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Placing 'REINS' on Regulations: Assessing the Proposed REINS Act

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PLACING “REINS” ON REGULATIONS: ASSESSING THE PROPOSED REINS ACT

Jonathan H. Adler*

Over the past several decades, the scope, reach and cost of federal regulations have increased dramatically, prompting bipartisan calls for regulatory reform. One such proposed reform is the Regulations From the Executive in Need of Scrutiny Act (REINS Act). This proposal aims to restore political accountability to federal regulatory policy decisions by requiring both houses of Congress to approve any proposed “major rule.” In effect, the REINS Act would limit the delegation of regulatory authority to federal agencies, and restore legislative control and accountability to Congress. This article seeks to assess the REINS Act and its likely effects on regulatory policy. It explains why constitutional objections to the proposal are unfounded and many policy objections overstate the REINS Act’s likely impact on the growth of federal regulation. The REINS Act is not likely to be the deregulatory blunderbuss feared by its opponents and longed for by some of its proponents. The REINS Act should be seen more as a measure to enhance accountability than to combat regulatory activity.

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INTRODUCTION

Over the past several decades, the scope, reach, and cost of federal regulations have increased dramatically as federal agencies have developed rules and policies to address an expanding array of public policy concerns.¹ From air pollution and health insurance to wireless communications and consumer finance, a proliferating number of federal agencies are responsible for developing regulations to address an ever-growing number of policy problems.² This increase in regulatory activity has been facilitated by the wholesale delegation of quasi-legislative regulatory authority to federal administrative agencies. While expedient, and perhaps necessary,³ the widespread practice of delegation has diminished political accountability for regulatory decisions.

As the federal regulatory state has grown, congressional accountability for regulatory policy choices has declined. One reason for this decline in accountability is a deterioration of legislative control. There are too many agencies doing too many things for any member of Congress to stay abreast of all but the most important or controversial regulatory initiatives.⁴ Even if congressional committees keep tabs on agency activities, the average member of Congress does not, to say nothing of his or her constituents.⁵ As now-Justice Elena Kagan ob-

1. It is fair to say that federal regulations touch nearly every aspect of a person's life. *See, e.g.*, KENNETH J. MEIER, *POLITICS AND BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT* 2 (3d ed. 1992) (detailing how federal regulations affect individual citizens' daily routines, from what they eat, to what they drive, to what they hear on the radio, and more).

2. Among the new administrative agencies created since 2010 are the Independent Payment Advisory Board and the Consumer Financial Protection Bureau. According to the Congressional Research Service, the Patient Protection and Affordable Care Act alone "creates, requires others to create, or authorizes dozens of new entities to implement the legislation." CURTIS W. COPELAND, *CONG. RESEARCH SERV.*, R41315, *NEW ENTITIES CREATED PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 1* (2010).

3. The basic case for delegation of regulatory authority was provided by James Landis. *See generally* JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). For the case against delegation, see generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

4. The *Unified Agenda of Federal Regulatory and Deregulatory Actions*, published twice a year by the Office of Information and Regulatory Affairs, routinely lists over 4,000 regulatory initiatives in various stages of development at any given time. *See, e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, *REGULATORY PLAN AND THE UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS*, available at <http://www.reginfo.gov/public/do/eAgendaMain> (last visited Jan. 18, 2012).

5. *See, e.g.*, J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *TEX. L. REV.* 1443, 1444 (2003) (noting that congressional oversight does not necessarily represent or advance the position of congressional majorities due to the delegation of such authority to oversight committees and

served after serving in the White House counsel’s office, Congress’s “capacity to control agency discretion is restricted.”⁶

Administrative agencies are empowered—and in some cases required—to implement policies that would not be approved by Congress, at least not in the same form.⁷ Long after authorizing legislation is adopted, agencies continue to adopt regulations and implement policies without meaningful congressional input. Increasing efforts to insulate executive branch actions from legislative control have magnified this trend.⁸ At the same time, presidential administrations of both parties have used administrative regulations to implement policies and programs that fail to obtain legislative support.⁹

The simultaneous increase in regulatory activity and decline in political accountability has produced renewed calls for regulatory reform from figures within both major political parties. In recent years, the House of Representatives has debated and passed several regulatory reform measures endorsed by the Republican leadership, including bills that would mandate greater use of cost-benefit analysis and revise large portions of the Administrative Procedure Act.¹⁰ Demo-

the disproportionate influence of individual members of Congress who may not be representative of their caucus).

6. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001) (“[B]ecause Congress’s most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted.”).

7. Under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2011), for example, agencies will be required to adopt regulations for many years to come, even though it is quite clear the statutory provisions mandating such regulatory measures could not pass Congress again in the foreseeable future. Concern for this phenomenon is one motivation for the adoption of sunset provisions. See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 27–28 (1990).

8. See generally Kagan, *supra* note 6.

9. See, e.g., John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 212–16 (2001) (explaining how the Clinton Administration pursued administrative reforms due to congressional deadlock on the Administration’s reform proposals); Bruce Barcott, *Changing All the Rules*, N.Y. TIMES MAGAZINE, Apr. 4, 2004, at 38, 40 (describing the Bush Administration’s realization that the Clear Skies Initiative lacked congressional approval, and their subsequent decision to bring about environmental change administratively through the new-source review regulations); *Clear Skies*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/clearskies/> (last visited Sept. 20, 2012); see also Wendy Koch, *Obama Could Cut Emissions Without Congress, Group Says*, USA TODAY (Dec. 4, 2012, 5:37 PM), <http://www.usatoday.com/story/news/nation/2012/12/04/obama-carbon-power-plant-emissions-congress/1745881/> (discussing potential initiatives the Obama Administration could take to address greenhouse gas emissions without the passage of additional legislation).

10. E.g., Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. This bill passed the House on Dec. 2, 2011 with unanimous Republican support (albeit with seven abstentions), and nineteen Democrats voting aye (and six abstaining).

cratic Senator Mark Warner has proposed limiting the ability of agencies to adopt new rules without eliminating old ones,¹¹ and President Obama issued an executive order requiring agencies to evaluate the success of past regulations and revise or eliminate those that are too costly or ineffective.¹² This reform effort was designed, among other things, to seek public input to improve regulatory measures and “change the regulatory culture of Washington.”¹³

One regulatory reform proposal that has received substantial attention is the Regulations From the Executive in Need of Scrutiny Act (REINS Act).¹⁴ The Act would attempt to reassert legislative control over regulatory policy decisions by requiring both Houses of Congress to approve any proposed “major rule.”¹⁵ In effect, the REINS Act would limit the delegation of regulatory authority to federal agencies and restore legislative control and accountability to Congress. This legislation has attracted significant political support, albeit primarily from one side of the aisle. In December 2011 the U.S. House of Representatives passed a version of the REINS Act,¹⁶ and a similar proposal was endorsed by Republican presidential nominee Mitt Romney.¹⁷

11. Mark R. Warner, Op-Ed., *Red-tape Relief for a Sluggish Recovery*, WASH. POST, Dec. 13, 2010, at A19.

12. See Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); see also Kori Schulman, *A 21st Century Regulatory System*, THE WHITE HOUSE BLOG (May 26, 2011, 8:00 AM), <http://www.whitehouse.gov/blog/2011/05/26/21st-century-regulatory-system> (describing Obama’s call for comprehensive review of existing regulations); *2012 Democratic National Platform: Moving America Forward*, DEMOCRATS.ORG, <http://www.democrats.org/democratic-national-platform> (last visited Nov. 6, 2012) (same).

13. Cass Sunstein, *21st-Century Regulation: An Update on the President’s Reforms*, WALL ST. J., May 26, 2011, at A17.

14. Regulations From the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. (as passed by House, Dec. 7, 2011). Similar legislation was introduced in 1995 as the Congressional Responsibility Act of 1995, H.R. 2727, 104th Cong.

15. A major rule is defined as any rule that the Office of Information and Regulatory Affairs concludes is likely to have an annual effect on the economy of \$100 million or more or otherwise have significant effect on consumer prices or the economy. See H.R. 10, 112th Cong. § 3 (to amend 5 U.S.C. § 804(2)).

16. See Felicia Sonmez, *REINS Bill to Expand Congressional Power over Executive Regulations Passed by House*, WASH. POST: 2CHAMBERS BLOG (Dec. 7, 2011), http://www.washingtonpost.com/blogs/2chambers/post/reins-bill-to-expand-congressional-power-over-executive-regulations-passed-by-house/2011/12/07/gIQAs6VMdO_blog.html.

17. See Mitt Romney, *Believe in America: Mitt Romney’s Plan for Jobs and Economic Growth*, ROMNEY FOR PRESIDENT, INC. (July 1, 2012), <http://www.mittromney.com/sites/default/files/shared/BelieveInAmerica-PlanForJobsAndEconomicGrowth-Full.pdf> (“Mitt Romney supports implementation of a law, similar to the REINS Act now before Congress, that would require all ‘major’ rules (i.e., those with an economic impact greater than \$100 million) to be approved by both houses of Congress before taking effect. If Congress declines to enact such a law, a President Romney

REINS Act supporters hail the legislation as a needed check on federal regulatory agencies. Opponents rail against it as a potentially unconstitutional attack on federal regulations that could undermine health, safety, and environmental protections.¹⁸ Some business- and market-oriented groups, such as the U.S. Chamber of Commerce¹⁹ and the Competitive Enterprise Institute,²⁰ believe the Act will constrain the growth of intrusive federal regulation. The Natural Resources Defense Council, on the other hand, calls the REINS Act a “radical” and “perilous” proposal that would hamstring needed regulatory initiatives.²¹ According to the NRDC’s David Goldston, “it is hard to imagine a more far-reaching, fundamental and damaging shift in the way the government goes about its business of safeguarding the public.”²²

The REINS Act’s most ardent proponents and most strident critics both assume that the Act would stem the flow of federal regulation from the nation’s capital, but is this so? A more measured look at the REINS Act suggests that it could enhance regulatory accountability and popular input on major regulatory proposals, but may not do all that much to slow the proliferation of federal rules, particularly those that command popular support. Whether or not the REINS Act would prove much of an obstacle to additional regulatory initiatives or reforms, in all likelihood it would help stem the continuing accretion of executive authority over domestic affairs.

This article seeks to assess the REINS Act and its likely effects on regulatory policy were it to be enacted. Part I provides a brief over-

will issue an executive order instructing all agencies that they must invite Congress to vote up-or-down on their major regulations and forbidding them from putting those regulations into effect without congressional approval.”)

