An Argument For Non-Delegation?

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Introduction

I am approaching the following thesis as a position piece. It is my opinion, and the stance I am taking, that the Judicial Branch of the federal government needs to revive the long dormant Non-Delegation Doctrine and to begin to again apply it to questions of law involving administrative agencies. The reasons for this position are due to:

- The constitutional issues contained within the following thesis; and,
- The economic consequences of continuing the policies of the Intelligible Principle test and Chevron Deference; and,
- The social and litigious consequences of continuing the Intelligible Principle test and Chevron Deference.

Economically in the mid-1990’s, the estimated annual cost of compliance with federal regulations was $300,000,000,000.00.¹ Overtime this number only grew exponentially to the point where in 2015, the estimated annual cost of compliance with federal regulations was $2,000,000,000.00 per year or $33,000 per year for a family of five.²

Socially, administrative regulations have contributed to an overly litigious environment resulting in everyday citizens unknowingly being convicted and fined if not imprisoned. For example, in 1993 a court found that a father and son had violated regulatory interpretations promulgated by the Environmental Protection Agency and Army Corps of Engineers related to the Clean Air Act.³ In this case, Ocic and Carrie
Mills were constructing a home on land they purchased in Florida. Off the property was a strip of marsh grass. Due to the existence of this marsh grass, and the construction taking place nearby, the court found that the father and son had “discharged a ‘pollutant,’ into the ‘navigable waters of the United States.’” Due to the complexities of the Clean Water Act and interpretations by the agencies, the presiding Judge Roger Vinson commented that the “layman,” would not understand the complexities of such regulation. In this case that, the average person would not understand that even land which appeared dry, but, “May have some saturated-soil vegetation,” would be considered navigable waters. Despite the judge’s sympathies towards the defendants and admitting that they would not have known the complexities of the law, the defendants were sentenced to prison for two years and nine months.

The United States v. Mills case was not the only case where environmental regulations resulted in litigious harm towards citizens in the late 20th Century. John C. Coffee found that within a three-year period that there were 400 cases due to environmental regulations alone. These 400 cases resulted in over 300 years of prison sentences and millions of dollars in fines. Coffee also found that around 1991 over 300,000 criminally enforceable regulations existed. It is not surprising, due to the growing excess of regulations, that on average people unknowingly break three federal laws every day.

Administrative agencies exist within the Executive Branch in order to more efficiently execute the role of the Executive Branch, which is to faithfully carry out legislation as passed by Congress. In 1789 the United States began with five agencies;
War, Navy, State, Treasury, and the Attorney General’s office. The agencies, aside from advising the President, had two responsibilities:

- Estimate duties payable on imports; and
- Make decisions related to pension claims made by soldiers wounded and disabled during the revolution.

From 1789 to 2017, the number of Federal Agencies within the United States has increased dramatically, and their roles have grown exponentially. Today, there are over 400 registered Federal Agencies tasked with countless responsibilities ranging from benefitting marginalized groups in Africa to gathering military intelligence, to regulating food supply.

The exponential growth in scope given to administrative agencies has allowed for the legislature to delegate away much of its decision-making and regulatory powers, and the courts generally have upheld these delegations under what are known as Chevron Deference and the Intelligible Principle test. Prior to the 1920’s and 1930’s, the courts had mostly maintained the policy of Non-Delegation.

Non-Delegation is the idea that the separation of powers creates a wall between each of the branches of government to prevent one branch from becoming more powerful than another. The Non-Delegation Doctrine asserts that the legislature cannot delegate legislative power to administrative agencies because Article 1, Section 1 of the United States Constitution vests all legislative power in the legislature which consists of a Senate and a House of Representatives. Because all legislative power is to be vested in Congress and each branch is meant to be separate but equal, then administrative agencies
should not be delegated regulatory power. Administrative agencies are not inherently evil, and quite honestly are not always the problem.

In some cases, Congress can certainly be blamed for failing to be transparent in the legislative process by passing broad legislation which agencies must then interpret on their own. Agencies exist to enforce the laws of our nation, to ensure that all citizens are safe, and to preserve their rights. For example, the Department of Defense exists to ensure all branches of the military share relevant intelligence and coordinate in joint operations to ensure a more efficient military structure. The Food and Drug Administration exists to ensure most consumable products maintain a relative standard of safety to prevent consumer harm. Unfortunately, Congress has realized that allowing administrative agencies to make difficult and strict decisions is politically expedient and removes a lot of the pressure from them.

Congress’ lack transparency and desire to make the difficult decisions on the floor of the House or Senate can result in legislation which contains broad language without one clear and specific interpretation. Over time the language has often only gotten broader to the point where recently Supreme Court Justices are beginning to question if they had allowed Congress too much room to delegate away legislative power. This thesis makes the argument that the courts, in order to prevent the continued expansion of the Executive Branch, should apply the check given to the Judicial Branch. The courts need to revive the long-dormant policy of Non-Delegation, to rule many Congressional delegations of power to administrative agencies unconstitutional; thus, preventing the Executive Branch from assuming more legislative authority.
The first section of this thesis covers the judicial history resulting in the dormancy of the Non-Delegation Doctrine and an expansive administrative state. Opening with one of the first major administrative law cases, *The Cargo of Brig Aurora* (1813), the Supreme Court found that Legislation can be worded to allow for the President to effect legislation by declaring an event to have transpired. In *Wayman v. Southard* (1825) the court upheld the Process Acts which allowed agencies internal decision making power when that decision does not interfere with legislation. *J.W. Hampton, Jr., & Co. v. The United States* (1928) created the Intelligible Principle Test. The Intelligible Principle test was employed just before the last two major cases which struck down legislation employing the Non-Delegation Doctrine.

By this point in American judicial history, the court policy only examined Congress and the legislation it passed. In 1984, *Chevron v. Natural Resource Defense Council, Inc.* was decided and introduced the policy Chevron Deference. Chevron Deference addresses the agency when questions of law and fact arise. Chevron Deference answers these questions of law by the creation of a judicial principle which can allow the courts to defer to the agency’s interpretation. *Mistretta v. the United States* (1989), addresses the court’s strengthened policy of allowing Congress to delegate larger amounts of power. Section I concludes with *Whitman v. American Trucking Association, Inc.* (2001), which demonstrates how far the courts are willing to go when handling cases related to an administrative agency’s interpretation of legislation. The result is the allowance of the agencies to assume broad regulatory authority with little to any questioning over whether the power is excessive, and whether it violates the separation of powers.
Section II focusses on the non-Delegation Doctrine. The section defines the threats associated with accepting delegation as it is allowed today. Continued delegation poses a threat to the separation of powers. The Intelligible Principle test, and its expansion since 1928, specifically escalates the threat. The test does this by setting a low bar for Congress to meet when deciding to delegate powers, and by allowing broader delegated powers to administrative agencies. Thus, resulting in the co-mingling of the powers within one pair of hands.

The court has justified this breach in the separation of powers by employing the Necessary and Proper Clause. The Necessary and Proper Clause grants Congress the ability to pass all laws necessary and proper for carrying into execution the powers vested by the Constitution to the government. The justification is that Congress lacks the expertise and resources to pass sufficient regulatory legislation. The Justices on the Supreme Court have even upheld certain delegations of power while cautioning that the delegation does expand legislative power to administrative agencies. The justification for upholding such legislation is the Intelligible Principle test, and the challenged legislation passes the test.

Section II continues by explaining Chevron Deference in relation to Non-Delegation. The court is afraid that by questioning an Agency’s interpretation of legislation, the court would be challenging Congress’ will. By employing Chevron Deference, the court ignores the power delegated. If the court fears to go against the will of Congress, the court should instead rule that the legislation an Agency acts upon is too ambiguous. The court should then strike down the regulation and force Congress to revisit and refine the legislation, in whole or in part, that is in question.
The last major decisions where principles of the Non-Delegation Doctrine were employed in any part of the majority opinion both occurred in 1935. Today, it appears that the Supreme Court may consider reviving the Non-Delegation Doctrine. Chief Justice Roberts in *City of Arlington v. Federal Communications Council* (2013) explained that it was the role of the court to ensure that every branch was confined within its bounds.\(^3\) In the same case, Justice Clarence Thomas in his dissenting opinion expressed concern that the policy of allowing the continued mixture of all three powers within administrative agencies will erode the protections provided by the separation of powers.\(^4\) Justice Kennedy in *Clinton v. the City of New York* (1996) expressed his belief that the Constitution exists to ensure protections to those living in the United States, and that the Constitution should not be violated because a policy would be convenient.\(^5\)

Section II addresses James Madison’s beliefs related to the separation of powers. Along with many other founders, Madison believed that if one branch could accumulate portions of all three governing powers, then tyranny would result.\(^6\) The court has failed to prevent this accumulation of powers by administrative agencies. To prevent any further expansion of legislative power within the Executive Branch, and to return it to the legislature, the court must revive its policy of Non-Delegation.

