CHEVRON, AND BEYOND THE INFINITE: THE JUDICIAL AND LEGISLATIVE CHALLENGES TO THE ADMINISTRATIVE STATE

Shane LaBarge†

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

—James Madison, Federalist No. 47

Princeps, Senator, Consul, Censor, Proconsul, Pontifex Maximus, Imperator, Tribune.

—Eight distinct positions of executive, judicial, and legislative power during the Roman Republic. Caesar Augustus assumed all eight positions in his lifetime and this is generally cited by historians as the end of the Roman Republic.

"Fools ignore complexity. Pragmatists suffer it. Some can avoid it. Geniuses remove it."

—Alan Perlis

† J.D. candidate 2018, Notre Dame Law School. I would like to thank the Executive Board of Volume 43 for selecting this Note for publication, the Editors of Volume 44 for making it readable, and the bureaucrats of the administrative agencies who made this Note possible. I couldn't have done it without your hard work. Thank you.

ABSTRACT

The modern administrative state operates as a shadow legislature, lacks political accountability, and has become the primary source of law in the United States. These laws are not created and enforced by the mechanisms of bicameralism and presentment mandated by our Constitution. Instead, these laws are created in an opaque process involving technocrats, special interest groups, and constantly shifting policy agendas. Political debate is relegated to the "comments" section of administrative actions. Questions of deep political and economic significance are in the hands of the administrative agencies. There have been several judicial and legislative push-backs against the administrative state, but this Note argues that the Regulations From the Executive in Need of Scrutiny Act of 2017 ("REINs")[1] *accomplishes the most effective restoration of constitutional balance and political accountability to our government. This Note advocates that challenging the administrative state generally, and REINs specifically, should be a bipartisan effort.*

As a nominal creature of the executive branch, the administrative state defies oversight from any branch of government and any political process. First, the executive branch cannot properly oversee its agencies. Even a president entering the White House with reformist goals must deal with a bureaucracy staffed by career officials, and with an entrenched institutional memory of independence. And, perhaps worse, a president may enter the White House viewing the administrative state as an efficient means to accomplish policy goals that are currently stymied by the political process or held up in Congress. In this scenario, the executive branch is empowered at the expense of the legislative branch. Congress and the political process have been victims of an end-run. A short-cut.

Second, no solution comes from the federal judiciary. The Supreme Court of the United States held in Chevron, U.S.A., Inc v. Natural Resources Defense Council, Inc.[2] *that administrative agencies are free to implement the statutes that supposedly guide their actions subject only to highly deferential review by the courts. The Court in Chevron rightly feared the absence of democratic legitimacy and separation of powers issues inherent in unelected federal judges guiding the implementation of law and exercising what is effectively legislative power. Despite these valid concerns, the Court did not settle the underlying issues. Chevron's legacy is that unelected federal officials of the executive branch, called "administrators," exercise legislative power, rather than judges. This exacerbates the problem, avoids the political process, and acquiesces to a system in which Congress loses legitimate legislative power.*

There have been three recent challenges to the administrative state; two came from Congress and one came from the Supreme Court. The challenge from the Supreme Court and one challenge from Congress aimed at restoring oversight of the administrative agencies to the federal judiciary. The challenge from the Supreme Court came from the decision in King v. Burwell. The Court held that the high level of deference accorded to administrative agency interpretations of their governing

1 H.R. 26, 115 Cong. (2017).

2 467 U.S. 837 (1984).

statutes would not extend to questions of "deep" economic or political significance. This decision is a tacit acknowledgement that administrative agencies are exercising legislative power, and those administrative decisions that most resemble legislation may be reviewed by the judiciary.

The first challenge from Congress is the Separation of Powers Restoration Act ("SOPRA").[3] *It is legislation that would completely remove Chevron deference for all administrative decisions, not just those of "deep" significance. This would certainly roll-back the independent power of the administrative agencies, but would bring back the very concerns that caused the establishment of Chevron deference in the first place: the lack of political legitimacy and expertise that courts have when they form policy from the bench.*

The final challenge from Congress is REINs. This Note argues that REINs is the most legitimate and desirable answer to the administrative state. The challenges to the administrative state in King v. Burwell and in SOPRA take legislative power from the executive and give it to the judiciary, all while ignoring the obvious answer: legislative power belongs in the legislature. REINs ensures that Congress must approve all major regulations, which opens it up to criticism on governmental inefficiency. If this criticism is valid, then the American people should rightly reject REINs and their votes during congressional elections will reflect this. The political process and democratic legitimacy have been restored. Currently, if administrators formulate rules that the American people reject, there is no political recourse.

A key point to this Note is that rolling back the administrative state is not and should not be a partisan issue. King v. Burwell was penned by the liberals on the court. Chevron deference was born from a majority decision consisting of both liberals and conservatives. Justices Roberts and Alito made use of Chevron deference during their careers at the Department of Justice. Conservatives were angered during the Obama presidency by administrative fiat; and now liberals are similarly angered. It is in the long-term interest of both parties to roll-back the administrative state.

A change is needed, and REINs is that change. To continue to allow the proliferation of law-making from institutions far removed from the very people that these laws affect would be a grave mistake.

I. INTRODUCTION

A. Background

In 2015 the Federal Register was 81,405 pages, contained 40,500,500 words, and recorded 3,378 rules.[4] These rules governed issues ranging from the esoteric, to the technically complex, to the undeniably petty.[5] In the thousands of pages of the

3 H.R. 76, 115th Cong. (2017).

4 *Regulatory Statistics*, COLUMBIAN C. OF ARTS & SCIS., https://regulatorystudies.columbian.gwu.edu/reg-stats (last visited Dec. 4, 2017).

5 James L. Gattuso, *Ten Worst Regulations of 2015*, THE HERITAGE FOUND., (Jan. 6, 2016), http://www.heritage.org/government-regulation/commentary/10-worst-regulations-2015.

Federal Register, you will find not just regulations controlling what individuals can and cannot do,[6] but also critical decisions on how major issues of policy or authority will be handled in the United States.[7] For example, the 2015 Federal Register gave the American people the definition of the 'waters' of the United States. In the process, it also expanded the jurisdiction of the Environmental Protection Agency and the Army Corps of Engineers over those 'waters' to 20 million acres of wetland and 2 million miles of streams.[8] In the Net Neutrality Order, the nature of the internet was decided for us. The internet is actually now a utility, and as such is open to the same price, content, and service controls that your electricity and water providers are.[9] The rules just mentioned are two of many given to us by administrative agencies that are not minor regulations, or even major regulations, but instead are decisions of policy, deciding the strategic direction that this nation takes. These regulations have supplanted acts of Congress as the dominant law of the land. The powers of the legislative and executive branches are not separated, but rather concentrated. The judiciary has effectively abdicated its oversight of this new source of laws via a common law doctrine of deference established by the Court.[10] The administrative state is firmly ensconced.

In 2015 the United States Congress passed 113 measures that have been signed into law, making the U.S. Congress ninety-percent less active than regulatory bodies, which enacted 3,378 *major* regulations.[11] Many of the measures passed by Congress were recurring measures that provided funding to the previously mentioned and *very* active regulatory agencies, or otherwise transferred more power to the executive branch.[12] A notable piece of congressional legislation from 2015 is the cleverly named SPACE Act—the Spurring Private Aerospace Competitiveness and Entrepeneurship Act of 2015.[13] This Act allows for the commercial exploitation of space resources, such as those that may be found on asteroids.

