § 802(a).

<sup>33</sup> *Id.* § 805(a).

<sup>34</sup> *Id.* § 805(c).

<sup>35</sup> *Id.* § 2.



cuss 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. The language of accountability, therefore, may essentially be 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.

Would such increased control be a good thing? This Part 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.

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,<sup>36</sup> Congress retains broad opportunities to influence the course of administrative rulemaking and, when it chooses, 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 that the legislative branch can employ.<sup>37</sup> 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 suggest 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 ACUS's ongoing work 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.

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<sup>36</sup> See Adler, *supra* note 8, at 19–21 (discussing some of the causes of the Congressional Review Act's limited impact).

<sup>37</sup> See 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).

### 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 only 116 legislative days, yet 100 major rules that would have been subject to the REINS Act were issued during that period.<sup>38</sup> (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 its nature raise important public policy questions that Congress has a natural interest in answering, but in reality many involve relatively narrow, fact-bound questions.<sup>39</sup> Requiring Congress to master these rules in order to give them affirmative approval would be an unwise burden, at least if legislators are going to study the issues carefully enough to make their votes meaningful.<sup>40</sup>

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 which are 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 the EPA under Presidents Nixon and Reagan, was asked about the proposal that Congress should affirmatively approve regulations:

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<sup>38</sup> 2013 *House Report*, *supra* note 13, at 54 (dissenting views).

<sup>39</sup> For detailed descriptions of the manifold varieties of major rules, see CURTIS W. COPELAND & MAEVE P. CAREY, CONG. RESEARCH SERV., R41651, REINS ACT: NUMBER AND TYPES OF "MAJOR RULES" IN RECENT YEARS (2011).

<sup>40</sup> See PHILIP A. WALLACH, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS, AN OPPORTUNE MOMENT FOR REGULATORY REFORM, 11 (2014) ("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." (footnote omitted)).

“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.”<sup>41</sup>

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.<sup>42</sup> Even though the REINS Act contains exemptions from the filibuster, floor time is a scarce asset that 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, for example, meeting on more days or curtailing ceremonial or symbolic votes.<sup>43</sup> That may be true in some sense, but I do not 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.<sup>44</sup> Such a

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<sup>41</sup> Erica Martinson, *Mitt's EPA Would Likely Look Familiar*, POLITICO (May 7, 2012, 11:36 PM), <http://www.politico.com/news/stories/0512/76022.html>.

<sup>42</sup> REINS Act §§ 802(d)(2), 802(e).

<sup>43</sup> See, e.g., *2013 Hearing*, *supra* note \*, at 59 (prepared statement of Professor Eric R. Claeyes); Schoenbrod, *supra* note 16, at 357–58.

<sup>44</sup> See WALLACH, *supra* note 40, at 12 (suggesting that Congress should review ten or twenty rules per year); Schoenbrod, *supra* note 16, at 358 (“If the time for considering all the major rules is too great in Congress’s judgment, it should raise the criteria for a major rule above \$100 million.”).

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's 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 to ascertain whether 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*,<sup>45</sup> 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 to 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, then-Assistant Attorney General Antonin Scalia discussed some of these challenges in terms that could equally well apply 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 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

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<sup>45</sup> See *supra* notes 28–32 and accompanying text.

thus cannot be implemented in either direction? What does a court do with a law suit [sic] 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.<sup>46</sup>

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. After all, the public has recently witnessed extraordinary levels of partisan and ideological divisions in Congress, including brinksmanship, political hardball, and just plain unwillingness to compromise.<sup>47</sup> In fact, the 112th

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<sup>46</sup> 1976 *Bicentennial Institute—Oversight and Review of Agency Decisionmaking, Part II, Morning Session*, 28 ADMIN. L. REV. 661, 692–93 (1976) (remarks of Assistant Attorney General Antonin Scalia) [hereinafter *1976 Bicentennial Institute*].

<sup>47</sup> The dysfunction haunting the legislative process at present is a familiar theme in current political science literature. 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); STEVEN S. SMITH, *THE SENATE SYNDROME: THE EVOLU-*

Congress passed nearly one hundred fewer public laws than any other Congress during the preceding sixty years,<sup>48</sup> and the output of the 113th Congress was almost as meager.<sup>49</sup> In this light, now is hardly a propitious time to consider a substantial *increase* in the responsibilities of the legislative branch. One consequence of the REINS Act could be that the dysfunction that now afflicts Congress in the *enactment* of laws would spread to the *implementation* of laws. Meanwhile, the ensuing standoff would leave an agency unable to implement important building blocks in programs 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 Article 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 continue to 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 is true that some national elections result in the selection of a President and two houses of Congress from the same party. However, such unified control of the legislative and executive branches has prevailed during only twelve of the past forty-five years.<sup>50</sup> 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

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TION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE (2014); Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 UTAH L. REV. 703, 703–04.

