

THE REINS ACT AND THE STRUGGLE TO CONTROL AGENCY RULEMAKING

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The REINS Act (“Regulations From the Executive in Need of Scrutiny”), which passed the House of Representatives in December 2011, would revolutionize our system of government by requiring that all major rules promulgated by federal agencies receive congressional approval before becoming effective. The tremendous significance of the REINS Act has led to fierce debate about both its constitutionality and its wisdom. This article explains that the REINS Act would be perfectly constitutional. Those who challenge its constitutionality correctly point out that the Act would diminish the power of the President and add to the power of Congress. The critical question, however, is not how the Act would alter those powers relative to where they stand now, but whether the Act would impermissibly grant Congress powers beyond those provided by the Constitution. The Act would not do so because it would merely reclaim for Congress powers that Congress was not required to delegate in the first place. This article also addresses the REINS Act from a policy perspective. While the Act would have the virtue of implementing the constitutional ideal that the legislature makes the laws, it would be hopelessly impractical. Congress lacks the time and expertise to vote responsibly on every major regulation. Thus, while the Act would be constitutional, it would be bad policy.

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INTRODUCTION

On Capitol Hill, the hottest trend in administrative law consists of legislative attempts to assert more control over federal agency rulemaking. The Administrative Procedure Act (APA), which has hardly changed in over sixty years, is suddenly the subject of intense scrutiny. Congress is considering bills that would codify the require-

ments of the principal executive orders on rulemaking (such as cost-benefit analysis),¹ replace the APA's simple notice-and-comment rulemaking process with dozens of pages of detailed and complex requirements,² and strengthen the Congressional Review Act's (CRA) process whereby Congress can override regulations once agencies promulgate them.³

But the most theoretically and practically significant of all congressional efforts to regain control over agency rulemaking is the "Regulations From the Executive in Need of Scrutiny Act of 2011," or REINS Act,⁴ which passed the House of Representatives in December 2011.⁵ Whereas the other proposed measures would tinker around the edges of the administrative state, the REINS Act would revolutionize it by reversing the existing procedure of the CRA. The CRA provides that Congress may pass a resolution *disapproving* a regulation promulgated by an administrative agency.⁶ The REINS Act would require that, before any "major rule" promulgated by any agency can take effect, Congress must pass a resolution *affirmatively approving* the rule.⁷

The REINS Act would effect a monumental change in American government. It would eliminate the long-established authority of federal agencies to promulgate regulations governing virtually all aspects of society and reclaim authority over such matters for Congress. Un-

1. *See, e.g.*, Clearing Unnecessary Regulatory Burdens Act, S. 602, 112th Cong. (2011) (proposing to codify provisions of Executive Orders 12,291 and 12,866); Regulatory Responsibility for our Economy Act of 2011, S. 358, 112th Cong. (proposing to codify provisions of Executive Order 13,563).

2. *Compare* 5 U.S.C. § 553 (2006) (setting forth the APA's notice and comment requirements), *with* Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (as passed by the House of Representatives, Dec. 2, 2011).

3. Congressional Office of Regulatory Analysis Creation and Sunset and Review Act of 2011, H.R. 214, 112th Cong.

4. Regulations From the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. [hereinafter REINS Act]; S. 299, 112th Cong. (2011). The House and Senate bills differ slightly. For purposes of this article, references to the REINS Act should be understood as references to H.R. 10 as passed by the House of Representatives on December 7, 2011. The bill contains a single section—section 3—that would amend the whole of what is currently chapter 8 of title 5 of the United States Code. Because references simply to "§ 3" of the REINS Act would not be very illuminating, the section number of chapter 8 that the referenced portion would create will be inserted in parentheses.

5. *See* 157 CONG. REC. H8237 (daily ed. Dec. 7, 2011) (241 representatives voted in favor of the REINS Act).

6. 5 U.S.C. § 802 (2006).

7. REINS Act, H.R. 10, 112th Cong. § 3 (proposing to amend 5 U.S.C. § 801(b)(1) to state that a "major rule shall not take effect unless the Congress enacts a joint resolution of approval . . .").

like the existing scheme of the CRA, which for structural and institutional reasons is almost guaranteed to be ineffective,⁸ the REINS Act would have an enormous impact on the nature of rules promulgated by executive agencies.⁹

Naturally, such a dramatic proposal has attracted controversy. Numerous participants in the debate have questioned the wisdom of the REINS Act, and some have asserted that the Act is, or at least might be, unconstitutional.¹⁰ The Act, some opponents argue, would violate the separation of powers by requiring Congress to approve particular actions taken by the executive, in a fashion reminiscent of the “legislative veto” that the Supreme Court famously struck down in *INS v. Chadha*.¹¹ Citing Article II of the U.S. Constitution and cases such as *Chadha* and *Morrison v. Olson*,¹² these opponents argue that the REINS Act would improperly aggrandize the power of Congress.¹³ Supporters of the Act defend its constitutionality and wisdom.¹⁴

The Article shows that those who attack the constitutionality of the REINS Act are mistaken. The Act would be perfectly constitutional. Indeed, the attacks on the Act’s constitutionality are not only mistaken, but ironic, because the REINS Act would, if anything, put the federal government on a sounder constitutional footing than that on which it rests now. If anything is constitutionally surprising, it is not Congress’s efforts to assert authority over rulemaking, but rather its massive, wholesale delegation of that authority, which the courts have for so long tolerated.¹⁵

8. See *infra* Parts I.A.2, I.A.4.

9. See *infra* Part I.A.4.

10. See, e.g., *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 8–9 (2011) [hereinafter *REINS Act Hearing I*] (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary); *id.* at 95–97 (statement of Prof. Sally Katzen, former Administrator, Office of Info. & Regulatory Affairs); see also *Regulations From the Executive in Need of Scrutiny Act of 2011: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 8–10 (2011) [hereinafter *REINS Act Hearing II*] (statement of Rep. Conyers).

11. 462 U.S. 919, 951–59 (1983) (striking down a statutory scheme whereby a single house of Congress could overturn executive branch actions).

12. 487 U.S. 654, 694 (1988) (approving limitations on the President’s power to remove an executive branch officer, but expressing concern about “attempt[s] by Congress to increase its own powers at the expense of the Executive Branch”).

13. See *REINS Act Hearing I*, *supra* note 10, at 95–97 (statement of Prof. Katzen).

14. E.g., Jonathan H. Adler, *Would the REINS Act Rein in Federal Regulation?*, REG., Summer 2011, at 22.

15. See *infra* Part II.B.3.

The specific, theoretical error of the REINS Act's opponents is that they have ignored the constitutional starting point—the baseline distribution of power provided by the Constitution. In arguing that the Act would unconstitutionally aggrandize the powers of Congress, they observe that the Act would increase the powers of Congress and decrease the powers of the executive.¹⁶ While that is certainly true, the critical test is not whether a statute would vary those powers relative to where they happen to stand now. What matters is whether Congress is attempting to give itself extra powers relative to the baseline provided by the Constitution. The baseline is that Congress has the legislative power and can choose how much rulemaking power to delegate to executive agencies. The REINS Act is constitutional because it would merely reclaim, for Congress, powers that Congress was not required to delegate.¹⁷

The larger lesson of the debate over the constitutionality of the REINS Act is that one should not confuse the *familiar* with the constitutionally *required*. Innovation is possible. Decades of usage have accustomed Americans to the practice whereby administrative agencies make vital decisions that set social policy. But we are not bound to continue a practice forever merely because it has proved expedient for some time. Part of the excellence of the Constitution is that it permits experimentation and change.¹⁸ The REINS Act would be a constitutionally permitted change.

From a policy perspective, however, the Act would be a bad change. The Act would undoubtedly have one great virtue: it would implement the constitutional ideal that the legislature makes the laws.¹⁹ Nonetheless, in determining whether to reclaim so much control over regulation from the executive branch, Congress should remember the reasons it delegated regulatory authority to the executive in the first place.

The fundamental reason is that Congress lacks the time and expertise to vote responsibly on every regulation.²⁰ Congress also created administrative agencies in order to reduce the influence of politics on regulatory decisions and to increase the influence of tech-

16. See *infra* Part I.B.

17. See *infra* Part II.

18. See *infra* Part II.D.

19. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 193 (Thomas I. Cook, ed., Hafner Publ’g Co. 1947) (1690) (stating that a legislature cannot delegate the legislative power); *infra* Part III.A.

20. See *infra* Parts III.B.1, III.B.2.

nocratic considerations.²¹ By requiring congressional approval for every major regulation, the REINS Act would certainly increase Congress's control over regulation, but it would create an enormous obstruction to the necessary processes of government.

Part I of this article reviews the REINS Act. It explains the revolutionary effects that the Act would have and lays out the constitutional arguments that some have made against it. Part II explains why the REINS Act is, in fact, perfectly constitutional. Part III considers the REINS Act from a policy perspective.

I.

THE REINS ACT

The REINS Act is the brainchild of Congressman Geoff Davis of Kentucky, who introduced it in 2009,²² after a constituent asked him “a simple yet powerful question: why doesn't Congress vote on new regulations?”²³ The Act made little progress in the 111th Congress, but Davis reintroduced it in the 112th Congress,²⁴ and, as one might expect given the results of the 2010 elections, it fared much better. It attracted an impressive 204 co-sponsors in the House of Representatives,²⁵ and the House actually passed the Act on December 7, 2011, by a vote of 241–184.²⁶ In the Senate, Senator Rand Paul, also of Kentucky, has championed the Act,²⁷ and it attracted thirty-one co-sponsors and has been discussed in committee hearings.²⁸

21. See *infra* Part III.B.3.

22. Regulations From the Executive in Need of Scrutiny Act of 2009, H.R. 3765, 111th Cong. The ideas behind what is now the REINS Act were discussed as early as the 1980s, following the Supreme Court's decision in *Chadha*. See, e.g., Stephen Breyer, *The Legislative Veto after Chadha*, 72 GEO. L.J. 785, 789 (1984).

23. *History of the REINS Act*, <http://toddyoung.house.gov/reins/history-of-the-reins-act/> (last visited Feb. 11, 2013).

24. REINS Act, H.R. 10, 112th Cong.

25. *Bill Summary and Status 112th Congress (2011-2012) H.R. 10*, LIBRARY OF CONG., THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.10>: (last visited Jan. 9, 2013).

26. See 157 CONG. REC. H8237 (daily ed. Dec. 7, 2011).

27. See Regulations From the Executive in Need of Scrutiny Act of 2011, S. 299, 112th Cong. (2011) (Senator Paul introduced the Senate version of the REINS Act on February 7, 2011).

28. *Bill Summary and Status 112th Congress (2011-2012) S.299*, LIBRARY OF CONG., THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.299>: (last visited Jan. 9, 2013); see also *Fed. Regulation: A Review of Legislative Proposals—Part I: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2011) [hereinafter *Senate Hearing Part I*]; *Fed. Regulation: A Review of Legislative Proposals—Part II: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2011) [hereinafter *Senate Hearing Part II*].

If enacted, the REINS Act would effect a simple but monumental change in the federal government. It would strip federal agencies of much of their rulemaking power. Instead of promulgating rules, federal agencies would, in effect, make proposals to Congress. It would be up to Congress to decide whether to approve or reject the proposed rules.²⁹

The fundamental nature of this change makes the REINS Act the most theoretically and practically significant (and therefore the most worthy of study) of the proposals to assert more congressional control over the agency rulemaking process. Other proposals would add more steps to the rulemaking process or more criteria to be considered in rulemaking, but those steps would still be carried out, and those criteria applied, by agencies in the executive branch.³⁰ Congress's control over rulemaking would be asserted only at the level of generic criteria and procedures. The REINS Act, by contrast, would impose direct congressional control over the adoption of individual rules.

This Part lays out the terms of the REINS Act. It then describes the arguments that some opponents have made against the Act's constitutionality.

A. *The Potentially Revolutionary Effects of the REINS Act*

The REINS Act's proposed changes to agencies' rulemaking powers are so important because agency rulemaking powers are themselves so important. Congress and the executive have long struggled over control of executive agencies' rulemaking power.

1. *The Vital Power of Rulemaking*

Under current law, most federal agencies are authorized to promulgate rules and regulations to carry out their statutory missions.³¹ The rulemaking power of federal agencies is of the highest importance because Congress has in many cases vested agencies with enormous

29. See H.R. 10 (proposing to amend 5 U.S.C. §§ 801(a)(3), (b)(1) to provide that major rules promulgated by federal agencies shall take effect only upon enactment by Congress of a joint resolution of approval).

30. See proposed bills cited *supra* notes 1–3.

31. *E.g.*, 18 U.S.C. § 4001(b)(1) (2006) (authorizing the Attorney General to promulgate rules governing federal prisons); 22 U.S.C. § 2651a(a)(4) (2006) (authorizing the Secretary of State to promulgate such rules and regulations as are necessary to carry out her functions and the functions of the Department of State); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (“Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than, as they once were, the exception . . .”).

discretion. In many statutes, Congress charges an agency with a mission and sets for it a goal, but does so only in the most general of terms, leaving the agency with vast discretion in deciding how that goal can best be achieved. Congress has, for instance, instructed the Federal Communications Commission to grant applications for broadcast licenses when doing so would serve “the public interest, convenience, and necessity,”³² but has left the definition of that broad phrase up to the Commission. Similarly, Congress has charged the Federal Energy Regulatory Commission with enforcing the requirement that rates and charges for the transportation of natural gas be “just and reasonable,”³³ but it provided no definition of that term.

Even where Congress gives an agency a more particular formula to implement, the agency will often still exercise vitally important discretion in determining the precise application of the formula. To mention just one of innumerable possible examples, the Clean Air Act directs the Administrator of the Environmental Protection Agency (EPA) to set the National Ambient Air Quality Standards (NAAQS) at a level that is “requisite to protect the public health.”³⁴ The term “requisite,” the Supreme Court has explained, means “sufficient, but not more than necessary.”³⁵ Yet even this level of precision leaves the EPA with discretion to make extremely important choices. In its recent determination of the NAAQS for sulfur dioxide, for example, the EPA recognized that the Administrator’s choice “require[d] judgments based on an interpretation of the evidence,”³⁶ and that there was some evidence for considering figures anywhere between 50 and 150 parts per billion.³⁷ The Administrator’s choice within this range made a difference of tens of billions of dollars in the costs and benefits of the NAAQS regulations.³⁸

32. 47 U.S.C. § 309(a) (2006).

33. 15 U.S.C. § 717(c)(a) (2006).