The dichotomy between the scale and scope of the acts of Congress, and the scale and scope of the acts of regulatory bodies, is striking. The number of very significant rules promulgated in 2015 by regulatory bodies—rules with an economic effect greater than $100,000,000—is over three times the total number of acts signed by Congress in that same year (counting acts such as Pub.L. 114-20, which renamed a courthouse in Pittsburgh[14], and its eighty-two sister acts which served to rename buildings and facilities after eminent or well-regarded citizens).

6 *Id.*

7 *Id.* Minimum wage in certain contexts increased to $15.00 per hour; heavy coal regulatons aimed to phase out the industry; mandatory birth control insurance.

8 *Id.*

9 COLUMBIAN C. OF ARTS & SCIS., *supra* note 1.

10 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

11 COLUMBIAN C. OF ARTS & SCIS., *supra* note 1.

12 *See, e.g.*, the Trade Preferences Extension Act, which restarted the impermanent grant of enhanced power to the president while negotiating trade deals.

13 U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90 §101, 129 Stat. 704 (2015).

14 Pub. L. No. 114-20, 129 Stat. 217 (2015).

B. Summary of Argument

This Note's leading assertion is simple: the current arrangement of power, where regulatory bodies nominally acting under the authority of the executive branch have taken legislative power from the U.S. Congress and are acting as the primary legislature, is untenable. The regulatory agencies act as the maker and enforcer of the laws. Further, the common law doctrine of *Chevron* deference has removed the judiciary from the equation. In short, executive and legislative powers have concentrated in one institution, and this institution is given large deference by the judiciary. Congress's acquiescence accomplished this informal, institutional arrangement and, consequently, is now liable for very little. Legislation has become optional for accomplishing most political goals and is only needed for the most extensive public programs (such as the Affordable Care Act[15]) or when political grandstanding calls for it[16] (such as to name the Bison as the national mammal of the United States).[17]

This Note argues that this arrangement is undesirable for lack of democratic legitimacy, dearth of constitutional support; and lack of individual and collective accountability. Despite the issue of regulatory bodies appearing at first glance as a partisan issue because of the outspokenness of conservatives and members of the Republican Party, it is *not*. The party that currently does not control the Presidency is the party that is most incentivized in the short-term to agitate the exercise of sweeping administrative power (as is evinced by Justices Alito and Roberts, two critics of administrative power from the bench, but who regularly invoked *Chevron* deference while working in George H.W. Bush's Justice Department).[18] Much like executive orders, administrative regulations may be seen by a political party as being an expedient means to accomplish policy goals while bypassing Congress. This same political party may be horrified, however, when they lose the White House and suddenly the same sweeping regulatory power they embraced as a means to an end, is being used to further policies that they abhor, with no recourse found in Congress. Instead, the recourse lies in the twice-a-decade election of a single candidate. This candidate then has to deal with an entrenched and recalcitrant bureaucracy that has served multiple presidents before him or her, and agencies and commissions that have a high autonomy.

15 Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2012).

16 The bill's sponsor, Senator John Hoeven, had this to say about the bill: "Both the Senate and the House have now passed the National Bison Legacy Act, which names this noble animal as our national mammal. This is a fitting designation that recognizes the important cultural and economic role the bison has played in our nation's history." Press Release, Office of Congressman Wm. Lacey Clay, U.S. Congress Passes Clay's Legislation Recognizing Bison as National Mammal of the United States (Apr. 27, 2015). Fans of bisons celebrated when the bill passed, as did the Vote Bison Coalition, which included Cibola Farms, Cowtown Cowboy Outfitters, and Montour Grill—all of which concerned themselves primarily with the skinning, tanning, and eating of the noble mammal.

17 *National Bison Legacy Act*, NEWSMAX, (Feb. 7, 2017), http://www.newsmax.com/TheWire/national-bison-legacy-act-signed-obama/2016/05/10/id/728138/.

18 Jeffrey Toobin, *Did John Roberts Tip His Hand?*, NEW YORKER (Mar. 4, 2015), http://www.newyorker.com/news/daily-comment/did-john-roberts-tip-his-hand.

Using regulatory bodies to enact what should be sweeping legislations is a sloppy and dangerous shortcut. It undercuts both political parties' goals in the long run, and circumvents the basic political processes of bicameralism and presentment laid out in the Constitution. This political process is replaced with an administrative state that is responsible for the legislation, interpretation, and enforcement of the laws of the United States.

Even when Congress and the White House are unified under a single party, the administrative state facilitates a laundering of responsibility for government policies by politicians in Congress. For instance, a new U.S. president uses regulatory channels to enact a series of severe, wide-ranging immigration reforms. It never goes before Congress, and members of Congress up for re-election in moderate jurisdictions may simultaneously disown and own the immigration reform. By never having to vote, they receive a windfall for being able to deny that they ever supported such legislation and that they disagree with the president, all the while receiving the benefits of continuing to be a member of the very party that promulgated it. This distorts the process of democratic consent and blurs these members' true positions. A yes, no, or abstention is a singular response to a proposed law. It must be defended, retracted, or explained. When the default is "I don't decide that," despite the fact that Congress' role is to decide issues, then the value of the institution becomes questionable. This is frightening because Congress is the institution most closely aligned with the democratic will of the people, and its value has become questionable.[19]

C. Road Map

This Note will first analyze the rationales behind *Chevron* deference, which also served as justifications for embracing an administrative state largely independent of the judiciary. *Chevron* did not establish a unifying rationale, and for decades the Court lacked one, until the implicit delegation rationale was embraced in *United States v. Mead Corp*.[20] This Note will also analyze critiques and alternative rationales. Ultimately, this Note will reject some of these rationales as being illegitimate for balance of power concerns, and as being undesirable for reasons of political accountability. This Note does not reject that the rationales behind *Chevron* were proper concerns, only that the proper solution should come from the legislative branch, not the executive, or the judiciary, as *King v. Burwell*[21] would have it.

This Note is not the sole challenge to the administrative state; several other prominent challenges have come from the legislative and judicial branches of the United States government and will be analyzed. This Note will look at these challenges, present their weaknesses and strengths, and then provide tentative recommendations.

19 *Congress and the Public*, GALLUP NEWS, http://www.gallup.com/poll/1600/congress-public.aspx, (last visited Jan. 11, 2017). Congressional approval rating consistently beneath Twenty Percent.

20 522 U.S. 218 (2001).

21 King v. Burwell, 135 S. Ct. 2480 (2015).

The first challenge has its origins in Congress and attacks one of the primary enablers of the administrative state: the Supreme Court precedent known as *Chevron* deference, which allows administrative agencies to essentially interpret their 'governing' statutes for themselves. The Separation of Powers Restoration Act aims to nullify this doctrine and restore greater judicial oversight of regulation. A more aggressive legislative move, the Regulations From the Executive in Need of Scrutiny Act, has passed the House and would block any and all regulation having an economic impact greater than $100,000,000 and put it before Congress for approval. Ultimately, this Note recommends that any enactment of SOPRA is inadequate without a simultaneous enactment of REINs. This will prevent the Court from effectively deciding an issue of significant political importance and cost that is, in reality, a piece of political legislation, despite the Court having low levels of democratic legitimacy and life-time tenure (and thus limited accountability).

