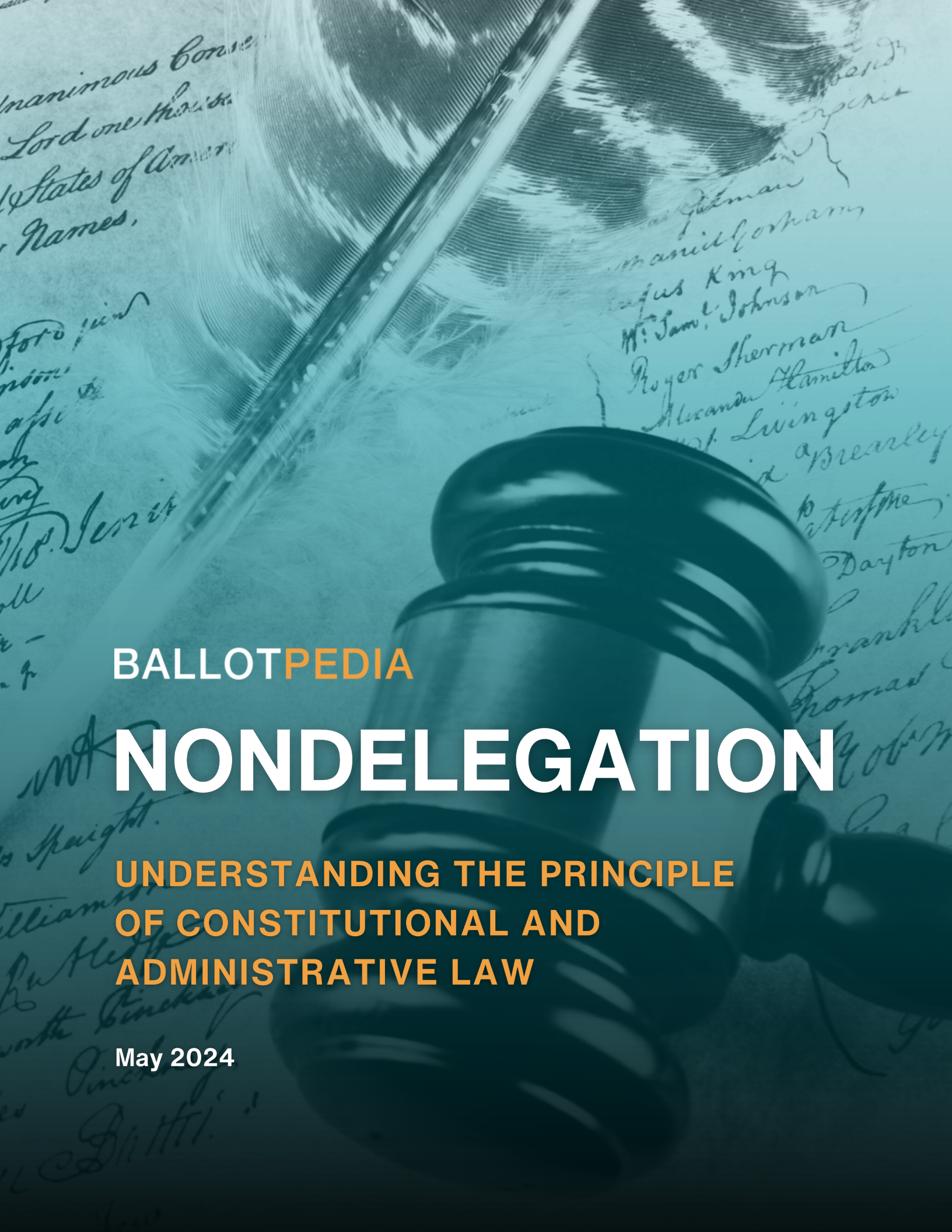

BALLOTPEDIA

NONDELEGATION

UNDERSTANDING THE PRINCIPLE OF CONSTITUTIONAL AND ADMINISTRATIVE LAW

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Nondelegation: Understanding the principle of constitutional and administrative law

Summary

This document leads you on a path of discovery surrounding the nuts and bolts of the nondelegation doctrine and what it means for American government.

This document outlines the origins of the nondelegation doctrine, notable milestones in its development, and arguments supporting and opposing its application.

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Ballotpedia's policy content and assets are a gateway to learning about policy and an unparalleled resource for in-depth, historical, clear, comprehensive, factual and neutral information on key policy areas.

Nondelegation: What is the nondelegation doctrine?

The nondelegation doctrine

The nondelegation doctrine is a principle of constitutional and administrative law that holds that the legislative branch cannot delegate its legislative powers to other branches of government.

Delegate, in this context, means to entrust or hand over authority to another branch of government. In other words, the nondelegation doctrine holds that lawmakers cannot allow other government actors or entities, such as administrative agencies, to make laws.

