The Administrative State

A Primer

Table of Contents:

Introduction:

The *administrative state* is a term used to describe the phenomenon of executive branch administrative agencies exercising the power to create, adjudicate, and enforce their own rules. Five pillars are key to understanding the main areas of debate about the nature and scope of administrative agency action: nondelegation, judicial deference, executive control of agencies, procedural rights, and agency dynamics.

This primer examines the nuts and bolts of each pillar, including the legal fundamentals, and curates the scholarly arguments in support and opposition, and potential reform proposals. Before diving into the five pillars, this introduction provides a brief background of the historical development of the administrative state.

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Key points in the development of the administrative state

The Age of Enlightenment (18th century)

The roots of the administrative state extend to the Age of Enlightenment and the corresponding French and American Revolutions. In the broadest terms, philosophers of the period embraced rational thought as the instrument of human improvement. During this time, individuals began to regard reason as intellectually superior to faith, including faith in religion and the social hierarchy of the period. Enlightenment thinkers embraced the idea that reason could drive human improvement by giving individuals the tools to make the best decisions for their lives.

Undergirding this philosophy was the idea that knowledge over time, if applied by well-intended people, would result in societal benefits. A society organized by reason would, it was supposed, engender liberty and equality to replace the ancien régime (the monarchy, nobility, and the Catholic Church).

The Enlightenment principle that reason could improve society was embraced by French and American revolutionaries of the late 18th century, who championed the notion that reason could entirely remake society. The argument that reason can improve and reshape society is a common thread that carries through to leaders of the Progressive Era and the modern administrative state.

The Progressive Era (1890-1920)

Early growth of the administrative state occurred as a result of government regulation in the late 19th century. Thus was born the Progressive Era, during which reformers sought to remedy a variety of perceived social ills through an administrative apparatus run by those deemed experts untainted, it was believed, by political ambitions—and freed, in the view of some, from fixed constitutional constraints.

During the 1870s, agricultural workers called for the government regulation of railroads, which transported farm goods to markets, and banks, which financed farm production. The Interstate Commerce Commission, the nation's first regulatory agency, was created in 1887 to regulate railroads and carriers across state lines. Moreover, industrialization and immigration contributed to enormous wealth creation at the turn of the 20th century, but living conditions in major cities also deteriorated, and factories, some argued, could be dangerous. As the 19th century drew to a close, workers compensation laws were adopted by a number of states to address accidents and injuries suffered by industrial workers. Congress went on to pass the Federal Meat Inspection Act in 1906 to regulate the meat packing industry and safeguard against unsanitary slaughterhouse operations. That same year, Congress passed the Pure Food and Drugs Act to regulate the manufacture and distribution of what the legislation described as "adulterated or misbranded or poisonous or deleterious foods, drugs or medicines, and liquors."

Woodrow Wilson

Woodrow Wilson, who assumed the presidency in 1913, embraced policies that contributed to the expansion of the budding administrative state. Wilson, Frank Goodnow, and other contemporary thought leaders envisioned a government structure where politics and administration could operate separately from one another. Under this structure, government administration could be managed by neutral experts operating without political influence who would, consequently, improve the lives of all Americans. The Pendleton Act of 1883 made early progress in this direction by eliminating patronage in political government appointments and establishing a merit-based system for the selection of government employees. In order to fully implement his vision, Wilson supported the concept of a Darwinian Constitution—the idea that the Constitution is a living document that can change with society over time. Wilson and his contemporaries, influenced by German Hegelian philosophers, also championed the idea of mature freedom, which grants individuals the freedom that they can responsibly manage as opposed to recognizing individual freedom as a natural right.

The progressive underpinnings of the Wilson administration (1913-1921) influenced a number of regulatory actions. The Federal Reserve Act of 1913 created the Federal Reserve System and implemented federal regulation of the banking industry, the Federal Trade Commission (FTC) was established in 1914, and the Clayton Act of 1914 strengthened the FTC's anti-trust enforcement measures.

The New Deal (1933-1939)

During the 1920s, the growth in government administration slowed and, according to Harvard professors Edward Glaeser and Andrei Schleifer, even retreated. However, the stock market crash of 1929 and the ensuing Great Depression gave rise to the New Deal, which operationalized progressive notions of government. President Franklin Roosevelt (D) and Congress effectively seized control of the financial system, and empowered a new administrative bureaucracy to refashion American society.

The New Deal ushered in a resurgence of progressive ideology and a shift toward the idea that science and experts in government administration could improve society. James Landis, an advisor to President Roosevelt and an architect of the New Deal, implemented a broad expansion of federal administrative agencies in a relatively short period of time. The Securities Acts of 1933 and 1934 regulated the securities markets and created the Securities and Exchange Commission. The National Labor Relations Board and the Federal Communications Commission were also created during this period.

According to Glaeser and Schleifer: "When Landis wrote in 1938, he could confidently conclude that 'the administrative' has replaced 'the judiciary' as the principal form of social control of business."

American political scientist Dwight Waldo coined the term *administrative state* in his 1948 book The Administrative State: A Study of the Political Theory of American Public Administration. For more information about the origin and evolution of the term administrative state, click here.

The second wave and the modern administrative state (1964-present)

President Lyndon Johnson's (D) Great Society programs spurred a new period of growth for the administrative state. This "second wave of regulatory growth crested" by the 1970s, according to Christopher DeMuth, a fellow at the Hudson Institute. Under Johnson and his successor, Richard Nixon (R), new federal

agencies were created, including the Environmental Protection Agency, the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, and the Occupational Safety and Health Administration.

Unlike the independent regulatory commissions created during the Progressive Era, which Demuth described as "mini-legislatures," the federal agencies established during the second wave of regulatory growth were hierarchies with a single individual at the helm appointed by the president. Moreover, unlike the Democratic-driven growth of the early 20th century, Democrats and Republicans alike contributed to the expansion of the administrative state during the second half of the 20th century and the early 21st century. DeMuth observed that prior to the Democratic Obama administration, the largest increases in federal regulations occurred during the Republican administrations of Richard Nixon and George W. Bush. The total annual page count of Federal Register, the daily journal of the federal government that is often used as a metric to gauge the size and scope of federal administrative activity, reached an all-time high of 95,894 pages under the Obama administration in 2016.

The modern administrative state is made up of a complex combination of executive agencies and independent federal agencies—though the exact number of current agencies is unknown. Estimates from the Administrative Conference of the United States (ACUS) range from 78 to 137 independent federal agencies and between 174 and 268 executive agencies.

The following chapters guide readers through the five pillars that are key to understanding the main areas of debate about the nature and scope of administrative agency action: nondelegation, judicial deference, executive control of agencies, procedural rights, and agency dynamics.

Chapter I: The nondelegation doctrine and the rise of the administrative state

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. In other words, lawmakers cannot allow other government actors or entities, such as administrative agencies, to make laws.[1] The nondelegation doctrine is viewed by some as a means to check the rise of the administrative state, which has gained power by way of increased congressional delegations of authority since the early 20th century.

The nondelegation doctrine is one of five pillars key to understanding the nature and scope of the administrative state. Its debate in legal and policy circles signifies both the importance of delegation as a source of authority for the administrative state and the potential for the nondelegation doctrine to rein in its growth. For some, the nondelegation doctrine is considered to be dead. The U.S. Supreme Court has not struck down a statute on nondelegation grounds in nearly a century.[2] But for others, the nondelegation doctrine is very much alive and is viewed as a means to reform the administrative state.

How can a legal doctrine be put to rest by some and championed by others? One answer lies in its interpretive origin. 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 Article I of the U.S. Constitution, which vests all legislative power in Congress.

This chapter begins by analyzing the constitutional foundation of the nondelegation doctrine. It then takes a closer look at how delegation works and examines the delegation parameters put in place over time by the U.S. Supreme Court. This chapter then pivots to the leading arguments in the legal debate surrounding the nondelegation doctrine and culminates in a review of the doctrine's uncertain future and reform proposals.

[1] *Legal Information Institute*, "Nondelegation Doctrine," accessed September 5, 2017.
[2] Lawson, Gary. "Delegation and Original Meaning." *Virginia Law Review*, Volume 88 (2002)

The root of the nondelegation doctrine: The separation of powers

The nondelegation doctrine is rooted in the separation of powers—a defining characteristic of the U.S. Constitution.[3] The separation of powers works to protect American citizens' individual liberties by preventing the concentration of government power in a single branch.[4] 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."[5]

The U.S. Constitution vests legislative authority delegated from the people to the federal government 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 of government with certain powers over the other two branches.[6] 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.

Under a strict application of the nondelegation doctrine, the separation of powers prohibits Congress from allowing the president or administrative agencies to pass laws.[7]

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[3] *SCOTUSblog*, "SCOTUS for law students: Non-delegation doctrine returns after long hiatus," December 4, 2014
[4] *Legal Information Institute*, "Separation of powers," accessed September 20, 2017
[5] *The Federalist Papers*, "Federalist No. 47." (1788)
[6] *Legal Information Institute*, "Separation of powers," accessed September 20, 2017
[7] Lawson, Gary. "Delegtion and Original Meaning." *Virginia Law Review*, Volume 88 (2002)

Where do administrative agencies fit in the separation of powers?

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 top officials who are nominated by the president and confirmed by the U.S. Senate.[8]

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.

U.S. Constitution: The Vesting Clauses

The Vesting Clauses of the U.S. Constitution grant distinct authority to the three branches of government. The nondelegation doctrine is rooted in the separation of powers implemented by the Vesting Clauses.[9] 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."

[8] *JUSTIA*, "Independent Agencies," accessed July 5, 2018.
[9] *SCOTUSblog*, "SCOTUS for law students: Non-delegation doctrine returns after long hiatus," December 4, 2014

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.[10] Others disagree. Since the U.S. Constitution does not include language that specifically prohibits delegation, opponents of the nondelegation doctrine argue that delegation to administrative agencies is lawful and allows expert agency staff to implement specialized policies that are too complex for Congress to pass into law.[11]

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

The U.S. 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. Nondelegation doctrine opponents, who defend the practice of delegation, have argued that the clause allows for Congress to delegate questions requiring subject-matter expertise to agency administrators in order to implement the law. Supporters of the nondelegation doctrine disagree, claiming 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.[12]

Some opponents of the nondelegation doctrine advocate for increased delegation to administrative agencies regardless of the original meaning of the Vesting Clauses or the Sweeping Clause. These delegation advocates praise

[10] Mascott,Jennifer. "*Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine." *George Mason Law Review* (2018)
[11] Farina, Cynthia R. "Deconstructing Nondelegation", *Harvard Journal of Law and Public Policy*, Volume 33, Issue no. 87 (2010)
[12] Lawson, Gary. "Delegtion and Original Meaning." *Virginia Law Review*, Volume 88 (2002)

delegation as a tool to improve policy-making through the specialized rulemakings of expert agency staff.[13]

What is legislative power?

In order to understand the debate about delegation, it is important to grasp what is meant by "legislative power." Scholars and legal practitioners have defined legislative power in different ways, which contributes to competing views about the nondelegation doctrine. The following selected definitions of legislative authority from legal scholars illustrate the variety of interpretations of legislative power:

- Legislative authority is the power to fashion legally binding rules

  In *Department of Transportation v. Association of American Railroads*, Justice Clarence Thomas offered the following definition of legislative power: "[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct. [...] the power to fashion legally binding rules is legislative."[14]

  Thomas' definition of legislative power asserts that the power to enact legally binding rules governing private conduct can only be exercised by the legislative branch. Thus, the promulgation of legally binding regulations by executive agencies, according to Thomas, infringes on legislative authority.[15]

- Legislative authority is the power to vote in Congress

  Nondelegation doctrine opponents Eric Posner and Adrian Vermeule claim that Congress does not violate the nondelegation doctrine through delegations of power but only through delegations of a lawmaker's vote in Congress. Legislative authority, therefore, does not refer to the

[13] Farina, Cynthia R. "Deconstructing Nondelegation", *Harvard Journal of Law and Public Policy,* Volume 33, Issue no. 87 (2010)
[14] Mascott,Jennifer. "*Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine." *George Mason Law Review* (2018)
[15] *Id.*

authority to make the laws but only the authority to cast a vote on proposed legislation.[16]

- Legislative authority is the power to make laws

  Nondelegation doctrine supporters Larry Alexander and Saikrishna Prakash respond to Posner and Vermeule's definition of legislative authority by revisiting nondelegation principles put forth by political theorists. The authors cite the work of historical scholars, including John Locke, to defend their definition of legislative authority as the power to make laws rather than the power to cast a vote.[17]

How does delegation work? Legislative grants of authority to administrative agencies

How does Congress go about delegating authority to administrative agencies? Congress routinely passes laws that authorize administrative agencies to fill in the gaps by issuing rules that require subject-matter expertise in a particular policy area. These laws often identify a broad policy goal, such as clean air, and empower agency experts to issue the necessary regulations to achieve that goal. These regulations are binding—meaning that they have the force and effect of law. In this way, Congress delegates authority to administrative agencies to administer complex statutes. While supporters of the nondelegation doctrine broadly argue that agencies exercise delegated legislative (lawmaking) power when they issue regulations[18], opponents generally contend that congressional delegations of authority direct agencies to use executive power to implement the laws passed by Congress.[19]

Early growth of the administrative state occurred as a result of increased congressional delegation to administrative agencies in the Progressive Era of the late 19th century. Progressive Era reformers, such as Woodrow Wilson and Frank

[16] Posner, Eric and Vermeule, Adrian, "Interring the Nondelegation Doctrine," *University of Chicago Law Review*. Volume 69. (2002)
[17] Alexander, Larry and Prakash, Saikrishna . "Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated." University of Chicago Law Review. (2003)
[18] Lawson, “Delegation and Original Meaning”
[19] Mascott, "Gundy v. United States: Reflections on the Court and the State of the Nondelegation Doctrine"

Delegation in practice: 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 sufficient guidance in the CAA to direct the agency's actions.[20]

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."

Goodnow, sought to remedy a variety of perceived social ills through the expansion of the administrative authority.[21] Administrative agencies, in their view, were run by neutral experts free from political ambitions and, according to some,

[20] United States Supreme Court, *Whitman v. American Trucking Associations Inc*, February 27, 2001.
[21] Postell, Joseph. "From Administrative State to Constitutional Government." *The Heritage Foundation*. (2012)

free from fixed constitutional constraints. This attitude in favor of broad delegation, embraced at times by both Democrats and Republicans alike, facilitated the New Deal era of the 1930s, the Great Society programs of the 1960s, and additional contributions to administrative expansion from the second half of the 20th century to today.[22]

Is delegation legal? The courts weigh in

Cases like *Whitman v. American Trucking Associations Inc.* demonstrate the role of the United States Supreme Court in drawing the line between lawful and unlawful delegations of authority to agencies—thus determining the limits of the nondelegation doctrine. The United States Supreme Court has played a critical role in shaping contemporary understanding of the nondelegation doctrine and setting precedent for its application. The U.S. Constitution vests the power to interpret the law in the judiciary and, over time, the court has issued decisions setting parameters to define what constitutes permissible delegations of legislative authority to agencies.

The following selected cases have shaped contemporary understanding of the nondelegation doctrine:

Wayman v. Southard (1825)

Wayman v. Southard is one of the seminal cases in the development of the nondelegation doctrine. The court 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.[23]

“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

[22] Glaeser, Edward and Schleifer, Andrei. "The Rise of the Regulatory State." *Harvard Law Review*. (2003)
[23] United States Supreme Court, *Wayman v. Southard*, February 12, 1825.

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," wrote Marshall.[24]

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 (1928)

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.[25]

The court formulated the intelligible principle test 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. 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.[26]

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."[27]

Panama Refining Co. v. Ryan and *A.L.A. Schechter Poultry Corp. v. United States (1935)*

In a turning point for the nondelegation doctrine, the court went on to apply the intelligible principle test in two 1935 cases: *Panama Refining Co. v. Ryan*[28] and *A.L.A. Schechter Poultry Corp. v. United States*.[29] Both *Panama* and *Schechter*

[24] *Id.*
[25] United States Supreme Court, *J. W. Hampton, Jr. & Co. v. United States*, April 8, 1928.
[26] *Legal Information Institute*, "Nondelegation Doctrine," accessed September 5, 2017.
[27] *J. W. Hampton, Jr. & Co. v. United States*
[28] United States Supreme Court, *Panama Refining Co. v. Ryan*, January 7, 1935.
[29] United States Supreme Court, *A.L.A. Schecter Poultry Corporation v. United States*, May 27, 1935.

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 Associations* (2001), and *Department of Transportation v. Association of American Railroads* (2015), just to name a few.

Debating the nondelegation doctrine: Arguments for and against

Though the United States Supreme Court has not invalidated a statute on nondelegation grounds since 1935, debate continues in law and policy circles over the proper scope of delegated authority. Proponents of the nondelegation doctrine argue that Congress violates the separation of powers by delegating its legislative authority to agencies, which then promulgate binding regulations in order to bring about statutory goals. They also contend that a strict application of the nondelegation doctrine would help to curb agency growth and restrain what they consider to be the abuses of the administrative state. Opponents of the nondelegation doctrine, on the other hand, claim that agencies only exercise executive power by implementing laws passed by Congress. They also argue that delegation improves government by harnessing the knowledge of experts, rather than non-specialized lawmakers, to make complex policy decisions.

The following sections highlight leading arguments in the debate over the nondelegation doctrine.

Supporters of the nondelegation doctrine: Delegation is unlawful

Nondelegation doctrine proponents defend the doctrine with claims grounded in the separation of powers, public accountability, constitutionality, and social compact theory. This section examines a selection of the leading arguments put forth by nondelegation doctrine advocates to support their position.

Delegation violates the separation of powers

When a legislature delegates authority to an agency that allows the agency—rather than the legislature— to promulgate policies, supporters of the nondelegation doctrine claim that the delegation violates the separation of powers.[30] Under the separation of powers doctrine, the executive, legislative and judicial branches need to be separated in order to restrain governmental overreach and the abuse of power. If the legislative branch delegates power to an agency to promulgate policies, the argument follows, the legislature is surrendering its power to the agency and allowing the agency to create new laws. The delegation violates the separation of powers, according to this claim, because the agencies of the executive branch are charged with administering statutes rather than creating the law.[31]

The framers of the United States Constitution aimed to restrain governmental abuse and promote liberty; one key way they attempted to do this was by separating out three governmental powers. If the legislative branch delegates their power to the executive branch to create rules, they are violating the separation of powers, and causing the very consolidation of power that the U.S. Constitution was framed to prevent.[32]

Delegation undermines public accountability and is anti-democratic

[30] Lawson, "Delegation and Original Meaning"
[31] Mallen, Travis. "Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory." *Notre Dame Law Review.* Volume 81, Issue no. 419 (2005)
[32] Waldron, Jeremy. "Separation of Powers in Thought and Practice." *Boston College Law Review.* Volume 54, Issue no. 2 (2013).

Since agency employees are hired by the agency, rather than elected by the public, supporters of the nondelegation doctrine argue that delegation allows unelected agency employees to make significant policy decisions. Unlike the elected president and members of Congress, the public can't remove agency employees from their roles if their policy positions are unpopular. Delegation, according to this claim, allows elected lawmakers to evade or duck responsibility for any of the negative costs, consequences or problems associated with the policies set in place by agencies.[33]

The argument further claims that delegation is anti-democratic because it creates a situation in which the public can't hold the government accountable for harmful policies.

Delegation is unconstitutional

Supporters of the nondelegation doctrine argue that delegation is prohibited by or inconsistent with the text of the U.S. Constitution. As examined earlier, the Constitution (Article 1, Section 1) states that "[a]ll legislative powers herein granted shall be vested in a Congress." The word "shall" in the constitutional text implies that Congress alone can exercise the legislative power, according to this claim.[34]

The nondelegation doctrine is "universally recognized"

This argument is drawn from the U.S. Supreme Court's 1892 decision in *Field v. Clark*. In the case opinion, the court "universally recognized" that Congress cannot "delegate legislative power." This principle, the court stated, is "vital to the integrity and maintenance of the system of government ordained by the constitution."[35]

Delegation violates social compact theory

[33] Schoenbrod, David, "Delegation and Democracy: A Reply to My Critics; Symposium - The Phoenix Rises again: The Nondelegation Doctrine from Constitutional and Policy Perspectives: Democracy and Delegation." *Cardozo Law. Review*. (1999).
[34] Lawson, "Delegation and Original Meaning"
[35] United States Supreme Court, *Field v. Clark*, February 29, 1892.

Nondelegation doctrine supporter Joseph Postell claims that the nondelegation doctrine is derived from social compact theory[36], which argues that society grew out of an original voluntary agreement between individuals to live together and protect each others' rights.

Postell likens social compact theory to a principal-agent relationship between the people and the legislature. The people are the principal who have delegated their rulemaking ability to the legislature. Unlike other principal agent relationships, the people are unable to approve of a further delegation of the legislative power. He writes, "[A]ccording to social compact theory, only the people can delegate legislative power, and when legislative power is delegated by the people to their agents in the legislature, the legislature cannot delegate its powers away because legislative power was never fully alienated by the people."

Opponents of the nondelegation doctrine: Delegation is lawful

Nondelegation doctrine opponents critique the doctrine by arguing that the Constitution does not prohibit the delegation of legislative power and that the creation of rules is not an exercise of legislative power. Opponents also put forth a variety of claims broadly asserting that agencies—unbound by the constraints of the legislative process—are poised to better facilitate complex government programs and adapt to the complexity of the modern world. This section examines leading arguments put forth by opponents of the nondelegation doctrine in the defense of delegation.

The Constitution does not prohibit the delegation of legislative power

The absence of explicit bans on delegation in the U.S. Constitution appears to some as a possible justification for the practice.

According to this claim, proponents of the doctrine are too strict given that no explicit nondelegation doctrine exists. Nondelegation doctrine opponent Cynthia

[36] Postell, Joseph."'The People Surrender Nothing': Social Compact Theory, Republicanism, and the Modern Administrative State," *Missouri Law Review.* (2016).

R. Farina describes this point of view, writing, "consider, for a moment, the basis for assuming that the Constitution forbids Congress to give significant policymaking authority to another entity, such as a regulatory agency. The Constitution's text is of little help, for it says nothing explicit about delegating the power Article I confers."[37]

As noted earlier, nondelegation doctrine opponents also claim that the Constitution's Sweeping Clause permits delegation by allowing Congress to delegate legislative authority to administrative agencies.

Rulemaking is not the same as lawmaking

Opponents of the nondelegation doctrine make a substantive distinction between laws passed by Congress and rules developed by administrative agencies. Some argue that agencies can make rules so long as Congress authorizes them to do so. Only unauthorized rulemaking, according to this claim, represents an unacceptable delegation of legislative power. For example, nondelegation doctrine opponents Eric A. Posner and Adrian Vermeule claim that agencies exercise legislative power only when they make rules without statutory (or constitutional) authorization. Rulemaking authorized by Congress is rather an exercise of executive power and, according to the authors, is not an unlawful delegation of authority.[38]

The U.S. Supreme Court has upheld nearly every statute challenged on nondelegation grounds

The court's reluctance to strike down statutes as violations of the nondelegation doctrine implies that the doctrine is not as robust as its defenders believe, according to some of the doctrine's opponents. Since those who challenge delegations of legislative power in court usually lose, opponents of the nondelegation doctrine claim that the doctrine might not be as strict as supporters think.

An analysis[39] by legal scholars Keith Whittington and Jason Iuliano reported a low success rate for nondelegation challenges. Their analysis showed that 24 percent

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[37] Farina, Cyntha R, "Deconstructing Nondelegation." *Harvard Journal of Law and Public Policy*. Volume 33, Issue no. 87 (2010).
[38] Posner and Vermeule, "Interring the Nondelegation Doctrine"
[39] Iuliano, Jason and Whittington, Keith, "The Myth of the Nondelegation Doctrine." *University of Pennsylvania Law Review*. (2017).

of state cases and zero percent of federal cases before 1880 invalidated statutes on nondelegation grounds.

Increasing complexity of society requires Congress to delegate

Economic changes as the result of technological advancements have led some scholars to argue that the federal government eventually needed to adapt in order to meet new challenges. Expert agency staff, according to this claim, are able to formulate complex, modern policies that are often too complex for lawmakers to shape themselves. Public opinion polls, scholars have argued, show that the American people support delegation that empowers administrative agencies to handle complex regulatory policies.[40]

Delegation makes the administrative state constitutionally mandatory

In a similar line of thinking, nondelegation opponent Gillian Metzger argued that the administrative state is necessary—or "constitutionally mandatory"— in order to carry out the directives of Congress. "Delegation comes with constitutional strings attached," wrote Metzger. "Having chosen to delegate broad responsibilities to the executive branch, Congress has a duty to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions."[41]

Agencies can adjust rules quickly in response to unanticipated policy consequences

Some advocates of delegation argue that agencies are able to react to unintended policy consequences more quickly than Congress. Agencies can change rules more easily than Congress can amend laws. When a law imposes burdens that Congress did not anticipate, it could take legislators a long time to

[40] Farina, "Deconstructing Nondelegation"
[41] Metzger, Gillian E. "1930s Redux: The Administrative State Under Siege," *Harvard Law Review*. Volume 131, Issue no.1 (2017)

arrive at a compromise solution. Agencies, on the other hand, can move through the rulemaking process more efficiently.[42]

Support of the nondelegation doctrine is the same as opposition to expansive federal regulations

Nondelegation opponent Cynthia Farina claims that delegation created a regulatory regime touching every significant aspect of social and economic life. Those who oppose such regulations see delegation as a catalyst for federal intervention into the economy and local governments and use legal theory to oppose a policy of expanding federal regulations.[43]

Can a line be drawn to distinguish permissible and impermissible delegations to agencies?

One of the main areas of inquiry and disagreement concerning the nondelegation doctrine concerns how to draw the line between a legislative act that engages in permissible delegation versus one that crosses the line into impermissible delegation. The intelligible principle test is one example of a line-drawing method used by courts to examine delegation. But what other ways do scholars and courts examine line-drawing in delegation?

Exploring the line between permissible and impermissible delegations: *Wayman v. Southard*

Wayman v. Southard (1825) was one of the first cases to explore the limits of congressional delegations of power and solidified the right of Congress to delegate power to other federal entities. The United States Supreme Court held

[42] Farina, "Deconstructing Nondelegation"
[43] Farina, "Deconstructing Nondelegation"

that Congress' delegation of authority to create federal court procedures to the federal courts themselves did not represent an unconstitutional delegation of legislative power.

In the case opinion, Chief Justice John Marshall explores the line between permissible and impermissible delegations, stating that Congress cannot delegate powers that "are strictly and exclusively legislative." It may only delegate "powers which [it] may rightfully exercise itself." He further observed that the line between delegable and non-delegable powers is inherently blurred: "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[44]

Delegation lines drawn by the U.S. Constitution

Nondelegation doctrine supporters have argued that congressional delegations of authority are contrary to the Vesting Clauses of the United States Constitution, which vest legislative, executive, and judicial authority in their respective branches of government. Legislative power, in particular, is vested in Congress through Article 1, Section 1 of the U.S. Constitution. The clause states that “[a]ll legislative powers herein granted shall be vested in a Congress.”

Nondelegation doctrine supporter Gary Lawson claims that unconstitutional delegations of authority infringe on the lines put in place by the Constitution's Vesting Clauses. He writes, “The Constitution clearly–and one must even say obviously–contemplates some such lines among the legislative, executive, and judicial powers. The vesting clauses, and indeed the entire structure of the Constitution, otherwise make no sense. The Constitution does not merely create the various institutions of the federal government; it vests, or clothes, those institutions with specific, distinct powers."[45]

[44] *Wayman v. Southard*
[45] Lawson, “Delegation and Original Meaning”

Nondelegation challenges to contingent legislation

The United States Supreme Court considered the following noteworthy challenges to contingent legislation on nondelegation grounds during the late 19th and early 20th centuries:

- *Field v. Clark* (1892): In *Field v. Clark*, Marshall Field & Company challenged the Tariff Act of 1890, arguing that it unconstitutionally delegated legislative power to the President. The United States Supreme Court ruled unanimously that the legislation was constitutional since it only delegated discretionary power to the President. "What the President was required to do was simply in execution of the act of Congress," stated Justice John Harlan in the opinion. "It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."[46]

- *J.W. Hampton Jr. & Company v. United States* (1928): In *J.W. Hampton Jr. & Company v. United States*, J.W. Hampton Jr. & Company brought a claim against the constitutionality of the Tariff Act of 1922. The plaintiff claimed that the president's authority to adjust import duties established by the act constituted an unconstitutional delegation of legislative power. The United States 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.

  J.W. Hampton moved beyond *Field v. Clark* in terms of the analysis of contingent legislation, according to Lawson. He wrote that the case allowed for a regulatory scheme "in which the President actually adjusts the tariff rates rather than merely determining whether pre-existing, congressionally-specified tariff schedules will take effect." Thus, J.W. Hampton blurred the line between executive implementation of contingent legislation and independent regulatory activity on behalf of the president in response to a legislative contingency.

[46] *Field v. Clark*

Contingent legislation: identifying the line between implementation and regulation

Contingent legislation is "legislation in which Congress conditions the force of the new law on a determination to be made by the President," according to attorney and scholar Robert Sarvis. In other words, contingent legislation allows Congress to delegate authority to the president that the president can later exercise in response to certain triggering conditions stipulated in the legislation. Legislation that allows the president to adjust tariff rates is an example of contingent legislation. The United States Supreme Court first expressly permitted contingent legislation in *Cargo of the Brig Aurora v. United States* (1813).

Contingent legislation "provides a wide range of contexts for delegation analysis," according to Lawson. He writes, "The question is when, if ever, determination of those [trigger] events passes beyond the implementational function of executive and judicial agents and instead becomes lawmaking." Thus, Lawson identifies the line-drawing problem in cases of contingent legislation as a question of whether the executive branch serves to implement a legislatively enacted regulatory scheme or, instead, engages in independent lawmaking beyond the scope of executive authority.[47]

Rules vs. goals statutes: demarcating permissible and impermissible delegations

Nondelegation doctrine supporter David Schoenbrod developed a distinction between what he refers to as rules statutes and goal statutes as a means to determine a statute's validity. Rules statutes put forth specific rules of conduct to guide government entities charged with their implementation while goals statutes lay out broad policy goals without a specific plan to bring the policy into effect. Schoenbrod stated, "[T]he statute itself must speak to what people cannot do; the statute may not merely recite regulatory goals and leave it to an agency to promulgate the rules to achieve those goals."[48]

Schoenbrod's distinction between rules and goals statutes aims to draw a line between legislation that puts forth permissible and impermissible delegations of authority. According to Schoebrod's formulation, a rules statute clearly "demarcates permissible from impermissible conduct" and, therefore, constitutes

[47] *Id.*
[48] Schoenbrod, “Delegation and Democracy”

a valid exercise of delegated authority. A goals statute, on the other hand, is an impermissible exercise of delegation because it does not sufficiently guide agencies through the implementation of a policy priority.

The revival of the nondelegation doctrine?

The U.S. Supreme Court has not invalidated a congressional action on nondelegation grounds since *A.L.A. Schechter Poultry Corp. v. United States* in 1935. Nonetheless, statements from U.S. Supreme Court justices in 2019 shed light on the nondelegation doctrine and indicated potential for a future revival on the court.

Gundy v. United States (2019)

In *Gundy v. United States*[49], a nondelegation doctrine challenge once again came before the nation's highest court. Though the U.S. Supreme Court ruled 5-3 that the challenged statute, the Sex Offender Registration and Notification Act (SORNA), did not violate the nondelegation doctrine, dissenting views from minority justices indicated that the debate surrounding the nondelegation doctrine is far from settled.

Justice Elena Kagan's plurality opinion noted that the court has only declared delegations of authority unconstitutional twice in its history and that past courts have upheld broader delegations with less guidance from Congress. Justice Alito, however—who voted to uphold SORNA—wrote a separate opinion stating his willingness to reconsider how the court approaches future nondelegation doctrine challenges, suggesting potential changes in precedent. Justice Kavanaugh did not vote on the case, which was heard before he joined the court.

Justice Gorsuch filed a dissenting opinion arguing that SORNA is unconstitutional because it gives the U.S. attorney general the power to write and enforce his own criminal code. He argued, "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us.

[49] United States Supreme Court, *Gundy v. United States*, June 20, 2019

But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?"

Justice Kavanaugh open to reviving the nondelegation doctrine

In a statement published with the U.S. Supreme Court's November 25, 2019, denial to take up the nondelegation challenge in *Ronald W. Paul v. United States*[50], Justice Brett Kavanaugh noted that Justice Neil Gorsuch's analysis of the nondelegation doctrine in *Gundy v. United States* "may warrant further consideration in future cases."

Kavanaugh had not yet joined the court when the conservative justices commented on reviving the nondelegation doctrine in *Gundy*. His later comments suggest that there could be a majority willing to reconsider the doctrine.

Reform proposals to address the nondelegation doctrine

Signals from the U.S. Supreme Court suggest a potential revival of the nondelegation doctrine in the judiciary, but what other government proposals conceive of restraining the growth of the administrative state through the return of the nondelegation doctrine?

A number of legislative, executive, and judicial reform proposals aim to increase oversight of delegated authority, limit congressional delegations of authority, or breathe new life into the nondelegation doctrine itself. The following section provides an overview of select legislative, executive, and judicial approaches to address delegation.

Legislative approaches

Legislative approaches to delegation reform include various proposals that aim to strengthen the regulatory review role of Congress. From reconfiguring a version

[50] United States Supreme Court, *Ronald W. Paul v. United States*, November 25, 2019

of the legislative veto to requiring Congress to vote on major agency rules, the following proposals seek to increase congressional oversight of delegated authority to agencies.

Require Congress to vote on rules

Legislative veto

The legislative veto proposal would empower Congress to reverse decisions made by administrative agencies. Common versions of the proposal would allow one house of Congress to invalidate agency actions; however, the U.S. Supreme Court ruled that one-chamber legislative vetoes were unconstitutional in *INS v. Chadha* (1983). The court ruled that the one-chamber legislative veto was a legislative act that bypassed the U.S. Constitution's requirements of bicameralism and presentment—having the president sign legislation into law. In response, proposals like the Regulations from the Executive in Need of Scrutiny (REINS) Act seek to give Congress the power to review agency rules before they go into effect while following the constitutional boundaries articulated by the U.S. Supreme Court in *Chadha*.[51]

Use REINS Act legislation to *undelegate* delegated authority

The REINS Act is a legislative proposal that would require congressional approval of certain major agency regulations before those regulations can be implemented. The REINS Act defines major agency regulations as those that have financial impacts on the U.S. economy of $100 million or more, increase consumer prices, or have significant harmful effects on the economy. It is designed as an amendment to the Congressional Review Act (CRA) of 1996, under which Congress has the authority to issue resolutions of disapproval to nullify agency regulations.