18. See, e.g., Noah M. Sachs, *When It REINS, It Pours*, THE NEW REPUBLIC (Feb. 10, 2011, 12:00 AM), <http://www.tnr.com/article/politics/83195/reins-act-congress-veto-gop>.

19. Press Release, U.S. Chamber of Commerce, U.S. Chamber Applauds House Passage of REINS Act (Dec. 7, 2011), available at <http://www.uschamber.com/press/releases/2011/december/us-chamber-applauds-house-passage-reins-act>.

20. See Nicole Ciandella, *House Expected to Vote Tomorrow on REINS Act*, COMPETITIVE ENTER. INST. (Dec. 6, 2011), <http://cei.org/news-releases/house-expected-vote-tomorrow-reins-act>; Wayne Crews, *It’s Time to Regulate the State*, FORBES (Nov. 2, 2010, 4:00 PM), <http://www.forbes.com/2010/11/02/regulation-congress-reins-act-opinions-columnists-wayne-crews.html>.

21. David Goldston, *The REINS Act: Why Congress Should Hold Its Horses*, SWITCHBOARD: NATURAL RES. DEF. COUNCIL STAFF BLOG (July 1, 2012), http://switchboard.nrdc.org/blogs/dgoldston/the_reins_act_why_congress_sho.html.

22. *Regulations From the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 124 (2011) [hereinafter *REINS Act Hearing II*] (testimony of David Goldston, Director of Government Affairs, Natural Resources Defense Council).

view of how the delegation of regulatory authority has facilitated the growth of federal regulation and the decline in congressional accountability for regulatory decisions. Part II places the REINS Act in the context of prior efforts to control regulatory delegation, most notably the Congressional Review Act, upon which the REINS Act would build. Part III provides an overview of the REINS Act and describes, in some detail, how the law would (and would not) operate. Part IV addresses concerns that have been raised about the REINS Act's constitutionality. Part V addresses policy concerns, and explains why the REINS Act is not likely to be the deregulatory blunderbuss feared by its opponents and longed for by some of its proponents. The article then concludes with some closing thoughts about why the REINS Act should be seen more as a measure to enhance accountability than to combat regulatory activity.

I.

REGULATION AND DELEGATION

Federal regulatory activity has increased dramatically over the past half-century. One need only look at the six-fold increase in the annual number of pages in the *Federal Register* from the 1950s to the 2000s for evidence of this increase.²³ The number of new final rules each year has declined from its 1970s peaks, but federal regulations are still adopted at a rapid pace.²⁴ Federal agencies finalized over 3,500 regulations per year in 2009, 2010, and 2011.²⁵ Recent rules cover everything from greenhouse gas emissions,²⁶ to conflict mineral disclosures,²⁷ to electronic fund transfers,²⁸ and the energy and water

23. See CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE (2012), available at http://cei.org/sites/default/files/Wayne%20Crews%20-%2010,000%20Commandments%202012_0.pdf. In the 1950s, federal agencies published an average of fewer than eleven thousand pages per year. *Id.* at 17. During the 2000s, federal agencies have averaged over seventy thousand per year. *Id.* at 16. In 2011, the *Federal Register* contained over eighty-one thousand pages, over one-quarter of which were devoted to final agency regulations. *Id.* at 2. While *Federal Register* pages are an imperfect proxy for the number of regulations issued or regulatory burdens imposed, the dramatic increase from the 1950s to 2000s illustrates the increase in federal regulatory activity over this period.

24. *Id.* at 45.

25. *Id.* at 17.

26. Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22,392 (proposed Apr. 13, 2012) (to be codified at 40 C.F.R. pt. 60).

27. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249(b)).

use of home appliances.²⁹ Substantially more regulation is on the way. The Fall 2011 *Unified Agenda of Federal Regulatory and Deregulatory Actions* lists over 4,000 additional regulations in various stages of the regulatory pipeline.³⁰ By some estimates, the Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) alone will require over three hundred federal rulemakings.³¹ The Patient Protection and Affordable Care Act will require dozens more.³²

The growth of federal regulatory activity has been “a bipartisan enterprise” and Republican presidents have presided over some of the greatest regulatory surges.³³ Federal regulations have been adopted to address a wide array of public policy problems and have also imposed significant costs on American business and consumers. According to one frequently cited (but disputed) estimate, the aggregate costs of federal regulations could exceed \$1.5 trillion per year³⁴—substantially

28. Health Care Electronic Funds Transfers (EFT) and Remittance Advice, 45 C.F.R. § 162.1601–1603 (2012).

29. Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Required Under the Energy Policy and Conservation Act (“Appliance Labeling Rule”), 16 C.F.R. pt. 305 (2012).

30. *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, OFFICE OF INFO. & REGULATORY AFFAIRS, <http://www.reginfo.gov/public/do/eAgendaMain> (last visited Jan. 25, 2013). Note that the federal government did not release any *Unified Agenda* for 2012 until a single report for the year was released in December. See Tim Devaney, *OMB Report: ‘No Regulatory Tsunami on Way’*, WASH. TIMES, Dec. 27, 2012, at A4.

31. See *Too Big Not to Fail*, THE ECONOMIST, Feb. 18, 2012, at 23 (reporting Dodd-Frank contains four hundred rule-making requirements, of which only ninety-three had been completed); see also CURTIS W. COPELAND, CONG. RESEARCH SERV., R41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010), available at <http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf>. The Copeland report identified three hundred thirty provisions in Dodd-Frank requiring or authorizing rulemakings by federal agencies and concluded that the ultimate number of rulemakings that will result from the statute is “unknowable.” *Id.* at 4.

32. CURTIS W. COPELAND, CONG. RESEARCH SERV., R41180, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (2010) (“it seems likely that there will be a great deal of regulatory activity relating to the many provisions in PPACA for years, or even decades to come.”), available at <http://www.ncsl.org/documents/health/Regulations.pdf>.

33. Christopher DeMuth, *The Regulatory State*, NAT’L AFF., Summer 2012, at 70, 70; see also *Over-regulated America*, THE ECONOMIST, Feb. 18, 2012, at 9, 9 (“Governments of both parties keep adding stacks of rules, few of which are ever rescinded.”). The first President Bush, for example, earned the moniker “the regulatory president” due to the dramatic increase in federal regulations during his single term. Jonathan Rauch, *The Regulatory President*, 23 NAT’L J. 2902 (1991).

34. See NICOLE V. CRAIN & W. MARK CRAIN, U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010), available at <http://archive.sba.gov/advo/research/rs371tot.pdf> (estimating regulatory costs of \$1.75 trillion). This study has been challenged for over-estimating the costs of federal

more than the total amount collected from individual income taxes annually.³⁵ Just like taxes, regulations may be necessary to address public ills or to provide important public benefits, and many regulations may provide benefits greater than their costs, but this does not make the costs irrelevant.³⁶ At the same time, regulations often produce unintended consequences, the costs (or benefits) of which are not accounted for at the time the rules are adopted.³⁷ The fact that regulations can both impose substantial costs and generate substantial benefits makes it that much more important that there be political accountability for federal regulatory decisions.

A. Delegation

The practice of delegating substantial amounts of regulatory authority and policy discretion to federal regulatory agencies has facilitated the dramatic increase in the scope of federal regulation.³⁸ Under

regulation and failing to account for regulatory benefits. See Lisa Heinzerling & Frank Ackerman, *The \$1.75 Trillion Lie*, 1 MICH. J. ENVTL. & ADMIN. L. 127 (2012); John Irons & Andrew Green, *Flaws Call for Rejecting Crain and Crain Model*, ISSUE BRIEF (Econ. Policy Inst., Washington, D.C.), July 19, 2011, at 1–9, available at http://www.epi.org/publication/flaws_call_for_rejecting_crain_and_crain_model/; see also SIDNEY SHAPIRO, RUTH RUTTENBERG & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (2011), available at http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf.

35. CREWS, *supra* note 23, at 10–11.

36. See OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, 2011 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES (2011), available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf; see also RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008) (arguing cost-benefit analysis may justify more stringent regulation).

37. For example, regulations requiring the widespread use of oxygenates in gasoline encouraged the use of a particular additive, methyl tertiary butyl ether (MTBE), which caused widespread groundwater contamination throughout the country. See Arnold W. Reitze, Jr., *Biofuels—Snake Oil for the Twenty-First Century*, 87 OR. L. REV. 1183, 1190–95 (2008); Douglas A. Henderson & Mary K. McLemore, *MTBE: A Tale of Air, Water, and Civil Procedure*, NAT. RES. & ENV'T, Spring 2005, at 20, 20–21. On the other side of the ledger, regulations limiting automobile carbon monoxide emissions appear to have reduced the number of suicides due to asphyxiation. See M. Shelef, *Unanticipated Benefits of Automotive Emission Control: Reduction in Fatalities by Motor Vehicle Exhaust Gas*, 146/147 SCI. TOTAL ENV'T 93, 93–94 (1994).

38. For histories of the growth of the regulatory state tailing the increase in delegation, particularly in the 1960s and 1970s, see MARC ALLEN EISNER, JEFF WORSHAM & EVAN J. RINGQUIST, *CONTEMPORARY REGULATORY POLICY* 35–44 (1999); CORNELIUS M. KERWIN, *RULEMAKING* 8–20 (3d ed. 2003); WILLIAM F. WEST, *ADMINISTRATIVE RULEMAKING* 16–31 (1985).

existing doctrine, Congress has virtually unlimited discretion to delegate policymaking authority to federal agencies, and uses this authority regularly.³⁹ Through such delegation, Congress evades accountability by shifting responsibility for the resulting policies to administrative agencies, undermining political control of regulatory policy.

Agency power to regulate private activity can only come from Congress. Federal regulatory agencies have no inherent powers of their own. Article I, section 1 of the Constitution vests all legislative power in the Congress.⁴⁰ Federal agencies only have the power to adopt rules governing private conduct if such power has been delegated to them through a valid statutory enactment.⁴¹ As the Supreme Court has explained, "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."⁴²

Over the course of the twentieth century, Congress delegated ever-greater regulatory authority to more and more federal agencies. Congress has often had good reasons for this escalation of delegation.⁴³ The economic, environmental and other problems Congress sought to address were complicated and often necessitated careful study and analysis. Delegation of regulatory authority to agencies with greater technical expertise and staff resources is a way to ensure that federal regulations are adopted to address the nuances and particulars

39. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. (forthcoming 2013) (unpublished manuscript at 1) (on file with the N.Y.U. Journal of Legislation and Public Policy) ("At least since the New Deal, this delegation of discretionary regulatory power, exercised in an open-ended fashion, has been the archetypal form of delegation. It is not the mere power to 'fill up the details' that Congress left unspecified in a policy that is otherwise clearly established. It is the power to make the policy that Congress self-consciously chose not to make.").

40. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

41. See *Am. Library Ass'n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) ("The FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power upon it.'" (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986))).

42. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); see also *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

43. See, e.g., DAVID H. ROSENBLUM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION* 133–34 (2000) ("Congress can delegate its legislative authority to the agencies at its discretion for a wide variety of reasons: to alleviate its workload; to avoid a particularly nettlesome political issue; to focus highly specialized administrative expertise on a particular problem; for convenience; or simply because the agencies do not face the constraints of a legislature that is reconstituted every two years.").

of specific problems.⁴⁴ At the same time, developing and issuing legislative-like rules is easier within a hierarchical regulatory agency than within a legislative body with hundreds of voting members.⁴⁵

Under the “nondelegation doctrine,” Congress is precluded from delegating legislative power to administrative agencies.⁴⁶ In principle, this doctrine ensures that Congress remains responsible for the major policy judgments that drive regulatory decisions.⁴⁷ In practice, however, delegation enables Congress to pass the buck to the executive branch.⁴⁸ Under existing precedent, the nondelegation doctrine does not impose significant constraints on the delegation of rulemaking power. Congress need only provide federal agencies with an “intelligible principle” to guide regulatory initiatives.⁴⁹ It does not take much to satisfy this standard; virtually any broad statement of policy will do.⁵⁰ The Supreme Court has found an “intelligible principle” in statutes authorizing federal agencies to set “generally fair and equitable” prices⁵¹ and to regulate in the “public interest.”⁵² As Justice Antonin Scalia summarized, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”⁵³

Delegation may be expedient, or even necessary, but it also has costs. When Congress delegates broad regulatory authority to executive or independent agencies, it inevitably loses some degree of con-

44. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (noting that “in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives”).

45. See DeMuth, *supra* note 33, at 72 (“A hierarchy can make decisions with much greater dispatch than a committee can.”).

46. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

47. See *Loving v. United States*, 517 U.S. 748, 757 (1996) (“[T]he delegation doctrine [was] developed to prevent Congress from forsaking its duties.”); see also *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (noting that the doctrine ensures “that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will”).

48. Kagan, *supra* note 6, at 2347 (“Congress rarely is held accountable for agency decisions . . .”).

49. *Whitman*, 531 U.S. at 472; see also *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (delegation is permissible provided that “Congress . . . lay down by legislative act an intelligible principle” to guide the agency).

50. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004) (noting that Congress only may not grant “something approaching blank-check legislative rulemaking authority”).

51. *Yakus v. United States*, 321 U.S. 414, 420, 426 (1944).

52. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943).

53. *Whitman*, 531 U.S. at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

trol over how that authority is exercised. The resulting loss of political accountability for regulatory decisions has allowed regulatory agencies to adopt policies at odds with congressional intent or contemporary priorities. This is particularly so when Congress delegates broad authority to pursue generic—almost platitudinous goals—such as advancing the public welfare or protecting public health.⁵⁴ For instance, if Congress instructs a federal agency to adopt measures that will address a given environmental problem as far as is practicable, the federal agency retains substantial discretion to determine what sorts of measures should be adopted and at what cost. And should the agency veer off course and adopt a measure of which Congress disapproves, it is not so easy to put the genie back in the bottle.⁵⁵

Federal agencies are left with tremendous amounts of discretion in how they exercise their regulatory power. For example, the newly created Consumer Financial Protection Bureau is instructed to “ensure that ‘all consumers have access to markets for consumer financial products and services . . . [that] are fair, transparent, and competitive.’”⁵⁶ A statute’s “intelligible principle” need not even dictate a policy direction. Under existing doctrine agencies are free to reverse course and overturn prior policies without any meaningful input from Congress.⁵⁷ As a consequence, legislators may take credit for enacting high-minded legislation while simultaneously decrying the faults of agency implementation.⁵⁸ Ambiguous delegations both enhance

54. See, e.g., *id.* at 465–67.

55. See, e.g., Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 437 (1989) (“[E]ven with perfect monitoring of agency noncompliance, no legislative remedy is available to the original coalition that will restore its original agreement.”).

56. Establishment of the Consumer Advisory Board and Solicitation of Nominations for Membership, 77 Fed. Reg. 10,725, 10,726 (proposed Feb. 23, 2012) (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021(a), 124 Stat. 1376, 1980 (to be codified at 12 U.S.C. § 5511(a))).

57. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (“The Court of Appeals for the District of Columbia Circuit has similarly indicated that a court’s standard of review is ‘heightened somewhat’ when an agency reverses course. . . . We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard.”).

58. See FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* 37 (1997); see also David Schoenbrod, *How REINS Would Improve Environmental Protection*, 21 DUKE ENVTL. L. & POL’Y F. 347, 349 (2011).

agency authority and enable Congress to escape political accountability for difficult policy choices.⁵⁹

Judicial review helps ensure that agencies play by the rules set out by Congress—that agencies provide adequate notice and opportunity for public participation,⁶⁰ provide sufficient explanations for the rules they adopt,⁶¹ and observe the limits of their regulatory jurisdiction.⁶² Yet judicial review is not a substitute for political oversight of regulatory agencies, as courts do not (or at least should not) delve into the policy choices agencies make.⁶³ Progressive Era reformers may have believed that regulatory administration could be an expertise-driven, value-neutral enterprise.⁶⁴ Today we are more skeptical.⁶⁵ Rulemaking may indeed involve some scientific or technical expertise, but it also involves normative policy judgments. Whether a given agency is following the best policy course and properly resolving inevitable trade-offs between competing goals is ultimately a normative policy decision that should be reserved for the political branches.⁶⁶ If

59. See, e.g., Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2155 (2002) (noting that “ambiguity allows Congress to evade accountability”); see also Mathew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006) (discussing various explanations for the enactment of ambiguous authorizing statutes).

60. E.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 745 (D.C. Cir. 1991) (finding inadequate notice and opportunity for comment on EPA’s “mixture” and “derived-from” rules).

61. E.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983) (finding NHTSA’s rescission of airbag standard arbitrary and capricious).

62. E.g., *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 458–59 (D.C. Cir. 2005) (holding that FTC exceeded its statutory authority by regulating attorneys as “financial institutions”).

63. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (noting that “a court is not to substitute its judgment for that of an agency” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

64. See, e.g., EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 98–109 (1973).

65. See, e.g., Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995) (explaining how “agencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions”); see also ROGER A. PIELKE, JR., *THE HONEST BROKER: MAKING SENSE OF SCIENCE IN POLICY AND POLITICS* (2007) (discussing how normative policy questions are often presented as value-neutral scientific questions).

66. See, e.g., *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985) (“[I]t is appropriate that our standard of review of the substance of agency decisions be as limited as the APA provides. We do not reverse simply because there are uncertainties, analytic imperfections, or even mistakes in the pieces of the picture petitions have chosen to bring to our attention, . . . but only when there is such an absence of overall rational support as to warrant the description ‘arbitrary or capricious.’”).

delegation is to be restrained and accountability restored, this must be accomplished by Congress, not the courts.

B. *Old Statutes, New Regulations*

The difficulty of ensuring that agencies remain politically accountable for their policy choices is magnified by time. Agencies today continue to exercise authority granted decades ago under statutes drafted to address different policy concerns.⁶⁷ The Federal Communications Commission (FCC), for example, is still implementing authority to regulate in pursuit of “the public interest” under the Communications Act of 1934.⁶⁸ Yet the communications technologies and associated industries regulated by the FCC today are a far cry from those that existed before World War II. The 1934 Act was not Congress’s last word on communications regulation, but even the Telecommunications Act of 1996 is “woefully outdated.”⁶⁹

In an effort to keep pace with technological change, the FCC has strained to find regulatory authority in the relevant statutes for new regulatory initiatives. The 1996 Act embodies a “stovepipe” regulatory framework that, among other things, relies upon regulating telecommunications apart from information services.⁷⁰ Yet this distinction is increasingly artificial and obsolete.⁷¹ The FCC is faced with the choice of plowing ahead with new regulatory initiatives that lack firm statutory grounding, or risking obsolescence. In recent years the FCC has adopted the former strategy, promulgating rules that seek to establish Internet “neutrality” without clear textual warrant.⁷² Whether or not such an approach makes sense from a policy standpoint, it has never been authorized, let alone endorsed, by Congress.

The FCC is not alone in this sort of endeavor. The Environmental Protection Agency (EPA) is in the midst of implementing a series of regulations governing the emission of greenhouse gases from mobile

67. See Schoenbrod, *supra* note 58, at 347 (noting “the statutes that empower the agencies are increasingly obsolete”).

68. 47 U.S.C. § 303(y)(2)(A) (2006).

69. See Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 103 (2006).

70. *Id.* at 104.

71. See *id.* As May notes, “However serviceable these definitional constructs may have been at an earlier time, . . . they are no longer serviceable in a world in which digital technology is rapidly displacing analog.” *Id.* at 106–07.

72. See, e.g., Preserving the Open Internet, 76 Fed. Reg. 59,192 (Sept. 23, 2011); see also Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) (vacating and remanding prior FCC order for exceeding agency’s statutory authority).

and stationary sources.⁷³ These regulations are intended to address the threat of global climate change and will have a tremendous effect on the American economy and affect thousands, if not millions, of facilities around the country. The EPA's authority for these regulations is a statute passed by Congress, the Clean Air Act,⁷⁴ which the Supreme Court interpreted to authorize regulation of greenhouse gases.⁷⁵ Yet there is no indication that Congress has ever supported the EPA taking such actions, let alone that any Congress would enact legislation to mandate this result.⁷⁶

The Clean Air Act's basic architecture was enacted in 1970.⁷⁷ Key provisions were added in 1977⁷⁸ and 1990,⁷⁹ and the Act has not been amended to any significant degree in over twenty years.⁸⁰ According to the EPA, these decades-old provisions authorize (if not compel) it to regulate greenhouse gas emissions from cars and trucks, utilities, factories, and other sources.⁸¹ The legislative grant of authority that the EPA received decades ago drives its decisions today, even though Congress was not at all focused on global climate change when the relevant provisions of the Clean Air Act were adopted,⁸² relatively few members of Congress who voted for the Clean Air Act remain in

73. For an overview of the EPA's regulatory initiatives, see Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011); see also *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 113–14 (D.C. Cir. 2012) (rejecting challenge to EPA regulation of greenhouse gases under the Clean Air Act).