34. 42 U.S.C. § 7409(b)(1) (2006). The Act also instructs the Administrator to leave “an adequate margin for safety.” *Id.*

35. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001).

36. Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520, 35,541 (June 22, 2010).

37. *See id.* at 35,542 (noting that there was “clearly sufficient evidence” for considering figures starting at 50 ppb and that the agency’s science advisory panel had concluded that figures as high as 150 ppb could be justified under some interpretations of the evidence).

38. *See AIR BENEFIT-COST GRP., U.S. ENVTL. PROT. AGENCY, FINAL REGULATORY IMPACT ANALYSIS (RIA) FOR THE SO₂ NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS), at ES-9 (2010)* (analyzing the costs and benefits of choosing 50, 75, or 100 ppb). The Administrator ultimately chose a figure of 75 ppb. 75 Fed. Reg. at 35,520.

Thus, agency rules are not mere matters of housekeeping. They are vital instruments of social policy. And yet, these social policy decisions are made by agencies within the executive branch. Congress might have made most of the decisions itself—Congress could certainly, for example, have fixed the permissible level of sulfur dioxide in the air or the permissible rates for the transportation of natural gas—but it has instead vested executive agencies with the authority to make these decisions.

2. *How Congress Has Tried to Control Rulemaking*

For decades, Congress has struggled to reconcile its decision to delegate great discretion to the executive branch with its desire to exercise control over that discretion. Prior to the Supreme Court's decision in *INS v. Chadha*,³⁹ Congress often used the legislative veto as a control mechanism: it would delegate power to an agency, but reserve to either house of Congress (or to both houses acting together) the power to override the agency's decisions on a case-by-case basis.⁴⁰ *Chadha*, however, made clear that the legislative veto was unconstitutional, thereby forcing Congress to seek some alternative mechanism by which to control executive discretion.

In some cases, Congress achieves control by passing more precise statutes that leave executive agencies with less discretion to exercise.⁴¹ Frequently, however, Congress vests an executive agency with broad discretion, so as to permit the agency to take into account all the circumstances necessary to make wise decisions, or because members of Congress agree on the broad goals of the agency's mission but are unable to agree on details, or for some other reason. Even in such cases, however, Congress may still wish to exercise a degree of control over that discretion.

The Congressional Review Act,⁴² passed after *Chadha*, represents Congress's existing attempt to retain some measure of control over agency rulemaking. The CRA requires agencies to submit any

39. 462 U.S. 919 (1983).

40. *See id.* at 1003–13 (White, J., dissenting) (listing dozens of examples).

41. A famous example is the Delaney Clause of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) (2006), which mandates that no food additive may be deemed safe if it is found by appropriate tests to cause cancer in humans or animals. The clause deprives the Secretary of Health and Human Services of discretion to consider whether an additive's cancer risk is small or whether the additive has countervailing benefits.

42. 5 U.S.C. §§ 801–808 (2006). The “Congressional Review Act” is the common name for section 251 of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 868.

rule to both houses of Congress (and to the Comptroller General) before the rule takes effect.⁴³ In submitting a rule, the agency must supply Congress with a report explaining the rule and with a copy of any cost-benefit analysis or other analyses associated with the rule.⁴⁴ If the rule is a “major rule,” as statutorily defined,⁴⁵ then the rule cannot take effect for sixty days following its submission to Congress.⁴⁶ During this sixty-day period, Congress may enact a joint resolution disapproving the rule.⁴⁷ Special legislative procedures expedite the progress of such a joint resolution.⁴⁸ If Congress enacts a joint resolution of disapproval, then the agency rule does not take effect, and, indeed, the agency is forbidden from reissuing the rule, or a substantially similar rule, unless Congress subsequently authorizes it to do so in a new law.⁴⁹ If Congress does not act within the sixty-day period, the rule takes effect as promulgated.⁵⁰

The CRA, at least in theory, provides Congress with the ability to block any major rule promulgated by any agency and thus gives Congress some degree of control over agency rulemaking. In practice, however, the CRA has had hardly any impact on agency rules. Congress has used its disapproval procedure only once in the fifteen years since the statute’s enactment.⁵¹ It is not surprising, therefore, that some members of Congress desire a stronger control mechanism for agency rules.

43. *Id.* § 801(a)(1)(A). The term “rule” is broadly defined in the CRA and would include many guidance documents, policy statements, and other matters besides formal legislative rules issued pursuant to the notice-and-comment rulemaking process. *Id.* § 804(3) (incorporating most of the APA’s broad definition of “rule” as set forth in 5 U.S.C. § 551).

44. *Id.* § 801(a)(1)(A), (B).

45. *Id.* § 804. A “major” rule is defined as a rule that would likely result in an annual effect on the economy of \$100 million or more, major increases in costs or prices, or significant adverse effects on competition, employment, or other specified economic matters. *Id.*

46. *Id.* § 801(a)(3).

47. *Id.* §§ 801, 802.

48. *Id.* § 802(d), (e). See *infra* notes 65–67 and accompanying text.

49. *Id.* § 801(b).

50. *Id.* § 801(a)(3).

51. S.J. Res. 6, 107th Cong. (2001) (disapproving the Occupational Safety and Health Administration’s ergonomics standard); MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008).

3. *The REINS Act*

The REINS Act is one attempt at creating such a mechanism. It would substantially change the current agency rulemaking process. Indeed, it would revolutionize that process.

The REINS Act would retain the CRA requirement that agencies submit all rules to Congress before they take effect.⁵² For non-major rules,⁵³ the REINS Act procedure would be essentially the same as the current CRA procedure for major rules. Under the REINS Act, Congress would have sixty days to enact a joint resolution disapproving a non-major rule, and certain special, expedited procedures would apply to such a joint resolution.⁵⁴ Enactment of such a joint resolution would block a non-major rule from taking effect, as is true under the current scheme for major rules.⁵⁵

But for major rules, the REINS Act procedure would be completely different. Unlike the CRA, which provides that a major rule can take effect sixty days after its submission to Congress unless Congress enacts a joint resolution of *disapproval*,⁵⁶ the REINS Act would provide that a major rule could take effect only upon enactment of a joint resolution of *approval*.⁵⁷ Moreover, Congress would have only seventy days to enact such a joint resolution.⁵⁸ Although special, expedited procedures designed to guarantee a vote would apply to the

52. REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 801).

53. The REINS Act would retain the CRA's definition of a "major" rule, *id.* (proposing 5 U.S.C. § 804(2)), and would define a non-major rule as any rule that is not a major rule, *id.* (proposing 5 U.S.C. § 804(2), (3)).

54. *Id.* (proposing 5 U.S.C. § 803).

55. Actually, there appears to be an error in the REINS Act as introduced in Congress and as passed by the House of Representatives. The Act would amend 5 U.S.C. § 801(a)(4) to provide that a non-major rule would take effect "as provided by section 803," *id.*, but the proposed new text of § 803 does not, in fact, provide for when or how a non-major rule would take effect, nor does it expressly state the impact of Congress's adoption of a disapproval resolution on the validity of a non-major rule, as the current CRA does. *Id.* Presumably, the intent of REINS Act proponents is to have the Act mirror the CRA procedures for major rules.

56. 5 U.S.C. § 801(a)(3), (b)(1) (2006).

57. H.R. 10 (proposing 5 U.S.C. § 801(a)(3), (b)(1)). The joint resolution could only approve the rule as promulgated by the agency, without change. *Id.* (proposing 5 U.S.C. § 802(a)(1), (a)(3)).

58. *Id.* (proposing 5 U.S.C. § 801(b)(2)). The "days" would not be calendar days, but legislative or session days, *id.*, so Congress would actually have more than seventy calendar days to act. *Id.* A special provision takes care of the circumstance in which an agency promulgates a major rule near the end of a session of Congress. *Id.* (proposing to amend 5 U.S.C. § 801(d) so that any rule promulgated within the last sixty days of a session would be treated as if promulgated on the fifteenth day after the next session convenes).

approval resolution,⁵⁹ if Congress failed to enact the resolution within the seventy-day period, the rule in question would not take effect.⁶⁰ Moreover, the same rule could not be considered again during the same Congress.⁶¹

4. *The Impact of the REINS Act*

The REINS Act would be fundamentally different from the CRA. Superficially, they have some similarity. Both are designed to give Congress a degree of control over agency rulemaking. But in practice, the CRA is almost wholly toothless, whereas the REINS Act would represent a monumental change in our system of government.

Under the CRA, Congress is, to be sure, empowered to interfere with agency rules. As noted earlier, the CRA creates a facially impressive array of legal requirements. Agencies must submit all rules to Congress before the rules can take effect, and Congress can disapprove any major rule at its pleasure. Nevertheless, the practical impact of the CRA is virtually nil. There are several reasons why this is so.

First, the CRA gave Congress no power that it did not already have. Congress always had the power to overturn any agency rule by passing a new statute,⁶² and the CRA process by which Congress can overturn an agency rule *is* the process of passing a new statute: a disapproval resolution, like any legislation, must pass both houses of Congress and be presented to the President.⁶³ Congress had no need to pass a statute to tell itself that it can pass a statute.

59. *Id.* (proposing 5 U.S.C. § 802). The approval resolution would be required to be introduced in each house of Congress, *id.* (proposing 5 U.S.C. § 802(a)(2)), could not die in committee, *id.* (proposing 5 U.S.C. § 802(c), (e)), and would be guaranteed floor time, but the floor time would be limited, *id.* (proposing 5 U.S.C. § 802(d), (e)).

60. *Id.* (proposing 5 U.S.C. § 801(b)(2)). The Act would provide a limited escape hatch for exigent circumstances: it would allow the President to certify that a rule had to take effect immediately if it was urgently needed for specified reasons. *Id.* (proposing 5 U.S.C. § 801(c)). But such presidential certification could be effective only for a single, ninety-day period. *Id.* The Act would also exempt certain agencies dealing with monetary policy and rules related to hunting, fishing, or camping. *Id.* (proposing 5 U.S.C. §§ 806–807).

61. *Id.* (proposing 5 U.S.C. § 801(a)(5)).

62. See FREDERICK M. KAISER, CONG. RESEARCH SERV., 79-206 GOV, CONGRESSIONAL ACTION TO OVERTURN AGENCY RULES: ALTERNATIVES TO THE “LEGISLATIVE VETO” 5 (1979) (citing enactment of a new statute as “[t]he most fundamental and direct mechanism for Congress to overturn a rule”); see also *INS v. Chadha*, 462 U.S. 919, 935 nn.8–9 (noting Congress’s authority to overturn action of other branches by statute).

63. See 5 U.S.C. §§ 801(b), 802 (2006). The CRA does not spell this point out, but it permits Congress to block an agency regulation from taking effect only by passing a “joint resolution” of disapproval. By definition, a “joint resolution” is a resolution passed by the House of Representatives and the Senate, and either signed by the Presi-

The CRA would be far more significant if it gave Congress some power that it would not otherwise have. If it allowed Congress to block an agency rule by some procedure, such as a one-house veto, that had fewer requirements than the process of passing a new statute, the CRA would have some actual teeth. Even a provision allowing Congress to act by concurrent resolution (which, unlike a joint resolution, would not require presentation to the President) would be quite significant. But, as the Supreme Court made clear in *Chadha*, the Constitution does not permit Congress to overturn an agency action by a procedure short of passing a new statute.⁶⁴ Thus, the requirement that Congress act by *joint* resolution, which robs the CRA of any real significance, is constitutionally necessary.

The CRA does one potentially significant thing to distinguish the process of disapproving an agency rule from the process of passing an ordinary statute: it puts the disapproval resolution on a “fast track” in the Senate.⁶⁵ A disapproval resolution cannot die in committee,⁶⁶ and it is not subject to filibuster.⁶⁷ Allowing disapproval resolutions to escape the sixty-vote requirement for ending debate,⁶⁸ which makes it difficult for the Senate to pass ordinary legislation, might appear to be of real significance.

But even with this special feature, the CRA is still doomed to irrelevance. The fast track procedure gets disapproval resolutions around the filibuster, but it cannot get them around other fundamental structural features of lawmaking that make successful disapproval resolutions almost nonexistent.

The fundamental problem is that if an agency promulgates a regulation, the President probably approves of that regulation. Certainly this is true for the pure executive agencies, such as the cabinet departments, where the head of the agency serves at the President’s pleasure.

dent or re-passed by a two-thirds vote of each house of Congress following the President’s disapproval. *Bowsher v. Synar*, 478 U.S. 714, 767 (1986) (White, J., dissenting).

64. *Chadha*, 462 U.S. at 951–59.

65. 5 U.S.C. § 802(c), (d) (2006).

66. *Id.* § 802(c) (providing that if the committee to which a disapproval resolution is referred does not report on the resolution within twenty days, it may be discharged by a petition that requires the signatures of only thirty Senators).

67. *Id.* § 802(d). The CRA contains no comparable “fast track” procedures for the House of Representatives, but the rules of the House permit its leadership to force votes on whatever bills they desire; the House has no counterpart to the Senate filibuster that permits a minority to block a vote on a bill. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 187–88 (1989). Thus, there is less need for a fast track procedure in the House.

68. R. OF THE U.S. SENATE, R. XXII(2).

Such an official is unlikely to risk incurring the President's displeasure by promulgating a regulation (especially a major regulation subject to the CRA's disapproval process) that the President would not support.⁶⁹ Even at the independent agencies, where the agency head or heads enjoy some insulation from the President's removal power,⁷⁰ the agency is typically controlled by members of the President's political party.⁷¹ Thus, while there is more scope for an independent agency to promulgate rules that the President would not approve,⁷² such rules would still be the exception, not the norm.

Therefore, although the CRA puts a disapproval resolution on a fast track that might help it get through Congress, both houses know that the President probably supports the regulation involved and could veto the disapproval resolution.⁷³ It would then require a two-thirds vote in both houses to overturn the President's veto.⁷⁴ But it would be a rare rule indeed that made sufficient sense that an agency would promulgate it, but that was so unacceptable that it could not win the support of at least one-third (plus one) of the members of at least one of the two houses of Congress.

69. *See, e.g.*, Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 24–25 (1995) (noting that agency heads who serve at the pleasure of the President “will generally follow the President on matters of importance”). In recent decades the likelihood that a purely executive agency will promulgate a regulation that the President does not support has been further reduced by the process of formal, centralized review of significant regulations by the Office of Management and Budget. *See* Exec. Order No. 12,866, 3 C.F.R. 638, § 6 (1993); Exec. Order No. 12,291, 3 C.F.R. 127, § 3 (1981).