Section III focuses specifically on Chevron Deference, and the dangers it specifically poses. Chevron Deference allows agencies a large amount of discretion when interpreting legislation, even though any Congressional challenge to an agency’s interpretation is severely limited. Chevron Deference is a policy praised by, the late, Justice Antonin Scalia.\(^7\) Justice Scalia had seen Chevron Deference as a policy which contains the Judicial Branch and limits the potential for future Judicial Activism.\(^8\)
Chevron Deference appears to fail though in multiple areas of law. Which is most clearly seen when applying 5 United States Code § 706, which grants courts the final say in questions of law. In contrast, Chevron Deference encourages courts to accept the Agency’s answer to questions of law and fact. Some experts even believe that Chevron Deference violates your 5th Amendment Right to due process by creating an unfair trial where the court is prejudiced in favor of the Agency. Justice Neil Gorsuch previously has condemned Chevron Deference for its degradation of the separation of powers by encouraging the court to continue to abdicate its judicial duty.

Opposition to Chevron Deference is a bi-partisan issue, especially with the Trump Administration. branches of Conservatism often have opposed the expansive administrative state, and the opposition camp grew under the Obama Administration. Many liberals currently are speaking out against the Trump Administration, claiming violations of American federalist principles. The Non-Delegation Doctrine could promote both efforts within each ideology to restrain the administrative state and Executive Power.

Justice Clarence Thomas in Michigan v. EPA (2015) addresses his disdain for the expansive Administrative state. In his concurring opinion, Justice Thomas lamented against Agencies and their willingness to continue pushing the boundaries of their delegated power. Justice Thomas specifically was frustrated with how the word, “appropriate,” was being interpreted. He was also concerned with, the cost of administrative agencies’ regulations.

At least four current Justices on the Supreme Court have expressed concerns about Administrative Power. Opposition to an expansive Executive Branch is a bi-
partisan issue. The stage appears to be set for the rollback of Chevron Deference, and movement toward the revival of the Non-Delegation Doctrine. Currently, there are movements within the other two branches of government and the states aimed at limiting agency power.

The non-judicial movements to limit the Executive Branch are covered within Section IV. Within Congress, the House in early 2017 passed the Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act) which aims at increasing Congress’ ability to check administrative regulations. The Convention of States Project. This Project is a coalition of States and citizens with the common goal of reigning in the federal government. The Project has enough momentum that in 2016 they hosted a trial convention in Williamsburg at which they passed two resolutions aimed at reigning in the Executive Branch. Finally, President Trump has adopted a One-In-Two-Out policy which is aimed at cutting down the number of regulations. This policy would remove two regulations for every new regulation created, and require that for every increase in cost, another regulation must be cut to ensure a net increase of $0.00.

With members of every branch and citizens at all levels expressing concern over the broad delegation of powers from the legislature to the Executive, it is hardly deniable that this is a systemic issue. If the courts fail to revive the Non-Delegation Doctrine, at least there are movements elsewhere which may reach the same result. If, however, the courts can revive the Non-Delegation Doctrine, and these policies prevail from the other branches and the States, it would ensure the Executive Branch, and subsequently, the administrative state is back within Constitutional bounds.
In short, the Non-Delegation Doctrine may overtake the Intelligible Principle test and Chevron Deference. The judicial history which allowed the dormancy of Non-Delegation Doctrine will be presented. The Intelligible Principle test and Chevron Deference principles will be broken down. Finally, actions being taken by the other branches and the states towards a same or similar end goal will be presented to demonstrate the serious concerns about an expansive administrative state.

The application of the Non-Delegation Doctrine going forward would cut the hidden tax facing everyone due to the compliance costs associated with regulation. The application of Non-Delegation Doctrine would help protect individuals from regulatory overreach. The application of Non-Delegation Doctrine is a constitutional solution to a problem born from a legislative culture of unaccountability and regulatory convenience. Administrative agencies are not the enemy, but the power they have been delegated and their current exercise of that power is harmful to the Federalist style of government established by the Constitution. It is the role of the courts to rein the agencies back in and force Congress to make clear legislative decisions to be carried out by the Executive Branch.
Section I: The Judicial History Resulting in Dormancy

The Non-Delegation Doctrine is often referred to as being dormant. It is dormant because of a series of cases which over time allowed for the legislature to delegate different types and amounts of power to the other branches. The first often cited case which defines the Concerns over separation of powers is Cargo of the Brig Aurora v. The United States (1813), in which Congress passed legislation that allowed the President to declare an event to have occurred, and thus affect the legislation itself.59

The Cargo of Brig Aurora v The United States (1813)

The Cargo of the Brig Aurora v. The United States (1813) was one of the earliest cases in which the new republic had to wrestle with the constitutional issues revolving around the delegation of power to the Executive Branch. The issue rose because of the Non-Intercourse Act of 1809 which prohibited trade to both Great Britain and France until the President declares that they are no longer a threat.60 In November of 1810, the Brig Aurora left England to return to the United States, but not long after, word reached England that the United States would allow trade once again.61

In early February 1811, the Brig Aurora reach the United States, and upon inspection of its logs, the cargo on board was seized.62 The authorities determined that the ship had left Britain prior to the trade prohibition being lifted.63 Over the next two years, the owners of the cargo appeared to have argued against its seizure through the Legislative Vesting Clause where all Legislative Power is to be vested within the legislature (U.S. Const. art. I, § 1).64 The Plaintiff’s point appeared to be that the Non-Intercourse Act of 1809 was unconstitutional because it relied upon the President to
determine when the law would expire; rather than forcing Congress to be solely responsible for terminating the Legislation. The court was then forced to answer the question, does Congress have the ability to delegate power to the Executive that may require a more efficient response than the normal Legislative Process allows.

In short, the Supreme Court ruled in 1813 that the law was constitutional and that the cargo was to remain impounded. By affirming that this law was constitutional, the Supreme Court, in effect, allowed for a slight expansion of what could be considered legislative power into the Executive Branch by maintaining that Congress could pass laws with provisions in which the President may declare certain events to occur in order to affect the law in various ways. In this simple case of Executive expansion into the Legislative realm, the courts appeared to have sided with political expediency as opposed to maintaining the appropriate structure where Congress may renew or terminate legislation, and made the President responsible for signing or vetoing new legislation as he or she sees fit. This case was the first major case regarding Congress’ delegation of power. The case does not demonstrate the delegation of legislative power, and instead, defines the thin line between executive and legislative powers. The case *Wayman v. Southard (1825)* then addresses how agencies operated internally in the 19th Century.

*Wayman v. Southard (1825)*

This case revolved around the Process Act of 1792 and other similar federal statutes which allowed courts to establish their own rules, so long as they did not conflict with U.S. Law. Chief Justice John Marshall in *Wayman v. Southard (1825)*, found that the Process Acts were a constitutional delegation of power because they only regulated the form of agencies, but these Acts did not delegate Legislative Power. The main issue
arises with the wording of the opinion where it states that it is acceptable to pass legislation which delegates power but allows the Executive or Legislative Branch to, “fill in the details,” of laws. This otherwise harmless phrasing will later be used to allow for a more expansive view and acceptance of the delegation of powers within the federal government.

Wayman essentially decided that for an agency to effectively operate, it must be allowed some level of self-control over certain processes and functions critical to its operation. In the Supreme Court’s view, the lower courts were not delegated any powers which would conflict with legislation and so each court should be allowed to tailor its internal rules and regulations to the needs of the people they serve. This is an early precedent which sets forward the idea that agencies, in certain cases, may make decisions solely affecting their daily operation in cases where the legislation is either unclear or nonexistent. Cargo of Brig Aurora and Wayman were the primary court cases which established the general rules balancing each branch of government throughout the 19th Century persisting until 1928.

*J. W. Hampton, Jr., & Co. v. United States (1928)*

J.W. Hampton, Jr., & Co. (Hampton) were in the process of importing barium dioxide into New York when the customs collector taxed them at a rate of $0.02/pound above the statutory rate. The collector claimed that this increase was allowable due to a Presidential Proclamation to raise tariffs. This increase in tariffs was believed acceptable due to the Tariff Act of September 21, 1922.

This case was generated when Hampton moved to file a petition against the United States claiming that the tariff increase, and that Section 315 of title 3 of the Tariff
Act of September 21, 1922, were both unconstitutional.\textsuperscript{77} Hampton’s reasoning was that the Act alone allowed for an unlawful delegation of power from the legislature into the hands of the Executive Branch.\textsuperscript{78} The courts, in this case, thought otherwise, and it is this case which the Intelligible Principle test originates.\textsuperscript{79} The court found that Congress does not always have all of the necessary and pertinent information to make decisions which may require minute adjustments over short periods of time.\textsuperscript{80} The court found that because Congress expressed its general will by laying an intelligible principle, the delegation of power, in this case, was acceptable.\textsuperscript{81} The court’s opinion was that Congress:

- May delegate insignificant legislative power in cases where they include a clear principle to follow; and
- Must list the parties authorized to carry out the delegated power; and
- Must provide oversight through the creation of a related advisory commission to work alongside the agency charged with delegated legislative power.\textsuperscript{82}

This is the first major case which defined and applied the Intelligible Principle test as a Judicial test for addressing cases which come from Congress delegating power to the other branches. Between 1928 and today there are only two major cases which ignore this test in favor of the Non-Delegation Doctrine due to the, at the time, excessive amounts of power that would have been delegated. These two cases are \textit{Schecter Poultry Corp. v. The United States} (1935) and \textit{Panama Refining Co. v. Ryan} (1935).