The nondelegation doctrine is not explicitly spelled out in the Constitution. There is not a specific phrase that defines its parameters or stamps it into law. Rather, the doctrine is drawn from scholarly interpretations of the Constitution. While some scholars support the principle of nondelegation, others find fault with its premise.

The separation of powers

The separation of powers is a defining characteristic of the United States Constitution, which vests legislative authority in Congress (Article I), executive power in the president (Article II), and judicial power in the judiciary (Article III).

The separation of powers is sometimes referred to as a system of checks and balances because the Constitution provides each branch with certain powers over the other two branches.

Under a strict application of the nondelegation doctrine, Congress would not be allowed to let the president, administrative agencies, or courts pass laws.

- **What about administrative agencies?**

The majority of administrative agencies are housed in the executive branch. These agencies operate under the Executive Office of the President, within one of the 15 Cabinet departments, or as independent agencies with a top official who is nominated by the president and confirmed by the U.S. Senate.

Depending on the agency, these entities may house additional sub-agencies, bureaus, divisions, and commissions. A handful of agencies are also housed in the legislative and judicial branches, including the Government Publishing Office (GAO) and the United States Sentencing Commission, respectively.

Delegations of authority
Proponents of the nondelegation doctrine argue that Congress violates the separation of powers by delegating its legislative authority to agencies, which promulgate regulations in order to bring about statutory goals.

Opponents of the nondelegation doctrine claim that agencies only exercise executive power by implementing laws passed by Congress.

Can a line be drawn marking the types of authority that can be delegated?
One idea is the intelligible principle test. Rather than drawing a hard line against delegations of authority, the intelligible principle test aims to shed light on the degree of discretion Congress entrusts to executive branch decision makers. The intelligible principle test, established by the United States Supreme Court in *J.W. Hampton Jr. & Co. v. United States* (1928), holds that Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."

United States Supreme Court (SCOTUS) impact

Wayman v. Southard is one of the seminal cases in the development of the nondelegation doctrine. SCOTUS held that Congress' delegation of the power to federal courts to create their own procedures did not represent an unconstitutional delegation of legislative power. In the case opinion, Chief Justice John Marshall made a distinction between the essential legislative functions of Congress, which it should regulate itself, and the subordinate rules and procedures, which he felt could be more practically established by other entities.

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." **- Judge John Marshall.**

The line-drawing problem first identified by Marshall has resurfaced time and time again in cases concerning the nondelegation doctrine.

J.W. Hampton Jr. & Company v. United States involved a delegation of authority by Congress to the president to adjust tariff rates with the goal of protecting American business. The Supreme Court held that Congress did not delegate legislative power to the executive because it provided the president with clear instructions on when and how to adjust the tariff rates established by the law.

Remember yesterday's intelligible principle test? This is where it all began. SCOTUS formulated the intelligible principle standard in J.W. Hampton as a legal test to determine whether or not a delegation of authority by Congress to the executive branch violates the separation of powers and the related nondelegation doctrine.

Writing for the court, Chief Justice William Howard Taft argued,
"If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Panama Refining Co. v. Ryan and ***A.L.A. Schechter Poultry Corp. v. United States***
SCOTUS went on to apply the intelligible principle test in two 1935 cases: *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*. Both Panama and Schechter were major cases in the development of the nondelegation doctrine and laid the groundwork for many subsequent rulings. The cases concerned provisions of the National Industrial Recovery Act (NIRA) that SCOTUS held to be unconstitutional delegations of legislative authority. Together, the two cases effectively neutralized NIRA—a major component of President Franklin D. Roosevelt's New Deal.

In both *Panama* and *Schechter*, Chief Justice Charles E. Hughes applied the intelligible principle test but none could be found. The decisions clarified the boundaries governing the delegation of Congressional power and reiterated the intelligible principle as the court's primary test to examine questions of delegation.

SCOTUS has not invalidated a congressional delegation of authority on nondelegation grounds since *Panama* and *Schechter* in 1935. The court rejected a number of nondelegation challenges over the remainder of the 20th century and early 21st century, including *Mistretta v. United States* (1989), *Whitman v. American Trucking Ass'ns* (1999), and *Dept. of Transp. V. Ass'n of Am. R.R.s, 135 S.Ct. 1225* (2015), just to name a few.

Nondelegation: Breaking down the laws

U.S. Constitution: The Vesting Clauses

The Vesting Clauses of the U.S. Constitution grants distinct authority to the three branches of government. The nondelegation doctrine is rooted in the separation of powers implemented by the Vesting Clauses. Let's take a closer look at the language of the Vesting Clauses:

- **Article I:** "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

- **Article II:** "The executive power shall be vested in a President of the United States of America."