The Note will next analyze the recent Supreme Court decision in *King v. Burwell*, where the Court appeared to be moving away from the *Chevron* doctrine by suggesting a possible weakening of the doctrine from the bench. *King v. Burwell* will also be used to illustrate the illegitimacy and unworkability that a restoration of more readily available judicial review of regulation would have without REINs also being passed. Instead of unelected administrators being the sole sources of law in the land, equally unelected judges with life tenure would now be added to the process. Judicial review *may* be seen to rightfully act as a check for regulations that are of insignificant effect, described as less than $100 million (as REINs puts it), or as not having a "deep" significance[22] (as the Court in *King v. Burwell* puts it). The question of clarifying deeply significant regulation, however, would still fall to federal courts. If this were to occur, much of what led to the passing of *Chevron* deference in the first place, and much of what was highlighted in the confused parsing of *King v. Burwell*, would become the vehicle for lawmaking in this country. Unilateral administrative action would be supplemented by endless litigation at different tiers of government, with seemingly every government official *except* members of Congress weighing in. With *Chevron* deference removed either by SOPRA or by Court ruling, and REINs not passed, the judiciary would be added to the shadow legislature of executive branch administrative bureaucrats. Legislative power would then have concentrated in exactly every branch of government that is *not* supposed to concern itself with lawmaking—an absurd result.

As the Court and bureaucracies decide, the laws of the United States Congress will rename post offices, designate official animals, and—only when politically expedient—step up to pass real legislation that, under the current order, could likely have been accomplished via administrative order in the first place.

22 *Id.* at 2483.

II. *CHEVRON* DEFERENCE: ORIGIN, EXPLANATION, AND RATIONALES

A. Political Origins

In 1984 the Supreme Court decided the seminal case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[23] which ensconced the deference lower courts must give to administrative agencies. The case addressed whether or not it was permissible for the Court to impose its own construction of an issue that the governing statute was either silent on or ambiguous towards over the construction of the agency that administers the statute. In the case, the key ambiguity was the word, "source," with at least two possible interpretations, each of which carried with it an economic and environmental effect.[24] The question presented to the Court was whether or not the Court or the administrative agency could decide which interpretation to use. Justice Stevens held that the court's construction of an issue arising from silence or ambiguity would not take precedence over the administering agency's construction, so long as the construction is permissible. Thus, a two-question test was laid out for courts reviewing an agency's construction of a statute it administers: first, whether Congress has directly spoken to the question at issue, and second, if not, whether the agency's construction is permissible.[25]

Several facts are worth pointing out about the *Chevron* decision: the rule-change from the United States Environmental Protection Agency ("EPA") as to the definition of "source" came after Republican Ronald Reagan was elected president; conservative justices on the court supported the decision; and *Chevron* never fully established the dominant rationale behind the deference given to administrative agencies.[26] As judicial and legislative challenges to *Chevron* arise, it should be noted that these challenges seem to operate on partisan lines. Republican congressmen tend to support SOPRA and REINs, and conservative justices tend to more strongly support scaling back *Chevron*. The recent push-back from modern conservatives comes not from a place of integral ideological revulsion—as evidenced, again, from Justice Alito's and Robert's repeated use of *Chevron* while employed by the Department of Justice[27]–but from a place of oppression; the opposing party has controlled the executive branch for eight years. Administrative regulations were enacted throughout the Reagan and Bush administration, and defended on *Chevron* grounds.[28] In short, the party that is likely to control the Presidency, has the short-term incentive to favor administrative regulations as a means to an end, and thus also has *Chevron* deference, while the party not in control of the executive has a tendency to chafe under the regulations and agitate for reform.

In situations where there is unanimous control of Congress and the White House, there may still be a preference for administrative agencies, as members of Congress

23 Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

24 *Id.* at 851.

25 *Id.* at 866.

26 *See* Manuel Hernandez, Comment, *Running out of Gas: Why Texas Must Distance Itself Completely from the Chevron Doctrine of Administrative Deference*, 14 TEX. TECH. ADMIN. L.J. 225 (2012).

27 Toobin, *supra* note 12.

28 *Id.*

can distance themselves from administrative acts while still accomplishing desirable policy goals. Thus, both political parties can receive many short-term benefits by retaining the administrative state. Despite the administrative state's fleeting utility for political parties, in the long run, it makes politics a zero-sum game and serves to distort incredibly the lines of accountability.

An alternative view, expressed by this Note, is that both parties are incentivized to scale back administrative power—whether via a change to *Chevron* deference or otherwise. Without *Chevron* deference, the playing field is leveled between the administrative state and the other branches of government. The legislative branch is not just the most legitimate institution for law-making, but also arguably the branch best equipped to do so, as Congress benefits from regular elections drawing from a diverse pool of candidates. This is in contrast to the presidency, which is dominated by a single candidate running infrequently for office, and where a single individual's personal idiosyncracies can have significant effects on policy. The risk of a complete shutout of an entire collection of ideologies representing half or nearly half of the electorate is thus reduced and the division that would be caused is averted. Therefore, the ruling party, currently the Republican Party, should accept—notwithstanding concerns of constitutionality and democratic legitimacy—that it is in their long-term self-interest to pursue legislation via legislature, and not from the Oval office.

B. Rationales for the Administrative State

Chevron is one of the most cited Supreme Court decisions in history, and it had no clear underpinning rationale when it was decided.[29] A confluence of several rationales were cited, and the Court, eventually in *Mead*, settled on the congressional delegation theory.[30] The entire administrative state, then, is predicated on the notion that Congress has delegated to the administrative state this power. Perhaps Congress has actually delegated this extensive power, which is unlikely. But even if Congress has, the question is whether or not Congress *could* delegate this power without violating separation of power principles within the Constitution. This Note argues that this delegation, if such a delegation took place, is not just illegimate under the Constitution, but also undesirable as a policy matter for reasons of democratic accountability.

Common ground can be found, though. Many of the Court's concerns that led to the abdication of judicial power in the realm of administration, such as concerns of the judiciary's expertise and illegitimacy to resolve political questions,[31] strongly support the argument for REINs or a similar legislative effort. This Note does not assert that the Supreme Court should have declined to give the duty of administrative construction to another branch of government; rather, it posits that the Supreme Court unloaded the duty of administrative construction *to the wrong branch*. The best

29 Chris Walker, *Most Cited Supreme Court Administrative Law Decisions*, NOTICE & COMMENT, (Oct. 9, 2014), http://yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

30 United States v. Mead Corp., 533 U.S. 218, 231–233 (2001).

31 *See* Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984). ("Judges are not experts in the [specialized administrative field at issue], and are not part of either political branch of the Government.").

branch to clarify acts of Congress is Congress, or should be Congress. *Chevron* did not discriminate between administrative rulings. The smallest regulation on the refurbishing process of a minor dam in South Dakota received the same deference as a ruling that increased the waters under the jurisdiction of the EPA by millions of acres and miles. To the Court's credit, after several decades of allowing such deference, *King v. Burwell* declared that not all administrative regulations are created equal.

Next, this Note asseses several of the most prominent rationales behind the judicial abdication of statutory construction to the executive.