This approach argues that instead of issuing resolutions of disapproval after a rule takes effect, REINS Act legislation could give legislators the preemptive authority to halt the initial enactment of certain regulations.[52]

Force Congress to vote on major changes in regulations

[51] Wallach, Phillip. "Losing hold of the REINS: How Republicans' attempt to cut back on regulations has impeded Congress's ability to assert itself," *R Street*. May 2, 2019
[52] "H.R. 26: Regulations from the Executive in Need of Scrutiny Act of 2017—Overview." GovTrack. Accessed July 14, 2017.

This approach argues that the delegation of legislative authority effectively shields Congress from public accountability. Congress should, therefore, be required to vote on major administrative and regulatory rules to lift that shield.

Nondelegation doctrine supporter David Schoenbrod illustrated this argument, writing, "The regulation trick lets current members of Congress and Presidents shift blame to federal agencies for the burdens required to vindicate rights to regulatory protection and the failures to deliver the promised regulatory protection. Implementing the proposal by James Landis, the New Deal expert, as fleshed out by then judge Stephen Breyer, the Honest Deal Act would require members of Congress to cast roll call votes on major regulatory changes, whether to strengthen or weaken regulation."[53]

Require Congress to pass more specific statutes

This approach from Schoenbrod discussed earlier argues that the nature of the statute being passed matters; rules statutes require more specificity from lawmakers whereas goals statutes delegate greater authority to agencies to interpret legislative intent.[54] Nondelegation doctrine supporter John Manning argued that more specific legislation would reduce the instances of unlawful delegations of authority, thus supporting nondelegation principles. More precise policymaking by Congress (like Schoenberg's rules statutes) would minimize opportunities for agencies to broadly act beyond the scope of their authority.[55]

Use Sunset provisions to force Congress to revisit delegations of power to agencies

Some critics of delegation, like Schoenbrod, argue that delegation allows unelected agency employees to make significant policy decisions.[56] This reform proposal seeks to address that concern by using sunset provisions to force Congress to review laws that delegate authority to agencies. Sunset provisions set expiration dates for laws and require Congress to actively vote to keep those laws in place. To make sure agencies are following congressional instructions,

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[53] Schoenbrod, David. "How to Salvage Article I: The Crumbling Foundation of Our Republic." *Harvard Journal of Law and Public Policy*. Volume 40 (2017).
[54] Schoenbrod, David. "Goals Statutes or Rules Statutes: The Case of the Clean Air Act." *UCLA Law Review*. (1982)
[55] Manning, John. "The Nondelegation Doctrine as a Canon of Avoidance." Supreme Court Review. (2000)
[56] Schoenbrod, "Delegation and Democracy."

Congress could review expiring laws and compare their requirements with related regulations.

Nondelegation doctrine supporters Jonathan Adler and Christopher Walker argue that Congress should use sunset provisions "to mitigate the democratic deficits that accompany broad delegations of lawmaking authority to federal agencies and spur more regular legislative engagement with federal regulatory policy. A return to reauthorization would also strengthen the partnership between Congress and the regulatory state."[57]

Create an office within Congress to review regulations

This approach would establish a Congressional Regulation Office (CRO) in order to provide members of Congress with expert analysis of regulations produced by federal agencies.[58] Nondelegation doctrine supporters Philip Wallach and Kevin Kosar argue that the CRO's information would enable Congress to improve agency oversight by tracing agency actions directly to delegated legislative authority.

Require agencies to review major rules administered under delegated authority

This approach would strengthen oversight of delegate authority by requiring agencies to review major rules to see how effective they are in practice—holding agencies accountable to Congress for the exercise of delegated authority.[59]

Executive branch approaches

Executive branch approaches to delegation reform generally aim to increase transparency in agency rulemaking. From requiring the executive to send major rules to Congress for a vote to developing a nondelegation doctrine specific to the executive branch, the following proposals seek to heighten the role of the executive branch in the oversight of delegated authority.

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[57] Adler, Jonathan H. and Walker, Christopher J. "Delegation and Time." C. Boyden Gray Center for the Study of the Administrative State CSAS Working Paper 19-14. (2019)
[58] Kosar, Kevin and Wallach, Phillip. National Affairs, "The Case for a Congressional Regulation Office." *National Affairs*. Fall 2016.
[59] *Congress.gov*. "SMART ACT of 2019," accessed May 20, 2019.

What is a major rule?

Major rules are federal regulations that have or are likely to have the following results:

- An annual effect on the economy of $100 million or more
- A major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions
- Significant effects on competition, employment, investment, productivity, innovation, health, safety, the environment, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets

Presidents send major rules to Congress for a vote before implementation

This approach would have the president enforce the nondelegation doctrine by sending all major rules to Congress for a vote before allowing agencies to publish them in the *Federal Register*. Nondelegation doctrine supporter Christopher DeMuth argued[60] that presidents could pressure Congress to limit delegation by publicly stating that any major rule drafted by an agency would not go into effect until Congress voted to approve the rule. Such a presidential declaration would effectively block new rules unless they received an affirmative vote in Congress.

Make sure agencies follow Congressional Review Act procedures when issuing guidance

This proposal seeks to increase presidential oversight of agency guidance documents, which have been unlawfully used by agencies at times to create binding rules outside of the rulemaking process.

A 2019 guidance memo from the Office of Management and Budget (OMB) affirmed that some guidance documents fall within the definition of rules subject

[60] DeMuth, Christopher. "Panel 3: Rediscovering Congress's Institutional 'Ambition.'" C. Boyden Gray Center for the Study of the Administrative State. May 2, 2019.

to the Congressional Review Act (CRA)—a law that allows Congress to nullify agency rules through resolutions of disapproval.[61]

Apply a strict nondelegation doctrine to agency cost-benefit analyses

This approach calls for a strict application of the nondelegation doctrine to agency cost-benefit analyses in order to determine whether agencies have exercised legislative authority beyond objective statutory interpretation. In other words, courts that identify inconsistent or inflated values for agency actions in cost-benefit analyses should be able to hold agencies accountable for misusing delegated authority in violation of the nondelegation doctrine.[62]

Develop and enforce a nondelegation doctrine for the executive branch

This approach argues that a nondelegation doctrine for the executive branch needs further development but might already exist in Article II—specifically the Vesting Clause—and places limits on executive branch delegations of power, not just those of Congress. Nondelegation doctrine supporter Dina Mishra argues that if agencies cannot be effectively overseen by the executive then they are exercising power beyond their scope of authority since the president would no longer have the authority "to take Care that the Laws be faithfully executed."[63]

Judicial branch approaches

Judicial branch approaches to delegation reform range from reviving the nondelegation doctrine piece by piece to developing an improved line-drawing test between permissible and impermissible delegations. The following proposals seek to harness the power of the judiciary to reinvigorate judicial application of the nondelegation doctrine.

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[61] Office of Management and Budget. "Memorandum for the Heads of Executive Departments and Agencies." April 11, 2019.
[62] Flatt, Victor B. "The 'Benefits' of Non-Delegation: Using the Non-Delegation Doctrine to Bring More Rigor to Benefit-Cost Analysis." William and Mary Bill of Rights Journal, (2007)
[63] Mishra, Dina. "An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law." *Vanderbilt Law Review*. (2015).

Develop a better line-drawing test

One of the main areas of inquiry and disagreement concerning the nondelegation doctrine is how to draw the line between permissible and impermissible delegations of legislative authority to administrative agencies. The following approaches aim to facilitate enforcement of the nondelegation doctrine by developing better ways of distinguishing between legislative statutes that confer permissible powers to agencies through delegations of authority and those that violate the nondelegation doctrine through impermissible delegations.

A good line-drawing test can create more consistent outcomes when enforcing nondelegation

Nondelegation doctrine proponent A.J. Kritikos argued[64] that improving the line-drawing test would lead to more consistent outcomes in delegation challenges. Consistency in rulings would result in more stable nondelegation doctrine jurisprudence and reduce the uncertainty surrounding nondelegation challenges.

Use of an elastic Marshall test can lead to consistent application of the nondelegation doctrine

Kritikos further claims that the Marshall test—formulated by Chief Justice John Marshall in the 1825 case *Wayman v. Southard* to distinguish between permissible and impermissible delegations—can be interpreted on a sliding scale to protect individual rights while still providing for agency discretion. In other words, a nondelegation doctrine doesn't have to be one-size-fits-all. According to this view, legislatures should have the discretion to delegate broad authority when statutes involve technical matters of expertise, but should minimize delegation when creating less complex policies, such as the determination of criminal penalties.[65]

[64] Kritikos, A.J. "Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment." *Missouri Law Review*. (2017)
[65] *Id.*

Let courts rebuild nondelegation doctrine piece by piece

Nondelegation doctrine supporter David Schoenbrod argues that the court can take baby steps to limit delegation through case precedent rather than prohibiting delegation in one fell swoop.[66]

Apply the nondelegation doctrine on a case-by-case basis

The nondelegation doctrine can be applied on a case-by-case basis, according to nondelegation supporter Ilan Wurman. A case-by-case approach would eliminate the need for a broad, sweeping doctrine that prohibits all delegation.[67]

Do nothing: Let current nondelegation enforcement standards continue

The following reform approaches would protect lax nondelegation doctrine enforcement and defend or expand traditional delegation practices.

The nondelegation doctrine can be enforced through the nondelegation canons

Administrative law scholar Cass Sunstein argues that a sweeping nondelegation doctrine is unnecessary because smaller nondelegation canons forbidding agencies from taking certain unilateral actions already exist. The nondelegation canons, according to Sunstein, "have crucial advantages over the more familiar nondelegation doctrine insofar as they are easily administrable, pose a less severe strain on judicial capacities, and risk far less in the way of substantive harm."[68]

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[66] Schoenbrod, David. "Politics and the Principle That Elected Legislators Should Make the Laws." Harvard Journal of Law and Public Policy. (2003)
[67] Wurman, Ilan. "As-Applied Nondelegation," *Texas Law Review*. (2019).
[68] Sunstein, Cass. "Nondelegation Canons." Chicago Working Paper in Law and Economics. (1999).

Delegate the power to act unless Congress intervenes

This reform proposal would empower agencies to adjust regulations when changing situations might call for new policies. Nondelegation doctrine opponent Sam Berger argued[69] that delegations of authority with a clear goal, a trigger to act, and significant discretion give agencies the flexibility to respond to changing circumstances. Less flexible delegations, argued Berger, instead force agencies to respond to new problems using old directives, which can lead to mixed results or agency inaction.

Are there nondelegation doctrines in the states?

Legislative delegation of authority varies by law and in practice by state. According to the National Conference of State Legislatures[70], states can generally be divided into the following three types:

- Strict standards and safeguards: "States in this category permit 'delegation of legislative power only if the statute delegating the power provides definite standards or procedures' to which the recipient must adhere."

- Loose standards and safeguards: "States in this category view delegation as acceptable 'if the delegating statute includes a general legislative statement of policy or a general rule to guide the recipient in exercising the delegated power.'"

- Procedural safeguards: "States in this group 'find delegations of legislative power to be acceptable so long as recipients of the power have adequate procedural safeguards in place.'"

[69] Berger, Sam. "Creating Agencies that Default to Action." *Rethinking Admin Law: From APA to Z*. Accessed July 9, 2019.
[70] National Conference of State Legislatures. "Separation of Powers: Delegation of Legislative Power." Accessed 2019.

Chapter II - Judicial deference to administrative agencies, and its uncertain future

The term *deference*, in the context of the administrative state, refers to the administrative law practice by which courts are expected to defer to an administrative agency's interpretation of a statute or regulation when the legislative language is silent or ambiguous.[71] In other words, reasonable agency interpretations of vague statutory or regulatory language are often upheld by the courts—even if the judges disagreed with the agency's interpretation. Deference compels judges to support an agency's reasoning regardless of their own interpretation of the law. As such, deference is viewed in some legal and policy circles as an abdication of the judicial duty to interpret the law and a major factor in the expansion of administrative agency powers.

As we discussed in the last chapter on the nondelegation doctrine, Congress often passes broad legislation that requires agencies to fill in the details of rulemaking and enforcement. In situations where the statute delegating the authority is unclear, agencies interpret the statute themselves. Deference directs the judicial branch to defer to an agency's subject-matter expertise in a particular policy area and uphold their reasonable interpretations of unspecific statutes. In this way, deference strengthens agency authority by preventing the judiciary from overruling an agency's reasonable statutory interpretation. Delegation facilitates deference and, together, these practices contribute to the concentration of authority in administrative agencies.

This chapter begins by examining the nuts and bolts of deference and the different deference doctrines applied at the federal level. It then reviews the leading arguments from supporters and opponents of deference as well as its uncertain future in the courts. Lastly, this chapter reviews federal proposals to reform deference and culminates with a look at deference in the 50 states.

[71] Bamzai, Aditya. "The Origins of Judicial Deference to Executive Interpretation." *Yale Law Journal*. Volume 126 Issue no. 4 (2017).

How does deference work?

Deference applies in cases of judicial review, e.g., when a plaintiff accuses an agency of unlawful action. In such cases, the court must decide whether the agency action in question was authorized. But when the unlawful action stems from an agency's interpretation of a statute or regulation, the court is sometimes compelled to support the agency's interpretation. Deference requires the judges to defer to, or accept, an agency's interpretation—even when the judges themselves may hold different views. The court developed a number of deference doctrines over the course of the 20th century that require courts to defer to agency interpretations of statutes or regulations in a variety of scenarios.

Example:
City of Arlington v. FCC

City of Arlington, Texas v. Federal Communications Commission (FCC)[72] was a 2013 United States Supreme Court case that questioned whether courts should defer to an agency's interpretation of the extent of its own authority under a particular statute. In other words, how much authority did Congress intend to grant the agency? The Federal Communications Commission (FCC) claimed that it had the legal authority to set time limits for local entities to approve zoning requests under the Communications Act of 1934. Plaintiffs disagreed, arguing that the statute did not explicitly authorize the agency to set time limits. The FCC asserted that it had crafted a reasonable interpretation of an ambiguous provision of the Act. The court applied the *Chevron* deference doctrine and deferred to the FCC's interpretation of the Act that the power to set time limits fell within the agency's delegated authority.

[72] United States Supreme Court. *City of Arlington v. Federal Communications Commission.* May 20, 2013.

The main types of deference

The United States Supreme Court has developed several forms of deference in reviewing federal agency actions. The three most common forms of deference include *Chevron* deference, *Skidmore* deference, and *Auer* deference.

- *Chevron* deference*:* The *Chevron* doctrine is named for the 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in which the United States Supreme Court established the legal test to determine whether a court should defer to an agency's reasonable interpretation of an ambiguous statute. Under *Chevron*, courts are expected to refrain from imposing their own statutory interpretation unless the agency's interpretation is determined to be unreasonable.[73]

- *Skidmore* deference: The *Skidmore* doctrine applies when a federal court yields to a federal agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate persuasive reasoning. *Skidmore* deference allows a federal court to determine the appropriate level of deference for each case based on the agency's ability to support its position. The United States Supreme Court developed *Skidmore* deference in the 2000 case *Christensen v. Harris County* and named the doctrine for the court's 1944 decision in *Skidmore v. Swift & Co.*[74]

- *Auer* deference: A federal court applies *Auer* deference, also known as *Seminole Rock* deference, when it yields to an agency's interpretation of an ambiguous regulation that the agency itself has promulgated. In order for a court to apply *Auer* deference, the underlying statute must be unclear and the agency's interpretation must be deemed reasonable. The United States Supreme Court first described the underlying rationale for *Auer* deference in the 1945 case *Bowles v. Seminole Rock & Sand Co.* The court went on to develop and implement the deference principle in the 1997 case *Auer v. Robbins*.[75]

[73] United States Supreme Court, *Chevron, U.S.A. v. Natural Resources Defense Council.* accessed June 25, 1984.
[74] United States Supreme Court. *Skidmore v. Swift & Co.* accessed December 4, 1944.
[75] United States Supreme Court. *Auer et al. v. Robbins et al.* February 19, 1997.

Other types of deference

Besides the three main types of deference, federal courts have developed a range of less-commonly applied deference doctrines. Courts also have the choice in some cases to apply no deference at all. Administrative law scholars William Eskridge Jr. and Lauren Baer developed a continuum of deference in 2008 that identifies these less-commonly applied deference doctrines and the option to decline deference altogether. Below, is a selection of deference doctrines from Eskridge and Baer's continuum:[76]

- The United States Supreme Court has applied strong deference to executive interpretations involving foreign affairs and national security, citing the 1936 precedent *United States v. Curtiss-Wright Export Corporation*.

- The United States Supreme Court sometimes applies a deference permitting reasonable interpretations that are consistent with the statute in labor cases. Similar to *Chevron* deference, it cites precedents from pre-*Chevron* cases. A commonly cited precedent in these cases is the 1978 case *Beth Israel Hospital v. National Labor Relations Board*.

- The court can rely on some input from the agency (e.g. amicus briefs, interpretive rules, or other guidance documents) and use that input to guide its reasoning and decision-making process without invoking a named deference doctrine. Eskridge and Baer refer to this approach as *consultative deference*.

- In some cases, the court exercises ad hoc judicial reasoning and does not apply any type of deference. In these cases, courts review agency actions *de novo*, or without respect to lower court rulings. Agency actions reviewed *de novo* generally concern questions of law, such as cases concerning the constitutionality of an agency action, the categorization of an agency rule as interpretive or legislative, an agency's interpretation or application of an unambiguous statute, and an agency's interpretation of its statutory mandate.

[76] Baer, Lauren and Eskridge, William. "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan." *The Georgetown Law Journal*. Volume 96 (2008).

Debating deference: Arguments for and against

Judicial deference supporters claim that deference respects the expertise of administrative agencies and prevents courts from imposing their own statutory interpretations developed by judges without subject-matter expertise. Deference, it follows, is seen in some legal and policy circles as a tool to support the administrative state by preventing judges from tampering with complex policy decisions. Opponents of judicial deference, on the other hand, argue that the practice is unconstitutional because it prevents the judiciary from exercising its constitutional duty to interpret the law. Reining in deference practices, according to opponents, would check the growth of the administrative state by preventing agencies from interpreting the law themselves.

Deference opponents: Deference is unlawful and creates bias in favor of agencies

Opponents of judicial deference take issue with what then-Judge Niel Gorsuch described in his 2016 concurrence in *Gutierrez-Brizuela v. Lynch* as the resulting "abdication of the judicial duty"[77] by the federal judiciary. Deference opponents claim that the practice is unconstitutional, violates legal precedent, and is the product of bad jurisprudence.

Argument: Deference is unconstitutional

Deference opponents contend that deference violates the text of the U.S. Constitution. In particular, opponents argue that the practice violates Article III, which vests judicial power in the federal courts. Other abuses include violation of the Fifth Amendment by creating a judicial bias in favor of agencies, the prevention of judicial review, and violation of the nondelegation doctrine.

[77] United States Court of Appeals for the Tenth Circuit. *Gutierrez-Brizuela v. Lynch*. August 23, 2016.

Article III forbids courts from exercising deference

Article III of the U.S. Constitution states that 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." Deference opponents interpret this vesting clause as requiring the courts to interpret the law without deferring to interpretations offered by any other entities. Deference supporter Jonathan Siegel described this argument, writing, "Judges, legislators, and scholars have suggested that the Constitution imposes a duty on courts to exercise 'independent judgment' when interpreting a statute. This duty … derives from Article III's vesting of the 'judicial Power' in the courts, and it forbids courts from deferring to an agency's interpretation."[78]

Chevron deference creates opportunities for systemic bias

The U.S. Supreme Court's 1984 decision in *Chevron v. Natural Resources Defense Council* created the *Chevron* deference doctrine and changed the balance of power among the branches of the federal government, according to deference opponents. Some argue that *Chevron* deference creates a risk of systematic bias by giving agencies an unfair advantage when their actions are challenged in court.[79]

Another bias concern of deference opponents is the potential expansion of agency authority through agency cooperation with individual members of Congress. Members of Congress who favor a strong administrative state could work directly with agencies to implement a preferred policy outcome through the rulemaking—rather than the legislative— process. Since agency rulemakings often receive deference, members of Congress can pass broad legislation to facilitate policymaking through agency rulemaking that rises above judicial review. This bias in favor of rulemaking over legislating further entrenches lawmaking power in the administrative state and shifts judicial authority away from the courts. Moreover, *Chevron* could keep judges from ensuring that the intent of Congress as a whole is the standard agencies follow during the regulatory process.

Law professor Philip Hamburger described this argument, writing, "When judges defer to agency interpretations, they abandon their office of independent judgment and engage in systematic bias, and these dangers, being

[78] Siegel Jonathan R. "The Constitutional Case for *Chevron* Deference," *Vanderbilt Law Review*. Volume 71 (2018).
[79] Hamburger, Philip. "*Chevron* Bias," *The George Washington Law Review*. Volume 84, Issue no. 5 (September 2016).

clear violations of Article III and the Fifth Amendment, are far more serious than the difficulties of wrestling with open-ended statutes. Put another way, it is better for judges to face up to disputes about statutory interpretation than to walk away from their constitutional role and a central constitutional right. The statutory uncertainties will be difficult, but they are no excuse for abandoning what (relatively speaking) are constitutional certainties. The judges thus must wrestle with the difficult statutory questions rather than give up on the Constitution's clear and profound limits on judicial power."[80]

Argument: Deference prevents judicial review

Judicial review refers to the power of the courts to interpret laws and overturn legislation and executive actions that conflict with the law or the U.S. Constitution. Deference opponents claim that courts abandon their duty to interpret and apply the law when they defer to agency interpretations of the law.

Justice Antonin Scalia argued that agencies might reach the right result on interpretive questions more often because of their expertise, but that is not a theoretical justification for deference if the constitutional duty of the courts is to say what the law is. Scalia claimed that some might think that courts accepting agency judgments on questions of law seems incompatible with John Marshall's claim in *Marbury v. Madison* that the duty of the judicial department is to say what the law is. He stated, "I suppose it is harmless enough to speak about 'giving deference to the views of the Executive' concerning the meaning of a statute, just as we speak of 'giving deference to the views of the Congress' concerning the constitutionality of particular legislation — the mealy-mouthed word 'deference' not necessarily meaning anything more than considering those views with attentiveness and profound respect, before we reject them. But to say that those views, if at least reasonable, will ever be binding - that is, seemingly, a striking abdication of judicial responsibility."[81]

[80] *Id.*

[81] Scalia, Antonin, "Judicial Deference to Administrative Interpretations of Law." *Duke Law Journal*. Volume 1989 Issue no. 3 (1989)

Argument: Chevron deference violates the nondelegation doctrine

The nondelegation doctrine holds that Congress may not give away its legislative power to another branch of government. This claim argues that the deference courts give to agency actions under Chevron (1984) violates the restrictions of the doctrine because it compels courts to honor agency interpretations of unclear statutes—even when the interpretations change over time.

Justice Neil Gorsuch grappled with this claim in his *Gutierrez-Brizuela* concurrence, questioning, "if an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what City of Arlington's application of Chevron says it can), you might well wonder: where are the promised "clearly delineated boundaries" of agency authority?"[82]

Argument: Deference violates the separation of powers

The idea of separation of powers was foundational during the drafting of the U.S. Constitution. Under the separation of powers doctrine, three powers (executive, legislative and judicial) need to be separated in order to restrain governmental overreach and the abuse of power. Deference opponents claim that deference transfers the judicial power to the executive branch by requiring judges to accept agency interpretations of unclear statutes or regulations and preventing them from exercising their constitutional duty to interpret the law. In this way, deference ignores the judicial obligation to serve as a check on the political branches and blurs the boundaries between the branches of the federal government.[83]

Argument: *Auer* deference violates the separation of powers

Auer deference raises particular objections for deference opponents. The doctrine requires courts to uphold agency interpretations of ambiguous regulations promulgated by that same agency. Deference opponents claim that the U.S. Supreme Court cases that gave rise to *Auer* deference—*Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*—misapplied separation of powers principles by allowing agencies to interpret their own ambiguous regulations without the neutral input of the courts.

Deference opponent Christopher J. Walker argued that *Auer* deference allows "an agency official to both make and execute the same law." He also claimed that the

[82] *Gutierrez-Brizuela v. Lynch*
[83] Bamzai, "The Origins of Judicial Deference to Executive Interpretation"

doctrine works to facilitate changes to agency interpretations over time, claiming that *Auer* deference "creates inappropriate incentives for agencies to draft vague regulations and interpret those regulations through less-formal means after the fact."[84]

Argument: Deference violates legal practices and precedent

Chevron and other cases concerning deference broke with U.S. Supreme Court precedent and the Administrative Procedure Act (APA), according to deference opponents. They claim that the question of how much respect courts should give to agency interpretations of statutes appeared long before *Chevron* in cases involving writs of mandamus—court orders directing government officials to take particular action aimed at either correcting an abuse of discretion or fulfilling an official duty.

Chevron (1984) was a break from the legal practice of the early American Republic

Early federal court decisions, according to deference opponents, articulated an expansive role for judges to review laws and executive actions without granting binding deference to the views of the other branches of government.

For example, deference opponent Aditya Bamzai argued that *Marbury v. Madison* (the 1803 case that established judicial review) seems to contradict *Chevron* deference in its conception of the role of the judiciary. He wrote, "the concept may appear inconsistent with Chief Justice Marshall's assertion, in *Marbury v. Madison*, that '[i]t is emphatically the province and duty of the judicial department to say what the law is' —a tension that has prompted some to characterize *Chevron* as the 'counter-*Marbury*' of the administrative state." Bamzai, citing Ann Wollhandler, also argued that Chevron broke with the historical precedent of de novo review, which "was the predominant form of judicial review of executive action in the early Republic."[85]

The APA was created with the idea that questions of law would be subject to de novo judicial review and limit judicial deference

Deference opponents claim that Congress drafted the Administrative Procedure Act (APA) with the idea that courts would review questions of law for themselves and not defer to interpretations made by agencies. Justice Antonin Scalia argued

[84] Walker, Christopher J. "Attacking Auer and Chevron Deference: A Literature Review," *The Georgetown Journal of Law & Public Policy*. Volume 16 (2018).
[85] Bamzai, "The Origins of Judicial Deference to Executive Interpretation"

that the APA assumes that questions of law would be decided *de novo* by the courts, which is one reason that the APA exempts interpretive rules from notice-and-comment rulemaking procedures. Scalia said that this assumption was untrue by 1989.[86]

Deference abandons a legal-interpretive tradition dating to 17th-century English courts

Deference opponents claim that contemporary systems of judicial deference ignore the 17th-century English court precedent of interpreting ambiguous laws by deferring to contemporaneous and longstanding interpretations of those laws. The English judges argued deference opponent Aditya Bamzai, "adhered to customary canons of construction in the face of statutory ambiguity. Two of those canons—the contemporanea expositio [contemporary exposition] and interpres consuetudo [consistent interpretation]—were central to the development of judicial deference."[87]

Argument: Deference is the product of bad jurisprudence

Deference opponents claim that deference results from judges applying an improper methodology to legal and regulatory interpretation. This claim differentiates *Chevron* deference given to agency interpretations of ambiguous laws from the respect earlier judges paid to longstanding and contemporaneous interpretations of ambiguous laws. "American courts 'respected' longstanding and contemporaneous executive interpretations of law as part of a practice of deferring to longstanding and contemporaneous interpretation generally," wrote deference opponent Bamzai. "It was the pedigree and contemporaneity of the interpretation, in other words, that prompted 'respect'; the fact that the interpretation had been articulated by an actor within the executive branch was relevant, but incidental."[88]

[86] Scalia, "Judicial Deference to Administrative Interpretations of Law"
[87] Bamzai, "The Origins of Judicial Deference to Executive Interpretation"
[88] *Id.*

Deference supporters: Deference is lawful and supports good government practices

Supporters of judicial deference generally argue that deference practices respect agency expertise, facilitate improved outcomes, support the separation of powers, and are in line with constitutional requirements.

Argument: Deference respects expertise

This argument says that judicial deference to administrative agencies keeps judges from interfering with agency staff who apply their expertise to solve policy problems.

The following claims elaborate the defense of deference based on agency expertise.

Deference allows for expertise

This claim states that administrative agencies have expert staff who are better-equipped than judges to handle the technical and specialized questions that arise during the regulatory process. Under a system of judicial deference, these experts would be able to solve difficult problems without the interference of non-specialist judges.

Law professors Jacob Gersen and Adrian Vermeule argue that courts should defer to the scientific expertise of agencies. They write, "[A] reviewing court must remember that the [agency] is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[89]

Agencies have the discretion to consider relevant factors during decision making

This claim focuses on the requirements of *Chevron* deference, which instructs courts to uphold reasonable agency interpretations of ambiguous statutes, in the context of the regulatory process. When an agency is deciding how to regulate in

[89] Gersen, Jacob and Vermeule, Adrian. "Thin Rationality Review," *Michigan Law Review*. Volume 114 (2016)

a particular area, this claim argues that courts should defer to the agencies' choices about which factors to consider during their deliberations.

Jacob Gersen and Adrian Vermeule argue that agencies should consider relevant factors as established by Congress in statutes. They write, "Given that the relevant factors inquiry is really one of statutory interpretation, it is subject to the rules of statutory interpretation that always govern in administrative law. One of those is the Chevron doctrine, under which agencies, rather than courts, enjoy the authority to fill in statutory gaps and ambiguities. The Court has made it plain that Chevron applies to the interpretive question about what factors the statute makes relevant. And, three terms ago, the Court also explained that Chevron applies to agency interpretations of their own jurisdiction as well. In particular, where statutes are silent or ambiguous, agencies—rather than courts—enjoy discretion to decide what the relevant factors may be and whether to consider those factors."[90]

Argument: Deference produces better outcomes

This argument states that judicial deference to administrative agencies leads to better outcomes than if courts reviewed all agency decisions on a *de novo* basis. Beyond better outcomes, some proponents of this argument say agencies have more flexibility to solve problems when judges defer to them and that chaos would follow if courts were less deferential. Most of the following supporting claims involve *Chevron v. Natural Resources Defense Council*, the 1984 U.S. Supreme Court decision that said courts must yield when agencies make reasonable interpretations of ambiguous laws they are empowered to administer.

Chevron deference is better than a case-by-case approach

This claim argues that when judges follow the deference rules outlined in the *Chevron* decision, there will be more stability, accountability, and political participation than if judges follow a less-precise rule about when to defer to agency decisions. Some who advance this claim also argue that the *Chevron* decision brought clarity to conflicting historical precedents regarding how judges were supposed to treat agency interpretations of the law or specific facts.

Justice Antonin Scalia argued in a lecture that Chevron is better than the previous case-by-case approach because Congress can anticipate how ambiguity will be resolved by agencies better than how judges will rule.[5] He says, "If that is the principal function to be served, Chevron is unquestionably better than what

[90] *Id.*

preceded it. Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known. The legislative process becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether, if they say nothing about it in the statute, the ultimate answer will be provided by the courts or rather by the Department of Labor."[91]

Chevron allows for agency flexibility

This claim refers to the idea that deference frees agencies to change their minds about policy when circumstances change, which allows them to adapt to new problems without roadblocks from judges.

T. J. McCarrick writes, "Chevron offers agencies flexibility to pursue different—and yes, opposite—policy goals than their predecessors. Put differently, it prevents ossification of federal law."[92]

Argument: Deference is constitutional

This argument states that the U.S. Constitution allows for judicial deference to administrative agencies and that such deference does not violate the nondelegation doctrine. The nondelegation doctrine is a legal principle that says legislatures may not give away legislative power to other branches of government or to private entities. The argument is developed by the following claims.

Chevron deference does not create judicial bias in favor of agencies

This claim argues that Congress empowers agencies to make decisions and that the act of courts deferring to those decisions does not signify that courts are biased in favor of agencies. According to this claim, courts that defer to congressional will to empower agencies are following the law.

Jonathan R. Siegel writes, "There is no bias when a judge enforces a statute that expressly delegates authority to an administrative agency. Innumerable statutes expressly delegate authority to an agency to make some decision—say, to set the maximum levels of a pollutant in the air or drinking water in accordance with a statutory standard. In such cases, when the agency exercises the power delegated to it, judicial review is routinely held to be available only for rationality.

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[91] Scalia, "Judicial Deference to Administrative Interpretations of Law"
[92] McCarrick, T.J. "In Defense of a Little Judiciary: A Textual and Constitutional Foundation for Chevron," *San Diego Law Review* (2018)

Challengers of the agency's action therefore labor under the same burden as to which Hamburger complains—they can win only if they convince a reviewing court that the agency's action is not only wrong, but irrational. The agency has a clear advantage. And yet no one would claim that courts are unconstitutionally showing bias in favor of agencies in such cases. The agencies have the advantage simply because courts will necessarily permit the agencies to exercise the power conferred on them by statute."[93]

The nondelegation doctrine allows *Chevron* deference

According to the nondelegation doctrine, Congress may not give away its legislative power to another branch of government. One interpretation of *Chevron v. Natural Resources Defense Council*, the case that instructs courts to defer to reasonable agency interpretations of ambiguous laws, is that Congress delegates policy-making authority to agencies implicitly when it leaves laws ambiguous. This claim focuses on those implicit delegations of authority and argues that they do not violate the nondelegation doctrine.

Jonathan R. Siegel writes, "[W]hatever decisionmaking authority Congress implicitly confers on agencies by virtue of Chevron, Congress could have conveyed to agencies expressly. The authority conferred might or might not violate the nondelegation doctrine, but the form by which the authority was conferred should make no difference. Once again, therefore, Chevron makes things no worse from a nondelegation perspective."[94]

Judges may evaluate policy outcomes to make decisions

This claim focuses on the idea that the U.S. Constitution allows courts to weigh the policy consequences of a decision as they evaluate whether an agency action followed the law.

Antonin Scalia argued in a speech that courts are allowed to consider policy consequences when they make decisions. He stated, "Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results, or results less compatible with the reason or purpose of the statute. This, it seems to me, unquestionably involves judicial consideration and evaluation of competing policies, and for precisely the same purpose for which (in the context we are discussing here) agencies consider and evaluate them—to determine which one

[93] Siegel, "The Constitutional Case for *Chevron* Deference"
[94] *Id.*

will best effectuate the statutory purpose. Policy evaluation is, in other words, part of the traditional judicial tool-kit that is used in applying the first step of Chevron—the step that determines, before deferring to agency judgment, whether the law is indeed ambiguous. Only when the court concludes that the policy furthered by neither textually possible interpretation will be clearly "better" (in the sense of achieving what Congress apparently wished to achieve) will it, pursuant to Chevron, yield to the agency's choice. But the reason it yields is assuredly not that it has no constitutional competence to consider and evaluate policy."[95]

Chevron reconciles the administrative state with constitutional law principles

This claim refers to the idea that Chevron deference, which requires courts to uphold reasonable agency interpretations of ambiguous statutes, helps bring the structural innovations of the administrative state within the bounds of the U.S. Constitution.