- **Article III:** "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Legislative power that is vested in Congress, argue supporters of the nondelegation doctrine, is vested in Congress alone and cannot be delegated to the judicial or executive branches, including administrative agencies. Others disagree. Since the Constitution does not include a specific prohibition on delegation, opponents of the nondelegation doctrine argue that delegation to administrative agencies allows them to implement specialized components of broad laws passed by Congress.

U.S. Constitution: The Sweeping Clause (Necessary and Proper Clause)

The Constitution's Sweeping Clause, also known as the Necessary and Proper Clause, grants Congress the authority to make laws that are necessary and proper for the government entities to carry out their vested responsibilities. The clause states:

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof".

The Sweeping Clause is at the forefront of interpretation of the nondelegation doctrine. Scholars have argued that the clause allows for Congress to delegate questions requiring subject-matter expertise to agency administrators in order to implement the law. Others claim that the Sweeping Clause grants no such authority and, instead, actually limits government activity to those responsibilities deemed "proper"—or explicitly authorized—in the Vesting Clauses.

Statutory delegations

Besides the Constitution, what statutes impact interpretation and application of the nondelegation doctrine? Sometimes Congress passes laws that authorize administrative agencies to “fill in the gaps” by issuing rules that require subject-matter expertise in a particular policy area. Thus, Congress delegates its lawmaking authority to administrative agencies to administer complex statutes.

Example: The Clean Air Act

Let’s take a look at the Clean Air Act (CAA) as an example of how a law passed by Congress can allow Congress to delegate its authority to administrative agencies.

In *Whitman v. American Trucking Associations Inc.* (2001), several industry groups challenged the Environmental Protection Agency's (EPA) revised 1997 ozone regulation as an unconstitutional delegation of legislative power since Congress had not provided an intelligible principle in the CAA to guide the agency's actions.

Here’s a look at the challenged text of Section 109(b)(1) of the CAA: The statute instructs the EPA to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documents of §108] and allowing an adequate margin of safety, are requisite to protect the public health."

The Supreme Court disagreed with the industry groups and held that the EPA's interpretation of Sections 108 & 109 of the Clean Air Act did not unconstitutionally delegate legislative power to the EPA. The court found that “Section 109(b)(1) of the CAA, which to repeat we interpret as requiring the EPA to set air quality standards at the level that is ‘requisite’--that is, not lower or higher than is necessary--to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.”

Scholarly analysis

Nondelegation doctrine

"Interring the Nondelegation Doctrine" by Eric A. Posner and Adrian Vermeule (2002)

- "Interring the Nondelegation Doctrine" (2002) is an article by American lawyers and professors Eric Posner and Adrian Vermeule arguing that the nondelegation doctrine is a legal fiction and that congressional delegations of authority are never delegations of legislative power.

"'The People Surrender Nothing': Social Compact Theory, Republicanism, and the Modern Administrative State" by Joseph Postell (2016)

- "'The People Surrender Nothing': Social Compact Theory, Republicanism, and the Modern Administrative State" (2016) is an article by American political theorist Joseph Postell searching for a philosophically and legally sound argument for the nondelegation doctrine. Postell's goal is "to establish that there is a nondelegation principle in the U.S. Constitution, and that it is ultimately derived not from the separation of powers theory, accountability, or simply the text of the document, but that it flows from social compact theory and republicanism."

Separation of powers

"The Checks & Balances of the Regulatory State" by Paul R. Verkuil (2016)

- "The Checks & Balances of the Regulatory State" (2016) is an article by American lawyer and professor Paul Verkuil arguing that the administrative state (as he refers to it, the regulatory state) is involved in a system of checks and balances that prevents administrative abuses of power and violations of constitutional rights. Verkuil defends, in a general sense, the administrative powers exercised by the executive and independent agencies of the federal government.

"The Place of Agencies in Government: Separation of Powers and the Fourth Branch" by Peter L. Strauss (1987)

- "The Place of Agencies in Government: Separation of Powers and the Fourth Branch" (1984) is an article by American legal scholar Peter L. Strauss that advocates for a shift in the view of the role of administrative agencies within the federal government from a separation of powers perspective toward what Strauss describes as a separation of functions lens. Strauss argues that the separation of powers approach seeks to compartmentalize agencies within the three branches of government and fails to account for the checks and balances that allow Congress, the president, and the courts to jointly exercise agency oversight. By supporting a separation of functions view of administrative agencies, Strauss aims to promote an understanding of agencies with respect to their responsibilities and relationships with the three branches of government.