70. By definition, the “independent” agencies are those headed by officials who do not serve at the pleasure of the President.

71. Most independent regulatory agencies are headed by a collegial board consisting of an odd number of members, and members of the President's political party will typically occupy the majority of seats on the board. There are rare exceptions, such as the Federal Election Commission, which has an even number of members, and as to which neither political party is permitted to occupy a majority of the seats. *See* 2 U.S.C. § 437c(a)(1) (2006). But in such cases any rule promulgated by the agency must have the support of agency members of both political parties, and so is even less likely to be the subject of a disapproval resolution in Congress.

72. Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 260 (1994) (“For better or for worse, independent agencies are empowered to make policy at odds with White House priorities.”).

73. This point is well understood. *See, e.g.*, Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1831 n.137 (2010); *see also* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1002 (2001); Adler, *supra* note 14, at 26.

74. U.S. CONST. art. I, § 7.

Thus, it is hardly surprising that in the fifteen-year history of the CRA, Congress has used its procedures to overturn an agency rule only once.⁷⁵ Indeed, it is also no surprise that this singular action occurred in connection with a transition between Presidents of different political parties. The rule in question was a “midnight rule” promulgated at the end of President Clinton’s second term,⁷⁶ and the disapproval resolution was signed by President George W. Bush.⁷⁷ In such circumstances, the above analysis, suggesting that the President will usually support rules promulgated by federal agencies, does not apply. But apart from this unusual kind of case, one would expect, and experience confirms, that the CRA will accomplish almost nothing.⁷⁸

The REINS Act would have infinitely more impact—and not just because it has a snappier acronym. The CRA requires Congress to *act* in order to block an agency regulation, and it therefore requires Congress to go through all of the constitutional procedures that are designed for the very purpose of making it difficult for Congress to act.⁷⁹ By contrast, the REINS Act would provide that an agency regulation would not take effect *unless* Congress acts. The REINS Act would

75. S.J. Res. 6, 107th Cong. (2001); ROSENBERG, *supra* note 51.

76. The rule was adopted November 14, 2000, after the election that put President George W. Bush in office. 65 Fed. Reg. 68,262 (Nov. 14, 2000).

77. See S.J. Res. 6, 107th Cong. (2001); Presidential Statement on Signing Legislation to Repeal Federal Ergonomics Regulations, 1 PUB. PAPERS 269 (Mar. 20, 2001).

78. The perceptive reader might observe that the fact that Congress has exercised its powers under the CRA only once does not by itself prove that the CRA has little or no impact on regulations. It is possible that Congress has little occasion to exercise its powers under the CRA because agencies take assiduous care to make sure that regulations they promulgate are acceptable to Congress, precisely because they know that Congress could otherwise use its powers under the CRA to overturn the regulations.

The analysis contained in the text above, however, suggests that this explanation is implausible. Even without the CRA, agencies would know that Congress could overturn any agency regulation by statute. The only difference the CRA makes is to put disapproval resolutions on a fast track in the Senate. Protecting a disapproval resolution from a filibuster, however, is of no significance if the President is going to veto the resolution. If Congress could pass a disapproval resolution over the President’s veto, then the CRA’s expedited procedures would be unnecessary to secure passage, because a veto-proof majority in the Senate would necessarily also be a filibuster-proof majority. Thus, so long as the President supports a regulation, the CRA makes little difference to Congress’s ability to overturn the regulation. It therefore seems unlikely that the CRA causes agencies to take any additional care to mold regulations to please Congress.

79. See *INS v. Chadha*, 462 U.S. 919, 944, 959 (1983) (“Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.”).

thus reverse the immensely significant burden of inertia. Under the CRA, if an agency promulgates a rule and Congress does nothing—which, by design, is what Congress typically does—the rule takes effect. Under the REINS Act, if an agency promulgated a major rule and Congress did nothing, the rule would *not* take effect. Therefore, whereas the CRA, as explained above, would have a practical impact on agency regulations only in rare circumstances, the REINS Act could be expected to affect every major rule promulgated by any agency.

The REINS Act's effect would be most evident in periods of divided government. Under the system in place now, an administrative agency can promulgate a regulation even if that regulation does not have the support of the current Congress. In particular, when government power is divided, and the President's political party lacks control over one or both houses of Congress, agencies can still promulgate regulations desired by the President, because, for the reasons explained above, Congress has little ability to block such regulations. To be sure, there are some practical limits to an agency's power to displease the current Congress—the agency knows that it must get funding from Congress, so it cannot afford to get Congress too upset—but in general an agency can promulgate regulations without regard to whether those regulations would be passed as legislation by the current Congress.

Under the REINS Act, however, every major rule promulgated by any agency would have to be *affirmatively approved* by both houses of Congress. If the President's political party lacked control over even one of the two houses, no rule could be passed that was not acceptable to both political parties.⁸⁰ Therefore, the REINS Act could

80. This statement is, of course, oversimplified. Political parties are not always monolithic, so a rule disfavored by the majority party in a house of Congress might still win approval by attracting a large number of votes from that house's minority party and a few votes from the more centrist members of the majority party. The recent "fiscal cliff" crisis showed that a bill may pass in this manner provided it can get over the important hurdle of actually being put to a vote. *See* 158 CONG. REC. H7558-59 (Jan. 1, 2013) (recording passage of tax legislation by vote of 257-167 in which most of the "aye" votes came from Democrats, the minority party in the House of Representatives). The REINS Act would take away the majority's discretion not to schedule a vote on an approval bill. *See supra* note 59. So the "fast track" provisions of the REINS Act could be very significant and could allow a major rule to be approved even if it was disfavored by most of the members of a house's majority party. A major rule might also be approved as part of a package deal that included something else the majority party wanted (although arranging such package deals would be somewhat difficult, as the REINS Act forbids including anything else in the "joint resolution of approval" that is required to make a major rule effective). *See* REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 802(a)(1)). Still, in periods of di-

be expected to have a tremendous impact on regulation in periods of divided government.

Even in periods when the President's political party also controlled both houses of Congress, the REINS Act could still be expected to have quite a significant effect on regulation. The expedited procedures of the REINS Act would prevent a minority party in Congress from blocking a vote by mechanisms such as the filibuster,⁸¹ so it might seem that the President's party (assuming it controlled both houses of Congress) could get a proposed rule approved by legislation as easily as it could get the rule issued by an executive agency in the first place. But there are two significant qualifications to this point. First, the President's party might not be monolithic. The President might have policy views that are different from those of his party's congressional wing (which itself might not be monolithic).⁸² Thus, the President's imprimatur on a regulation might not guarantee its smooth passage through Congress, even when a single political party controls the White House, the House of Representatives, and the Senate.

Second, the REINS Act's requirement for an affirmative vote of Congress would change the system significantly by requiring members of Congress to avow their support for particular regulations openly. The current system shields members of Congress from direct accountability for regulations. Members of Congress can, for example, say that they support a clean environment, safe working conditions, reasonable energy rates, and other popular matters, without being directly responsible for the burdensome regulations that may be necessary to achieve them.⁸³ Members of Congress might be happy to see an administrative agency enact a burdensome rule, even if they might not be willing to take the responsibility for voting for such a rule themselves.⁸⁴

Under the REINS Act, things would be quite different. Agencies formulating major regulations would have to consider that Congress would have to approve, not just the general statutory goal of the regulations, but the regulations themselves. The REINS Act would limit

vided government, getting any major rule approved would require some degree of bipartisanship, which would be an extremely significant point in America's increasingly polarized politics.

81. *Id.* (proposing 5 U.S.C. § 803).

82. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 & n.261 (2001).

83. See Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1197–98 (1981).

84. See *id.*; see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 415–16 (2d ed. 1991); Adler, *supra* note 14, at 28.

enactable regulations to those for which members of Congress are willing to take personal responsibility.⁸⁵ Thus, even if a single political party controlled the White House and both houses of Congress, the REINS Act could still significantly impact regulation.

In short, the REINS Act would revolutionize our system of government. It would end the long-established practice of allowing vital regulatory choices to be made by unelected administrators. It would require the elected members of Congress to approve, and thus take responsibility for, every major regulation. It would have a tremendous impact on regulations in periods of divided government, and it would probably have quite a significant impact on regulations even in periods of unified government. Depending on one's point of view, this might be a good thing or a bad thing,⁸⁶ but it would, in any event, be a very big thing.

B. *Constitutional Arguments Against the REINS Act*

Whenever someone suggests a substantial change to a long-established feature of our system of government, it is natural to wonder whether the change would be constitutional. The REINS Act, as explained above, would be a tremendous change, and as it has progressed in Congress, some of its opponents have claimed that it is, or at least might be, unconstitutional. These opponents have raised several arguments.

Representative John Conyers of Michigan has stated flatly that the REINS Act would be unconstitutional.⁸⁷ He first claims that the Act would violate the separation of powers.⁸⁸ The Constitution grants the executive power to the President, and it gives the President the responsibility to "take care that the laws be faithfully executed."⁸⁹ The REINS Act, Conyers asserts, would "unduly trammel[] on executive authority."⁹⁰

In addition to this rather generalized argument, Conyers makes a more specific argument based on case authority. The Supreme Court, he observes, held in *Chadha* that Congress cannot block executive agency action by use of a one-house veto.⁹¹ A one-house veto, he claims, is exactly what the REINS Act would create. Under the

85. Adler, *supra* note 14, at 28.

86. *See infra* Part III.

87. *REINS Act Hearing I*, *supra* note 10, at 8–9.

88. *Id.* at 9.

89. *Id.*; *see also* U.S. CONST. art. II, § 3.

90. *REINS Act Hearing I*, *supra* note 10, at 9.

91. *REINS Act Hearing II*, *supra* note 10, at 8–9.

REINS Act, when an agency promulgated a major rule, either house of Congress, by itself, could block the rule simply by failing to adopt a joint resolution approving it. The rule would fail even if it had the approval of the other house of Congress and the President. Effectively, therefore, Conyers argues, the REINS Act approves a one-house veto of any major rule.⁹² Nine other members of the House Judiciary Committee (all Democrats) joined Representative Conyers in these arguments in the House Report on the REINS Act.⁹³

Sally Katzen, a visiting professor at New York University School of Law and former Administrator of the powerful Office of Information and Regulatory Affairs within the federal Office of Management and Budget, shares Representative Conyers' concern. While she does not go so far as to say that the REINS Act would definitely be unconstitutional, she raises questions about its constitutionality. Like Conyers, she believes that the REINS Act procedure cannot easily be distinguished from the one-house veto struck down in *Chadha*.⁹⁴

In addition, she gives some more body to Conyers' generalized separation-of-powers argument. Katzen notes that, in *Morrison v. Olson*, the Supreme Court expressed concern about statutes that "involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."⁹⁵ That, Katzen notes, is exactly what the REINS Act does.⁹⁶ Tying this together with the President's responsibilities under the Take Care Clause, Katzen notes that, for over a century, the executive branch has taken care to faithfully execute the laws by developing and issuing regulations.⁹⁷ The REINS Act, Katzen implicitly suggests, would increase Congress's power, while interfering with the executive branch's authority over regulations.

Finally, Katzen asserts that it would certainly be unconstitutional, as inconsistent with separation of powers, for Congress to require congressional approval for every initiation of a prosecution by a U.S. Attorney.⁹⁸ She asks whether the REINS Act's requirement of

92. *Id.* at 8.

93. H.R. REP. NO. 112-278, pt. I, at 52 (2011) (dissenting views); *see also* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1183-84 (1999) (asserting that a 1990s precursor of the REINS Act "would clearly violate *Chadha's* rule").

94. *REINS Act Hearing I*, *supra* note 10, at 95.

95. 487 U.S. 654, 694 (1988).

96. *REINS Act Hearing I*, *supra* note 10, at 96 (noting that the phrase from *Olson* "may be an apt characterization of the REINS Act").

97. *Id.*

98. *Id.*

congressional approval for every major regulation would be similarly unconstitutional.⁹⁹

Thus, important players in the debate over the REINS Act have challenged the Act's constitutionality. Their arguments raise a key issue. Given the tremendous impact that the Act would have, it is critically important to know whether the Act would be within Congress's powers.

II.

THE CONSTITUTIONALITY OF THE REINS ACT

The opponents of the REINS Act are wrong to suggest that the Act would be unconstitutional. They see the Act as a dangerous aggrandizement of Congress's powers, but in fact it would simply reclaim powers that Congress was never required to delegate in the first place. In assessing the constitutionality of the Act, it is an error simply to examine how the Act would change the powers of Congress and the executive relative to where they are now. Identifying the proper starting point—the constitutional baseline—is critical. The baseline is that Congress can determine whether to grant agencies rulemaking authority.

As the previous section showed, the arguments against the constitutionality of the REINS Act fall into several categories. The Act's opponents have made a specific argument based on the authority of *Chadha*, a more generalized argument based on separation of powers, and some other, more minor arguments. In answering these arguments, it is best to take the claim based on *Chadha* first, because exposing the error in this argument provides the crucial insight that addresses all the others.

A. *The REINS Act and the One-House Veto*

Opponents of the REINS Act compare its impact to that of the one-house veto disapproved in *Chadha*. It is true that, under the REINS Act, if an agency attempted to promulgate a major regulation, the disagreement of a single house of Congress would block the regulation from becoming effective. But blocking a regulation from becoming effective is different from undoing a regulation. This difference is crucial to the Act's constitutionality under *Chadha*.

99. *Id.*

1. *The Search for the Starting Point*

The Supreme Court held in *Chadha* that Congress cannot act except through bicameralism and presentment.¹⁰⁰ Therefore, a crucial first step in applying *Chadha* is determining whether Congress has *acted*. Action by Congress is something that effects a change, and to determine whether Congress has changed something requires identification of the starting point.

Chadha itself demonstrates these principles. *Chadha* concerned the Immigration and Nationality Act (INA). Under the Act, the Attorney General had the authority to suspend the deportation of otherwise deportable aliens if he determined that they met specified requirements.¹⁰¹ The Attorney General exercised this authority in *Chadha*'s case.¹⁰² However, under the "legislative veto" provisions of the INA, as it then existed, the House of Representatives, acting alone, adopted a resolution that had the effect of canceling the suspension of *Chadha*'s deportation.¹⁰³ The fatal problem in *Chadha* was that action by a single house of Congress changed *Chadha*'s status. The starting point, following the Attorney General's action, was that *Chadha* was not deportable.¹⁰⁴ The "veto" adopted by the House of Representatives made *Chadha* deportable.¹⁰⁵ The specific defect in the statutory scheme was that it permitted the action of a single house of Congress to change something from its starting point, or, as the Court put it, to "alter[] the legal rights, duties and relations of persons . . . outside the legislative branch."¹⁰⁶

The REINS Act scheme would be different. In comparing the scheme to a one-house veto, opponents of the Act are necessarily postulating that, when an agency promulgates a major rule, the starting point is that the rule is effective. Under the REINS Act, they claim, either house of Congress could change things from that starting point, by failing to adopt a resolution approving the rule, thereby rendering the rule ineffective.