<sup>48</sup> Amanda Terkel, *112th Congress Set To Become Most Unproductive Since 1940s*, THE HUFFINGTON POST: HUFFPOST POLITICS, [http://www.huffingtonpost.com/2012/12/28/congress-unproductive\\_n\\_2371387.html](http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html) (last updated Dec. 28, 2012 9:37 AM). For the official figures, see *Résumé of Congressional Activity*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://library.clerk.house.gov/resume.aspx> (last visited Sept. 3, 2015).

<sup>49</sup> Drew DeSilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, PEW RESEARCH CTR. FACT TANK (Dec. 29, 2014), <http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/>.

<sup>50</sup> Jeffrey M. Jones, *In U.S., No Preference for Divided vs. One-Party Government*, GALLUP (Oct. 16, 2014), <http://www.gallup.com/poll/178550/no-preference-divided-one-party-government.aspx>.

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 in 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 is true that, as a candidate, Governor Romney endorsed the REINS Act,<sup>51</sup> 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 to carry out the policies he had been elected to pursue.

Reflection on that hypothetical situation brings to mind an article that then-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.<sup>52</sup> 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.<sup>53</sup> As he wrote, such "[e]xecutive-enfeebling measures . . . do not specifically deter regulation. What they deter is change."<sup>54</sup> 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 an evaluation of whether, as section 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.<sup>55</sup> That perspective is not surprising when one considers that many of the Act's supporters

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<sup>51</sup> ROMNEY FOR PRESIDENT, INC., BELIEVE IN AMERICA: MITT ROMNEY'S PLAN FOR JOBS AND ECONOMIC GROWTH 63 (2011).

<sup>52</sup> Antonin Scalia, *Regulatory Reform—The Game Has Changed*, REG., Jan/Feb. 1981, at 13.

<sup>53</sup> *Id.* at 14.

<sup>54</sup> *Id.*

<sup>55</sup> Even 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.

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,<sup>56</sup> 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.”<sup>57</sup> I am less optimistic. As discussed above, the risks of impasse would be high, because the agency, the House, the Senate, and the President would all have to concur.<sup>58</sup> 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, none 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, under the REINS Act, discussions between the agency and congressional committees or their staffs in some instances 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.<sup>59</sup>

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

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<sup>56</sup> See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993) (urging reinvigoration of the nondelegation doctrine).

<sup>57</sup> Schoenbrod, *supra* note 16, at 359. For a similar line of argument, see DeMuth, *supra* note 14, at 86–88.

<sup>58</sup> See *supra* Part II.B.

<sup>59</sup> See 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”).



on some terms.<sup>60</sup> 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 an impasse to be a particularly unwelcome outcome. The point may be best illustrated by the 2013 floor amendment in which the House voted to subject *all* regulations promulgated under the Affordable Care Act ("ACA") to REINS Act approval.<sup>61</sup> As is well known, the House repeatedly voted during the last two Congresses to repeal the ACA in its entirety.<sup>62</sup> 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."<sup>63</sup> In other words, all grounds for attacking a major rule in court, such as Administrative Procedure Act ("APA") challenges, would remain viable notwithstanding the fact that Congress had approved the rule.<sup>64</sup> 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.<sup>65</sup>

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<sup>60</sup> Schoenbrod, *supra* note 16, at 361 ("Experience shows that environmental interests often fare better when Congress makes the hard choices."); see Adler, *supra* note 8, at 30.

<sup>61</sup> See *supra* note 26 and accompanying text.

<sup>62</sup> 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), <http://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/> (listing more than fifty House votes to repeal, defund, or weaken the ACA in whole or in part, including multiple votes for full repeal).

<sup>63</sup> REINS Act § 805(c).

<sup>64</sup> Note that the bill differs in this regard from proposals for congressional approval statutes by Paul Verkuil and Morton 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 Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1085 (1999); Paul R. Verkuil, *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.

<sup>65</sup> Fortifying this understanding of the real nature of REINS review is the curious provision in section 805(c) that "[t]he enactment of a joint resolution of approval . . . shall not form part of the record before the court in any judicial proceeding concerning a rule except for purposes of determining whether or not the rule is in effect." REINS Act § 805(c). Why is this limitation included? An enacted joint resolution is *law* and thus can always be cited to a court,

Incidentally, as noted above, section 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.”<sup>66</sup> 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 ACUS 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.<sup>67</sup>

This prediction was based on research demonstrating that legislative veto provisions in specific enabling statutes had indeed sometimes had this effect.<sup>68</sup> 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.

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regardless of whether it is physically inserted into an administrative record. See 1 U.S.C. § 112 (2012) (“[T]he 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 section 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 the same basis).

<sup>66</sup> REINS Act § 2.

<sup>67</sup> ACUS Recommendation 77-1, Legislative Veto of Administrative Regulations, 42 Fed. Reg. 54,251 (Oct. 5, 1977).