1. Flexibility

One of the main reasons why this rationale has been popular, and why it was cited in *Chevron* in the first place, is because of the effect stare decisis had on administrative regulation in the lead-up to the *Chevron* case. When a court interprets a regulation, its rulings are final and binding—not only to the administrative agencies, but also to courts deciding the issue in the future. The issue at point regarding the new installations and the "bubble concept" in *Chevron* had already been decided in *ASARCO Inc. v. EPA*.[32] It was decided that the concept could not be used in regulations regarding air quality.[33] The EPA followed this precedent, until under the administration of Ronald Reagan they sought to employ the "bubble" concept related to new sources once again. The circuit court struck this down, and rested their decision on the two previously-mentioned cases. The circuit court believed the issue had been determined conclusively six years earlier when it had initially ruled on the matter, and decided accordingly.

It has been pointed out that the Supreme Court could have ignored this reasoning by virtue of the lower court having no precedential power over it, but instead chose to specifically call out and analyze this reasoning.[34] Justice Stevens criticized the appellate court's "basic legal error" as being an adoption of a "static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[35] Justice Stevens here is upbraiding the circuit court for holding its precedent as being superior to that of the new EPA interpretation, which must be agile enough to change with the times. *Chevron* in this moment ensconced the notion that the precedential supremacy of stare decisis should give way to a "new vision of continuous, flexible, agency-directed statutory administration."[36] This notion was referenced and made explicit in the case of *National Cable & Telecommunications Service v. Brand X Internet Services*.[37] There, the Court said that the "whole point of *Chevron* is to leave the discretion provided by the

32 ASARCO Inc. v. EPA, 578 F.2d 319 (1978).

33 *Id.* at 321.

34 Evan J. Criddle, Chevron's *Consensus,* 88 B.U. L. Rev. 1271, 1282 (2008). ("Had the Supreme Court chosen to do so, it could have ignored the D.C. Circuit's stare decisis argument in Chevron.").

35 Chevron, U.S.A., Inc v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

36 Criddle, *supra* note 26, at 1282.

37 Telecomms. Serv. v. Brand X Internet Serv., 545 U.S. 967 (2005).

ambiguities of a statute with the implementing agency."[38] The Court explained expressly that it is "for agencies, not courts, to fill statutory gaps."[39] The Court elevated precedent over deference only when there was a precedent that held that "the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displac[ing] a conflicting agency construction."[40] The Court here appears to prioritize administrative flexibility over statutory standardization. Statutory ambiguities had become firmly within the control of the executive branch.

Administrative agency flexibility and executive control over statutory ambiguity sound like uncontroversial positives that everyone can get behind, but these positives come with significant draw-backs. As statutory legislation becomes ever more complex, so do the ambiguities. These "holes" in legislation can become as big as the legislation itself—the "hole" in *King v. Burwell* nearly killed the most sprawling piece of lawmaking action to come from Congress in decades.

This congressional delegation rationale for the administrative state is nakedly utilitarian, and only provides lip-service to separation of powers. While administrative flexibility and a lack of interference from judicial precedent may seem like expedient means by which to create an administrative state, the merits of creating such a state are treated as a foregone conclusion necessisated by the complexities of the modern state. One does not need to be a formalist to accept that the powers of lawmaking are reserved for Congress; one does not need to be a functionalist to agree that executive regulations enabled by statutory ambiguity as enacted upset the checks and balances between our divisions of government. If the reader believes that trained technocrats are more able to make value-laden min-max decisions regarding every aspect of political policy instead of Congress, then the legislature and Constitution are already redundant. Unelected rule by administrators is entirely anthitetical to the construction of the Constitution, and if this implicit belief underlies the reader's attitude towards the administrative state, then the Constitutional discussions are moot points, as the Constitution died long ago. That is an appropriate segue for the next rationale and critique: the idea that administrators are superior to congressmen at making laws.

2. Agency Expertise

This underlying rationale contends that administrative agencies not only have superior technical expertise for understanding complex administrative issues, but also often have more familiarity with the legislative histories of their governing statutes. Before being expressly ordered to do so in *Chevron*, lower courts often deferred to administrative agencies for these reasons alone. Administrative legislation from Congress is often written with the advice of regulators.[41] It has also been noted that

38 *Id.* at 981 (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996)).

39 *Id.* at 967.

40 *Id.* at 982–83.

41 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986). Justice Stephen Breyer remarked that agencies may have had a hand in the drafting of regulatory statutes, and maintain close contacts with Congressional staffers.

agencies tend to be more static than Congress, which has a constantly shifting membership—particularly the House. Agencies, then, bring a certain desirable institutional memory and continuity of leadership to statutory interpretation of ambiguous provisions, and best flesh out the program's purpose.

The expertise rationale was one that was specifically supported in *Chevron.* It was noted in *Chevron* that technical expertise and institutional memory fed further into the previously mentioned rationale of administrative flexibility, and that administrative interpretations (also known as regulations) should be able to easily change as time moves on.[42] *Chevron* and previous cases acknowledged that judges were not experts in the sciences or fields that the statutes concerned themselves with. Because of this, it is most appropriate to defer—absent total and apparent unreasonableness—to an administration's interpretation of the statute.

This Note raises two critical comments of the expertise rationale. First, expertise cannot possibly exist without scientists making judgments about risk, utility optimization, and cost-benefits to society. Science is a method focused on the study and understanding of the behavior of the physical and natural world through observation and experiment. It is a process; an intellectual tool. Science and its methodological training provide no method by which to gauge the *value* or *use* of the processes it discovers. Nor does it provide a framework to judge the risk of research. For example, it was possible for nuclear physicists to describe the effect that the detonation of an atomic weapon would have over a Japanese city to president Truman. They were able to accurately state the blast radius, the effect on human life, and the residual effect of radioactivity on the land. The scientists were unable, using purely technical expertise, to state whether or not the bombs *should* be dropped. The bombs were dropped, and the justification rested in part on the calculation that overall more human life would be spared by dropping the atomic bombs, as opposed to a protracted land campaign in Japan.[43] Even though this rings of objective, technical assessment—one can imagine statisticians charting casualty numbers of civilians and soldiers, and speaking in objective tones to the presidents—it rested on the value judgment that human life should be maximized, even at the cost of innocent lives. This claim sounds like a fundamental truth, but it is not. Informed consent, one of the bedrock tenets of modern biological research, holds that in order to conduct experimentation on a human being, consent must first be freely given after the patient is educated on the risks of the experiment.[44] In other words, it is widely accepted that the benefits to mankind accrued from expedited or non-consensual human experimentation—which are imagined to be vast—outweigh the relatively miniscule

42 Chevron, U.S.A., Inc v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984). "The fact that [the agency] from time to time changed its interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute." The court also states that implementing policy decisions occur in a "technical and complex arena," words which suggest that technically savvy administrators are *needed* to realize Congressional goals.

43 Tom Nichols, *No Other Choice: Why Truman Dropped the Atomic Bomb on Japan*, NAT'L INTEREST (Aug. 6, 2015), http://nationalinterest.org/feature/no-other-choice-why-truman-dropped-the-atomic-bomb-japan-13504.

44 *Informed Consent for Clinical Trials*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/ForPatients/ClinicalTrials/InformedConsent/default.htm (last visited Dec. 4, 2017).

loss of life from such non-consensual experimentation. Why was life maximized objectively in the context of the atomic bomb, and not maximized in the arena of informed consent? These are difficult questions that scientists, by virtue of their training and experience, are no more able to answer than you or I. These are fundamental questions.

