

PULLING THE REINS ON *CHEVRON*

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I. INTRODUCTION

Over the past century, the United States has seen a dramatic rise in the power of administrative agencies, or as some call them: “the fourth branch of government.”¹ Unbeknownst to most Americans, administrative agencies have acquired growing authority that allows them to make a direct and unchecked impact into our everyday lives.

1. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 8 (2009).

This authority ultimately stems from one major United States Supreme Court decision, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.² The doctrine that followed this decision, called *Chevron* deference, is arguably unconstitutional because it gives agencies powers normally reserved to the three branches of government: executive, legislative, and judicial. This disruption of power is most often seen in lower federal courts that have increasingly deferred to an agency's interpretation of a legislative provision, causing administrative law to become increasingly more complex.

This Comment intends to highlight the problems of this growing leviathan and provide solutions to combat this usurpation of power by the regulatory agencies. This Comment will proceed in the following order: first, it will demonstrate how administrative law has developed over time; second, it will draw attention to the current problems in the United States' administrative state; third, it will present solutions through legislative and judicial action; and, finally, it will conclude by presenting a proposal that will provide the necessary foundation for bringing our federal government back to what the Founding Fathers envisioned.

II. HISTORY

A. PRE-CHEVRON

Before *Chevron* was decided, *Skidmore v. Swift & Company* was the landmark case for decades regarding the extent of administrative agencies' powers.³ In *Skidmore*, seven employees brought an action under the Fair Labor Standards Act of 1938 (FLSA) to recover overtime pay.⁴ As a condition of their employment, these employees were required to remain on company premises three to four nights per week.⁵ The issue in this case was whether these extra nights constituted working time and, thus, overtime under the FLSA.⁶ Because the FLSA did not address this issue, the office of the Administrator published guidance that supported the employer's position that the employees' "waiting time" did not actually constitute "working time."⁷ Although the United States Supreme Court ruled in favor of the employees and

2. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

3. *See generally* *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

4. *Id.* at 135.

5. *Id.*

6. *Id.* at 136.

7. *Id.* at 136, 138-39.

against the Administrator's interpretation of the issue, the Court used this case to devise an important deference standard for future cases.⁸

In the opinion, the Court gave added weight to the agency's interpretation because its opinion "constitute[d] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."⁹ The Court expounded upon this reasoning by listing the factors that can help determine the amount of weight given to an agency's interpretation, which include: "the thoroughness evident in its consideration, the validity of its reasoning," its consistency with its interpretation over time, and other persuasive powers of the agency.¹⁰ Thus, as one scholar succinctly phrased it, the Court created "*Skidmore* weight" for agency interpretations.¹¹

The Administrative Procedure Act (APA) was the next major milestone in the development of administrative law.¹² Enacted in 1946, this Act granted judicial oversight over all agency actions to protect citizens from the increasing number of regulations agencies made after Franklin D. Roosevelt's New Deal.¹³ Section 706 of the APA states that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."¹⁴ Section 706 further provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"¹⁵ Thus, by enacting the APA, Congress intended reviewing courts to resolve legal issues, not agencies as seen in modern precedent or more recent cases.¹⁶ However, as the following will show, the Court slowly turned its back on Congress's intent.

8. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

9. *Id.*

10. *Id.*

11. Peter L. Strauss, "*Deference*" Is Too Confusing—Let's Call Them "*Chevron Space*" and "*Skidmore Weight*," 112 COLUM. L. REV. 1143, 1145 (2012).

12. See Administrative Procedure Act, 5 U.S.C. §§ 500-706 (2012).

13. Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 789 (2010).

14. 5 U.S.C. § 706 (2012); Beerman, *supra* note 13, at 788.

15. 5 U.S.C. § 706(2)(A) (2012); Beerman, *supra* note 13, at 788.

16. See Beerman, *supra* note 13, at 788.

B. *CHEVRON* AND BEYOND

Almost forty years after the APA's enactment, the Court released a decision that drastically altered the administrative law landscape for years to come. In *Chevron*, the Court analyzed whether the Environmental Protection Agency (EPA) utilized a reasonable interpretation of the term "stationary source" under the Clean Air Act.¹⁷

To determine if the EPA reasonably interpreted this term, the Court established a two-step process for analyzing agency interpretations.¹⁸ Step One calls for the reviewing court to use the ordinary tools of statutory construction to determine on a *de novo* basis whether Congress has spoken clearly on the question at issue.¹⁹ Pursuant to Step Two, if the statute is unclear, the court must defer to the agency's interpretation if it is a reasonable one.²⁰ The court must defer to an agency's reasonable interpretation even if that court would have arrived at a different interpretation.²¹ This two-step process recognizes that if Congress intentionally left gaps in the law, then it was delegating its lawmaking authority to the relevant agency to fill in any holes.²²

Congress may leave gaps in legislation either explicitly or implicitly.²³ Congress explicitly delegates authority to an agency when it enacts legislation with gaps in the statute.²⁴ When this occurs, the reviewing court must give the agency's interpretation controlling weight, unless it is "arbitrary, capricious, or manifestly contrary to the statute."²⁵ In effect, the Court in *Chevron* blended the *Skidmore* and APA standards together to form a new standard for when Congress explicitly delegates its authority to an agency. Alternatively, Congress implicitly delegates authority to an agency when it leaves an ambiguity in the statute for an agency to resolve.²⁶ The reviewing court may not substitute or alter the

17. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 840-41 (1984).

18. *See id.* at 842-44.

19. *Id.* at 842.

20. *Id.* at 843.

21. *Id.* at 843-44.

22. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

23. *Id.*

24. *Id.*

25. *Id.* at 844.

26. *Id.*

agency's interpretation when this occurs unless the court determines it was unreasonable.²⁷

After the Court's ruling in *Chevron*, it developed and further complicated *Chevron's* original two-step process (the *Chevron* Doctrine) in the cases that followed: *Auer v. Robbins*, *United States v. Mead Corporation*, and *National Cable & Telecommunications Association v. Brand X Internet Services*. First, in *Auer*, the Court analyzed the Fair Labor Standards Act's classification of employees exempt from overtime pay.²⁸ Before litigation began, the Secretary of Labor promulgated regulation that created a "salary-basis" test for determining the status of an employee.²⁹ Then, during litigation, the Secretary provided an interpretation of this test in the form of a legal brief.³⁰ The Court accepted this interpretation as controlling because it was "a creature of the Secretary's own regulations . . ."³¹ Thus, the Court expanded the *Chevron* Doctrine for when agencies interpret their own regulations, thereby giving even more deference to agencies, unless the interpretation is "plainly erroneous or inconsistent with the regulation."³²

Next, the Court extended the *Chevron* Doctrine in *Mead Corp.* by prescribing when the courts may apply this two-step process.³³ Some scholars call this added nuance "*Chevron* Step Zero"³⁴ because courts must now first determine if *Chevron* deference even applies.³⁵

The issue in *Mead Corp.* involved the Secretary of Treasury's interpretation that day planners fell within the term "diaries" under the United States Harmonized Tariff Schedule.³⁶ The Court held that two requirements must be met for *Chevron* deference to apply.³⁷ Under the first requirement, the Court noted that Congress intended to delegate rulemaking authority that carried

27. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

28. *Auer v. Robbins*, 519 U.S. 452, 454-55 (1997).