Law professor Cass R. Sunstein makes the case that a judicial deference principle, like the one articulated in Chevron can help courts and agencies discern the meaning of ambiguous laws. Such a principle might bridge the divide between traditional constitutional law and administrative law. He elaborates in a 1990 law review article, "By developing a clear view of the relationship among [interpretive] principles, we might ultimately be able to reconcile Chevron, even in its broader formulations, with approaches to statutory interpretation that help to discipline the administrative state through legal constraints on the exercise of public power. A reconciliation of this sort would count as one among a wide range of steps designed to adapt a legal system founded on common law principles to the aspirations and pathologies of the administrative state."[96]

Argument: Deference recognizes congressional delegations of authority to agencies

This argument defends judicial deference to administrative agencies by stating that Congress gives agencies, not courts, the power to resolve ambiguities found within statutes. The following claims elaborate on this argument.

[95] Scalia, "Judicial Deference to Administrative Interpretations of Law"
[96] Sunstein, Cass. "Law and Administration after Chevron." *Columbia Law Review.* (1990).

Statutory ambiguity should be understood as a delegation of authority

According to this claim, ambiguous laws contain implicit authority for agencies to fill in the gaps left by ambiguity. Courts defer to reasonable agency decisions made within the bounds of such ambiguity out of respect for that implicit instruction from Congress.

Law professor Henry Monaghan wrote in a law review article, "[J]udicial review of administrative action contains a question of the allocation of law-making competence in every case, given congressional power to delegate law-making authority to administrative agencies. The court's interpretational task is (enforcement of constitutional restrictions aside) to determine the boundaries of delegated authority. A statement that judicial deference is mandated to an administrative "interpretation" of a statute is more appropriately understood as a judicial conclusion that some substantive law-making authority has been conferred upon the agency. Where deference exists, the court must specify the boundaries of agency authority, within which the agency is authorized to fashion authoritatively part, often a large part, of the meaning of the statute. By contrast, to the extent that the court interprets the statute to direct it to supply meaning, it interprets the statute to exclude delegated administrative law-making power. In this context, the agency view of what the statute means may persuade, but it cannot control, judicial judgment."[97]

Courts can fulfill their judicial duty by interpreting ambiguous statutes as vesting power in agencies

This claim focuses on the idea that courts fulfill their duty to interpret the law by recognizing that ambiguous statutes are delegations of authority to agencies to fill in gaps.

Antonin Scalia argued in a speech that the theoretical justification of Chevron comes from the intent of Congress as revealed by a particular statute. He stated, "In my view, the theoretical justification for Chevron is no different from the theoretical justification for those pre-Chevron cases that sometimes deferred to agency legal determinations. As the D.C. Circuit, quoting the First Circuit, expressed it: 'The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue.' 'An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires:

[97] Monaghan, Henry Paul. "Marbury and the Administrative State," *Columbia Law Review*. Volume 83 Issue no.1 (1983)

(1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. When the former is the case, what we have is genuinely a question of law, properly to be resolved by the courts. When the latter is the case, what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable."[98]

Argument: Deference is required by separation of powers

This argument says that separation of powers principles require judicial deference to administrative agencies when resolving ambiguous statutes involves making policy judgments. Separation of powers refers to the idea that the functions of government should be divided between the legislative, executive, and judicial branches. Since policy judgments are political questions, this argument says that the political branches, Congress and the president, must resolve them instead of judges. The argument is developed in the following claim:

Separation of powers requires deference

This claim argues that the political branches, Congress and the president, are empowered to make policy choices, according to the separation of powers. When Congress leaves ambiguity in a statute, this claim states that it is for the executive branch to resolve and that judges should defer to that executive resolution.

Antonin Scalia rejected the idea that separation of powers principles require judicial deference to agencies, but he gave a clear summary of the idea in a speech from 1989. He stated, "[T]he constitutional principle of separation of powers requires Chevron. The argument goes something like this: When, in a statute to be implemented by an executive agency, Congress leaves an ambiguity that cannot be resolved by text or legislative history, the 'traditional tools of statutory construction,' the resolution of that ambiguity necessarily involves policy judgment. Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive."[99]

[98] Scalia, "Judicial Deference to Administrative Interpretations of Law"
[99] *Id.*

Argument: Deference adheres to legal practices and precedent

This argument states that *Chevron* and other post-WWII cases that established judicial deference to administrative agencies were in line with previous court decisions. In addition, the argument claims that such deference is consistent with the requirements and background of the Administrative Procedure Act (APA), which governs agency procedures. Finally, some defenders of judicial deference to administrative agencies cite as precedent the deference courts have granted in cases involving writs of mandamus—court orders to government officials commanding them to correct an abuse of discretion or fulfill an official duty. The following claims support this argument:

Chevron did not make new law

This claim argues that *Chevron*, which requires courts to uphold reasonable agency interpretations of ambiguous laws, was not a change from precedent.

Law professor Ann Woolhandler described this claim, "[T]he background assumption that the first hundred years were an age of judicial deference to agencies implicitly undergirds current claims that the executive agencies can more legitimately exercise delegated lawmaking power than the courts. Historically, however, the courts exercised significant lawmaking powers both under the common law and under nineteenth-century administrative law. The pre-ICC law tends to demonstrate the long pedigree of inelegant allocations of lawmaking authority between courts and agencies that persisted until the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council* transferred significant lawmaking authority from the courts."[100]

Chevron is a legitimate framework built on the tradition of deference in mandamus cases

This claim argues that the *Chevron* decision followed early Supreme Court precedent dealing with writs of mandamus. In those cases, courts would order executive officials to carry out ministerial duties, but not to take a specific action when the relevant laws allowed for executive discretion.

[100] Woolhandler, Ann. "Judicial Deference to Administrative Action—A Revisionist History," *Administrative Law Review*. Volume 43 Issue no. 2 (1991).

T.J. McCarrick described this claim, "Of course, not all actions are unreviewable. 'Ministerial' duties involve no delegation of discretion and 'are not [subject] to the direction of the President.' Lawsuits involving ministerial acts, therefore, do not 'interfere[ ] . . . with the rights or duties of the executive.' The discretionary ministerial distinction has deep roots in American jurisprudence. And it has been developed primarily in writ of mandamus cases. Revived, the discretionary-ministerial distinction offers a constitutional basis for *Chevron* deference. That is to say, it supports the claim that agency officials interpreting ambiguous statutes exercise executive power under Article II. Of course, not all agree. Some argue the discretionary-ministerial distinction stems from the form of relief requested. In other words, the nature of mandamus review put the rabbit in the hat, so to speak, in favor of the executive's preferred construction. … In fact, Marbury originated the discretion-ministerial distinction that provides deference with its constitutional pedigree. Many forget that Marbury began by questioning judicial authority to review executive action, formulating what became known as the political question doctrine."[101]

Deference is the law under the APA

According to this claim, the Administrative Procedure Act (APA) created a system of judicial review that allows courts to defer to agency interpretations of law or fact in different cases.

T.J. McCarrick described this claim, "The APA commands courts to interpret statutes. But it is far from clear that judges abdicate that duty in Chevron's name. Under Chevron, courts determine de novo the existence or non-existence of a statutory ambiguity. And even then, an agency's interpretation cannot exceed the bounds of the reasonable. Courts applying Chevron, therefore, do engage in statutory interpretation. And nothing in the APA requires more. To the contrary, APA standards of review lend support to Chevron's framework. Under § 706, courts must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." That is Chevron with the steps reversed."[102]

[101] McCarrick, "In Defense of a Little Judiciary"
[102] *Id.*

United States Supreme Court precedents deferring to agency factual determinations led to deferring to legal determinations

This claim argues that the U.S. Supreme Court's longstanding practice of deferring to agencies on factual questions led the court to adopt agency interpretations of law involving agency expertise.

Aditya Bamzai described this claim, "[T]he Court invoked longstanding precedents addressing judicial deference to agency factual determinations and analogized questions of law requiring agency expertise to questions of fact. In doing so, the Court drew on preexisting scholarship suggesting that a formal distinction between 'law' and 'fact' in administrative review was illusory. By embracing this legal-realist perspective on the law-fact distinction, and thereby blurring the line between factual determinations and legal questions, the Court incrementally expanded the domain of agency discretion in a manner that ultimately led to the Chevron doctrine."[103]

He continued, "In the time between the APA's adoption and Chevron, courts relied interchangeably on cases applying the mandamus standard, cases applying the traditional contemporary and customary canons, and cases applying the 1940s approach breaking down the distinction between judicial review of questions of law and questions of fact."[104]

Arbitrary-and-capricious review requires less of agencies than some judges believe

Arbitrary-or-capricious review refers to judicial applications of the Administrative Procedure Act (APA) to agency decisions to make sure that agencies follow proper regulatory procedures. The APA requires judges to invalidate agency actions they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[105] This claim argues that the APA has looser standards than some judges apply to agency decisionmaking.

Gersen and Vermeule describe this claim through thin rationality review—a standard of review according to which courts would uphold agency actions as long as they are based on reasons instead of policing whether those reasons are scientifically valid. Thin rationality review, according to Gersen and Vermeule,

[103] Bamzai, "The Origins of Judicial Deference to Executive Interpretation"
[104] *Id.*
[105] Administrative Procedure Act, 5 U.S.C. §§ 551-559

means that “agencies are (merely) obliged to make decisions on the basis of reasons. Second-or-higher order reasons may, in appropriate cases, satisfy that obligation. What is excluded by the arbitrary and capricious standard is genuinely ungrounded agency decisionmaking, in the sense that the agency cannot justify its action even as a response to the limits of reason.”[106]

The uncertain future of deference

Judicial deference as a doctrine faces an uncertain future. *Chevron* deference, in particular, has been seen as "entering a period of uncertainty, after long seeming to enjoy consensus support on the Court,” according to administrative law scholar Michael Kagan. What has emerged since 2015, according to Kagan, has been a period "in which it seems that the Court may be more willing to explicitly refine the doctrine, to limit its application in certain ways, and to articulate new exceptions."[107] The following sections examine Supreme Court activity that has signaled a shift in judicial approaches to deference.

Chevron deference and a new period of uncertainty

Once considered canonical judicial doctrine—cited 81,000 times as of 2018 in legal arguments since its first articulation in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.—Chevron* deference has been seen by some scholars as "entering a period of uncertainty, after long seeming to enjoy consensus support on the Court.” What has emerged since 2015 has been a period "in which it seems that the Court may be more willing to explicitly refine the doctrine, to limit its application in certain ways, and to articulate new exceptions."[108]

Hailed by Kenneth Starr during the Reagan administration as a Magna Carta for use in federal administrative agency deregulation, *Chevron* has been a tool for subsequent administrations for deregulatory as well as increased regulatory

[106] Gersen and Vermeule, “Thin Rationality Review”
[107] Kagan, Michael. “Loud and Soft Anti-Chevron Decisions." UNLV William S. Boyd School of Law Legal Studies Research Paper, (2017).
[108] *Id.*

purposes. The Obama administration, for instance, relied on *Chevron* in its case for the Affordable Care Act.[109]

Once supported by conservative-leaning legal authorities including Justice Antonin Scalia and Justice Clarence Thomas, Thomas, for instance, has in more recent years reversed his views. He wrote the 2005 opinion in National Cable & Telecommunications Ass'n v. Brand X Internet Services, seen as "one of the Court's most robust articulations of the commandment for judges to defer to administrative agencies." In 2015's Michigan v. Environmental Protection Agency, however, Thomas' views had changed; his ruling in that case "derided his own prior majority opinion."[110]

Prior to joining the U.S. Supreme Court, Justice Neil Gorsuch declared *Chevron* to be "no less than a judge-made doctrine for the abdication of the judicial duty." Gorsuch's opposition to deference regimes became the model for Trump administration judicial appointments.

But opposition to *Chevron* has materialized along a broader ideological spectrum. According to a 2018 study, "[i]f one counts King v. Burwell, all nine justices have at least once signed an opinion explicitly holding that *Chevron* should not apply in a situation where the administrative law textbooks would previously have said that it must apply."[111]

There had been uncertainty since the inception of *Chevron* about why the courts had appeared to apply deference in one case but not another. But because prior to 2015 "no justice had announced any desire to formally abandon *Chevron*, the dominant streams of administrative law scholarship were reluctant to draw doctrinal conclusions from the justices' failure to practice what they preached." The future of *Chevron* is therefore unclear. As one study stated, "despite all the fanfare, it is now well known that the Supreme Court itself applies *Chevron* inconsistently at best."[112]

[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*

Kisor v. Wilkie and the future of *Auer* deference

The United States Supreme Court on June 26, 2019, unanimously upheld *Auer* deference—the practice of federal courts deferring to administrative agencies' interpretations of ambiguous regulations. However, the ruling also limited application of the doctrine. The opinion, written by Justice Elena Kagan, set the following four parameters for Auer deference:[113]

1. *Auer* deference applies only when a regulation is ambiguous. Courts must first consider the text, structure, history, and purpose of a regulation before deferring to an agency's reasonable interpretation.
2. Whether the reasonable agency interpretation of a regulation is an authoritative or official position of the agency.
3. *Auer* deference is only appropriate for regulatory matters that fall within agency expertise.
4. An agency's interpretation must be a "fair and considered judgment" that does not create unfair surprise for those subject to the regulation. Moreover, courts should not defer to agency interpretations that were only adopted in order to assist the agency in a lawsuit.

Justice Gorsuch authored a concurring opinion, joined by Justices Thomas, Alito, and Kavanaugh, that criticized the court for not invalidating *Auer* altogether, noting the court's responsibility "to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve."[114]

Justice Thomas labels deference doctrine inconsistent with the Constitution

U.S. Supreme Court Justice Clarence Thomas on February 24, 2020, stated that he would reconsider his 2005 opinion in *National Cable & Telecommunications Association v. Brand X Internet Services* that gave rise to the *Brand X* deference doctrine.[115]

Thomas dissented from the majority's decision not to hear *Baldwin v. United States*, a case challenging *Brand X* deference. He argued that *Brand X* deference

[113] U.S. Supreme Court. *Kisor v. Wilkie*. (2019)

[114] *Id.*

[115] United States Supreme Court, "Order List: 589 U.S." February 24, 2020

appears to be "inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation."[116]

The *Brand X* case concerned an application of the *Chevron* deference doctrine. Under Chevron deference, federal courts must defer to a federal agency's interpretation of an ambiguous or unclear statute. *Brand X* built on Chevron's foundation by requiring courts to defer to agency interpretations of statutes even when courts previously held contrary views.[117]

Justice Thomas argued that both deference precedents undermined the requirements of the United States Constitution. He wrote, "Regrettably, *Brand X* has taken this Court to the precipice of administrative absolutism. Under its rule of deference, agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations. *Brand X* may well follow from Chevron, but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence. Even if the Court is not willing to question Chevron itself, at the very least, we should consider taking a step away from the abyss by revisiting *Brand X*."[118]

Deference reform proposals

Administrative law scholars and government officials have proposed various approaches to reforming deference. The following section contains executive, legislative, and judicial branch deference reform proposals as well as a selection of state-level responses to judicial deference.

Legislative branch proposals

The Separation of Powers Restoration Act (SOPRA) and the Regulatory Accountability Act (RAA) are two legislative proposals from recent years that would limit or eliminate judicial deference to agencies in cases where there is a dispute about the meaning of a statute or regulation.

[116] *Id.*
[117] *Id.*
[118] *Id.*

Separation of Powers Restoration Act (SOPRA)

SOPRA would eliminate *Chevron* and *Auer* deference by amending the Administrative Procedure Act to require courts to review agency actions *de novo*. The legislation, introduced by Republican legislators, died in the 114th, 115th, and 116th Congresses.[119]

Regulatory Accountability Act (RAA)

The RAA was 2017 legislation introduced in the U.S. House of Representatives that would have amended the Administrative Procedure Act (APA) to change how agencies make rules, to change how judges reviewed agency decisions, and to change how to measure the impact of regulations. The judicial review portion of the bill included provisions from the Separation of Powers Restoration Act that would have required *de novo* review of agency interpretations of the Constitution, laws, and regulations. The RAA also would have prohibited courts from interpreting ambiguities in laws as implicit delegations of authority to agencies or as justification for deferring to agency interpretations. It also would have blocked courts from deferring to agency determinations of regulatory cost and benefits in some cases and to agency determinations related to interim rules or guidance. The RAA did not pass in the 115th Congress.[120]

Executive branch proposals

Paul R. Noe, a former Office of Information and Regulatory Affairs (OIRA) staff member during the George W. Bush administration, suggested that the next president could instruct agencies to use cost-benefit analysis when issuing new regulations.

Noe's proposal is a response to the 2009 U.S. Supreme Court case *Entergy Corp. v. Riverkeeper Inc.*, which held that the Environmental Protection Agency (EPA) could use cost-benefit analysis when implementing provisions of the Clean Water Act. The court applied *Chevron* deference to defer to the EPA's interpretation of the law, which the agency argued allowed for cost-benefit analysis—consideration of whether the anticipated benefits of regulation will be greater than its costs.

[119] United States Senate. "Sasse, Colleagues Introduce Separation of Powers Restoration Act of 2019." March 27, 2019.
[120] United States Congress. "H.R.5 - Regulatory Accountability Act of 2017." accessed March 26, 2019.

Noe stated that the president could direct "agencies, including independent agencies, to reexamine their statutory interpretations ... and, 'unless prohibited by law,' implement those statutes through cost-benefit balancing."[121]

Judicial branch proposals

Deference opponents have put forth a number of proposals to limit, modify, or end the application of judicial deference doctrines. The following sections examine specific approaches to bringing about deference reform through the judicial branch.

Have judges interpret laws without deference

This proposal would require judges to interpret laws on a *de novo* basis—meaning that they would apply their own interpretations of ambiguous laws instead of deferring to those made by agency officials.

Deference opponent Philip Hamburger took this proposal one step further, arguing that it is the judicial duty to expound, or find meaning in, statutes, but not to find meaning where none exists. "When judges reach the point at which they no longer can discern the meaning of a statute, they should not attribute meaning to it," Hamburger claimed. "In other words, where a statute—considered in its context and with canons of interpretation and other aids to construction—reveals its meaning, judges should expound the statute; but where the statute is so profoundly ambiguous that it reveals no more meaning, judges should simply stop. At that point, the statute has nothing more to say."[122]

Changes to existing judicial deference regimes

Both supporters and opponents of judicial deference have proposed making changes to existing judicial deference doctrines. These proposals include narrowing the scope of deference doctrines, changing the approach to applying deference doctrines, and narrowing the scope of judicial review of agency actions,

[121] Graham, John D. and Noe, Paul R. "A Paradigm Shift in the Cost-Benefit State." *The Regulatory Review* (2016).
[122] Hamburger, "*Chevron* Bias"

to name a few. The following list examines a selection of proposed modifications to judicial deference doctrines.

Narrow the scope of Chevron deference by defending the Major Questions Doctrine

This approach would not allow courts to defer to agency interpretations of law when the interpretation involves policies with great economic and political significance, known as major questions. One version of the Major Questions Doctrine (MQD) would force Congress to pass new legislation to resolve statutory ambiguity. Another version would allow judges to settle policy disputes that come from ambiguities or gaps in statutes.[123]

Look to Congressional intent before applying *Chevron* deference

This approach, put forth by U.S. Supreme Court Justice John Roberts, would call on courts to use context to determine whether Congress intended to have agencies or courts interpret particular statutes.

Deference opponent Christopher J. Walker suggested that Roberts' proposal might be the most likely approach to reforming *Chevron* deference. He wrote, "Limiting *Chevron*'s domain at Step Zero via a context-specific inquiry into objective congressional intent, as the Chief Justice has advocated, is the most probable narrowing that could occur in the near future.[124]

Chevron Step One changes

This approach aims to restrain the way courts decide whether a statute is ambiguous. *Chevron* step one requires courts to determine whether Congress expressed its intent clearly in a statute. Limiting the number of statues that courts find ambiguous, argues Walker, limits the opportunities for a court to defer to an agency. Walker claims that courts can "more stringently apply the textual canons

[123] Gustafson, Adam R. "The Major Questions Doctrine Outside Chevron's Domain." CSAS Working Paper 19-07 Draft (February 15, 2019).
[124] Walker, "Attacking *Auer*"

at Step One to resolve statutory ambiguities, similar to how Justice Scalia approached his *Chevron* inquiry."[125]

Do not allow Chevron to preempt state law

This approach would prevent courts from upholding agency interpretations of law under *Chevron* that contradict state laws on the subject.[126]

Narrow the scope of judicial review of agency action

Courts exercise judicial review when they examine the lawfulness of agency actions. This approach would limit the types of agency actions that courts could review, decreasing the burden that courts put on agencies to justify their decisions. For example, deference supporters Jacob Gersen and Adrian Vermeule proposed that courts abandon hard look review, which requires courts to strike down agency actions found to be arbitrary, capricious, or an abuse of discretion, and instead apply what the authors refer to as " thin rationality review." Thin rationality review would entail requiring agencies to act based on reasons while not requiring agencies to use cost-benefit analysis, to resolve scientific uncertainty, or to pick optimal policy.[127]

Do nothing: Keep current judicial deference precedents

This approach argues for the status quo of judicial deference to agency interpretations of laws and regulations. Advocates of the status quo argue that existing deference doctrines are optimal administrative law policy and encourage judges to exercise judicial restraint. The following claims defend the current state of judicial deference.

Chevron is the most plausible method to determine what statutes mean

Justice Antonin Scalia argued in a speech that congressional intent is hard to determine, and Chevron deference might be the best alternative to approach

[125] *Id.*
[126] *Id.*
[127] *Id.*

ambiguous statutes “If the Chevron rule is not a 100% accurate estimation of modem congressional intent,” he claimed, “the prior case-by-case evaluation was not so either-and was becoming less and less so, as the sheer volume of modem dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule. And to tell the truth, the quest for the ‘genuine’ legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.”[128]

Removing *Chevron* would empower judges at the expense of the American people

Deference supporter T.J. McCarrick argued that ending deference would empower judges and throw the separation of powers out of balance. He wrote, “In the post-*Chevron* world, judges would likely replace the political choices of indirectly accountable agency officials with their own. Ambiguities would confront courts with a Rorschach test; what judges see would say a great deal more about their political preferences than congressional intent or statutory meaning.”[129]

Strict-constructionist judges should not fear *Chevron*

Justice Antonin Scalia argued that strict-construction approaches to statutory interpretation limit the application of *Chevron*. He claimed, “In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a ‘strict constructionist’ of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a 'plain meaning' rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of ‘reasonable’

[128] Scalia, "Judicial Deference to Administrative Interpretations of Law"
[129] McCarrick, "In Defense of a Little Judiciary”

interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require that judge to accept an interpretation he thinks wrong is infinitely greater."[130]

Deference in the states

State-level approaches to judicial deference vary significantly. State courts are not obliged to defer to state-level administrative agencies or adopt federal deference doctrines. As of 2020, thirty-six states had implemented or adopted some form of judicial deference to state administrative agencies similar to the federal deference doctrines, according to the Goldwater Institute.[131] Eleven of these states and the District of Columbia have specifically adopted the *Chevron* deference approach, according to Professor Bernard Bell of Rutgers University.[132]

States that have taken action to limit deference practices

As of 2020, Arizona, Florida, Wisconsin, Mississippi, and Michigan had taken either legislative or judicial action to prohibit state courts from exercising deference. Courts in these states are not subject to deference doctrines that would compel them to defer to administrative agencies.

Arizona

Arizona became the first state to legislatively prohibit judicial deference to state administrative agencies in April 2018 when Governor Doug Ducey (R) signed House Bill 2238 into law. The law instructs courts handling proceedings between an agency and regulated party to decide all questions of law without deference to government agencies, including on matters of constitutional, statutory, and regulatory interpretation. The law included two exceptions for agencies created pursuant to the Arizona Corporation Commission (the state's utility regulator) and healthcare-related appeals arising from a specific article of Arizona law.[133]

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[130] Scalia, "Judicial Deference to Administrative Interpretations of Law"
[131] Riches, John. "Stop Deferring to Rule by Bureaucrats." *National Review*. April 2, 2019.
[132] Saiger, Aaron. Fordham Law Review, "Chevron and Deference in State Administrative Law." *Fordham Law Review* (2014).
[133] Arizona House of Representatives. "House Bill 2238," (2018).

Florida

Florida voters passed a ballot measure prohibiting judicial deference to state administrative agencies in November 2018. The ballot measure—Florida Amendment 6, Marsy's Law Crime Victims Rights, Judicial Retirement Age—bundled three proposed amendments related to trials, judges, and courts into one ballot measure. The third part of the measure prohibited state courts from deferring to an administrative agencies''s interpretations of a statutes or rules in legal cases. The measure requires state courts to interpret statutes or rules *de novo*—that is, without deference to the legal opinions of administrative agencies or previous judgments.[134]

Wisconsin

The Wisconsin Supreme Court issued a decision in *Tetra Tech, Inc. v. Wisconsin Department of Revenue* in June 2018 that ended the practice of judicial deference to state administrative agencies. The court stated in the case opinion, "We have ... decided to end our practice of deferring to administrative agencies' conclusions of law. However ... we will give 'due weight' to the experience, technical competence, and specialized knowledge of an administrative agency as we consider its arguments."[135]

The Wisconsin Legislature later approved legislation in December 2018 that codified the intent of the Wisconsin Supreme Court's ruling in *Tetra Tech, Inc. v. Wisconsin Department of Revenue*. The deference provision was part of a larger legislative package passed by legislators during a lame-duck session.

Mississippi

The Mississippi Supreme Court issued a decision in *King v. Mississippi Military Department* in June 2018 that ended deference to administrative agencies in the state. The court stated in the case opinion, "[W]e announce today that we abandon the old standard of review giving deference to agency interpretations of statutes ... in deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes."

[134] Florida Constitution Revision Commission. "Proposal Analysis - P6." (2018).
[135] Wisconsin Supreme Court. *Tetra Tech EC, Inc., and Lower Fox River Remediation LLC v. Wisconsin Department of Revenue*. June 26, 2018

The court in 2021 ruled 8-1 in *Mississippi Methodist Hospital and Rehabilitation Center Inc. v. Mississippi Division of Medicaid* to end the state practice of deferring to agency interpretations of regulations, a doctrine known as *Auer* deference at the federal level. The court's decision, combined with its prior rejection of state-level *Chevron* deference, effectively banned judicial deference practices in the state, according to an analysis by Pacific Legal Foundation attorney Daniel Ortner.[136]

Michigan

On July 23, 2008, the Michigan Supreme Court issued a decision in *In re: Complaint of Rovas against SBC Michigan* that ended deference to administrative agencies in the state. The court stated in the case opinion, "[I]n accordance with longstanding Michigan precedent and basic separation of powers principles, we hold and reaffirm that an agency's interpretation of a statute is entitled to 'respectful consideration,' but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation."[137]

Georgia

The Georgia House of Representatives on March 22, 2021, voted 164-4 to send legislation to the governor's desk that would limit judicial deference in the state by ending deference to certain tax regulations. The state Senate unanimously approved the legislation on March 1.

Senate Bill 185, sponsored by state Senator Bo Hatchett (R) and six Republican cosponsors, requires state courts and the Georgia Tax Tribunal to decide all questions of law without deference to the regulations or policy interpretations of the state's Department of Revenue, among other provisions.[138]

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[136] Ortner, David. "The End of Deference: An Update from Mississippi, by Daniel Ortner." *Yale Journal on Regulation*. (2021).
[137] Michigan Supreme Court. "*In Re: Complaint of Rovas Against SBC Michigan*." July 23, 2008.
[138] "Georgia Legislature approves Taxpayer Fairness Act limiting administrative deference." *JDSupra*. March 23, 2021.

Chapter III. Executive control of administrative agencies

Executive control of administrative agencies is one of the five pillars supporting a thorough understanding of the administrative state. According to the separation of powers, the president exercises control over executive branch administrative agency activity through a variety of actions—though his power is not absolute. For example, the Appointments Clause of the U.S. Constitution authorizes the president to appoint certain agency officials while executive orders have clarified executive oversight of regulatory review activity.

The extent of executive control over administrative agencies is a topic of debate among administrative law scholars. Some favor stronger presidential control of administrative agencies, such as the president's authority to directly fire an agency head. Others have concluded that federal agencies should have greater independence, with stronger checks on the president's power, including limits on the removal of agency officials without cause. The current state of executive control of administrative agencies can serve as a window into the forces at work in the executive branch that control and contribute to the combination of powers within administrative agencies.

The growth of the administrative state has contributed to the changing state of executive control. The current state of executive control comprises a mixed bag of agency oversight tools. For example, while the president can appoint some agency officials directly, others require the advice and consent of the U.S. Senate. Similarly, the president can fire some agency heads at will, but others can only be removed for cause. This chapter examines the scope of executive authority of administrative agencies, including the appointment and removal power, and its relationship to the growth of the administrative state.

The changing scope of executive control

The executive control toolkit features a number of agency oversight options, such as the appointment and removal power, regulatory review authority, and agency reorganization authority. The nature of these tools has changed over time. For example, a number of U.S. Supreme Court decisions have affected the scope of

the executive appointment and removal power while executive orders have directed the development and evolution of the regulatory review process.

What is the appointment power?

The president's appointment power is derived from the Appointment Clause (Article I, Section II) of the U.S. Constitution:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

The term appointment power refers to the president's authority to appoint "officers" of the United States (subject to Senate confirmation), such as federal judges, ambassadors, and heads of Cabinet-level departments.

The Appointments Clause grants the president the power to appoint "officers" of the United States (subject to Senate confirmation), including federal judges, ambassadors, and the heads of Cabinet-level agencies. But the authority granted in the Appointments Clause of the United States Constitution is limited—Congress must first approve the president's nominee before the appointment may occur, which imposes a check on the executive's power.

The Appointment Clause does allow Congress to authorize (by statute) a direct appointment by the president, a federal court, or agency head of "inferior officers" (e.g., federal attorneys, federal court clerks and special prosecutors).

Case law shaping the scope of the appointment power

The U.S. Supreme Court has issued decisions that have further clarified the scope of the executive appointment power, mainly by helping to distinguish between officers and inferior officers. The following United States Supreme Court cases have further delineated the scope of executive appointment power:

- *Buckley v. Valeo* (1976): The court distinguished between “significant” officers and “inferior officers” for the first time. The justices determined that the method formulated by Congress under the Federal Election Campaign Act of 1974 to appoint members of the Federal Election Commission violated the Appointments Clause because the commissioners qualified as "significant" officers. As such, the FEC commissioners were subject to executive nomination/appointment and Senate confirmation.[139]

  Why it matters: Since “significant” officers, unlike “inferior” officers, must be nominated by the president and confirmed by the Senate, the decision served to strengthen executive control over the appointment of agency officials.

- *Morrison v. Olson* (1988): This case clarified that an independent counsel appointed by the attorney general is considered to be an "inferior officer" and, therefore, is not subject to appointment by the president and confirmation by the Senate. Accordingly, only Cabinet-level department heads, ambassadors, and federal judges qualify as officers of the United States. All other officers, such as federal attorneys, district court clerks, chaplains, and federal election supervisors, qualify as inferior officers.[140]

  Why it matters: The court limited the scope of the president’s appointment power by identifying a set of characteristics that further defined “inferior” officers, including the ability to be removed by an executive branch official other than the president as well as limitations on the officer’s duties, jurisdiction, and tenure.

- *National Labor Relations Board v. Noel Canning Company* (2014): The court defined the scope of the Recess Appointments Clause by holding that the president can only make recess appointments during recesses that occur between formal sessions of the United States Senate. Presidents had previously used recess appointments to approve nominees who would otherwise have had difficulty being confirmed by the United States Senate.[141]

[139] United States Supreme Court. *Buckley v. Valeo*. January 30, 1976.
[140] United States Supreme Court. *Morrison v. Olson*. June 29, 1988.
[141] United States Supreme Court. *National Labor Relations Board v. Noel Canning Company*. June 26, 2014.

Why it matters: The court clarified and narrowed the scope of the president's appointment power by holding that the president cannot use recess appointments to circumvent confirmation by the Senate.

- *Lucia v. SEC* (2018): In *Lucia v. SEC*, the court held that the administrative law judges (ALJs) of the Securities and Exchange Commission (SEC) are "inferior officers" subject to the Appointments Clause. Prior to the ruling, the SEC's ALJs had been appointed by agency staff without approval by the SEC commissioners.[142]

  Why it matters: The case strengthened executive oversight of the SEC's ALJ appointments by requiring that the SEC commissioners, as agency heads, appoint the agency's ALJs pursuant to the Appointments Clause.

What is the executive removal power?

The Constitution contains no direct reference to the president's removal powers, but a line of legal cases support the president's authority to remove his appointees from office—with the exception of the heads of independent agencies, who may only be removed for "inefficiency, neglect of duty, or malfeasance in office."

But that doesn't mean that the president's removal power isn't limited.

Humphrey's Executor v. United States (1935) marked a turning point in the United States Supreme Court's interpretation of the executive removal power by requiring the president to demonstrate good cause in order to remove a principal officer of an independent agency. The court defined good cause as "inefficiency, neglect of duty, or malfeasance in office." Since *Humphrey's Executor*, Congress has established a number of independent agencies with principal officers whose for-cause removal protections insulate them from direct presidential control.

[142] United States Supreme Court. *Lucia v. SEC*. June 21, 2018.

Case law shaping the scope of the removal power

The Constitution contains no direct reference to the president's removal powers, but a line of legal cases support the president's authority to remove his appointees from office—with the exception of the heads of independent agencies, who may only be removed for "inefficiency, neglect of duty, or malfeasance in office." The following cases have largely defined the scope of the president's removal authority:

- *Myers v. United States* (1926): This case involved an 1876 law that required Senate confirmation of a president's appointments and removals of postmasters. President Woodrow Wilson, in 1920, unilaterally removed Postmaster Frank S. Myers—prompting Myers to challenge his dismissal. The court upheld Myers' removal, finding that the Constitution was silent on the executive's removal power because that power was implicit in the president's discharge of his duties. Therefore, the court ruled, the 1876 law violated the separation of powers between the executive and legislative branches.[143]

  Why it matters: The court's decision upheld the president's broad removal authority over federal appointees.

- *Humphrey's Executor v. United States* (1935): This case concerned the Federal Trade Commission (FTC) Act, which only allowed a president to remove an FTC commissioner for "inefficiency, neglect of duty, or malfeasance in office." The statute was challenged after then-Commissioner William Humphrey refused the request of newly elected President Roosevelt to resign, and the president summarily dismissed him. The court ruled that the FTC Act was constitutional and that Humphrey's dismissal was unjustified.[144]

  Why it matters: The decision limited the president's authority to remove independent agency officials. The court concluded that the Constitution does not grant the president "illimitable power of removal" over officers

[143] United States Supreme Court. *Meyers v. United States*. October 25, 1926.
[144] United States Supreme Court. *Humphrey's Executor v. United States*. May 27, 1935.

within independent agencies (which operate with a degree of autonomy from the executive branch).