"The Rise and Rise of the Administrative State" by Gary Lawson (1994)

- "The Rise and Rise of the Administrative State" is an article by administrative law scholar Gary Lawson in which Lawson explains his understanding of the origins and development of the administrative state. He argues that it violates the constitutional principles of limited government and separation of powers and, moreover, that many of the New Deal-era reformers responsible for the administrative state were aware of these contradictions at the time. Lawson explains his belief that the administrative processes of rulemaking, investigation, enforcement, and adjudication violate the Constitution and the rights it guarantees by concentrating legislative, executive, and judicial powers within a single entity, the administrative agency.

📖 Continued reading on the nondelegation doctrine:

- Nondelegation doctrine
- Separation of powers
- Executive agency
- Article I
- Article II
- Article III
- Article I, Section 8 (Sweeping Clause)
- Timeline of SCOTUS cases that have shaped the nondelegation doctrine

Nondelegation: The separation of powers

What is the separation of powers principle?

Sometimes referred to as the system of checks and balances, the separation of executive, legislative and judicial functions into three distinct branches of government was designed to thwart a concentration of power.

In The Federalist No. 47, James Madison wrote that 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."

Separation of powers and the Constitution

The first three articles of the Constitution establish the distinct powers of the executive, legislative, and judicial branches. The framework is both philosophical and practical.

Article I: Legislative branch

Article I begins:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." There are 10 sections in Article 1 that, among other things, delineate the structure of the institution; qualifications for office and the election process. Article 1 also confers on Congress:

- "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."
- "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

(Article 1 also bars states from taking a variety of actions, including entering into treaties or interference in trade.)

Article II: Executive branch

Article II vests executive authority in the president (for both domestic law and foreign policy); details the manner of election; establishes the president as Commander in Chief of the Army and Navy; empowers the president to appoint justices of the U.S. Supreme Court (with the advice and consent of the Senate); and delineates succession in the event a president is removed from office or unable to perform the duties of the office.

"The term "executive authority" in Article 1 refers to the president's responsibility to "take care that the laws be faithfully executed." This includes management of federal departments and agencies, and the implementation and enforcement of regulation.

Article III: The Judiciary

Article III declares: "The judicial Power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." The term "judicial power" refers to interpreting the Constitution and the law, and applying those interpretations to the disputes before the court(s).

Article III also delineates the type of cases that fall under the jurisdiction of the federal judiciary, including:

- Constitutional disputes;
- Cases arising from application of federal laws;
- Cases affecting treaties, ambassadors, and other public ministers and consuls;
- Cases of admiralty and maritime jurisdiction;
- Controversies to which the United States is a party;
- Controversies between two or more states, or between a state and citizens of another State;
- Cases involving citizens of different States.

The separation of powers refers to the division of legislative, executive, and judicial functions into three distinct branches of government. The Framers applied this principle to prevent a concentration of powers. The Constitution vests the legislative branch (Congress) with the power to make law; the executive branch with the power to execute the law; and the judicial branch with the power to interpret the law.

Why does the separation of powers matter?

Separation of powers protects individual liberty against tyranny

The separation of powers works to protect American citizens' individual liberties by preventing the concentration of government power in a single branch. By contrast, allowing any single government entity to exercise legislative, judicial, and executive functions can result in tyranny by unaccountable government actors. James Madison cautioned against the accumulation of power in a single government actor in *Federalist 47*, arguing, "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."

Thus, the system of separation of powers designed by the Framers aimed to disperse government authority and institute a system of checks and balances to prevent any single branch from wielding too much power.

Separation of powers allows for accountable, representative government

The separation of powers was designed to create a government accountable to its citizens through their participation in representative government. The Founding Fathers were influenced by the representative governments of the Ancient Greeks and Romans as well as the political philosophy of Enlightenment thinkers, such as Montesquieu, Locke, and Blackstone. James Madison argued in *Federalist 51* that, "A dependence on the people is, no doubt, the primary control on the government."

Representative government in the United States takes different forms according to each branch:

- Members of the Senate and House of Representatives are directly elected by the public.
- The president is elected by the members of the Electoral College, who are selected through procedures put forth by the elected members of the state legislatures. Depending on the state, Electoral College members cast their votes according to a winner-take-all system or a proportional system that reflects the popular vote in each state.
- Federal judges, though not directly elected by the people, are appointed by the president with the advice and consent of the elected members of the U.S. Senate.

Checks and balances

The separation of powers in the United States is sometimes referred to as a system of checks and balances because the Constitution provides each branch with certain powers over the other two branches. The ability of the branches to check the authority of the others safeguards the separation of powers and prevents any single branch from accumulating too much authority.

What does the system of checks and balances look like in practice?

- The president can check Congress by vetoing legislation to prevent laws from being enacted.
- Congress can check the president by overriding a presidential veto with a two-thirds vote of both the House and Senate. Congress can also impeach the president and federal judges for treason, bribery, or other high crimes and misdemeanors.
- The United States Supreme Court can check the legislative and executive branches by declaring a law unconstitutional.