In fact, however, the very essence of the REINS Act scheme lies in its impact on the starting point itself. Under the REINS Act, when an agency promulgated a major rule, that rule would *not* be effective.

100. *INS v. Chadha*, 462 U.S. 919, 951–55 (1983).

101. *Id.* at 923–24.

102. *Id.* at 924–25.

103. *Id.* at 926–27.

104. *Id.* at 952 ("[A]bsent the House action, *Chadha* would remain in the United States.").

105. *Id.*

106. *Id.*; *see also id.* ("Congress has *acted* and its action has altered *Chadha*'s status.").

The rule would have no force unless and until approved by joint resolution of Congress.¹⁰⁷ The rule would, in effect, be a proposal to Congress, and it would have no more legal force than any other proposal (e.g., a proposal from the President or from a private party), unless Congress approved it.

Thus, the fatal problem with the one-house veto—that it allows action by a single house of Congress to effect a change—would not apply. A major rule promulgated by an agency would be born ineffective. No action by a single house of Congress could change that. If a single house of Congress failed to adopt a resolution approving the rule, the rule would simply keep its status: it was ineffective to start with, and it would remain ineffective. Only action by both houses of Congress (with presentment to the President) could have the effect of changing the rule by making it effective.

Therefore, under the REINS Act, action of one house of Congress would not interfere with an agency's rulemaking power. Rather, the REINS Act itself (which would be adopted through the constitutional lawmaking procedures) would remove the rulemaking power altogether. Following enactment of the REINS Act, agencies would simply not have the power to adopt major rules.

Thus, the REINS Act would not violate *Chadha*. Indeed, if one imagined Congress creating a *new* agency and deciding whether to give it authority to adopt major rules, it would surely be obvious that Congress would have no obligation to do so. Congress could create an agency that would only have the authority to make recommendations, which Congress could choose to approve or not. Indeed, such agencies exist today.¹⁰⁸ Surely if Congress can create such an agency in the first place, it can revise the powers of an agency it has previously created, to make it such an agency. That is what the REINS Act would do. For this reason, the REINS Act scheme would not be the same as a legislative veto, and it would not violate the proscription of *Chadha*.¹⁰⁹

107. REINS Act, H.R. 10, 112th Cong. (proposing to amend 5 U.S.C. § 801(a)(3) so that “A major rule . . . shall take effect upon enactment of a joint resolution of approval . . .”).

108. *See, e.g.*, 5 U.S.C. §§ 591–596 (2006) (creating the Administrative Conference of the United States, which makes recommendations, including recommendations to Congress, but has no substantive powers); 42 U.S.C. §§ 1975–1975d (2006) (creating the Commission on Civil Rights, which makes “appraisals” of federal law and policy relating to discrimination, but has no substantive powers).

109. *See also* Adler, *supra* note 14, at 27 (arguing that the REINS Act would not violate the rule of *Chadha* because approval resolutions under the Act would be enacted via the constitutional lawmaking process of bicameralism and presentment).

2. *The REINS Act as Super-Statute*

Katzen adds an addendum to the argument against the REINS Act based on *Chadha*. She acknowledges the argument that the REINS Act does not provide for a one-house veto of final, effective regulations, but, rather, removes the underlying regulatory authority.¹¹⁰ She observes, however, that, under this characterization, the REINS Act would effectively amend hundreds, if not thousands, of previously enacted laws.¹¹¹

Certainly this is true. But so what? Yes, the REINS Act would, in effect, be a “super-statute” that would amend the organic legislation of nearly every agency in the whole federal government. But there is no constitutional bar against such government-wide statutes. What Congress can do for one agency, it can do for all agencies, and what Congress could do by amending many statutes seriatim, it can do in one, single, government-wide statute. Katzen’s subsidiary point is not an argument against the constitutionality of the REINS Act.¹¹²

The proof is that Congress passes government-wide statutes all the time. What, after all, is the APA but a single statute that, in effect, amends every agency’s organic legislation by imposing government-wide requirements? In particular, the APA tells nearly every agency how to promulgate rules,¹¹³ and so effectively amends the rulemaking power of nearly every agency.

Similarly, the National Environmental Policy Act requires every agency to consider the environmental impact of its actions.¹¹⁴ Failure to do so can vitiate an agency’s regulatory action, including its promulgated rules,¹¹⁵ so this statute also, in effect, amends the rulemaking power of every agency. The Regulatory Flexibility Act requires all agencies to consider the impact of their actions on small businesses,¹¹⁶ and, again, an agency’s failure to comply can under-

110. *REINS Act Hearing I*, *supra* note 10, at 95.

111. *Id.* at 95–96.

112. In fairness, it should be noted that Katzen does not explicitly suggest that this subsidiary point cuts against the constitutionality of the REINS Act. She discusses it as a matter of “truth in legislating.” *Id.* at 95.

113. 5 U.S.C. § 553 (2006).

114. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2006 & Supp. IV 2011)). The Act applies to all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C).

115. *E.g.*, *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37–38 (D.D.C. 2007).

116. 5 U.S.C §§ 601–612 (2006).

mine the validity of its rules.¹¹⁷ The Congressional Review Act requires all agencies to submit regulations to Congress and automatically delays the effective date of all major regulations to give Congress an opportunity to consider them.¹¹⁸ The Unfunded Mandates Act requires (albeit weakly) that all executive agencies consider alternatives to proposed rules and “select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.”¹¹⁹

As to any of these statutes, one might say that, in effect, the statute amended the organic statute of every agency that existed when it was passed (as well as impacting every agency’s organic statute passed subsequently). But no one suggests that these statutes are thereby invalid. There is simply no constitutional prohibition against statutes that simultaneously cover all the agencies of government.¹²⁰

In sum, the REINS Act would not violate the prohibition against the legislative veto, because, rather than permit a single house of Congress to change what an agency has done on a case-by-case basis, the REINS Act itself (which would be a duly enacted statute) would change the underlying authority of agencies to promulgate rules, so that major rules, as promulgated by agencies, would in fact be mere proposals to Congress. Congress could do this for any one agency, and it can do the same for all agencies at once.

B. *The REINS Act and General Separation of Powers*

In addition to making a specific claim that the REINS Act would violate the rule of *Chadha*, opponents of the Act also make the more general argument that the Act would offend the principle of separation of powers. The REINS Act, opponents claim, would aggrandize the powers of the legislative branch at the expense of the executive. Such aggrandizement, they argue, would be unconstitutional.

117. *E.g.*, U.S. Telecom Ass’n v. FCC, 400 F.3d 29, 42 (D.C. Cir. 2005).

118. 5 U.S.C. §§ 801–808 (2006).

119. 2 U.S.C. § 1535(a) (2006); *see also id.* §§ 658, 1502 (defining “agency” to exclude the independent regulatory agencies for purposes of this requirement). The requirement is weak because the statute allows an exception for cases in which the agency, in adopting a rule, explains why it did not select the least costly, most cost-effective, or least burdensome method. *Id.* § 1535(b).

120. The cited statutes primarily affect the *procedure* by which agencies promulgate rules (the Unfunded Mandates Act affects the substance of agency rules, although only weakly). The REINS Act would be more drastic in that it would essentially remove agency rulemaking power altogether. Still, the cited statutes address the argument that there is something wrong with government-wide statutes. They demonstrate that there is no prohibition on Congress’s passing a statute that affects all the agencies at once.

1. *The REINS Act and the Non-Aggrandizement Principle*

It is certainly true that the specific rule of *Chadha* is but a part of a larger constitutional principle against congressional self-aggrandizement. *Chadha* exemplifies this principle but does not exhaust it. Together with the related case of *Bowsher v. Synar*,¹²¹ *Chadha* stands for the principle that Congress cannot give itself (or a part of itself, or one of its own officers) powers that it would not have anyway by virtue of the Constitution.¹²² Congress can, and constantly does, vest the *executive* branch with extra powers not given in the Constitution,¹²³ but for Congress to give *itself* extra powers is forbidden.

Moreover, this non-aggrandizement principle is quite strict. Within separation of powers jurisprudence, it stands out as a bright-line rule amidst a host of mushy balancing tests.¹²⁴ In *Chadha* and *Bowsher* (unlike most separation of powers cases), the Supreme Court, having determined that Congress was attempting to give itself extra powers, did not consider whether countervailing factors could mitigate the harm to the constitutional values involved. If Congress is improperly aggrandizing its powers, it has crossed a bright constitutional line and cannot be rescued by countervailing considerations.¹²⁵

121. 478 U.S. 714, 732 (1986) (holding that Congress may not vest executive power in legislative branch officials).

122. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 715–17 (1997); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1467 (2000); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 441 (1998).

123. Examples are really too numerous to require citation, but see, e.g., *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971), discussing the Economic Stabilization Act of 1970, which authorized the President to “issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970”.

124. Most separation of powers tests are mushy. For example, when courts need to determine whether Congress has unconstitutionally restrained the power of the President to remove an executive branch official, they ask whether Congress has “impe[d] the President’s ability to perform his constitutional duty.” *Morrison v. Olson*, 487 U.S. 654, 691 (1988). This is a rather vague balancing test. See *id.* at 711–12 (Scalia, J., dissenting). Similarly, when the question is whether Congress has permissibly vested administrative agencies with the power to decide individual cases that might go to the Article III courts, the applicable test is explicitly a multi-factor balancing test that includes consideration of “the concerns that drove Congress to depart from the requirements of Article III.” *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

125. Even such minor violations of the principle as congressional appointment of non-voting members to executive branch commissions have been struck down as unconstitutional. *Fed. Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

The REINS Act, however, is safe from the charge of unconstitutional aggrandizement. The reason follows from the discussion in the previous section.¹²⁶ The error in the *Chadha* argument, writ large, is the error in this more general argument. Once again, the key is that, in determining whether Congress is “aggrandizing” its powers, one must begin by identifying the starting point—the constitutional baseline. The non-aggrandizement principle does not forbid every statute that increases the power of Congress and decreases the power of the executive. It forbids only statutes that increase the power of Congress beyond the constitutional baseline.

It happens all the time that Congress vests the President or some other executive officer with a power that Congress might have chosen to exercise itself. But having ceded the power, Congress can always reclaim it. As the D.C. Circuit remarked in a pre-*Chadha* case about the legislative veto, “[i]f Congress has given away too much power, it may by statute take it back.”¹²⁷ All Congress needs to do is repeal the statute ceding the power.

Such a repealing statute necessarily increases the power of Congress at the expense of the executive. No one, however, even imagines that the repealing statute is thereby unconstitutional. The statute is permitted as long as it only takes back what Congress was not required to cede in the first place.

That is precisely what the REINS Act would do. The constitutional baseline is that agencies have only such powers as Congress chooses to give them. An agency “literally has no power to act . . . unless and until Congress confers power upon it.”¹²⁸ Agency rulemaking powers, like other agency powers, “come solely from congressional authorizations,”¹²⁹ and “the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”¹³⁰ Thus, Congress is not obliged to give agencies rulemaking authority, and indeed, although it has granted

126. See *supra* Part II.A.

127. *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm’n*, 673 F.2d 425, 476–77 (D.C. Cir. 1982); see also Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 45 n.267 (1998); Adler, *supra* note 14, at 28.

128. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

129. *Consumer Energy Council*, 673 F.2d at 476.

130. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Or, as another case put it, “it is beyond cavil that ‘an agency’s power is no greater than that delegated by Congress.’” *Ry. Labor Execs.’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986)).

such authority to most agencies, it has withheld it from some.¹³¹ If Congress withdrew rulemaking power from an agency, it would only be taking back what it was not obliged to give in the first place.

Thus, although the REINS Act would undoubtedly increase the power of Congress and decrease that of the executive branch relative to where they stand now, the Act would not unconstitutionally *aggrandize* the power of Congress. The fatal defect in the statutes at issue in the non-aggrandizement cases was not merely that they increased the powers of Congress, but that they increased the powers of Congress beyond the baseline specified in the Constitution. Identifying the constitutional baseline is the critical step in determining whether Congress has violated the non-aggrandizement principle. If any statutory change reset the baseline, Congress could never repeal a statute that grants power to the executive—as it undoubtedly can.¹³² The REINS Act would merely reclaim power that Congress was not obliged to confer on agencies.¹³³

2. *The REINS Act and Inherent Rulemaking Power*

Before dispensing with this argument against the REINS Act, however, it is worth considering one additional point. As the previous section showed, in determining whether the REINS Act is constitutional, it is critical to know whether the powers it reclaims for Congress are powers that Congress chose gratuitously to delegate to the executive branch. If Congress chose to give the executive branch certain powers, it can always reclaim them, but the situation would be different if Congress had no choice in the matter.

Therefore, opponents of the REINS Act might strengthen their general separation of powers argument by looking more closely at the question of whether an executive agency's rulemaking authority really comes from Congress. Although agency powers are conventionally

131. The Equal Employment Opportunity Commission, for example, lacks authority to promulgate rules to enforce Title VII of the Civil Rights Act of 1964, and as a result, its interpretations of that statute are not entitled to *Chevron* deference. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (noting that the appropriate level of deference will depend on the underlying reasoning of the interpretation (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). *Chevron* deference means that a court will usually defer to an agency's reasonable construction of a statute that the agency administers. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

132. *Consumer Energy Council*, 673 F.2d at 476.

133. *See also* Adler, *supra* note 14, at 27–28 (arguing that the REINS Act would not violate the general separation of powers because it would not invade a “core” executive power).

understood to come only from congressional grant,¹³⁴ there is in fact some subtlety to the matter. Agency rulemaking powers, in particular, are sometimes said to be inherent in an agency's other authority.

Most agencies that issue rules do so pursuant to express rulemaking authority. Imagine, however, an agency that is statutorily authorized to apply some statutory standard to individual cases, but that lacks express rulemaking authority. Imagine further that the agency's statutory standard contains some ambiguity that the agency would like to resolve by rule. What is the agency to do?