- *Wiener v. United States* (1958): This case questioned the president's authority to dismiss officers from executive branch entities outside the core executive departments. Applying the precedent set in *Humphrey's Executor v. United States*, the court ruled unanimously that the president did not have the power to remove a member of the War Claims Commission (an independent federal agency).[145]

  Why it matters: This case solidified the precedent set in *Humphrey's Executor v. United States* that the president cannot not remove officers of independent agencies for causes other than those listed in the enabling acts of those agencies.

- *Bowsher v. Synar* (1986): This case concerned the Gramm-Rudman-Hollings Deficit Control Act of 1985, which instituted automatic spending cuts requested by the Comptroller General in the event allowable deficit targets were breached. The act authorized Congress to dismiss the comptroller general for "inefficiency," "neglect of duty," "malfeasance," or other similar reasons. However, the court concluded that the comptroller general, under the act, was performing executive branch functions. Therefore, Congress (the legislative branch) did not have the constitutional authority to remove an officer of the executive branch.[146]

  Why it matters: The case affirmed the president's sole removal authority over executive branch officials.

- *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010): The Supreme Court's ruling in *Free Enterprise Fund v. Public Company Accounting Oversight Board* set a limit on the ability of Congress to create agencies insulated from presidential control. The court held that two layers of removal restrictions unconstitutionally limited the president's exercise of executive power and his control of executive officers.

[145] United States Supreme Court. *Wiener v. United States*. June 30, 1958.
[146] United States Supreme Court. *Bowsher v. Synar*. July 7, 1986.

Why it matters: The decision strengthened the president's removal authority over executive branch officials by placing limits on removal restrictions.

- *Seila Law v. Consumer Financial Protection Bureau* (2020)*:* The court's decision in *Seila Law v. Consumer Financial Protection Bureau* held that the structure of the Consumer Financial Protection Bureau (CFPB), an independent agency that exercised executive powers and had a director protected from at-will termination by the president, was unconstitutional. The majority held that restrictions on the president's ability to remove such agency leaders violated separation of powers principles by limiting presidential control of executive power. The decision only affected part of the agency's structure without eliminating the agency altogether by striking down the Dodd-Frank Act, the 2010 law that created the agency.[147]

  Why it matters: The U.S. Supreme Court's decision expanded the president's ability to remove the director of the CFPB.

- *Collins v. Yellen* (2021)
  In *Collins v. Yellen*, the United States Supreme Court on June 23, 2021, held that restrictions on the president's authority to remove the director of the FHFA violated the separation of powers. In its decision, the court also rejected the argument that the FHFA actions at issue in the case went beyond the agency's legal authority.

  Justice Samuel Alito delivered the opinion of the court, writing that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."[148]

  Why it matters: The court's decision to hold the structure of the FHFA unconstitutional articulated limits on the types of administrative agencies Congress may create and reaffirmed the court's 2020 decision in Seila Law v. Consumer Financial Protection Bureau (CFPB), which held that the CFPB director's removal protections unconstitutionally insulated the agency from presidential control.

[147] United States Supreme Court. *Seila Law v. Consumer Financial Protection Bureau*. June 29, 2020.
[148] United States Supreme Court. *Collins v. Yellen*. June 23, 2021.

Should the executive have strong or weak control over the appointment and removal of agency officials?

The proper scope of executive control over the appointment and removal of agency officials is a topic of debate among administrative law scholars and government officials. While some argue that the president should have complete removal authority, others support checks on the president's authority to fire agency officials. This section reviews leading arguments concerning the appropriate degree of executive control of the appointment and removal of agency officials.

Arguments to expand or limit appointment power

The degree of exclusivity the Appointment Clause confers on the president has been a matter of debate since the drafting of the clause.

Some scholars assert that the Constitution vests in the president the exclusive authority to nominate and appointment officers without interference from Congress (such as a refusal to hold a confirmation vote or denial of confirmation on the basis of partisanship). They hold that the president is better positioned than the Senate to identify qualified nominees, and exclusivity enhances accountability.[149]

Others contend that the Constitution divides responsibility between the president and the Senate because an appointment cannot proceed without the actions of each. They hold that exclusive appointment power by the president would undermine consideration of merit in appointments in favor of fealty to the president. Sharing the responsibility, they say, also acts as a check on presidential power.[150]

[149] Datla, Kirti and Revesz, Richard L. "Deconstructing Independent Agencies (and Executive Agencies)." *Cornell Law Review.* (2013).
[150] Hamilton, Alexander. "Federalist No. 77." April 4, 1788.

Arguments to expand or limit removal power

Supporters of broad removal powers claim that the president cannot fulfill his constitutional duty to "take Care that the Laws be faithfully executed" if he cannot control executive branch officers. They also contend that the president is better positioned than Congress to oversee the performance of executive branch officers.[151]

Supporters of limiting the president's removal authority assert that for-cause removal protections promote technical expertise over political fealty and slow the expansion of executive power.[152]

Development of the civil service: A case study in the changing scope of executive control

The civil service is made up of individuals other than military personnel who are employed by the federal government. These individuals, known as civil servants, are sometimes referred to as government bureaucrats or career administrators. In the context of administrative law, a civil servant is a civilian who is employed by a federal administrative agency.

The extent of the president's authority over the civil service illustrates a broader debate about executive control over administrative agencies—one of five pillars key to understanding the administrative state. The development of the civil service illustrates the changing scope of executive authority over time.

The early civil service and the spoils system

The federal workforce of the United States during the late 18th century was very small (for example, the State Department was staffed by nine employees)

[151] Rao, Neomi. "A Modest Proposal: Abolishing Agency Independence in *Free Enterprise Fund v. PCAOB*," *Fordham Law Review*. (2011).
[152] Miller, Geoffrey P. "Independent Agencies." *The Supreme Court Review*. (1986).

and federal workers were rarely removed from office. However, politically aligned patronage appointments and removals of federal employees became common during the 19th century, most notably under President Andrew Jackson (D). According to University of Tennessee professor Daniel Feller, Jackson "claimed to be purging the corruption, laxity, and arrogance that came with long tenure, and restoring the opportunity for government service to the citizenry at large through 'rotation in office.'"[153]

During this period, individuals were often rewarded for partisan loyalty and service through appointments to government positions, a process that became known among historians as the spoils system. After the assassination of President James Garfield (R) in 1881 by a disgruntled federal job-seeker, President Chester Arthur (R) supported the call to end the spoils system and implement a merit-based system for the selection of federal employees.

The shift toward merit-based selection in the civil service

The Pendleton Civil Service Reform Act of 1883 eliminated the spoils system and established what became known as the competitive civil service, a merit-based system for the appointment of federal executive branch employees. The new system, overseen by the U.S. Civil Service Commission, was insulated from direct executive control. Individuals could apply for government employment and compete through examinations rather than seek an appointment to a position on the basis of their political ideology or government connections.

During the late 19th century and early 20th century, members of the competitive civil service gained workers compensation protections, retirement annuities, and procedural protections against removal, which aimed to ensure that federal employees could only be fired for just cause.

Procedural protections and prohibited practices in the civil service

In addition to codifying procedural protections and prohibited practices, the CSRA also established the Senior Executive Service, a separate tier of administrators "designed to attract and retain highly competent senior executives," according to the legislation.

[153] Feller, Daniel. “Andrew Jackson: Domestic Affairs.” Miller Center. Accessed October 2017.

Lastly, the CSRA decentralized civil service oversight by replacing the U.S. Civil Service Commission with the following agencies:

- The U.S. Office of Personnel Management
  The U.S. Office of Personnel Management is tasked with implementing rules to oversee the management of the federal workforce.

- The Merit Systems Protection Board
  The Merit Systems Protection Board is responsible for processing employment-related hearings and appeals.

- The Federal Labor Relations Authority
  The Federal Labor Relations Authority is responsible for establishing guidelines and resolving issues related to collective bargaining practices.

Other types of executive control

In addition to the executive appointment and removal power, the president has other tools to exercise control over federal administrative agencies, including regulatory review of agency rules and reorganization authority over executive agencies. This section takes a closer look at how the president uses the regulatory review authority and reorganization authority to oversee federal agencies.

Executive authority over regulatory review

Regulatory review refers to the review of agencies' proposed and final rules issued by administrative agencies. Regulatory review involves examining agencies' analyses of costs and benefits of the regulation, its source of legal authority, and agencies' adherence to rulemaking requirements.

Management of rulemaking and regulatory review is one of the primary ways in which the president pursues his policy agenda.

The degree to which the president should control rulemaking is a longstanding topic of debate among scholars. Some assert that a heavy hand is necessary to ensure accountability and constrain bureaucratic imperiousness. Others contend that agencies must be given leeway to exercise their technical expertise.

What is the executive role in the regulatory review process?

The president's regulatory review authority is grounded in Executive Order 12866, which was issued by President Bill Clinton (D) in 1993. E.O. 12866 established principles and processes to govern federal agency rulemaking, regulatory planning, and regulatory review, including presidential oversight of regulatory and administrative policy. The order tasked the White House Office of Information and Regulatory Affairs (OIRA) with reviewing and coordinating what it deems all significant regulatory actions made by federal agencies, excluding those defined as independent federal agencies.[154]

Significant regulatory actions include agency rules that have had or may have a large impact on the economy, environment, public health, or state and local governments and communities. These regulatory actions may also conflict with other regulations or with the priorities of the president. OIRA has the authority to request that agencies make changes to significant regulatory actions that conflict with presidential priorities, other agency rulemakings, or are inconsistent with the law.

Executive branch reorganization authority

The president may reorganize the structure and operation of agencies only if authorized by Congress in law. The president may abolish an agency he created but cannot do so in violation of a congressional act. The executive may also assemble experts to compile recommendations for a reorganization plan to be submitted to Congress for approval.

Congress granted reorganization authority for the first time to President Herbert Hoover (R) in 1932, and the most recent grant to President Ronald Reagan in

[154] *Federal Register.* "Executive Order 12866." September 30, 1993.

1984. Congress has since declined to grant reorganization authority to Presidents George W. Bush (R), Barack Obama (D), and Donald Trump (R).

Reorganization authority is either included in legislation related to agency functioning or by a standalone resolution. Presidents have used reorganization authority to create, merge, restructure, and abolish agencies. The framework for delegating reorganization authority has varied across time, but it has generally included the following provisions:

- The range of actions that can be taken.
- Limitations on the scope of reorganization.
- A time frame for Congress to consider reorganization proposals.
- A mechanism for Congress to act on a plan.

Congress must approve a presidential reorganization plan before it is implemented.

Should the executive have strong or weak control over regulatory review and executive branch reorganization?

Since the appropriate degree of executive control of administrative agencies is debated among administrative law scholars and government officials, there are different points of view concerning the current state of executive control. While some argue that the president should have complete control of the executive branch, others support checks on the president's authority to control agency activity. This section reviews leading arguments concerning the appropriate degree of executive control of the regulatory review of agency activities and executive branch reorganization.

Arguments to strengthen or limit executive regulatory review authority

Supporters of vigorous regulatory review assert that it increases the president's control over administrative agencies, improves agency accountability, and ensures public participation in the rulemaking process.

Others contend that strict presidential oversight of agency rulemaking unduly prolongs the process and undermines agency expertise.

Arguments to strengthen or limit executive reorganization authority

Supporters of strong executive reorganization authority claim that strong reorganization authority allows for increased agency oversight. Moreover, supporters argue that the president is more effective than Congress at reorganizing agencies because Congress often lacks the necessary consensus to realize reorganization proposals.

Those who support a narrow scope of executive reorganization authority argue that the president's existing authority to reorganize agencies within statutory limits is sufficient for the president to achieve policy goals. These scholars also claim that Congress is better suited to drive reorganization efforts since the legislative branch is constitutionally tasked with creating and abolishing federal agencies and departments.

The evolution of executive control of administrative agencies: Proposals for reform

The proper degree of executive control of administrative agencies is a key area of debate among administrative law scholars. As such, it is also an area that is ripe for reform proposals. The following reform proposals describe executive, legislative, and judicial approaches to reform the current state of executive control.

Legislative approaches

Congress' legislative authority allows it to pass legislation that affects the scope of executive control of administrative agencies. For example, Congress can enact statutes that statutorily limit the president's authority to remove the top officials of agencies it creates through cause removal protections.

The legislative approaches in this section aim to affect the scope of the president's appointment and removal power.

Restore the president's ability to remove agency leaders

The following legislative approaches seek to limit restrictions on the president's removal authority:

- Senators Mike Lee (R.-Utah) and Josh Hawley (R.-Mo.) introduced the Take Care Act on June 5, 2019. The act would have eliminated restrictions on the ability of presidents to remove upper-level executive branch officers.

- Judge Neomi Rao argued in a 2014 law review article that Congress should eliminate for-cause removal restrictions that keep presidents from removing agency officers at will.[155]

- Professor J. David Alvis wrote in a 2019 article that independent regulatory commissions "will only encourage Congress to shirk its duties, and it will exacerbate the problem of the lack of political accountability. Placing these agencies under the removal authority of the President, on the other hand, would improve the process of legislation by giving Congress the proper incentive to assume its constitutional responsibility under the country's separation of powers rather than delegate that power to another agency."[156]

Strengthen civil service protections

The following reform proposals seek to limit direct executive control of civil service employees by strengthening civil service protections:

- UCLA law professor Jon Michaels argued in an article for the American Constitution Society that protections for civil servants should expand. He argued, "As it stands, political appointees are not permitted to fire or demote civil servants absent good cause. Such prohibitions on adverse employment actions must be broadened to include a wider range of (adverse) geographic or portfolio reassignments, of which we've seen

[155] Rao, Neomi. "Removal: Necessary and Sufficient for Presidential Control." *Alabama Law Review*. (2014)
[156] Alvis, J. David. "The Contested Removal Power." The Heritage Foundation. (2019).

plenty during the Trump presidency; and the prohibitions must be tightened to facilitate appeals by aggrieved civil servants, in which evidence of a good-faith policy disagreement constitutes a rebuttable presumption in favor of immediate reinstatement."[157]

- University of Texas law professor Thomas McGarity proposed creating a firewall between political appointees and career agency experts in an article for the American Constitution Society. He argued, "The entire operation of the scientific and technical staff and the agency's scientific integrity office should be located inside the firewall to protect them from political interference. The management of these technical personnel — their budget, their assignments, and their hiring and firing — should also be protected by the firewall. Career managers would do the hiring and firing, make the assignments, and propose annual budgets that could be considered, alongside the administration's proposal, by Congress. These managers would not report to personnel within the agency, but instead to an independent unit, perhaps even a new agency in the Congressional Research Service or General Accounting Office that retains independence from the executive branch. This outside, independent agency would also manage the hiring of these key career managers. Managers would be protected from disciplinary action except through the office that hired them."[158]

Executive branch approaches

As the head of the executive branch, the president can make certain unilateral changes that impact the scope of control of administrative agencies.

One approach is to have presidents treat officer disobedience as a cause for removal.

Law professor Geoffrey P. Miller described this proposal in a 1986 law review article, "Most statutes establishing independent agencies can easily be construed as including disobedience of the President's lawful instructions within the varieties of 'cause' for which presidential removal is already authorized. In the relatively infrequent cases where the statutes cannot be so construed, the

[157] Michaels, John. "Revitalize the Bureaucracy." *Rethinking Admin Law: From APA to Z*. Accessed July 9, 2019.
[158] McGarity, Thomas. "Protecting Agency Science from Political Interference." *Rethinking Admin Law: From APA to Z*. Accessed July 9, 2019.

unconstitutionality of the removal provision would not ordinarily invalidate the agency's substantive and enforcement powers. And the President can be expected in some cases voluntarily to eschew the power to remove particular officers who now head 'independent' agencies, either by means of a formal commitment or by informal policy. This is not to deny that the proposal would have a potentially significant impact. Its effect would be to increase, in more or less important ways, the control that the President is able to exercise over the federal bureaucracy. Such a change, however, might well be a beneficial development."[159]

Judicial branch approaches

The judicial branch has the power to say what the law is, which allows it to impact the scope of executive authority of administrative agencies through statutory interpretation. The judicial approaches in this section aim to affect the scope of the president's appointment and removal power.

Courts should find some appointment power restrictions unconstitutional

The following reform proposals focus on judicial strategies aimed at changing how executives control agencies through the appointment and removal powers:

- According to a 2007 note published in the Harvard Law Review, "Courts should find political party restrictions on presidential appointment power unconstitutional because they have no basis in the U.S. Constitution and there is no contemporaneous practice in support of those restrictions."[160]

- Attorney Kirti Datla and professor Richard L. Revesz argued in a 2013 law review article, "There is no consensus on what limits on presidential interference come with status as a fourth branch, which is unsurprising given the slim doctrinal basis for that status. We therefore conclude that the Humphrey's Executor dicta should be abandoned. It rests on a flawed understanding of the ways Congress insulates agencies from

[159] Miller, "Independent Agencies"
[160] "Congressional Restrictions of the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation." *Harvard Law Review*. (2007).

> presidential control. The subsequent significant expansion of the administrative state and increased complexity of the President's relationships with administrative agencies underscore the untenable logic of the Humphrey's Executor dicta. ... [W]e accept that, within limits, Congress can by statute impose certain constraints on the President's exercise of his Article II powers. Our argument is simply against fashioning a constitutional doctrine that would bootstrap onto a statutory constraint a set of other constraints not specified in that statute."[161]

Courts should require clear restrictions from Congress over presidential control of agencies

This reform proposal aims encourages Congress to craft clear statutes that define the parameters of executive control of agencies:

Cass R. Sunstein and Lawrence Lessig described this proposal in a 1994 law review article, "In view of what we see as the constitutional backdrop, however, courts should probably invoke a 'clear statement' principle; one that interprets statutes to grant the President broad supervisory power over the commissions. On this approach, courts would allow the President such power unless Congress has expressly stated its will to the contrary. Such an approach would minimize the risks of the independent agency form and promote coordination and accountability in government. It would recognize that many independent agencies perform important policymaking functions, and that the performance of such functions by truly independent agents is plausibly inconsistent with the constitutional structure. At the very least, we would require Congress to speak unambiguously if it wants to compromise those goals. These suggestions do not answer the question of precisely when the President may discharge the commissioners. But they do indicate that he has far more authority than is usually thought."[162]

[161] Datla and Revesz, "Deconstructing Independent Agencies (and Executive Agencies)"
[162] Lessig, Lawrence and Sunstein, Cass. "The President and the Administration." *Columbia Law Review*. (1994)

Do nothing: Do not change current rules governing the executive appointment and removal power

This approach aims to support the current scope of executive control over administrative agencies by supporting current restrictions on presidential control of agency leaders. The proposal claims that the executive appointment and removal power has little impact on agency independence.

Adrian Vermeule described this approach in a 2012 paper. He argued that unwritten public norms, or conventions, have a greater impact on agency independence than the president's appointment and removal power: "The legal test of independence fails adequately to describe or make sense of agency independence in practice. The communities that operate the administrative state – executive and legislative officials, agency personnel, the administrative law bar, commentators on administrative law, and regulated parties – create and follow observable norms of agency independence that are not derived from the judicial doctrine, and that in some cases cannot be squared with it. In particular, for-cause tenure protection turns out to be neither necessary nor sufficient for the operational independence of administrative agencies."[163]

The future of executive control of administrative agencies

With so many different perspectives on the appropriate degree of executive control of administrative agencies, it's difficult to predict what the future might hold. However, three recent cases before the U.S. Supreme Court may signal a shift toward strengthening executive control of administrative agencies in the immediate future.

[163] Vermeule, Adrian. "Conventions of Agency Independence." Harvard Law School Public Law & Legal Theory Working Paper Series. (2012).

Lucia v. SEC (2018)

In *Lucia v. SEC*, the court held that the administrative law judges (ALJs) of the Securities and Exchange Commission (SEC) are "inferior officers" subject to the Appointments Clause. Prior to the ruling, the SEC's ALJs had been appointed by agency staff without approval by the SEC commissioners.[164]

Many agency heads ratified the appointments of their ALJs in the aftermath of the Lucia decision. President Trump issued Executive Order 13843 pursuant to Lucia, which exempted ALJs from the merit-based selection process of the competitive civil service and reclassified them as members of the excepted service. The reclassification allowed agency heads to directly appoint ALJs and select candidates who meet specific agency qualifications. Some opponents of the order expressed concern that the direct appointment of ALJs would open the door to politicization and threaten ALJs' duty to serve as impartial adjudicators.[165]

Seila Law v. Consumer Financial Protection Bureau (2020)

The court's decision in *Seila Law v. Consumer Financial Protection Bureau* expanded the president's ability to remove the director of the CFPB. The court held that the structure of the Consumer Financial Protection Bureau (CFPB), an independent agency that exercised executive powers and had a director protected from at-will termination by the president, was unconstitutional. The majority held that restrictions on the president's ability to remove such agency leaders violated separation of powers principles by limiting presidential control of executive power. The decision only affected part of the agency's structure without eliminating the agency altogether by striking down the Dodd-Frank Act, the 2010 law that created the agency.[166]

[164] *Lucia v. SEC*
[165] *Federal Register*. "Executive Order 13843." July 13, 2018.
[166] *Seila Law v. Consumer Financial Protection Bureau*

Collins v. Yellen (2021)

In *Collins v. Yellen*, the United States Supreme Court held that restrictions on the president's authority to remove the director of the FHFA violated the separation of powers. In its decision, the court also rejected the argument that the FHFA actions at issue in the case went beyond the agency's legal authority. The court's decision articulated limits on the types of administrative agencies Congress may create and reaffirmed the court's 2020 decision in *Seila Law v. Consumer Financial Protection Bureau*.[167]

Executive control of administrative agencies in the states

The scope of executive control over administrative agencies in the states varies. Unlike the federal government, some state-level cabinet officials are elected by the public rather than appointed by the governor. Direct election by the citizenry limits the scope of the governor's appointment power of certain administrative officials. A Ballotpedia survey of the state constitutions and Administrative Procedure Acts (APA) in the 50 states found that 46 states have elected cabinet members. In Maine, two of the state's administrative officials, the secretary of state and the treasurer, are elected by the state legislature.

Another key area of executive control at the state level is the governor's power to remove agency officials. The Ballotpedia survey found that 26 state constitutions and four state APAs grant removal power to the governor. The following states have constitutional or APA limits on the governor's power to remove agency officials:

- 14 state constitutions grant the governor at-will removal power over agency officials.
- 12 state constitutions require the governor to cite a specific cause before removing an agency official.

[167] *Collins v. Yellen*

- The Florida Constitution grants the governor a mix of at-will and for-cause removal powers. In certain cases, the governor needs senate or cabinet approval to remove an agency official.
- Four state APAs grant the governor removal power over certain agency officials.

The varying degrees of gubernatorial appointment and removal powers demonstrate the different approaches to executive control of administrative agencies at work in the states.

Chapter IV. Procedural rights and the administrative due process of citizens

Procedural rights and administrative due process refer to the protections for citizens against arbitrary actions by administrative agencies that threaten to deprive them of life, liberty, or property. Procedural due process specifically concerns the legal procedures administrative agencies are required to follow during rulemaking and adjudication proceedings.

This chapter examines the wide range of possible citizen interactions with agencies, from rulemaking to enforcement, to adjudications about disputes, and the relationship of procedural rights at each point along that spectrum.

Access to due process for citizens who seek to understand and challenge agency actions affecting them varies. The availability of due process during the agency adjudication process can vary in light of the requirements of the governing statute and the type of protected interest at issue. Individuals who seek to appeal an agency adjudicative order for review by an Article III court are subject to certain restrictions that shape the application of due process. Moreover, an Article III court must grant standing to an individual before they can proceed with judicial review of their complaint.

The availability of due process in the context of standing varies: while some scholars argue that due process allows for broad grants of standing, others claim that due process deficits prevent individuals from demonstrating standing and obtaining judicial review. A court that conducts judicial review of an agency action may ultimately exercise deference and yield to the agency's due process procedures—curtailing an individual's recourse to address their complaint.

Debates about what is constitutionally required to satisfy procedural due process, as well as whether available procedural due process protections are sufficient, are among the main areas of disputation among scholars and practitioners of administrative law. While some scholars claim that current agency adjudication and appeals processes satisfy due process, others argue that the availability of due process for individuals who seek to challenge agency actions falls short of constitutional requirements.

Foundations of procedural due process

The concept of due process in the United States can trace its foundations to the English Magna Carta of 1215. The Magna Carta limited the power of the king and government to deprive an individual of his rights without judgment by his peers according to the law of the land. The right to judicial proceedings according to the law of the land developed into the phrase "due process of law."

The U.S. Constitution and the Administrative Procedure Act (APA), among other sources, establish due process protections for citizens during administrative rulemaking and adjudication processes. These protections are designed to prevent administrative agency violations of individual rights.

U.S. Constitution

The framers of the U.S. Constitution enshrined the due process of law in the due process clause of the Fifth Amendment:

"No person shall ... be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment of the U.S. Constitution further prohibited state and local governments from depriving citizens of due process protections:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Administrative Procedure Act

The 1946 Administrative Procedure Act (APA) established uniform rulemaking procedures for federal agencies to propose and issue regulations, put forth procedures for issuing policy statements and licenses, and provided for judicial review of agency adjudications and other final decisions.

The APA features procedural due process protections for citizen interactions with the administrative state. These protections, which concern administrative

rulemaking and adjudication activities, are described in more detail in tomorrow's installment.

Procedural due process in administrative proceedings

Procedural due process rights take many forms depending on whether the agency is engaged in rulemaking or adjudication.

Administrative rulemaking: Fair notice and opportunity to comment

The 1946 Administrative Procedure Act (APA) established rulemaking processes that enable federal agencies to amend, repeal, or create administrative regulations. The most common rulemaking process is informal rulemaking, which solicits written public feedback on proposed rules during a comment period. When required by statute, certain agencies must follow the formal rulemaking process, which incorporates a trial-like hearing in place of the informal comment period.

Agency use of informal rulemaking expanded as a result of the health, welfare, and environmental laws passed during the 1960s and 1970s. In the 1973 U.S. Supreme Court case *United States v. Florida East Coast Railway*[168], the court held that formal rulemaking procedures are only required when the governing statute requires a hearing "on the record." As a result, agency use of formal rulemaking has declined, leading Justice Clarence Thomas to describe the process as the "Yeti of administrative law" in his 2015 concurrence in *Perez v. Mortgage Bankers Association.*[169] The use of informal rulemaking, on the other hand, has increased. In remarks before a 2020 U.S. Justice Department symposium, Deputy Attorney General Jeffrey A. Rosen observed that informal rulemaking "has been the fuel of the administrative state's explosive growth."

[168] United States Supreme Court. *United States v. Florida East Coast Railway* January 22, 1973.
[169] United States Supreme Court. *Perez v. Mortgage Bankers Association*. March 9, 2015.

Procedural due process in administrative rulemaking includes fair notice of agency regulatory activity and the opportunity for members of the public to offer feedback on proposed regulations.

Fair notice of regulatory activity

The due process of law requires administrative agencies to follow a legislative-like process that provides reasonable notice of regulations. Fair notice of regulations aims to ensure that individuals are not subject to regulatory penalties for unknowingly violating agency rules. An agency that seeks to embark on a regulatory course of action must first issue a proposed rule, also known as a notice of proposed rulemaking (NPRM). After a period of public comment, the agency may determine to revise the proposed rule, abandon the proposal, or move forward to the final rule stage of the rulemaking process.[170]

Public comment

The rulemaking process aims to facilitate procedural due process by providing individuals with the opportunity to offer feedback on proposed regulations, either through public comment periods or formal hearings. After reviewing public feedback, the agency determines whether to revise the proposed rule, abandon the proposal, or move forward to the final rule stage of the rulemaking process. However, some agency processes allow agencies to bypass public feedback opportunities. For example, publication rulemaking allows agencies to circumvent informal rulemaking requirements and directly implement rules (generally interpretive rules and other guidance documents) through publication in the Federal Register. In these cases, the level of available due process varies with specific agency processes.[171]

Administrative adjudication: No uniform blueprint

Administrative adjudication encompasses a broad swath of agency determinations that take place outside of the rulemaking process. Adjudication aims to resolve a dispute between either an agency and a private party or between two private parties. Individuals subject to adjudication proceedings may

[170] Gaziono, Todd, Slattery, Elizabeth, and Wood, Jonathan. "The Regulatory State's Due Process Deficits." Pacific Legal Foundation. (2020).
[171] Gaziano, Slattery, and Wood, "The Regulatory State's Due Process Deficits"

have appealed an agency decision, been found to be in violation of a law that the agency administers, or applied for licensure, accreditation, or other agency permissions. The adjudication process results in an adjudicative order, which serves to resolve the dispute and, in some cases, may set agency policy.

Similar to agency rulemaking, adjudication may take place through formal or informal proceedings. Formal adjudication, which is governed by the Administrative Procedure Act (APA), functions in a manner similar to federal civil court proceedings and requires a hearing "on the record." Formal adjudication, similar to formal rulemaking, has declined in practice in the wake of the *Florida East Coast Railway* decision. Informal adjudication, on the other hand, has grown to comprise roughly 90 percent of agency adjudications.Informal adjudication consists of agency decision-making processes that are not clearly defined by the APA and may follow different formats depending on the specific statute that calls for the proceedings. Under informal adjudication, a hearing may or may not be required.

No one-size-fits-all procedural due process blueprint exists for agencies to follow during adjudication proceedings. Instead, the requirements of procedural due process in agency adjudication in practice tend to vary according to the specific circumstances of the case at hand. Administrative law scholar O. John Rogge provided the following description of the diversity of procedural due process in his 1973 law review article "An Overview of Administrative Due Process":

"The requirements of due process will vary with different situations. If an individual's profession, livelihood, or liberty is at stake - if, for instance, a lawyer or other professional person is in danger of losing his license; or a public employee or tenured teacher is in danger of losing his job; or a person on parole is in danger of losing his liberty - due process will require charges, the right to counsel, a hearing, confrontation with one's accusers, the examination and crossexamination of witnesses, and a reasoned determination. On the other hand, if what is involved is a bar association's endorsement of a particular judicial candidate, the punishment of a prisoner for an infraction of prison regulations, termination of utility services, the payment of unemployment compensation, or the amount of a government subsidy, a simple hearing by a disinterested individual open to all parties may be sufficient."[172]

In order to determine if an agency's unique adjudication procedures satisfy due process in a particular case, the U.S. Supreme Court held in *Mathews v. Eldridge*[173]

[172] Rogge, O. John. "An Overview of Administrative Due Process." *Villanova Law Review.* (1973).
[173] United States Supreme Court. *Mathews v. Eldridge.* February 24,1976.

(1976) that the fairness and reliability of existing procedures must be evaluated in addition to the added value of further procedural safeguards.

Model procedural due process requirements in agency adjudication

Judge Henry Friendly of the United States Court of Appeals for the Second Circuit created a model list of procedural due process protections during agency adjudication in his 1975 law review article "Some Kind of Hearing." The list, according to administrative law scholar Peter Strauss, "remains highly influential, as to both content and relative priority." Friendly's list features the following procedural due process protections, which apply equally to civil due process and criminal due process:

- An unbiased tribunal.
- Notice of the proposed action and the grounds asserted for it.
- The opportunity to present reasons for the proposed action not to be taken.
- The right to present evidence, including the right to call witnesses.
- The right to know the opposing evidence.
- The right to cross-examine adverse witnesses.
- A decision based only on the evidence presented.
- Opportunity to be represented by counsel.
- A requirement that the tribunal prepare a record of the evidence presented.
- A requirement that the tribunal prepare written findings of fact and the reasons for its decision.[174]

Procedural due process in legal challenges to agency actions

Individuals adversely affected by agency adjudication decisions may seek to appeal those decisions to Article III courts. The courts can exercise judicial review to interpret the law and overturn any appealed agency actions that are unlawful.

[174] Friendly, Henry. “Some Kind of Hearing.” University of Pennsylvania Law Review. (1975).

The APA allows individuals adversely affected by agency decisions to appeal those decisions for judicial review as long as the challenged action is a final agency action with no other adequate remedy. The APA excludes judicial review, however, when other statutes preclude judicial review or when the agency action "is committed to agency discretion by law." Outside groups with an interest in agency decisionmaking may also seek to challenge agency decisions via judicial review by Article III courts.

In order for an Article III court to review an appealed agency decision or other legal challenge, the plaintiff in the case must first demonstrate standing to bring their case before the court.

Debating the scope of access to judicial review of appealed agency actions

The scope of access to judicial review of agency action through appeals to Article III courts is a topic of debate among administrative law scholars. Some scholars support broad access to judicial review of challenged agency actions, claiming that judicial review strengthens due process and agency accountability. Other scholars support limited judicial review of agency actions, arguing in part that Article III courts would be overwhelmed by the high volume agency appeals.

Procedural due process in the context of standing

Standing is a legal doctrine applied by courts to determine whether a prospective plaintiff in a case has suffered a legal injury as the result of an action by the defendant. Plaintiffs must first gain standing in order to obtain judicial review of their complaint.

In the context of administrative law, plaintiffs seek standing in order to obtain judicial review of what they consider to be a harmful agency action. While some plaintiffs seek to appeal what they consider to be an adverse agency decision issued through the adjudication process, others seek to challenge what they consider to be a harmful agency policy choice determined through adjudication or rulemaking.

An affected party (an individual, group, or entity) must first demonstrate standing to sue in order to challenge an agency action in court. Once an affected party obtains a grant of standing from a court, the court can review their complaint and make a determination on what the affected party considers to be a harmful agency action.

Foundations of standing

Since Article III of the U.S. Constitution doesn't explicitly define who can receive standing, the United States Supreme Court has shaped the doctrine over time. The court first recognized the standing doctrine in the 1923 case *Frothingham v. Mellon* and developed the contemporary criteria to satisfy standing in the 1992 case *Lujan v. Defenders of Wildlife*.[175] According to the *Lujan* criteria, a plaintiff must demonstrate an actual or threatened injury, must show that the injury can be traced to the challenged agency action, and must be able to obtain redress through a favorable decision by the court.

The Administrative Procedure Act (APA) provides for standing when an individual is adversely affected by an agency decision. These individuals can appeal what they consider to be a harmful agency decision for judicial review by an Article III court as long as the challenged action is a final agency action with no other adequate remedy. The APA excludes judicial review, however, when other statutes preclude judicial review or when the agency action "is committed to agency discretion by law."

Deference and procedural due process

When a court yields to an agency's interpretation of a rule or statute, they defer to the agency's reasoning in its particular area of expertise. From time to time, however, a court defers to an agency's determination of the level of due process required when an individual challenges an agency action. In these cases, the agencies themselves (rather than the courts) apply the *Mathews v. Eldridge* calculus to formulate due process procedures for given challenges to agency rules. Rather than reviewing the agency's due process procedures *de novo* and independently applying the *Mathews* test, courts may instead defer to an agency's due process formulation.