\textit{Schecter Poultry Corp. v. The United States} (1935)

On June 16, 1933, President Franklin D. Roosevelt signed the National Industrial Recovery Act of 1933 into law, which was part of Roosevelt’s New Deal Legislation
intended to help the United States recover from the Great Depression by instituting various social welfare programs. Title I of the legislation allowed the President and the newly established National Recovery Agency to institute codes of fair competition within industries, moving the United States towards a more centralized economy. The codes sought to eliminate unfair competitive practices, reduce unemployment, improve labor conditions, increase the purchasing power of the average American, and make interstate and foreign commerce flow more freely. In May 1935, the Supreme Court ruled that Title I of the Act was unconstitutional in Schecter Poultry Corp. v. The United States (1935).

The Supreme Court believed that the power granted was too broad, and instead should have been passed with a more limited scope. The executive orders and actions taken by the National Recovery Agency were found to be bordering too closely to the realm of Legislative Power, and thus had to be trimmed. The law was also found to be unconstitutional because the court believed Congress was overstepping its authority in regulating local commercial activity by allowing the Executive to set Industry standards which affected everyone no matter where they were operating. The Supreme Court found that the delegation of power to the Executive Branch was unconstitutional not just because the powers delegated were improperly delegated, but also because the regulation attempted to regulate intrastate commerce (commerce within a solitary state), as opposed to the Constitutionally allowed regulation of interstate commerce (commerce among the states).

The National Industrial Recovery Act was a bill passed into law where Congress had intended that the executive would, “fill in the details,” and lead the nation back into
prosperity with the goal of creating an environment of, “fair competition.” The Supreme Court in this ruling did not base its decision on the Intelligible Principle test established by *J.W. Hampton & Co. v. the United States* (1928). This is one of the last times in American judicial history where the Non-Delegation doctrine wins over the Intelligible Principle test. The only other time is *Panama Refining Co. v. Ryan* (1935).

*Panama Refining Co. v. Ryan (1935)*

This case is also known as the *Hot Oil Case*, as it resulted in the National Industrial Recovery Act suffering another judicial blow, and prompting Congress to pass the Connally Hot Oil Act of 1935. This case was similar to *Schecter Poultry Corp. v. the United States* (1935) in that both cases found that the scope of the powers delegated to the Executive Branch was too broad, and thus unconstitutional. Both cases were enacted to combat executive orders and administrative regulation affecting their respective industries; in this case, it was the oil industry.

In *Panama Refining Co. v. Ryan* (1935), the Supreme Court found that Congress overstepped its authority to regulate by failing to show any injury under the system prior to the new executive orders and regulations affecting the oil industry. The court ruled that Congress:

1) Must make the generally desired policy clear
2) Must list which agency the law applies to
3) Must explain the scope of delegated authority

Congress then passed the Connally Hot Oil Act of 1935 in order to address the concerns addressed up by the Supreme Court in the *Panama Refining Co.* decision.
The expanded definition of the Intelligible Principle test put forward by the court does not solve the problem of delegating powers which could be construed as being legislative in this case. Instead, it creates a system Congress may follow that will become more and more expansive. Expansive to the point where Supreme Court Justices will begin to question whether or not delegation should be allowed even though the delegation passes the test. Future legislation will delegate so much power that the power could not be construed as anything other than legislative.

The Non-Delegation Doctrine, after this case, quickly faded into dormancy due to the Intelligible Principle test taking precedence over cases of power delegation. Court opinions in the future will cite the Non-Delegation Doctrine occasionally, but for the most part, the standard for delegation will only get easier on Congress and administrative agencies. The Intelligible Principle test up to this point has mostly dealt with Congressional delegation, and less with Agency interpretation. In 1984, the Supreme Court developed a principle handling interpretation in Chevron v. National Resource Defense Council, Inc. The principle would become known as Chevron Deference.


*Chevron v. National Resource Defense Council, Inc. (1984)*, deals directly with the Clean Air Act Amendments of 1977. These amendments included the term, “stationary source,” which generates the question in Chevron. The Environmental Protection Agency when interpreting the term, defined it broadly when related to statewide emissions standards. In the case, it was found that Congress neither specifically defined the term, “stationary source,” nor did previous legislative history exist to provide a proper definition. The Supreme Court thus ruled that because there was no clear
definition in existence, the court could not rule against the reasonable interpretation of the agency in question.\textsuperscript{100}

Chevron Deference, which is named because of the Chevron case, requires only that the Agency in question proves that:

- Congress did not clearly define the issue at question.
- Previous legislative history does not provide a clear or reasonable definition.
- The Agency answered the question in a way which is based on a permissible construction of the statute in question.\textsuperscript{101}

Chevron Deference, when coupled with the Intelligible Principle test, provides the courts with two standards to apply which allows the general delegation of most powers. The Intelligible Principle test provides Congress a loose guide to follow when crafting legislation to delegate power to administrative agencies. Chevron Deference provides Agencies a standard to follow when interpreting legislation. Neither of these standards specifically limits delegation so long as the standards are adhered to. After Chevron, the court began expanding both the Intelligible Principle test and Chevron Deference to allow for more expansive delegations of power and agency interpretations.

\textit{Mistretta v. the United States (1989)}

Historically, Congress had the ability to fix federal sentencing standards and judicial scope for federal crimes.\textsuperscript{102} Over time, Congress lessened its control over federal sentencing standards. Instead, they began giving judges more control over the sentencing, leading to confusion among the three branches of government over the fates of those
convicted. Before the case, the concept of rehabilitation rather than strict punishment was becoming more popular, which caused the parole system to grow.

In 1976 Congress passed the Parole Commission and Reorganization Act, which would be strengthened in 1979 by *United States v. Addonizia*. That case established a division of responsibilities among the three branches as it relates to criminal law where:

- Congress is responsible for setting broad sentencing parameters for federal crimes
- The Judge is then responsible for examining each case and issuing an appropriate sentence from within the allowed range
- The Executive Branch’s Parole Commission then examines convicted individuals and determines their actual release date based upon their rehabilitation potential.

Unfortunately, the Act only allowed the confusion to persist regarding the responsibilities and decision-making power of each branch. Therefore in 1984, Congress passed the Sentencing Reform Act which created the United States Sentencing Commission. The Commission would be under the umbrella of the Judicial Branch, and it would be responsible for creating binding sentencing guidelines; previously, Congress had been responsible.

The Supreme Court upheld this decision, 7 to 2, allowing the Commission to continue to be in charge of establishing sentencing guidelines. The decision is aimed at creating a more efficient government, but when you look at it by examining the proper process under the Doctrine of Non-Delegation, the argument begins to fall apart. Congress has legislative power. Legislative power is the power to make laws. Part of a law consists of laying out the consequences of disobeying or breaking the law.
then up to the Judicial Branch when a charge arises to examine the facts of the case, to examine the law which was allegedly broken, and hand down the penalty which that law carries.\textsuperscript{111} The Executive Branch is responsible for carrying out the judgment from the Judicial Branch, facilitating the rehabilitation of those convicted, and determining if the subject has been rehabilitated prior to the completion of their official sentence.\textsuperscript{112}

Justice Scalia addressed specifically the delegated power claiming it did not just delegate permission to carry out a specific Executive or Judicial power.\textsuperscript{113} Instead, the legislation intended for the Judicial Branch to set the standards of future legislation by being responsible for setting sentencing standards.\textsuperscript{114} The interpretation adopted by the court in this case, as much as it may make sense, strengthens a dangerous precedent where the legislature may push off legislative decisions onto another part of the government that is less accountable to the electorate and public opinion. The principles utilized by the court in deciding Mistretta only become more broad, as is evident in \textit{Whitman v. American Trucking Associations, Inc.} (2001).