In this situation, some courts have held that agencies have *inherent* authority to make rules. As the Seventh Circuit observed, "[w]here [an] agency must make a large number of individual discretionary decisions, it is entirely appropriate for it to issue regulations informing the public about the standards and procedures the agency intends to apply."¹³⁵ In other words, the agency is just giving advance notice of what it plans to do as cases arise. On this theory, "[a]ll agencies charged with enforcing and administering a statute have inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion."¹³⁶

These cases suggest that perhaps Congress's decision to give agencies rulemaking authority is not so discretionary after all. Perhaps, if Congress gives an agency authority to act on a case-by-case basis, it *must* also vest the agency with rulemaking power, because rulemaking authority is inherent in the power to act. Opponents of the REINS Act could therefore argue that the Act would not simply reclaim power that Congress could have chosen not to vest in the first place.

In fact, however, the cases about inherent rulemaking authority do not go nearly that far. First of all, the cases suggest only that agencies have inherent power to issue *interpretative* rules, not legislative rules.¹³⁷ Unlike legislative rules, interpretative rules are not binding on courts.¹³⁸ Where Congress has withheld express rulemaking authority from an agency, the agency's interpretations of a statute it administers will not even receive *Chevron* deference.¹³⁹ So Congress

134. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

135. *Indus. Holographics, Inc. v. Donovan*, 722 F.2d 1362, 1366 (7th Cir. 1983).

136. *Metro. Sch. Dist. of Wayne Twp. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) (internal quotation omitted); *see also* *Associated Dry Goods Corp. v. EEOC*, 720 F.2d 804, 810 (4th Cir. 1983) (agency "had inherent power to issue what are characterized as interpretative rules").

137. *Davila*, 969 F.2d at 490.

138. *Id.*

139. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991).

can certainly make the very important choice of whether to vest legislative rulemaking authority in an agency.

Moreover, the cases concerning inherent rulemaking authority deal only with the situation where Congress has been silent on the question of an agency's authority to promulgate rules. There is no reason to believe that the same result would apply in the face of an express congressional directive to an agency (or, as in the REINS Act, to all agencies) not to issue rules without congressional approval. Typically, when Congress chooses to restrict an agency's rulemaking authority, its restrictions are effective. For example, after the Federal Trade Commission asserted general rulemaking authority in the 1970s,¹⁴⁰ Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, which confirmed the agency's rulemaking authority but encumbered it with such burdensome procedural requirements that the agency hardly ever uses it.¹⁴¹ Yet no one suggests that the agency may, in the face of *express* congressional restrictions, act pursuant to an inherent rulemaking power. The REINS Act would impose express restrictions on all agencies, and the cases suggest that such restrictions would be effective.

Thus, the REINS Act remains secure against a general separation of powers argument. The cases that suggest that agencies have inherent rulemaking authority should be understood as limited to situations where Congress has remained silent on the issue. If Congress were to restrict agency rulemaking powers expressly, its restriction would be valid, because it would be taking from agencies a power that Congress did not have to give them.

3. *The Irony of the General Separation of Powers Argument*

The argument against the REINS Act based on general separation of powers principles is not only wrong, but truly ironic. If anything is constitutionally surprising, it is not that Congress would require its own approval for major rules, but that Congress can permit agencies

140. See *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973) (upholding the FTC's first assertion of a generalized rulemaking authority).

141. See Lydia B. Parnes & Carol J. Jennings, *Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989, 995–96 (1997). Particularly burdensome is the statutory requirement that the agency provide an opportunity for an informal hearing that must include “such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to” disputed issues of material fact. 15 U.S.C. § 57a(c)(2)(B) (2006). As a result, in almost all cases, the agency engages in rulemaking only when specially authorized by a statute that permits it to use ordinary, APA rulemaking procedures. Parnes & Jennings, *supra*, at 995–96.

to make major rules *without* its approval. The REINS Act would not only be perfectly constitutional, it would take our government much closer to its constitutional roots.

Hornbook separation of powers doctrine provides that Congress cannot delegate the legislative power.¹⁴² This view was strongly held at the time of the framing and had several sources. It was based partly on democratic theory, which holds that laws should be made by the people's democratically elected representatives, not by anyone else. Established authorities well known to the Framers, such as John Locke, noted that "[t]he power of the legislative . . . [is] only to make laws, and not to make *legislators*."¹⁴³ That is, the citizenry elects members of Congress who they believe will be good at making laws, not at picking other people to make laws.

The nondelegation principle also follows from the ordinary common law of agency. A standard maxim of agency law was *delegata potestas non potest delegari* ("a delegated power cannot be re-delegated").¹⁴⁴ That is, an ordinary agent of an ordinary principal was not authorized to subdelegate his powers. The constitutional nondelegation principle followed by applying this general rule to the special case of a legislature acting as agent for its principal, the public.¹⁴⁵

Finally, of course, the nondelegation principle also has a basis in the constitutional text. The Constitution vests "[a]ll legislative Powers" in the Congress.¹⁴⁶ It would textually appear, therefore, that no one else can exercise the legislative power.¹⁴⁷

Nonetheless, as every law student knows, delegation of legislative power to the executive—or, as it is often expressed, the vesting of "decisionmaking power" in the executive¹⁴⁸—is in fact permitted, provided that the executive's discretion is guided by an "intelligible

142. See, e.g., *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear.").

143. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 193 (Thomas I. Cook, ed., Hafner Publ'g Co. 1947) (1690) (emphasis added).

144. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405 (1928).

145. *Id.* at 405–06.

146. U.S. CONST. art I, § 1.

147. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citing Article I, § 1 and noting that "[t]his text permits no delegation of those powers").

148. E.g., *id.* The point is expressed this way in order to maintain the view that no delegation of legislative power is permitted, *id.*, although a more realistic way to express the same thing might be to say that some delegation of legislative power is permitted provided the delegation is sufficiently cabined, see also *id.* at 488 (Stevens, J., concurring).

principle” laid down in statutory text.¹⁴⁹ The statutory principle must be sufficiently clear that a reviewing court can tell whether the legislative will is being obeyed.¹⁵⁰ In such cases, the theory goes, Congress has fixed the primary standard, and the executive is merely “fill[ing] up the details” in exercising its delegated power.¹⁵¹

But, as every law student also learns, these supposed limitations on delegations of legislative power are little more than a legal joke. Having allegedly limited delegations to those that are guided by an “intelligible principle,” the courts have in fact approved delegations guided by principles that can only be called unintelligible. Courts have upheld statutes telling agencies to set rates that are “just and reasonable” or to grant licenses that serve the “public interest, convenience and necessity,” even though such empty standards are open to “any conceivable interpretation.”¹⁵² Congress also frequently gives agencies no more guidance than a list of competing, unranked social policy goals,¹⁵³ and sometimes even inherently inconsistent goals,¹⁵⁴ all of which are regularly upheld against nondelegation challenges. The courts have, in short, thrown up their hands and permitted the most substantial deviations from the constitutional ideal of nondelegation, as Congress has given the executive branch power to make enormously significant social policy decisions.¹⁵⁵

Thus, if anything is constitutionally surprising, it is the way things work now.¹⁵⁶ The courts maintain a nondelegation requirement in theory but routinely depart from it in practice. The REINS Act, far

149. *J.W. Hampton*, 276 U.S. at 409.

150. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

151. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932); *Wayman v. Southard*, 23 U.S. 1, 43 (1825).

152. Richard J. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 474 (1986).

153. *Id.* at 475 (citing the Emergency Petroleum Allocation Act of 1973, which listed nine unranked factors to be provided for by regulations issued under the Act).

154. *Id.* at 475–76 (citing the Occupational Safety and Health Act of 1970, which requires regulations regarding toxic hazards to be issued only when “reasonably necessary or appropriate to provide safe or healthful employment,” but also to “most adequately assure [], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health”).

155. Even Justice Scalia, one of the strongest believers that nondelegation doctrine is “a fundamental element of our constitutional system,” recognizes that “it is not an element readily enforceable by the courts.” *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

156. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (asserting that the administrative state is unconstitutional, partly because of the death of the nondelegation doctrine).

from being unconstitutional, would in fact bring us back to the constitutional ideal of having the legislature make the laws.¹⁵⁷

That is not to say that any substantial change in nondelegation doctrine is likely or desirable. As the previous discussion of the REINS Act's potential impact showed,¹⁵⁸ such a change would require a monumental restructuring of our government. Of the current Justices, only Justice Thomas has expressed any interest in a major retrenchment in this area.¹⁵⁹

However, it is to say that the constitutional argument against the REINS Act is deeply ironic. Those who argue that the Act would impermissibly aggrandize the powers of Congress overlook the absolutely vital fact that Congress has over time chosen to cede enormous powers to the executive. The REINS Act would not give Congress more power than it may constitutionally have, but would, rather, reclaim for Congress the power that it has allowed to slide away.

C. *Other Constitutional Arguments Against the REINS Act*

The preceding sections dispose of the two main arguments against the constitutionality of the REINS Act: the argument based on *Chadha* and the general separation of powers argument. A few, remaining arguments must still be addressed.

1. *The Analogy to Constraints on Individualized Decisions*

In arguing that the REINS Act might be unconstitutional, Katzen analogizes it to a statute that would require congressional approval for individualized executive decisions. "It is beyond dispute," she says, "that if Congress were to require that the initiation of any prosecution by a U.S. Attorney or the Department of Justice would have to be approved by Congress before a prosecution could begin, such an act would be inconsistent with the separation of powers."¹⁶⁰ She asks whether the same analysis would hold for the REINS Act.¹⁶¹

The answer is no. Accepting *arguendo* Katzen's assertion that Congress clearly may not interpose itself into the process for initiating

157. Of course, even the REINS Act would only apply to "major" rules, and would leave agencies free to promulgate rules other than major rules without Congress's approval. REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 801(a)(3), (4)). But it would still bring us far closer to the constitutional ideal of nondelegation than where we are now.

158. See *supra* Part I.A.4.

159. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring).

160. *REINS Act Hearing I*, *supra* note 10, at 96.

161. *Id.*

prosecutions, her analogy of such a requirement to the REINS Act is not well taken. The reason is that a decision to initiate a prosecution and a decision to issue a major rule fall within fundamentally different categories of administrative action. The former is individualized and adjudicatory, the latter is generalized and essentially legislative. The two categories are constitutionally distinct.¹⁶² Whatever impropriety there might be in Congress's inserting itself into individualized cases would not infect Congress's requiring its approval for the promulgation of general rules.

2. *The Status of Rules Under the REINS Act*

One might wonder about the status of an agency rule that has been expressly approved by Congress pursuant to the REINS Act. By approving a rule, does Congress *enact* the rule? If so, the rule would have the status of legislation. If not, the rule would remain a rule.

This distinction raises further questions. If, under the REINS Act, an approved major rule would still be a rule and not legislation, then the REINS Act provides that the last step in the creation of an agency rule will be an act of Congress. Is it permitted for an act of Congress to give birth to an agency rule? This question is distinct from the questions previously addressed. The previous sections of this article showed that Congress can *take away* the power of agencies to promulgate major rules. But having stripped agencies of that power, can Congress use its legislative power to give force to a proposed agency rule?

In addition, assuming approved major rules remain rules, their status would be somewhat curious. On the one hand, they would have been specifically approved by act of Congress. On the other hand, they could subsequently be changed by agencies without permission from Congress. Such a change could occur either (a) if an agency made a small change to the major rule, such that the change did not, by itself, constitute a "major rule" that would trigger the congressional approval requirement of the REINS Act, or (b) if Congress subsequently repealed the REINS Act, thereby restoring agencies' power to change things that have the status of rules, rather than the status of legislation.

In other words, the REINS Act would create the curious situation whereby something specifically approved by act of Congress might

162. The distinction is embodied in the familiar "*Londoner/Bi-Metallic*" dichotomy. See *Londoner v. Denver*, 210 U.S. 373, 386 (1908) (holding that the Due Process Clause requires minimal procedures in individualized cases); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that due process does not require individualized proceedings when "a rule of conduct applies to more than a few people").

later be changed by an executive agency. Is this constitutional? Opponents of the Act might argue that agencies cannot be allowed to change something that Congress has specifically approved.

This Subpart addresses these questions. It first addresses the status rules would have when approved by Congress pursuant to the REINS Act. Then it addresses the further questions raised above.

a. Rules are Rules

First, it appears that, under the REINS Act, a major rule, although approved by act of Congress, would still be a rule and would not have the status of legislation. The REINS Act does not specifically address this point, but in setting forth the form of the “joint resolution of approval” that would be required before any major rule could take effect, the Act provides that such a resolution shall state that “Congress *approves* the rule” proposed by the agency,¹⁶³ not that Congress *enacts* the rule. This language suggests that Congress would be approving the rule as a rule, not as legislation.

In addition, the REINS Act provides that Congress’s approval of a major rule would have no effect on judicial review of that rule—the rule would still be subject to review on all the grounds specified in Section 706 of the APA.¹⁶⁴ But if Congress *enacted* a rule as legislation, the rule would presumably not be subject to judicial review on claims such as that it was arbitrary or capricious or that the agency violated APA procedures in promulgating it, because legislation is subject to review only for constitutionality. Thus, the fact that, under the REINS Act, approved major rules would still be subject to all the usual claims for judicial review further suggests that the rules would still be rules, not legislation.

Certainly the REINS Act could have been written differently. It could have provided that Congress, using the expedited procedures set forth in the Act, would vote on whether to *enact* any major rule proposed by an agency. Such a provision would be similar to the “fast track” procedures by which Congress has enacted implementing legislation for trade agreements such as the North American Free Trade Agreement. Such agreements, and implementing bills for them, are proposed by the President, but take effect when Congress enacts an implementing bill pursuant to expedited legislative procedures that

163. REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 802(a)(1)(C)) (emphasis added).

164. *Id.* (proposing 5 U.S.C. § 805(c)).

prohibit amendments and guarantee an up-or-down vote.¹⁶⁵ Congress could, by similar procedures, vote on proposed major rules. Congress would not even have to set forth the text of an agency's rule verbatim in the approval resolution; if it just used the word "enacts" in place of "approves," it would enact the agency's rule via incorporation by reference.¹⁶⁶

So the REINS Act might have been written that way, and, indeed, it might cause less discomfort if it were written that way—it would bring its process within familiar, well-accepted, fast-track legislative forms. But it is not written that way. It provides that Congress will "approve," not "enact," major rules proposed by agencies. Hence, it appears that, under the REINS Act, a major rule, although approved by Congress, remains a rule and is not a statute.

b. Congress's Role in Creating Rules

If, as suggested in the previous section, major rules approved by Congress are still rules, not legislation, then the REINS Act would give rise to the unusual circumstance that the last step for creation of an agency rule would be an act of Congress. One might wonder whether Congress can have this degree of participation in the creation of an agency rule.