<sup>68</sup> Bruff & Gellhorn, *supra* note 59, at 1427–28.

### III. CONSTITUTIONAL CONCERNS

In all likelihood, the preceding discussion in this Article has been largely an exercise in preaching to the choir. ACUS took a stand in opposition to the legislative veto a generation ago,<sup>69</sup> and presumably most readers of a special issue marking the Conference's anniversary would have a similar reaction to its lineal descendant, the REINS Act. Now, however, I will 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.<sup>70</sup> They 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, who considers the bill “perfectly constitutional” even though he strongly opposes it on policy grounds.<sup>71</sup> In addition, other scholars who could by no means be considered unsympathetic to regulation have written that they see nothing unconstitutional about certain proposals for congressional approval statutes that bear at least a superficial resemblance to the REINS Act.<sup>72</sup> 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.<sup>73</sup>

In contrast to these scholars, I argue 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.

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<sup>69</sup> See *supra* note 67 and accompanying text.

<sup>70</sup> 2013 *Hearing, supra* note \*, at 47–62 (prepared statement of Professor Eric R. Claeys); Adler, *supra* note 8, at 24–29.

<sup>71</sup> Siegel, *supra* note 16, at 134, 174–85.

<sup>72</sup> See, e.g., Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 19 (1984) (discussed *infra* note 125 and accompanying text). This might also be said of Rosenberg, *supra* note 64, at 1083–90, but this Article 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.

<sup>73</sup> Stephen Breyer, Circuit Judge, United States Court of Appeals for the First Circuit, *The Legislative Veto After Chadha*, Thomas F. Ryan Lecture at the Georgetown University Law Center (Oct. 13, 1983), in 72 GEO. L.J. 785 (1984).

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.<sup>74</sup> Shortly after *Chadha* was decided, he and a coauthor proposed that "legislative action should be required," through enactment of a joint resolution, "[f]or the more significant regulations, those with an economic impact of \$100 million or more per year."<sup>75</sup> They called this proposal, which bears an obvious resemblance to the REINS Act, the "son of legislative veto."<sup>76</sup> As they candidly acknowledged, "if one House fails to pass the resolution of approval, in effect a one-House veto will have been exercised."<sup>77</sup> Perhaps, however, this "son" would inherit the same constitutional disorder that afflicted its "parent." This Article makes a case for that proposition.

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*,<sup>78</sup> "impermissibly interfer[ing] with the President's exercise of his constitutionally appointed functions," including the function of executing the law.<sup>79</sup> I myself find Katzen's application of *Morrison* persuasive.<sup>80</sup> However, the *Morrison* methodology is somewhat indeterminate. Whether a law is an *impermissible* interference with the prerogatives of the executive branch can be in the eye of the beholder.<sup>81</sup> 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.

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<sup>74</sup> KORN, *supra* note 37, at 4.

<sup>75</sup> Elliott 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 (1984).

<sup>76</sup> *Id.* at 806.

<sup>77</sup> *Id.*

<sup>78</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>79</sup> *Id.* at 685; see Sally Katzen, *Why the REINS Act Is Unwise If Not Also Unconstitutional*, REG BLOG (May 3, 2011), <http://www.regblog.org/2011/05/03/why-the-reins-act-is-unwise-if-not-also-unconstitutional/>.

<sup>80</sup> The 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. NO. 112-278, pt. 1, at 14 (2011) [hereinafter *2011 House Report*]. This argument rests on an unduly limited understanding of the meaning of executive power. See *infra* notes 119–23 and accompanying text.

<sup>81</sup> Other language from *Morrison* is vulnerable to the same critique. See *Morrison*, 487 U.S. at 691 (considering whether a statutory provision "unduly trammels on executive authority") (emphasis added); *id.* at 693 (asking 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).

This latter approach is compatible with the relatively formal style of analysis that characterizes much of the Supreme Court's recent case law on separation of powers.<sup>82</sup>

#### A. *INS v. Chadha and its Implications*

In *Chadha*, an alien filed a petition for suspension of deportation, which the Attorney General granted.<sup>83</sup> 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.<sup>84</sup> The House of Representatives exercised that power in *Chadha's* case. *Chadha* sought judicial review, and the Court held that the legislative veto violated Article I, Section 7 of the Constitution.<sup>85</sup> That section requires that a bill may not become law unless it is passed by both houses of Congress (bicameralism) and presented to the President for approval (presentment). If the President does not sign the bill, it must be re-passed by a two-thirds vote in each house.

Writing for the Court, Chief Justice Burger highlighted the importance that the Framers 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.”<sup>86</sup> 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.”<sup>87</sup> 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

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<sup>82</sup> See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). The Court’s recent decision on recess appointments, *NLRB v. Noel Canning*, is a more ambiguous case. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). 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. *Id.* at 2566–67.