29. *Id.* at 455.

30. *Id.* at 462.

31. *Id.* at 461.

32. *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

33. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

34. Kurt Eggert, *Deference and Fiction: Reforming Chevron's Legal Fictions After King v. Burwell*, 95 NEB. L. REV. 702, 721 (2017).

35. *Id.*

36. *Mead Corp.*, 533 U.S. at 225.

37. *Id.* at 226-27.

the force of law to the interpreting agency.³⁸ Thus, contrary to what the Court concluded in *Chevron*, courts may no longer assume implicit congressional intent from ambiguous or vague statutes.³⁹ Instead, a court must find that Congress delegated authority through avenues such as adjudication or notice-and-comment rulemaking.⁴⁰ Second, the agency must have made laws through interpretation by following that delegated authority.⁴¹ In addition to explaining when *Chevron* deference should apply, the Court also ruled in favor of the Secretary of Treasury's interpretation without applying *Chevron* deference because *Skidmore* weight is still applied.⁴² Thus, under the Court's reasoning, when *Chevron* does not apply, an agency's interpretation still receives additional *Skidmore* weight.⁴³

Finally, in *Brand X*, a case from the United States Court of Appeals for the Ninth Circuit, the Supreme Court considered the Federal Communications Commission's (FCC) interpretation that cable modem services do not fall within the term "telecommunication services" under the Communications Act of 1934.⁴⁴ The particularly interesting aspect of this case is that the Ninth Circuit had already determined in a previous case that the best interpretation of the term included cable modem services.⁴⁵ Thus, when *Brand X* reached the Ninth Circuit, the court ruled against the FCC's interpretation by relying on *stare decisis*.⁴⁶ However, the Supreme Court went in a different direction. Although the Court admitted that the Ninth Circuit's interpretation was the *best* interpretation of "telecommunication services," the Court also noted that it was not the *only* interpretation of the term.⁴⁷ Thus, the Court held that if an agency makes a permissible interpretation, that interpretation trumps any previous court interpretation, even if a prior court interpreted

38. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

39. Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L. J. 921, 953 (2006).

40. *Mead Corp.*, 533 U.S. at 227.

41. *Id.* at 226-27.

42. *Id.* at 237-38.

43. *Id.* at 237-38.

44. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973-74 (2005).

45. AT&T Corp. v. Portland, 216 F.3d 871, 880 (9th Cir. 2000).

46. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003).

47. *Nat'l Cable*, 545 U.S. at 984-85.

the statute in the best possible manner.⁴⁸ The Court supported its reasoning by saying that a court's prior statutory construction only trumps an agency's interpretation of that statute when the court has found the only possible interpretation.⁴⁹

III. ANALYSIS

A. *CHEVRON* AND SEPARATION OF POWERS

Chevron deference strikes at the heart of an ideal that is central to the United States: the separation of powers between the legislative, judiciary, and executive branches of government. The Framers of the Constitution were well aware of the importance of separation of powers. For instance, the Constitution's Bill of Attainder Clause prohibits the legislature from exercising the judiciary function by having a legislative trial.⁵⁰ In *Marbury v. Madison*, the Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁵¹

John Locke, whose views influenced the Constitution, argued this concept.⁵² Locke argued that separation of powers between the executive and legislative branch gives strong incentives to the legislature to impose clear limits on governmental authority, instead of vague delegations of power.⁵³ As one scholar stated, "[W]hen a lawmaker controls the interpretation of its own laws, an important incentive for adopting transparent and self-limiting rules is lost because any discretion created by an imprecise, vague, or ambiguous law inures to the very entity that created it."⁵⁴ Thus, because agencies currently control the interpretation of legislative regulation, there is no pressure on Congress to pass clear and concise rules.

In addition to violating the fundamental principle of

48. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983-85 (2005).

49. *Id.* at 982.

50. See U.S. CONST. art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed."); *United States v. Brown*, 381 U.S. 437, 442 (1965); see also *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring) (pointing to the Constitution's separation of powers by illustrating how the Bill of Attainder Clause was designed to prevent the legislative branch from exercising judicial power).

51. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

52. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 646-47 (1996).

53. *Id.* at 647.

54. *Id.* at 647-48.

separation of powers, agencies have accumulated a substantial amount of power over the years by playing an increasing role in drafting the laws passed by Congress.⁵⁵ For example, empirical research by scholar Christopher Walker illustrated that:

Nearly eight in ten (78%) indicated that their agency always or often participates in a technical drafting role for the statutes it administers (with another 15% indicating sometimes), and 59% reported that their agency always or often participates in a policy or substantive drafting role for the statutes the agency administers (with another 27% indicating sometimes).⁵⁶

Further, as noted by the Administrative Conference of the United States, Congress frequently asks for technical assistance by asking agency employees to review or draft legislation to the congressional requester's congressional specifications.⁵⁷

Although it may appear inconsequential that agencies play an increasing role in drafting legislation, it becomes more insidious upon examining our current governmental power scheme as a whole. In our highly polarized political climate, Congress is incentivized to delegate increasing authority to agencies for reasons including shifting the blame for unfavorable legislation, avoiding unfavorable compromises, providing benefits to particular constituents, or appeasing donors.⁵⁸

In addition to Congress's incentive to pass vague legislation, empirical research provides that agency officials often recommend drafting legislation in "broad" or "flexible" terms to help the agency

55. Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight,"* 112 COLUM. L. REV. 1143, 1146 (2012) (recognizing the increased presence in the law-making process by noting that "[t]he agency may have helped to draft the statutory language and was likely present and attentive throughout its legislative consideration. Its views about statutory meaning may have been shaped in the immediate wake of enactment, under the enacting Congress's watchful eye.").

56. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1037 (2015); see also Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 758 (2014) (noting that "25% and 34% of our respondents told us that first drafts are typically written by, respectively, the White House and agencies, or policy experts and outside groups, like lobbyists.").

57. Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015).

58. DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 30-32 (1999).

smoothly implement the statute.⁵⁹ Courts have also increasingly deferred to agencies following the *Auer* decision, further highlighting this problem. If an agency drafts the legislation it will ultimately interpret, it no longer needs to fear judicial scrutiny. Justice Scalia noted this problem specifically: “[D]eferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking and promotes arbitrary government.”⁶⁰

B. *CHEVRON* AND POLITICS

Chevron deference is problematic because it enables circuit and district court judges to use their appointed position to uphold laws that align with their political beliefs.⁶¹ One of the largest empirical studies of all circuit courts found that agency interpretations are more likely to be upheld under *Chevron* deference (77.4%) than *Skidmore* (56%) or *de novo* review (38.5%).⁶² In terms of the two-step process, circuit courts found a clear statutory interpretation at Step One only 30% of the time.⁶³ Of this 30%, the agencies won 39% of the time.⁶⁴ Alternatively, the circuit court ruled in the agency’s favor 93.8% of the time when an agency’s interpretation made it to Step Two.⁶⁵

These scholars further refined the agency win-rates to determine if political affiliation affected the application of *Chevron* deference. When they considered a politically liberal agency interpretation, conservative and liberal judges applied *Chevron* deference at an equal rate (95% of the time).⁶⁶ However, when these courts were alternatively faced with a conservative agency interpretation, liberal judges applied *Chevron* deference as low as

59. Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1412 (2017).

60. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

61. Kent H. Barnett et. al., *The Politics of Selecting Chevron Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 601-02 (2017).

62. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

63. Kent Barnett & Christopher J. Walker, *Chevron Step Two’s Domain*, 93 NOTRE DAME L. REV. 1441, 1461 (2017).

64. *Id.*

65. *Id.*

66. Kent H. Barnett et. al., *The Politics of Selecting Chevron Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 608 (2017).

74% of the time.⁶⁷ On the other hand, conservative judges continued to apply *Chevron* deference at the same rate (90%) for conservative agency interpretations.⁶⁸

This Comment does not intend to illustrate that conservative federal judges are less ideological than liberal federal judges. Human nature is quick to show that we all share biases and overcoming them is difficult regardless of whether a person is conservative or liberal. Instead, this Comment highlights these statistics to show the possibility for federal judges to use certain judicial tools to impact the results of a case in their political favor. Further, as of Spring 2018 when the empirical study mentioned above was performed, the current number of active liberal judges outnumbered the number of conservative federal judges by more than 25%.⁶⁹ It is possible that if the number of conservative and liberal judges were reversed, or if the United States was in a different political climate during the sample period, the statistics would show that conservative judges are equally biased. At the very least, the study also implies that judges can use *Chevron* to quickly clear their overloaded dockets without having to expend much effort into writing a legally sound opinion.⁷⁰

C. RECENT LEGISLATION

In an attempt to solve these problems, Congress recently introduced two new bills: the Separation of Powers Restoration (SPR) Act and the Regulations from the Executive in Need of Scrutiny (REINS) Act.⁷¹ The House of Representatives first passed the SPR Act on July 12, 2016.⁷² Representative John Ratcliffe introduced the bill and summarized the theory behind it:

67. Kent H. Barnett et. al., *The Politics of Selecting Chevron Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 608 (2017).

68. *Id.*

69. *Biographical Directory of Article III Federal Judges, 1879-present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited April 11, 2019). At the time of writing this Comment in the Spring of 2018, there were 430 judges appointed by Democratic presidents and 302 judges appointed by Republican presidents. *Id.*

70. In other words, because agencies almost always win if the issue goes to Chevron Step-Two, judges who want to quickly decide the case could just rule that Step One and Step Two apply and rule in favor of the agency's interpretation without risking any blowback from an appellate court. Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 831 (2010).

71. H.R. Res. 4768, 114th Cong. (2016); H.R. Res. 26, 115th Cong. (2017).

72. H.R. Res. 4768.

The constituents I represent aren't just frustrated with the enormous quantity of regulations being rolled out by unelected federal bureaucrats—they're fed up with the lack of accountability administrative agencies have when they make all these rules out of thin air. For too long, federal regulators have been allowed to run free and loose in their interpretation of the laws that Congress writes, resulting in a dangerous and unconstitutional culmination of power. The government works for the people—not the other way around—and I'm proud to help lead this effort to ensure the separation of powers is respected as our Founding Fathers intended.⁷³

The SPR Act would modify the scope of all judicial review of agency actions by requiring courts to look at each issue *de novo*.⁷⁴ This Act would repeal *Chevron's* Step Two, and it would erase all the confusing and problematic case law that has engulfed the Step Two analysis. Further, agencies would no longer enjoy any added weight to their interpretations from *Skidmore* deference. However, the SPR Act was never enacted because it never passed the Senate.⁷⁵

Similarly, the REINS Act passed the House but never passed the Senate.⁷⁶ In contrast to the SPR Act's effect on *Skidmore* deference, the REINS Act would not alter any aspect of *Chevron* deference.⁷⁷ Instead, it would prospectively require the House and the Senate to approve any new "major rule" that an administrative agency intended to adopt.⁷⁸ A "major rule" is any rule that is likely to result in:

- (1) an annual cost on the economy of \$100 million or more (adjusted annually for inflation);
- (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or
- (3) significant adverse effects on competition, employment,

73. Iain Murray, *Stopping the Bureaucrats Requires an End to Chevron Deference*, NAT'L REV. (May 11, 2016), <http://www.nationalreview.com/corner/435277/stop-bureaucrats-ending-chevron-deference-through-sopra>.

74. H.R. Res. 4768, 114th Cong. (2016).

75. See Separation of Powers Restoration Act of 2016, S. 2724, 114th Cong. (2016).

76. See H.R. Res. 26, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny Act of 2017, S. 21, 115th (2017).

77. See generally H.R. Res. 26.

78. See *id.*

investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.⁷⁹

If a rule is not considered a “major rule,” then the agency does not need legislative approval for the rule to take effect.⁸⁰ However, the House and the Senate would still be empowered to disapprove any “non-major” agency rules at any time.⁸¹

If the House and the Senate failed to approve the agency’s “major rule” within seventy calendar days, then the agency’s rule would not come into effect.⁸² Further, the bill would require the Senate to vote on the rule within fifteen days after a Senate committee reviews it, and the bill would prohibit Congress from amending the rule.⁸³ However, a “major rule” could bypass this legislative approval process for one ninety-day period if the President decided that the rule was “necessary because of an imminent threat to health or safety or other emergency, for the enforcement of criminal laws, for national security, or to implement an international trade agreement.”⁸⁴

D. BIG BUSINESS IN BED WITH THE REGULATORS

The current regulatory state is troubling because big corporations are using agency regulations to protect their businesses through the concept of “agency capture.” Although regulators are supposed to serve the public’s interests,⁸⁵ some scholars argue that corporations and special interest groups use their financial power and political influence to sway regulators to the benefit of these groups.⁸⁶ Agency capture is a three-party triangle: an agency, the overseeing congressional committee, and a powerful interest group.⁸⁷ First, the interest group will “aggressively lobby” congressional committee members through financial contributions or endorsements to secure votes.⁸⁸ These contributions will then cause the committee members to pressure agencies to enact regulations that are favorable to the specific

79. H.R. Res. 26, 115th Cong. (2017).

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. H.R. Res. 26, 115th Cong. (2017).

85. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284 (2006).

86. *Id.*

87. *Id.*

88. *Id.*

interest groups.⁸⁹ Because the rest of Congress is oblivious to the committee's inner workings, these interest groups continue to assert unchecked influence over the agencies through the congressional committee members.