[175] United States Supreme Court. *Lujan v. Defenders of Wildlife*. June 12, 1992.

Some scholars support judicial deference to agency due process determinations. These scholars argue in part that *Mathews* directs courts to give substantial weight to the due process procedures formulated by the agency tasked with implementing the statute. Other scholars disagree, arguing that it is the constitutional role of the courts to interpret the law and that judicial deference to agency due process procedures leaves individuals no recourse to challenge what they consider to be unconstitutional due process deficits.

Should procedural due process rights be broad or limited?

Debates about what is required to satisfy procedural due process in administrative standing, as well as whether available procedural due process protections concerning administrative standing are sufficient, are key areas of disputation among scholars and practitioners of administrative law. These debates primarily center on three key areas: standing, adjudication, and appeals of agency actions.

- Supporters of a broad application of the standing doctrine argue that standing should be available to any plaintiff seeking judicial review of an agency action. Supporters of a limited view of the standing doctrine argue that standing should be limited to cases in which the prospective plaintiff has suffered a demonstrable legal injury as a result of the agency's action.

- Supporters of existing due process protections in agency adjudication argue that the current model of agency adjudication is sufficient to satisfy constitutional due process standards, that administrative proceedings do not require the same due process procedures as criminal proceedings, and that due process is not uniform. Supporters of increased due process protections in agency adjudication argue that existing adjudication procedures fail to embody constitutional standards and that informal adjudication weakens due process.

- Supporters of broad access to judicial review of appealed agency actions argue that broad access to judicial review of agency actions strengthens due process by allowing individuals more opportunities to challenge agency decisions. Supporters of a limited approach to judicial review of

appealed agency actions argue that narrow applications of judicial review help to protect agency expertise from government overreach.

Arguments in favor of a broad application of the standing doctrine

The breadth of standing is a topic of debate among administrative law scholars. While some scholars argue that standing should be available to any plaintiff seeking judicial review of an agency action, others claim that standing should be limited to cases in which the prospective plaintiff has suffered a demonstrable legal injury as a result of the agency's action.

Supporters of a broad application of the standing doctrine argue that standing should be available to any plaintiff seeking judicial review of an agency action.

Argument: Standing is subjective

Supporters of a broad interpretation of the standing doctrine argue that it is a subjective doctrine that is dependent on the judge's own interpretation of the injury in question. As such, any efforts to limit the scope of the standing doctrine are in vain because individual judges define its parameters.[176]

Argument: Broad standing is democratic

Supporters of a broad interpretation of the standing doctrine claim that wider access to standing supports democracy by allowing for more citizens to seek judicial review of agency actions. Since agency actors are not directly elected by the public, supporters of a broad standing doctrine argue that the wider interpretation furthers democratic accountability. Democracy, they argue, is strengthened by the increased citizen participation in agency oversight through judicial review of agency action.[177]

[176] Sunstein, Cass. "What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III." *Michigan Law Review*. (1992).
[177] *Id.*

Argument: Broad standing is constitutional

Supporters of a broad interpretation of the standing doctrine argue that the Constitution does not place any limits on standing. Proposals to limit standing, according to this view, are the result of jurisprudence that misinterprets the Constitution.[178]

Argument: Broad standing has historical foundations

Supporters of a broad interpretation of the standing doctrine argue that the limited view of standing is drawn from English common law and has no foundation in American constitutional law. Supporters also contend that the limited view of standing should be challenged because it is drawn from a relatively recent legal interpretation in the 1923 U.S. Supreme Court case *Frothingham v. Mellon*.

Supporters of a broad interpretation of the standing doctrine further claim that those who seek limits on standing rely on an incorrect interpretation of English history. Under English common law, according to this claim, a personal claim of injury was not required to receive standing. Therefore, supporters of a broad view of the standing doctrine argue that those who seek to limit standing to personal injury claims are relying on a questionable interpretation of English history and the separation of powers.[179]

Arguments in favor of limited standing to challenge agency actions

Supporters of a limited view of the standing doctrine argue that standing should be limited to cases in which the prospective plaintiff has suffered a demonstrable legal injury as a result of the agency's action.

Argument: Limits on standing protect minority rights

[178] *Id.*
[179] Berger, Raoul. "Standing to Sue in Public Actions: Is it a Constitutional Requirement?" *The Yale Law Journal*. (1969).

Supporters of limits on the standing doctrine argue that narrow standing allows the judiciary to protect the rights of minority groups rather than serve the interests of the majority. The political branches, according to this argument, are the appropriate government bodies to safeguard majority interests since they are representative of the people. Since the judiciary is removed from direct accountability to the electorate, supporters of a limited view of standing argue that judges are not appropriately positioned to serve majority interests without imposing their own political prejudices.

The responsibility of the judiciary, according to this argument, is to protect the rights of the minority while Congress and the executive branch serve the interests of the majority. In this way, supporters of limits on standing contend that limits on standing reserve judicial resources for individuals with specific injuries, rather than for those with general concerns about issues that would be better addressed through the democratic process.[180]

Argument: Limits on standing support the separation of powers

Supporters of limits on the standing doctrine claim that such limits serve to safeguard the Constitution's separation of powers. Broad interpretations of the standing doctrine that grant standing to individuals who seek to challenge agency actions, according to this argument, transfer the president's power to oversee the administrative state to the judicial branch in violation of the separation of powers.

Lawsuits seeking to address agency actions, according to this argument, allow the judiciary to overstep its authority and manage the administrative state, thereby usurping the executive's power. Limits on the standing doctrine, according to supporters, aim to prevent the judiciary from overstepping its authority into areas of executive control. Moreover, supporters of limits on standing argue that limited standing prevents courts from ruling on broad questions of public significance that are better resolved by the people's representatives in the political branches.[181]

[180] Scalia, Antonin. "The Doctrine of Standing as an Essential Element of the Separation of Powers." Suffolk University Law Review. (1983).
[181] Yan, Jerett. "Standing as a Limitation on Judicial Review of Agency Action." Ecology Law Quarterly (2012).

Argument: Limits on standing promote agency efficiency

Supporters of limits on the standing doctrine argue that the threat of litigation that would result from a broad interpretation of the doctrine could reduce agency efficiency. Moreover, supporters of limits on standing claim that judges are not agency experts and, therefore, are not suited to weigh in on complex agency decisionmaking.[182]

Argument: Limits on standing strengthen political accountability

Supporters of a limited interpretation of the standing doctrine claim that limits on standing strengthen political accountability by providing the public with clear distinctions between executive and judicial branch responsibilities. Supporters of limits on the standing doctrine argue that a broad interpretation of standing reduces political accountability because it confuses public understanding of whether the executive or the judiciary is responsible for an agency action.[183]

Procedural due process rights in administrative adjudication: Sufficient or deficient?

The appropriate degree of required due process protections available to individuals subject to agency adjudication proceedings is a topic of debate among administrative law scholars. Some scholars argue that the due process protections available to individuals during the agency adjudication process fail to embody the due process protections in the Constitution's Fifth and Fourteenth Amendments. These scholars generally favor strengthening due process protections in agency adjudication.

Others claim that due process protections in agency adjudication are sufficient, in part because they satisfy the requirements of the Administrative Procedure Act (APA). These scholars largely support current standards of due process protections in agency adjudication.

[182] *Id.*
[183] *Id.*

Arguments in favor of existing due process protections and procedural rights in administrative adjudication

Supporters of existing due process protections in agency adjudication argue that the current model of agency adjudication is sufficient to satisfy constitutional due process standards, that administrative proceedings do not require the same due process procedures as criminal proceedings, and that due process is not uniform.

Argument: Agency adjudication satisfies due process

Supporters of existing due process protections in agency adjudication argue that the current model of agency adjudication is sufficient to satisfy constitutional due process standards. Supporters argue that disparate features of agency adjudication can determine a constitutional due process baseline. For example, some supporters claim that due process is satisfied if APA procedures are followed while others argue that due process is satisfied if a hearing is held.[184]

Argument: Administrative proceedings do not require the same due process procedures as criminal proceedings

Some scholars argue that the inability of individuals to exercise the Fifth Amendment's privilege against self-incrimination denies individuals due process. Supporters of existing due process protections in agency adjudication, however, claim that agency proceedings do not require the same due process protections as criminal proceedings. Therefore, the Fifth Amendment's privilege against self-incrimination does not apply to administrative proceedings, according to this argument, and open proceedings are not required.[185]

[184] McCall, Kristin and Redish, Martin. "Due Process, Free Expression, and the Administrative State." Northwestern Public Law Research Paper No. 18-03, Northwestern Law & Econ Research Paper No. 18-03 (2018).
[185] Hamburger, Philip. *Is Administrative Law Unlawful?* University of Chicago Press. (2014).

Argument: Due process requirements are not uniform

Supporters of existing due process protections in agency adjudication claim that there is no uniform mandate of due process for agency adjudication. Instead, according to this argument, due process can take different forms depending on the circumstances.[186]

Arguments in favor of increased due process protections and procedural rights in administrative adjudication

Supporters of increased due process protections in agency adjudication argue that existing adjudication procedures fail to embody constitutional standards and that informal adjudication weakens due process.

Argument: Due process protections in agency adjudication are unconstitutionally insufficient

Supporters of increased due process protections in agency adjudication argue that existing adjudication procedures are unconstitutionally insufficient. For example, some supporters of increased due process protections claim that agencies fail to provide individuals subject to criminal penalties with fair notice of proceedings. Others argue that administrative judges (a type of federal administrative adjudicator) are unconstitutionally biased. Since the adjudication process fails to establish a level playing field between parties, according to this argument, agency adjudication violates constitutional due process protections.[187]

Argument: Informal adjudication weakens due process

Supporters of increased due process protections in agency adjudication argue that informal adjudication weakens due process protections for defendants because it fails to follow Administrative Procedure Act (APA) procedures. The lack

[186] United States Supreme Court. *Arnett v. Kennedy*. April 16, 1974
[187] Hamburger, *Is Administrative Law Unlawful?*

of defined informal adjudication requirements and the judicial deference given to agency informal adjudication procedures serve to deny due process.[188]

Procedural due process in judicial review of appealed agency actions: Broad or limited?

Individuals adversely affected by agency adjudication decisions may seek to appeal those decisions to Article III courts. The Administrative Procedure Act (APA) provides for the appeal of federal agency actions in certain cases. Article III courts can exercise judicial review to interpret the law and overturn any appealed agency actions that are inconsistent with the law.

Arguments in favor of broad access to judicial review of appealed agency actions

Supporters argue that broad access to judicial review of agency actions strengthens due process by allowing individuals more opportunities to challenge agency decisions.

Argument: Due process is strengthened by the broad ability to appeal agency actions

Supporters of broad appeals of agency actions to Article III courts argue that broad access to judicial review strengthens due process by increasing the opportunities available to individuals to challenge agency decisions. The ability to challenge government action, according to this argument, contributes to a robust legal system.[189]

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[188] Funk, William. "Slip Slidin' Away—The Erosion of APA Adjudication." *Penn State Law Review*. (2017)
[189] Re, Edward. "Due Process, Judicial Review, and the Rights of the Individual." *Cleveland State Law Review*. (1991).

Supporters further claim that the opportunity for judicial review of agency actions strengthens due process by allowing individuals to seek redress when they are adversely affected by the government.

Argument: Broad appeals to Article III courts increase agency accountability

Supporters of broad access to appeals of agency actions to Article III courts argue that judicial review strengthens agency accountability. Broad access to judicial review, according to this argument, increases public oversight of agency activity. Supporters also contend that increased judicial oversight of agencies allows judges to correct a higher volume of agency legal errors.[190]

Arguments in favor of a limited approach to judicial review of appealed agency actions

Supporters of a limited approach to judicial review of appealed agency actions argue that narrow applications of judicial review help to protect agency expertise from government overreach.

Argument: Limited appeals of agency action to Article III courts protect against government overreach

Supporters of limited appeals of agency action to Article III courts argue that narrow applications of judicial review help to insulate agency expertise from judicial interference. Judges, according to this argument, are generalists who should only interfere in specialized agency decisionmaking in limited circumstances. Judges interfere with agency specialists, according to this claim, when they attempt to address individual agency actions through judicial review.[191]

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[190] Araiza, William D. and Dreher, Robert G. "Judicial Review Under the APA of Agency Inaction in Contravention of a Statutory Mandate: Norton v. Southern Utah Wilderness Alliance," *Environmental Law Reporter*. (2004).
[191] Levin, Ronald M. and Woodward, David R. "In Defense of Deference: Judicial Review of Agency Action." *Administrative Law Review* (1979).

Argument: Limited appeals of agency actions to Article III courts conserve judicial resources

Supporters of limited appeals of agency action to Article III courts argue that the high volume of agency adjudication necessitates constraints on access to judicial review. Unbounded agency appeals, according to this argument, would overwhelm Article III courts.

Supporters further claim that federal agency tribunals were created in order to curb the flood of appeals to Article III courts. Agency tribunals, according to this claim, are themselves overwhelmed by high caseloads. Supporters contend that limited appeals to Article III courts allow administrative tribunals to manage agency cases without burdening judicial resources.[192]

Argument: Limited appeals of agency actions to Article III courts protect statutory intent

Supporters of limited appeals of agency action to Article III courts argue that Article III review of agency decisionmaking ignores Congress' intent to allow agencies to implement directives. Unbounded Article III review of agency actions, according to this argument, allows the judiciary to substitute its judgment for the intent of Congress.[193]

Reform proposals

Reform proposals aimed at addressing procedural rights in agency adjudication may concern the breadth of standing, the degree of due process protections available to individuals subject to agency adjudication proceedings, or the scope of judicial review of agency actions.

The following reform proposals aim to address procedural rights in agency adjudication through action by the legislative, executive, or judicial branches.

[192] Manuel, H. Alexander. "Judges and the administrative state." American Bar Association. May 9, 2018.
[193] Levin and Woodward, “In Defense of Deference”

Legislative branch approaches

Legislative branch proposals that seek to strengthen procedural rights in agency adjudication direct Congress to influence agency procedures through statutory changes. Congress, for example, can pass legislation to increase the use of administrative law judges in an effort to ensure the impartiality of agency adjudicators. Other proposals encourage Congress to rein in its delegation and deference practices and suggest that agencies follow the formal adjudication procedures put forth in the Administrative Procedure Act (APA).

Congress can amend the APA to require APA procedures for adjudication with evidentiary hearings

This reform proposal suggests that Congress can strengthen procedural rights in agency adjudication by passing legislation that requires agencies to follow APA procedures when adjudication calls for evidentiary hearings.

In his 2017 law review article "Slip Slidin' Away—The Erosion of APA Adjudication," law professor William Funk proposed that Congress could amend the APA to require that agency adjudication that is statutorily mandated to include a hearing must follow the formal adjudication procedures put forth in the APA.

"An alternative to having the Court clarify the existing law would be for Congress to amend the APA in such a way as to make clear, as was its original intention, that whenever an evidentiary hearing is required by a statute, that hearing should be an APA adjudication. In a sense this would be the simplest and cleanest solution. Indeed, given the current Congress's interest in regulatory reform, this might be an attractive undertaking, especially because it is not, like some other bills under consideration, a subterfuge for shutting down government regulation."[194]

Congress can increase the use of formal APA adjudication under ALJs

Similar to the proposal above, this proposal seeks to strengthen procedural rights in agency adjudication by requiring agencies to follow APA procedures. Formal adjudication under the APA, according to this proposal, helps to mitigate bias concerns by requiring the use of administrative law judges rather than

[194] Funk, "Slip Slidin' Away"

administrative judges. To learn more about the debate surrounding the use of ALJs and AJs, click here.

In his 2016 law review article "Why Bias Challenges to Administrative Adjudication Should Succeed," law professor Kent Barnett suggested that Congress and the president can reduce concerns about partiality in agency adjudication by ensuring that agencies follow APA procedures, which require the use of ALJs rather than AJs.

“Because of the implications of a judicial decision concerning AJ partiality, Congress and the President should act before courts force them to. Doing so not only avoids administrative chaos, but it returns agency adjudication to its intended form under the APA. The very problems that I identified for AJs here are not new. Shortly after the APA's enactment, U.S. Attorney
General J. Howard McGrath stated that "[i]f salaries and promotions are subject to agency control, there is always danger that a subtle influence will be exerted upon the examiners to decide in accordance with agency wishes." Guaranteeing that agency adjudication has its constitutional appearance of impartiality - the appearance that Congress intended it to have under the APA - is not too much for Congress and the President to accomplish."[195]

The Administrative Conference of the United States (ACUS), an independent federal agency tasked with developing recommendations to improve federal administrative processes, issued a 1992 recommendation titled "The Federal Administrative Judiciary" that aims to mitigate bias concerns in agency adjudication by urging Congress to pass statutes that require the use of ALJs in administrative proceedings.

"The uniform structure established by the APA for on-the-record hearings and for qualifications of presiding officers serves to provide a consistency that helps furnish legitimacy and acceptance of agency adjudication. A rationalized system of determining when ALJs should be used would encourage uniformity not only in procedure, and in the qualifications of the initial decider, but in adjudication of similar interests. The Conference, therefore, recommends that Congress consider the conversion of AJ positions to ALJ positions in certain contexts. While the Conference does not identify specific types of cases for which such conversion should be made, it proposes a series of factors for Congress to consider in making such determinations; these same factors should also apply when Congress creates new programs involving evidentiary hearings."

[195] Barnett, Kent. "Why Bias Challenges to Administrative Adjudication Should Succeed." *Missouri Law Review*. (2016).

Congress can restrain delegation and deference practices

This proposal recommends that Congress rein in its delegation and deference practices in order to protect procedural rights. Changes to agency adjudication procedures aimed at strengthening due process protections, according to this proposal, will not be as effective at protecting procedural rights as limiting delegation and deference practices in the first instance.

Administrative law scholar Robert Cass suggested in his 2017 research paper "Due Process and Delegation: 'Due Substance' and Undone Process in the Administrative State" that strengthening due process in agency adjudication would be a second-best approach to protecting procedural rights. Instead, Cass claimed that the most effective approach to shore up procedural rights would be for Congress to restrain its delegation and deference practices.

“Reliance on softer notions of due process may be especially problematic in respect to questions of administrative process, which often lie outside the ambit of appropriate due process constraints. Even where due process does apply, other legal rules strongly influence the degree to which administrative processes work and frequently provide better avenues for constraining them. Addressing directly the problematic nature of many delegations of authority to administrators and of inappropriate judicial deference to administrative determinations by and large will be preferable to due process challenges to administrative action. Due process can be a complement to reinvigorated delegation constraints and reformed deference rules or a partial substitute—used to compensate for failure to properly reform those doctrines—but it is at best a ‘second best’ option.”[196]

Executive branch approaches

Executive branch approaches to address procedural rights in agency adjudication primarily aim to affect the procedures agencies follow during adjudication. Ensuring that agencies follow ACUS best practices, seeking equitable discovery procedures for both agencies and individuals, and modifying ALJ selection and independence are examples of executive branch actions that can strengthen procedural rights in agency adjudication.

[196] Cass, Ronald. "Due Process and Delegation: 'Due Substance' and Undone Process in the Administrative State." George Mason Legal Studies Research Paper Series. (2017).

Adopt ACUS best practices for adjudication

ACUS issued its revised Model Adjudication Rules in September 2018. The MARs aim to provide consistent approaches to adjudication in an effort to address areas of debate, such as potential adjudicator bias, inequitable discovery, and administrative review practices.

The revised MARs feature the following updated recommendations for agency adjudication procedures, among other guidelines:

- "The revised MARs do not rely upon the term 'formal adjudication.' The term commonly refers to 'on the record' adjudications governed by the APA (5 U.S.C. §§ 554, 556–557) over which an ALJ presides. But the term is misleading because numerous adjudications that fall outside this definition have procedures whose formality rivals or exceeds adjudications with ALJs.2 As with the original MARs, the revised MARs are not designed for inquisitorial proceedings, although they may be instructive.

- The Working Group has sought, where appropriate, to render the revised MARs more consistent with the FRCP as to the filing and service of records. These revisions include protecting private information, revising time-computation formulas, and revising the filing party's certification requirements.

- The revised MARs include new rules on, among other things, foreign-language interpretations and translations, and sequestration of witnesses.

- The revised MARs' discovery protective-order provisions account for various revisions to the FRCP.

- The revisions also recognize advances in technology and provide adjudicators with discretion to use technology in a wide array of matters, including hearings and discovery.

- The revised MARs provide significant revisions to the closing and reopening of the record.

- The revised MARs incorporate certain revisions to the Federal Rules of Appellate Procedure. For instance, the revised MARs add new rules

concerning the appellate record (Rule 411), additional evidence (Rule 412), and amicus briefs (Rule 421)."[197]

Follow minimum discovery standards

This proposal seeks to address concerns about access to discovery in agency adjudication by ensuring that agencies operate according to the APA's minimum discovery standards.

ACUS' 1970 recommendation "Discovery in Agency Adjudication" urges agencies support due process in adjudication by following the minimum discovery standards put forth in the APA.

"Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations."[198]

[197] "Model Adjudication Rules (Rev. 2018)," Administrative Conference of the United States. Accessed August 10, 2020.
[198] "Discovery in Agency Adjudication." Administrative Conference of the United States. (1970).

Improve ALJ selection

This proposal suggests that the current method of selecting ALJs through competitive examinations is not sufficient to ensure high-quality ALJs. Instead, this proposal recommends that ALJs should be subject to a series of progressive promotions to ensure the retention of high performers.

In his 1979 law review article "The ALJ Fiasco—A Reprise," U.S. Supreme Court Justice Antonin Scalia argued that ALJ selection could be improved through a system of progressive promotions that would reward high performers and retain the most qualified individuals for the role.

"What I am suggesting is that unless (as there is no reason to believe) the activity of being an administrative law judge is different from any other field of legal endeavor-or, indeed, any other field of human endeavor-the best way to achieve excellence is to promote from within, on the basis of observed performance. A blindman's buff, paper-record system is acceptable for the selection of neophyte judges, at lower levels of salary and responsibility; but the high-level judges, who are to conduct and decide the most difficult proceedings, should be chosen principally (if not exclusively) from among existing judges on a progressive promotion basis. Not only is this not a revolutionary thought; it is, I believe, the system envisioned by the APA."[199]

Centralize ALJ oversight

This proposal aims to strengthen the neutrality of ALJs by removing them from direct agency oversight and placing them in an independent central panel. In this way, the proposal suggests that centralized ALJs could decide cases more independently outside of the direct agency supervision.

Scalia suggests the establishment of a central ALJ corps in order to improve efficiency in agency adjudication and minimize bias by severing the supervisory relationship between ALJs and employing agencies:

"The problem of improper influence would also be solved by implementing proposals for establishment of a unified ALJ corps, headed by an independent administrator. There would be no obstacle to giving such an administrator authority over promotion. Moreover, the unified-corps concept has some

[199] Scalia, Antonin. "The ALJ Fiasco—A Reprise." *The University of Chicago Law Review.* (1979).

independent managerial advantages-notably, the efficiency of scale which would eliminate the phenomenon of highly paid judges who occasionally have no work within their own agency, and which would make possible a range of grade levels not feasible within many single agencies. On the other hand, it seems unlikely that the administrator of a unified corps would have the same degree of knowledge concerning the judges' performance, or the same degree of incentive to maximize the quality of that performance, as the agencies whose substantive programs are affected. In any case, the unified corps would make a fundamental change in the perceived role of the administrative law judge as the 'front line' of the agency itself rather than an impartial outsider; and it is that issue which should probably control the fate of the proposal. But the efficiency advantages, if the corps is combined with a multi-level grade system, should not be ignored-as they seem to be in most discussions of the proposal."[200]

Similarly, Funk proposed the creation of a central panel of generalist ALJs to hear cases across agencies:

"If current regulatory reform efforts wished to address some of the problems that have been identified with the current organization and use of ALJs, whether from the agency perspective or the public's perspective, consideration of some mix of split-enforcement models or central panels should probably be included. ... One might argue that the SEC has too few ALJs – five – to justify a separate agency like OSHRC or MSHRC. This, however, could be addressed by the creation of a central panel whose ALJs would hear SEC and other cases. Agencies might then argue that their cases require ALJs with specialized knowledge and expertise in the area regulated rather than generalist judges. Without deciding here whether that argument has merit, it could be easily addressed, as some state central panels have done, by having the central panel hire and assign judges with the appropriate knowledge and expertise to cases from the agencies requiring it. Of course, there is an argument that generalist judges are precisely who should be adjudicating these cases."[201]

Funk concluded with the suggestion that a central ALJ panel would strengthen procedural rights by limiting agency influence over ALJs and, as a result, encouraging agencies to follow formal APA adjudication procedures:

"Both central panels and split-enforcement models for specific agencies relate to how ALJs are organized and supervised. So, again, one might ask how this would provide any solution to the erosion of APA adjudication, the subject of this paper. And, again, the answer is that it might be that agencies would be less reluctant to

[200] *Id.*
[201] Funk, "Slip Slidin' Away"

use APA adjudication if they believed that ALJs were indeed subject to someone's supervision and oversight."[202]

Create an impartiality disclosure for federal administrative adjudicators

This proposal recommends that agencies can strengthen due process protections in adjudication by disclosing information about the impartiality of federal administrative adjudicators. Agencies could use the disclosure data, according to this proposal, to improve transparency surrounding the impartiality of agency adjudicators and develop best practices to ensure adjudicator impartiality across agencies.

In his 2019 law review article "Some Kind of Hearing Officer," law professor Kent Barnett suggested that an impartiality disclosure could facilitate the protection of adjudicator independence from agency influence:

"Impartiality disclosures are a relatively low-cost way of providing significant information to scholars, litigants, Congress, and agencies themselves about the current state of administrative adjudication. They provide a mechanism for obtaining complete and updated data for proceedings that are often forgotten or confused with others. As the findings reported here demonstrate, agency practice is extremely diverse and likely far from optimal. Disclosures may prove sufficient by themselves to alter agency behavior and bring us closer to optimal impartiality in administrative adjudication. Or they may serve as a tool for considering whether and to what extent Congress should promulgate government-wide impartiality protections for non-ALJs. After all, ACUS and scholars have already provided significant theoretical guidance on how agencies should think about adjudicatory impartiality. What is needed now is action. The time has come to move away from some kind of hearing officer and toward an optimal one, using impartiality disclosures as a first step."[203]

[202] *Id.*
[203] Barnett, Kent. "Some Kind of Hearing Officer." *Washington Law Review*. (2019).

Agencies initiating criminal proceedings should comply with the standard notice for criminal trials

This proposal suggests strengthening procedural rights in agency adjudication by ensuring that agencies seeking criminal penalties provide fair notice to affected parties according to the standard notice for criminal trials, rather than the standard notice for civil actions.

Law professor Philip Hamburger proposed in his 2016 book "Is Administrative Law Unlawful?" that agencies can strengthen procedural rights in agency adjudication by complying with the standard notice for criminal trials rather than civil actions:

"When agencies bring proceedings of a criminal nature against defendants, they should comply with the standard notice for criminal trials. This is different from the APA's requirements, which call for a standard that satisfies due process in civil actions."[204]

Agencies should provide transparency around monetary penalties

This proposal aims to improve transparency surrounding agency monetary penalties by making agency penalty schedules publicly available.

The Pacific Legal Foundation (PLF), a 501(c)(3) nonprofit organization that aims to advance principles of limited government, proposed that agencies should create and provide tables to the public that break down their minimum and maximum penalties in order to give citizens fair notice of potential penalty enforcement:

"To ensure greater transparency in penalty enforcement, agencies with the authority to issue fines should publish tables identifying classes of common de minimis violations. These tables should identify the maximum administrative penalty and under what circumstances it may be sought. This would ensure potential agency targets like the Sacketts are provided adequate notice of the penalties to which they may be subject and that arbitrary penalties aren't threatened or collected. Further, when a violation is minor and thus ineligible for criminal prosecution or harsh civil penalties, the tables should limit the imposition of daily accrued penalties for the duration of a violation. Such penalties for minor infractions should not accrue daily, especially when the citizen is contesting the

[204] Hamburger, *Is Administrative Law Unlawful?*

validity of the agency determination and there is no concrete, additional harm from his not bending immediately to the agency's will."[205]

Agencies should issue monetary penalties that are proportional to regulatory violations

This proposal aims to ensure that monetary penalties issued by agencies are proportional to the alleged regulatory violations. This approach aims to protect due process rights by preventing agencies from issuing excessive monetary penalties in an effort to coerce individuals into compliance.

PLF suggested that agencies can strengthen individual due process protections by ensuring that monetary penalties are in proportion to the alleged regulatory violations:

"[T]he case also demonstrates how agencies attempt to use the threat of excessive penalties to coerce people into submitting to agency demands. For constructing an environmentally beneficial livestock pond, the EPA threatened Johnson with up to $20 million in potential fines. Although he refused to be coerced, few would have the courage to fight the government at the risk of financial ruin. Agencies should limit penalties to amounts proportional to the alleged violation, so that Americans cannot be coerced into giving up their due process rights."[206]

PLF proposed that agencies should reserve large monetary penalties for alleged regulatory violations that constitute a common law nuisance:

"Robertson's case demonstrates one due process deficit—that ordinary and harmless conduct should not be the basis for criminal prosecution and crushing fines. Clean Water Act prohibitions have been interpreted so broadly that ordinary and innocent activities—like Robertson's digging a few ponds—can result in the imposition of tremendous penalties and even imprisonment. This is incompatible with a system that values due process, fairness, and the rule of law. The EPA should, at a minimum, issue regulations requiring that, for large civil or criminal penalties to be sought for a Clean Water Act violation, the offending conduct must constitute a common law (public or private) nuisance. If the nuisance

[205] Gaziano, Slattery, and Wood, "The Regulatory State's Due Process Deficits"
[206] *Id.*

standard is not met, then enforcement should be strictly limited to appropriately minor administrative penalties or remedial orders."[207]

PLF further proposed that agencies should reserve large monetary penalties for deliberate regulatory violations rather than the unintended violations of otherwise law-abiding citizens:

"Across the federal government, agencies should ensure that criminal prohibitions and civil penalty provisions are not employed to punish ordinary and normal conduct of otherwise law-abiding citizens. Thus, agencies should declare by regulation that, for a criminal prosecution to occur or for a civil penalty greater than $5,000 to be threatened or imposed, the offending conduct must have been deliberate and actually directed at a specified prohibited outcome."[208]

Agencies should ensure timely and independent adjudication

This proposal suggests that agencies can strengthen due process protections in adjudication by guaranteeing that agencies act in a timely fashion and do not subject citizens to undue delays. Moreover, this proposal recommends that agencies can further strengthen due process protections in adjudication by ensuring that their review procedures are independent of their enforcement mechanisms.

PLF recommended that agencies proceed with adjudication in a timely manner and safeguard adjudicatory independence by separating review and enforcement responsibilities:

"[T]he case also demonstrates how agencies try to deny an impartial and effective review of their initial enforcement decisions and how they try to delay or deny access to courts to provide a truly neutral forum for deciding the dispute. The Army Corps' internal review procedures were a sham, since they were not independent of the enforcement chain of command and any result in favor of the regulated party could be overruled by the original district official who made the initial decision. The Army Corps also spent four years trying to close the courthouse doors to Hawkes Co. to prevent independent scrutiny of the agency's actions. Instead of resisting judicial review, agencies should guarantee prompt and independent adjudication."[209]

[207] *Id.*
[208] *Id.*
[209] *Id.*

Agencies should avoid sub-delegations of authority

This proposal recommends that agencies can strengthen due process protections in adjudication by limiting the exercise of rulemaking authority delegated by Congress to agency heads and avoiding the sub-delegation of such authority to lower-level agency employees.
PLF proposed that agencies can shore up due process protections in adjudication by ensuring that only senior agency officials exercise delegated authority:

"Manor's case highlights a structural due process deficit that may exist in many government agencies: The delegation of rulemaking authority from Congress to senior agency appointees is wrongly redelegated to unaccountable lower-level civil servants. Kux alone, in fact, issued nearly 200 rules that purport to bind the public over the last couple of decades.

"Delegating rulemaking authority to someone not properly appointed as an "Officer of the United States" violates one of the most important separation-of-powers clauses in the Constitution, the Appointments Clause. That Clause requires permanent executive officials who wield significant federal power, such as rulemaking or adjudication powers, to be nominated by the President and confirmed by the Senate. This process ensures that officers may wield power only after being approved by high-ranking elected officials directly accountable to the people."[210]

Agencies should base decisionmaking on reliable evidence

This proposal suggests that agencies can strengthen due process protections in adjudication by ensuring that agencies rely on appropriate evidence rather than selected evidence aimed at a particular outcome.

PLF recommended that agency decisionmaking should be based on reliable evidence:

"The Fosters' case demonstrates the due process deficit of unfair rules of evidence. Rather than using reliable evidence to evaluate whether the Fosters' land contained a wetland, the USDA used the selection of a biased comparison site to dictate its preferred result. Agencies should make decisions based only on

[210] *Id.*

reliable evidence and should give people a fair opportunity to refute that evidence."[211]

Agencies should coordinate overlapping authority

This proposal suggests that agencies can strengthen due process protections in adjudication by ensuring that a single agency takes the lead in cases where agency authority overlaps. Such agency coordination, according to this proposal, would conserve agency resources by preventing multiple investigations into a single alleged regulatory violation.

PLF proposed that agencies should coordinate adjudication and enforcement activities in situations where agency authority overlaps:

"Where statutes provide agencies with overlapping authority, the agencies should identify a single lead agency with sole authority to make the relevant, factual determinations, with the other agency bound by these decisions. This would prevent multiple investigations with conflicting demands and an unclear lead decision maker, as the Boyd family experienced, improving both due process and efficiency concerns. Where agencies do not have overlapping authority but their mandates and the activities they regulate do overlap, agencies beginning an investigation must notify all relevant agencies of the case. This alert would function to require those agencies to begin their investigations at the risk of waiving their claims. This would prevent successive investigations over the same conduct."[212]

Agencies should bear the burden of proof for regulatory activity

This proposal suggests that agencies can strengthen due process protections in adjudication by bearing the burden of proof in defending their regulatory activity. Agencies, according to this proposal, can perform analyses and audits to support their regulatory activity and to prevent shifting the burden of proof to individuals.

PLF recommended that agencies can strengthen due process protections in adjudication by bearing the burden of proof for their regulatory activities:

[211] *Id.*
[212] *Id.*

"The ranchers' case demonstrates that those who face potentially crippling harm from unaccountable rulemaking should not bear the burden of proof of ensuring that regulatory agencies follow the rules set out by Congress. Agencies, such as FWS, should be required to conduct meaningful regulatory analyses where Congress has required them to do so. This could be achieved through the commencing of audits by agencies that are required to conduct economic analyses. These audits would look for instances in which the burden is on the government to establish whether and to what extent an agency action would impact individuals and businesses. If the agency relies on guidance, procedures, or internal documents that allow it to shift this burden of proof to a regulatory presumption of zero impact, these should be discarded in favor of a meaningful analytical tool.