That agencies have a superior understanding of the technical processes as well as the legislative intent, and thus are more able to realize the value judgments of Congress, is not persuasive. While this could be true, it is also equally true that there exists no check or balance to police the agencies' realization of legislative intent. This is dangerous, even if agencies are operating in good faith to honestly enact congressional will. Even a brief history shows that the true cause of a changing of agency interpretation is due not to a shifting understanding of science, or experimentation, but rather due to the executive in power at the time being averse to the value judgments of the Congress that created the statute. *Chevron* itself was born of one agency interpretation, one of many agency interpretations of its like, that was promulgated via the Reagan administration to counter what the administration viewed as an onerous regulatory environment for industry.[45] In other words, at its core was a value judgment: that the cost to industry outweighed in a normative sense the benefit of regulation. There was no great scientific discovery made about the sources of pollution between the earlier *ARASCO* case and *Chevron.* It was instead a shift in values which had its origins in the executive branch, the branch governed by the Take Care Clause, which demands that the "*laws be faithfully* ***executed***."[46] This Note does not argue that the president lacks discretion in the faithful execution of the laws it is given. It *does* argue, however, that the changing of integral value judgments via administrative agencies operates as a retroactive veto of the legislation, violates bicameralism and presentment, and usurps Congress' lawmaking powers in violation of the non-delegation principle.

The second critical comment of the expertise rationale is that the Court's reasoning in *Chevron* directly supports REINs' underlying logic, which is itself not opposed to technical expertise, but merely seeks to find an appropriate place for it. This Note does not dispute that agencies have superior technical training and experience than an average judge or member of Congress, and even cautiously accepts the notion that administrators at these agencies have a greater knowledge of the legislative history and purposes of the statute. It agrees with *Chevron* in this regard, but proposes strongly that this expertise be reserved as advisory for Congress. In the same way that the physicists could explain the effects of the atomic bomb to president Truman, who possessed the authority and democratic legitimacy as commander-in-chief to decide the *use* of that bomb, the agencies and their administrators are perfect for describing the cause-and-effects of certain administrative decisions. For example, if the word, "source," were to trigger a REINs

45 Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1565 (2005); *see also* Illya Somin, *Gorusch is Right About Chevron Deference*, WASH. POST. (Mar.25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference/?utm_term=.df8786e15765.

46 U.S. CONST. art. II, § 3, cl. 5 (emphasis added).

procedure by virtue of its economic cost, then elected representatives could hear testimony on the "bubble" theory of sources of pollutions, and other theories, and hear from administrators on their thoughts of the legislative purpose. Congress could then make an informed opinion in full view of the electorate. In all likelihood, Congress, like the judiciary before them, would defer to the judgment of the administrators. It is the instances when they do not, however, that this Note and REINs are concerned with. It will not be the judiciary clarifying ambiguities, opening itself to criticism of legislating from the bench, and it will not be the executive branch essentially ignoring the Take Care Clause of the Constitution and exercising a retroactive veto. It instead will be Congress, whom all agree has the power to create intensely technical statutes in the first place and are the most politically accountable of the three branches, which brings us to our next rationale.

3. Political Accountability

This rationale holds that if statutory interpretations contain normative questions of value and judgment, then agencies associated with the executive branch should decide the issue instead of the judiciary. This is a recurring theme, and it is the rationale for *Chevron* that this Note supports the most, though there are criticisms. It has been said that the federal judiciary "have no constituency"[47] and they "have a duty to respect legitimate policy choices made by those who do."[48] This is valid, and supports the inference that when regulations are massive enough to kick in a REINs procedure that the appropriate branch to clarify the ambiguities is Congress, instead of the president.

This rationale derives its support from the unitary executive theory—that the president has the popular and constitutional mandate to insert policy into all administrative decision-making.[49] This Note does not dispute that the president has more accountability and democratic legitimacy than the judiciary, but it does dispute the extent of control the president actually has over certain agencies or administrators. The president exercises authority over the federal bureaucracy, but many important decisions and powers are within the hands of independent agencies or administrative law judges. Additionally, there are many thousands of career administrative staff that will serve multiple presidencies and are not accountable to the people. The unitary executive theory is interesting because it can be seen to circularly defeat itself. As it stands, it is likely that many major regulations come from agency formulation and not presidential policy directives, thus giving them low levels of legitimacy. If the inverse were true, that the president operated massive control over all agency formulations, then not only would the previously mentioned technical expertise rationale be undermined, but the executive itself would resemble what has been called a "brooding omnipresence in the sky."[50] Critics of the unitary executive theory are

47 *Chevron*, 467 U.S. at 866.

48 *Id.*

49 For a comprehensive review of the history of the Unitary Executive theory, and its relationship to the administrative state, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

50 S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

familiar with the constitutional and political problems of an omnipotent president, and when his or her power is increased exponentially by the apparatus of the administrative state, these concerns become even deeper.

4. Implicit Delegation

This theory maintains that the reason the courts are showing deference to the administrative regulatory agencies is because the ambiguity in the statutes is actually Congress consenting to administrative agencies filling in those "statutory gaps." Thus, the democratic legitimacy of *Chevron* deference is that, by writing statutes ambiguously, or by being silent on potential issues, Congress has tacitly requested that courts defer to the administrative agencies. When a statute specifically instructs the court to show deference, then *Chevron* deference does not kick in—this Note takes no exception to explicitly delegated issues. If the administrative state we have now were the result of explicitly delegated powers that were debated in Congress in full view of their constituents, then this Note would not exist. It was written because the implicit delegation theory is of questionable legitimacy. In what situations in government is silence or ambiguity considered a full yes? Is the legislative power of the United States one such situation? It can be persuasively said that the grant of what is effectively legislative power without de novo review from courts can only be made explicitly, and a constitutional analogy is the amendment process; in this process, either two-thirds of Congress or two-thirds of the state legislatures must *actively call* for the amendment to take place. The silence or abstentions of congressmen or state legislatures are not taken as meaning, "yes," to the proposed amendment, so why should that rationale extend here?

This rationale is the rationale the Supreme Court most strongly endorsed in the case of *United States v. Mead Corp*, a later case dealing with *Chevron* deference. Professor Criddle, a supporter of *Chevron* deference who supports a theory that a confluence of rationales mentioned here converge to support *Chevron*, critiques the interpretation.[51] He mentions that one of the best justifications for the delegation theory is actually a post hoc rationale: "the best argument for the congressional delegation theory may rest on legislative inaction; namely that Congress has not intervened to suppress *Chevron's revolution*."[52] In what is perhaps most telling to the legislation that this Note concerns itself with, Professor Criddle went on to state that "[u]nless Congress speaks more plainly to the issue in the future, critics' discontent with the congressional delegation theory is unlikely to subside."[53] REINs would be Congress speaking to the matter, and would be a perfectly formed death knell to the congressional delegation theory, the rationale embraced in *United States v. Mead Corp.*[54] Nothing can possibly counter the idea of tacit delegation more strongly than an act of Congress saying the delegation does not exist.

51 Criddle, *supra* note 26, at 1282.

52 *Id.* at 1286. (emphasis added). The revolution referred to here is the creation of the Administrative state.

53 *Id*.

54 United States v. Mead Corp., 533 U.S. 218 (2001).

This Note has so far criticized the rationales for the administrative state, especially in the context of deference towards large regulations that would trigger REINs procedure. It will now analyze the judicial analogue to REINs—*King v. Burwell.* When a "major" regulation triggers REINs, the question is put before Congress. Under *King v. Burwell,* the Court has allowed major regulations (defined as those of "deep economic or cultural significance"[55]) to bypass *Chevron* deference and go to the judiciary for construction. This is not an ideal situation, as the preferable check on administrative fiat exists within the legislative branch, not the judiciary.