Over the years, scholars have cast doubt on whether the traditional “iron triangle” model of agency capture exists in reality.⁹⁰ Instead, scholars have tried to articulate more subtler forms of agency capture.⁹¹ One of these explanations includes the concept of a “revolving door,” in which an agency member agrees to publish favorable regulations in exchange for a high-paying industry job once the member leaves the public sector.⁹² Moreover, interest groups influence congressional oversight committees through lobbying and campaign contributions to pressure agency members.⁹³ For instance, the chair of the Securities Exchange Commission (SEC) from 1993 to 2001 stated that he consistently received threats from SEC congressional overseers that his budget would be cut if he continued pursuing aggressive regulations.⁹⁴ Thus, even the most stringent and independent agency will fall to the mercy of special interest groups if it becomes too dependent on the industry it regulates.⁹⁵

In addition to trying to influence agencies and their congressional oversight committees, interest groups work with lawmakers to draft favorable regulation under the guise of promoting the “common good.” Industry leaders pursue this strategy because increased regulations can sometimes create higher barriers to entry, which allows industry giants to maintain their current market share.⁹⁶ For example, the cigarette industry benefitted from the passage of the Family Smoking Prevention and Tobacco Control Act of 2009.⁹⁷ This Act placed cigarettes under the

89. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284 (2006).

90. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1685-86 (1975).

91. *Id.*

92. David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 512 (2013).

93. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 22 (2010).

94. *Id.* at 22-23.

95. *Id.* at 23.

96. See generally Jacob Grier, *How the FDA Is Keeping New Cigarettes Off the Market*, THE ATLANTIC (Mar. 6, 2013), <https://www.theatlantic.com/health/archive/2013/03/how-the-fda-is-keeping-new-cigarettes-off-the-market/273679/>.

97. See *id.*

Food and Drug Administration's (FDA) oversight,⁹⁸ and it forced new companies to complete the FDA's long and arduous approval process before selling their new cigarettes on the market.⁹⁹ One writer detailed the approval process, stating: "New cigarettes cannot be introduced without an order from the [FDA]. The law provides two routes to approval. One route is for completely new tobacco products and requires a highly detailed review. The other is for products that are 'substantially equivalent' to those already on the market."¹⁰⁰

At first glance, this Act may seem harmful to the tobacco industry, but both the Campaign for Tobacco Free Kids and the cigarette giant Philip Morris drafted it, forming an unlikely alliance in the process.¹⁰¹ Further, between 2009 and 2014, the FDA only approved two new cigarettes under the "new cigarette" approval process and none through the "substantially equivalent" method.¹⁰² Philip Morris undoubtedly saw this Act as a way of securing its nearly 50% market share, much to the chagrin of other tobacco companies who labeled this Act as the "Marlboro Monopoly Act."¹⁰³ One researcher even outlined Philip Morris's two-step plan by saying: "First, they make it look like they are a reformed company which really cares about reducing the toll of cigarettes and protecting the public's health; and second, they protect their domination of the market and make it impossible for potentially competitive products to enter the market."¹⁰⁴ Thus, industry interest groups can either infiltrate agencies from the inside through "agency capture," or they can promote favorable

legislation from the outside under the cloak of promoting the public interest.

98. *Family Smoking Prevention and Tobacco Control Act – An Overview*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/TobaccoProducts/Labeling/RulesRegulationsGuidance/ucm246129.htm> (last updated Oct. 31, 2018).

99. *See id.*; Brittany Hunter, *The FDA is Blocking a New E-Cigarette That Won't Explode in Your Face*, FOUND. FOR ECON. EDUC. (Nov. 27, 2018), <https://fee.org/articles/the-fda-is-blocking-a-new-e-cigarette-that-won-t-explode-in-your-face/>.

100. Jacob Grier *How the FDA Is Keeping New Cigarettes Off the Market*, THE ATLANTIC (Mar. 6, 2013), <https://www.theatlantic.com/health/archive/2013/03/how-the-fda-is-keeping-new-cigarettes-off-the-market/273679/>.

101. *Id.*

102. *Id.*

103. *Id.*

104. Paul Smalera, *Cool, Refreshing Legislation for Philip Morris*, BIG MONEY (June 8, 2009), <http://blogs.reuters.com/great-debate/2009/06/12/cool-refreshing-legislation-for-philip-morris/>.

E. DEATH OF THE NONDELEGATION DOCTRINE

The Nondelegation Doctrine is necessary for any government to maintain separation of powers. This doctrine holds that one branch of government cannot pass on its constitutionally authorized duties to another branch.¹⁰⁵ Article I of the United States Constitution establishes that all legislative powers are vested to Congress.¹⁰⁶ Although not explicitly stated within the Constitution, the Court has held that the vesting clause prevents Congress from delegating authority to the executive branch.¹⁰⁷ Although seemingly a straightforward notion, the following will show how this concept has seen a drastic transformation over the years.

The Court first analyzed this concept in *Wayman v. Southard*.¹⁰⁸ In *Wayman*, the Court considered whether Congress had the constitutional authority to delegate the ability to set rules of practice for the federal judiciary system to the courts.¹⁰⁹ The Court in dictum provided an influential definition of nondelegation that courts used for years following the decision.¹¹⁰ The Constitution assigns certain functions that are unique to one branch.¹¹¹ For instance, only the judicial branch “can adjudicate guilt in a criminal case.”¹¹² However, as one scholar pointed out, “[T]he Constitution does not *always* uniquely assign a given function to one power. Accordingly, it is not a per se violation of the nondelegation doctrine for Congress to authorize another actor to perform a function or make a decision that Congress could make for itself.”¹¹³ The difficulty is determining the boundary between constitutionally delegable and constitutionally nondelegable

105. Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 807 (1999).

106. U.S. CONST. art. I, § 1.

107. Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L. J. 921, 926 (2006); see also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”).

108. See generally *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

109. *Id.* at 42-43; Garry, *supra* note 107, at 928-29.

110. See *Wayman*, 23 U.S. at 42-43; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 357-59 (2002).

111. See *Wayman*, 23 U.S. at 43; Lawson, *supra* note 110, at 358.

112. Lawson, *supra* note 110, at 358.

113. Lawson, *supra* note 110, at 358-59.

duties.¹¹⁴ The Court attempted to define this line by adopting a simple, but vague, test: matters concerning “important subjects” are subject to nondelegation while matters of “less interest” are delegable.¹¹⁵ Put simply, Congress is forced to make decisions that relate to the statutory scheme of important provisions.¹¹⁶

One of the first major cases where the Court tried to sort out its nondelegation test was *Marshall Field & Co. v. Clark*.¹¹⁷ There, the Court analyzed the constitutionality of the Tariff Act of 1890, which authorized the president to implement tariffs on imported goods within designated ranges.¹¹⁸ Further, this case involved a type of rulemaking called contingent legislation.¹¹⁹ As the name suggests, this type of legislation only takes effect if some uncertain future event occurs.¹²⁰ In this case, foreign countries placed reciprocally unequal trade restrictions on United States exporters.¹²¹ Interestingly, the majority opinion and the dissent employed the nondelegation test, but arrived at two different results.¹²² The majority believed that unreasonable trade restrictions were a matter of “less interest,” so the provision in the Act was constitutional.¹²³ Alternatively, the dissent argued that unreasonable trade restrictions were an “important subject,” and the concurrence writers would have declared the Act’s provision unconstitutional.¹²⁴

Next, in 1928, the Court implemented a new test for delegation of authority that is still used today.¹²⁵ *J.W. Hampton, Jr. & Co. v. United States* involved contingent legislation passed by Congress that granted the president the ability to alter tariffs on goods to “equalize the . . . costs of production” between America and an exporting company.¹²⁶ However, unlike in *Marshall Fields*,

114. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

115. *Id.* at 43.