<sup>83</sup> *INS v. Chadha*, 462 U.S. 919, 923–25 (1983).

<sup>84</sup> *Id.* at 925.

<sup>85</sup> *Id.* at 959.

<sup>86</sup> *Id.* at 947–48.

<sup>87</sup> *Id.* at 948–49.

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.<sup>88</sup>

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.”<sup>89</sup> Chief Justice Burger acknowledged that “some administrative agency action—rulemaking, for example—may resemble ‘lawmaking.’”<sup>90</sup> But he also saw differences between the 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.”<sup>91</sup> In contrast, a “one-House veto . . . is not so checked; the need for the check provided by Article I, §§ 1, 7, is therefore clear.”<sup>92</sup>

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.”<sup>93</sup> 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.”<sup>94</sup> 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.<sup>95</sup>

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<sup>88</sup> *Id.* at 949.

<sup>89</sup> *Id.* at 947 (emphasis added).

<sup>90</sup> *Id.* at 953 n.16.

<sup>91</sup> *Id.* at 953–54 n.16.

<sup>92</sup> *Id.* at 954 n.16.

<sup>93</sup> *Id.* at 952.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 954–55.

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 the *Chadha* opinion that “the purposes underlying the Presentment Clauses and the bicameral requirement . . . guide our resolution of the important question presented in these cases,”<sup>96</sup> and those purposes are implicated just as much by the REINS Act as by the legislative veto in its previous forms.

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.<sup>97</sup> Other scholars staunchly defend the *Chadha* holding and the basic thrust of the opinion.<sup>98</sup> 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*,<sup>99</sup> 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 aspects of the implementation of the sequestration to the Comptroller General, an official who, by statute, was removable by Congress.<sup>100</sup> In rejecting this arrangement, the Court wrote broadly that “Congress [may] play no direct role in the execution of the laws.”<sup>101</sup> Thus, the legislature could not remove, or even assert the power to remove, the Comptroller General, because his role under

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<sup>96</sup> *Id.* at 946 (citations omitted).

<sup>97</sup> See, e.g., E. 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.

<sup>98</sup> See, 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, 1276 (1988).

<sup>99</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>100</sup> *Id.* at 727–28.

<sup>101</sup> *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);

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.”<sup>102</sup>

Later, in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.* (“MWAA”),<sup>103</sup> 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 metropolitan region. 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.<sup>104</sup> “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 persons . . . outside the Legislative branch,’ it must take that action by the procedures authorized in the Constitution.”<sup>105</sup>

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 “formal” methodology, as in *Chadha*, *Bowsher*, and *MWAA*, and at other times it uses a more “functional” approach, as in *Morrison*.<sup>106</sup> 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.<sup>107</sup>

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Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Distrust*, 95 MICH. L. REV. 1, 38–39 n.149 (1996).

<sup>102</sup> *Bowsher*, 478 U.S. at 726.

<sup>103</sup> *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

<sup>104</sup> *Id.* at 271–77.

<sup>105</sup> *Id.* at 276 (quoting *INS v. Chadha*, 462 U.S. 919, 952–55 (1983)). 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.

<sup>106</sup> See generally Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225–27; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

<sup>107</sup> Of course, the subject matter of the REINS Act does fall outside the scope of the



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.”<sup>108</sup> In general, the Court tends to allow Congress relatively little latitude in circumstances in which the legislature has a palpable conflict of interest.<sup>109</sup> 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.<sup>110</sup>

### 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.<sup>111</sup> For purposes of my analysis, I rely primarily on that report, read together with the commentaries on which the committee relied. The 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

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*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. See *Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 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 FTC 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 (although 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, 678, 697 (1987).

<sup>108</sup> *Morrison v. Olson*, 487 U.S. 654, 694 (1988).

<sup>109</sup> See Merrill, *supra* note 106, at 226 (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”).

<sup>110</sup> Katzen, *supra* note 79. For Siegel’s response, see *infra* note 130 and accompanying text.

<sup>111</sup> See *2011 House Report*, *supra* note 80, at 13–16. The committee also issued a report supporting the Act in the 113th Congress, but the constitutional analysis in that report was perfunctory. See *2013 House Report*, *supra* note 13, at 11–12 (report of committee majority).

through a joint resolution, which implies bicameralism and presentment.<sup>112</sup> This is correct as far as it goes, but it answers the wrong question. It is akin to 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.<sup>113</sup> 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."<sup>114</sup> This theory is also dubious. Congress has broad power to impose conditions on executive action, of course; but what if those conditions 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."<sup>115</sup> 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 suspension of such deportation, the Attorney General shall thereupon deport such alien."<sup>116</sup> There is little if any difference in principle between the two. Since

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<sup>112</sup> 2011 House Report, *supra* note 80, at 14; *see also* 2013 Hearing, *supra* note 0, at 49–50 (prepared statement of Professor Eric R. Claeys); Adler, *supra* note 8, at 25.