Where did the idea of separation of powers originate?

According to scholar Charles Kessler, the initial context of the separation of powers "was the English Civil War, when the idea of separated powers first appeared in the pamphlets and essays of parliamentary writers who distinguished between legislative and executive powers in order to subordinate the executive to the legislative. The aim of such republicans as John Milton and Philip Hunton was to establish the rule of law by guaranteeing that those who made the law could not execute it and that those who executed it could not make it for the sake of their private advantage. In effect, of course, the doctrine was anti-monarchical, inasmuch as it reduced the King to the status of an "executive" (that is, someone who carries out the will of another)."

Below, we take a look at the separation of powers ideas put forth by Enlightenment philosophers Locke, Montesquieu, and Blackstone, and examine their influence on the Founding Fathers:

Locke

John Locke was a 17th century English political philosopher who saw legislative power as the ultimate governing authority and the executive power as the administrator and enforcer of the law. In his Second Treatise of Government, Locke stated that it is "too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they exempt themselves from obedience to the laws they make."

Montesquieu

Baron de Montesquieu was an 18th century French political philosopher whose political treatise, The Spirit of the Law, divided the powers of government into executive, legislative and judicial categories. He argued that, in order to protect liberty and prevent the abuse of government power, these powers should be exercised by separate institutions and officials:

“When the legislative and executive powers are united in the same person ... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.” (The Spirit of the Law)

Blackstone

William Blackstone was an 18th century English jurist and political philosopher. Blackstone favored the separation of powers to promote efficiency in government (by counteracting the slow, deliberative legislative branch with an expedient executive) and protect individual liberty. In his Commentaries, Blackstone argued, “where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of it’s [sic] own independence, and therewith of the liberty of the subject.”

The Federalist Papers

The Federalist Papers is a collection of 85 essays written by Alexander Hamilton, James Madison, and John Jay under the pseudonym "Publius" advocating for ratification of the Constitution to replace the Articles of Confederation. The essays were published together as The Federalist Papers in 1788.

James Madison strongly argued for the separation of powers in The Federalist Papers. He described the need for a system of checks and balances to maintain the separation of powers in Federalist 51:

“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others... Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government.”

Challenges to the separation of powers

Below are key challenges to the separation of powers by the administrative state, that is, the concentration of powers within federal agencies facilitated by congressional delegations of legislative authority and judicial deference. This is not an exhaustive analysis, but rather an overview of the practical effect of the separation of powers in contemporary American government.

Separation of powers and the combination of functions

Administrative law scholar Elizabeth Slattery described this challenge in an essay for The Heritage Foundation: "Though typically categorized as part of the executive branch, administrative agencies perform legislative, executive, and judicial functions by issuing, enforcing, and settling disputes involving regulations that have the force of law. ... The Founders sought to prevent such tyranny—thereby safeguarding Americans' individual liberties—by dividing the powers of the federal government among three coordinate branches. The modern administrative state, however, blurs the separation of powers and the system of checks and balances and has become an unaccountable fourth branch of government."

Separation of powers and delegation

Congress often passes broadly worded legislation that allows agencies to fill in the details of rule-making and enforcement. Critics of such delegation argue that agencies, as part of the executive branch, are only authorized to implement and enforce the law. Delegation, on the other hand, allows unelected administrators to create regulations that—subverting the accountability of representative government. Scholars have argued that congressional delegations of authority to administrative agencies violate the separation of powers and the nondelegation doctrine by placing legislative authority in the hands of executive branch actors.

In "The Constitution as Political Structure," administrative law scholar Martin Redish argued that "[t]he system of separation of powers was established in order to prevent undue accretion of political power in one branch. Abandonment of the nondelegation doctrine effectively permits the executive branch to accumulate an almost unlimited amount of power."

Separation of powers and deference

The term “judicial deference” refers to a federal court accepting an agency's interpretation of an unclear statute or regulation passed by Congress. Critics argue that the practice violates the separation of powers by transferring judicial power to executive branch agencies and ignoring the court's’ obligation to interpret the law and serve as a check on the other branches.

Administrative law scholar T.J. McCarrick summarized this argument in a paper for the San Diego Law Review, stating, “In sum, [deference] concentrates almost all government power in the administrative state. And by vesting agencies with authority to create, interpret, and enforce the law, individual liberty is placed at risk.”

Continued reading on the separation of powers:

- Separation of powers
- United States Constitution
- Executive agency
- Judicial review
- Separation of powers
- Key points in the development of the administrative state: the Age of Enlightenment
- *The Federalist Papers*
- *Federalist 47*
- Deference
- Nondelegation doctrine

Nondelegation: Enumerated powers

What are enumerated powers?