116. Lawson, *supra* note 110, at 361.

117. *See generally* *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

118. *See generally id.*

119. Lawson, *supra* note 110, at 363.

120. Lawson, *supra* note 110, at 363.

121. *See Marshall Field & Co.*, 143 U.S. at 680; Lawson, *supra* note 110, at 361-62.

122. *See generally* *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

123. *Id.* at 692.

124. *Id.* at 697-700 (Lamar, J., dissenting in the judgment but concurring in the opinion).

125. Lawson, *supra* note 110, at 367.

126. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 403 (1928); Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L. J. 921, 930 (2006).

this Act gave more latitude to the president to determine the costs of production than the pre-set ranges seen in *Marshall Fields*.¹²⁷ The Court used an “intelligible principle” test which provided that courts must measure the amount of discretion delegated from the legislative branch to the executive branch “according to common sense and the inherent necessities of the governmental coordination.”¹²⁸

The Court has only struck down two statutes for violating the principle of nondelegation since *J.W. Hampton, Jr. & Co.*¹²⁹ This has led some scholars to conclude that the principle of nondelegation is firmly dead and buried.¹³⁰ Indeed, the Court is enthralled with the notion that agency efficiency is more important than holding fast to the principles enshrined in the Constitution.¹³¹ Only Justice Thomas seems to recognize how far the legislative and executive branches have strayed off the intended path.¹³²

However, this was not always the case. In 1996, Congress attempted to resurrect this doctrinal idea of nondelegation in some fashion through the passage of the Congressional Review Act (CRA).¹³³ This Act authorizes Congress to nullify any regulation it finds to be “unauthorized, unnecessary, or unwise before they can go into effect.”¹³⁴ Congress nullifies a proposed rule only after it passes an identical joint resolution through both houses of Congress, and the President signs it.¹³⁵ Further, Congress has

127. Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L. J. 921, 930 (2006).

128. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 406, 409; see also Garry, *supra* note 127, at 929-30.

129. See, e.g., *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935).

130. Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 619-20 (2017).

131. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (noting that “[d]elegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.”); see also *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

132. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (stating how he was “not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”).

133. Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL’Y 187, 190-91 (2018).

134. *Id.* at 198.

135. *Id.*

sixty legislative session days from the day the agency publishes the proposed rule to nullify it, or it will become effective law.¹³⁶ Lastly, an agency may not reissue a proposed rule that is substantially the same as a rejected rule “unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”¹³⁷

Because of its formulation, the CRA has scarcely been used since its implementation in 1996. This is because, as one writer put it, “the very president who approved the regulation would need to sign the legislation overturning it.”¹³⁸ Thus, because Congress would need two-thirds approval to override the President’s veto, this power has only been used to nullify actions the leaving president enacted just before the newly-elected president replaced him.¹³⁹ For example, President Bush used the CRA to nullify one regulation published by the Occupational Safety and Health Administration (OSHA) concerning ergonomic safety under President Clinton’s administration.¹⁴⁰ President Trump later used the CRA to rollback fifteen agency provisions published under the Obama Administration.¹⁴¹ Except for these two instances, Congress has failed to successfully nullify any other agency regulations.¹⁴²

IV. PROPOSAL

To solve the problems analyzed above, this Comment urges Congress to pass a synthesized version of the REINS Act and the SPR Act. First, this Comment adopts the majority of the ideas presented in the REINS Act. This Comment’s proposal requires that all agency rules that impact the economy by \$100 million (indexed for inflation) or more must be approved by both the House

136. 5 U.S.C. § 801(a)(3) (2012).

137. 5 U.S.C. § 801(a)(5)(b)(2) (2012).

138. Stuart Shapiro, *The Congressional Review Act, Rarely Used and (Almost Always) Unsuccessful*, HILL (Apr. 17, 2015), <http://thehill.com/blogs/pundits-blog/law-maker-news/239189-the-congressional-review-act-rarely-used-and-almost-always>.

139. *Id.*

140. *Id.*

141. Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL’Y 187, 190 (2018).

142. See Amber Phillips, *The Obscure Law Allowing Congress to Undo Obama Regulations on Guns and Coal in A Matter of Days*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/03/the-obscure-law-allowing-congress-to-undo-obama-regulations-on-guns-and-coal-in-a-matter-of-days/?utm_term=.cb1c93cfd24b.

and the Senate.¹⁴³ The agency's rule must be approved within fifteen calendar days after the relevant Senate and House committees complete their review of the rule. Further, the Office of Management and Budget (OMB) will do the calculations to determine if an agency's proposed rule meets the \$100 million threshold. After congressional approval, the rule will be presented to the president for approval or veto. Like normal bills, Congress can override the president's veto with a two-thirds majority vote. Further, and just as in the version of the REINS Act that passed the House, the agency rule only needs to be approved by a simple majority in Congress. Additionally, neither the Senate nor the House may use dilatory tactics, such as a filibuster, to delay voting on the approval of the rule.¹⁴⁴ All "major" agency rules approved by Congress cannot be challenged by the courts, except to challenge the rule's constitutionality.

Second, agency rules that impact the economy by less than \$100 million do not need legislative approval. However, the legislature may call to disapprove certain "non-major" rules if both the House and the Senate reach a simple majority. Further, any litigant may challenge the agency's interpretation of the relevant statute for all "non-major" rules, and the reviewing court must apply a *de novo* standard to the agency's interpretation. The following will (1) present the rationale behind the "major" agency rule in this proposal, (2) offer support for the rationale behind this proposal's depiction of "non-major" agency rules, (3) illustrate the arguments against this Comment's proposal, and (4) provide a defense against these critiques.

A. RATIONALE BEHIND PROCESS FOR "MAJOR" AGENCY RULES

First, the principle of nondelegation is a significant rationale behind this Comment's proposal for legislative approval of "major" agency rules. The nondelegation doctrine prevents Congress from delegating legislative power to administrative agencies, and it ensures that Congress is held accountable for the policy behind regulatory provisions.¹⁴⁵ However, over the years, the judiciary

143. US INFLATION CALCULATOR, <http://www.usinflationcalculator.com/> (last visited Apr. 14, 2019) (calculating that \$100,000,000 in 2011 equals \$109,595,934.90 in 2018).