<sup>113</sup> *But see* INS v. Chadha, 462 U.S. 919, 963–67 (1983) (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.

<sup>114</sup> 2011 House Report, *supra* note 80, at 13; *see also* 2013 Hearing, *supra* note 0, at 48–50 (prepared statement of Professor Eric R. Claeys).

<sup>115</sup> REINS Act, § 801(b)(1).

<sup>116</sup> *See Chadha*, 462 U.S. at 925.

Congress was not permitted to avoid the requirements of Article I, Section 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. 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.”<sup>117</sup>

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.<sup>118</sup>

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<sup>117</sup> *Id.* at 954–55. In this connection, Professor Claeys also cited to the Necessary and Proper Clause of the Constitution. *2013 Hearing, supra* note \*, at 49 (prepared statement of Professor Eric R. Claeys). Presumably, however, that clause does not justify the REINS Act if, as I have been suggesting, Article I, Section 7 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.”).

<sup>118</sup> *1976 Bicentennial Institute, supra* note 46, at 690–91. The “two separate clauses” to which Scalia referred were clauses 2 and 3 of Article I, Section 7. The former requires presentment for “Bill[s],” and the latter requires it for “[e]very Order, Resolution, or Vote to Which the

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.”<sup>119</sup> That reasoning, however, rests on an overly narrow understanding of executive authority. In *Bowsher*, the Supreme Court took a directly contrary view noting that, in constitutional terms, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”<sup>120</sup> Less than two years ago, in *City of Arlington v. FCC*,<sup>121</sup> 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.’”<sup>122</sup> 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 in nature until Congress legislates again.”<sup>123</sup>

### 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

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Concurrence of the Senate and House of Representatives may be necessary.” U.S. CONST. art. I, § 7.

<sup>119</sup> 2011 House Report, *supra* note 80, at 14 (emphasis added); see also 2013 Hearing, *supra* note 0, at 50–51 (prepared statement of Professor Eric R. Claeys); Adler, *supra* note 8, at 27–28.

<sup>120</sup> *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Professor Katzen relies on this precedent to similar effect. Katzen & Ginos, *supra* note 16, at 17–18.

<sup>121</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

<sup>122</sup> *Id.* at 1873 n.4 (citing U.S. CONST. art. II, § 1, cl. 1).

<sup>123</sup> BRUFF, *supra* note 98, at 240; see also Beermann, *supra* note 101, 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.” (emphasis omitted)).

final step would be reserved to Congress to take through a bicameral resolution with presentment to the President.”<sup>124</sup> According to this theory, Congress does not need 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, Section 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,<sup>125</sup> and Judge Breyer apparently just took it for granted instead of spelling out a doctrinal defense of it.<sup>126</sup> Jonathan Siegel’s article, on the other hand, expounds this analysis at length in the specific context of the REINS bill.<sup>127</sup> 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.<sup>128</sup> In this view, a major rule formulated by an agency in a REINS Act world should not be seen as growing out of an existing delegation, which *Chadha* suggests may not be altered without Article I, Section 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.<sup>129</sup> 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.”<sup>130</sup> According to Siegel, that cannot be said of the reconceptualized enabling statute that does not authorize major rulemaking.<sup>131</sup>

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

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<sup>124</sup> 2011 House Report, *supra* note 80, at 13.

<sup>125</sup> See Tribe, *supra* note 72, at 19.

<sup>126</sup> See Breyer, *supra* note 73, at 789, 793.

<sup>127</sup> See Siegel, *supra* note 16, at 150–57, 170–71.

<sup>128</sup> *Id.* at 150, 154.

<sup>129</sup> *Id.* at 151–52.

<sup>130</sup> *Id.* at 156.

<sup>131</sup> *Id.* at 156–57, 170–71.

rules as mere proposals. The Act's definition of "rule" is essentially the same as the APA definition,<sup>132</sup> 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.*"<sup>133</sup> In substance, the condition is that either house of Congress may nullify the rule without bicameralism or presentment. For reasons just explained, that aspiration is impermissible.

It might be argued that the language of the Act does not deserve much weight in this analysis, because one should look through form to substance. That type of argument has led to spirited disagreement in other contexts.<sup>134</sup> The theoretical question need not be pursued here, however, because three very tangible aspects of the Act provide further evidence that the "withdrawal of jurisdiction" theory is a thinly disguised fiction. First, under the Act, 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 nonmajor 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 defini-

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<sup>132</sup> The only difference is that the APA definition includes certain rules of "particular applicability," whereas the REINS Act definition expressly excludes them. Compare 5 U.S.C. § 551(4) (2012), with REINS Act § 804(4). Such rules are customarily not subjected to political oversight review anyway. See Congressional Review Act, 5 U.S.C. § 804(3)(A) (2012) (containing the same exclusion); Exec. Order No. 12,866 § 3(d), 3 C.F.R. 638, 641 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 803 (2012) (limiting OIRA review to agency statements of general applicability).