The answer is yes. Although Congress typically gives an agency generalized authority and leaves it to the agency to employ that authority in particular actions, Congress may also give its approval to a particular agency action. The validity of such approval is confirmed by a long-standing line of cases about congressional *ratification* of agency action. "It is well settled that Congress may, by enactment not otherwise inappropriate, ratify . . . acts which it might have authorized . . . and give the force of law to official action unauthorized when taken."¹⁶⁷ That is, if an agency takes a particular action in the mistaken belief that the action is within its existing authority, or where the agency's authority may exist but is doubtful, Congress can approve and give force to that specific action retrospectively.¹⁶⁸

165. See 19 U.S.C. §§ 2191–2193, 2902–2903 (2006); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1303 n.4 (11th Cir. 2001).

166. See Siegel, *supra* note 122, at 1493–94 (providing examples of Congress's enacting legislation via incorporation by reference).

167. *Swayne & Hoyt v. United States*, 300 U.S. 297, 301–302 (1937) (quoting *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878)).

168. *Id.*; see also *United States v. Alaska*, 521 U.S. 1, 43–45 (1997); *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907); *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878); *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1250 (10th Cir. 2004); *Schism v. United States*, 316 F.3d 1259, 1289–90 (Fed. Cir. 2002);

Congress has used this procedure in the rulemaking context. A recent example occurred in the adoption of the popular “do-not-call” regulation by the Federal Trade Commission.¹⁶⁹ When the FTC first promulgated this regulation, a district court held that the agency lacked statutory authority to do so.¹⁷⁰ Congress promptly passed a statute stating that the agency had such authority and ratifying the specific rule already promulgated by the agency.¹⁷¹ The court of appeals confirmed Congress’s power of ratification and said that by virtue of the ratification the agency’s statutory authority to make the rule had become “unmistakably clear.”¹⁷²

The procedure provided by the REINS Act is slightly different from this well-accepted congressional ratification procedure, but the differences only cut in favor of the REINS Act procedure. One difference is that the ratification procedure generally involves congressional ratification of an action taken by an agency that mistakenly believed it already had authority to take the action; under the REINS Act, by contrast, Congress would approve actions proposed by agencies that knew that their proposals were mere proposals, because they did not have authority to take the proposed action without congressional approval. But surely the propriety of the latter follows *a fortiori* from the propriety of the former. It could hardly make things *worse* that the agency, at the time it played its part in the procedure, had a correct understanding of its powers rather than an incorrect one. If Congress can retrospectively approve and give force to a specific action taken by an agency that mistakenly thought it had authority to take the action, Congress must be able to approve and give force to a specific action proposed by an agency that understands that it lacks authority.

The other distinction is that, in using the ratification procedure, Congress approves a specific agency action retrospectively, whereas, under the REINS Act, Congress would in most cases approve a specific agency rule only prospectively—the agency rule would take ef-

Thomas v. Network Solutions, Inc., 176 F.3d 500, 506 (D.C. Cir. 1999). In *Thomas*, the D.C. Circuit described a case in this line as “rarely cited but never overruled,” 176 F.3d at 506, which is not exactly a ringing endorsement, but it approved congressional ratification all the same, *id.* at 506–07, and the other cases cited did not question the “well settled” status of the doctrine.

169. 16 C.F.R. § 310.4(b)(1)(iii) (2012).

170. U.S. Sec. v. FTC, 282 F. Supp. 2d 1285, 1291 (W.D. Okla. 2003), *rev’d sub nom.* Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004).

171. Pub. L. No. 108-82, 117 Stat. 1006 (2003). Congress passed the statute within a week after the district court’s decision.

172. Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1250 (10th Cir. 2004).

fect only upon Congress's passage of an approval resolution.¹⁷³ Again, this difference can only make things better. Some of the ratification cases express concern that retrospective congressional ratification of an unauthorized agency action might be impermissible if it "interfere[d] with intervening rights."¹⁷⁴ Such a concern could not, however, arise under the REINS Act, because the agency action would not take effect prior to congressional authorization. Thus, once again, the propriety of the REINS Act procedure follows from the well-accepted ratification procedure.

The REINS Act would take the ratification procedure, which is now rarely used (but uncontroversial when used), and make it the general practice for major rules. Agencies would not have the power to promulgate major rules, but they could propose such rules for Congress to approve, and Congress's approval would give force to the agency's proposed rule. The ratification cases show that this is a role that Congress may play.

c. Agencies Changing What Congress Has Approved

As noted above, major rules approved by Congress under the REINS Act would have the peculiar feature that, although specifically approved by Congress, they could, in some circumstances, be changed by agencies without congressional approval. One might question the constitutionality of a system whereby the executive can, without congressional approval, change something that Congress has approved.

In fact, this feature of the REINS Act would not be a constitutional problem. Indeed, there would be no problem even if major rules approved by Congress were regarded as having the status of legislation. Congress can choose to give agencies the power to change, by rule, specified provisions of statutes. In such cases, Congress, in effect, creates the initial rule, but an agency is authorized to make changes from there.

Such statutory schemes are unusual, but exist today. The best example is the Controlled Substances Act.¹⁷⁵ Under that Act, Congress created an initial set of five schedules of controlled substances,¹⁷⁶ and

173. REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 801(a)(3)). As noted earlier, the REINS Act does permit the President to authorize an agency rule to go into effect for a limited period prior to congressional approval in exigent circumstances. *See supra* note 60.

174. *E.g.*, *United States v. Heinszen & Co.*, 206 U.S. 370, 384 (1907); *Thomas v. Network Solutions, Inc.*, 176 F.3d 500, 506 (D.C. Cir. 1999).

175. Controlled Substances Act, Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (1970).

176. 21 U.S.C. § 812(c) (2006).

it specified numerous civil and criminal requirements regarding such substances that vary according to which schedule a substance is on.¹⁷⁷ Congress also, however, authorized the Attorney General to change the schedules. The Attorney General may, by rule, add a substance to a schedule, transfer a substance between schedules, or remove a substance from the schedules altogether.¹⁷⁸ The Attorney General has exercised this power on innumerable occasions,¹⁷⁹ and the Supreme Court has unanimously affirmed it as constitutional,¹⁸⁰ even though its effect is to permit the Attorney General to change what Congress has enacted, and the result is that the real, operative schedules are not the statutory schedules but the schedules contained in the Attorney General's regulations.¹⁸¹

Accordingly, the fact that, under the REINS Act, major rules would be approved by Congress, yet changeable by agencies, is not a constitutional defect. Some rules have that status now. While that status is unusual under the current system, it is uncontroversially constitutional. In sum, therefore, although the REINS Act procedures would be different from what we are used to, their propriety follows from well-established, if now rarely used, procedures.

177. *E.g.*, 21 U.S.C. § 829 (2006) (specifying different rules for prescribing substances on the different schedules).

178. 21 U.S.C. § 811 (2006).

179. *E.g.*, 75 Fed. Reg. 79,296 (Dec. 20, 2010) (adding a substance to schedule I); 74 Fed. Reg. 51,234 (Oct. 6, 2009) (adding a substance to schedule IV); 64 Fed. Reg. 35,928 (1999) (transferring a substance from schedule II to schedule III). In practice, the Attorney General has delegated his authority to the Administrator of the Drug Enforcement Administration. 28 C.F.R. § 0.100(b).

180. *Touby v. United States*, 500 U.S. 160, 169 (1991). The Court addressed nondelegation challenges to the Attorney General's power, but did not face the specific point made here—that the Attorney General, by rule, is altering something Congress has enacted. This merely suggests, however, that the constitutionality of such a statutory scheme is not even controversial. *See also* *United States v. Alexander*, 673 F.2d 287, 289 (9th Cir. 1982) (delegation of authority to Attorney General to reclassify controlled substances is “clearly constitutional”).

181. Another example of the same kind of statutory scheme is the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 to 300aa-34 (2006). The Act authorizes payment of compensation by the United States for certain injuries caused by vaccines. *Id.* § 300aa-10(a). The statute provides a “Vaccine Injury Table,” which provides that if a claimant can show that the onset of specified injuries occurred within specified periods of administration of specified vaccines, then the claimant can recover compensation without having to prove that the vaccine caused the injuries (causation is presumed in cases covered by the table). *Id.* §§ 300aa-11(c)(1)(C)(i), 300aa-14. But although the statute itself contains the initial Vaccine Injury Table, the Secretary of Health and Human Services may change the table by rule. *Id.* § 300aa-14(c).

3. A State Analog

At least one court, it must be noted, has rejected arguments similar to those made in this article. In *State ex rel. Meadows v. Hechler*,¹⁸² the Supreme Court of Appeals of West Virginia considered and disapproved a state law similar to the REINS Act. At the time of the case, West Virginia law required state agencies to submit proposed rules for legislative approval and provided that if the legislature failed to act upon a proposed rule, state agencies could not implement it.¹⁸³ The state court unanimously held that this state law violated the state constitutional provisions requiring separation of powers.¹⁸⁴

The defendants made the argument put forward in this article, that under the state law “[t]he agency was never authorized to act, only to propose a rule,”¹⁸⁵ and therefore that the failure of the legislature to approve a proposed rule was not equivalent to a forbidden legislative veto.¹⁸⁶ The court, however, not only characterized this argument as “spurious,” but called it a “most extreme assertion of legislative authority.”¹⁸⁷ The court held that “[w]hen the Legislature delegates its rule-making power to an agency of the Executive Department . . . it vests the Executive Department with the mandatory duty to promulgate and to enforce rules and regulations,” and that “the rule-making function comes under the executive department’s bailiwick upon the delegation of the duty to propose rules for promulgation.”¹⁸⁸ The court was particularly concerned that, under the state scheme, legislation to approve a proposed rule could die in committee; it therefore analogized the case to a previous case in which it had held that the legislature could not authorize a legislative committee to veto rules.¹⁸⁹

In light of the *Hechler* case, one cannot completely exclude the possibility that judges would take an unfavorable view of the REINS Act. To try to distinguish the case, one might note that the REINS Act would not lead to the particular problem that most concerned the state court—namely, that a legislative committee might kill a proposed rule.¹⁹⁰ Under the special legislative procedures that the REINS Act

182. 462 S.E.2d 586 (W. Va. 1995). I am indebted to Ron Levin for calling this case to my attention.

183. *Id.* at 588–89.

184. *Id.* at 587, 588 n.10.

185. *Id.* at 590.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 591–92.

190. *Id.*

provides, approval resolutions cannot die in committee.¹⁹¹ But this distinction does not really work. If the failure of a legislative committee to permit progress on an approval resolution would constitute a legislative veto, so would the failure of a single house of the legislature to adopt the resolution. The rule of *Chadha* applies to actions by a single house of Congress.¹⁹² The arguments in this article suggest that the REINS Act would be equally constitutional even if it provided no special, expedited procedures for approval resolutions, but permitted them to languish in committee or be filibustered in the Senate just as much as other bills.

The real distinction of *Hechler*, therefore, must lie in the state court's suggestion that "the rule-making function comes under the executive department's bailiwick upon the delegation of the duty to propose rules for promulgation."¹⁹³ However valid this statement might be as a matter of state law, it is incorrect as applied to the federal system. In the federal system, as noted earlier, agencies have such powers as Congress confers upon them.¹⁹⁴ Some agencies have rulemaking authority and some lack it, as Congress has chosen. Moreover, even when an agency has rulemaking power, that power is "subject to limitations which [Congress] imposes."¹⁹⁵ There is, therefore, no reason why, if Congress instructs an agency to propose rules, it *must* empower that agency to adopt the rules proposed, as the state court suggested in *Hechler*. Rather, Congress may create, and indeed has created, agencies that are authorized to make proposals but not to adopt them.¹⁹⁶

Thus, under the REINS Act, Congress's failure to approve a regulation proposed by an agency would not be a legislative veto, as the court concluded in *Hechler*.¹⁹⁷ A legislative veto could occur only if the agency regulation was effective to begin with, but was rendered

191. In either house of Congress, a committee to which an approval resolution is referred would be automatically discharged if it does not report the resolution to its house within fifteen days. REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 802).

192. *INS v. Chadha*, 462 U.S. 919, 948–56 (1983). For this reason, it is curious that the state court placed so much weight on the possibility that a legislative committee might kill a proposed rule; the possibility that a single house of the legislature might kill a proposed rule should have been equally bad. Possibly the state court was influenced by its prior case specifically dealing with a legislative committee veto. *See Hechler*, 462 S.E.2d at 591–92.

193. *Hechler*, 462 S.E.2d at 590.

194. *See supra* notes 128–131 and accompanying text.

195. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

196. *See supra* note 108 and accompanying text.

197. *Hechler*, 462 S.E.2d at 593.

ineffective by a constitutionally insufficient action of the legislature. Under the REINS Act, the agency's rule would be only a proposal. The state court seemed to think that it is improper for a legislature to empower an agency only to make proposals, but even if that is true under state law, federal law permits Congress to withhold rulemaking power from agencies.

Even accepting that the REINS Act does not constitute a forbidden legislative veto, one must consider whether federal courts, like the West Virginia Supreme Court, might regard the Act as an "extreme assertion of legislative authority" that "excessively interfer[es] with the functions of the executive branch."¹⁹⁸ That is, even if the REINS Act satisfies the rule of *Chadha* and other particularized separation-of-powers rules, would federal courts nonetheless regard the REINS Act as simply going too far—asserting too much congressional control over the executive branch?

The answer, as discussed in Part II.B, must turn on the fundamental roles of Congress and the executive under the Constitution. Congress, under the federal Constitution, is the primary lawmaking body. Executive agencies have only such rulemaking powers as Congress chooses to give them. Because Congress was never obliged to give executive agencies rulemaking authority, the Act's removal of such authority cannot constitute a separation of powers problem. The REINS Act would be a very substantial departure from current arrangements, to be sure, but it would not represent an assertion of too much power by Congress. Rather, it would represent a decision by Congress to do its constitutionally assigned job. Congress would reclaim the task of making substantive policy choices, rather than farming out a substantial portion of that task to the executive, as is currently done.

D. *The Larger Lesson of the REINS Act Controversy*

For the reasons discussed above, the REINS Act would survive all constitutional challenges. The larger lesson of the controversy over the constitutionality of the REINS Act is that it is a mistake to confuse the *familiar* with the constitutionally *required*. The great strength of the Constitution is that, while it sets forth a basic framework of government, it leaves enormous room for experimentation.