144. Jonathan H. Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 22 (2013).

145. Adler, *supra* note 144, at 10; see *Loving v. United States*, 517 U.S. 748, 758 (1996) (noting that "[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress and may not be conveyed to another branch

has failed to check the legislature's ever-growing delegation of power.¹⁴⁶ Delegation essentially allows Congress to pass more responsibility for legislation to the executive branch.¹⁴⁷ Without any real type of nondelegation principal, Congress only needs to provide an "intelligible principle" to agencies to guide their regulatory provisions.¹⁴⁸ Thus, because today's agencies are making rules that effectively result in new legislation, members of Congress are able to shift the blame from themselves to the agencies.¹⁴⁹ For instance, if the EPA takes a politically unpopular position, the legislature can blame it for harming constituents.¹⁵⁰ This Comment's proposal would instead place the responsibility back on Congress's shoulders by forcing it to conduct an on-the-record voting process.¹⁵¹

Second, implementing an approval process for "major" rules would restore the balance of powers between the three different branches. Even some members of the Court have recognized this growing problem and have called for the restoration of this precious balance.¹⁵² Justice Thomas echoed this sentiment: "I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."¹⁵³ Throughout the twentieth and early twenty-first centuries, America lost its way in its development of administrative law. Unfortunately, our country

or entity.") (citations omitted).

146. Adler, *supra* note 144, at 10; see *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

147. Adler, *supra* note 144, at 10.

148. Adler, *supra* note 144, at 10.

149. See David Schoenbrod, *How REINS Would Improve Environmental Protection*, 21 DUKE ENVTL. L. & POL'Y F. 347, 349 (2011).

150. *Id.*

151. Jonathan H. Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 30 (2013).

152. *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part) (noting that, "[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (writing that, "[t]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.").

153. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring).

places far more value in achieving governmental efficiency than in preserving the personal liberties of every citizen.

More specifically, when there is no separation of powers between the legislative and executive branches, the laws become tyrannical and arbitrary.¹⁵⁴ As explained by James Madison, the accumulation of three powers into one branch of government is the very definition of tyranny.¹⁵⁵ The current state of American administrative law presents a serious constitutional problem because agencies are allowed to enforce, create, and interpret their own laws.¹⁵⁶ We as a society must recognize the need for that individual freedom must always outweigh the call for a larger governmental influence.

Third, this Comment's proposal intends to encourage members of Congress to curb regulatory spending by forcing them to take more ownership in the approval and disapproval of excessively expensive new "major" agency rules. For instance, the National Association of Manufacturers released a report that illustrated how the total cost of federal regulations amounted to a little over \$2 trillion.¹⁵⁷ This resulted in an average cost burden of \$233,182 per U.S. company (21% of the average payroll).¹⁵⁸ This Comment's proposal would increase public awareness of the tremendous cost of regulation, and it would provide an extra control function to ensure that members of Congress, who are directly elected by the people, truly believe that the benefits of "major" regulations are worth more than their costs.

B. RATIONALE BEHIND *DE NOVO* JUDICIAL REVIEW FOR MINOR AGENCY RULES

Lower courts have a tendency to use *Chevron* deference to uphold regulation that aligns with a judge's personal and political

154. CHARLES BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent, trans., Cosimo Classics 2011) (1750).

155. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 294 (Dover Thrift Ed. 2014).

156. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984-85.

157. Jay Timmons, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, NAT'L ASS'N OF MFRS., <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Executive-Summary.pdf> (last visited Jan. 7, 2019).

158. *Id.*

beliefs.¹⁵⁹ *De novo* review, however, requires courts to use a well-reasoned approach to reach its conclusions, instead of referring vaguely to *Chevron's* two-step test to reach a certain result. Further, employing a *de novo* review would encourage both legislative drafters and their agency helpers to write clear statutes that will withstand judicial scrutiny.

Next, repealing *Chevron* deference will also restore our government's system of separation of powers. Although the Framers could not have envisioned the rise of today's administrative state, they undoubtedly foresaw the possibility of one of the three branches wielding all governmental power. Repealing *Chevron* deference will provide various benefits, such as allowing political representation from a wide range of differing interests, holding the government more accountable, and promoting stability by preventing unchecked lawmaking decisions.¹⁶⁰ Thus, we as a nation must act by demanding the repeal of *Chevron* deference and restoring the authority of the judiciary to act as a check on the executive branch.

Lastly, repealing *Chevron* deference will discourage agencies from employing aggressive and unsubstantiated interpretations for congressional laws. Currently, agencies have a strong incentive to make aggressive interpretations because they lead to more power, and courts do little to check these interpretations.¹⁶¹ As described in the empirical research, two in five rule drafters feel more confident to be aggressive in their regulatory decisions if they know that *Chevron* deference will be applied instead of *Skidmore* weight or *de novo* review.¹⁶² Congress cannot be expected to draft clear and comprehensive rules for every law it passes that agencies will then have to interpret. Instead, Congress must restore the judiciary's power to check the agencies that try to abuse their authority.

C. ARGUMENTS AGAINST "MAJOR" RULE PART OF PROPOSAL

This Comment's proposal has its fair share of critics and

159. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

160. See, e.g., Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 695-96 (2006).

161. Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1419 (2017).

162. Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1063 (2015).

skeptics. Critics against the “major” rule proposal present three main critiques, which include: its impracticality, its unconstitutionality, and its troublesome process for calculating \$100 million to reach “major” rule status. First, scholars are quick to point out how congressional approval for “major” rules would place a heavy burden on Congress.¹⁶³ For example, agencies passed 126 provisions that qualified for “major” rule status during the 111th Congress.¹⁶⁴ However, during that same meeting, the Senate met only 349 days and the House met only 286 days.¹⁶⁵ Thus, on average, the Senate would have needed to vote on a “major” rule once every 2.8 session days, while the House would have needed to vote on a “major” rule once every 2.3 session days.¹⁶⁶ Congress lacks the necessary time and expertise to vote intelligibly on rules that require precise understanding of the relevant agency issues in such a short span of time.¹⁶⁷ Although advocates for congressional approval, like Senator Rand Paul, point to eliminating wasted time spent on ceremonial bills, this is not a realistic possibility.¹⁶⁸ Members of Congress do not even spend *hours* debating the merits of a bill implementing “National Chess Day.”¹⁶⁹ However, Congress would need *days or weeks* to debate the latest “major” rule from the Environmental Protection Agency.¹⁷⁰

Second, other critics argue that requiring Congress to approve “major” rules is unconstitutional.¹⁷¹ Specifically, they argue that this type of congressional approval resembles a one-house veto which the Supreme Court declared unconstitutional in *I.N.S. v. Chadha*.¹⁷² In *Chadha*, the Court ruled on the constitutionality of the Immigration and Nationality Act (INA).¹⁷³ The INA allowed the Immigration and Naturalization Services (INS) to suspend deportation of an illegal alien pursuant to the Attorney General’s

163. See Ronald M. Levin, *The Reins Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1455 (2015).

164. Jonathan R. Siegel, *The Reins Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 175 (2013).

165. *Id.*

166. *Id.*

167. *Id.* at 178.

168. *Id.* at 177.

169. Siegel, *supra* note 164, at 177; see S. Res. 255, 112th Cong. (2011) (enacted); 157 CONG. REC. S5269 (daily ed. Aug. 2, 2011) (illustrating passage without debate).