The term ”enumerated powers” refers to the specific actions that Congress alone is authorized to take and to which its authority is limited by Article 1, Section 8 of the Constitution. The enumerated powers are a structural element of the separation of powers between the legislative, executive and judicial branches of the federal government.

Georgia Rep. James Jackson, serving in the First Congress, expressed the principle succinctly: "We must confine ourselves to the powers described in the Constitution, and the moment we pass it, we take an arbitrary stride towards a despotic Government."

Enumerated powers: specific and limited
Article 1, Section 8 of the United States Constitution delineates the following powers exclusively to Congress:

Clause 1: Taxing and Spending

- “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States”

Clause 2: Borrowing Power

- “To borrow Money on the credit of the United States;”

Clause 3: Commerce Clause

- “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;”

Clause 4: Naturalization and bankruptcies

- “To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;”

Clauses 5 and 6: Currency

- “To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- “To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;”

Clause 7: Post Offices

- “To establish Post Offices and post Roads;”

Clause 8: Copyright

- “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;”

Clause 9: Creation of Courts

- “To constitute Tribunals inferior to the supreme Court;”

Clause 10: Maritime Crimes

- “To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;”

Clauses 11-14: War and military

- “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
- “To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- “To provide and maintain a Navy;
- “To make Rules for the Government and Regulation of the land and naval Forces;”

Clauses 15 and 16: Militia

- “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
- “To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;”

Clause 17: District of Columbia and Federal Property

- "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And"

Clause 18: Necessary and Proper Clause

- "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Constitution also grants Congress the authority to declare punishments for treason in Article III, Section 3. Moreover, Article IV, Section 3 grants Congress the authority to admit new states to the Union and to craft rules and regulations for United States territories. Lastly, the Sixteenth Amendment grants Congress the authority to levy an income tax.

Enumerated powers: non-transferable

Congress is barred from delegating its enumerated powers to either the executive or judicial branch under the nondelegation doctrine implicit in the framework of the Constitution. In actuality, however, Congress in recent decades has repeatedly delegated its authority to executive branch agencies to formulate regulation and a host of other public policies that carry the force of law—a major factor in the expansion of the administrative state.

Congress' exercise of enumerated and other powers

The enumerated powers function as both grants and limits on congressional authority. However, Congress often passes legislation that oversteps the limits of the enumerated powers in breach of the separation of powers. In these cases, the federal government's system of checks and balances enables the president and the judicial branch to help guard against congressional overreach.

The following content provides a spectrum of examples to illustrate Congress' exercise of both enumerated and unenumerated powers:

Example 1: Congress acts according to the enumerated powers
The most basic application of enumerated powers is execution of an explicit authority. For example, the Patent and Copyright Clause (Article I, Section 8, Clause 8) authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Congress first exercised this authority in the Copyright Act of 1790, and has revised copyright terms multiple times since. Because setting copyright terms is an explicit enumerated power, the authority of Congress to do so--and Congress alone--is indisputable.

Example 2: Congress derives implied powers from the enumerated powers
Congress has taken many actions that are not expressly listed among the enumerated powers. They are often justified as implied by an enumerated power. The term implied powers refers to congressional actions that are not expressly listed among the enumerated powers but which are said to derive from them.

The broad nature of three enumerated powers, in particular, has contributed to the proliferation of implied powers:

1. The Necessary and Proper Clause, which authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
2. The Taxing and Spending Clause, which authorizes Congress "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."
3. The Commerce Clause, which authorizes Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

For example, the Constitution does not explicitly authorize Congress to charter a federal bank. However, the United States Supreme Court, in *McCulloch v. Maryland* (1819), upheld the grant of such a charter as a valid exercise of an implied power under the Necessary and Proper Clause.

Example 3: Congress exceeds the enumerated powers

The U.S. Supreme Court, in a number of cases, has invalidated congressional actions as exceeding the scope of enumerated powers. For example, Congress in 1990 banned possession of a firearm on school property under the Gun Free Schools Act, citing its authority to regulate interstate commerce under the Commerce Clause. However, the U.S. Supreme Court, in *United States v. Lopez* (1995), ruled that the law was unconstitutional because the prohibition did not constitute regulation of interstate commerce.

Congress in 1996 rewrote the prohibition to apply to a firearm that "has moved in or otherwise affects interstate commerce."

Continued reading on the enumerated powers:

- *United States Constitution*
- *Article I, Section 8*
- *Nondelegation doctrine*
- *Article III, Section 3*
- *Article IV, Section 3*
- *Sixteenth Amendment*
- *McCulloch v. Maryland*
- *United States v. Lopez*
- Separation of powers

Nondelegation: The Congressional Review Act

What is the Congressional Review Act?