III. *KING V. BURWELL*, AND THE UNWORKABILITY OF THE MODERN ADMINISTRATIVE STATE

King v. Burwell[56] was one of numerous pieces of Supreme Court litigation to arise out of Barack Obama's sweeping healthcare reform initiative, The Patient Protection and Affordable Care Act ("Affordable Care Act"). Decided in June of 2015, it is a perfect recent illustration for showing the range of issues currently being raised by the intersection of the federal administrative state, congressional legislation, and federal court oversight. This case has been chosen to appear in this Note for two specific reasons. First, it is an example of a bipartisan Supreme Court majority (including Justices Kennedy and Roberts) adopting a much less deferential tone of *Chevron* deference, refusing to grant such deference to ambiguous wording where the question was one of "deep economic and political significance."[57] Second, its complexity makes it a perfect case-study of the difficulty courts have in construing a statute while maintaining their judicial prerogatives, and the need for a solution to come elsewhere (such as from Congress, on which the U.S. Constitution has conferred lawmaking powers). As the Supreme Court slowly creeps back into overseeing regulations, the current tyranny of administrative regulation will have the dubious benefit of a body of several different layers of appointed, unelected lawyers weighing in with their views.

Indeed, there were no fewer than five different opinions of what the instant sections of the Affordable Care Act in *Burwell* really meant and how the meaning of those sections should be treated. Of those five interpretations, Congress remained uninvolved, and the average citizen (along with this humble law student) remains utterly befuddled. Here is a brief recapture of the several interpretations: 1.) The Internal Revenue Service ("IRS"), which promulgated the first opinion as to what the sections meant; 2.) the federal district court, which held that the sections clearly meant tax credits would be available in federal exchanges and that the IRS rule was redundant;[58] 3.) the appellate court, which held that the sections were actually ambiguous and thus the IRS rule would be treated deferentially as per *Chevron*;[59] 4.)

55 King v. Burwell, 135 S. Ct. 2480, 2483 (2015) (internal quotations omitted).

56 *Id.* at 2480.

57 *Id.* at 2483 (internal quotations omitted).

58 King v. Sebelius, 997 F. Supp. 2d 415, 439 (E.D. Va. 2014).

59 King v. Burwell, 759 F.3d 358, 376 (4th Cir. 2014).

the Supreme Court majority, which held that despite the sections being ambiguous, the IRS would *not* be given *Chevron* deference, but that the rule would stand anyways as a matter of statutory interpretation;[60] 5.) and, finally, the Supreme Court minority which stated that the rule *was* ambiguous, *should not* receive *Chevron* deference, and was *not* reasonable.[61] Despite the previously mentioned congressionally penned legislation on bison and building names, *this* is how the law is made in the United States of America. It is technocratic, highly bureaucratic, with numerous layers of debate by persons none of whom are directly accountable to a single voter in the United States.

This is exactly as convoluted and unworkable as it appears. If several of the main purposes of our system of laws is repose, predictable outcomes, and notice of how to follow laws, then in many regards our current system is failing. It is a mishmash of "pure applesauce," as Justice Scalia wrote famously in this dissent (even though his dissent only added to the applesauce).[62] This brings us to the third reason this case is included in this Note: its complexity perfectly highlights that the majority has already adopted something similar to SOPRA and the Court itself has moved away from the previously near-inviolability of *Chevron* deference (which may hint at further erosions in the future). Fourth, despite the Court's seeming embrace of SOPRA, the stark, sometimes scathing, differences between the majority and minority's interpretation of the statute show that a legislative remedy for ambiguity is preferable on grounds of democratic legitimacy. In short, *King v. Burwell* is a complex case based on complex litigation, with a series of judicial decisions so confused as to verge on the schizophrenic. This perfectly illustrates the need for a legislative solution. At least when a legislature is confused and contentious, they have to own up to it.

A. Background and Explanation of Affordable Care Act Legislation

The basic point at issue in *King v. Burwell* was whether or not federal income tax credits extended to individuals in states that had federally-created, and not state-created, healthcare exchanges.[63] Some background on the Affordable Care Act is required. Health insurance costs and availability have long been a major political and economic issue in the United States. Over the years, several states enacted pieces of legislation that compelled guaranteed issue and community rate.[64] Guaranteed issue bars health insurers from denying coverage to any person because of his health—including pre-existing medical conditions. Community rating requirements mandated that health insurers give, within a given territory, the same health insurance price to all individuals without health underwriting. This essentially barred health insurers from charging more to the individuals with the pre-existing conditions or health problems that they were forced to accept under the guaranteed issue

60 *Burwell*, 135 S. Ct. at 2484.

61 *Id.* at 2497.

62 King v. Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

63 *See generally id*.

64 ANTHONY T. LO SASSO, PHD, COMMUNITY RATING AND GUARANTEED ISSUE IN THE INDIVIDUAL HEALTH INSURANCE MARKET (2011).

requirements. These reforms at the state level greatly expanded health insurance coverage, but at the expense of causing a phenomenon known as a "death spiral."[65] The combination of guaranteed issue and community rates incentivized people to only purchase health insurance when they became sick. The result was a rise in premiums, a resulting decrease in people buying insurance, and private health insurance exiting the markets in a death spiral of increased costs and lower profitability. In the mid-2000s, Massachusetts introduced what became a powerful counter to the death spiral: along with guaranteed issue and community rate guidelines, the state also mandated an individual health insurance coverage.[66] Individuals would be required to maintain health insurance, the cost of which would be offset by tax credits made available to certain individuals (typically those of lower and middle incomes). Those who did not maintain insurance would pay a penalty. This legislation in Massachusetts was specifically enacted to counter the death spiral seen in other states. The combination of these reforms, guaranteed issue and community rate, a coverage requirement, and tax credits for eligible individuals succeeded in expanding health insurance access and avoiding the dreaded death spiral.[67]

The Affordable Care Act sought to replicate the success of the Massachusetts system on the federal level, and adopted analogues of many of the key reforms found in Massachusetts. First, the Act adopted both the guaranteed issue and community rate reforms in order to increase access to private health insurance for individuals.[68] Second, it more or less required that all individuals in the country maintain health insurance or pay a penalty (read later to be a tax)[69] to the IRS. Individuals whose health insurance payments would comprise more than eight percent of the individual's income were exempt from buying health insurance or paying the penalty.[70] Third, the Act adopted a similar program of tax credits to offset the cost of mandatory health insurance purchases for individuals. Individuals whose household incomes fall between 100 and 400 percent of the federal poverty line are eligible to use their health insurance premiums as a tax credit.[71] The Act aped the Massachussets method in many ways, but its national scope necessitated some improvisations. The most notable of which, and the cause of the litigation, was the setting up of health insurance markets on a state-by-state basis.

An Exchange is a marketplace, typically online, where individuals may browse and compare private health insurance packages. This is where the statute becomes less straightforward. The Act requires the creation of "an Exchange" in every state in America.[72] If states opt not to create their own Exchange, then the federal government will establish "such Exchange."[73] As to tax credits, the Act states they

65 *Burwell*, 135 S. Ct. at 2482.

66 *Id.* at 2486.

67 *Id.*

68 *See* 42 U.S.C.S § 300gg (LexisNexis 2017).