Sometimes, legislative policy choices remain in place for so long that one can almost forget that they are not in the Constitution itself. But the power to change them remains intact, however much it might

198. *Id.* at 590, 592 (internal quotations omitted).

be forgotten, and in fact Congress has tried numerous experiments only after decades or centuries of doing things a different way. Systematic federal wealth redistribution programs, for example, did not exist prior to the twentieth century.¹⁹⁹ The prior, longstanding practice of keeping the federal government out of such matters led some to think federal involvement would be unconstitutional,²⁰⁰ but the twentieth century experiment of Social Security and other redistributive programs was upheld.²⁰¹ Similarly, many industries, such as insurance, were, by a tradition that lasted for more than a century, regulated only at the state level, but when Congress chose to regulate them, its constitutional power was sufficient.²⁰² Congress also sometimes chooses to reshuffle longstanding structural arrangements. For example, for over a century the Supreme Court's power to review judgments of state courts on questions of federal law existed only where the state court had *denied* a claim of federal right; Supreme Court jurisdiction to review cases in which a state court had *upheld* a claim of federal right was not conferred until 1914.²⁰³ But Congress was free to make that innovation.²⁰⁴

Long usage has accustomed us to Congress's vesting broad discretion in executive agencies. In many cases, Congress has done little more than identify a problem and ask an agency to solve it, vesting the agency with broad power to adopt rules as necessary. The practice has continued for decades—for so long, indeed, that the opponents of the REINS Act have, in effect, read the practice into the Constitution itself. But it is still a practice, not a constitutional requirement. Indeed, as noted earlier, if anything might be unconstitutional, it would be the current practice, not the departure from it.²⁰⁵ In any event, neither the familiarity of the practice of allowing agencies to make major rules without congressional involvement, nor its longstanding use, turn it into a constitutional requirement.

199. Minor Myers III, *A Redistributive Role for Local Government*, 36 *URB. LAW.* 753, 776 (2004).

200. *Id.* (noting that President Pierce thought the Constitution did not authorize the federal government to act for public charity).

201. *Helvering v. Davis*, 301 U.S. 619, 640–45 (1937); *see also* *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (establishing that the spending power is a distinct power that is not limited to the purpose of supporting the other enumerated powers).

202. *Polish Nat'l Alliance of the U.S. v. NLRB*, 322 U.S. 643, 649–50 (1944) (considering the exercise of federal power with respect to insurance for the first time, and upholding it).

203. *See* *Illinois v. Gates*, 462 U.S. 213, 221 (1983).

204. *Coleman v. Miller*, 307 U.S. 433, 442–44 (1939).

205. *See supra* Part II.B.3.

To regard the Constitution as freezing in place the current system of delegation of rulemaking power to agencies would be a grave error. It would be an error on the order of the error in *Lochner v. New York*,²⁰⁶ in which the Supreme Court effectively held that the Constitution froze in place certain principles of the common law. Indeed, it would be an even greater error, because the common law principles at stake in *Lochner*, in addition to being established for a long time, at least originated outside of and antedated Congress. The delegation of rulemaking power to executive agencies, although longstanding, is of congressional origin. It would be a truly strange Constitution that permitted the legislature to pass a statute but not to repeal it.

III.

THE REINS ACT FROM A POLICY PERSPECTIVE

Needless to say, not every constitutional statute is a good idea. The preceding Part suggested that the REINS Act would be perfectly constitutional. That leaves open, however, the question of how the Act would fare under policy analysis.

The REINS Act is a bad idea. The Act would offer one big, theoretical and doctrinal advantage: it would restore the constitutional notion that Congress makes the laws. It would require Congress to take responsibility for national policy. But the Act would be wholly impractical. There are good reasons why Congress creates administrative agencies in the first place. These same reasons show why Congress should not wish to deprive agencies of rulemaking authority.

A. *The Advantage of the REINS Act*

The chief advantage of the REINS Act is implicit in the previous discussion of the Act's likely impact and its relationship to nondelegation doctrine.²⁰⁷ The Act would reconnect Congress with social policy. It would prevent elected representatives from avoiding responsibility for the rules that actually apply to people's lives.

As noted above, current law leaves enormously important social policy decisions in the hands of unelected administrators. The public's ability to control such administrators through the democratic process is limited. It is not zero: many of the administrators serve at the pleasure of the President, and the public can change these administrators

206. 198 U.S. 45, 53 (1905) (referring to the "general right to make a contract"); *see also* *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 93 (Marshall, J. dissenting) (warning against "a return to the era of *Lochner* . . . , when common-law rights were . . . found immune from revision by State or Federal Government").

207. *See supra* Parts I.A.4, II.B.3.

by changing the President.²⁰⁸ But other administrators are insulated from full presidential control,²⁰⁹ and, in any event, the vesting of decisions in unelected administrators creates a layer of insulation between directly elected representatives and the creation of social policy.

As also discussed earlier, this layer of insulation permits elected representatives to avoid responsibility for unpopular governmental measures. Members of Congress can claim credit for voting for clean air, safe workplaces, and other popular goals, while blaming agencies for burdensome measures imposed in service of those goals.²¹⁰ The REINS Act would compel members of Congress to take responsibility for the burdens of government. Doing so would make legislators more accountable by giving voters a clearer picture of what their representatives stand for.

Thus, the REINS Act would have undeniable advantages. It would bring us much closer to the constitutional ideal of a legislature that makes the laws. That ideal would promote accountability and create a closer connection between democracy and social policy.

B. *The Impracticality of the REINS Act*

Notwithstanding its advantages, however, the REINS Act would in all likelihood be hopelessly impractical. To see this, one need only recall the reasons why Congress creates administrative agencies and vests them with rulemaking authority in the first place: Congress lacks the time and expertise to make every decision itself,²¹¹ and it also, with regard to some decisions, desires to strengthen the weight given to technocratic considerations and to reduce the effect of politics. These same impulses suggest that Congress should not desire to reclaim its rulemaking authority from administrative agencies—at least not on a wholesale basis.

208. All the Cabinet Secretaries, for example, serve at the pleasure of the President and can be routinely changed by a new President. Akhil Reed Amar, *The President, the Cabinet, and Independent Agencies*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 36, 43–45 (2010–2011).

209. The heads of the independent agencies are, by definition, those whom the President cannot remove at will. *See, e.g., Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–32 (1935) (holding that Congress may limit the power of the President to remove a Federal Trade Commissioner).

210. Pierce & Shapiro, *supra* note 83, at 1197–98.

211. *See, e.g.,* Lisa Shultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612 (2010) (“Congress lacked the kind of technical competence to solve the problems for which independent agencies were created.”); Pierce & Shapiro, *supra* note 83, at 1198 (noting lack of congressional time to legislate on each question as it arises).

1. *Lack of Time*

The most basic problem with the REINS Act would be the immense strain it would place on congressional resources. It seems unlikely that Congress would have anything like sufficient time to consider and vote on all major rules issued by federal agencies.

Simple numbers prove the point. According to Senator Paul, the REINS Act's chief proponent in the Senate, during the 111th Congress, federal agencies adopted 126 rules that would have required congressional approval had the Act been in effect.²¹² In that same Congress, the Senate met for a total of 349 days, and the House of Representatives for 286.²¹³ That means that the Senate would on average have had to vote on a major rule once every 2.8 session days, and the House once every 2.3 session days—a breakneck pace in either chamber. Allowing for work done when Congress is not in session moderates the figures slightly, but each house of Congress would still, on average, have had to vote on a major rule once every 5.8 calendar days, which is more than once a week. Other sources report even more major rules issued during the 111th Congress, which would have required Congress to vote on them even more frequently.²¹⁴ It seems highly unlikely that Congress could do a responsible job of processing major rules so quickly. Major rules, by definition, would be important matters, and important bills normally take months or years of processing in Congress.²¹⁵

It is true that, under the REINS Act, resolutions to approve major rules would have procedural advantages over ordinary bills. The months or years preceding passage of an ordinary bill involve a great deal of time devoted to holding hearings and other committee pro-

212. *Senate Hearing Part I, supra* note 28, at 5 (statement of Sen. Rand Paul).

213. See Final Resume of Congressional Activity, 156 CONG. REC. D294 (daily ed. Mar. 19, 2010); Final Resume of Congressional Activity, 157 CONG. REC. D290 (daily ed. Mar. 29, 2011).

214. As noted in the text, the figure of 126 major rules promulgated during the 111th Congress is taken from the REINS Act's chief Senate sponsor. The website of the Government Accountability Office (to which all rules must be reported, by virtue of the Congressional Review Act) states that federal agencies reported 184 major rules during the 111th Congress. See *GAO Federal Rules Database Search*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/congressact/fedrule.html> (search by "Date Received by GAO" for major rules between January 2009 and December 2010). If that is the correct figure, then the Senate would have had to vote on major rules every 1.9 session days, the House every 1.6 session days (i.e., more frequently than once every other session day), and both chambers every 4.0 calendar days.

215. WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 15–16, 33 (7th ed. 1989) (noting that the process of passing a major bill often requires more than one legislative session and that "it is never easy to get fast results in the legislature").

ceedings, perfecting statutory text, waiting for available floor time, and overcoming filibusters in the Senate. The “fast track” procedures of the REINS Act would cut through some of this processing. Also, the rule involved would have been fully crafted by an expert agency, and Congress would be called upon only to vote it up or down, not to negotiate anything different.²¹⁶ Floor time would be guaranteed, as would a vote after a fixed, short amount of debate.²¹⁷

Still, it seems extremely unlikely that Congress would have time to responsibly vote on so many important bills. Indeed, in 1977, when Congress was considering a proposal to extend the one-house legislative veto (which had not yet been declared unconstitutional) to all rules issued by notice-and-comment rulemaking, the Administrative Conference of the United States recommended against adopting the proposal partly on the ground that the necessary work would take up too much of Congress’s time.²¹⁸ Significantly, the proposal would only have given either house the *option* of considering a legislative veto of a promulgated rule; Congress would have had no obligation to act and could have let rules take effect simply by ignoring them.²¹⁹ Nonetheless, the Administrative Conference was of the view that “[l]egislative review of substantive rules would increase the workload of Congress substantially. Review of complex, technical rules would be difficult, time consuming, and often impracticable.”²²⁰ If that was true of the proposed optional veto, it would be even more true of a scheme that would require affirmative congressional action on every major rule adopted by every federal agency.²²¹

Nor would it help matters that the REINS Act would give Congress a short, fixed time period—seventy days—to complete its work on any major rule.²²² Under the Act, Congress could not delay approving a rule that required extra consideration because of its importance or complexity. If several important rules happened to come out at

216. REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 802(a), (d)(2), (e)(2)).

217. *Id.* (proposing 5 U.S.C. § 802(d), (e)).

218. ADMIN. CONFERENCE OF THE UNITED STATES, RECOMMENDATION 77-1, LEGISLATIVE VETO OF ADMINISTRATIVE REGULATIONS, 4 ACUS 63, 64 (1977).

219. *Id.*

220. *Id.*; see also Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1380 (1977) (noting the potential for “an alarming increase in the volume of Congress’ business”).

221. See Breyer, *supra* note 22, at 789 (requiring congressional approval for each rule would “often hamstring governmental decisionmaking”).

222. H.R. 10 (proposing 5 U.S.C. § 801(b)(2)). Because the days involved are “session” or “legislative” days, *id.*, Congress would have more than seventy calendar days, but still only a relatively short, fixed time.

once, they would vie for Congress's attention. Failure to adopt a joint resolution approving any major rule within the seventy-day period would kill the rule and forbid its reconsideration during the same Congress.²²³ This short time limit makes it even more likely that Congress would lack sufficient time to do a responsible job of considering all major rules.

Senator Paul responds to the time argument by observing that Congress wastes considerable time on trivia. He notes that the 111th Congress managed to name seventy post offices and to consider perhaps as many as 700 bills of a ceremonial nature that either commended, congratulated, or honored something.²²⁴ He suggests, therefore, that Congress could find sufficient time to fulfill its responsibilities under the REINS Act by "simply . . . shift[ing] its attention from passing symbolic legislation and . . . focus[ing] on taking responsibility for regulations that bind and protect Americans."²²⁵ But Senator Paul's logic is highly questionable. The time saved by eliminating a ceremonial bill would not be equal to the time needed to do a responsible job of considering an important substantive bill. The Senate may need hardly any time to declare a day to be "National Chess Day,"²²⁶ but only because no one really cares enough to oppose such fluff. It would require the elimination of many such ceremonial bills to save enough time to responsibly consider even one major bill. Abandoning the practice of considering ceremonial bills might well be a good idea, but at a ratio of only about six to one, even elimination of all 770 ceremonial bills cited by Senator Paul would not be likely to save nearly enough time to consider bills to approve 126 major rules.

One might perhaps argue that the strain that the REINS Act would impose on congressional time is a feature of the Act rather than a bug. Justice Scalia has observed that limited legislative time is an important constraint on democratic government.²²⁷ He has argued that legislators have violated this constraint by passing statutes that require more decisions than they have time to review responsibly and farming

223. *Id.* (proposing 5 U.S.C. § 801(a)(5), (b)(2)).

224. *Senate Hearing Part I, supra* note 28, at 5 (statement of Sen. Rand Paul). Actually, Senator Paul counted the number of bills containing the words "congratulates," "commends," and "honoring" separately, *id.*, so the figure of 700 may overstate matters by double- or triple-counting bills containing more than one of those words.

225. *Id.*

226. *See* S. Res. 255, 112th Cong. (2011); 157 CONG. REC. S5269 (daily ed. Aug. 2, 2011) (showing resolution approved without floor debate).

227. Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG., Nov.–Dec. 1979, at 19, 25–26.

out the necessary work to unelected administrators.²²⁸ On this view, if the REINS Act limited rules to those that Congress has the time to review responsibly, the limitation would be a good thing, not a bad thing.

That is not, however, what the REINS Act would actually do. If Congress feels that it has created more government than it can responsibly handle, it should cut back on the amount of substantive business that federal agencies actually do. The REINS Act, however, would not relieve any federal agencies of any of their responsibilities or change any of their mandates. It would keep all the work going and throw on Congress the additional responsibility of approving or disapproving of it. Thus, Congress would be squarely faced with the problem of insufficient time to vote responsibly on the large number of major rules it would have to consider.

2. *Expertise*

The REINS Act would also implicate another concern related to the reason for vesting decisions in administrative agencies in the first place: expertise. The Act would not merely require Congress to take more votes than it would likely have time to consider responsibly. Many of these votes would also likely concern matters outside the expertise of most members of Congress,²²⁹ which would make their rapid consideration even more difficult.