<sup>133</sup> REINS Act § 801(b)(1) (emphasis added).

<sup>134</sup> Compare *Nat'l Fed'n of Indep. Bus. 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, JJ., dissenting) (insisting that "there is simply no way, 'without doing violence to the fair meaning of the words used,' to escape what Congress enacted" (citation omitted)).

tion of “major rule”<sup>135</sup> would be even more elusive, as they would depend entirely on OIRA’s completely unreviewable judgment<sup>136</sup> as to what effects on costs or prices would be “major” or what adverse effects on competition, employment, etc., would be “significant.” The artificial nature 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,<sup>137</sup> the National Environmental Policy Act,<sup>138</sup> executive oversight orders, etc. This, obviously, is not the kind of process that one ordinarily associates with legislative “proposals.” Undoubtedly, the agencies, 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.<sup>139</sup> 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 standards applied to other exercises of congressional power. For economic legislation, that review would be highly deferential. 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

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<sup>135</sup> For the text of the definition, see *supra* note 23.

<sup>136</sup> See REINS Act § 805(a) (forbidding judicial review of any determination made under the Act); *2011 House Report*, *supra* note 80, at 27 (specifically stating that OIRA’s determinations would be unreviewable).

<sup>137</sup> 5 U.S.C. §§ 601–612 (2012).

<sup>138</sup> 42 U.S.C. §§ 4321–47 (2012).

<sup>139</sup> 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.”).

the sponsors of the Act think of these measures as executive actions, not legislative actions.

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.”<sup>140</sup> 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,<sup>141</sup> Members of Congress surely 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 are not likely to trade their own limited scrutiny for the more careful job that courts can provide. Early experience with REINS Act-like mechanisms in the states tends to bear out this expectation, as I explain below.<sup>142</sup> 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 authority to adopt major rules but would have the authority to propose statutory prescriptions to Congress.<sup>143</sup> Siegel submits that this scenario would obviously be constitutional, and the REINS Act is indistinguishable from it.<sup>144</sup> To make the analogy closer, however, suppose that (1) the new agency’s statutory charter consistently refers to the agency’s “proposals” as rules; (2) 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; (3) the “proposals” would be adopted through full rulemaking procedure; and (4) 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

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<sup>140</sup> Siegel, *supra* note 16, at 182.

<sup>141</sup> See *supra* Part II.

<sup>142</sup> See *infra* notes 185–89 and accompanying text.

<sup>143</sup> Siegel, *supra* note 16, at 152.

<sup>144</sup> *Id.*



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.<sup>145</sup> 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 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 institutional self-interest may influence such assessments; they will not necessarily accept those perceptions at face value.<sup>146</sup> As I will show below, state law cases offer further support for the same conclusion.<sup>147</sup>

### C. *The REINS Act and Today’s Court*

One might ask, however, whether the above analysis pays too little attention to then-Judge Breyer’s defense of a congressional approval device in his lecture delivered shortly after *Chadha* was decided.<sup>148</sup> Members of Congress, and others, have cited the Breyer lecture as an important datum in its own right.<sup>149</sup> 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,<sup>150</sup>

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<sup>145</sup> In *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.” *INS v. Chadha*, 462 U.S. 919, 958 n.23 (1983); 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 (majority opinion).

<sup>146</sup> See *supra* notes 108–10 and accompanying text.

<sup>147</sup> See *infra* notes 177–82 and accompanying text.

<sup>148</sup> See Breyer, *supra* note 73.

<sup>149</sup> See, e.g., *2013 House Hearing*, *supra* note 0, at 78 (statements by Rep. Goodlatte and Professor Claeyes); *2013 House Report*, *supra* note 13, at 12 (report of committee majority); Adler, *supra* note 8, at 24–25. Regarding Professor Tribe’s position, also cited by these sources, see *supra* note 125 and accompanying text.

<sup>150</sup> See 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.

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, that reasoning would read too much into the Breyer lecture and also would make a dubious extrapolation to the rest of the Court.

It is easy to see why the future Justice would have been dissatisfied with the *Chadha* opinion. Throughout his career, Justice Breyer, the “quintessential justice of standards,”<sup>151</sup> has advocated pragmatic approaches to legal problems, including separation of powers analysis.<sup>152</sup> 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*<sup>153</sup> and *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>154</sup> 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?”<sup>155</sup> Clearly, he was unconvinced that it was. He suspected that *Chadha* would prove to be “a judicial tree that bears little fruit.”<sup>156</sup>

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 an approval 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.”<sup>157</sup> He also discerned “powerful if not overwhelming practical considerations” militating against creation of such a device.<sup>158</sup> 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.<sup>159</sup>

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<sup>151</sup> Linda Greenhouse, *The Nation: Judicial Intent; The Competing Visions of the Role of the Court*, N.Y. TIMES, (July 7, 2002) <http://www.nytimes.com/2002/07/07/weekinreview/the-nation-judicial-intent-the-competing-visions-of-the-role-of-the-court.html> (ascribing that description of Justice Breyer to Professor Kathleen Sullivan).