69 Nat'l Fed. Indep. Bus. v. Sebelius 132 S. Ct. 2566, 2600 (2012).

70 *See* 26 U.S.C.S § 5000A (LexisNexis 2017).

71 King v. Burwell, 135 S. Ct. 2480, 2484 (2015).

72 *Id.* at 2491.

73 42 U.S.C.S §§ 18031, 18041 (LexisNexis 2017).

"shall be allowed" for any "applicable taxpayer."[74] The tax credits will only be available if the taxpayer is enrolled for health insurance through "an Exchange established *by the state* under 42 U.S.C. § 18031, 36b**.**"[75] The IRS, to which the penalty tax will be paid, promulgated regulation 45 CFR 155.20, which states that the tax credits will be made available to an Exchange "regardless of whether the Exchange is established and operated by a state."[76] The IRS rule sought to clarify the statute with a regulation. This clarification, which gave rise to the present litigation, would have great importance to the Affordable Care Act because thirty-four states have opted for the federal government to establish health insurance Exchanges through the HHS. The plaintiffs in the case at issue were individuals of the state of Virginia, which had opted to have a federally created system, who would be exempt from the penalty and the coverage requirement because it would comprise more than eight percent of their income, without the tax credits. With the tax credits it would comprise less than eight percent of their income, and they would have to purchase coverage or pay the penalty.

What follows is an analysis on how the courts dealt with the uncertainty created by the statute's directive of a creation of "such an Exchange" by the federal government if the states opted not to do so, and the seemingly limited nature of the tax credits to only those Exchanges "established by the State." Keep in mind the overarching policy goals of avoiding the death spiral of rising insurance premiums and offsetting the costs of mandatory purchases for qualified individuals.

B. The Majority Opinion: Unworkability, and the Implications on Precedent

Firstly, and most importantly, the majority opinion, despite finding that the statutory wording was ambiguous, did not grant *Chevron* deference. The Court instead chose to interpret the statute de novo, without regard to an agency's interpretation. This is strikingly similar to the purpose and effect of SOPRA,[77] with a key caveat being that the Court would only ignore deference to agencies in regards to questions of high political and economic significance. Despite the problems surrounding this standard, which include the questionable legitimacy of an unelected Court to decide what is politically and economically important, the standard may also prove low and still empower *Chevron* deference in all but the most massive decisions. SOPRA goes a step further than this, removing it entirely. The majority's analysis is a great example of how the Court would construe a statute in a world where SOPRA has been enacted, and, taken with the dissent, is a good example of why perhaps another step past SOPRA is needed in the form of REINs (which would immediately trigger congressional approval for the major questions that the Court here decided do not deserve *Chevron* deference). Without REINs also being enacted, the confused and sometimes scathing opinion above would become the norm of settling major questions of law under SOPRA.

74 26 U.S.C.S § 36B (LexisNexis 2017).

75 *Burwell*, 135 S. Ct. at 2481 (emphasis added).

76 *Id.* at 2487.

77 Separation of Powers Restoration Act, H.R. 76, 115th Cong. (2017).

The justifications for not applying *Chevron* deference in this case are similar to the justifications for supporting REINs. The Court here found that the IRS Rule was not deserving of *Chevron* deference because of its deep political and economic significance.[78] It noted that *Chevron* deference is predicated on the basis that Congress implicitly delegated power to regulatory agencies to fill statutory gaps, but that would be inappropriate here as this gap is simply too large to be seen to be delegated.[79] It is worth stressing that it is unlikely that such a delegation regarding tax credits in the Affordable Care Act would ever have been delegated to the IRS, which has no particular expertise for formulating healthcare policy. This suggests that the congressional delegation theory still has legs, but no matter how it is read, *King v. Burwell* was a narrowing of *Chevron* deference by the Supreme Court.

The Court in *Burwell* seemed to apply a "filtering" test similar to what REINs requires. While *Chevron* deference was not overturned in *King v. Burwell*, a bar, or more accurately, a filter, was applied to it. When a rule addressing a statutory ambiguity is challenged, instead of deference to the administrative agency (so long as the rule is reasonable), courts will now decide whether or not the rule was deeply significant. Lack of agency expertise and the importance of the rule compared to the goals of the statute seem to be relevant factors in deciding whether Congress implicitly delegated authority to the agency. Here, tax credits were important precisely because they were part of the statutory scheme aimed entirely at preventing a death spiral in the insurance industry following issue and rate reforms. When these factors are significant, the Court construes the statute, not the agency. But is this adequate and justifiable?

REINs proposes that in this almost exact scenario—when an ambiguity of significance is decided by administrative rule—Congress, not the Court, should approve the administrative construction of the statute. This is desirable for several reasons. As the preceding section showed, construing statutes from the bench is no easy business and yields unpredictable results. If Congress had the ability to construe their own statutes when the REINs requirements are met, then predictability would return to the law. The political parties that dominate Congress have regularly published agendas of how they will act, whereas the Court has only intermittently published agendas, called decisions, and they are difficult to predict.

Accountability is a major reason why Congress, not regulatory agencies or the Court, should make decisions of deep significance stemming from statutory ambiguity. Were this particular IRS rule kicked back to the Republican controlled Congress at the time under REINs, then a majority of both Houses would have never approved the measure. Thus ends the tax credit provision of the Affordable Care Act. This seemingly harsh result may stir some readers' political beliefs, but I urge that you look to the *legitimacy* of such a decision, not its *result*.

Imagine if an executive agency interpreted a statutory ambiguity to empower the deportation of millions of undocumented immigrants utilizing new, controversial

78 King v. Burwell, 135 S. Ct. 2480, 2483 (2015).

79 What about the Clean Water Act regulations? How about the FCC's designation of the internet as a utility provider? Don't these seem to be deeply economically and politically significant? *King v. Burwell* has implications for future sweeping regulations such as this.

methods that may or may not have been allowed in the original legislation. Congress is held by the opposition to the president, and when the reinterpreted rule is kicked back down to them under REINs, they fail to approve it, the tactics are not used, and mass deportations are prevented, as they desired. Congress answers to their voters for that decision. Similarly, imagine that Congress is held not by the opposition but by supporters of the president—the only difference is that they now must sign off on the rule adopting the controversial methods, and assume accountability to their voters for the results. The result is the same: Congress is accountable again to the democratic process and democratic legitimacy is preserved.

The Court in *King v. Burwell* construed a question regarding a statute that was of admittedly "deep . . . significance."[80] The overall position of this Note, SOPRA, REINs, and the majority and minority in *King v. Burwell* is that administrative agencies lack legitimacy to make decisions that have the same impact legislation would have. What legitimacy does the Court have to do the same? The Court is certainly more desirable as they have received more vetting by elected officials than, say, an associate trade commissioner. But the Court nevertheless has found itself the propagator of decisions that undoubtedly are legislative in effect. Indeed, many such decisions came from the court for the same reasons that sweeping regulations came from the agencies: legislative gridlock. Justice Scalia once critically referred to the Court as acting like a sitting body of Philosopher-Kings.[81] I disagree. The Court more closely resembles a body of Charlatan-Diviners, who spend thousands of hours and pages attempting to divine the purposes and meanings of a legislature that exists in human form less than a mile away from them. Giving a non-political institution authority over sprawling political issues necessarily politicizes that institution, and Congress has certainly given that power to the Court. It was not usurped from them, it was freely given. The connection between the people and the laws as enacted are so attenuated that it verges on the comical. Voters elect representatives, who then write broad and ambiguous laws because they want to deflect blame if something goes wrong. These laws are then clarified by unelected bureaucrats appointed and vaguely overseen by the executive branch. These clarifications are reviewed (or maybe not, post-*King v. Burwell*) by a series of courts who disagree with themselves at every single level regarding the same set of facts, and who use intellectual tools with names such as, "surplusage constructions," to support their disagreements. All of this is done in order to divine the meaning of what a voter from Michigan, Hawaii, or California, consented to. It reads like a twisted national game of telephone, where each passing level of removal from the voter further twists the word that the same voter has spoken. This removes the voter from the process and further stokes discontent and apathy.