One of the most recent key cases related to the Delegation Doctrine and the Legislative Vesting Clause came from the Environmental Protection Agency’s (EPA) National Ambient Air Quality Standard, which the EPA believed was a proper exercise of their power under the Clean Air Act.\textsuperscript{115} Like in other cases after 1930 related to the delegation of power, the courts were searching for an intelligible principle. The main argument defending the EPA’s regulation was that the Clean Air Act grants the EPA the powers necessary to protect public health by exercising, “an adequate margin of safety.”\textsuperscript{116} In the end, the court decided that Congress had provided an Intelligible
Principle and applied Chevron Deference when determining if the Agency properly exercised the delegated powers.\textsuperscript{117} Thus, the court allowed the regulation to remain.\textsuperscript{118}

The case was set apart by Justice Clarence Thomas’ concurring opinion. In his consenting opinion, Justice Thomas questioned whether the majority’s decision would allow a deference of legislative power in future cases.\textsuperscript{119} Justice Thomas agreed that the Clean Air Act passed by Congress did, in fact, contain an intelligible principle, and it was clear providing enough structure to allow the EPA to enact the National Ambient Air Quality Standard.\textsuperscript{120} Despite this assumption of power by the EPA being allowed under the intelligible principle test, Justice Thomas had questioned if the Supreme Court should allow this type of delegation in the future.\textsuperscript{121} Justice Thomas claimed that the delegated power in this case was such a significant delegation of power that the delegated power could not be called anything other than Legislative Power.\textsuperscript{122}

What Justice Thomas appears to be questioning in his concurring opinion, is exactly what Chevron Deference ignores when combined with the Intelligible Principle test. The Intelligible Principle test has become a tool for Congress to delegate away decisions, and the courts accept it so long as Congress maintains the standards laid out by the test, which in each case have become more broad. Chevron Deference gives the courts a simple option to rule in favor of administrative agencies, so long as the legislation granting them power is written broadly with minimal definition. In order to best protect the public interest, the courts should revive the Non-Delegation Doctrine, begin challenging Agencies and Congress on power delegated, and ultimately force Congress to make more regulatory decisions on the chamber floors.
Section II: Applying the Non-Delegation Doctrine

Non-Delegation Defined

The court’s revival of the Non-Delegation Doctrine could stem the expansion of legislative power into the Executive Branch. The Non-Delegation Doctrine is the principle which prevents one branch of the government from delegating its constitutionally vested power to another branch.\textsuperscript{123} Congress, being vested with legislative power by Article I, Section I of the Constitution, is the only branch which may exercise legislative power.\textsuperscript{124} The Constitution’s separation of powers between and among the three branches of government, and the related Checks and Balances prevent one branch from seizing power from the other branches.

The Non-Delegation Doctrine makes up a portion of these checks and balances. It exists to prevent one branch from giving its power to the other branches.\textsuperscript{125} In contrast to Non-Delegation, under the Intelligible Principle test, the court is not necessarily required to question the type or scope of power delegated so long as an Intelligible Principle exists.\textsuperscript{126} In the eyes of the court, an Intelligible Principle can be as vague as to ensure the “public interest, convenience, and necessity,” to ensure legislation is, “fair and equitable,” or, “just and reasonable,” but the test clearly neglects the types of power being shifted from the legislature to the agencies.\textsuperscript{127} This allowance by the Intelligible Principle test endangers the federal structure in which specific powers are delegated uniquely to each branch. The danger is due to the fact that legislative power can be delegated from Congress to administrative agencies decreasing a constituent’s ability to hold their representatives accountable.
The court and Delegation

The court has justified delegation under the *Necessary and Proper* Clause by asserting that the knowledge required to properly regulate the United States exceeds'. So, Congress should have the ability to allow the Judicial and Executive Branches to fill in details of legislative acts. Historically, Wayman v. Southard (1825), limited the legislature from delegating power which is exclusively legislative. The court in recent history has decided to look less at the type of power delegated for reasons discussed in this paper.

Justice Clarence Thomas, when writing his concurring opinion in Whitman v. American Trucking, Inc. (2001) [Whitman], believed that the amount of power delegated by the Clean Air Act could not be classified as anything other than legislative. Even though the power delegated was believed to be legislative, it remained upheld by the court, and Justice Thomas even concurred with the majority. The case the modern Intelligible Principle test originates from, *J. W. Hampton, Jr., & Co. v. United States* (1928), even goes so far in the opinion to admit that Congress had delegated legislative power to the Executive Branch. By allowing these delegations, the court reaffirmed the concept that Congress is responsible for determining how much power to delegate, even if it is so much that it can be considered nothing less than legislative. Under this process, the legislature would be allowed to delegate its power away if the courts do not draw a line in the sand.

The result of Whitman is only an expansion from *Chevron v. Natural Resource Defense Council* (1984), in which the court affirmed the Intelligible Principle, created Chevron Deference, and the court’s notion of a proper delegation of power.
Chevron, the court decided that the reviewing court should not substitute its interpretation of a statute for the interpretation of an Agency, the concept known as Chevron Deference. The court is generally concerned with Congress’ rules of standards, fearing that in ruling against a delegation of power, they would be subverting the intent of Congress. If the court were to apply their own standard, it could easily be misconstrued as having legislated from the bench. Since the court fears misinterpreting the intentions and meanings of Congress, they fail to examine the power delegated. If the court examines the delegated powers and rules that the delegated powers were delegated unconstitutionally, would this not be proper judicial review? If unconstitutional types or amounts of power were delegated, the court should apply the Non-Delegation Doctrine, strike down the legislation, and leave the rest to Congress to revisit the legislation. The last time the court significantly maintained this standard was in 1935.

The Last Applications of Non-Delegation

The court has only struck down two delegations of power by Congress. Both cases were struck down in 1935, and involved legislation passed as a result of Franklin Roosevelt’s New Deal Program. The two cases were *Schecter Poultry Corp. v. The United States* and *Panama Refining Co. v. Ryan*. When ruling against the New Deal Programs, the court explained why Congress’ delegation of power was unconstitutional. Thereafter, President Roosevelt and Congress continued to perfect and push through legislation, like the Connally Hot Oil Act of 1935, which better conformed to the Supreme Court’s interpretation of the Intelligible Principle test at the time.
Reviving Non-Delegation

Scholars speculate that the current court, based on recent rulings, may move toward the re-application of the Non-Delegation Doctrine going forward. Specifically, authors focus on the case of City of Arlington v. Federal Communications Commission (2013) [Arlington]. In the case, Chief Justice Roberts declared that the founders could not have envisioned the Nation as it functions today. Roberts, criticizing the court’s interpretation of Chevron, declared that it is the role of the Judiciary first to confine itself within its proper bounds, but then to ensure that the other branches stay within theirs as well. In relation to the Non-Delegation Doctrine and the dissolution of the Intelligible Principle Test, Arlington does not demonstrate a major change in the court’s policy. The court, instead of addressing the issue of the Intelligible Principle Test and Non-Delegation Doctrine, avoided the issue altogether. It did so by ruling that in order to address the issue, the court would have first needed to determine if Congress intended to delegate the contested power to the exercising agency. This opinion demonstrates that the court is beginning to become concerned with the expansive Administrative state, and the risk it poses to Federalism.

Further evidence of this, as mentioned earlier, is Justice Thomas’s concurring opinion in Whitman where he expressed concerns about the delegation of power to the Environmental Protection Agency. Chief Justice Roberts, in his dissent in Arlington, rules out the current state of affairs as being tyrannical, but Roberts carries on to declare that, “the danger posed by the growing power of the administrative state cannot be dismissed.” By continuing to ignore the Non-Delegation Doctrine, the court allows, “a potent brew,” of the three powers eroding the separation of powers put forth in the
Constitution. The Justices, by expressing their concerns about delegation of power, may resume applying the Non-Delegation Doctrine in future decisions.

Opponents of the Non-Delegation often argue that the federal government has too many complex matters to handle, and Congress typically lacks the expert knowledge to address all issues. While it may be more efficient for a government to function as an administrative state, it is not necessarily the best for the people. It appeared that the Founders cared less about an efficient government and more about defending individual rights. For example, James Madison wrote that “the accumulation of all powers, legislative, executive, and judicial, in the same hands… may justly be pronounced the very definition of tyranny.” The Founders in writing the Constitution mostly were skeptical, at best, of a large federal government, as evident in the Federalist Papers.