74. 42 U.S.C. § 7401–7671q (2006).

75. See *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

76. Legislation to authorize federal regulation of greenhouse gases narrowly passed the U.S. House of Representatives in 2009, but was not even brought up in the U.S. Senate. See *Final Vote Results for Roll Call 477*, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2009/roll477.xml> (last visited Feb. 19, 2013) (indicating that the American Clean Energy and Security Act passed the House by a vote of 219 to 212 on June 26, 2009).

77. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

78. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C. (2006)).

79. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C. (2006)).

80. The last major amendments to the Clean Air Act were added in 1990. See *id.*

81. See, e.g., Lisa P. Jackson, Adm'r, Env'tl. Prot. Agency, Remarks on the Endangerment Finding on Greenhouse Gases (Dec. 7, 2009) (saying the EPA is "obligated to take reasonable efforts to reduce greenhouse pollutants under the Clean Air Act"), available at <http://yosemite.epa.gov/opa/admpress.nsf/dff15a5d01abdfb1852573590040b7f7/b6b7098bb1dfaf9a85257685005483d5!OpenDocument>.

82. ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 419 (2001); see also Jonathan H. Adler, *Warming up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 69–72 (2007).

Congress today,⁸³ and Congress has never taken any action to affirmatively approve the regulation of greenhouse gases in the years since the Act was first adopted or subsequently amended.⁸⁴ Indeed, the EPA maintains that to apply the Clean Air Act, as actually written, to the emission of greenhouse gases would produce “absurd” results, and grind air pollution permitting programs to a halt.⁸⁵ This is because the statutory emission thresholds that trigger the Act’s requirements were written for traditional pollutants, which are generally emitted in far lesser amounts than carbon dioxide, and applying such thresholds to carbon dioxide increases the number of regulated facilities by orders of magnitude.⁸⁶ As a consequence, the EPA argues it has the authority to “tailor” the Act’s requirements to the agency’s determination of what would be practical, without legislative approval.⁸⁷

Although the EPA is exercising authority ostensibly delegated by Congress, Congress is not politically accountable for the EPA’s actions. Members of both parties decry the EPA’s policies, arguing they are too lenient or strict, as if the decision whether to regulate greenhouse gases was the EPA’s and the EPA’s alone.⁸⁸ Further, insofar as

83. As of January 2013, there were only two members of Congress who were members of Congress when the Clean Air Act was enacted in 1970 and fifty-one members of Congress who were members of Congress when the Clean Air Act Amendments of 1990 were passed. See *House Seniority List—112th Congress*, ROLL CALL, <http://www.rollcall.com/politics/houseseniority.html> (last visited Jan. 18, 2013); *Senate Seniority List—112th Congress*, ROLL CALL, <http://www.rollcall.com/politics/senateseniority.html> (last visited Jan. 18, 2013).

84. Some bills have specifically sought to block the EPA’s interpretation of the Clean Air Act. See, e.g., Dina Fine Maron, *New Anti-EPA Bill Aims to ‘Rein in’ Agency’s Climate Rules Permanently*, N.Y. TIMES (Mar. 4, 2011, 10:10 AM), <http://www.nytimes.com/cwire/2011/03/04/04climatewire-new-anti-epa-bill-aims-to-rein-in-agencys-cl-37816.html>; see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (“Although we are chary of attributing significance to Congress’s failure to act, a refusal by Congress to overrule an agency’s construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress’s attention through legislation specifically designed to supplant it.”).

85. See *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,516 (June 3, 2010); see also Adler, *supra* note 73, at 422.

86. See Adler, *supra* note 73, at 433–34.

87. The EPA’s “tailoring rule” was challenged in the U.S. Court of Appeals for the D.C. Circuit, which held that industry plaintiffs lacked standing to challenge the rule because they would be subject to emission controls whether or not the rule were “tailored.” See *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012) *reh’g denied*, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012).

88. The EPA’s proposed regulation has been derided by both Democrats and Republicans. See Letter from Senator Sherrod Brown to President Barack Obama (Feb. 28, 2011), available at <http://www.brown.senate.gov/imo/media/doc/EPAletter1.pdf> (calling the Clean Air Act “remarkably successful,” while expressing con-

some maintain that the EPA's actions are based upon a misreading of congressional intent, it is difficult for Congress to correct the agency's course without reopening and revising a major environmental statute.⁸⁹ In the meantime, the EPA has taken it upon itself to amend the Clean Air Act's numerical emission thresholds that trigger stationary source permitting requirements so as to ensure a "common sense" approach to emissions control that Congress never conceived, let alone adopted.⁹⁰

These are not isolated examples. Numerous federal agencies exercise substantial regulatory authority under old and often outdated statutes. Though Congress passed the statutes, and Congress is ultimately responsible for the power these agencies wield, Congress is not particularly accountable for how agencies today exercise power granted years ago. Agency authority, once granted, is difficult to modify or repeal. Drafting and adopting new legislation to revise existing agency authority is a laborious process not well suited to active agency oversight and control. As a consequence, the delegation of regulatory authority, once granted, becomes entrenched and is only rarely revisited.

cerns over the "unintended consequences of imprudent regulation" of greenhouse gases); Press Release, Senator Joseph Manchin, Rockefeller, Manchin Lead Colleagues in Fight to Protect Coal and Manufacturing State Economies (Jan. 31, 2011), available at <http://manchin.senate.gov/record.cfm?id=330724&> ("No bureaucratic agency should be able to regulate what has not been legislated, especially when their actions jeopardize thousands of jobs." (internal quotation marks omitted)); Press Release, Senator Mary L. Landrieu, Landrieu Votes to Block EPA's Overreach on Regulating Greenhouse Gases (June 10, 2010), available at http://www.landrieu.senate.gov/?p=press_release&id=1427 ("The Clean Air Act was designed to reduce the smog and acid rain that was choking our cities in the 1970s and 1980s, not to limit carbon in our atmosphere." (internal quotation marks omitted)); Press Release, Congressman Ed Whitfield, Committee Passes Whitfield Bill to Stop EPA Regulation of Greenhouse Gases (Mar. 15, 2011), available at <http://whitfield.house.gov/press-release/committee-passes-whitfield-bill-stop-epa-regulation-greenhouse-gases> ("[D]ecisions with such sweeping influence on jobs and the economy must be made by elected members of Congress and not by unelected executive branch staff." (internal quotation marks omitted)); see also Fred Upton & Tim Phillips, *How Congress Can Stop the EPA's Power Grab*, WALL ST. J., Dec. 28, 2010, at A15 (saying the EPA's regulation of Greenhouse Gases "represents an unconstitutional power grab that will kill millions of jobs—unless Congress steps in").

89. The Congressional Review Act is not a practical means of preventing the adoption of regulations opposed by congressional majority. See *infra* Part II.

90. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (final rule). The tailoring rule was challenged in federal court, but the D.C. Circuit concluded none of the petitioners had standing to challenge this rule. See *Coal. for Responsible Regulation*, 684 F.3d at 113.

II.

PRIOR EFFORTS AT LEGISLATIVE CONTROL

Over the years Congress has adopted various reforms aimed at restoring political accountability, disciplining federal agencies, and ensuring that federal regulatory policy is responsive to contemporary legislative priorities, without sacrificing the practical benefits of delegation. Indeed, legislative oversight and review may, in many respects, facilitate greater delegations of regulatory authority, as Congress may be more comfortable delegating substantial amounts of power if it is assured that it retains a degree of oversight and control.⁹¹ While well-intentioned, these efforts have been largely unsuccessful at disciplining regulatory agencies or ensuring that regulatory policy reflects popular sentiment.

In the mid-twentieth century, Congress attempted to control administrative agency decision making through the adoption of legislative veto provisions.⁹² Between the 1930s and 1980s, Congress enacted legislative veto provisions within nearly three-hundred statutes.⁹³ These provisions enabled Congress to delegate broad legislative-like authority to administrative agencies while retaining the unilateral authority to overturn administrative decisions through legislative action, but without presidential assent or a veto-proof majority.

The Immigration and Nationality Act contained a typical legislative veto provision, which authorized either house of Congress to invalidate a decision by the Attorney General to allow an otherwise deportable alien to remain in the United States with a simple resolution passed by majority vote.⁹⁴ By allowing either house to override an agency decision, the legislative veto provisions effectively required concurrent agreement by the President and both houses of Congress before an agency decision could take effect, for dissent by either the Senate or the House of Representatives was enough to veto the action. Such provisions were frequently used, but they were short-lived.

91. See *INS v. Chadha*, 462 U.S. 919, 974 (1983) (White, J., dissenting) (“[T]he Executive has . . . [generally] agreed to legislative review as the price for a broad delegation of authority.”); see also Michael Herz, *The Legislative Veto in Times of Political Reversal: Chadha and the 104th Congress*, 14 CONST. COMMENT. 319, 324 (1997) (noting that the legislative veto was developed “as a means for allowing massive concessions of authority to the executive” by ensuring Congress would retain the ability to review and control such delegations).

92. JAMES R. BOWERS, *REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING* 20 (1990).

93. *Chadha*, 462 U.S. at 944 (internal citation omitted).

94. Immigration and Nationality Act, Pub. L. No. 82-414, § 244(c), 66 Stat. 163, 216 (1952) (as amended), *invalidated by Chadha*, 462 U.S. at 959.

In 1983 the Supreme Court invalidated unicameral legislative vetoes in *Immigration and Naturalization Service v. Chadha*.⁹⁵ The Court held that it was unconstitutional for a single house of Congress to overturn an administrative action taken pursuant to a valid grant of legislative authority.⁹⁶ Overturning an administrative action was, in effect, a legislative act. Under Article I of the Constitution, legislative acts require bicameralism and presentment—the concurrence of both houses of Congress and presentation to the President for his signature or veto, the latter of which could be overturned by super-majorities in both legislative chambers.⁹⁷

Although *Chadha* eliminated the availability of the legislative veto, Congress had been considering and enacting other regulatory reforms in an effort to increase accountability and improve regulatory policy even before the case was decided. In 1980, for example, Congress enacted the Regulatory Flexibility Act⁹⁸ and the Paperwork Reduction Act,⁹⁹ which required agencies to consider the costs of new regulatory initiatives and consider less burdensome alternatives. The latter statute also created the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget to formalize White House oversight of federal regulatory activity.¹⁰⁰ Over a decade later, Congress enacted the Unfunded Mandates Reform Act (UMRA)¹⁰¹ and the Small Business Regulatory Enforcement Fairness Act (SBREFA),¹⁰² intended to reduce the economic burdens of regulatory requirements imposed on state and local governments and small business entities, respectively. With each of these reforms Congress required agencies to devote more attention to the economic and other consequences of their rules, but did not constrain the ultimate choices agencies could make.