The Congressional Review Act (CRA), a 1996 law that provides Congress with an expedited process to overturn final rules issued by federal agencies. The CRA functions as a congressional check on rulemaking by executive branch agencies and, as such, serves the U.S. Constitution's separation of powers principle.

The Congressional Review Act

The CRA was enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act and signed into law by President Bill Clinton (D). Under the act, a new final rule may be invalidated by a joint resolution of disapproval passed by Congress and signed by the president. The resolution also prevents the agency from issuing a similar rule in the future unless authorized by new legislation, and it bars judicial review—meaning that a resolution of disapproval cannot be challenged in federal court.

The law requires agencies to submit new and interim final rules to both houses of Congress and the Government Accountability Office (GAO) in order to take effect. The submission should include (1) a copy of the rule; (2) a general description; (3) the proposed effective; and (4) Cost-benefit and other analyses required by the Paperwork Reduction Act and the Administrative Procedure Act.

What is a joint resolution of disapproval?

Members of Congress may introduce a CRA resolution of disapproval within 60 days of a new rule notification by an agency. (That time period is counted as 60 continuous days of a single session.) The CRA incorporates the definition of "rule" used in the Administrative Procedure Act which, in addition to regulations, includes guidance documents and policy memoranda.

In the Senate, the CRA process circumvents a filibuster if the resolution of disapproval is acted upon within 60 days of the agency notifying Congress of the rule. In the House, the resolution is often considered under a closed special rule reported by the Rules Committee, according to the Congressional Research Service. All votes under a CRA resolution are simple majority votes. As with other legislation, Congress may override a presidential veto of a CRA resolution by a two-thirds vote of members.

If a resolution of disapproval passes, the targeted rule does not take effect. In the event the rule is already in effect, the resolution blocks enforcement and the agency must act as though the rule never took effect.

The CRA does not apply to rules governing agency procedures, management and personnel. A CRA resolution cannot invalidate parts of a rule or more than one rule at a time.

The CRA and major rules

The CRA includes two provisions for ules that are designated as "major"—that is, rules expected to cost the private sector at least $100 million annually or that have significant impacts on employment, investment, competition or prices. The GAO is required to submit an assessment of the rule to the committees of jurisdiction within 15 calendar days of its rule's submission or its publication in the Federal Register.

Congress may delay a major rule from taking effect in order to have more time to consider the rule beyond the standard 60 days under the CRA.

Effects of the Congressional Review Act

How does the CRA affect rulemaking and the legislative process?

The CRA provides a congressional process to repeal executive branch regulations, guidance documents and policy memoranda. It also prevents federal agencies from promulgating new rules that are substantially similar to ones repealed under a joint resolution of disapproval. In so doing, the CRA serves as a congressional check on executive branch rulemaking.

Prior to the CRA, Congressional oversight of executive branch agencies included hearings; agency reporting requirements; committee investigations; budget constraints; and legislative directives. These tools, however, are time-consuming and generally apply to regulations already in effect. But most important, they do not result in the repeal of a rule. By comparison, a CRA joint resolution of disapproval is both expeditious and conclusive.

How does the CRA change the rulemaking process?

The CRA takes the rulemaking process one step further by requiring agencies to submit all final rules to Congress and the U.S. General Accounting Office (GAO) after publication. What the CRA allows Congress to do, in theory, is rein in agency rulemaking while leaving untouched the multi-step rulemaking process that yields a final rule in the first place.

The CRA added the opportunity for congressional review of new rules whereas before only the Office of Information and Regulatory Affairs (an office located within the Office of Management and Budget, itself a division of the Executive Office of the President) conducted review of final rules. The CRA works to add a stronger congressional oversight layer to the regulatory review process by requiring agencies to submit final rules to Congress and bring them to the attention of legislators.

Applications of the Congressional Review Act

Successful applications of the CRA

A total of 17 rules have been repealed through the exercise of the CRA. With one exception, all of the successful joint resolutions of disapproval occurred under the administration of President Donald Trump (R).

The one exception occurred during the administration of George W. Bush (R).

The table on the following page identifies all rules repealed by a CRA resolution as of April 2019.