In *Clinton v. The City of New York* (1996), Justice Kennedy expressed his own concerns about the current state of the separation of powers. Kennedy claims that in order for the federal government to continue to operate in the public’s best interest, it must adhere to the structure of the Constitution; declaring that maintaining the structure and stability of the Constitution is much more important than what is convenient at the moment. Kennedy continues explaining the threat to the liberties afforded to every entity beneath the federal government. He reaffirms that even though, in the case of *Clinton v. The City of New York* (1996), Congress had willingly surrendered its power to the Executive, the transfer of power should be ruled as unconstitutional. The surrender of power from one branch to another may endanger the entire federal structure as established by the separation of powers.
The Constitution created a system of governance which exists to protect the rights of all those living within the system. The current policy of applying the Intelligible Principle test and Chevron Deference highlights a failure on the part of the courts to ensure that the unique powers of each branch remain distinctly separate and equal. In order to prevent further transgressions in the future where the Executive acquires more legislative power, the courts should revive the Non-Delegation Doctrine and ultimately check many more delegations of power and executions of power.
Section III: Rolling Back Chevron Deference

Of the two policies, Chevron Deference is the most dangerous to the policy of Non-Delegation, as it is the policy least accountable to the electorate. Chevron deals primarily with administrative agencies. Under Chevron Deference agencies are allowed to construct their own interpretations of legislation in order to create equally powerful regulation with little accountability. This is the result of the Congressional Review Act, where Congress has only a limited window of time in which to challenge these regulations.156

The case, *Chevron v. National Labor Relations Board*, was decided in 1989 by the Supreme Court establishing the judicial principle of Chevron Deference. Praised by Justice Antonin Scalia, Chevron Deference is a two-step process in which:

- First, the reviewing court must determine if Congress had spoken directly to the question being addressed. If the intent of Congress is clear, the matter is resolved, and the court must rule on whether the agency dutifully carried out the unambiguous will of Congress
- Second, if the court found that Congress had not directly addressed the question at issue, the court is not to impose its own view of the statute. Instead, the court must determine if the agency’s answer to the statute was a reasonable construction157

In short, if Congress’ will is uncertain with regards to an administrative action, it is not the court’s role to interpret the law.158 Instead, the court’s role is to determine if the legislation was ambiguous and if the agency reasonably interpreted the law.159
**Chevron Deference’s Failures**

*The Administrative Procedures Act of 1946*

The strongest case against Chevron Deference is that it is in direct conflict with the Administrative Procedures Act of 1946 (APA) which impacts 5 U.S. Code § 706 to read, “The reviewing court shall decide all relevant questions of law,” interpreting, “constitutional and statutory provisions.” Under 5 U.S. Code § 706 the reviewing court should not simply accept the Agency interpretation of the law, and instead, the court should consider all reasonable interpretations of ambiguous legislation. If the reviewing court finds the agency to have acted in a way which is, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity,” the court should hold the agency action as unlawful and abrogate the agency’s’, “action, findings, and conclusions.” The concerns with Chevron Deference violating statutes is only the beginning; some experts even contend that Chevron Deference may be unconstitutional.

*An Unfair Trial*

Evan Bernick of the Federalist Society makes the argument that the courts adopting Chevron Deference violates a citizen’s rights under the 5th Amendment. The 5th Amendment ensures citizens the right to due process under the law. To ensure all parties have their right to due process maintained, it is the role of the court to remain wholly unbiased towards either party when an issue makes its way to the court. Unfortunately, what Chevron Deference does is require judges to favor the legal position of the Agency in question over that of the citizen. This is due to the judge being forced by Chevron Deference to trust that the agency’s interpretation of ambiguous legislation is
Congress’ will. By deciding the case based on law interpreted by the agency, the role of the court is more or less pointless. The court is essentially deciding a case where the outcome has already been decided by one of the parties involved in the case. This standard clearly stacks the deck against any citizen, and because of it, due process is compromised. The concern has also been raised that Chevron Deference is the epitome of the courts abdicating the judicial duty to ensure the rights of citizens are protected and ensuring the separation of powers.

“Abdication of judicial duty”

Concerns with Chevron Deference have even been raised in the confirmation hearings for Justice Neil Gorsuch’s appointment to the Supreme Court. In the United States Tenth Circuit court of Appeals Case Number 14-9585, Gorsuch plainly states his view that, “Chevron seems no less than a judge-made doctrine for the abdication of the judicial duty.”166 Gorsuch goes on to explain how Chevron Deference gives agencies all three types of power violating the separation of powers.167 In terms of legislative power, he found, agencies are vested with the ability to set aside or revise policies. In terms of judicial power, he found, agencies are able to override previous judicial determinations of legislation.168 Finally, in terms of executive power, Gorsuch found, agencies are able to use their own discretion when carrying out laws.169 Through this examination agencies then have powers related to all three branches of government violating the separation of powers necessary to protect the Federalist structure, the rights of states, and the rights of citizens. What is worse is that current Supreme Court Jurisprudence allows for this to continue by maintaining Chevron Deference and the Intelligible Principle test. By expressing disagreement with Chevron Deference in recent history, it would not be
surprising if Justice Gorsuch were to err on the side of Non-Delegation in future Supreme Court Cases.

Concerns over Chevron Deference, and subsequently the Intelligible Principle test, are bi-partisan where both liberals and conservatives fear the power delegated to the Executive Branch. For example, Ilya Somin recently expressed his concerns about the Judiciary relaxing against the Executive Branch exercising the broad powers delegated to them by the legislature. Somin expresses that this issue is not just relevant to Textualists or Originalists, individuals who believe that the Constitution should be interpreted as it was written. Instead, an expansive administrative state and Executive Branch is a threat to everyone. The reason for this is, as he quotes Gorsuch, is that deference allows agencies to be sole arbiters of interpretation with the ability to change their interpretation 180 degrees with the prevailing political winds and still come ahead in court. The left is increasingly more concerned with the strength of the Trump administration, and a reversal of Chevron Deference would be a blow to the Trump Administration’s power and resource pool. Gorsuch, as has been mentioned, is not the only Justice who has issues with the administrative state or a growing Executive Branch.

Failing to Ask, Why?

Justice Clarence Thomas in Michigan v. EPA (2015), expresses his own concerns about the liberties taken by administrative agencies pushing the boundaries of Chevron Delegation. In his concurring opinion, Justice Thomas expresses his dissatisfaction of how far the word, “appropriate,” in legislation has been allowed by the courts to give agencies near absolute discretion over interpreting and carrying out the law. Thomas laments that we should be gravely concerned that the EPA, in this case, felt emboldened
by the precedent to ask the court for deference in the case at hand in which they passed unreasonably costly regulations without any care or consideration towards the costs of the regulations themselves! Thomas concludes his concurring opinion by commenting on the current state of the Nation’s view of the Constitution. Thomas concludes, “We seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before giving the force of law to any other agency “interpretations” of federal statutes,” without any care.

The court seems to be primed to revive at least portions of the Non-Delegation Doctrine and has the potential to rollback Chevron Deference. Between comments made by Justices Roberts, Thomas, and now Justice Gorsuch there are at least three justices on the court who do not feel that the amount of power being delegated is proper. Fears over an overly expansive administrative state and Executive Branch are growing in the country. In the end, it could be up to the court to block any future delegations of legislative power to the Executive Branch and subsequently, administrative agencies. Although, it may not be completely up to the Judiciary to defend the Federalist structure which the people must rely on to defend their rights. Other movements are sprouting up around the country at all levels of government attempting to address the problem of an expansive administrative state and an encroaching federal government.

Section IV: Other Solutions to Reign in Agencies

It is not just members of the Judiciary who are concerned with an expansive administrative state. Throughout the nation, there are those concerned anywhere from the smallest town all the way to Congress, and because of the concerns being raised, there are many different solutions to an expansive administrative state being presented. From
Congress, we can see the REINS Act which is the legislature’s attempt to limit the interpretive ability of Executive Agencies by setting certain standards on major and minor regulations. Most state legislatures are currently considering legislation based on the Convention of States Project; a coalition of states and individuals with the goal of limiting the federal government. In relation to delegation issues, the Convention of States plan could help Congress abrogate regulations promulgated by agencies. The Convention of States also aims at giving the states a stronger stance when opposing bad regulations, legislations, and court rulings. Even the Executive Branch has acknowledged the problem of expansive regulations by creating the recent One-In-Two-Out policy which requires administrative agencies to remove two regulations for every new regulation created, and to absorb the additional costs of the new regulation by eliminating an equal amount of cost by trimming or eliminating existing regulations.

It is evident that members and leaders within each branch of government at many different levels have concerns with the administrative state and the growth of the federal government. The problem related to the current policy of expansive delegation is one with many solutions and one which may require any combination of solutions. A strengthening of the Legislative and Executive opposition to delegation has the potential to strengthen the court’s revival of Non-Delegation Delegation Doctrine. The common theme from all of these parties is a recognition that the administrative state is growing causing the federal government to grow with the administrative state. Each branch and the states are attempting to do what they think they can do to weaken agencies, but not necessarily prevent delegation. If all three branches and the states are able to adopt
policies limiting the amounts and types of power being delegated, the odds of a continued expansion of administrative power will decline.

The REINS Act

Under the current system, the Congressional Review Act, Congress has 60 days to vote to disapprove a proposed regulation in which a majority of both houses must disapprove the regulation, and the President must sign the bill. Under the Congressional Review Act, the President still retains his or her power to veto the bill in order to allow the regulation to continue. The Congressional Review Act essentially allows the Executive Branch to regulate itself by maintaining the President’s veto power, and regulations passed by an executive agency are unlikely to be overturned because they often reflect the will of the President. The law came in place in 1996, and since then it has only once been able to stop a final rule when President George W. Bush entered office after President Bill Clinton’s second term. Between January 2013 and January 2015, two Congressional Review Act resolutions of disapproval were introduced in the House and none were introduced in the Senate. Historically, it is evident that the Congressional Review Act has been a tool in the legislature’s belt with few teeth, and little use. In order to address the issues, found in the Congressional Review Act, the House has passed its version of the REINS Act which is currently under consideration in the Senate.