Over the same period, successive presidential administrations also sought to impose greater discipline on the regulatory process, while also centralizing White House control over executive branch

95. 462 U.S. 919.

96. *Id.* at 954.

97. U.S. CONST. art. I, § 7, cl. 2–3.

98. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980).

99. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812.

100. *Id.* § 3503(a). For a broad discussion of OIRA's contemporary responsibilities, see generally Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. (forthcoming 2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192639.

101. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48.

102. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201–253, 110 Stat. 847, 857–75.

agencies.¹⁰³ A series of executive orders, beginning under President Gerald Ford, laid out standards for regulatory analysis and established the parameters of White House review of regulatory initiatives.¹⁰⁴ These orders, combined with more aggressive monitoring of agency activities by OIRA, made executive branch agencies more responsive and accountable to the President.¹⁰⁵ This did not make such agencies more accountable to Congress, however.

The most recent effort to impose greater legislative control on regulatory policy was the Congressional Review Act of 1996 (CRA).¹⁰⁶ The CRA created an expedited process for consideration of joint resolutions to overturn regulations of which Congress disapproved.¹⁰⁷ In effect, the CRA created a framework for Congress to enact new laws to overturn or correct administrative implementations of previously enacted laws. The purpose of the CRA was to provide Congress with a quick and easy way to invalidate regulatory initiatives with which a majority of Congress disagreed, although such resolutions could still be subject to a presidential veto. The CRA has not been particularly effective, largely because it is difficult to enact congressional resolutions of disapproval that are still subject to presidential veto, nor have there even been many attempts to use it.¹⁰⁸

The core of the CRA is a mechanism whereby Congress could, at its own initiative, act to overturn significant regulatory actions. Under the CRA, before any new rule may take effect, the promulgating agency must submit a report on the rule to each house of Congress and the Comptroller General.¹⁰⁹ If the regulation is deemed a “major rule”—defined for purposes of the Act as any rule that OIRA concludes is likely to have an annual effect on the economy of \$100 million or more, or otherwise have significant effect on consumer prices

103. See Kagan, *supra* note 6.

104. See, e.g., Exec. Order No. 11,821, 3A C.F.R. 926 (1971–1975) (President Ford); Exec. Order No. 12,044, 3 C.F.R. 152 (1979) (President Carter); Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (President Reagan); Exec. Order No. 12,498, 3 C.F.R. 323 (1986) (President Reagan).

105. For an empirical examination of the effects of White House review, see Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003).

106. 5 U.S.C. §§ 801–808 (2006).

107. 5 U.S.C. § 801(a)(3)(B).

108. See, e.g., Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies’ Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907, 911 (2010); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1052 (1999).

109. 5 U.S.C. § 801(a)(1)(A).

or the economy¹¹⁰—it may not take effect for at least sixty days after its submission to Congress.¹¹¹ This waiting period was adopted to provide Congress with an opportunity to review major rules and consider whether to overturn them. For this purpose, the CRA creates a streamlined procedure whereby Congress may overturn a major regulation by enactment of a joint resolution by both houses.¹¹²

That the CRA has not had much effect on federal regulatory activity should not surprise. There is tremendous inertia within the legislative process, and if Congress is required to take the initiative to overturn an unjustified or excessive regulation, it is unlikely to happen. Other priorities compete for legislators' time and attention. The streamlined procedure may make it easier to obtain a vote on joint resolutions to disapprove of new regulations, but members of Congress are not always eager to cast a vote for or against a controversial or high-profile regulation.¹¹³ The CRA's effectiveness is further diminished by the failure of many agencies to comply with its requirements.¹¹⁴

Since its enactment, several joint resolutions disapproving new regulations have been introduced, and only one such resolution has been enacted. As the Congressional Research Service reported, through 2008, joint resolutions of disapproval were introduced for fewer than five percent of the regulatory actions to which the CRA procedure could be applied.¹¹⁵ Of the forty-seven total resolutions introduced, only three passed even one house of Congress.¹¹⁶ The only joint resolution actually enacted was a measure disapproving of the

110. 5 U.S.C. § 804(2).

111. 5 U.S.C. § 801(a)(3)(A).

112. 5 U.S.C. § 802.

113. See Cindy Skrzycki, *Will Congress Wake up to Its Rule-Blocking Weapon?*, WASH. POST, Feb. 13, 1998, at G1 (noting congressional reluctance to “risk political capital on attacking regulations that the public seems to support”).

114. See Croston, *supra* note 108, at 908–09. According to the Congressional Research Service, agencies routinely fail to submit final rules to the Comptroller General even though such submission is required before such rules may take effect. See CURTIS W. COPELAND, CONG. RESEARCH SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS (2009). Agencies also sometimes fail to identify rules that will have a greater than \$100 million economic impact as “major rules.” See Jonathan H. Adler & Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, HEALTH MATRIX (forthcoming) (discussing IRS rule authorizing tax credits for purchase of health insurance on federal exchanges).

115. See MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008).

116. *Id.*

ergonomics rule adopted by the Occupational Safety and Health Administration during the Clinton Administration.¹¹⁷

One particular problem is that the CRA effectively requires a super-majority in Congress to overturn an administrative action. This is because a President is likely to veto any legislative effort to overturn a regulation issued by his own administration.¹¹⁸ Only those rules adopted near the end of a President’s term are vulnerable to CRA repeal—because the next President may sign a joint resolution—and the executive can reduce the vulnerability of regulations to CRA review by ensuring new rules are not issued at the tail end of a presidential term. During the last year of the Bush Administration, for example, agencies were put on notice that they needed to finalize new regulations early enough so that they would not be subject to repeal under the CRA.¹¹⁹ As a consequence, the CRA has not done much to increase legislative control over, or accountability for, federal regulatory policy.

III.

THE REINS ACT

The REINS Act seeks to discipline federal regulatory agencies and enhance congressional accountability for federal regulations without replicating the problems of prior reform efforts or sacrificing the benefits of agency expertise and specialization. The central provision of the REINS Act provides that new major rules cannot take effect unless Congress passes a joint resolution approving the regulation within seventy session or legislative days of the rule’s submission to Congress.¹²⁰ “Major rules” are defined as those regulations that are anticipated by the White House Office of Management and Budget to impose annual economic costs in excess of \$100 million or otherwise

117. Joint Resolution Providing for Congressional Disapproval of the Rule Submitted by the Department of Labor Under Chapter 8 of Title 5, United States Code, Relating to Ergonomics, Pub. L. No. 107-5, 115 Stat. 7 (2001).

118. See Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 HARV. J. ON LEGIS. 323, 326 (1996); see also Herz, *supra* note 91, at 323 (“Requiring presidential approval (or a two-thirds majority to override) is hardly a formality.”).

119. See Memorandum from Joshua B. Bolten, Chief of Staff, White House, to Heads of Exec. Dep’ts & Agencies (May 9, 2008), available at <http://www.ombwatch.org/files/regs/PDFs/BoltenMemo050908.pdf>; see also Charlie Savage & Robert Pear, *Administration Moves to Avert Late Rules Rush*, N.Y. TIMES, May 31, 2008, at A1 (noting effect of memo would be to make it more difficult for new administration to reverse course).

120. Regulations From the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. § 3 (to amend 5 U.S.C. § 801(b)).

have significant economic or anticompetitive effects.¹²¹ Joint resolutions of approval, once passed by both houses of Congress, are then forwarded to the President for his signature (or veto).¹²²

A key feature of the REINS Act is that it creates an expedited procedure to ensure prompt consideration of resolutions of approval in each house of Congress. First, it provides that such a resolution is automatically introduced into each house once it is finalized by the agency.¹²³ Second, legislative committees have a limited time period during which they may consider the resolution. Unlike with legislation, the failure of a committee to act does not kill the resolution. Rather, after fifteen session days, the resolution is automatically placed on the House or Senate calendar whether the committee has acted or not.¹²⁴ Third, the REINS Act provides that resolutions of approval are privileged, not subject to amendment, and not subject to dilatory procedural motions.¹²⁵ Debate is limited in each house and a resolution may not be filibustered in the Senate.¹²⁶ As introduced in the 112th Congress, the REINS Act is drafted so as to ensure that a resolution of approval is voted up-or-down in each house within seventy session or legislative days of when an agency finalizes a major rule.

These provisions effectively disable the traditional means legislators and special interest groups use to slow or stop legislative proposals. Whereas traditional legislation can be bottled up in committee or held up by a determined handful of legislators, resolutions of approval under the REINS Act cannot be disposed of without a majority vote. The Act requires an additional step before new major rules can become effective, but it also requires members of Congress to openly declare their support or opposition for a specific rule.

In effect, the REINS Act amends pre-existing regulatory statutes to remove federal agency authority to unilaterally adopt major regulatory measures, instead requiring agencies to forward “final” rules as proposals for congressional review. Requiring congressional approval before economically significant rules may take effect ensures that

121. *Id.* (to amend 5 U.S.C. § 804(2)).

122. Joint resolutions are subject to the Constitution’s presentment requirement like any other bill. The only exception to this rule is a joint resolution used to propose a constitutional amendment. Such a resolution is instead submitted to the states for ratification. See *Joint Resolution*, UNITED STATES SENATE, http://www.senate.gov/reference/glossary_term/joint_resolution.htm (last visited Jan. 3, 2012).

123. H.R. 10, 112th Cong. § 3 (to amend 5 U.S.C. § 802(a)(2)).

124. *Id.* (to amend 5 U.S.C. § 802(c), (e)).

125. *Id.* (to amend 5 U.S.C. § 802(a)(3), (d)–(e)).

126. *Id.* (to amend 5 U.S.C. § 802(d)–(e)).

Congress takes responsibility for major regulatory policy decisions. Adopting an expedited legislative process, much like that which has been used for fast track trade authority or base closings,¹²⁷ ensures that major regulatory initiatives are considered by each house of Congress while simultaneously preventing the congressional review requirement from unduly delaying needed regulatory initiatives. As a consequence, the REINS Act enhances transparency and accountability without creating a significant new procedural obstacle to the adoption of needed regulatory measures.¹²⁸

Under the REINS Act, Congress would only be responsible for considering a small percentage of the regulations proposed by federal agencies in a given year. While federal agencies promulgate over 3,000 new regulations each year, only a fraction of these constitute “major” rules. From 1998 to 2010, for example, federal agencies promulgated between fifty and one hundred major rules per year.¹²⁹ Expedited consideration of this number of rules would not significantly increase the legislative workload or obstruct other business.