<sup>152</sup> See, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 80–87 (2010).

<sup>153</sup> *Clinton v. City of New York*, 524 U.S. 417, 473–84 (1998) (Breyer, J., dissenting).

<sup>154</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 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 82.

<sup>155</sup> Breyer, *supra* note 73, at 790.

<sup>156</sup> *Id.* at 792.

<sup>157</sup> *Id.* at 798.

<sup>158</sup> *Id.* at 797.

<sup>159</sup> *Id.*

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.”<sup>160</sup> This quip, typical of Justice Breyer’s characteristic good humor (the transcript noted “Laughter”<sup>161</sup>), 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.

Ultimately, 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.<sup>162</sup> However, his 1983 lecture 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*.<sup>163</sup> His reservations about the merits of his own hypothetical veto substitute suggest a strong possibility that the latter might occur.

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 tough 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 regu-

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<sup>160</sup> ADMIN. CONFERENCE OF THE U.S., LEGISLATIVE VETO OF AGENCY RULES AFTER *INS v. Chadha*, Twenty-Seventh Plenary Session Discussion, Dec. 15, 1983, at 38 (1984) (remarks of Judge Breyer).

<sup>161</sup> *Id.*

<sup>162</sup> See 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.” (footnote omitted)).

<sup>163</sup> See *supra* notes 78–80 and accompanying text.

latory reform bill for “‘hobbling agency rulemaking by requiring affirmative Congressional assent to all major rules.’”<sup>164</sup>

- As seen above, Justice Scalia, while an Assistant Attorney General, was scathingly critical of the legislative veto on both constitutional and policy grounds.<sup>165</sup> Later, he became a coauthor of the ABA’s amicus brief asking the Supreme Court to invalidate the legislative veto in *Chadha*.<sup>166</sup>

- 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.<sup>167</sup> Her article “suggested reasons to welcome some substitution of presidential for congressional influence over administration.”<sup>168</sup>

- 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 . . . .”<sup>169</sup> 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.”<sup>170</sup>

- Justice Anthony Kennedy wrote the Ninth Circuit opinion that the Supreme Court affirmed in *Chadha*.<sup>171</sup> Indeed, he relied on much of the same historical language that the Court later invoked, such as its emphasis on the need for bicameralism:

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<sup>164</sup> *Roberts Showed Prudence in Reg Reform Initiative*, CTR. FOR EFFECTIVE GOV’T (Sept. 6, 2005), <http://www.foreffectivegov.org/node/2652>.

<sup>165</sup> See *supra* notes 46 & 118 and accompanying text.

<sup>166</sup> *ABA Files Amicus Brief in Supreme Court Review of Legislative Veto*, ADMIN. L. NEWS, Winter/Spring 1982, at 7, 7, 10.

<sup>167</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2333 (2001).

<sup>168</sup> *Id.* at 2348.

<sup>169</sup> Panel Discussion, *Administrative Law & Regulation: Presidential Oversight and the Administrative State*, in ENGAGE, NOV. 2001, at 11, 12 (remarks of Judge Alito).

<sup>170</sup> *Id.* at 13.

<sup>171</sup> *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff’d*, 462 U.S. 919 (1983).

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.<sup>172</sup>

The other members of the Court have not spoken as directly to this set of issues. Justice Clarence Thomas has recently denounced broad grants of rulemaking authority to agencies.<sup>173</sup> To that extent, he could be considered a good candidate to support the REINS Act. On the other hand, he (like Scalia and Kennedy) did join the Court's opinion in *MWAA*, which relied on and arguably extended *Chadha's* rationale.<sup>174</sup> Meanwhile, Justices Ruth Bader Ginsburg and Sonia Sotomayor have been strong supporters of the regulatory state.<sup>175</sup> 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, as I noted earlier, federal judges tend to be wary of legislative actions that look like self-aggrandizement.<sup>176</sup> 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.<sup>177</sup> Some of these holdings rested on enactment clause require-

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<sup>172</sup> *Id.* at 434.

<sup>173</sup> See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1240–55 (2015) (Thomas, J., concurring in judgment).

<sup>174</sup> See *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991); see also *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1241 (Thomas, J., concurring in judgment) (citing *Chadha* for the proposition that Congress “improperly ‘delegates’ legislative power to itself when it authorizes itself to act without bicameralism and presentment”).