The Proposed Legislation

The REINS Act continues to ensure that agencies will publish their regulations in the Federal Register and report the regulation to the Government Accountability
The proposed legislation continues to require agencies to classify regulations as a major or minor rule. The REINS Act defines a “major rule,” as a regulation which:

- Has an annual economic effect of $100 Million USD; and
- Causes a major cost increase for consumers, individual industries, government agencies, or geographic regions; and
- Creates significant adverse effects on competition, employment, investment, productivity, innovation, and the ability of a US-based enterprise to compete with foreign enterprises.\(^{189}\)

A minor rule is any regulation which does not meet the standards to be considered “major.”\(^{190}\) Under the REINS Act, proposed regulations also should include a cost-benefit analysis detailing the impact of the regulation, and it must include the projected number of jobs added or lost through the implementation of the regulation.\(^{191}\)

The REINS Act substantially weakens an agency’s ability to promulgate expansive regulation by requiring a joint resolution of approval before any major rules are enacted.\(^{192}\) This differs from the current system under which even major regulations take effect unless a joint resolution of disapproval is passed in both houses.\(^{193}\) Under the REINS Act, if a joint resolution of approval is not enacted within 70 session or legislative days a major rule is then deemed to be not approved, and it will not take effect.\(^{194}\) If the President determines the regulation is necessary due to an imminent threat or emergency, to enforce criminal laws, for national security, or to implement an international trade agreement the rule may take effect for one 90 calendar day period without approval from Congress.\(^{195}\) As to major rules and regulations, the REINS Act essentially flips the current process of requiring a majority to disapprove of a major regulation to requiring a
majority to approve a major regulation. This process also would solve the issue of the presidential veto of legislation aimed to stop regulations promulgated by the president’s administration. The veto concern is solved because the REINS Act assumes any regulation promulgated to be the will of the President, and in effect, Congress is creating a process by which they are able to check the Executive Branch’s authority. Because they are checking the President’s authority to carry out a law, Congress is essentially ensuring that their will is being carried out, and is not being misinterpreted by the President or an administrative agency. This is why the REINS Act would remove the President’s ability to veto joint resolutions of disproval.

The REINS Act remains more lax toward minor regulations which require the House and Senate to enact a joint resolution of disproval to prevent a regulation from going into effect. The REINS Act requires agencies to, “amend or repeal other rules to offset any annual costs of the new rules to the U.S. economy.” This proposed legislation requires the Government Accountability Office to conduct a study in order to determine:

- How many rules were in effect prior to this act
- How many major rules were in effect prior to this act
- The total economic cost of all administrative regulations

Within one year of passage of the REINS Act, the Government Accountability Office must complete its study and report to Congress with their findings. All agencies would be required to submit to Congress reports for all agency rules which are in effect up to one year after the REINS Act is enacted. Over this 10-year period, Congress must submit joint resolutions for approval of each regulation; if not approved by Congress the rule shall not continue into effect.
**What the REINS Act Would Accomplish**

The main goal of the REINS Act is to increase governmental transparency and to increase congressional accountability to the electorate. The Act accomplishes this by forcing major regulatory decisions to be made on the congressional floor, and by excluding amendments to the regulation. This prevents backroom deals from being made and greatly increases transparency. Many people fear that special interest groups hold large sway over Congress, but these groups tend to have more influence in developing administrative rules because the process is significantly less public simply due to the complex bureaucratic system around administrative agencies.

The REINS Act would also have an impact which would resolve many concerns about Chevron Deference and the Intelligible Principle test. The Act does this by giving Congress a more clear and simple path to ensure regulations reflect the intentions of Congress. Even if the court was unable or refused to readopt a stricter non-delegation policy, the REINS Act empowers citizens to pressure their representatives in Congress to restrict actions and regulations promulgated by agencies. The REINS Act still requires Congress to interject on minor regulations, allowing agencies some freedom interpreting legislation. It also does not directly address the issue of improper power delegations between branches. Aside from that fact, the REINS Act would at least provide Congress more control over the exercise of power by agencies with the hope that Congress would act against any improper exercise of power by an administrative agency.

The REINS Act is Congress’ solution to the problems related to an expansive administrative state. The Act is similar to solutions presented by a citizen and state coalition that has the ultimate goal of decreasing the amount of power delegated to the
federal government as a whole by allowing much of the decision-making power to be returned to the State level. The Convention of States Project attempts to accomplish these goals through a State Convention and Amendment Process.\textsuperscript{205}

\textit{Proposals from the Convention of States Project}

The Convention of States Project is a movement to encourage state legislatures to call for a convention of the states in order to amend the constitution.\textsuperscript{206} The goal being to ultimately decrease the size of the federal government and allow the people and the states to make more decisions for themselves.\textsuperscript{207} The project boils down to the idea that people are beginning to trust their own states to do what is best for them rather than officials in Washington D.C.\textsuperscript{208} In September 2016 legislators from all 50 states participated in a simulated convention in order to practice all rules and procedures for a live convention in the future.\textsuperscript{209} This simulation resulted in six amendment proposals to be passed which further develops the movement’s identity. Of the proposals passed, Federal Legislative \& Executive Jurisdiction Proposal 2 and Federal Legislative \& Executive Jurisdiction Proposal 3 would create recourse for the States and Congress against unpalatable regulation.\textsuperscript{210}

\textit{Federal Legislative \& Executive Jurisdiction Proposal 2}

Federal Legislative \& Executive Jurisdiction Proposal 2 (Proposal 2) outlines a process by which the States can stop a perceived violation against them. This proposal provides the states the power to abrogate any provision of Federal law or regulation as promulgated or interpreted by any branch of the federal government.\textsuperscript{211} Abrogation would require a 3/5 majority of states to pass legislation to abrogate the Federal law, rule,
regulation, order, opinion, etc., and the power applies to already existing Federal standards. Any abrogated laws are barred from being reenacted for a period of six years after abrogation, and to ensure this the proposal allows for legal ramifications against agencies and individuals who attempt to enforce abrogated laws. This proposal creates a standard largely difficult for the states to reach, but it does provide an additional outlet to pursue to weaken the federal government’s ability to regulate and challenge the rights of states.

_Federal Legislative & Executive Jurisdiction Proposal 3_

Federal Legislative & Executive Jurisdiction Proposal 3 (Proposal 3) outlines a process by which Congress’ ability to vacate regulations promulgated by administrative agencies which is similar to the REINS Act. The proposal accomplishes this by allowing 1/4 of the members of the House or Senate to present the President with a written declaration of opposition to any proposed or existing Federal agency regulation, in whole or in part. Once presented, Congress has 180 days to pass legislation, by majority vote, reaffirming the regulation. If the vote to reaffirm the regulation fails or Congress fails to pass a reaffirming vote within 180 days, the regulation is to be considered vacated. The vote itself is not subject to Presidential Veto. The major distinctions between this proposal and the REINS Act are that:

1) Proposal 3 requires 1/4 of either house to come forward in opposition to a specific piece of administrative regulation, whereas, the REINS Act is automatically activated by major rules.

2) The REINS Act requires a Joint Resolution of Approval to pass in order for a major regulation to become enforceable. In order to stop minor regulations,
Congress must initiate and pass a Joint Resolution of Disapproval in order to prevent the minor regulation from continuing in effect. While Proposal 3 only requires the challenge to be levied and then a resolution affirming the regulation must pass in both houses to allow the regulation to continue.\textsuperscript{219}

3) The REINS Act would institute additional regulations and measures on agencies in their application of regulations and their reporting to Congress.; while Proposal 3 does not include any additional administrative checks against agencies.\textsuperscript{220}

While extremely similar in effect, the differences between Proposal 3 and the REINS Act are significant enough to warrant further question. It is my own opinion that the REINS Act would be the better option of the two, in furthering a legislative culture of Non-Delegation, due to its inclusion of further checks and regulations against agencies and forcing Congress to vote on major regulations.

Four other proposals were also passed during the Convention of States Project’s trial run covering tax reform all the way to term limits for members of Congress.\textsuperscript{221} The Convention of States Project, if nothing else is important in strengthening the ideas surrounding federalism and states’ rights. Especially, during a period of time where people are questioning whether or not the federal government is going too far, and whether or not the Executive Branch has too much power.