IV. CONCLUSION AND RECOMMENDATIONS

This Note concludes that a move away from *Chevron* deference may already be underway by the Supreme Court. But that is an imperfect solution to the overly

80 *Burwell*, 135 S. Ct. at 2483.

81 Stanford v. Kentucky, 492 U.S. 361, 379 (1989).

powerful administrative state. The move from *Chevron* deference, be it from the Court or from SOPRA, is only desirable if REINs is also enacted. This is because under SOPRA—or its arguably looser judicial analogue, *King v. Burwell*—the Court will still provide clarifications of ambiguous provisions of statutes that have "deep political and economic significance." These "clarifications" of major provisions are no less than lawmaking. The Court, though having more legitimacy than agencies to decide such issues, is still an imperfect decider of what decisions the nation makes in regards to deep political and economic questions. The same questions of legitimacy that dog an administrative agency decision arising from a statutory ambiguity will also dog any major Court decision resolving the ambiguity. The answer is before us: REINs. Congress will have the opportunity to clarify the ambiguity and be accountable for that clarification, thus preventing two undesirable results: 1.) a clarification due to an untouchable amount of deference from an unelected *agency*, and 2.) a clarification due an untouchable amount of deference from an unelected Court.[82]

Congress under both parties has given its responsibility away by its silence on ambiguities and its purposefully vague drafting to launder culpability, relegate political debate to the "comments" section of the Federal Reporter, and accomplish substantive goals at the cost of substantive process. REINs, if passed, would be a complacent Congress taking that power back and it would be doing so for the benefit of the people who elected it. No longer will Congress be incentivized to write and hide behind ambiguous provisions. No longer may they launder their culpability for their own legislation by punting the tough questions to administrative agencies which are, at best, creatures of the executive. No longer may they count on the Court to serve as the guards to Capitol Hill, closing off challenges to ineffectual laws through rules such as *Chevron* deference. And no longer may they count on the Court to legislate from the bench using methods of analysis that are incomprehensible to the people whose consent the federal government supposedly relies on to exist.

Many feel as if there is something wrong, a formless dread floating across all parties, ideologies, and demographics. A feeling that something is just not quite right with our Republic. If the majority feel disenfranchised, then who is enfranchised? The answer has been in front of us for some time: no one is enfranchised. Institutions have proliferated, accountability has been laundered, and the organs of the federal government exist independently of the body politic. Under REINs, the buck stops with Congress once more. Are they up for it? How long can our Republic sustain the weight of this laborious system of work dodgers, Charlatan-Diviners, petty-king bureaucrats and grasping executives? A structural problem requires a structural answer. Consider this.

REINs is not the end-all be-all solution to the administrative state. Indeed, if an administrative state is not seen by the reader as being illegitimate—either constitutionally or in terms of democratic legitimacy—then REINs may certainly be considered a disaster. It is, however, profound in its simplicity, and profound in its effect. It would be the legislature turning aside not only one of the most cited cases

82 Marbury v. Madison, 5 U.S. 137, 177 (1803) (" It is *emphatically* the province and duty of the judicial department to say what the law is.") (emphasis added).

in Supreme Court history, but it would also be reorganizing the very balance of power in our government. This should not be undertaken lightly. REINs could undergo a different form. The dollar amount for triggering the procedure may be increased or decreased. Special categories of "fast-track" regulations, such as those dealing with national urgencies or defense, may be exempt from the provisions. A possible fear of REINs is essentially that Congress is incompetent, and that nothing would ever get done in this country if Congress had to clarify certain major administrative questions. To be fair, Congress is likely seen as incompetent precisely for the reason REINs needs to be passed; it has abdicated power. But even so, this nation's two tiered system of federal government with checks and balances was not made to be a hyper-efficient or hyper-agile administrative state. If we are to continue to be a nation bound by the Constitution, resisting short term expediency at the expense of long-term liberty, like Odysseus who asked to be bound to the masts of his ship to resist the call of the sirens, the administrative state must either be rejected or legitimized. This Note calls for either a rejection or a full legitimation, and a subsequent change of Constitutional jurisprudence, in favor of an administrative state. It is not only more honest, but it is this author's sincerest belief that the only fount of power for government exists from the consent of the people it governs. Let the people have a chance to see what representative democracy looks like in the 21st Century. If they are horrified by the result of REINs, if fears of government ineffectuality are realized and the people judge this loss of efficiency as being more detrimental than their loss of enfranchisement, then let them choose. For agencies to take this power and for the Court and Congress to show deference to the theft, or to close its eyes, cannot stand.

The final assertion of this Note is the most important: there are greater values at risk than efficiency, or even liberty. The Author asserts that the administrative state, and the flowing of power to the executive branch over the course of decades, has been the cause of the severe and deep political division America now faces. Politics has become a zero-sum game: the presidency. Even with minorities in state legislatures, governorships, and the national Congress, a political party can accomplish successfully large policy programs to the disappointment or horror of half of the nation if they control the presidency. The administrative state is an effective counter-majoritarian tool.

If presidential elections were a stock, then analysts would say that it has a high beta, or high volatility. Elections are infrequent. One candidate, who is liable to die, or to be compromised, or to be disappointing, is invested with all the hopes and dreams of a nation.

Said explicitly, what many Democrats saw as a tool to get things done with a do-nothing Congress during president Obama's second term is now a tool for Donald Trump to gracefully execute his own personal reform—a reform that Republicans in Congress can applaud, or not applaud, whatever is convenient for their district, as they do not have to vote on the most controversial matters.

This Note takes no position on any specific political policies, but does point out that it will only be the most recent example of the administrative state being leveraged against the United States as a whole, without check or balance from the other two branches of government.

When a twice-a-decade election effectively can decide the fate of our nation, an election subject to flukes and miracles, and an administrative apparatus readily exists for a president to subject his policy on the body politic with no recourse by the governed, tyranny reigns. And from tyranny comes populism, and from populism more tyranny still. The political process is undermined, faith in institutions continues to decrease, and voters will funnel their discontent into the election of the increasingly omnipotent president, chosen during an election cycle as vicious and as high-stakes as we have ever seen. The administrative state is responsible for the partisanship we see now. As this pendulum of control over the admistrative apparatus swings every several years, the nation's policies on both wings of politics becomes increasingly radical. There is no incentive in the United States to be moderate. A two-party system creates a binary choice; you have to be just slightly more acceptable than your opponent and you can earn a vote from a moderate…or at the very least quash the moderate's turnout. The very comity of our nation depends on the legislative branch being restored its power and, more importantly, being restored its *responsibilities.* Never in our history has one individual successfully carried the hopes and dreams of this nation, and it is naïve or even dangerous to expect that to change.

Consider that.