Administrative agencies have expertise in their subject matter areas, which allows them to consider complex, technical issues. Congress is a generalist body that considers legislation on every subject.²³⁰ Congress must inevitably be at a disadvantage when it comes to considering the particulars of a complex and technical rule. Do members of Congress really know whether the permitted level of SO₂ in the atmosphere should be 50, 75, or 100 parts per billion?²³¹ Presumably most do not. And even if some members of Congress have technical expertise in some area or areas, no member could possibly be expert on all the many, diverse matters that the agencies collectively consider.

228. *Id.* at 26.

229. *See, e.g.*, Bressman & Thompson, *supra* note 211, at 612; Pierce, *supra* note 83, at 1198.

230. Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 34 (2008) (“[O]f course, the members of Congress are generalists who are usually not steeped in any of the fields that they regulate.”).

231. *See supra* text accompanying note 34–38.

Members of Congress can, of course, rely on staff for expertise—as they must in conducting oversight of agencies. Still, the entire staff of Congress is smaller than that of just one of the larger agencies.²³² It would be a daunting challenge for this staff to match the expertise of all the agencies combined.

3. *Politicization*

Finally, another standard reason for the creation of administrative agencies is to make some effort to soften the influence of politics on social policy decisions and to increase the influence of technocratic considerations.²³³ The REINS Act would put the decisions back in the nation's most political forum.

To be sure, this point must be considered cautiously. The day is long gone when the conventional wisdom was that Congress should simply delegate social policy to “the experts,” who would reach the technocratically correct decision on each policy matter, free from the baneful influence of politics.²³⁴ Today, scholars recognize the existence of political influence on agency decisions, consider some degree of political input to be good, and note that a focus on purely technocratic decisions can lead to harmful “tunnel vision.”²³⁵ Still, the point remains that having Congress vote on an issue is likely to maximize the influence of partisan politics on the decision, whereas giving the decision to an administrative agency, while by no means insulating it from political influence, will at least have the tendency to strengthen

232. Total employment in the entire legislative branch in 2010 was 30,643. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 327 tbl. 499 (2012). In the same year, employment at the Department of State was 39,016; at the Department of Health and Human Services, 69,839; at the Department of Agriculture, 106,867; at the Department of the Treasury, 110,099; and at the Department of Justice, 117,916. *Id.*

233. See, e.g., Lisa Shultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 471–72 (2003); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 835–36 (2003).

234. See, e.g., Bressman, *supra* note 233, at 472–76; Lars Noah, *Scientific “Republicanism”: Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033, 1038–39 (2000) (describing this mode of thinking as popular in the New Deal era); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 33–34 (2009) (describing the expertise model as “outmoded”).

235. Bressman, *supra* note 233, at 472–76, 505–06; see also *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981) (“[W]e do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”).

the influence of technocratic considerations.²³⁶ The REINS Act would expose all major rules to the full force of the political process.

4. *Other Difficulties*

a. *Statutorily Mandated Rules*

Numerous statutes require agencies to adopt rules, in many cases by a specified date.²³⁷ The REINS Act makes no exception for such rules,²³⁸ so if a statutorily mandated rule qualified as a “major” rule under the Act, that rule would require congressional approval following promulgation by an agency. What would happen if Congress said that an agency *must* make a rule on a certain topic, perhaps by a specified date, but then refused to approve the rule that the agency made? There would appear to be no solution for such cases. The problem would not be new, since agencies frequently miss statutory deadlines now and there is little the courts can do about it,²³⁹ but there would be even less a court could do to command an agency to make a statutorily mandated rule by the specified date if the problem were that the agency had made the rule but Congress refused to approve it.

b. *Gaming the Definition of “Major”*

The REINS Act’s requirement of congressional approval would apply only to “major” rules,²⁴⁰ so there would be considerable pressure for agencies to implement their programs by means other than major rules. Agencies would have a strong incentive to fudge the characterization of their rules to attempt to classify them as nonmajor wherever possible. One might also expect agencies to break what would be a major rule into multiple pieces and to promulgate the

236. *E.g.*, Rodríguez, *supra* note 73, at 1808 (“[I]t is not necessary to portray the bureaucracy in the New Deal spirit famously articulated by James Landis—as made up of disinterested technocrats applying scientific expertise to regulatory problems—to establish that, relative to Congress and the president, the bureaucracy is less responsive to political pressure and more likely to incorporate technocratic modes of thought into its decisionmaking.”). The need to justify actions for purposes of judicial review also “prioritizes expertise and technocratic decisionmaking within the agency, in the process downplaying more raw political considerations.” Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 30 J. NAT’L ASS’N ADMIN. L. JUDICIARY 421, 436 (2010).

237. Jacob E. Gersen & Anne Joseph O’Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 941–42, 984 tbl. 5 (2008).

238. *See* REINS Act, H.R. 10, 112th Cong. (proposing to amend 5 U.S.C. § 801(b)(1) to apply to any “major rule”); *id.* (proposing to amend 5 U.S.C. § 807 to provide certain exceptions, but none based on statutory deadlines for rulemaking).

239. 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 1080 (5th ed. 2010).

240. H.R. 10 (proposing 5 U.S.C. § 801(a)(3), (b)(1)).

pieces separately, if by doing so the pieces would not qualify as major rules. Such pointless maneuvering would waste government resources that might be put to better use.

c. Avoiding Rulemaking

Many agencies have the authority and discretion to make policy either by rule or through the process of case-by-case adjudication.²⁴¹ Rulemaking is generally considered the preferred process for policy formulation.²⁴² However, if rulemaking becomes impossible because of the constraints of the REINS Act, agencies may be compelled to use adjudication instead. In this regard, the REINS Act would represent the ultimate culmination of the “ossification” process, whereby rulemaking procedures have become more burdensome and costly over time, leading agencies to formulate policy by adjudication instead.²⁴³

d. Effect on Judicial Review

One might expect the REINS Act to have another potential benefit: it could greatly simplify judicial review of agency rulemaking. Currently, after an agency promulgates a rule, private parties can seek judicial review of whether the agency used proper rulemaking procedures and whether the rule conforms to the applicable governing statute.²⁴⁴ Judicial review extends the rulemaking process beyond the already burdensome process that occurs at the agency level. It requires agencies to expend resources defending rules in court and may result in judicial reversal of the agency’s efforts.²⁴⁵

This level of judicial scrutiny, however, does not apply to acts of Congress. Courts do not review the procedure whereby Congress enacted a statute,²⁴⁶ and there is no need for a court to determine

241. 1 PIERCE, *supra* note 239, at 495, 502.

242. Among other advantages, rulemaking allows greater public participation in the process of policy formulation, provides the agency with a broader array of factual evidence on which to base its policy, and provides the public with better notice of rules of conduct. *Id.* at 495–501; *see also* Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672, 681–93 (D.C. Cir. 1973); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 904–05 (2004); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755 (1996).

243. 2 PIERCE, *supra* note 239, at 678–80.

244. 5 U.S.C. § 706 (2006).

245. 1 PIERCE, *supra* note 239, at 680.

246. Indeed, the “enrolled bill rule” forbids courts from looking behind the face of a congressional enactment to determine whether Congress properly followed the constitutional lawmaking procedures. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

whether a statute conforms to some other, governing statute. Courts review statutes only for constitutionality.

One might hope, therefore, that if Congress gave its express approval to an agency regulation, courts would no longer need to inquire into the procedure by which the regulation was promulgated or determine whether the regulation conformed to the agency's governing statute. Congress's express approval of the regulation would ratify the regulation notwithstanding any such alleged procedural or substantive difficulties, excepting only constitutional defects, which congressional approval cannot cure. If this were true, then in exchange for the considerable costs, discussed above, that the REINS Act would entail, we would at least get the benefit that judicial review of major rules for anything other than constitutional challenges could be omitted, with a resultant decrease in cost and increase in certainty.

In fact, however, the REINS Act, as adopted by the House of Representatives, expressly disclaims this potential benefit. The proposed Act provides that Congress's approval of an agency regulation would have no impact on judicial review.²⁴⁷ It would not ratify an agency rule for which statutory authority was otherwise lacking.²⁴⁸ It would not "extinguish or affect any claim, whether substantive or procedural, against any alleged defect in a rule."²⁴⁹ Judicial review would proceed as though Congress's approval resolution did not exist—the resolution would not even be part of the record of the judicial review proceeding.²⁵⁰ In other words, the REINS Act would impose the immense cost of congressional review on the rulemaking process, while not reducing the cost of judicial review at all.

Unlike the other defects in the REINS Act, this one could be easily fixed. If Congress does pass the REINS Act, it should provide that an agency rule that has been approved by act of Congress should be as impregnable from judicial challenge as any statute. Agencies would still be required to use the APA's rulemaking procedures, but if Congress has expressly approved a specific rule, courts should not need to review the procedures by which the agency promulgated the rule or inquire into whether the rule conforms to a general statute. Congressionally approved rules should be subject only to constitutional challenge.

247. REINS Act, H.R. 10, 112th Cong. (proposing 5 U.S.C. § 805(c)).

248. *Id.*

249. *Id.*

250. *Id.*

C. *A Possible Reconciliation, Denied*

One might, perhaps, address most of the problems with the REINS Act discussed above by imagining that Congress would take an “appellate” view of major rules that come before it for approval. Under this view, Congress would give deference to agency recommendations. It would approve any rule that came before it unless it regarded the rule as failing the functional equivalent of the “clearly erroneous” or “arbitrary or capricious” tests. Congress could approve most rules routinely, reserving its disapproval for rules that were wholly unacceptable. Great congressional deference in approving rules could even justify maintaining the existing level of judicial scrutiny.

However, while Congress might choose to review agency rules deferentially, it would certainly be under no compulsion to do so, and given the state of partisanship in Congress, it seems likely that approval of major rules would be highly contentious. Recent history shows that partisanship can obstruct the passage of even the most basic matters. In the recent debates over increasing the national debt ceiling, for example, numerous members of Congress voted against authorizing the Treasury to borrow the necessary sums to spend the money that Congress had already budgeted.²⁵¹ The necessary authority was granted only at the last possible moment and after enormous contentiousness.²⁵² If Congress is not prepared to give routine approval for the executive to borrow necessary funds so that it can spend the money that Congress itself has already appropriated, it hardly seems likely that Congress would routinely give deference to major rules created by executive agencies, and if it does not, it would face the problems of lack of time and expertise and the other problems discussed above.

D. *Likelihood of Passage*

The saving grace of the otherwise objectionable REINS Act is that the Act is not likely to pass. A simple political analysis shows why.

251. See Michael Cooper & Louise Story, *As 11th Hour Nears, a Look at the Debt Ceiling*, N.Y. TIMES, July 28, 2011, at A14.

252. Carl Hulse, *House Passes Deal to Raise Debt Cap and Defuse Crisis*, N.Y. TIMES, Aug. 2, 2011, at A1. For another example of severe congressional contentiousness, see Binyamin Applebaum, *Former Ohio Attorney General to Head New Consumer Agency*, N.Y. TIMES, July 18, 2011, at B1 (noting that forty-four Senate Republicans signed a letter stating that they would refuse to confirm *any* nominee to head a new federal agency that Congress itself had recently created).

It is obvious why the REINS Act has not become law yet. Democrats oppose it. The Act passed the House on an almost straight party-line vote.²⁵³ The Act could never have emerged from the Senate, which the Democrats control.

Even more important, however, is that the Act would attract an almost certain presidential veto, regardless of who controlled the White House. Even if Republicans were to capture the White House, the House of Representatives, and the Senate simultaneously, what President would ever agree to the REINS Act? The Act would, at one stroke, greatly diminish the power of every executive agency. A President, regardless of party, would want the rules promulgated by his agencies to be effective. Every President knows that it is easier to accomplish tasks that do not require congressional approval. It therefore seems extremely unlikely that any President, regardless of party, would favor requiring congressional approval for every major rule promulgated by every federal agency. Thus, the only likely way that this monumental rebalancing of the powers of the branches could occur would be for Congress to pass the REINS Act over the President's veto, which would be very difficult to achieve.

The only other plausible scenario by which the REINS Act could become law would be a highly cynical scenario: in a lame-duck session, following an election but preceding the transition to a President (and perhaps a Congress) of a different party, Congress and the President could collude to impose the strictures of the REINS Act on the *next* President. The Act could even contain a sunset provision that would make it last for four years only. The cynicism of passing the Act in such circumstances would, however, be so evident that one can only hope a popular outcry would prevent it.

In sum, the REINS Act is a bad idea. If Congress wants to rein in agency rulemaking, it should do so on a more targeted basis, not wholesale. If there is really an excess of burdensome regulations being issued by federal agencies, Congress should identify bad regulations and repeal them. If particular agency powers are consistently yielding bad regulations, Congress could repeal those powers, or subject them, on a targeted basis, to an approval requirement like that of the REINS Act. But to impose such an approval requirement for all major regulation would be hopelessly impractical.

253. 159 CONG. REC. H8237 (daily ed. Dec. 7, 2011); *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 Jan. 9, 2013) (237 Republicans and 4 Democrats voted in favor of the bill; 184 Democrats and no Republicans against).

The yearning for a time when Congress made all major policy decisions is understandable, but unrealistic. It is also, as Jerry Mashaw's recent study of nineteenth century administrative law has shown, inaccurate. Congress's vesting of broad discretion in the executive to carry out national programs with only general guidance is not, as the conventional view would have it, a twentieth century development, but has existed since the founding of the Republic.²⁵⁴ Certainly, in light of the tremendous expansion of federal governmental activity, it is impractical to expect Congress, in the twenty-first century, to assume a role in micromanaging regulation that it did not play even in the nineteenth.

CONCLUSION

Congress has ceded enormous powers to the executive, and it is only natural for Congress to seek an effective method of controlling those powers. Congress can always repeal a particular agency rule by legislation, but, as the experience of the Congressional Review Act shows, such a strategy is likely to have little impact. It is hardly surprising that Congress wants a stronger control mechanism.

Although the REINS Act is a bad idea, it would be perfectly constitutional. The Act's detractors have erred in charging that it would violate the separation of powers. Their error lies in their failure to consider the constitutional baseline. The Act would change the powers of Congress relative to what they are now, but it would not aggrandize the powers of Congress. It would merely reclaim powers that Congress has ceded over time. If anything, the Act would bring us closer to the constitutional ideal of a legislature that makes the laws.

254. See Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 976 (2010).