\textit{Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs}

On January 30, 2017, President Donald Trump signed into law what is known as the “One-In-Two-Out” executive order.\textsuperscript{222} The stated purpose of this regulation is to ensure Executive Agencies be fiscally responsible, both with public and private money.
In assessing regulatory costs, the administration is also including regulatory and compliance costs faced by those impacted by regulations.\textsuperscript{223} In order to accomplish the goals of this order, the order requires that for every new regulation proposed two former regulations must be repealed, and for every additional dollar of regulatory cost added the agency must remove an equal amount of cost by repealing at least two existing regulations.\textsuperscript{224} All of which only applies when not prevented by law.\textsuperscript{225} The order allows the Director of the Office of Management and Budget to identify the total incremental costs allowed to each agency during the Presidential budget process.\textsuperscript{226} This policy is nothing new globally, and has been successful in other countries in decreasing regulatory cost and establishing some measure of accountability.\textsuperscript{227} This policy also does not necessarily address the issue of delegation but does address an issue with the administrative state, its lack of accountability, and the resulting added cost.

\textit{Britain’s One-In-Two-Out Policy}

The Federalist Society, on February 9, 2017, during their practice group section tackled this issue with featured speakers Susan Dudley, Director of George Washington University’s Regulatory Studies Center and Jitinder Kohli, the former Chief Executive of Britain’s Better Regulation Executive.\textsuperscript{228} During the teleforum conference call, Kohli compared President Trump’s executive order to similar restrictions in Great Britain which came into place between 2005 and 2009 as he was working as the lead official responsible for implementing the United Kingdom’s one-in-one-out and later one-in-three-out policies.\textsuperscript{229} During the teleforum, Kohli explains the successes of the British plan and emphasizes efficiency and price cutting encouraged by the policy. In fact, the policy was
successful enough in Britain that Australia and Canada also began implementing their own similar plans to streamline their administrations.230

**Recommendations to Ensure Success**

Kohli is not entirely in favor of President Trump’s order though, and he instead provides a few recommendations for the Trump Administration to consider. Primarily, Kohli recommends that the Trump Administration focusses less on the number of regulations cut and more on the financial burden of regulations.231 The administration should also focus less on what they are regulating and more on how they will regulate it, and it can be as easy as simplifying forms for affected parties and eliminating much of the bureaucratic structure surrounding many regulations.232 The administration needs to avoid allowing exclusions to agencies for nearly any reason.233 For example, if an agency needs to implement a regulation immediately but is unable to identify the cost, that agency should still be responsible for adjusting for the added cost within a future period of time.234 The agencies should avoid being ignorant of the complexity of regulation, especially the impacts on small businesses who often cannot afford to maintain an up to date compliance department, and often relies solely on the entrepreneur and his or her occasional meeting with an attorney.235 The agencies should then ensure they create regulations which are easy to understand for all citizens, especially those impacted.236

Marcus Peacock from the George Washington University Regulatory Studies Center identified the potential short lifespan of this policy and recommended future adjustments, considering that in its current form the One-In-Two-Out policy is unsustainable.237 To ensure the policy’s success, the administration should lay the groundwork to embed the policy in the culture of agencies and move towards codification
of laws which would further the administration’s goals of offsetting costs of new regulations by removing old regulations. The administration should also find ways to encourage competition within and among the agencies. In order to accomplish this, they should start by setting clear regulatory and cost-cutting goals for the agencies to meet providing incentives for those who meet their goals and those who rate well based on a value metric systems. These recommendations are similar to what an undergraduate business management student would learn, where one key of human resource management is to encourage associated entities to buy-in to the overall mission, and if successful the entity will be more engaged in their work and thus perform more efficiently. If President Trump is looking to run his administration more like a business, these ideas may in some form come to fruition.

*Combating the Administrative state*

The idea behind the one-in-two-out executive order as it stands appears to have the potential to begin solving some of the problems posed by an expansive administrative state, but it does not appear to be either as long term nor as sustainable as it could be. Despite those weaknesses, the order serves as another example that the members of each branch of government may be concerned about the exercise of regulatory power by administrative agencies. If the Trump Administration examines applications of similar policies and works to embed the policy into law, it is likely to be successful in decreasing regulatory power delegated to administrative agencies. The main concern as it stands now is that it is the Executive Branch issuing the order, and so the President currently could change his or her mind at any time in order to satisfy his or her regulatory agenda.
Conclusion

Administrative agencies exist to do good in an efficient manner. They seek to carry out the law as part of the Executive Branch. Unfortunately, this efficiency has resulted in the abdication of significant legislative power from Congress to the Executive Branch, which threatens the separation of powers protecting everyone from a large, overbearing federal government promulgated by one branch assuming significant power over the other two. All legislative power is no longer vested in the legislature, and instead much of it is tied up in the administrative state. The rise of the administrative state is as much a threat to the separation of powers as it is a benefit to citizens.

We do benefit from the existence of administrative agencies, but we must question their role in society. If you apply Non-Delegation Doctrine to the role of administrative agencies, agencies do not exist to promulgate regulations. Instead, administrative agencies are entities which willfully, efficiently, and dutifully carry out the law in order to protect the rights of all citizens. Under current interpretations, we receive an efficient regulatory system which is adaptive and responsive to technological and social changes, which is unhindered by Congressional deadlock. Unfortunately, regulatory proliferation threatens the rights of citizens, by cutting their voices out of the decision-making process. The legislature exists to exercise the will of the people, and to be directly accountable for their decisions to the American Electorate. If the legislature continues to delegate more of its power away it may undermine its purpose, and who will then advocate for the electorate in establishing Federal Policies? By continuing to allow agencies to answer the major questions left open by the legislature, the electorate cannot clearly see the policies for which their representatives are responsible.
The expansion of the administrative state was not abrupt. It took judicial precedent evolving over 200 years to lay the framework and eventually resulting in the dormancy of the Non-Delegation Doctrine. The result was lax judicial principles which allowed Congress to delegate power, and for the administrative state to grow. The judicial history shows the expansion of the role of the entities outside of Congress to be allowed to make decisions that can affect or work alongside legislation in 1813 and 1825 respectively.\(^{244}\) In 1928 the Intelligible Principle test was solidified in law, even though it was not employed in 1935 with the last two major cases to apply principles of Non-Delegation Doctrine.\(^{245,246}\) In 1984, the more dangerous principle of Chevron Deference was established allowing courts to avoid examining the specific interpretations of legislation employed by administrative agencies.\(^{247}\) After 1984, the court strengthened the Intelligible Principle test and Chevron Deference in 1989 and 2001.\(^{248}\) It is this history which the court must challenge in order to revive the Non-Delegation Doctrine.

Non-Delegation Doctrine could easily stop or at least slow, the growth of the administrative state. The current principles of the court fail to uphold the separation of powers which protect the rights of citizens and the states from an overly expansive federal government by preventing one branch from accumulating power over the others and exercising unconstitutional amounts of power.\(^{249}\) Congress under current court doctrine can freely delegate their legislative power to administrative agencies, leading to a legislature which is slothful, not transparent, and less accountable to the electorate.\(^{250}\) The Congressionally approved and Judicially allowed co-mingling of powers within one pair of hands, the Administrative state, is a clear threat and violation of the separation of powers.\(^{251}\)
This violation of separation of powers has been justified under the Necessary and Proper Clause, due to Congress lacking the knowledge and resources to legislate regulations on every facet of the modern United States. The court assumes by applying the Intelligible Principle test that Congress is knowingly and willingly delegating away legislative power, and because Congress approved this delegation, the court should not challenge the will of Congress.

Judicial fears related to going against the will of Congress grew over time. In 1984, Chevron Deference was developed, and the courts directly addressed the interpretive powers of administrative agencies. When a question of law and/or fact arises between one party and an Administrative Agency, the court must look at the legislation which the Agency based its action upon. If the court finds that the legislation in question is ambiguous, then the court must, generally, allow the Agency’s interpretation to prevent going against the will of Congress.

When legislation is ambiguous, and the court is unable to ascertain the clear will of Congress, under the Non-Delegation Doctrine, the court should ask Congress what they desired from the legislation. The court would accomplish this by striking down the regulation in part or in whole, and returning the legislative matter for Congress to express its will more clearly. Unfortunately, the last major cases where this policy prevailed occurred in 1935. Fortunately, Justices on the court appear to be posturing for future applications of the Non-Delegation Doctrine.

The application of Chevron Deference may be the largest challenge for the Non-Delegation Doctrine to overcome. Chevron Deference allows the court to freely and easily neglect its responsibility to check the other two branches and to prevent them from
accumulating too much power. One of Chevron Deference’s strongest arguments is that even one of the most conservative Supreme Court Justices, Antonin Scalia, had favored it, and its policy of reigning in Judicial Power.

Conversely, Chevron Deference may be open to several different legal concerns. First, 5 United States Code § 706, grants the court final say in questions of law. Other experts argue that Chevron Deference may violate your 5th Amendment right to due process, by biasing the court in favor of the Agency and against citizens. Justice Neil Gorsuch, prior to his appointment to the Supreme Court, was also clearly opposed to the application of Chevron Deference. He viewed it as the “Abdication of Judicial Duty,” resulting in the degradation of the separation of powers.