<sup>175</sup> See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) (Ginsburg, J.) (relying squarely on *Chevron* to uphold an EPA rule); *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 98–100 (2d Cir. 2007) (Sotomayor, J.) (requiring the EPA to set standards under the Clean Water Act using the “best technology available,” regardless of what a cost-benefit analysis might show), *rev'd sub nom.* *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

<sup>176</sup> See *supra* notes 108–10 & 146 and accompanying text.

<sup>177</sup> Appellate cases in ten states and the District of Columbia have found legislative veto statutes unconstitutional. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 770 (Alaska 1980); Gary

ments, similar to the 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*,<sup>178</sup> a decision in which the Supreme Court of Appeals of West Virginia unanimously found a violation of separation of powers in the face of arguments that strongly resembled the ones used to support the REINS Act.<sup>179</sup> 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 not take action to implement them.<sup>180</sup> 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.”<sup>181</sup> 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

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v. United States, 499 A.2d 815, 817 (D.C. 1985); *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622, 638 (Kan. 1984); *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 931 (Ky. 1984); *Blank v. Dep’t of Corr.*, 564 N.W.2d 130, 132–33 (Mich. Ct. App. 1997); *Mo. Coalition for the Env’t v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 136 (Mo. 1997) (en banc); *Op. of the Justices*, 431 A.2d 783, 789 (N.H. 1981); *Gen. Assembly v. Byrne*, 448 A.2d 438, 439 (N.J. 1982); *Gilliam Cnty. v. Dep’t of Env’tl. Quality*, 849 P.2d 500, 505 (Or. 1993) (en banc), *rev’d on other grounds sub nom. Or. Waste Systems, Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93 (1994); *Commonwealth v. Sessoms*, 532 A.2d 775, 782 (Pa. 1987); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 636 (W. Va. 1981). 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. Dep’t of Indus., Labor & Human 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, 418–20 (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 fully support the constitutionality of the REINS Act, under which judicial review of Congress’s decisionmaking would be expressly precluded. REINS Act § 805(a).

<sup>178</sup> *State ex rel. Meadows v. Hechler*, 462 S.E.2d 586 (W. Va. 1995).

<sup>179</sup> *See id.* at 594–95.

<sup>180</sup> *Id.* at 588–89.

<sup>181</sup> *Id.* at 590.

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 [previously], “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.”<sup>182</sup>

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 may 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 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.”<sup>183</sup> Since then, the legislature has ratified several “million dollar rules,”<sup>184</sup> but one cannot tell from a distance what rules have *not* been adopted because of this

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<sup>182</sup> *Id.* (emphasis added) (footnote omitted).

<sup>183</sup> FLA. STAT. ANN. § 120.541(2)(a)(3) & (3) (West 2015); see Larry Sellers, *Florida Legislature Overrides Veto of “Million Dollar Rules” Ratification Requirement*, ADMIN. & REG. L. NEWS, Winter 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.” Editorial, *Bad Bill Will Be Scott’s First Test*, TAMPA BAY TIMES (Nov. 9, 2010), <http://www.tampabay.com/opinion/editorials/bad-bill-will-be-scotts-first-test/1133314>.

<sup>184</sup> See, e.g., H.R. 7145, 116th Leg., Reg. Sess., at 2075 (Fla. 2014); H.R. 7089, 116th Leg., Reg. Sess., at 1962 (Fla. 2014); H.R. 7163, 116th Leg. Reg., Sess., at 2916–17 (Fla. 2014); H.R. 7171, 116th Leg., Reg. Sess., at 2100–01 (Fla. 2014).

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.<sup>185</sup> 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.<sup>186</sup>

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."<sup>187</sup> Thus the Florida 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.<sup>188</sup>

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 approve regulations in batches through omnibus bills.<sup>189</sup> This tendency to dispose of ratifications in bulk may

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<sup>185</sup> Eric H. Miller, *HB 7253 & HB 993: The Legislature's Policy of Economic Review and the 2011 Amendments to the APA*, FLA. BAR ADMIN. L. SEC. NEWSL., June 2011, at 1, 12.

<sup>186</sup> See *Swiger v. UGI/AmeriGas, Inc.*, 613 S.E.2d 904, 910–11 (W. Va. 2005).

<sup>187</sup> Miller, *supra* note 185, at 12.

<sup>188</sup> See *supra* notes 114–23 and accompanying text.

<sup>189</sup> See *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,"



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.

#### 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,<sup>190</sup> 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,<sup>191</sup> 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.

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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.

<sup>190</sup> *Report No. 2 of the Section of Administrative Law and Regulatory Practice*, 122 ABA ANN. REP. 465 (1997) [http://www.americanbar.org/content/dam/aba/directories/policy/1997\\_am\\_107a.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_107a.authcheckdam.pdf).

<sup>191</sup> Levin, *supra* note 2, at 1882–84, 1889–90.