"Requiring federal agencies to discharge this burden would eliminate unnecessary public and private costs. Similarly, requiring FWS to measure the costs of its actions rather than assume them away would go a long way in avoiding needless litigation costs or the imposition of economic costs by the tailoring of critical habitat designations to avoid them, as Congress intended."[213]

Agencies should provide fair notice to individuals subject to adjudication

This proposal suggests that agencies can strengthen due process protections in adjudication by ensuring that citizens receive fair notice of adjudication and enforcement proceedings.

PLF recommended that agencies provide individuals with fair notice before moving forward with adjudication proceedings:

"To address the lack of fair notice of investigations and enforcement actions, agencies should establish procedures that provide proper notice and a fair opportunity for citizens to be heard before an enforcement action may proceed further."[214]

[213] *Id.*
[214] *Id.*

Judicial branch approaches

Judicial proposals to address procedural rights in agency adjudication generally aim to leverage the role of Article III courts as neutral adjudicators. Article III courts, according to these proposals, should take a more active role in determining when agencies must follow APA procedures, should refrain from evaluating due process based on liberty and property interests, and should assume more adjudicatory responsibilities from agencies.

The U.S. Supreme Court should correct lower courts' interpretations of when APA adjudication is required

Lower courts at times have exercised deference to agencies' interpretations of their statutory adjudication requirements, which some argue has spurred the increased use of informal adjudication over formal APA procedures. This proposal suggests ending the practice of deferring to agency interpretations of statutorily mandated adjudication procedures and requiring courts to independently determine when agencies must follow formal APA procedures.
Funk recommended that lower courts refrain from deferring to agency interpretations of statutory adjudication requirements. Agencies, according to Funk, will most often seek to implement less stringent informal adjudication procedures:

"[T]he lower courts seem to have reached a consensus that any statutory requirement for an adjudicatory hearing that does not expressly provide that it is a 'hearing on the record' is deemed ambiguous as to whether it requires an APA adjudication. From this they have concluded that *Chevron* deference is applicable to the agency's choice of procedure – APA adjudication or otherwise. As the earlier discussion suggested, this is an error. However, it appears to be an error widely held and deeply settled, at least in the lower courts. The Supreme Court has not addressed the issue. If a case could be brought to its attention on this issue, the Court might well grant certiorari, despite the apparent lower court agreement. The Court has recently seemed to be willing to address fundamental issues under the APA when a compelling case could be made that the lower courts have strayed from the original meaning and purpose. ... Were the Court to take the case and reverse the lower court decisions, this would ... [reestablish] the

presumption that an evidentiary hearing required by a statute is indeed to be an APA adjudication."[215]

Courts should not evaluate due process standards based on liberty and property interests

Liberty and property interests, according to this proposal, are impractical standards for agencies to apply in order to evaluate due process in agency adjudication.

Hamburger argues that liberty and property interest standards are too vague for courts to apply to evaluate due process protections:

"Courts should not look at liberty or property interests to evaluate the due process protections of adjudication because they are unworkable standards that are too broad."[216]

Use Article III courts instead of agency adjudication

This proposal aims to shift agency adjudication from the responsibility of agencies to the responsibility of Article III courts. This shift would protect procedural rights in adjudication by ensuring that individuals can seek redress through unbiased constitutional courts, according to this approach.

Funk summarized the proposals of Hamburger and administrative law scholar Gary Lawson, who advocate for the use of Article III courts in agency adjudication as a means to strengthen procedural rights.

"Probably the most radical response would be to adopt the position espoused by Professors Phillip Hamburger and Gary Lawson, each of whom conclude on an originalist basis that where liberty or property is involved only an adjudication by an Article III court is constitutionally permissible. In other words, any administrative adjudication governing liberty or property, including formal APA adjudication, is itself unconstitutional. It is a radical response because it would require overturning more than a century's worth of Supreme Court precedent and at least a century and a half of everyday practice. Moreover, under their view, their solution would not reach administrative deprivation of government 'benefits' and

[215] Funk, "Slip Slidin' Away"
[216] Hamburger, *Is Administrative Law Unlawful?*

'privileges,' which as an original matter were not deemed to be liberty or property."[217]

Do nothing: Do not change current practices governing procedural rights in agency adjudication

The current state of procedural rights in agency adjudication, according to these proposals, is sufficient to safeguard due process. No further action is required by agencies to address procedural rights, according to these proposals.

Do nothing: Continue the trend towards informal adjudication

This proposal suggests that the status quo in agency adjudication is sufficient to protect individual procedural rights. Therefore, no action would be required to address agency adjudication procedures. Under this approach, agencies will continue to prefer the use of informal adjudication over formal APA procedures.

Funk proposes that one option to address procedural rights in agency adjudication is to do nothing. This approach would retain the status quo and avoid the potentially unnecessary redirection of agency time and resources.

"One alternative is the no-action alternative. That is, nothing should be done; the trend is appropriate. This would presumably be the preferred alternative from the agencies' perspective. After all, to the extent that courts will defer to their 'reasonable' interpretation of an ambiguous hearing directive, agencies will be able to choose their desired method of proceeding – invariably to opt in favor of non-APA adjudication. Inasmuch as in most cases the Due Process Clause will assure fundamental fairness, the argument would be that anything more is simply more time and resource intensive and unnecessary."[218]

[217] Funk, "Slip Slidin' Away"
[218] *Id.*

Chapter V. Agency dynamics and the structure and function of administrative agencies

Agency dynamics is one of the five pillars key to understanding the main areas of debate about the nature and scope of the administrative state. Agency dynamics is a term used to refer to the structure and function of administrative agencies. While the majority of agencies are housed under the executive branch, others are established as independent federal agencies or are housed under the legislative or judicial branches. These structural variations impact agency oversight as well as agency interactions across branches. This pillar also involves understanding the nuts and bolts of agency functions, including rulemaking and adjudication proceedings.

This chapter examines agency dynamics through agency structure and functions. We first examine the structure of agencies—executive or independent—and how these structural variations affect the dynamics at play. Next, we take a closer look at agency functions—rulemaking and adjudication— and the governing statutes that lay out procedures for those functions. This chapter then compares theoretical procedural frameworks of agencies with their practice.

Lastly, this chapter examines scholarly arguments about agency dynamics. Debates about agency dynamics are key areas of disputation among scholars and practitioners of administrative law. These debates generally concern four areas of inquiry: the effectiveness of agency governing statutes, the political accountability of agencies, agency employee qualifications, and agency interactions with the constitutional order. This chapter presents leading arguments in these debates as well as proposals for reform.

Agency structure

What we mean when we talk about administrative agencies - indeed the administrative state - is complicated by the number and different types of agencies. Federal and state governments comprise a host of executive and independent agencies that administer and enforce the law. The structure of these agencies varies—while some are housed within the executive branch, others operate with some degree of independence from direct executive control. This section first examines the structure of executive agencies, then takes a closer look at the structure of independent agencies.

Executive agencies

An executive agency is an agency that is housed under a government's executive branch. At the federal level, an executive agency is an agency that is housed under the Executive Office of the President or one of the 15 Cabinet departments within the executive branch. According to the *Sourcebook of United States Executive Agencies*, a study produced by the Administrative Conference of the United States and Vanderbilt University, independent agencies with top officials who are nominated by the president and confirmed by the U.S. Senate also qualify as executive agencies (we'll take a closer look at independent agencies tomorrow). Executive agencies may house additional sub-agencies, bureaus, divisions, and commissions.[219]

The primary purpose of executive agencies "is to aid the President in carrying out the President's constitutional and statutory responsibilities," according to the *Sourcebook*. Agencies assist the president by promulgating and enforcing administrative regulations. The Administrative Procedure Act (APA) authorizes executive agencies to carry out these responsibilities through rulemaking and adjudication. Other governing statutes may also guide agency rulemaking and adjudication procedures in certain cases.

[219] *Sourcebook of United States Executive Agencies*. Administrative Conference of the United States. May 2013

How many executive agencies exist?

There is no definitive number of executive agencies and every list of federal agencies in government publications is different. For example, FOIA.gov lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency, according to the Sourcebook. This appears to be on the conservative end of the range of possible agency definitions. The United States Government Manual lists 96 independent executive units and 220 components of the executive departments. An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.

State-level executive agencies and Administrative Procedure Acts exist in all 50 states.

Independent agencies

Independent agency is a term used to describe an executive agency that operates with some degree of autonomy from the executive branch. At the federal level, these agencies are generally headed by a commission or board made up of five to seven members with protections against at-will removal by the president. According to the *Sourcebook*, independent federal agencies generally fall into one of the two following categories:

- An independent federal agency may be defined as any agency established outside of the Executive Office of the President or the 15 executive departments. Since these agencies are not required to report to a higher official within the executive branch, such as a department secretary, they may be considered independent.

- An independent federal agency may also be defined as an agency in which the top official has cause removal protections and, therefore, is insulated from political interference by the president or other elected officials. According to the *Sourcebook*, cause removal protections ensure that

"political appointees cannot be removed except 'for cause,' 'inefficiency, neglect of duty, or malfeasance in office,' or similar language."[220]

Court cases that have shaped the dynamics of independent agencies

The U.S. Supreme Court has issued rulings in the following cases concerning the structure and function of independent federal agencies.

Humphrey's Executor v. United States

The U.S. Supreme Court affirmed the constitutionality of independent agencies in the 1935 case *Humphrey's Executor v. United States*, which concerned the president's authority to remove an official of the Federal Trade Commission. The court ruled unanimously that the president couldn't remove a commissioner for a cause other than those listed in the act, which included "inefficiency, neglect of duty, or malfeasance in office."

The ruling set a precedent that the president cannot remove officers from independent federal agencies for reasons other than those listed in the relevant statutes. The court noted that administrative agencies are intended to function in an independent and nonpartisan manner, which prohibits the president from removing such officers for purely political reasons.

In the case opinion, the court identified the following characteristics of an independent federal agency:

"Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control. To the extent that it exercises any executive function -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the Government."[221]

[220] *Id.*
[221] *Humphrey's Executor v. United States*

Seila Law v. Consumer Financial Protection Bureau

The U.S. Supreme Court held in the 2020 case *Seila Law v. Consumer Financial Protection Bureau* that an independent agency cannot be headed by a single director with cause removal protections.

In a 5-4 decision, the court ruled that the structure of the Consumer Financial Protection Bureau (CFPB), an independent agency that exercised executive powers and had a director protected from at-will termination by the president, was unconstitutional. The majority held that restrictions on the president's ability to remove such agency leaders violated separation of powers principles by limiting presidential control of executive power.[222]

Collins v. Yellen

In the 2021 case *Collins v. Yellen*, the United States Supreme Court held that restrictions on the president's authority to remove the director of the FHFA violated the separation of powers. In its decision, the court also rejected the argument that the FHFA actions at issue in the case went beyond the agency's legal authority.

Justice Samuel Alito delivered the opinion of the court, writing that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer."[223]

Agency functions

Agency functions primarily fall into two separate categories: rulemaking and adjudication. These processes are governed by the Administrative Procedure Act at the federal level and by similar state administrative procedure acts across the 50 states. This section examines the role of the APA in governing agency procedures and takes a closer look at the rulemaking and adjudication processes.

[222] *Seila Law v. Consumer Financial Protection Bureau*
[223] *Collins v. Yellen*

The Administrative Procedure Act

The APA is a federal law passed in 1946 that established uniform rulemaking and adjudication procedures for federal agencies. The APA also addresses procedures for policy statements and licenses issued by agencies and provides for judicial review of agency adjudications and other final decisions. Prior to the APA, no federal laws governed the general conduct of administrative agencies.

Although the federal APA governs rulemaking and adjudication by federal agencies, all 50 states have passed APAs governing agency actions in their respective states.

History of the APA

During the first three and a half decades of the 20th century, new federal agencies tasked with regulating industry and the economy and administering a variety of programs were created. President Franklin D. Roosevelt (D) formed a presidential committee in 1936 to study the federal administrative and regulatory process. The President's Committee on Administrative Management issued a report referring to federal administrative agencies as a "headless 'fourth branch' of government" and criticizing what the committee understood as a lack of oversight and coordination among the various agencies.

In 1939, President Roosevelt formed the Attorney General's Committee on Administrative Procedure, which reviewed criticisms of federal administrative procedures and issued nearly 500 pages of recommendations in 1941. An early version of the APA was then drafted based on the committee's report, but World War II delayed the legislation's consideration and passage until the end of the war. The bill was reintroduced, revised, and enacted into law by Congress and President Harry Truman in 1946.

Below is a partial list of subsequent laws that amended provisions of the Administrative Procedure Act:

- Freedom of Information Act (1966): Congressman John Moss (D-Calif.) sponsored the Freedom of Information Act (FOIA) in 1966 in order to allow for public access to federal agency information after holding hearings for more than a decade on what he considered to be a lack of transparency among federal agencies. The U.S. House of Representatives voted 307-0 to

approve FOIA and President Lyndon Johnson (D) signed the bill into law on July 4, 1966.

- Privacy Act (1974): The Privacy Act of 1974 governs the acquisition, use, and dissemination of information about individuals by federal agencies and prohibits the release of an individual's records without the consent of the individual.

- Government in the Sunshine Act (1976): In the 1970s, the Panama Papers and Watergate scandals prompted greater public interest in government transparency. President Gerald Ford signed the Government in the Sunshine Act into law on September 13, 1976.

- Electronic Freedom of Information Act (1996): U.S. Senator Patrick Leahy (D-Vt.) sponsored the Electronic Freedom of Information Act Amendments (E-FOIA) of 1996, which sought to bring FOIA into the digital age by clarifying that FOIA also applied to electronic records in addition to physical documents maintained by federal government agencies. President Bill Clinton (D) signed E-FOIA into law on October 2, 1996.

Rulemaking

The APA established two rulemaking processes for agencies: informal rulemaking (also known as notice-and-comment rulemaking) and formal rulemaking. Some statutes may require agencies to use a hybrid form of rulemaking that combines elements of the informal and formal processes.

Formal rulemaking

The formal rulemaking process defined by the APA requires an agency to conduct a recorded hearing with procedures similar to those used in a court of law. These proceedings are usually overseen by an administrative law judge. The process is used in cases in which an agency is required by statute to issue rules after a recorded hearing.

Informal rulemaking

Informal rulemaking, the minimum procedural requirement for most agency rules, requires agencies to publish a notice of proposed rulemaking in the *Federal Register* (includes the rule's substance, the proposed effective date, and the legal

authority under which the agency is proposing the rule), provide a comment period for the public and interested parties to submit comments and recommendations, and publish a revised final rule in the *Federal Register*, at least 30 days before the rule is scheduled to take effect

Adjudication

Adjudication is a quasi trial-like process that aims to resolve regulatory disputes between agencies and private parties or between two private parties. Though adjudication can resemble a trial in an Article III court, the procedures may vary and due process protections may look different from one venue to the next. The adjudication process results in the issuance of an adjudicative order, which serves to settle the dispute and, in some cases, may set agency policy (agencies have the authority to issue rules through adjudication that must be followed by regulated entities).

Both federal and state-level agencies adjudicate disputes. Agencies can initiate proceedings by filing a notice against an individual that the agency observes to be in violation of a law that the agency administers. For example, the Consumer Financial Protection Bureau's (CFPB) website states that the agency may initiate adjudication proceedings "by filing a Notice of Charges alleging a violation of a consumer protection statute."[224] Likewise, an individual may initiate the adjudication process by appealing an agency decision or by applying for licensure, accreditation, or other agency permissions. An individual receiving benefits from the Social Security Administration, for example, may appeal an agency decision that impacts their retirement, disability, or supplemental security income benefits.

Similar to rulemaking, adjudication may take place through formal or informal proceedings.

Formal adjudication

In the federal government, for example, formal adjudication, which is governed by the federal Administrative Procedure Act (APA) under U.S. Code § 554, functions in a manner similar to federal civil court proceedings and includes a hearing followed by the issuance of an adjudicative order. An administrative law judge (ALJ) presides over a hearing and issues an order based on the findings from the

[224] "Administrative adjudication proceedings." Consumer Financial Protection Bureau. Accessed September 20, 2017.

record. If the ALJ finds the individual to be at fault, the agency may issue sanctions or penalties.

Informal adjudication

Informal adjudication consists of agency decision-making processes that are not clearly defined by the APA and may follow different formats depending on the specific statute that requires the proceedings. Administrative judges (AJs) generally preside over informal adjudication and a hearing may or may not be required.

Administrative adjudicators

ALJs and AJs are two types of federal administrative adjudicators—government officials who preside over adjudication proceedings. Both federal and state-level agencies use ALJs and AJs to adjudicate disputes. Although these officials have the word judge in their job title, administrative adjudicators, part of the executive rather than judicial branch, are not judges as described in Article III of the Constitution.

Though not judges in the traditional sense, administrative adjudicators may prepare for and conduct hearings or proceedings, make findings, and issue decisions on behalf of the agency that employs them. Dozens of federal agencies employ administrative adjudicators to handle a variety of cases, including enforcement actions, immigration hearings, and applications or appeals for benefits, licenses, and patents. The close relationship between ALJs, AJs, and their employing agencies, and whether that relationship impacts impartiality, is a subject of scholarly debate.

ALJs must possess a license to practice law, among other qualifications depending on the specific agency. The qualifications of AJs, however, vary widely and a law license may or may not be required.

Other APA procedures

In addition to the rulemaking and adjudication procedures, the APA also puts forth agency procedures for licensure and provides for judicial review of final agency decisions. Under the APA, final agency decisions (such as those made during rulemaking or adjudication) are subject to judicial review, usually with a six-year statute of limitations. The APA provides for judicial review for people and parties "adversely affected or aggrieved by agency action within the meaning of a relevant statute" or suffering "legal wrong because of agency action."

The current state of agency dynamics: The decline of formal procedures

The theoretical underpinnings of agency procedures and their implementation in practice have diverged since the passage of the APA in 1946. Agency use of formal procedures has drastically declined since the U.S. Supreme Court's 1973 decision in *United States v. Florida East Coast Railway.* The case held that formal rulemaking is only required when a governing statute calls for a hearing, in its words, "on the record." The subsequent decline in the use of formal rulemaking led Justice Clarence Thomas to describe the process as the “Yeti of administrative law” in his 2015 concurrence in *Perez vs. Mortgage Bankers Association.* Agency use of formal adjudication has similarly declined. Informal adjudication now makes up nearly 90 percent of adjudication proceedings.

Some scholars maintain that the decline of formal procedures was necessary given the breadth and complexity of agency rulemaking and adjudication responsibilities. These scholars generally claim that the APA and other laws should be modernized to codify current practices. Others argue that the decline of formal procedures has resulted in decreased agency accountability. For these scholars, a resuscitation of formal APA procedures would strengthen agency accountability by allowing for the cross-examination of experts. In the next section, we take a closer look at the arguments concerning APA procedures and other areas of disputation related to agency dynamics.For more about the arguments about that and other areas of agency activity etc, we turn to the next section.

Arguments about agency dynamics

Debates about agency dynamics are key areas of disputation among scholars and practitioners of administrative law. These debates generally concern four areas of inquiry: the effectiveness of agency governing statutes, the political accountability of agencies, agency employee qualifications, and agency interactions with the constitutional order. This section presents the leading arguments in these debates.

Arguments about agency political accountability

The following arguments examine key points of contention that have been advanced regarding the political accountability of agencies. While some arguments claim that agencies are accountable to the executive and legislative branches, others contend that agencies operate outside the scope of political control.

Argument: Agencies are accountable to the executive and legislative branches

Agencies are overseen by the elected executive, according to this argument, and report to the elected members of the legislature. Though agency actors themselves are not directly elected, their oversight by the political branches holds them accountable.

The U.S. Supreme Court held in the 1984 case *Chevron v. Natural Resources Defense Council* that although agencies are not directly accountable to the people, they are accountable to the elected executive as part of the executive branch.[225]

Argument: Agencies engage in constitutional interpretation without oversight by the political branches

This argument contends that agencies are able to interpret the Constitution—a responsibility vested in the judicial branch—without oversight by the political branches. Agencies, according to this argument, practice shadow administrative constitutionalism, which allows them to create internal norms and procedures that equate to internal agency constitutions without oversight by the political branches. Supporters of this argument also claim that shadow administrative constitutionalism allows agencies to exercise lawmaking power to amend statutes without democratic legitimacy.[226]

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[225] Barnett, Kent, Boyd, Christina, and Walker, Christopher. "Administrative Law's Political Dynamics." *Vanderbilt Law Review*. (2018).
[226] Bernstein, David. "'Administrative Constitutionalism:' Considering the Role of Agency Decisionmaking in American Constitutional Development." *Social Philosophy and Policy*. (2020).

Argument: Agencies operate outside the scope of political control

Agencies, according to this argument, operate autonomously with limited oversight from the political branches. This claim suggests that Congress' limited agency oversight and the judicial branch's deference to agency decisionmaking have resulted in relative autonomy for agencies.[227]

Argument: Independent agencies are unconstitutionally insulated from control by the elected executive

Independent agencies, according to this argument, are unconstitutionally insulated from control by the elected executive due to the cause-removal protections for agency heads. Cause-removal protections, according to this argument, prevent the executive from overseeing agencies' execution of the law. Moreover, this argument also claims that independent agencies are further insulated through their exemption from regulatory review by the Office of Information and Regulatory Affairs (OIRA), which prevents the elected executive from effectively overseeing independent agency rulemaking.[228]

Argument: Independent agencies are politically accountable

This argument contends that independent agencies are politically accountable because their structure is the result of political compromise.[229]

Arguments about the Administrative Procedure Act

The following arguments examine the main points of contention that have been advanced regarding the Administrative Procedure Act (APA), the statute governing federal administrative agency procedures (all 50 states have enacted similar legislation establishing procedures for administrative agencies in their

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[227] *Id.*
[228] Abbott, Alden."White House Review of Independent Agency Rulemaking: An Essential Element of Badly Needed Regulatory Reform." The Heritage Foundation. December 22, 2017.
[229] Lewis, David E. and Selin, Jennifer L. "Political Control and the Forms of Agency Independence." *The George Washington Law Review*. (2015).

respective states). These arguments generally concern the effectiveness of the APA as a governing statute and the exercise of formal and informal APA procedures.

Argument: The APA is out of date and needs to be modernized

The APA, according to this argument, is out of date and must be modernized in order to sufficiently govern agency action. Although formal processes have declined since the 1970s, the U.S. Supreme Court has called for additional requirements for informal processes that, according to this argument, have distorted the original intention of the APA. This claim suggests that the APA is in need of an update to align its standards with current practices. Moreover, this argument contends that calls for APA reform date back to commissions and panels from the mid-twentieth century. These calls for reform have highlighted the need to modernize the APA's procedures to maximize public participation, efficiency, accountability, and transparency.[230]

Argument: The APA needs to be resuscitated and agencies should return to formal procedures

This argument contends that the rise in informal procedures has allowed agencies to operate with little oversight by the APA. A return to the formal rulemaking and adjudication procedures outlined in the APA, according to this argument, would increase agency oversight and strengthen agency procedures by allowing for the cross-examination of experts on the record.[231]

Argument: The decline of formal rulemaking under the APA has led to the rise in informal procedures, which are insufficient to govern agency action

The ease of informal rulemaking, according to this argument, has contributed to the growth of the administrative state by minimizing rulemaking requirements. Moreover, this argument contends that informal rulemaking lacks sufficient

[230] "Modernizing the Administrative Procedure Act." U.S. Department of Justice. December 2019.
[231] *Id.*

procedural protections for citizens. Supporters of this argument generally claim that a revival of formal rulemaking procedures would increase the value of agency deliberations on matters of technical expertise.[232]

Argument: Informal procedures are sufficient to govern agency action

Supporters of informal procedures, including informal rulemaking and informal adjudication, argue that informal processes are sufficient to govern agency action because informal processes have received support from the U.S. Supreme Court and other institutions.[233]

Argument: Agencies sidestep the rulemaking process by setting policy through adjudication

According to the Administrative Conference of the United States, some agencies set policy through adjudication more often than rulemaking. Some argue that agencies should align theory and practice by setting policy through rulemaking rather than adjudication.[234]

Arguments about agency employee qualifications

The following arguments examine the main points of contention that have been advanced regarding agency employee qualifications. While some arguments claim that current agency employee qualifications promote expertise, for example, others contend that current agency employee qualifications hinder effective policymaking.

Argument: Agency expertise strengthens public policy

The expertise of agency employees, according to this argument, contributes to robust agency decisionmaking outside of the influence of the political branches.

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[232] *Id.*
[233] Verkuil, Paul. "Reflections upon the Federal Administrative Judiciary." College of Wiliam & Mary Law School Scholarship Repository. (1992).
[234] Araiza, William. "Agency Adjudication, the Importance of Facts, and the Limitations of Labels." *Washington and Lee Law Review*. (2000).

Rulemaking and adjudication procedures, according to this argument, enhance agency accountability and support agency expertise.[235]

Argument: Agency expertise contributes to regulatory stagnation

Agency expertise, according to this argument, can embed stagnant policies and hinder the development of new ideas.[236]

Argument: Administrative judges lack the expertise to preside over adjudication

This argument contends that administrative judges, unlike administrative law judges, lack sufficient expertise to preside over adjudication proceedings. While administrative law judges are in principle required to have specific legal credentials and experience, administrative judges are not required to have particular qualifications other than those that govern the general hiring of civil servants.[237]

Argument: Administrative judges' expertise meets the demand for adjudicative roles

This claim suggests that the rise in informal adjudication has created a demand for administrative adjudicators that exceeds the availability of administrative law judges. The expertise of administrative judges, according to this claim, is sufficient to satisfy agency needs for informal adjudicators.[238]

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[235] Wagner, Wendy. "A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power," *Columbia Law Review*, Accessed December 15, 2020
[236] Crews, Clyde Wayne. "The Costs Of Federal Agency Expertise." Competitive Enterprise Institute. August 29, 2018.
[237] Barnett, "Against Administrative Judges"
[238] Verkuil, "Reflections upon the Federal Administrative Judiciary"

Arguments about agency interaction with the constitutional order

The following arguments examine the main points of contention that have been advanced regarding agency interaction with the constitutional order. While some arguments support the constitutionality of agency dynamics, others contend that agency dynamics create tension with constitutional principles.

Argument: Agency adjudication violates the separation of powers

Current agency adjudication procedures, according to this argument, violate the Constitution's separation of powers provisions. This argument contends that agency adjudication violates the separation of powers by unlawfully transferring judicial power from the judicial branch to the executive branch and independent agencies.[239]

Argument: Agency adjudication does not violate the separation of powers

Adjudication procedures, according to this argument, function in accordance with the separation of powers. Since Congress deemed agency adjudication acceptable in the Administrative Procedure Act (APA), supporters of this argument claim that the resulting combination of functions within agencies is constitutional and does not pose a risk of bias in violation of due process.[240]

[239] Hamburger, *Is Administrative Law Unlawful?*
[240] McCall and Redish, "Due Process, Free Expression, and the Administrative State"

Reform proposals related to agency dynamics

Reform proposals aimed at addressing agency dynamics may concern, for example, the authority and appointment of administrative adjudicators, the mitigation of undue influence in the rulemaking process, or the development of agency staff.

The following reform proposals aim to address agency dynamics through action by the legislative or executive branches.

Legislative approaches

Legislative branch proposals that seek to address agency dynamics direct Congress to influence agency procedures through statutory changes. Congress, for example, can pass legislation to change agency adjudicators to Article III judges. Other proposals target regulatory practices, such as repealing the Congressional Review Act, limiting corporate influence in the rulemaking process, and limiting interaction between career agency staff and political appointees.

Transform agency adjudicators into adjuncts of Article III courts

This proposal aims to resolve a purported tension in administrative adjudication between political accountability for adjudicators and due process for individuals subject to adjudication. Law professor Christopher J. Walker discussed that tension in a law review article, writing that Congress could change agency adjudicators into adjuncts of courts established by Article III of the U.S. Constitution. The change, according to Walker, would ensure that political control of adjudicators through the president's appointment and removal power does not lead to partisan meddling in what should be neutral adjudication.[241]

[241] Walker, Christopher. "Constitutional Tensions in Agency Adjudication." *Iowa Law Review*. (2019)

Replace Article II adjudicators with Article III adjudicators

This proposal, also put forth by Walker, suggests that Congress could pass a law to replace agency adjudicators controlled by Article II of the U.S. Constitution with administrative law judges (ALJs) controlled by Article III of the U.S. Constitution. To achieve this end, Walker proposed that Congress could expand the size of the federal judiciary to also handle the administrative agency adjudication; Congress could pass a more limited law to replace existing administrative adjudicators who hold the power to exert significant regulatory control and issue civil monetary penalties with ALJs appointed by the president and confirmed by the U.S. Senate; and Congress could replace all of the nearly 2000 agency ALJs with ALJs subject to Article III requirements.[242]

Repeal the Congressional Review Act

This proposal suggests that the Congressional Review Act (CRA)—a law that allows Congress and the president to overturn a new federal agency rule and block the issuing agency from creating a similar rule in the future—allows Congress to bypass important procedural safeguards, such as the 60-vote cloture requirement in the Senate. Repealing the CRA, according to this proposal, would strengthen congressional deliberation and debate over administrative regulations.[243]

During the 115th Congress, Senator Cory Booker (D.-N.J.) and Representatives David Cicilline (D.-R.I.) and John Conyers (D.-Mich.) introduced the Sunset the CRA and Restore American Protections (SCRAP) Act. The bill would have repealed the CRA and would have allowed agencies to reissue rules that had been repealed under the CRA.

Apply the judicial review provisions of the Administrative Procedure Act to the president

Advocates of this proposal argue that the judicial review provisions of the Administrative Procedure Act (APA) should not only apply to administrative agencies, but also apply to the president. Law professor Alan Morrison claimed

[242] *Id.*
[243] "The Congressional Review Act: The Case for Repeal." Center for Progressive Reform. Accessed June 25, 2019.

that the proposal would require a careful balance to ensure that the president acts lawfully without limiting his discretion.[244]

Limit the role of the Small Business Administration Office of Advocacy

This proposal aims to limit corporate influence in the regulatory process by preventing the Office of Advocacy in the U.S. Small Business Administration from commenting during the notice-and-comment rulemaking process and from filing briefs during lawsuits.[245]

Create advocacy offices for more groups

This proposal would create offices of advocacy, like the one inside the Small Business Administration, for agencies like the U.S. Department of Labor, which would provide an official record of the costs and benefits of proposed regulations on workers.[246]

Amend the Paperwork Reduction Act (PRA) to increase public participation in rulemaking

This proposal aims to amend the PRA to allow agencies to gather voluntary feedback from the public with minimal procedural hurdles.[247]

Limit the ability of political appointees to interact with agency career scientific staff

This reform would have Congress pass new laws to insulate career civil service experts within agencies from interference by political appointees.[248]

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[244] Morrison, Alan. "Presidential Actions Should be Subject to Administrative Procedure Act Review." *Rethinking Admin Law: From APA to Z*. Accessed July 9, 2019.
[245] Block, Sharon. "Limiting Corporate Bias in Rulemaking." *Rethinking Admin Law: From APA to Z*. Accessed July 9, 2019.
[246] *Id.*
[247] Nayak, Rajesh. "Want More Public Participation in Rulemaking? Fix the Paperwork Reduction Act." *Rethinking Admin Law: From APA to Z*. Accessed July 9, 2019.
[248] McGarity, "Protecting Agency Science from Political Interference"

Pass the Regulatory Accountability Act

This reform would have Congress pass the Regulatory Accountability Act (RAA), which contains several provisions that would change how agencies function. "It would be the first major overhaul of the Administrative Procedure Act since it was enacted in 1946," according to Amanda Neely, general counsel for the bill's sponsor, U.S. Senator Rob Portman, speaking at a December 2019 summit sponsored by the U.S. Department of Justice.[249]

The RAA would require agencies to seek public input before drafting proposed rules; adopt requirements to mitigate the issuance of binding guidance; use the best reasonably available scientific data to formulate rules and consider regulatory alternatives; maximize the net benefits of new rules following rigorous cost-benefit analysis procedures; allow parties affected by major rules to request agency hearings to examine the facts the agency used to formulate the rules; and apply similar analytical requirements to both independent agencies and Executive Branch agencies.

Executive branch approaches

Executive branch approaches to address agency dynamics primarily aim to affect agency staff development and management. Creating an ROTC program for the civil service, opening more agency leadership positions to career staff, and increasing agency public relations budgets are examples of executive branch actions that affect agency dynamics.

Create an organization like the Federalist Society to train agency staff

This proposal argues that conservative opponents of the administrative state should create an organization like the Federalist Society and teach people how to work within the federal bureaucracy to restrain its activities.[250]

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[249] "Modernizing the Administrative Procedure Act." U.S. Department of Justice. Accessed October 13, 2020.
[250] Stone, Lyman."To Make America Great Again, The Right Needs To Learn How To Run Bureaucracies," *The Federalist*. June 13, 2019.

Reduce executive branch outsourcing

Advocates of this proposal see privatization of government functions as a source of abuse and fraud by private contractors. This proposal aims to increase agency independence by restricting the ability of agencies to outsource tasks to contractors.[251]

Create an ROTC program for the civil service

This proposal argues that a subsidized program that recruits and trains talented college students similar to ROTC for the military would improve the quality of the civil service.[252]

Remove layers of political appointees at agencies

Advocates of this reform proposal argue that the quality of the civil service would improve if there were more career opportunities within the leadership structure of federal agencies.[253]

Increase agency public relations budgets

Advocates of this reform proposal argue that bigger advertising budgets for agencies would help them attract and keep more talented employees.[254]

[251] Michaels
[252] *Id.*
[253] *Id.*
[254] *Id.*

Appendix I: Glossary of concepts, terms, and definitions related to the administrative state

Adjudication	In the context of administrative law, is defined by the Administrative Procedure Act as an "agency process for the formulation of an order." Adjudication proceedings include agency determinations outside of the rulemaking process that aim to resolve disputes between either agencies and private parties or between two private parties. The adjudication process results in the issuance of an adjudicative order, which serves to settle the dispute and, in some cases, may set agency policy.
Administrative Law	Refers to the laws, executive documents, and judicial decisions that concern the operation of government agencies as well as the regulations and decisions issued by such agencies. Legislative bodies authorize agencies to administer government programs, issue regulations through rulemaking, and conduct other activities such as licensing and adjudication.
Administrative patent judges (APJs)	A type of federal administrative adjudicator that decides cases before the Patent Trial and Appeal Board (PTAB), an administrative tribunal within the United States Patent and Trademark Office. APJs preside over special classes of administrative adjudication proceedings pertaining to the issuance of patents, including *inter partes* review.
Administrative State	A term used to describe the phenomenon of executive branch administrative agencies exercising the power to create, adjudicate, and enforce their own rules. Five pillars are key to understanding the main areas of debate about the nature and scope of administrative agency action: nondelegation, judicial deference, executive control of agencies, procedural rights, and agency dynamics.