Today, opposition to an expansive administrative state is clearly a bi-partisan issue, especially since the election of President Trump. In recent history, there have always been elements within Conservativism opposed to a centralized and expansive federal government and administrative state. Now, under the Trump Administration, there are many examples of liberals opposing a further expansion of the Executive Power. It is possible that the Non-Delegation Doctrine could exist in order to ease everyone’s concerns of a federal government which delegates large amounts of power into one branch’s hands.

With four current Supreme Court Justices expressing their opposition to Non-Delegation Doctrine, and the issue now being bi-partisan, it is unsurprising to see movement in the other branches and the states which are opposed to an expansive administrative state. The House of Representatives, in early 2017, has passed the REINS Act of 2017, and the Act is now under consideration by the Senate. Over the past few
years, a coalition of states, elected officials, and citizens have undertaken the Convention of States Project, with the overarching goal of restraining the federal government and giving the States more discretion over policies which affect them.\textsuperscript{267} The Project, in Fall 2016, hosted a trial-run of a state Convention in Williamsburg, and two of the resolutions developed sought to weaken the administrative state by creating more recourse that was simpler for Congress to achieve, and by creating a clearer path for recourse against Agencies for the states.\textsuperscript{268} President Trump had also signed in an Executive Order known as One-In-Two-Out, which limits agencies’ ability to create regulations. The Order requires that for every regulation created, two must be removed.\textsuperscript{269} Also, for every additional cost incurred by new regulations, equal amounts of cost must be cut by trimming or cutting other regulations.\textsuperscript{270}

It is difficult to deny that the expansive administrative state is widely troubling when the opposition is both bi-partisan and coming from every branch and every level of government. If the courts fail to revive the Non-Delegation Doctrine, the REINS Act, Convention of States Project, or Executive Orders may be able to constrain further delegation. If those opposed to expansive delegations of power to the Executive become more entrenched and active, it could severely hamper the growth of the administrative state, and bring it back within Constitutional bounds.

Current court principles will likely continue to be challenged in future litigation, and a case for the Non-Delegation Doctrine should be presented to replace these current court principles. The judicial history which allowed the dormancy of Non-Delegation Doctrine should be challenged. The Intelligible Principle test must be either more limited or removed completely. Chevron Deference should be completely rolled back, and the
court must force Congress to explicitly state their will in legislation. Agencies should not be able to interpret legislation broadly. Finally, actions being taken by the other branches and the states demonstrate the serious concerns about an expansive administrative state.

If the courts continue to fail to rein in the administrative state, the problems which persist now will only continue into the future. The cost of regulation has already grown by $1,700,000,000,000 between the mid-1990’s up until 2015. The costs related to regulatory compliance will only continue growing unless the courts intervene and put an end to Congress’ lax behavior towards delegation and agencies’ broad ability to interpret legislation. The court’s continued failure to apply the Non-Delegation Doctrine to prevent agencies from exercising legislative and executive power only harms society. Expansive regulation only harms the population by creating a litigious environment in which the agencies make the rules. As described in the beginning, the, “layman,” is now expected to keep up with every administrative interpretation of a term or risk a hefty fine if not prison.
Footnotes


2 Id.


4 Id.

5 Id.

6 Id.

7 Id.

8 Id.

9 Id.


11 Id.


14 Id.


16 Id.


African Development Foundation, Federal Register (N.D.)
https://www.federalregister.gov/agencies/african-development-foundation

Defense Intelligence Agency, Federal Register (N.D.)
https://www.federalregister.gov/agencies/defense-intelligence-agency

Food Safety and Inspection Service, Federal Register (N.D.)

Kathryn Watts, Rulemaking as Legislating, 103 Geo. L.J. 1003 (2015)


The Aurora, 11 U.S. 382, 3 L. Ed. 378 (1813).

Wayman v. Southard, 23 U.S. 1, 6 L. Ed. 253 (1825).


http://www.heritage.org/constitution/#!/articles/1/essays/2/legislative-vesting-clause


U.S. Const. art I, § 8, cl.18.


36 Id.


39 Id.


43 Id.

44 5 United States Code § 706 (West).


47 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

48 Ilya Somin, Gorsuch is right about Chevron Deference (May 23 2017)


50 Id


53 Convention of States Project, Convention of States Simulation (2016)

Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339.

Id.

Mike Lee, Our lost Constitution: The Willful Subversion of America’s Founding

Mike Lee, Our Lost Constitution (p. 68-70) 2015 see also The United States v. Mills,

Mike Lee, Our Lost Constitution (p. 67-68) 2015

Douglas H. Ginsberg, The Heritage Guide to the Constitution, Legislative Vesting

The Aurora, 11 U.S. 382, 3 L. Ed. 378 (1813).

Id.

Id.

Id.

The Aurora, 11 U.S. 382, 3 L. Ed. 378 (1813). see also US Constitution Art. 1 Sec. 1

The Aurora, 11 U.S. 382, 3 L. Ed. 378 (1813).

Id.

Id.

Wayman v. Southard, 23 U.S. 1, 6 L. Ed. 253 (1825).

Id.

Id.

Id.

Id.


Id.

Id.

Id.

Id.

Id.
81 Id.
82 Id.
84 Id.
85 H.R. 5755, 73rd U.S. Cong (1933).
87 Id.
88 Id.
89 Id.
90 Id.
91 H.R. 5755, 73rd U.S. Cong (1933).
96 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 United States v. Wiltberger, 18 U.S. 76, 5 L. Ed. 37 (1820).


104 Id.


107 Id.

108 Id.

109 Id.

110 United States v. Wiltberger, 18 U.S. 76, 5 L. Ed. 37 (1820).


112 Id.


114 Id.

115 Id.

116 Id.

117 Id.

118 Id.

119 Id.

120 Id.

121 Id.

122 Id.


125 Id.

126 Id.


129 Id.
Wayman v. Southard, 23 U.S. 1, 6 L. Ed. 253 (1825).


Id.


Id.

Id.


http://www.heritage.org/constitution/#!/articles/1/essays/2/legislative-vesting-clause


Id.

Id.

Id.


149 Id.


152 The Federalist No. 10 (James Madison) (Liberty Fund, 2001).


154 Id.

155 Id.


158 Id.

159 Id.

160 S. 7. 75th Cong. (1946). See also 5 United States Code § 706 (West)

161 Id.


163 Id.

164 Id.

165 Id.

166 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

167 Id.

168 Id.
Id.

Ilya Somin, Gorsuch is right about Chevron Deference (May 23 2017)

Id.

Id.

Heather Wilhelm, Trump’s Christmas Gift to America (December 14 2016).


Id.

Id.

Id.


Convention of States Project, Convention of States Simulation (2016)

Id.

Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339.


Id.


Id.

Id.


Id.

Id.

Id.

Id.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


Id.

Convention of States Project, About (N.D.)

https://www.conventionofstates.com/about.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Convention of States Project, Official Proposals of the Simulated Convention of States (Sept. 23 2016)

Convention of States Project, Official Proposals of the Simulated Convention of States (Sept. 23 2016)

https://d3n8a8pro7vhmx.cloudfront.net/conventionofstates/pages/6429/attachment

See also H.R. 26, 115th Cong. (2017).


https://d3n8a8pro7vhmx.cloudfront.net/conventionofstates/pages/6429/attachment
s/original/1474994742/Final_Convention_Report_with_Votes.pdf?1474994742

Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339.

Administrative Law & Regulation Practice Group Podcast, President Trumps “One-In-Two-Out” Executive Order, The Federalist Society (Feb. 10 2017)


Jitinder Kohli, What President Trump Can Learn From The UK About Reducing Regulations, Forbes (Jan. 27 2017)

https://www.forbes.com/sites/realspin/2017/01/27/what-president-trump-can-
learn-about-reducing-regulations-from-the-uk/#5d6d80f04c3a
Id.
Id.
Id.
Id.
Id.

Id.

https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Peacock_Implementing-Two-For-One%2012-2016_final.pdf

Id.
Id.
Id.


The Aurora, 11 U.S. 382, 3 L. Ed. 378 (1813). See also Wayman v. Southard, 23 U.S. 1, 6 L. Ed. 253 (1825).


Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).


Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).


Id.


Id.

Id.


Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).


5 United States Code § 706

Evan Bernick, Law’s Abnegation: From Law’s Empire to the Administrative State by Adrian Vermeule, 18 Federalist Soc’ Rev. 106, 117 (2017)

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016).

Id.

Ilya Somin, Gorsuch is right about Chevron Deference (May 23 2017)

Id.


Convention of States Project, About (N.D.)

https://www.conventionofstates.com/about.

Id.

Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339.

Id.


Id.

Wendy McElroy, Decriminalize the Average Man, Mises Institute (2011),

https://mises.org/library/decriminalize-average-man. See also Harvey Silverglate,

Three felonies a day: how the feds target the innocent (Encounter Books 2009).