Congress gives expedited consideration to a wide array of matters every year. Consider that a new president will nominate a few hundred people to Cabinet and agency positions that require Senate confirmation in just the first year of an administration.¹³⁰ Even with the recent rise of partisan obstruction, most nominees go through with minimal delay—and without obstructing or compromising other legislative business.¹³¹ In the case of confirmations, Senate rules and traditions provide many ways for a small minority of senators to gum up the works. A single senator can place a “hold” on a controversial or undesirable nominee.¹³² No such means of obstruction are available

127. See *infra* notes 158–163 and accompanying text.

128. See Rosenberg, *supra* note 108, at 1088–89 (with a legislative approval requirement “ultimate decisionmaking responsibility for important issues of national policy by Congress will be clear, highly visible, discrete, well-defined, and thereby be subject to unprecedented substantive scrutiny and evaluation by the voting public”).

129. CREWS, *supra* note 23, at 33.

130. Under the last four Presidents, nominations for Cabinet and agency positions in the first year have ranged between a low of 249 in the George H.W. Bush Administration and a high of 326 in the Obama Administration. See ANNE JOSEPH O’CONNELL, CTR. FOR AM. PROGRESS, WAITING FOR LEADERSHIP 9 (2010), available at http://www.americanprogress.org/issues/2010/04/pdf/dww_appointments.pdf.

131. The rate of confirmations within the first year for such nominees has ranged from 92.4% in the George H.W. Bush Administration to 80.4% in the Obama Administration. *Id.*

132. See Charlie Savage, *Obama Limits Lasting Stamp on the Courts*, N.Y. TIMES, Aug. 18, 2012, at A1. Even with the increased use of “holds” and other obstruction tactics, the Senate still manages to confirm individuals to fill hundreds of executive branch positions and dozens of judicial vacancies every year.

under the REINS Act, however, so there is no way for special interests to secretly stall a resolution of approval. It is for this reason that the REINS Act is unlikely to impede Congress's ability to consider other matters, nor is it likely to become a tool of obstruction for those opposed to new regulatory measures.

IV.

CONSTITUTIONAL CONCERNS

The modern regulatory state may not have been present at the nation's founding, but its basic architecture and practices have been in place for over sixty years and are now well-established.¹³³ The REINS Act would substantially alter longstanding administrative practice, at least with regard to major regulatory initiatives. This drastic reorientation of established procedures has led some commentators to raise concerns about the REINS Act's constitutionality, particularly given its potential effect on executive authority. While such concerns are understandable, they are unfounded. Whether or not the REINS Act would be good policy,¹³⁴ it would be constitutional under current law.

A. *INS v. Chadha*

An obvious question for REINS Act supporters is how the congressional approval requirement can be constitutional if a unicameral legislative veto, such as that considered in *INS v. Chadha*,¹³⁵ is not. After all, in either case an agency determination is effectively vetoed if a majority of either house disapproves. The legislative veto in *Chadha* enabled a single house to block an agency ruling by passing a simple resolution. Under the REINS Act, both houses must vote in the affirmative for a major rule to take effect. For practical purposes, each requires bicameral consent for the agency decision to stand. For constitutional purposes, however, the formal differences between the two are significant.

As then-Judge Stephen Breyer explained in a 1984 lecture, a congressional authorization requirement could replicate the function of the legislative veto invalidated in *Chadha* without the veto's constitutional infirmity.¹³⁶ By observing the formal requirements for legislation in Article I, he explained, congressional oversight of agency

133. The Administrative Procedure Act, for instance, was enacted in 1946. Administrative Procedure Act, 5 U.S.C. § 500 (2006).

134. See *infra* Part V.

135. 462 U.S. 919 (1983).

136. See Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–96 (1984).

activity could be maintained without violating constitutional principles of separation of powers.¹³⁷ Harvard Law School’s Laurence Tribe likewise concluded at the time that such a requirement would be constitutional, even if he also thought it would be a bad idea.¹³⁸

The Presentment Clause in Article I, section 7 of the Constitution provides that, for a bill to become law, it must be passed by a majority of both the House and Senate and signed into law by the President or, if vetoed by the President, re-passed by two-thirds majorities in each house.¹³⁹ It further provides that “[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States” for his signature or veto.¹⁴⁰ The REINS Act complies with both the bicameralism and presentment requirements of this clause, and is therefore constitutional. Just like any other bill, a joint resolution under the Act requires the approval of both houses of Congress and is presented to the President.¹⁴¹

In some respects the REINS Act is more limited than Breyer’s proposal for congressional resolutions of approval for regulatory measures or the unicameral legislative vetoes at issue in *Chadha*, further blunting any potential constitutional concerns. In contrast to those procedures, the REINS Act would only require congressional approval for so-called “major rules.” Before *Chadha*, the unicameral legislative veto often operated as a replacement for targeted “private bills” affecting the interests of a few.¹⁴² However, those regulations subject to the REINS Act would, by definition, be those that have broader impacts on large segments of the country, if not the nation as a whole. Only those rules deemed to be “economically significant” are covered, and such rules are a small, but important, portion of federal regulatory activity. From 1998–2010, the number of major rules promulgated by

137. *Id.* at 797.

138. See Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 19 (1984) (noting that a congressional approval requirement for agency regulations would be constitutional).

139. U.S. CONST. art. I, § 7.

140. *Id.* The only exception to this rule is a joint resolution used to propose a constitutional amendment. Such a resolution is instead submitted to the states for ratification. See *Joint Resolution*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/joint_resolution.htm (last visited Jan. 10, 2013).

141. See *Senate Legislative Process*, U.S. SENATE, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm#1 (last visited Jan. 10, 2013).

142. In *Chadha*, the House of Representatives voted to overturn 6 of 340 cases in which the Attorney General had concluded an otherwise deportable alien should be allowed to remain in the United States. *INS v. Chadha*, 462 U.S. 919, 926 (1983).

federal administrative agencies ranged between twenty-seven and eighty-one per year.¹⁴³

B. Executive Authority

Some members of Congress, including Representative John Conyers, have expressed the concern that the REINS Act unduly interferes with executive authority.¹⁴⁴ Sally Katzen, former Administrator of the Office of Information and Regulatory Affairs in the Clinton Administration, has cited *Morrison v. Olson* for the proposition that “a statute is suspect if it ‘involves an attempt by Congress to increase its own powers at the expense of the executive branch,’”¹⁴⁵ and has argued that it is reasonable to see the REINS Act as an effort to constrain the executive.¹⁴⁶ A look at the bill’s full title and statement of purpose reinforces this concern.¹⁴⁷

The problem with these arguments is that they ignore the distinction between executive and legislative functions: the executive power to “enforce” the laws—that is, the power to take action to see that legal rules are complied with—is distinct from the quasi-legislative power to make the rules pursuant to a delegation of authority from Congress. The power to enforce a given rule—whether a limit on emissions, an affirmative disclosure requirement, or something else—is different from the power to set a limit on emissions, mandate disclosure, and so on. The former may inhere in an executive agency, but the latter does not. The power to adopt legislative-type rules is not a core executive function; it is a power that only exists due to a legislative grant.

As a general matter, executive agencies have general (and largely unreviewable) discretion over how to enforce particular legislative requirements.¹⁴⁸ Exercise of such executive discretion, such as the discretion of a prosecutor to decide which crimes to investigate or prosecute, may not be controlled by Congress. A requirement that federal regulatory agencies obtain congressional approval before major rules may take effect asserts congressional control over legislative-like

143. CREWS, *supra* note 23, at 27.

144. *REINS Act Hearing I*, *supra* note *, at 8–9 (statement of Rep. John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary); *see also* Editorial, *Undermining the Executive Branch*, N.Y. TIMES, Dec. 4, 2011, at A26.

145. *REINS Act Hearing I*, *supra* note * at 96 (statement of Professor Sally Katzen (citing *Morrison v. Olson*, 487 U.S. 654, 694 (1988))).

146. *Id.* at 96–97.

147. *See* Regulations From the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. §§ 1–2.

148. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

policy decisions, however, and leaves such discretionary authority untouched.

The Constitution’s separation of powers among the three coordinate branches was designed as “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”¹⁴⁹ The Court has consistently sought to block Congress from interfering “with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.”¹⁵⁰ But, as *Morrison* itself illustrates, Congress is not prevented from limiting or constraining the exercise of power it delegates to the executive branch.¹⁵¹ The Court upheld the independent counsel law, despite its intrusion on core executive functions, because it did “not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch.”¹⁵²

Unconstitutional aggrandizement occurs when the legislature seeks to seize executive powers for itself, not when it places limits on rulemaking authority created by prior legislative grants. Federal agencies have no authority to promulgate regulations beyond that which has been given by Congress—and what Congress has given, it may take back. That Congress may restrain the exercise of such authority, whether by adopting rules for the exercise of regulatory authority (as under the Administrative Procedure Act or the Congressional Review Act) or limiting the scope of such authority, is perfectly acceptable, so long as other constitutional requirements (such as bicameralism and presentment) are satisfied. As the REINS Act does in fact satisfy such requirements, there is no constitutional problem. The REINS Act does not curtail inherent executive power so much as it places limits on the legislative-like power delegated by Congress.¹⁵³ As Justice Breyer noted, requiring congressional approval for the adoption of new regulatory initiatives “imposes on Congress a degree of visible responsibility” for new regulatory initiatives more than it limits executive

149. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976); *Morrison*, 487 U.S. at 693 (citing *Buckley*).

150. *Morrison*, 487 U.S. at 689–90 (internal citation omitted).

151. *Id.* at 693–94 (“[W]e have never held that the Constitution requires that the three branches of Government ‘operate with absolute independence.’”) (internal citation omitted).

152. *Id.* at 694; *see also* *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (warning against “dange[r] of congressional usurpation of Executive Branch functions”); *Chadha*, 462 U.S. at 958 (same).

153. *REINS Act Hearing II*, *supra* note 22, at 96 (prepared testimony of Eric R. Claeys) (“The power to promulgate legislative rules is not inherently executive, as the power to prosecute is.”).

authority.¹⁵⁴ While the REINS Act would reduce the discretion of executive and independent agencies to adopt far-reaching regulatory measures, it would neither interfere with core executive functions nor constrain the inherent discretionary authority of the executive branch.