170. See Siegel, *supra* note 164, at 177.

171. Siegel, *supra* note 164, at 134.

172. Siegel, *supra* note 164, at 134; *INS v. Chadha*, 462 U.S. 919, 928 (1983).

173. *Chadha*, 462 U.S. at 923-24.

discretion.¹⁷⁴ However, this suspension could be vetoed by either the House or the Senate.¹⁷⁵ Here, the INS wanted to suspend the deportation of Jagdish Chadha.¹⁷⁶ The House vetoed this suspension, and the INS was forced to resume Chadha's deportation.¹⁷⁷ The Court ultimately ruled that Congress violated the principle of bicameralism and the Constitution's Presentment Clause by passing an act that allowed for a legislative veto of actions of the executive branch.¹⁷⁸ Thus, as one scholar put it, the problem with requiring congressional approval for "major" rules is that "it would accomplish virtually the same result as the 'traditional' one-house veto—namely, it would enable a single house of Congress to nullify an agency rule, regardless of the wishes of the other house, let alone the President."¹⁷⁹

Finally, other scholars argue that regulatory agencies will try to "game the system" by ensuring that their policies do not reach the \$100 million threshold.¹⁸⁰ The tactics to avoid the \$100 million limit could include altering the characteristics of the regulation or passing the regulation in multiple stages.¹⁸¹ Further, these problems will only be exacerbated in times when different political parties control Congress and the Presidency. Thus, critics conclude, this type of proposal provides no answer to the practical problems that will arise after its implementation.

D. ANSWERING OBJECTIONS RAISED AGAINST "MAJOR" RULE PART OF THE PROPOSAL

First, the argument that Congress lacks the time and resources to approve "major" rules implicitly assumes that all of these regulations are necessary or that less costly regulation could not achieve the same result. As seen both above and in our daily lives, there are numerous governmental policies that are superfluous and lack any sense.¹⁸² This critique also misses the overall goal of this Comment's proposal: to place more

174. *INS v. Chadha*, 462 U.S. 919, 922-24 (1983).

175. *Id.*

176. *Id.* at 924.

177. *Id.* at 928.

178. *Id.* at 956-58.

179. Ronald M. Levin, *The Reins Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1468 (2015).

180. Siegel, *supra* note 164, at 180.

181. Siegel, *supra* note 164, at 180.

182. *See Over-regulated America*, ECONOMIST (Feb. 18, 2012), <https://www.economist.com/node/21547789>.

responsibility in the hands of elected officials, rather than appointed agency heads. For example, in a typical Fortune 500 company,¹⁸³ regular employees have the authority to make the company's day-to-day decisions, but need approval from the board of directors for decisions that would significantly impact the company.¹⁸⁴ As one scholar wrote, "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."¹⁸⁵ Even if Congress needs to spend more time reviewing and approving new proposed regulations, it is worth the congressional resources to honor the democratic principles our country was founded upon.

Next, critics that argue congressional approval of "major" rules was declared unconstitutional by *Chadha* miss a critical distinction between *approval* of a proposed "major" rule and the *veto* of an enacted agency rule.¹⁸⁶ This Comment's proposal differs from the Court's ruling in *Chadha* for one important reason: the timing of the effectiveness of the proposed "major" rule.¹⁸⁷ In *Chadha*, the Attorney General acted under authority already granted to him by the INA.¹⁸⁸ Therefore, the House vetoed a legally enacted and effective agency rule and made it ineffective.¹⁸⁹ Under this Comment's proposal, an agency's "major" rule will not become effective until after both Congress approves the rule and the President gives his signature of approval.¹⁹⁰ The agency's "major" rule remains a mere proposal until then. In other words, Congress effectively treats the agency's proposal as any other regular bill¹⁹¹ and does not grant any power until the "major" rule completes the approval process.

Lastly, critics make a valid point by noting that agencies might try to "game the system" by passing their regulations in

183. Jonathan H. Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 35 (2013).

184. *Id.*

185. *Id.*

186. Jonathan R. Siegel, *The Reins Act: Constitutional, but a Bad Idea*, 42 ADMIN. & REG. L. NEWS 9, 10 (2017).

187. Siegel, *supra* note 164, at 151-52.

188. *INS v. Chadha*, 462 U.S. 919, 923 (1983).

189. Siegel, *supra* note 186; Siegel, *supra* note 164, at 151.

190. Siegel, *supra* note 164, at 151-52.

191. Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL'Y 187, 252 (2018).

various phases to avoid the \$100 million threshold. The force of this criticism will fall on the OMB. This proposal will also implicitly ask the OMB to analyze whether certain regulations just resemble normal day-to-day rules, or whether they constitute a larger and identifiable unit of regulations. Therefore, some “major” rules might inevitably be passed under the guise of several “non-major” rules, but it is more likely that honest OMB employees will be able to tell the difference between the two types of rules. Further, citizens could sue an agency to challenge whether it released a “major” rule instead of just a “non-major” one. Thus, this will not turn into a significant problem as long as the OMB continues to perform its duties with integrity and normal citizens diligently adjudicate agencies that try to circumvent the \$100 million threshold.

E. ARGUMENTS AGAINST “NON-MAJOR” RULE PART OF PROPOSAL

In addition to critics disagreeing with this Comment’s proposal for “major” rules, critics also disagree with repealing *Chevron* deference for “non-major” rules. In particular, critics point to three major problems with repealing *Chevron* deference: (1) public policy issues, (2) the accountability of the executive branch, and (3) the loss of uniformity between the various circuits. First, repealing *Chevron* deference will result in a tremendous strain on the judicial system and will take away authority from the people who are more qualified to interpret regulation. Requiring courts to conduct a *de novo* analysis would likely flood the courts with new litigants who would have lost under the existing *Chevron* deference scheme.¹⁹² A *de novo* analysis would also substantially burden the judicial system because each judge would have to conduct a thorough statutory analysis. Further, as our world becomes more and more specialized, the courts have become increasingly inept at deciphering what a statute says or how the executive branch should implement its provisions.¹⁹³ As one scholar stated, “[b]ecause such statutes are often highly complex, courts rely on agencies’ expertise to anticipate the effects of the courts’ interpretations on the regulatory scheme as a whole. Giving deference to agency expertise, courts may then select the interpretation that will best promote the program’s purpose.”¹⁹⁴

192. Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2234 (1997).

193. Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1286-87 (2008).