Advice and Consent

Refers to the authority of the United States Senate to approve or reject a resolution of ratification of any treaty to which the United States is a proposed signatory, as well as to evaluate and confirm Presidential nominees to positions in the federal government. The Constitutional provisions for this power are found in Article II, Section 2.

Appointment and Removal Power

In the context of administrative law, refers to the authority of an executive to appoint and remove officials in the various branches vested in its authority to do so. In the context of the federal government, the Appointments Clause of the United States Constitution vests the president with the authority to appoint officers of the United States, including federal judges, ambassadors, and Cabinet-level department heads. Congress may authorize the president, the courts, or the heads of departments to appoint inferior officers, including federal attorneys, chaplains, and federal election supervisors, among other positions. The president has the authority to remove his appointees from office, but the heads of independent federal agencies can only be removed for cause.

Arbitrary-or-Capricious Test

A legal standard of review used by judges to assess the actions of administrative agencies. It was originally defined in a provision of the 1946 Administrative Procedure Act (APA), which instructs courts reviewing agency actions to invalidate any that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The test is most frequently employed to assess the factual basis of an agency's rulemaking, especially informal rulemakings.

***Auer* Deference**

In the context of administrative law, is a principle of judicial review of federal agency actions that requires a federal court to yield to an agency's interpretation of an ambiguous regulation that the agency has promulgated. In the context of *Auer* deference, courts uphold agency interpretations of ambiguous regulations unless those interpretations are plainly erroneous or inconsistent with the regulation. Unlike *Chevron* deference, which requires that a federal court defer to an agency's interpretation of a statute that the agency administers if the underlying statute is unclear and the agency's interpretation is deemed reasonable, *Auer* deference only applies to an agency's interpretation of its own unclear regulation

The United States Supreme Court upheld *Auer* deference but narrowed its scope in the 2019 case *Kisor v. Wilkie*.

***Brand X* Deference**

A federal deference doctrine that requires courts to defer to reasonable agency interpretations of statutes even when the interpretations conflict with prior court precedent. The doctrine is drawn from the 2005 United States Supreme Court case *National Cable & Telecommunications Association v. Brand X Internet Services*.

Chevmore

A term coined by law professor Kent Barnett in a 2015 law review article to refer to the judicial deference doctrines known as *Chevron* and *Skidmore*. Under *Chevron* deference, judges accept agency interpretations of ambiguous statutes. Under *Skidmore* deference, judges accept agency interpretations if the agency uses reasoning that is persuasive enough. *Chevmore* entails both deference doctrines. In his 2015 article, "Codifying *Chevmore*," professor Barnett argued that Congress recognized *Chevron* and *Skidmore* principles in part of the Dodd-Frank financial reform law passed in

2010. He argued that congressional recognition of those judicial doctrines supports the theoretical foundations of judicial deference doctrines and suggests ways to improve administrative law.

Chevron Deference/ The _Chevron_ Doctrine

An administrative law principle that compels federal courts to defer to a federal agency's interpretation of an ambiguous or unclear statute that Congress delegated to the agency to administer. The principle derives its name from the 1984 U.S. Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

Though it has been applied inconsistently across cases, justices had been reluctant to formally indicate any desire to formally abandon the doctrine. However, since 2015, "[i]f one counts *King v. Burwell*, all nine justices have at least once signed an opinion explicitly holding that Chevron should not apply in a situation where the administrative law textbooks would previously have said that it must apply."

Civil Servants

Sometimes referred to as government bureaucrats or career administrators, are individuals who are employed as a member of the civil service. In the context of administrative law, a civil servant is a civilian who is employed by a federal administrative agency. According to the United States Code § 2101, the federal civil service is made up of all unelected "positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." The competitive civil service, or classified civil service, is a subset of the civil service that is made up of civilian employees of the executive branch, including federal administrative agencies, and additional positions included by statute.

Civil Service

is made up of individuals other than military personnel who are employed by federal, state, or local government entities. These individuals, also known as civil servants, are sometimes referred to as government bureaucrats or career administrators. In the context of administrative law, a civil servant is a civilian who is employed by an administrative agency. In the context of the federal government, United States Code § 2101, defines the federal civil service as all unelected "positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." The federal civil service includes members of the competitive service, the excepted service, and the Senior Executive Service.

Code of Federal Regulations (CFR)

According to the U.S. Government Publishing Office (GPO), is "the codification of the general and permanent rules published in the Federal Register by the departments and agencies of the Federal Government." The CFR is organized into 50 subject matter titles that correspond to general areas of regulation, which are further subdivided into specific chapters, parts, and sections. The CFR is available to the public in print and digital formats.

Codify

In the context of administrative rulemaking, is a term used to describe the process of converting a federal agency's rule or regulation into law. Rules are codified through inclusion in a legal code, a government's official record of laws.

Comment Period

In the context of administrative rulemaking, is a timeframe during the informal rulemaking process in which members of the public can submit written feedback to a federal agency regarding a proposed rule. An agency may also choose to hold regulatory hearings, public meetings, or internet webcasts

during the comment period to solicit additional responses.

Competitive Service

Also known as the *classified service*, is a subset of the federal civil service that is made up of civilian government employees who are hired according to a merit-based selection process administered by the Office of Personnel Management (OPM). Their positions are standardized, or classified, according to a series of grade levels with associated compensation. Members of the competitive civil service are subject to federal civil service laws under Title 5 of the United States Code aimed at ensuring certain workplace protections, such as procedural protections against removal and discrimination.

Compliance Cost/Cost of Compliance

The expenses incurred by an organization or individual in the course of obeying legal and regulatory requirements. For example, when an individual files a personal income tax return, they incur compliance costs such as the time it takes to prepare a tax form or the fees they might pay to a professional tax preparer or advisor. Penalties for noncompliance, such as fines assessed to a firm found in violation of a regulation, are not considered compliance costs.

The *Congressional Record*

A published record of the proceedings of the United States Congress. It includes debates and remarks made by U.S. senators and representatives while on the floor of their respective houses, as well as bills, resolutions, motions, and vote tallies. The Government Publishing Office publishes the *Congressional Record* after each day that Congress is in session.

Coordination

In the context of administrative law, refers to the joint effort of more than one administrative agency

	to implement a congressional delegation of authority. Coordination arises when Congress delegates overlapping functions to multiple agencies or exercises fragmented delegation by dividing subtasks among separate agencies to implement a larger regulatory directive.
***De Novo* Review/ Plenary Review**	(Latin for "from the new"). In the context of administrative law, is a standard of judicial review in which a federal court examines an executive agency action, such as a regulation or an adjudicatory decision, without deference to a previous interpretation of the underlying statute in question.
Deference/Judicial Deference	Is a principle of judicial review. In the context of administrative law, deference applies when a federal court yields to an agency's interpretation of either a statute that Congress instructed the agency to administer or a regulation promulgated by the agency. The U.S. Supreme Court has developed several forms of deference in reviewing agency actions, including *Chevron* deference, *Skidmore* deference, and *Auer* deference.
Enabling Statute/Enabling Act	Legislation that confers new powers on an entity or permits something that was previously prohibited or not allowed.[1][2][3] In the context of administrative law, an enabling statute establishes the powers and responsibilities of a government agency.
Evidentiary Hearing	An administrative proceeding during which interested parties have the opportunity to present evidence in support of their position in a case. Though evidentiary hearings are not always required under the Administrative Procedure Act (APA), other statutes may require agencies to conduct evidentiary hearings during formal or informal adjudication. The APA has procedures for

conducting evidentiary hearings during formal adjudication. During informal adjudication, however, the procedures for evidentiary hearings range from trial-type hearings to reviews of written submissions.

Ex Parte Communication

In the context of administrative rulemaking, is a communication during the rulemaking process between a member of the public and a federal agency employee or administrative law judge regarding a proposed agency action. Open and transparent ex parte communications are permitted during the informal rulemaking process to encourage public participation. However, they are prohibited during the hearing phase of formal rulemaking, which is similar to a courtroom proceeding.

Excepted Service

A subset of the federal civil service that is made up of civilian positions in the federal government outside of the competitive service or the Senior Executive Service. Excepted service positions, also known as unclassified positions, require specialized expertise and are not subject to the merit-based selection process or grade-level classifications of the competitive service.

Executive Agency

In the context of administrative law, is a federal agency that is housed under the Executive Office of the President or one of the 15 Cabinet departments within the executive branch. According to the *Sourcebook of United States Executive Agencies*, a study produced by the Administrative Conference of the United States and Vanderbilt University, independent agencies with top officials who are nominated by the president and confirmed by the U.S. Senate also qualify as executive agencies. There is no definitive number of executive agencies.

Executive Branch Reorganization Authority

In the context of administrative law, refers to the executive's authority to reorganize the structure and responsibilities of executive agencies. Executive branch reorganization authority varies at the state and local level. At the federal level, the president has the independent authority to reorganize federal agencies within existing statutory limits. However, Congress must delegate reorganization authority in order for the president to implement statutory changes to federal agencies. Once the president presents a reorganization plan to Congress, members must issue a resolution of approval in order for the plan to take effect. Congress granted the first presidential reorganization authority to President Herbert Hoover (R) in 1932 and the most recent authority to President Ronald Reagan in 1984.

Executive Order

A formal command handed down from the head of the executive branch of government to the administrative agencies within the executive branch.

In the context of the federal government, the president issues executive orders to direct federal agency actions.[1] While executive orders are legally binding, they are not laws; they are instructions on how the executive branch ought to enforce the law. These instructions must line up with existing U.S. laws and the U.S. Constitution.

The *Federal Register*

A legal newspaper published every federal working day by the National Archives and Records Administration (NARA) and the Government Publishing Office (GPO). Each issue contains both proposed and finalized administrative agency rules and regulations, as well as policy statements and interpretations of existing rules. The newspaper also publishes presidential documents (such as executive orders) and notices of public hearings, grant applications, and administrative orders. It is

	used by government officials, attorneys, businesses, and other parties interested in the daily legal and administrative activities of the federal government.
Federalism	A system of government that divides power between member units and a common governing authority; the term can also be used to refer to the theory of or advocacy for this form of government. In the United States, the *federal* government is the common governing body to which the individual state governments belong.
Final Rule	In the context of administrative rulemaking, is a federal administrative regulation that advanced through the proposed rule and public comment stages of the rulemaking process and is published in the *Federal Register* with a scheduled effective date. The published final rule marks the last stage in the rulemaking process and includes information about the rationale for the regulation as well as any necessary responses to public comments.
Formal Rulemaking	In the context of administrative law, is a rulemaking process that enables federal agencies to amend, repeal, or create an administrative regulation. Unlike informal rulemaking, which calls for a comment period in which members of the public can submit written feedback on a proposed rule, formal rulemaking requires the consideration of a proposed rule during a trial-like hearing process.
Formalism/Legal Formalism	Can refer to both a descriptive theory of law and how judicial decisions are made as well as a form of judicial philosophy and legal reasoning. Legal formalism, both as a descriptive theory and a normative philosophy, views law as a distinct political institution determined by legal rules derived from authoritative sources, like constitutions and

	statutes. The term formalist can be used to describe a proponent of some form of formalism.
Functionalism/Legal Functionalism	Can refer to both a method of analyzing the law and explaining legal behavior as well as a method of interpreting constitutions and statutes. Legal functionalism explains and analyzes the law based on the functions that law and legal rules serve for society, the branches of government, interest groups, and other legal actors.
Guidance	A term in administrative law used to describe a variety of documents created by government agencies to explain, interpret, or advise interested parties about rules, laws, and procedures. Guidance documents clarify and affect how agencies administer regulations and programs. However, they are not legally binding in the same way as rules issued through one of the rulemaking processes of the Administrative Procedure Act (APA).
Hard Look Review	An application of the arbitrary-or-capricious test, which is a legal standard of review used by judges to assess the actions of administrative agencies. A provision of the 1946 Administrative Procedure Act (APA) instructs courts reviewing agency actions to invalidate any that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The test is most frequently employed to assess the factual basis of an agency's rulemaking, especially informal rulemakings.
Hybrid Rulemaking	In the context of administrative law, is a rulemaking process that enables federal agencies to amend, repeal, or create an administrative regulation. Hybrid rulemaking occurs when Congress requires an agency to expand on informal rulemaking procedures by incorporating certain elements of the

	formal rulemaking process. According to the Congressional Research Service, hybrid rulemaking generally results in greater public participation than informal rulemaking while remaining less rigid than formal rulemaking.
Immigration Judges (IJs)	A type of federal administrative adjudicator sometimes collectively referred to as administrative judges, or non-ALJ adjudicators. IJs are employed by the U.S. Department of Justice (DOJ) and preside over special classes of administrative adjudication proceedings pertaining to immigration matters, including removal proceedings.
Incorporation by Reference	The practice of declaring that the entire text of a referenced document is included in another document without reprinting the text of the cited document. The practice is used to save space in the text of government regulations and legal documents such as court pleadings, contracts, and wills. The referenced document may or may not be attached to the end of the incorporating document.
Independent Federal Agency	A term used to describe an executive agency that operates with some degree of autonomy from the executive branch. These agencies are generally headed by a commission or board made up of five to seven members.
Informal Rulemaking/ Notice-and-comment Rulemaking/ 553 Rulemaking	In the context of administrative law, is a rulemaking process that enables federal agencies to amend, repeal, or create an administrative regulation. Unlike formal rulemaking, which requires the deliberation of a proposed rule during a trial-like hearing process, informal rulemaking only requires the consideration of written public feedback on proposed rules submitted during a comment period.

Joint resolution of disapproval

A measure, introduced and considered by Congress under the terms of the Congressional Review Act of 1996, that overturns a new federal agency rule and blocks the issuing agency from creating similar rules in the future without specific authorization. "There is no real difference between a joint resolution and a bill" but joint resolutions are "generally used for continuing or emergency appropriations." As with all bills and joint resolutions, a joint resolution of disapproval must be passed by both houses of Congress in identical form and sent to the president for approval or passed over a presidential veto by two-thirds of the members of each house.

Jurispudence

In the context of administrative law, refers to the science or philosophy of law. The term is derived from the Latin *juris prudentia*, meaning "the study, knowledge, or science of law." There are four main types of jurisprudence and four primary schools of jurisprudence, each of which presents a distinct approach to examining the development and application of the law.

Legislative Veto

In the context of administrative law, refers to a resolution by a legislative body that invalidates an action by the executive branch. At the federal level, the legislative veto refers to a resolution by one house of Congress, both houses of Congress, or a congressional committee that nullifies an executive action. The legislative veto was declared unconstitutional at the federal level by the United States Supreme Court in the 1983 case *Immigration and Naturalization Service (INS) v. Chadha*. Despite the *INS v. Chadha* ruling, Congress has continued to approve new legislative veto provisions and honor informal legislative veto understandings with executive agencies, most often concerning committee oversight of agency spending.

Major Rule	When used in the context of regulatory review, refers to a rule issued by an agency that has had or may have a large impact on some aspect of the economy, such as prices, costs, competition, employment, or investment. It is a legal term defined by the Congressional Review Act (CRA). Under the CRA, there is a period of 60 legislative days, starting from the publication or submission of a final agency rule, during which Congress and the president can pass a joint resolution disapproving the rule. Regulations defined as major rules under the CRA are subject to a procedural review by the U.S. Government Accountability Office and may have their proposed effective dates delayed.
Midnight Rulemaking	The informal rules that federal agencies adopt at the end of presidential administrations. Scholars have found that since 1948 agencies have made rules at a higher rate between election day in November and inauguration day the following January.[1] Concerns about the quality of midnight regulations have led presidents, starting with Ronald Reagan, to issue regulatory freezes at the beginning of their administrations.
Negotiated Rulemaking/ Regulatory Negotiation/ Reg-Neg	In the context of administrative law, is a supplementary rulemaking process that allows federal agencies and stakeholders to build consensus on a proposed rule prior to beginning the informal rulemaking process. Negotiated rulemaking is generally used at the discretion of the agency with the goal of improving communication between agencies and affected parties, avoiding litigation, and increasing efficiency in the rulemaking process.
Nondelegation Doctrine/ Non-delegation Doctrine	A principle of constitutional and administrative law that holds that legislative bodies cannot delegate their legislative powers to executive agencies or private entities. In other words, lawmakers cannot

	allow others to make laws. In the context of the federal government, the doctrine comes from an interpretation of Article I of the United States Constitution and the separation of powers principle. Under a strict application of the nondelegation doctrine, Congress would not be allowed to let the president, administrative agencies, private corporations, or courts to pass laws.
OIRA Prompt Letter	In the context of administrative rulemaking, is a letter issued to a federal agency by the Office of Information and Regulatory Affairs (OIRA) that proposes a recommendation for new regulatory action. The letters are independently developed by OIRA and are not sent as response letters to ongoing agency rulemaking activity.
Organic Statute/Organic Act	In the context of administrative law, refers to legislation that creates government agencies and defines the original scope of their authority. It is a type of enabling statute .
Patent Examiners	A type of federal administrative adjudicator sometimes collectively referred to as administrative judges, or non-ALJ adjudicators. Patent examiners are employed by the Patent and Trademark Office at the U.S. Department of Commerce and preside over special classes of administrative adjudication proceedings pertaining to the issuance of patents.
Political Question Doctrine	Disputes that courts determine are best resolved by the politically accountable branches of government: the president and Congress. The traditional expression of the doctrine refers to cases that courts will not resolve because they involve questions about the judgment of actors in the executive or legislative branches and not the authority of those actors. For example, cases

	involving foreign policy or impeachment often raise political question concerns. Drawing lines between regular cases and political questions has been difficult over the course of American history because of differing opinions about the separation of powers among the branches of the federal government.
Pragmatism / Legal Pragmatism / Judicial Pragmatism	Both a descriptive theory of law and how judicial decisions are made as well as a form of judicial philosophy and legal reasoning. Legal pragmatism, both as a descriptive theory and a normative philosophy, views law as produced by specific social contexts and focuses on the consequences of judicial decisions. The term pragmatist can be used to describe a proponent of some form of pragmatism.
Precautionary Principle	An approach to environmental and health policy which says that preventive policy measures should be taken in cases where an activity or product may, in the view of some analysts, endanger human health or the environment, even if the risk has not been conclusively established. The principle holds that the proponent of a new activity or product has the burden of proof to demonstrate that the product or activity is safe.
Presidential Memorandum	An official document issued by the president in order to manage the federal government. Presidential memoranda achieve similar goals as executive orders, but are not required to be published in the *Federal Register* or include a justification of presidential authority.
Presidential Proclamations	Official announcements of policy from the president. Many proclamations are honorary or

	ceremonial, but some do carry the weight of law if they fall within the scope of presidential authority.
Procedural Due Process	In the context of the administrative state, refers to the protections for citizens against arbitrary actions by administrative agencies that threaten to deprive them of life, liberty, or property. Procedural due process specifically concerns the legal procedures administrative agencies are required to follow during rulemaking and adjudication proceedings. Substantive due process, on the other hand, involves the application of administrative law as it relates to individual life, liberty, or property interests.
Promulgate	In the context of administrative law, is a term used to describe the process of enacting an administrative final rule as an administrative regulation. A regulation is promulgated when a final rule is published in the *Federal Register* at the conclusion of the rulemaking process. Promulgated rules are then codified in the Code of Federal Regulations.
Proposed Rule / Notice of Proposed Rulemaking (NPRM)	A preliminary version of a prospective federal agency regulation. If an agency determines that a new regulation is necessary, the agency develops a proposed rule for publication in the *Federal Register*. After a period of public comment, the agency may determine to revise the proposed rule, abandon the proposal, or move forward to the final rule stage of the rulemaking process.
Publication Rulemaking	In the context of administrative law, is a rulemaking procedure that allows federal agencies to bypass the informal rulemaking process and directly implement certain rules through publication in the *Federal Register*. These rules, such as general agency policies, interpretive rules, and procedural rules, do not carry the force of law and cannot create

	or modify regulations. Instead, rules promulgated through publication rulemaking serve to provide guidance or clarification regarding the application of existing rules.
Regulatory Budget / Regulatory Budgeting	Policies that limit the total costs that a federal administrative agency may impose through rulemaking.
Regulatory Capture	In economics and political science,a situation in which a regulated entity or industry exerts a strong influence over the government bodies or officials tasked with regulating that entity or industry. A government agency involved in a situation of regulatory capture may be referred to as a captured agency. The concept was originally developed and applied by professors of political science and economics during the middle of the 20th century.
Regulatory Dark Matter	A term coined by policy analyst Clyde Wayne Crews Jr. to describe, in his words, "executive branch and federal agency proclamations and issuances such as memoranda, guidance documents, bulletins, circulars, announcements and the like with practical if not always technically legally binding regulatory effect."
Regulatory Impact Analysis (RIA)	A process used by regulators and other government officials to assess the anticipated costs and benefits of a regulation. The process involves comparing the estimated effects of a regulation with the estimated effects of other regulatory and non-regulatory options, including inaction. RIAs are used by the federal government to inform the rulemaking and regulatory review processes.
Regulatory Policy Officer(RPO)	A staff member of a federal administrative agency charged with overseeing the agency's rulemaking

process. The position was established in 1993 by President Bill Clinton's (D) Executive Order 12866, which directs RPOs to "be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations."

Regulatory Reform Officer (RRO)

A staff member of a federal administrative agency charged with overseeing the agency's presidential regulatory reform initiatives and serving as the chair of the agency's regulatory reform task force. The position was established in 2017 by President Donald Trump's (R) Executive Order 13777, which directed RROs to "ensure that agencies effectively carry out regulatory reforms, consistent with applicable law." President Joe Biden (D) abolished regulatory reform officer positions and regulatory reform task forces on January 20, 2021, via E.O. 13992.

Regulatory Review

In administrative law, processes used by Congress, the president, and the courts to oversee the rules, regulations, and other policies issued by federal agencies. Regulatory review may involve an examination of the content or effect of a rule, its estimated economic costs and benefits, or the adherence of the rule and the rulemaking agency to procedural requirements. Retrospective regulatory review, a type of regulatory review, is used to determine if existing regulations should be retained, modified, or repealed.

Rent Seeking/ Rent-seeking

A term used to refer to the practice of an individual or organization seeking an economic benefit through politics and public policy. Examples of rent-seeking behavior include lobbying for or otherwise supporting the implementation of a favorable regulation, subsidy, or tariff.

Retrospective Regulatory Review / Retrospective Review	Processes used to determine if existing regulations should be retained, modified, or repealed. Since the 1970s, beginning with the presidential administration of Jimmy Carter, the president and Congress have issued executive orders and enacted laws requiring federal agencies to conduct various kinds of retrospective regulatory review. The Office of Information and Regulatory Affairs (OIRA) is authorized under several presidential executive orders to review existing federal regulations. Some state governments have also undertaken retrospective review efforts.
Risk Assessment	A process used to determine the potential harm a situation poses and how likely people or the environment will be harmed in a given situation. Risk assessment is used by administrative rulemakers when approaching a perceived regulatory problem.
Rulemaking	In the context of administrative law, is a process that enables federal agencies to amend, repeal, or create an administrative regulation. The most common rulemaking process is informal rulemaking, which solicits written public feedback on proposed rules during a comment period. When required by statute, certain agencies must follow the formal rulemaking process, which incorporates a trial-like hearing in place of the informal comment period, or hybrid rulemaking, which blends specified elements of formal rulemaking into the informal rulemaking process.
Senior Executive Service (SES)	A subset of the federal civil service that is made up of civilian government positions outside of the competitive service or the excepted service. Members of the SES are recruited for their leadership and managerial experience, rather than technical expertise, and are hired to serve in senior

	executive roles below top-level presidential appointees within federal administrative agencies.
Separation of Powers	A system of government that distributes the powers and functions of government among separate and independent entities. In the United States, the federal government is divided into three branches: executive, legislative and judicial. The United States Constitution assigns each of these branches distinct powers and responsibilities. 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.
Significant Regulatory Action	A term used to describe an agency rule that has had or might have a large impact on the economy, environment, public health, or state or local governments. These actions may also conflict with other rules or presidential priorities. The term was defined by Executive Order 12866, which was issued in 1993 by President Bill Clinton. As part of its role in the regulatory review process, the Office of Information and Regulatory Affairs (OIRA) determines which rules meet this definition and are thus subject to its review.
***Skidmore* Deference**	In the context of administrative law, is a principle of judicial review of federal agency actions that applies when a federal court yields to a federal agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate persuasive reasoning. *Skidmore* deference was developed in the opinion for the 2000 U.S. Supreme Court case *Christensen v. Harris County* and named for the 1944 U.S. Supreme Court decision in *Skidmore v. Swift & Co.* Unlike *Chevron* deference, which requires a federal court to defer to an agency's interpretation of an ambiguous statute

	if the interpretation is considered reasonable, *Skidmore* deference allows a federal court to determine the appropriate level of deference for each case based on the agency's ability to support its position.
Standard of Review	In the context of administrative law, refers to the level of deference that a federal court affords to a lower court ruling or a determination from an administrative agency when reviewing a case on appeal. Courts reviewing an administrative action will consider whether the agency's action was arbitrary or capricious, an abuse of discretion, or contrary to law. In applying a standard of review, the reviewing court may either uphold, alter, or overturn the action under review.
Standing	A legal doctrine applied by Article III courts to determine whether a prospective plaintiff in a case has suffered a legal injury as the result of an action by the defendant. Plaintiffs must first demonstrate standing in order to obtain judicial review of their complaint. In the context of administrative law, plaintiffs seek standing in order to obtain judicial review of what they consider to be a harmful agency action. While some plaintiffs seek to appeal what they consider to be an adverse agency decision issued through the adjudication process, others seek to challenge what they consider to be a harmful agency policy choice determined through adjudication or rulemaking.
State Administrative Law Judge / State-level Administrative Law Judge	In the context of administrative law, refers to an official who presides over state-level agency adjudication proceedings. Similar to federal administrative law judges (ALJs), who preside over agency adjudication proceedings at the federal level, state ALJs adjudicate cases for state-level

administrative agencies. The scope and authority of state ALJs vary according to their respective states.

Statutory Authority

The powers and duties assigned to a government official or agency through a law passed by Congress or a state legislature. It is also known as a statutory grant of authority. At the federal level, Congress creates and authorizes agencies to administer government programs and enforce the law. Through statutory grants of authority from Congress, departments and agencies of the federal government obtain the authority to issue legally binding rules and resolve disputes through adjudication.

Substantive Law and Procedural Law

Terms used to describe and distinguish two different types of law:

1) Substantive law establishes the rights and obligations that govern people and organizations; it includes all laws of general and specific applicability;

2) Procedural law establishes the legal rules by which substantive law is created, applied and enforced, particularly in a court of law. In the United States, both of these types of law are derived from a variety of sources, including common law, constitutions, legislatively enacted statutes, and judicial decisions.

Sue and settle / Sue-and-settle

A term used to describe cases in which a federal agency is sued by an interested party, declines to defend itself in court, and negotiates a settlement with the plaintiff in a non-adversarial process. Through sue and settle, outside groups sue an agency in order to reach a settlement on terms favorable to the regulatory goals of both. These settlements may require the agency to issue a rule on a particular subject or within a certain timeline.

Sunset Provision / Sunset Clause / Sunset Law

A statute or provision of a statute establishing a date on which an agency, law, or benefit will expire without specific legislative action, usually in the form of formal reauthorization by Congress or a state legislature. Sunset provisions may be included within specific laws, while a number of states have implemented general sunset laws requiring regular review and reauthorization of government programs.

Unified Agenda of Federal Regulatory and Deregulatory Actions / Unified Regulatory Agenda / Unified Agenda

A semiannual publication of recently completed, ongoing, and anticipated federal regulatory actions, issued every spring and fall by the Regulatory Information Service Center (RISC). It combines regulatory agendas and other required reports and information from approximately 60 departments, agencies, and commissions of the federal government. The Unified Agenda is used by government officials, Congress, the president, regulated parties, and members of the general public.

United States Code (US Code / U.S.C)

A published collection of the laws of the United States federal government, prepared and released once every six years by the Office of the Law Revision Counsel (OLRC) of the U.S. House of Representatives. The U.S. Code is organized by subject matter and includes general and permanent public laws enacted by Congress; it excludes private laws, regulations, court decisions, treaties, and state and local laws.

United States Statutes at Large / Statutes at Large

A publication of the United States federal government, defined by the U.S. Government Publishing Office as "the permanent collection of all laws and resolutions enacted during each session of Congress." The Statutes at Large constitute legal

evidence of legislation enacted by Congress. The Office of the Federal Register prepares and publishes the Statutes at Large in collaboration with the Government Publishing Office.

Vermont Yankee II

A metaphor used by scholars and commentators of the administrative state to describe potential rulings from the United States Supreme Court that would stop undue lower court interference in the administrative process. The name comes from the *Vermont Yankee* case where the Court held that lower courts could not impose procedural requirements on administrative agencies beyond those specified in the Administrative Procedure Act (APA). Later observers of the administrative state have speculated about the Court issuing a "Vermont Yankee II" to rein in lower courts more and provide further guidance about how to conduct judicial review of agency actions.

***Voigt* Deference**

An administrative law principle that directs federal courts to defer to state agency interpretations of ambiguous federal regulations. A divided United States Court of Appeals for the Eighth Circuit developed *Voigt* deference in the court's November 2020 decision in *Voigt v. Coyote Creek Mining Company*.

Appendix II: Glossary of court cases related to the administrative state

A.L.A. Schechter Poultry Corp. v. United States was a case decided on May 27, 1935, by the United States Supreme Court in which the court invalidated Section 3 of the National Industrial Recovery Act of 1933 (NIRA) in violation of the nondelegation doctrine. Schechter—along with Panama Refining Co. v. Ryan— is one of two cases in which the United States Supreme Court has struck down legislation on nondelegation grounds. The case concerned Congress' delegation of legislative power to the executive branch to administer NIRA as well as the federal government's power to oversee intrastate commerce.

Abbott Laboratories v. Gardner was a case decided on May 22, 1967, by the United States Supreme Court holding that pre-enforcement review of administrative agency actions is appropriate when it is not prohibited by law or inconsistent with the intent of Congress. The case concerned drug labeling and advertising regulations issued by the Food and Drug Administration. The court reversed the ruling of the United States Court of Appeals for the 3rd Circuit, holding that the Federal Food, Drug, and Cosmetic Act did not prevent pre-enforcement review of the regulations in question. The court also held that the case satisfied the ripeness doctrine because it presented a case or controversy fit for judicial resolution.

AMG Capital Management, LLC v. Federal Trade Commission was a U.S. Supreme Court case about whether Congress gave the Federal Trade Commission (FTC) the power to request that a federal court order people who violate the Federal Trade Commission Act (FTCA) to pay equitable monetary relief in the form of restitution or disgorgement. In a unanimous ruling, the court held that Section 13b of the FTCA does not authorize the FTC to seek equitable monetary relief, nor does it authorize courts to award such relief. The court reversed the U.S. Court of Appeals for the 9th Circuit and remanded the case for further consideration.

Appalachian Power Company v. EPA was a case decided on April 14, 2000, by the United States Court of Appeals for the District of Columbia Circuit in which the court ordered the removal of a guidance document issued by the Environmental Protection Agency (EPA) because the document instituted a regulatory change without following the required rulemaking procedures.

Arnett v. Kennedy was a case decided on April 16, 1974, by the United States Supreme Court in which the court held that existing for-cause removal procedures satisfied procedural due process for a terminated federal employee. The decision ran counter to the court's expanding interpretation and application of the due process clause during the 1960s, which had broadened to include conditional property rights, such as federal employment, and statutory entitlements, such as welfare assistance. Instead, the court found that, though federal law prevented the employee from being terminated from his position except for cause, the prevailing statute limited his procedural protections and did not entitle him to a pre-termination hearing.

Association of Data Processing Service Organizations, Inc. v. Camp was a 1970 United States Supreme Court case that allowed more people to challenge actions of administrative agencies under the Administrative Procedure Act (APA). The case was part of a judicial trend toward allowing more parties to have standing to fight agencies in court. In this case, the court held that data processors could sue the comptroller of the currency and that Congress had not blocked courts from reviewing the comptroller's actions.

Auer v. Robbins was a 1997 U.S. Supreme Court case that created a principle known as Auer deference. Under Auer deference federal courts defer to agency interpretations of ambiguities in their own regulations. In the Auer case, a group of police sergeants and a police lieutenant sued members of the St. Louis Board of Police Commissioners alleging that the board failed to pay the policemen proper overtime wages under the Fair Labor Standards Act (FLSA). The board argued that the policemen were not entitled to overtime pay because the policemen fell under an exemption of the law pertaining to anyone employed in an executive, administrative, or professional capacity.

Azar v. Allina Health Services was a 2019 United States Supreme Court case about whether the process used by the U.S. Department of Health and Human Services (HHS) to change Medicare reimbursement rates complied with the notice-and-comment procedures of the Medicare Act. The case involved efforts started under former President Barack Obama to change how much reimbursement money hospitals receive for treating disproportionate numbers of low-income Medicare patients. The court ruled that HHS has to follow notice-and-comment procedures when it makes substantive changes to Medicare policy, which included the reimbursement formula at issue in the case.

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc. was a United States Supreme Court case applying hard look review to rules made by the Nuclear Regulatory Commission (NRC). The NRC had instructed nuclear

powerplant licensing boards to assume that permanently storing some nuclear waste would have no significant environmental impact. The National Environmental Policy Act (NEPA) required the NRC to consider the environmental impact of any major federal action. Petitioners challenged the way the NRC used the assumption about nuclear waste to keep those considerations from affecting whether to license specific powerplants.

Biestek v. Berryhill was a U.S. Supreme Court case involving whether the substantial evidence standard requires agency experts to share data used to deny a benefits claim. Under the substantial evidence standard, agencies have to base their actions on an established record that contains evidence a reasonable person might accept as supporting a conclusion. In this case, the court held that judges could uphold agency decisions even when agency experts refuse to provide requested data. The decision gave agencies more flexibility when establishing facts during a hearing and made it more difficult to challenge their conclusions.

BNSF Railway Company v. Loos was a 2019 U.S. Supreme Court case involving an agency interpretation of a law in which the court did not apply the *Chevron* doctrine. Under Chevron, federal courts must defer to a federal agency's interpretation of an ambiguous or unclear statute that Congress delegated to the agency to administer. The court held that "a railroad's payment to an employee for working time lost due to an on-the-job injury is taxable 'compensation' under the Railroad Retirement Act (RRTA)." The court reversed and remanded the ruling of the United States Court of Appeals for the 8th Circuit.