C. *Entrenching Legislative Rules*

A more serious constitutional question about the REINS Act is whether a statute may impose binding legislative process rules on either house of Congress. Article I, section 5 of the Constitution provides, “Each House may determine the Rules of its Proceedings.”¹⁵⁵ Some interpret this provision to mean that each house has exclusive, unilateral control over its own rules, and that it would be unconstitutional to preempt such authority with a statute subject to presentment to the executive.¹⁵⁶ Alternatively, this provision could simply mean that each house retains the authority to alter its own procedural rules, statutes to the contrary notwithstanding.¹⁵⁷ This would mean that a subsequent House or Senate could unilaterally repeal the procedural rules the REINS Act creates for expedited consideration of resolutions of approval.

Adopting rules of legislative procedure through statute is nothing new, and Congress has observed such limits throughout history. The practice dates to the founding period.¹⁵⁸ To this day Congress enacts laws altering legislative procedures to limit debate or otherwise provide a “fast track” for consideration of particular measures.¹⁵⁹ Beginning in the 1970s, Congress authorized the President to negotiate trade agreements that would be submitted to Congress for consideration on a straight up-or-down vote without amendment and without being subject to traditional procedural obstacles.¹⁶⁰

Although Congress traditionally includes “disclaimer clauses” in fast track legislation asserting each chamber’s right to change its own rules unilaterally, neither house has exercised this authority to amend

154. Breyer, *supra* note 136, at 794.

155. U.S. CONST. art. I, § 5.

156. See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 409 (2003).

157. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 365–66 (2004).

158. See, e.g., Act of June 1, 1789, ch. 1, 1 Stat. 23, 23 (prescribing the administration of oaths “previous to entering on any other business”).

159. See Bruhl, *supra* note 156, at 346 n.9 (2003) (listing examples of “debate-regulating statutes”); see also *id.* at 363 n.79 (listing fast track provisions that do not have disclaimer clauses).

160. See *id.* at 357–58.

or prevent prompt consideration of a trade agreement submitted under fast track procedures.¹⁶¹ One reason for this is that a vote to undo the fast track procedures would be recognized as a vote against the measure in question.¹⁶² There may also be reluctance within Congress to undermine the viability of procedural mechanisms that can be used to accelerate the condition of important measures. Once the precedent of undoing such fast track measures were established, it would be difficult to repair to such measures in the future.¹⁶³ If nothing else, concern for maintaining legislative norms has discouraged either house from attempting to undo prior deals that altered special procedural rules.

V.

POLICY CONCERNS

Just because the REINS Act would be constitutional does not mean that it would be wise. Little in the Constitution prevents Congress from adopting unwise or foolhardy initiatives. Many REINS Act critics worry that it would unduly constrain federal regulatory initiatives and make it too difficult for agencies to adopt needed protections for public health and the environment. The REINS Act “would threaten critical public protections” according to the Coalition for Sensible Safeguards.¹⁶⁴ Further, many critiques of the REINS Act misunderstand (or misrepresent) the substance of the bill. Others embrace an unduly alarmist view of the REINS Act’s likely effect on new regulatory policies, fueled by exaggerated claims made by the REINS Act’s proponents. In all likelihood, both advocates and critics alike overstate the likely effect of the REINS Act.¹⁶⁵

161. According to a 2002 Senate Report, “when fast track legislation has been in place for trade agreements, neither House has ever acted unilaterally to withdraw application of fast track procedures.” *See id.* at 369 (quoting S. REP. NO. 107-139, at 54 (2002)).

162. *Id.*

163. A similar dynamic could explain why Senate majorities have not exercised their authority to alter Senate rules to eliminate the filibuster of judicial nominations, as had been proposed. Once this “nuclear option” were to be exercised for the first time, it would be difficult to prevent its repeated use in the future. Similarly, once Senate Democrats chose to filibuster Republican judicial nominees in the 2000s, it became easier for Republicans to justify filibusters of Democratic judicial nominees. *See, e.g.,* Jeff Sessions, Op-Ed., *Playing by Reid’s Rules on Filibusters*, WASH. POST, Nov. 27, 2009, at A23.

164. Press Release, Coal. for Sensible Safeguards, Regulations Save Lives, Contribute to Job Growth, Groups Tell Lawmakers (May 16, 2011), available at <http://sensible safeguards.org/press-releases/regulations-save-lives-contribute-to-job-growth-groups-tell-lawmakers>.

165. *See* Mila Sohoni, *The Idea of “Too Much Law”*, 80 FORDHAM L. REV. 1585, 1614 (2012) (“Tighter limits upon delegation might restrain a particular channel for

The REINS Act provides a means of curbing excessive or unwarranted regulation, but it is not an obstacle to needed regulatory measures supported by the public. If agencies are generally discharging their obligations in a sensible manner, REINS Act-type controls will have little effect. Indeed, even if federal regulatory agencies are overzealous, the REINS Act may not curtail federal regulation all that much. The Act only applies to new major rules—so existing regulations would remain untouched—and would constrain regulatory and deregulatory initiatives alike. Perhaps more significantly, it is not clear that members of Congress would be so quick to condemn regulatory proposals if they knew they would be required to back up their condemnation with an on-the-record vote. There is no question agencies are already responsive to congressional pressures, but most such influence is exercised by committee leaders and is largely hidden from public view.¹⁶⁶ Making such influences more transparent is all the more reason to force congressional votes on legislative rules.

It is easy to claim the EPA has adopted an overly expensive rule, but it may be more difficult to actually vote against pollution controls than to pontificate against them if it means a legislator has to take responsibility for a lack of federal action. As New York Law School's Professor David Schoenbrod has argued, administrative delegation has often resulted in less environmental protection than there might have been had Congress been required to take responsibility for federal policy.¹⁶⁷ Based on his experience as a litigator for NRDC, he believes lead would have been phased out of gasoline much earlier were it not for Congress's ability to abdicate responsibility for making a policy choice by delegating the matter to an administrative agency.¹⁶⁸ Some of the nation's most important environmental gains were not the result of regulations promulgated by administrative agencies but rather were directly enacted by Congress.¹⁶⁹

exercising federal authority, but there is little reason to think that it would ultimately reduce the expression of that authority through the other channels accessible to federal power.”).

166. See D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 3, 235–37 (1991) (documenting indirect ways in which Congress influences the exercise of delegated power).

167. Schoenbrod, *supra* note 58, at 359.

168. *Id.* at 351–54; see also SCHOENBROD, *supra* note 3, at 58–81.

169. As former OIRA director Christopher DeMuth observes, “some of the most effective environmental policies, such as automobile tail-pipe emissions standards, have been statutory standards.” DeMuth, *supra* note 33, at 85 (noting that David Schoenbrod has recognized that phenomenon).

Some critics fear that requiring congressional approval of new major rules would create additional opportunities for corporations or other economic interests to influence or obstruct regulatory measures. Yet corporate interests have far more influence on agency rulemakings than on open votes on the floor, largely because the former is far more insulated from public view.¹⁷⁰ However much the legislative process may favor concentrated interest groups, the regulatory process is even more imbalanced.¹⁷¹ [a]s one analysis of public participation in federal rulemaking observed, "[a]gency officials too often hear mainly from politically popular or well-organized interests, which may make up only a subset of the overall interests that will be affected by many regulatory decisions."¹⁷² In any event, the average citizen is unaware of much that occurs within the rulemaking process and lacks the time, resources, and expertise to engage with this process.¹⁷³ Much congressional intervention in agency activities is likewise obscured from pub-

170. As Richard Stewart noted over thirty years ago:

It has become widely accepted . . . that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests. Such overrepresentation stems from both the structure of agency decisionmaking and from the difficulties inherent in organizing often diffuse classes of persons with opposing interests.

Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975). Even if agencies are not subject to "capture" by interest groups, "they certainly inhabit the same culture and come to share its perspectives and enthusiasms." DeMuth, *supra* note 33, at 77.

171. See, e.g., Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 103 (2011) (documenting "interest group imbalances" in the rulemaking process); see also Schoenbrod, *supra* note 58, at 361 (noting that corporate money can buy influence within the rulemaking process just as it does within Congress, but that "in politics, votes trump money").

172. Cary Coglianese, Heather Kilmartin, & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 932 (2009); see also Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 453 (2004) ("For the most part, each agency has a regular constituency of regulated parties and inside-the-Beltway interest groups.").

173. See Coglianese, Kilmartin, & Mendelson, *supra* note 172, at 933 ("The lack of meaningful access to important information detracts from the public's ability to contribute to the formulation of better rules."). Compare Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781 (1999) (suggesting that administrative agencies are "often the most accessible site for public participation" in the policymaking process), with Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 36 (2009) (noting low quality of public participation in complex rulemakings).

lic view.¹⁷⁴ Local media are far more likely to cover how a legislator votes on the floor than how the same legislator pressures an agency behind the scenes.¹⁷⁵ The enactment of additional procedural requirements for administrative rulemakings is one way to discipline agencies, but the adoption of more complex procedures can make the representational imbalance even worse.¹⁷⁶

The REINS Act not only brings major regulatory decisions into the sunlight, it also disarms the various legislative procedures that concentrated interest groups regularly use to their advantage in the legislative process. Interest groups are often able to work behind the scenes through congressional committees to advance their interests. The existence of numerous “veto gates” in the legislative process creates opportunities for groups and allied representatives to extract concessions or prevent adoption of unwanted measures.¹⁷⁷ The legislative process, as traditionally structured, makes it quite difficult to enact new laws, which is precisely why the REINS Act would limit and streamline this process. As a consequence, it would be far easier to obtain a legislative vote on a new major rule under the REINS Act than it is to obtain a vote on new regulatory legislation.

The primary effect of the REINS Act would not be to stop regulation across the board, but to ensure that those major regulations adopted are those that can command majority legislative support, not merely those that are endorsed by concentrated or highly motivated interests—and that appears to be what has REINS Act opponents most concerned. University of Richmond law professor Noah Sachs warns the REINS Act “would do serious damage to American health and prosperity—stopping agencies from promulgating important rules that, among other things, would help prevent bank failures, ensure the safety of the food we eat, and control toxic pollution in the air we breathe.”¹⁷⁸ Sachs’s unstated premise is that many of these “important rules” that are so necessary for the public good could not prevail on

174. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 68 (2006) (discussing congressional involvement in agency implementation of federal laws).