Date repealed	Title of disapproved rule	Issuing agency or department
March 20, 2001	Ergonomics Program	Occupational Safety and Health Administration
February 14, 2017	Disclosure of Payments by Resource Extraction Issuers	Securities and Exchange Commission
February 16, 2017	Stream Protection Rule	Department of the Interior
February 28, 2017	Implementation of the NICS Improvement Amendments Act of 2007	Social Security Administration
March 27, 2017	Federal Acquisition Regulation: Fair Pay and Safe Workplaces	Department of Defense and General Services Administration
March 27, 2017	Resource Management Planning	Bureau of Land Management
March 27, 2017	Accountability and State Plans	Department of Education
March 27, 2017	Teacher Preparation Issues	Department of Education
March 31, 2017	Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants	Employment and Training Administration
April 3, 2017	Non-subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska	U.S. Fish and Wildlife Service
April 3, 2017	Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness	Occupational Safety and Health Administration
April 3, 2017	Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	Federal Communications Commission
April 13, 2017	Compliance with Title X Requirements by Project Recipients in Selecting Subrecipients	Department of Health and Human Services
April 13, 2017	Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees	Department of Labor
May 17, 2017	Savings Arrangements Established by States for Non-Governmental Employees	Department of Labor
November 1, 2017	Arbitration Agreements	Consumer Financial Protection Bureau
May 21, 2018	Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act	Consumer Financial Protection Bureau

Why so few successful applications?
The successful application of the CRA is limited by several factors including the fact that few administrations invalidate their own rules and that the ideal conditions for repeal involve a new president of the opposite party assuming office when the same party controls Congress.

Midnight rules
The CRA has been successfully used most often to repeal so-called midnight rules—regulations issued by a lame duck administration in the period between the presidential election in November and Inauguration Day on January 20th of the following year.

Researchers have documented an increase in regulatory activity in the final months of an administration, as agencies attempt to fulfill the regulatory agenda. The CRA allows the incoming administration to check these midnight rules issued by the outgoing administration. This occurs because of the 60-day continuous session clock, which resets with each new session of Congress.

The first successful use of the CRA occurred in 2001 and involved a 600-page rule by the Department of Labor to force companies to redesign their facilities, tools and processes to prevent repetitive stress injuries. The rule was issued by the outgoing Clinton administration and the resolution of disapproval was signed by President George W. Bush (R).
14 CRA resolutions undoing a variety of midnight rules issued under President Barack Obama (D).

Unsuccessful applications of the CRA
President Barack Obama (D) is the only president to veto a CRA resolution. The table below includes the five CRA vetoes he issued.

Date vetoed	Title of disapproved rule	Issuing agency or department
March 31, 2015	Representation Case Procedures	National Labor Relations Board
December 19, 2015	Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units	Environmental Protection Agency
December 19, 2015	Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units	Environmental Protection Agency
January 19, 2016	Waters of the United States	Army Corps of Engineers and Environmental Protection Agency
June 8, 2016	Definition of the Term 'Fiduciary'; Conflict of Interest Rule—Retirement Investment Advice	Department of Labor

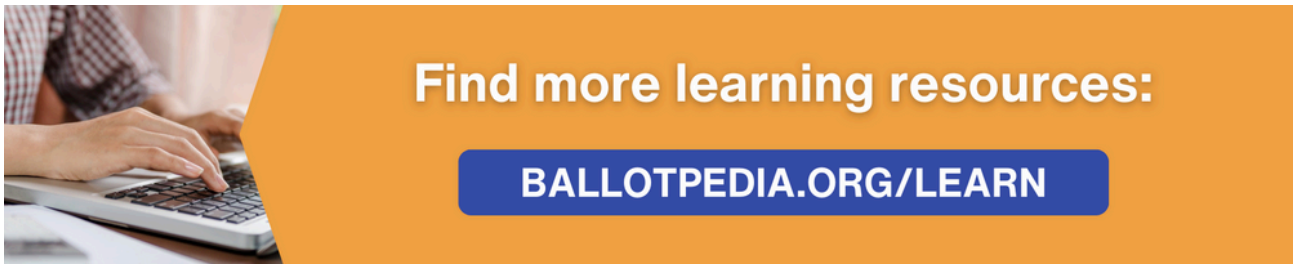
Efforts to change the CRA
The following legislative proposals have aimed to modify the Congressional Review Act:

Regulations in Need of Scrutiny Act (REINS Act)
The REINS Act would amend the CRA to require congressional approval of major regulations before they are implemented. The REINS Act has been introduced in every Congress since 2001, including the current 116th Congress. Former Wisconsin Governor Scott Walker (R) signed the first state-level REINS Act into law in 2017.

Midnight Rules Relief Act
The Midnight Rules Relief Act of 2017 would have allowed the use of a single joint resolution of disapproval to repeal multiple midnight rules. It has yet to be re-introduced (as of April 2019).

Continued reading on the congressional review act:

- Congressional Review Act
- Joint resolution of disapproval
- Major rule
- Final rule
- Proposed rule
- Rulemaking
- *Federal Register*
- Judicial review
- Regulatory review
- Rulemaking
- Executive Order 12866
- Office of Information and Regulatory Affairs
- Significant rule
- Congressional Research Service
- Federal agency rules repealed under the Congressional Review Act
- Legislation vetoed by Barack Obama
- REINS Act



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