194. *Id.*

Thus, there is a good reason why the Court originally applied *Skidmore* weight to an agency's interpretation before the Court implemented *Chevron* deference.¹⁹⁵

Second, scholars contend that the executive branch is better suited than the judiciary for making policy decisions because of the executive's accountability to its constituents.¹⁹⁶ Unlike federal judges who are appointed, the President is elected based on the opinion of the American public, and he or she has the ability to dictate and provide guidance for the agencies' positions. The President then appoints the heads of various agencies. Thus, these regulatory bodies are still answerable to the people in some fashion.¹⁹⁷

Third, critics contend that ending *Chevron* deference will result in drastic disparities in precedent between the various circuit courts.¹⁹⁸ In other words, if the courts interpret federal statutes, then the agency's programs and provisions will inevitably take different forms between the different circuits.¹⁹⁹ A particular EPA policy should not mean one thing in Mississippi while meaning another thing in Missouri. Further, before the Court developed *Chevron*, circuit splits ran rampant across the regulatory landscape, and the Supreme Court cannot be expected to resolve all these endless conflicts.²⁰⁰

F. ANSWERING OBJECTIONS RAISED AGAINST "NON-MAJOR" RULE PART OF THE PROPOSAL

Public policy reasons, like agencies' expertise and maintaining judicial efficiency, are strong arguments for agencies receiving *Chevron* deference; however, these arguments are not strong enough to discard the foundation of our nation's

195. Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1144-45 (2012); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

196. Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 436 (2006).

197. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865-66 (1984).

198. Laurence H. Silberman, *Chevron—the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990).

199. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1112 (1987).

200. Nicholas R. Bednar & Barbara Marchevsky, *Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines*, 47 U. MEM. L. REV. 1047, 1054 (2017).

government. Modern federal rulemaking involves agencies working together with members of Congress to draft and pass legislation, and these agency employees know that their interpretations will receive deference as long as laws are written in a sufficiently vague manner. By giving deference to the entity that helps draft the legislation, the agencies essentially possess the unchecked power of all three branches of government.²⁰¹

While this Comment's proposal will result in more work for the courts and will take deference away from the people who possess more expertise, it will do so for a necessary and justified reason, namely restoring the balance of powers. Further, agencies will still have an opportunity to share their wisdom with the court during litigation. However, the courts will now have the ability to weigh the other side's arguments before choosing the agency's interpretation. Moreover, the increased economic costs the judiciary incurs will likely be offset by the economic benefits of a regulatory system that is put in check by the courts and the citizens who fight agencies' erroneous interpretations.

Second, critics do not make a strong case for why political accountability justifies giving agencies so much deference. Agency oversight from within the executive branch stems from the President, his White House staff and cabinet members, and the Office of Information and Regulatory Affairs (OIRA).²⁰² OIRA is the agency that reviews drafted and proposed regulatory provisions.²⁰³ One implicit assumption with the accountability critique is that it presupposes an oversimplified hierarchal structure that always acts for the public good.²⁰⁴ In reality, the President lacks the time and resources to monitor the various

201. Justice Scalia echoed this exact sentiment:

When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.

Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

202. Lisa S. Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 48-49 (2006).

203. OFF. OF MGMT. AND BUDGET, <https://obamawhitehouse.archives.gov/omb/oira/about> (last visited Jan. 7, 2019).

204. Bressman & Vandenbergh, *supra* note 202, at 54-55.

agencies under executive control.²⁰⁵ Similarly, White House officials and the OIRA usually only become involved with agency decisions that involve “major” rules over \$100 million.²⁰⁶ Thus, executive overseers do not usually waste their time with “non-major” day-to-day rules. As shown from responses to questionnaires from EPA employees, “OIRA and the White House did not simply refrain from involvement in low-cost rule-making. Rather, EPA respondents indicated that OIRA and the White House also exhibited selective involvement within the category of major or significant rule-makings (i.e., \$100 million or over)”²⁰⁷ Therefore, there seems to be less accountability for agency rules that are below \$100 million, or “non-major” rules. Further, and unlike the judiciary, this lack of oversight may result in agency employees being more susceptible to the added pressures of “agency capture” when implementing “non-major” rules.²⁰⁸ Thus, because there is less political accountability for “non-major” rules, the American people should have a chance to have their voices heard in court to challenge an agency’s interpretation of these types of rules.²⁰⁹

Third, *Chevron* supporters present a strong argument that *Chevron* deference is vital because it maintains uniformity within the numerous circuits. Their claims, however, do not warrant keeping *Chevron* because of how inconsistently circuit courts have applied *Chevron* deference.²¹⁰ One study found that some circuit courts applied *Chevron* deference as high as 88.6% of the time, while other circuits applied *Chevron* deference as low as 60.7% of the time.²¹¹ Further, circuit courts have applied deference on a varying basis depending on the type of case. For immigration, the Ninth Circuit applied deference only 55.9% of the time, but the

205. Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 832 (2003).

206. Lisa S. Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 67 (2006).

207. *Id.*

208. *Id.* at 88-89 (recognizing the reality that scholars need to start paying attention to the concept of agency capture).

209. This Comment also recognizes that special interest groups are also not as likely to challenge “non-major” rules that do not have much of an effect on their industry.

210. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017).

211. *Id.* at 45. The circuits applied *Chevron* deference by the following orders: D.C. Circuit (88.6%), First Circuit (87.9%), Eighth Circuit (85.7%), Federal Circuit (84.6%), Fourth Circuit (80.6%), Tenth Circuit (73.8%), Eleventh Circuit (73.2%), Third Circuit (69.9%), Ninth Circuit (67.3%), Second Circuit (66.1%), Seventh Circuit (65.3%), Fifth Circuit (64.4%), and Sixth Circuit (60.7%). *Id.* at 46.

Fifth Circuit applied it 82.4% of the time.²¹² These differing application rates are important because the overall win rate for an agency when *Chevron* deference is applied is 77.4%.²¹³ One scholar summarized these circuit discrepancies from a strategical forum-shopping standpoint by saying:

[I]f an agency seeks to bring an enforcement action to test one of its statutory interpretations, the Ninth Circuit may not be the best place to do so. Moreover, if the agency is worried about receiving *Chevron* deference, the Eighth Circuit is a promising venue because agency-win rates are similar with or without *Chevron*. Or, if the agency is confident that it will receive *Chevron* deference, the Sixth Circuit appears promising because agencies have the highest win rates under *Chevron* in that circuit.²¹⁴

Therefore, in sum, although critics present a seemingly compelling argument for keeping *Chevron* deference intact, the benefits of keeping *Chevron* deference do not outweigh its disadvantages.

V. CONCLUSION

Our Founding Fathers were deeply aware of the dangers of a tyrannical and unchecked government. We, as a nation, have lost our way and have abandoned some of the fundamental ideals that helped form our country. However, it is not too late for us to reverse our path and implement a strategy that will regain control over our unbridled executive branch. This Comment's proposal will ensure that Congress starts taking responsibility again for our country's regulations. This proposal will also force Congress to choose which regulatory provisions are necessary and which ones are not. Further, this proposal will restore some sense of integrity to the lower federal courts; judges will no longer be able to rely on *Chevron* deference to uphold laws and regulations that align with their own political agendas.

Lastly, the problems created by *Chevron* deference are non-partisan issues. Democrats and Republicans alike can see the harm that it has caused and continues to cause. One only has to look back a few years to see how both President Obama and President Trump have used *Chevron* deference to increase their

212. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 45 (2017).

213. *Id.* at 47.

214. *Id.* at 48.

own power and pass their respective agendas. Thus, this is one of the few issues that both parties can rally around to finally come together and make positive governmental change—a change that must be made.

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