175. See David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 745 (1999).

176. See McCubbins, Noll, & Weingast, *supra* note 55, at 469 (“More elaborate procedures are generally regarded as favorable to regulated industries. Because industries possess much of the information relevant to regulatory decisions, elaborate processes give them more power by increasing the importance of that information.”).

177. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 7 (1994) (defining “veto gates”).

178. Sachs, *supra* note 18.

straight up-or-down votes. That is, the current, unaccountable regulatory process is necessary precisely because it enables the adoption and enforcement of rules that could not command the support of a majority of legislators voting in the open.

Dean Richard Revesz of N.Y.U. School of Law and his colleague Michael Livermore argue that the REINS Act puts undo emphasis on the “costs” of regulation. In the *Huffington Post*, they wrote:

By focusing exclusively on the downsides of regulation, and not the benefits, the implication of this proposed legislation is that protecting the health and safety of Americans is not worth the costs that regulated entities must pay. But in fact, the opposite is often true: These rules can produce billions of dollars in net benefits.¹⁷⁹

This critique simply misses the point. The REINS Act focuses on “major” rules because such regulations involve the most consequential policy choices, not because such rules are presumptively unwise or necessarily generate more costs than benefits. New regulatory measures may well produce substantial benefits, economic or otherwise. The question is whether the benefits justify the costs—however measured—recognizing that many costs and benefits are difficult to quantify and implicate contested normative claims. Regulatory decisions are policy decisions that must necessarily rest upon value judgments. As a consequence, they are the sorts of decisions best made by elected representatives who can be held accountable for their decisions. That some regulations “produce billions of dollars in net benefits” is no reason not to subject them to the democratic process. Indeed, an open and transparent debate on such measures might well increase the legitimacy of and support for needed regulatory interventions.

Regulations commandeer private resources, forcing them to be allocated to one purpose or another. Sometimes this is necessary or wise, but neither a cost-benefit nor a cost-effectiveness analysis will demonstrate this fact. Showing that a given rule is “cost-effective” in accord with a particular metric as compared with other regulatory alternatives does not establish that such a regulation is the wisest course, or even that it is preferable to doing nothing at all. We cannot afford every net beneficial idea, any more than the federal government or a private firm can afford to make every investment that is expected to yield a positive return. Moreover, cost-benefit and cost-effectiveness analyses are notoriously manipulable and imprecise—as progressives

179. Richard L. Revesz & Michael A. Livermore, *Hold the REINS: Regulations Generate Major Economic Benefits*, *HUFFINGTON POST* (Jan. 4, 2011, 12:48 PM), http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/hold-the-reins-regulation_b_804211.html.

like to remind us—and they have extreme difficulty accounting for subjective value preferences and normative concerns, such as the distributional impact of rules.¹⁸⁰

The Revesz-Livermore argument is echoed by the University of Michigan's David Uhlmann. On the blog of the American Constitution Society, Uhlmann warned it would be terrible to let Congress decide whether to regulate the private sector:

Do we want the Congress, with all of its partisan influences, to be the arbiter of sound science and best practices in areas as complex as toxicology, engineering, ecology, and pharmacology? Do we believe that we would have more efficient and more effective regulation if we empowered Congress, rather than scientists and engineers, to decide fundamental questions about environmental protection, public health, and motor vehicle safety?¹⁸¹

This argument suggests that some technical policy decisions are too important to be left to our elected representatives and should instead remain in the hands of unelected agency officials. The question is not whether we would have “more efficient and more effective regulation” but whether we would have regulations that align more closely with public preferences and that can be justified through majority political support. Whether a given regulatory measure is worth the cost is a normative question, not simply a matter of administrative or technical expertise. Contrary to Uhlmann's suggestion, it is not “scientists and engineers” in regulatory agencies who make the ultimate regulatory decisions, but political appointees who are often well-insulated from political and popular influence—at least in comparison to elected representatives.

Some REINS Act critics argue the reform is unnecessary because federal regulatory agencies are already subject to sufficient oversight.¹⁸² They argue that this oversight ensures that federal agencies do not promulgate excessive regulation, as demonstrated by studies which conclude the benefits of federal regulations outweigh their costs.¹⁸³ This may be so, but it is irrelevant. As noted above, that a

180. See generally REVESZ & LIVERMORE, *supra* note 36.

181. David M. Uhlmann, *The REINS Act: A Future Without Environmental, Health, and Safety Protections*, AM. CONST. SOC'Y (Feb. 25, 2011), <http://www.acslaw.org/acsblog/the-reins-act-a-future-without-environmental-health-and-safety-protections>.

182. See, e.g., Sally Katzen, *Why the REINS Act Is Unwise If Not Also Unconstitutional*, REGBLOG (May 3, 2011), <https://www.law.upenn.edu/blogs/regblog/2011/05/why-the-reins-act-is-unwise-if-not-also-unconstitutional.html>.

183. E.g., OFFICE OF INFO. & REGULATORY AFFAIRS, *supra* note 36, at 3 (“The estimated annual benefits of major Federal regulations reviewed by OMB from October 1, 2000, to September 30, 2010, for which agencies estimated and monetized both

government analysis concludes that a given rule is net beneficial does not, by itself, mean that it is good policy; but the REINS Act would not prevent the adoption of needed, popular measures. It would, however, discipline agency behavior insofar as agency officials would be more likely to draft regulatory proposals with an eye to what could obtain majority support in Congress. In this fashion, the Act would further make regulatory policy decisions more responsive to congressional concerns.

In a recent article in *The New Republic* critical of the REINS Act, Professor Sachs posed the following hypothetical: “Imagine if the board of a Fortune 500 company required the company’s vice presidents to obtain board approval before implementing any decision. Now imagine that the board is highly polarized and its members are at each other’s throats. A recipe for corporate gridlock, right?”¹⁸⁴

If Professor Sachs’s hypothetical were analogous to what the REINS Act proposes, it would be a devastating critique—but it’s not. Imagine instead if the board of a Fortune 500 company required the company’s vice presidents to obtain board approval before implementing the two or three percent of decisions that are most important and potentially costly. This would not surprise, nor produce “gridlock.” To the contrary, it is precisely the course we would expect a responsible board to take. Indeed, failure to do so could be seen as a breach of the board’s fiduciary duties.¹⁸⁵ Should Congress be held to a lesser standard? All the REINS Act would do is ask Congress to take responsibility for the less than five percent of the federal regulations promulgated in any given year that “major rules” represent, while leaving more routine matters alone. Thus Sachs’s board analogy actually reinforces the case for REINS-type measures.

If the public believes that more regulations are necessary, or supports regulatory initiatives of a particular type, requiring a resolution of congressional approval will not stand in the way. Indeed, it would enhance the legitimacy of those regulations Congress approves by

benefits and costs, are in the aggregate between \$132 billion and \$655 billion, while the estimated annual costs are in the aggregate between \$44 billion and \$62 billion.”)

184. Sachs, *supra* note 18.

185. A corporate board member’s “duty of care” includes the duty to monitor the actions of the corporation. *See, e.g., In re Abbott Labs. Derivative S’holders Litig.*, 325 F.3d 795, 805 (7th Cir. 2003) (citing *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)); *In re Oxford Health Plans, Inc. Sec. Litig.*, 192 F.R.D. 111, 116 (S.D.N.Y. 2000); *In re Caremark*, 698 A.2d at 967; *see also* Elizabeth F. Brown, *No Good Deed Goes Unpunished: Is There a Need for a Safe Harbor for Aspirational Corporate Codes of Conduct?*, 26 *YALE L. & POL’Y REV.* 367, 375–77 (2008) (discussing directors’ “duty to monitor” corporate activities).

making clear that such initiatives command the support of both the legislative and executive branches. If environmental regulation is as popular as environmentalist groups claim, then there is really nothing to fear from the REINS Act. Even if the Act allows conservatives in Congress to vote down some new major rules—a plausible scenario now that Republicans control the House of Representatives—anti-regulatory members of Congress will suffer for opposing the regulatory protections Americans want. The REINS Act forces major regulatory decisions onto the floor of Congress, and into the open, which provides greater transparency than backroom dealmaking or the administrative rulemaking process. Above all else, the REINS Act provides a means of enhancing political accountability for regulatory policy.

Unlike some other proposed regulatory reforms, the REINS Act would not have much deregulatory effect.¹⁸⁶ The REINS Act would not have any effect on the thousands of regulations already on the books. Further, by its terms, the Act would apply to *all* major rules, regulatory and deregulatory alike. A decision to repeal or revise a regulation so as to reduce regulatory burdens on businesses would be subject to the congressional approval requirement just as a decision to enhance such requirements would. This would blunt the use of the Act as a means of rolling back existing regulatory controls.

CONCLUSION

Federal regulation reaches nearly all aspects of modern life and is pervasive in the modern economy. Much of this regulation may be necessary or advisable, and nothing in the REINS Act would hinder a sympathetic Congress from approving new federal regulations. In all likelihood, however, the REINS Act's congressional approval process would prevent the implementation of particularly unpopular or controversial regulatory initiatives. The primary effect of the legislation would be to make Congress more responsible for federal regulatory activity by forcing legislators to voice their opinion on the desirability of significant regulatory changes.¹⁸⁷

186. See Federal Sunset Act of 2009, H.R. 393, 111th Cong. (proposing review at least every twelve years of each agency for abolishment or reorganization); see also SIDNEY A. SHAPIRO, RICHARD MURPHY & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, REGULATORY 'PAY GO': RATIONING THE PUBLIC INTEREST 1 (2012) (critiquing the "regulatory pay-go" anti-regulatory proposal embraced by Republican presidential nominee Mitt Romney).

187. As David Schoenbrod notes, "[t]he rhetoric surrounding REINS [has done] a disservice by posing the problem as controlling agencies when it is really making Congress accountable." Schoenbrod, *supra* note 58, at 355.

James Landis, who is often credited as the New Deal “architect” of the modern administrative process, advocated extensive delegation of regulatory authority to administrative agencies. His arguments in support of delegation are commonly repeated to this day.¹⁸⁸ Less well remembered is that Landis also believed Congress should take ultimate responsibility for major regulatory initiatives.¹⁸⁹ Given potential constitutional and practical concerns about widespread delegation, Landis thought it would be “an act of political wisdom to put back upon the shoulders of Congress” ultimate responsibility for regulatory policies.¹⁹⁰ The REINS Act would seek to put such wisdom into practice.

188. See, e.g., Kagan, *supra* note 6 (noting pervasiveness and influence of Landis’s arguments).

189. See SCHOENBROD, *supra* note 3, at 146.

190. LANDIS, *supra* note 3, at 76.