Bowles v. Seminole Rock & Sand Co. was a case decided on June 4, 1945, by the United States Supreme Court that established the Seminole Rock deference doctrine, also known as Auer deference. Under Seminole Rock deference, a federal court defers to an administrative agency's interpretation of a regulation that the agency administers. The case involved a dispute between Seminole Rock & Sand Co. and the Office of Price Administration (OPA) regarding a rule that established price ceilings pursuant to the Emergency Price Control Act of 1942.

Business Roundtable v. SEC was a 2011 case decided by the United States Court of Appeals for the District of Columbia Circuit that vacated (made void) a rule issued by the Securities and Exchange Commission (SEC). The rule was intended to change the way shareholders nominate and elect board members under various state corporation laws. The court held that the agency did not provide adequate cost-benefit analysis when it studied the potential economic impact of the rule. Without that analysis, the court held that the agency acted in an arbitrary-or-capricious manner and vacated the rule.

Butz v. Economou was a U.S. Supreme Court case decided in 1978 concerning the extent of federal administrative officials' personal immunity when exercising their discretionary authority. The court held that federal administrative officials performing discretionary functions are limited to qualified immunity while federal administrative officials who participate in agency adjudication proceedings are entitled to absolute immunity.

Caperton v. A.T. Massey Coal Co. was a 2009 United States Supreme Court case in which the court held that the 14th Amendment Due Process Clause requires judges to recuse themselves from cases that represent a probability of bias. The case involved Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refusing to recuse himself from a case involving a major donor to his election campaign. The range of conflicts of interest that require judges to recuse themselves expanded following the U.S. Supreme Court's ruling.

Carr v. Saul was a U.S. Supreme Court case that concerned whether people who were denied Social Security disability benefits by the Social Security Administration (SSA) lose the chance to challenge the appointment of SSA administrative law judges (ALJs) in court if they do not first present Appointments Clause challenges during agency proceedings. A unanimous U.S. Supreme Court ruled that issue exhaustion requirements, which say that people must bring up all legal objections in front of an agency before they can use those objections in federal court, did not apply to these Appointments Clause challenges.

Carter v. Carter Coal Company was a case decided on May 18, 1936, by the United States Supreme Court in which the court held that Congress cannot delegate legislative authority to private entities in violation of the nondelegation doctrine. The ruling also clarified that the intrastate production of goods was separate from interstate commerce and could not be regulated under the Commerce Clause.

The case concerned the Bituminous Coal Conservation Act of 1935, which coal producers claimed overstepped congressional regulatory authority under the Commerce Clause by regulating the production of goods before the goods entered interstate commerce.

Chevron U.S.A. v. Natural Resources Defense Council was a case decided on June 25, 1984, by the United States Supreme Court. The case is famous for establishing the extent to which a federal court, in reviewing a federal government agency's action, should defer to the agency's construction of a statute that the agency has been delegated to administer. This principle is commonly known as *Chevron* deference.

City of Chicago v. Atchison, Topeka & Santa Fe Railway Company (Chicago v. Atchison, T. & S.F. Ry. Co.) was a case decided on June 16, 1958, by the United States Supreme Court that broadened the class of parties who could receive standing to contest administrative actions under the Administrative Procedure Act (APA) to include those who had suffered an economic injury. The case concerned a municipal ordinance approved by the City of Chicago that aimed to regulate the operation of a motor carrier transfer service that shuttled passengers between train terminals in the city. The United States Supreme Court granted standing to a motor carrier service involved in the dispute—enlarging the scope of eligibility to receive standing in administrative challenges to include parties who had suffered economic harm.

Christensen v. Harris County was a 2000 United States Supreme Court case that narrowed the scope of Chevron deference. The case involved a U.S. Department of Labor (DOL) opinion letter, workplace regulations, and labor laws. The court ruled that Harris County was allowed to force its deputy sheriffs to take time off to avoid paying cash for overtime work. It also held that agency actions that do not carry the force of law, such as opinion letters and guidance have no binding effect on judges beyond their ability to persuade. The court also held that a DOL opinion letter cited in the case did not qualify for Auer deference because the labor regulations interpreted by the letter were clear and Auer only applies to interpretations of ambiguous regulations.

CIC Services v. Internal Revenue Service was a U.S. Supreme Court case involving when courts may accept lawsuits challenging the validity of regulations made by the Internal Revenue Service (IRS). The court ruled unanimously that the Anti-Injunction Act (AIA), a federal law that bars lawsuits to prevent the assessment or collection of taxes, does not apply to lawsuits challenging certain IRS regulations.

Citizens to Preserve Overton Park, Inc. v. Volpe was a case decided on March 2, 1971, by the United States Supreme Court that clarified the guidelines for judicial review of discretionary agency actions. The court held that the Administrative Procedure Act's exclusion of actions "committed to agency discretion" from judicial review was a narrow exception only to be used in cases where there was no law to apply. The case also marked the beginning of public interest litigation on environmental issues.

City of Arlington, Texas v. FCC was a 2013 United States Supreme Court case that upheld the idea that courts should defer to agencies when reviewing agency determinations about the extent of their own powers. At issue in the case was

whether the Federal Communications Commission (FCC) had legal authority to interpret part of the amended Communications Act of 1934. The majority held that under the Chevron deference doctrine the court should defer to the FCC's conclusion that the agency could interpret the act. Chief Justice John Roberts' dissent argued that the ruling expanded the Chevron doctrine and improperly empowered the administrative state.

Collins v. Yellen was a U.S. Supreme Court case about the extent of the president's removal powers and control of independent federal agencies. In a 7-2 decision, the court held that restrictions on the president's authority to remove the director of the Federal Housing Finance Agency violated the separation of powers. The court also rejected the argument that the FHFA exceeded its authority as conservator of Fannie Mae and Freddie Mac, the government-sponsored corporations that deal in mortgages.

Crowell v. Benson was a 1932 United States Supreme Court case that involved a claim for workers compensation, but ultimately decided the constitutionality of administrative adjudication and what deference federal courts owed the findings of administrative hearings at the time. The court held that agency adjudication was constitutional, but that a federal court must review factual questions related to agency jurisdiction or constitutional restrictions de novo, without deference. The case helped define the relationship between administrative agencies and federal courts for the time prior to the 1946 Administrative Procedure Act.

Daubert v. Merrell Dow Pharmaceuticals, Inc. was a United States Supreme Court case that recognized what kind of scientific testimony would be admissible in federal court following the passage of the Federal Rules of Evidence. The court ruled that expert witnesses must provide scientifically valid reasoning that applies to the facts of the case for their testimony to be admissible in court. This case arose when the parents of two children with serious birth defects sued Merrell Dow Pharmaceuticals, alleging that the birth defects developed because of an anti-nausea medication marketed by the company. The parents of the afflicted children cited eight experts who contested the results of previous studies that had concluded that the medication did not pose a risk of birth defects.

Department of Commerce v. New York was a case before the United States Supreme Court in which the court ruled that the Trump administration's decision to add a citizenship question to the U.S. census did not violate the Enumeration Clause or the Census Act, but that Commerce Secretary Wilbur Ross' rationale for the decision was inconsistent with the administrative record. The court held 5-4 to affirm in part, reverse in part, and remand the case to the agency for further proceedings.

The ruling intervened in the exercise of delegated congressional authority to invoke an exception for evaluating agency decisions beyond the scope of the administrative record on what it called a "strong showing of bad faith or improper behavior" drawn from the 1971 case *Citizens to Preserve Overton Park v. Volpe*. The dissenting justices argued that the exception opens a new legal avenue for challengers to contest administrative actions based purely on pretext.

Department of Homeland Security v. New York was a U.S. Supreme Court case involving judicial review of administrative agency decisionmaking and who has standing, the legal authority to challenge agency actions in federal court. At issue was whether the U.S. Department of Homeland Security (DHS) violated the Administrative Procedure Act (APA) and federal immigration law when it issued its 2019 final rule that expanded the definition of who qualifies as a public charge, a category of people inadmissible to the United States.

Department of Homeland Security v. Regents of the University of California was a 2020 U.S. Supreme Court case involving whether the U.S. Department of Homeland Security (DHS) lawfully ended the Deferred Action for Childhood Arrivals (DACA) program.

The court ruled that DHS's decision to end DACA did not properly follow the Administrative Procedure Act (APA). The majority opinion held that DHS failed to provide required analysis of all relevant factors associated with ending the program, thus making the agency's decision arbitrary and capricious under the APA. The court remanded the issue back to DHS, which can reattempt to end the program by providing a more thorough explanation for its decision.

Dominion Energy Brayton Point, LLC v. Johnson was a 2006 case decided by the United States Court of Appeals for the 1st Circuit that applied the *Chevron* doctrine to rule in favor of the Environmental Protection Agency (EPA) on a question of whether the agency had to conduct a formal hearing. The decision overturned circuit precedent from *Seacoast Anti-pollution League v. Costle* (1978). In the case of ambiguous statutes, the court ruled that agencies would be able to make reasonable decisions about whether to follow formal procedures during hearings. Dominion Energy involved whether the Clean Water Act required the Environmental Protection Agency (EPA) to provide a formal evidentiary hearing, as described by the Administrative Procedure Act (APA), during a certain permitting process.

Entergy Corp. v. Riverkeeper, Inc. was a 2008 case in which the United States Supreme Court ruled that the Environmental Protection Agency's (EPA) use of

cost-benefit analysis was permissible when formulating regulations under the Clean Water Act. The ruling is an example of the U.S. Supreme Court applying *Chevron* deference to a question about agency interpretations of law. The majority deferred to the EPA's determination that the Clean Water Act allowed it to consider site-specific cost-benefit variances to a broader set of regulations.

Environmental Protection Agency v. EME Homer City Generation was a 2014 United States Supreme Court case in which the court upheld an Environmental Protection Agency (EPA) rule in part by relying on *Chevron* deference. The EPA rule had set emission reduction standards for upwind states based on air quality standards in downwind states. The court held that the EPA made the rule using a reasonable interpretation of an ambiguous provision of the Clean Air Act.

Federal Communications Commission et al. v. Fox Television Stations, Inc., et al. was a United States Supreme Court case applying the arbitrary-or-capricious test to a policy change made by the FCC regarding how to enforce rules against indecency. The Court upheld the FCC order clarifying that the agency could consider single uses of expletives during broadcasts to be violations of indecency restrictions.

The ruling laid out a narrow scope for the arbitrary-or-capricious test. The decision also suggested that the U.S. Supreme Court would not require agencies to meet a higher standard to change existing policies than what the law requires agencies to meet to make an original policy.

FCC v. Prometheus Radio Project was a U.S. Supreme Court case about how courts should review the actions administrative agencies take. The case came out of 17 years of attempts by the Federal Communications Commission (FCC) to change regulations that govern ownership of broadcast media and involved whether the FCC adequately considered how its rule changes would affect broadcast media firms owned by women or minorities. The decision in favor of the FCC said federal agencies can pass the arbitrary-or-capricious test even if they do not have to have perfect empirical data before they make reasonable decisions.

Federal Trade Commission v. Standard Oil Company of California was a case decided on December 15, 1980, by the United States Supreme Court that helped define the scope of final agency actions subject to judicial review. The case involved a lawsuit against the Federal Trade Commission in which an oil company contested the agency's decision to initiate adjudication proceedings before those proceedings had concluded. The Supreme Court reversed the ruling of the Ninth Circuit Court of Appeals, holding that the decision to initiate proceedings was not

a final agency action under the Administrative Procedure Act and could not be judicially reviewed until adjudication was complete.

Field v. Clark was a case decided on February 29, 1892, by the United States Supreme Court concerning the constitutionality of a congressional delegation of authority to the President as part of the Tariff Act of 1890, commonly known as the Mckinley Tariff. Several import businesses, including Marshall Field & Co., the defendant, argued that the tariff represented an unconstitutional delegation of legislative power to the President. The Supreme Court ruled unanimously that the tariff was constitutional, since it only delegated discretionary power to the President.

Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment LLC was a 2020 U.S. Supreme Court case involving how the Appointments Clause found in Article II of the U.S. Constitution applies to U.S. territories. The court ruled 9-0 to uphold the practice of presidents appointing members of the Puerto Rican Financial Oversight and Management Board (FOMB) without confirmation by the U.S. Senate. Justice Stephen Breyer's majority opinion states that the Appointments Clause does not restrict the appointment process for "local officers that Congress vests with primarily local duties."

Food and Drug Administration v. Brown and Williamson Tobacco Corporation was a case decided on March 21, 2000, by the United States Supreme Court. It involved an attempt by the Food and Drug Administration to regulate tobacco under the Food, Drug, and Cosmetic Act. Several tobacco companies challenged these regulations on the grounds that the FDA did not have jurisdiction to regulate tobacco. The Supreme Court ruled 5-4 that the FDA did not have jurisdiction to regulate tobacco products, affirming the decision of the United States Court of Appeals for the 4th Circuit. The decision halted the FDA's attempts to regulate tobacco. It also established new guidelines for courts exercising deference under the *Chevron* doctrine.

Free Enterprise Fund et al. v. Public Company Accounting Oversight Board et al. was a United States Supreme Court case that said the two-tiered, for-cause limitation on the removal of members of the Public Company Accounting Oversight Board was an unconstitutional violation of the separation of powers. The case was argued on December 7, 2009, as part of the Supreme Court's October 2009 term.

General Electric Company v. Environmental Protection Agency was a case decided on May 17, 2002, by the United States Court of Appeals for the District of Columbia Circuit in which the court held that a guidance document issued by the

Environmental Protection Agency (EPA) concerning toxic waste disposal constituted an unlawfully promulgated regulation. The EPA claimed that the document demonstrated an interpretive rule—a form of agency guidance that seeks to clarify an existing regulation. The court disagreed and ruled that the document bound private parties with the force of law and was, therefore, a regulation that the agency had promulgated without adhering to its hybrid rulemaking requirements under the Administrative Procedure Act (APA) and the Toxic Substances Control Act (TSCA).

Goldberg v. Kelly was a United States Supreme Court case that treated welfare benefits as a form of property. As such, the Court ruled that state and federal government agencies could only remove welfare benefits after a pre-termination hearing at which recipients could confront witnesses before an impartial adjudicator.

Guerrero-Lasprilla v. Barr was a 2020 U.S. Supreme Court case concerning the authority of courts to review agency decisions in deportation cases involving people convicted of crimes. The court ruled 7-2 that lower courts may review whether immigration agencies properly applied relevant laws to a given set of facts in such cases. In 2005, Congress limited judicial review in those cases to questions of law and the court concluded that whether courts should extend the time limit for immigrants to challenge their removal from the United States fell within the definition of a question of law.

Gundy v. United States was a 2019 U.S. Supreme Court case about whether the U.S. attorney general's authority to issue regulations under the Sex Offender Registration and Notification Act (SORNA) violated the nondelegation doctrine. The court upheld the delegation of power to the attorney general in SORNA, saying that it did not violate the doctrine. In a concurring opinion, Justice Alito wrote that he would be willing to reconsider the way the court approaches nondelegation cases if a majority of the justices agreed.

Heckler v. Chaney was a 1985 United States Supreme Court case about whether an administrative agency's decision not to engage in enforcement proceedings was subject to judicial review under the Administrative Procedure Act (APA). The court ruled that such agency refusals were not subject to judicial review unless a statute stated otherwise.

Humphrey's Executor v. United States was a case decided on May 27, 1935, by the United States Supreme Court. It involved the power of the president to remove a member of the Federal Trade Commission for reasons other than the ones explicitly stated in the Federal Trade Commission Act. The Supreme Court

ruled unanimously that the president could not remove a commissioner for a cause other than those listed in the act, which were "inefficiency, neglect of duty, or malfeasance in office."

Immigration and Naturalization Service (INS) v. Chadha was a case decided on June 23, 1983, by the United States Supreme Court in which the court held that the legislative veto was an unconstitutional violation of the United States Constitution's separation of powers. The case concerned a legislative veto provision of the Immigration and Nationality Act that permitted one house of Congress to invalidate deportation rulings.

Iowa League of Cities v. Environmental Protection Agency was a case decided on March 25, 2013, by the United States Court of Appeals for the 8th Circuit in which the court held that certain guidance documents issued by the Environmental Protection Agency (EPA) constituted unlawfully promulgated regulations. The EPA claimed that the documents demonstrated interpretive rules—a form of agency guidance that seeks to clarify existing regulations. The court disagreed and ruled that the documents promulgated new regulations by establishing prohibitions against previously permissible activities without adhering to the rulemaking requirements of the Administrative Procedure Act (APA). Moreover, the court held that the agency had exceeded its regulatory authority under the Clean Water Act.

J.W. Hampton Jr. & Company v. United States was a case decided on April 9, 1928, by the United States Supreme Court that concerned the president's exercise of a congressional delegation of authority to adjust tariff rates to protect American business. The Supreme Court affirmed the ruling of the United States Court of Customs Appeals, holding that Congress did not violate the Constitution because the authority and discretion delegated to the president was not legislative in nature.

Kisor v. Wilkie was a United States Supreme Court case that upheld the idea that courts should defer to an agency's reasonable interpretation of its own ambiguous regulations in limited circumstances. The case explored whether the court should overturn *Bowles v. Seminole Rock & Sand Co.* (1945) and *Auer v. Robbins* (1997), both of which figure prominently in the expansion of the administrative state. The court decided to keep those precedents but articulated the narrow range of agency regulatory interpretations that qualify for Auer deference. Justice Neil Gorsuch was critical of the court for not overturning Auer, warning in a concurring opinion joined by Justices Thomas, Alito, and Kavanaugh that it would likely have to address the issue again in the near future.

Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania was a 2020 United States Supreme Court case following a series of cases about the legality of agency rules providing religious and moral exemptions to the contraception mandate created under the Affordable Care Act, commonly known as Obamacare. The court, in an opinion written by Justice Clarence Thomas, ruled 7-2 that the Departments of Health and Human Services, Labor, and the Treasury had the legal authority to create the exemptions and that they followed proper procedures under the Administrative Procedure Act (APA).

The majority addressed the other issue in the case, whether the Little Sisters of the Poor had standing to defend the exemptions, in a footnote saying that they did.

The court sent the case back to the Third Circuit to reconsider its decision to rule against the Little Sisters of the Poor.

Liu v. Securities and Exchange Commission was a 2020 United States Supreme Court case in which the court limited the Securities and Exchange Commission's (SEC) power to ask courts to issue disgorgement orders, which require wrongdoers to give up money gathered illegally. Though Liu challenged the agency's authority to seek disgorgement orders, the Supreme Court's decision did not ban the practice entirely. The court ruled that the SEC could ask for disgorgement orders that are less than or equal to the wrongdoer's net profit if the money goes to repaying any victims.

Lucia v. SEC was a case decided on June 21, 2018, by the United States Supreme Court that held that the administrative law judges of the Securities and Exchange Commission (SEC) are Officers of the United States subject to the Appointments Clause.

Marshall v. Barlow's Inc. was a case decided on May 23, 1978, by the United States Supreme Court in which the court ruled 5-3 that the Fourth Amendment prohibited inspectors of the Occupational Health and Safety Administration (OSHA) from conducting warrantless searches of business premises. The court affirmed the decision of the United States District Court for the District of Idaho and held that Section 8(a) of the Occupational Safety and Health Act of 1970 was unconstitutional.

Massachusetts v. Environmental Protection Agency is a 2007 United States Supreme Court ruling that found that carbon dioxide and greenhouse gases are air pollutants under the Clean Air Act and can be regulated by the Environmental Protection Agency (EPA). The court ruled that a federal agency does not have the

discretion to cite policy preferences as a reason for refusing to regulate certain issues under its purview.

Mathews v. Eldridge was a case decided on February 24, 1976, by the United States Supreme Court in which the court held that the termination of disability benefits prior to an evidentiary hearing does not violate an individual's due process rights under the Constitution. In the case opinion, the court developed a three-part balancing test, known as the Mathews v. Eldridge test, for lower courts to apply when determining whether or not an individual has received due process during administrative proceedings.

Merck Sharp & Dohme Corp. v. Albrecht was a case argued before the Supreme Court of the United States on January 7, 2019. The court vacated and remanded the ruling of the United States Court of Appeals for the 3rd Circuit, holding that the question of agency disapproval should be decided by a judge, not a jury.

Michigan v. Environmental Protection Agency was a U.S. Supreme Court case decided in June 2015. The court declined to apply *Chevron* deference—a principle of judicial review that directs a federal court to defer to a federal agency's reasonable interpretation of an ambiguous statute that the agency administers. Instead, the court concluded that the U.S. Environmental Protection Agency (EPA), which is tasked with regulating hazardous air pollutants under the Clean Air Act, unlawfully and unreasonably refused to consider costs when it initially decided to regulate mercury and other hazardous air pollutants from coal- and oil-fired power plants.

Mistretta v. United States was a case decided on January 18, 1989, by the United States Supreme Court in which the court upheld a delegation of authority to the United States Sentencing Commission that allowed the commission to issue sentencing rules. The plaintiff argued that the Sentencing Reform Act of 1984 violated the nondelegation doctrine because it unlawfully delegated rulemaking authority to the commission. The court affirmed the ruling of the United States District Court for the Western District of Missouri, holding that the guidelines put forth in the act were sufficiently specific and detailed to keep the commission's powers within constitutional bounds.

Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company was a United States Supreme Court case that endorsed hard look review. The Court held that agencies must examine relevant data and articulate a satisfactory explanation for its actions in order to pass the arbitrary-or-capricious test required by the Administrative Procedure Act.

Myers v. United States was a case decided on October 25, 1926, by the United States Supreme Court in which the court held that the power to remove appointed officials, with the exception of federal judges, rests solely with the president and does not require congressional approval.

National Federation of Independent Business v. Sebelius was a United States Supreme Court case regarding the individual mandate and Medicaid expansion provisions of the Affordable Care Act (ACA). Under the provisions in question, the ACA required most individuals to maintain minimum health insurance coverage and required states to expand their Medicaid programs or else lose federal Medicaid funds. The court upheld the individual mandate as a legitimate exercise of Congress' Article I taxing power and found that state participation in the Medicaid expansion program was voluntary.

National Labor Relations Board v. Noel Canning Company was a case decided on June 26, 2014, by the United States Supreme Court in which the court defined the scope of the Recess Appointments Clause of the U.S. Constitution. The court held that the president can only make recess appointments during recesses that occur between formal sessions of the United States Senate.

National Labor Relations Board v. Sears, Roebuck & Company was a case decided on April 28, 1975, by the United States Supreme Court in which the court clarified whether certain types of agency memoranda are subject to the Freedom of Information Act. The case concerned a Freedom of Information Act request by Sears, Roebuck & Co. for the National Labor Relations Board (NLRB) to disclose memoranda related to certain labor disputes.

The United States Supreme Court ruled 8-0 that memoranda explaining decisions of the general counsel to file unfair labor practices complaints fell under exemption 5, while those explaining decisions not to file complaints did not qualify for the exemption. The court also clarified whether memoranda qualified for exemption 5 in several other circumstances. The court declined to rule on the question of exemption 7, remanding part of that question to the United States Court of Appeals for the District of Columbia Circuit.

Oil States Energy Services v. Greene's Energy Group was a United States Supreme Court case that upheld the constitutionality of certain administrative adjudication proceedings performed by the U.S. Patent and Trademark Office's Patent Trial and Appeal Board (PTAB). Oil States Energy Services argued that the board functioned as an unconstitutional administrative tribunal—rather than a court established under Article III of the U.S. Constitution—with the authority to invalidate existing patents through a process known as inter partes review. The

court disagreed, holding that Congress had legislatively authorized the PTAB to perform and decide certain patent reviews.

Panama Refining Co. v. Ryan was a case decided on January 7, 1935, by the United States Supreme Court. It involved the constitutionality of Section 9(c) of Title I of the National Industrial Recovery Act, which had authorized the President to "prohibit the transportation in interstate and foreign commerce of petroleum" in excess of state quotas, and to publish violators with fines and jail time. The Supreme Court reversed the ruling of the United States Court of Appeals for the 5th Circuit and ruled that Section 9(c) represented an unconstitutional delegation of legislative power to the President.

PDR Network, LLC v. Carlton & Harris Chiropractic Inc. was a 2019 U.S. Supreme Court case concerning judicial deference and judicial review. The court questioned whether the Administrative Orders Review Act (Hobbs Act) can require district courts to defer to agency interpretations of laws and prevent judicial review in private enforcement actions.

The case examined a 2006 Federal Communications Commission (FCC) final order interpreting a provision of the Telephone Consumer Protection Act (Telephone Act) and its interplay with the Hobbs Act, which grants federal courts of appeal exclusive jurisdiction to review final orders issued by the FCC and other specified agencies. The court vacated and remanded the judgment of the United States Court of Appeals for the 4th Circuit and instructed that court to answer preliminary questions about the nature of the FCC's final order and the availability of judicial review.

Perez v. Mortgage Bankers Association was a case decided on March 9, 2015, by the United States Supreme Court in which the court clarified that federal agencies must engage in the rulemaking process in order to make changes to regulations that carry the force of law. Agencies are not required to follow rulemaking procedures, however, when making changes to interpretive rules and other guidance documents. The case concerned a change in the interpretation of an "administrative employee" for the purposes of determining overtime exemptions under the Fair Labor Standards Act (FLSA).

Salinas v. United States Railroad Retirement Board is a U.S. Supreme Court case involving the scope of judicial review of actions taken by administrative agencies. The court ruled that a choice by the U.S. Railroad Retirement Board not to reopen a decision to deny Manfredo Salinas benefits was a final agency action subject to judicial review. In the majority opinion, the court said that review of agency

reopening decisions will be limited to weighing whether the agency decision was an abuse of discretion.

Schweiker v. McClure was a 1982 United States Supreme Court case involving procedural due process standards in administrative adjudication. Procedural due process encompasses the government's obligation, under the Fifth and Fourteenth Amendments, to ensure that legal procedures are carried out in a fair and just manner. The U.S. Supreme Court overturned the ruling of the United States District Court for the Northern District of California, holding that the adjudication did not violate due process requirements.

Securities and Exchange Commission v. Chenery Corp. was a case decided on June 23, 1947, by the United States Supreme Court. It is often called *Chenery II*, since it was a rehearing of an earlier case of the same name involving the same parties. The original case, decided on February 1, 1943, is thus commonly called *Chenery I*. *Chenery I* involved a purchase by the management of the Federal Water Service Corporation of preferred stock in that company, which they then attempted to convert to common stock following a reorganization. The Securities and Exchange Commission refused to approve the plan, arguing that the officers of the company "were fiduciaries and were under a duty not to trade in the securities of that company during the reorganization period." The Supreme Court ruled 5-3 in *Chenery I* that the SEC's order could not be sustained and remanded the case for reevaluation. In that opinion, the Court also established the Chenery Doctrine, that "a court reviewing an agency action may only affirm that action on the grounds articulated by the agency when it made its decision." The SEC then reformulated its order, which was invalidated by the United States Court of Appeals for the District of Columbia Circuit and advanced to the Supreme Court as *Chenery II*. In *Chenery II*, the Supreme Court ruled 5-2 that the SEC's order was valid, reversing the Court of Appeals.

Seila Law v. Consumer Financial Protection Bureau was a 2020 U.S. Supreme Court case that examined the extent of the president's appointment and removal powers. In a 5-4 decision, the court ruled that the structure of the Consumer Financial Protection Bureau (CFPB), an independent agency that exercised executive powers and had a director protected from at-will termination by the president, was unconstitutional. The majority held that restrictions on the president's ability to remove such agency leaders violated separation of powers principles by limiting presidential control of executive power. The decision only affected part of the agency's structure without eliminating the agency altogether by striking down the Dodd-Frank Act, the 2010 law that created the agency.

The court nullified the judgment of the 9th Circuit and sent the case back for further proceedings to see whether Seila Law would have to obey a CFPB document request.

Skidmore v. Swift & Co. was a case decided on Dec 4, 1944, by the United States Supreme Court. It involved rules governing overtime pay under the Fair Labor Standards Act of 1938 and the degree to which courts should defer to administrative agencies in the interpretation of laws. The Supreme Court ruled unanimously that no public or case law precluded waiting time from also being considered working time, reversing the ruling of the Fifth Circuit Court of Appeals.

Smith v. Berryhill was a case argued before the Supreme Court of the United States on March 18, 2019, during the court's 2018-2019 term. The case concerned the Social Security Administration's Appeals Council. On May 28, 2019, the court reversed and remanded the ruling of the United States Court of Appeals for the 6th Circuit, holding that the Social Security Administration Appeals Council's dismissal of a claim for untimeliness permits judicial review in a U.S. federal court under 42 United States Code §405(g).

Smyth v. Ames was a case decided on March 7, 1898, by the United States Supreme Court in which the court declined to uphold a delegation of authority to an administrative agency to establish railroad rates. Instead, the court developed its own rate-setting formula. The court held that regulated industries were constitutionally entitled to earn a fair return on the fair value of their property.

In his opinion, Justice John M. Harlan put forth a formula for rate determinations that did not rely on input from agency administrators. Supporters claimed that Harlan's decision protected due process rights under the Fourteenth Amendment, but critics argued that the ruling demonstrated judicial overreach into an area of expertise that was better administered by agency specialists. The United States Supreme Court adhered to the Smyth v. Ames precedent until the ruling was overturned in the 1944 case *Federal Power Commission v. Hope Natural Gas Company*.

Swift & Co. v. United States was a case decided on January 30, 1905, by the United States Supreme Court. It involved the regulation of the meat industry under the Commerce Clause. The Supreme Court held that the meat industry at large constituted interstate commerce and that joint efforts by six meatpacking companies, known as the "Beef Trust" or the "Big Six," to fix prices and obtain reduced transportation rates violated the Commerce Clause.

Thole v. U.S. Bank, N.A. was a 2020 U.S. Supreme Court case about when people have standing, the legal right to sue in court. The case concerned the Employee

Retirement Income Security Act of 1974 (ERISA) and whether plaintiffs had standing, the legal right to sue. The court held that the plaintiffs, James Thole and Sherry Smith, did not have standing because they would still receive the same amount of monthly benefits regardless of the case's outcome.

Thryv, Inc. v. Click-To-Call Technologies, LP (originally *Dex Media Inc. v. Click-To-Call Technologies, LP*) is a 2020 U.S. Supreme Court case that limits judicial review of agency decisions. The court ruled that the Leahy-Smith America Invents Act (AIA) prevents courts from reviewing U.S. Patent and Trade Office interpretations of a law governing time limits for challenging patents. Citing previous decisions, the court decided that Congress intended for courts to stay out of agency decisions about when to begin patent reviews. Justice Ginsburg wrote for the majority that the AIA was supposed to weed out bad patent claims and that allowing challenges like this one would undermine Congress' objective. Following the ruling, the Patent Office has more flexibility to decide how strictly to follow the legal time limit placed on patent challenges.

Timbs v. Indiana was a case argued before the Supreme Court of the United States on November 28, 2018. The case concerned the Eighth Amendment's ban on excessive fines.

In a unanimous ruling, the court vacated and remanded the opinion of the Indiana Supreme Court, holding that "the Eighth Amendment's Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause."

Trump v. Hawaii was a U.S. Supreme Court case during the October 2017 term. The court's decision affirmed the president's authority over immigration matters and national security. Reviewing immigration law and presidential authority over immigration, Chief Justice John Roberts observed that "[t]he Proclamation does not exceed any textual limit on the President's authority" and that the president has "broad discretion to suspend the entry of aliens into the United States."

United States v. Arthrex Inc. was a U.S. Supreme Court case about whether the power of administrative patent judges (APJs) in the U.S. Patent and Trademark Office (PTO) was consistent with the requirements of the Appointments Clause in Article II of the U.S. Constitution. The court ruled that the Appointments Clause does not allow APJs to decide patent disputes without more supervision from higher agency officials. The court also ruled to sever the parts of the patent statute that prevented the director of the PTO from reviewing APJ decisions unilaterally. The three parts of the court's decision attracted different majorities from among the justices.

United States v. Lopez was a case decided on Apr 26, 1995, by the United States Supreme Court. It involved a high school student's conviction for bringing a concealed weapon to his school and the constitutionality of the Gun-Free School Zones Act of 1990. The Supreme Court ruled 5-4 that the act, which claimed to draw authority from the federal government's power to regulate interstate commerce, overstepped the boundaries of that power and was unconstitutional.

United States v. Mead Corporation was a case decided on June 18, 2001, by the United States Supreme Court. The case narrowed the scope of *Chevron* deference, which requires a federal court to defer to a federal agency's interpretation of a statute that the agency administers, to only include agency regulations and adjudicatory actions. The case reserved other agency actions for consideration under *Skidmore* deference, which allows a federal court to yield to an agency's interpretation of a statute administered by the agency according to the agency's ability to demonstrate persuasive reasoning. The case involved the tariff classification of a product imported by the Mead Corporation according to a ruling letter issued by the United States Customs Service.

United States v. Western Pacific Railroad Co. was a case decided on December 3, 1956, by the United States Supreme Court. It involved the tariff rates paid by the federal government to three railroad companies hired to transport steel canisters filled with napalm gel for the United States Army. The government had originally paid the tariff rates for incendiary bombs, but later argued that those shipments should have been classified under the lower rate for gasoline canisters, since there were no fuses or burster charges present. The Court of Claims ruled in favor of the companies; upon review, the Supreme Court ruled 6-1 to reverse that ruling and remand it. The Supreme Court held that when dealing with technical matters, such as the construction of explosives and the scheduling of railroad tariff rates, courts should consult administrative agencies in order to obtain facts relevant to the case before issuing a decision.

Universal Camera Corporation v. National Labor Relations Board was a case decided on February 26, 1951, by the United States Supreme Court. It involved the effect of the Administrative Procedure Act and the Taft-Hartley Act on the judicial review procedures of the Court of Appeals. The Supreme Court ruled unanimously to vacate the judgment of the United States Court of Appeals for the 2nd Circuit, since that court had not used the findings of the National Labor Relations Board's trial examiner in its review of the Board's order. The Supreme Court then remanded the case to the Appeals Court for reconsideration.

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. was a 1978 case involving the ability of courts to impose additional procedural requirements on government agencies beyond what the Administrative Procedure Act (APA) required. The Supreme Court reversed the ruling of the D.C. Circuit Court of Appeals, holding that the court had exceeded its authority under the APA.

The court set a clear and definitive precedent that courts could not impose additional procedural requirements on agencies, they could only evaluate existing procedures. Furthermore, judicial review could only concern itself with the agency's success or failure to conform to the established procedures, it could not invalidate an action simply because the court was "unhappy with the result reached."

Wayman v. Southard was a case decided on February 12, 1825, by the United States Supreme Court. It involved the rights of state legislatures to set rules and procedures in federal courts within their states. In this instance, the Kentucky state legislature attempted to bring the procedures governing writs of execution in federal courts in line with those in Kentucky state courts. The United States Court for the Seventh Circuit and District of Kentucky sent the question to the Supreme Court for certification. Chief Justice John Marshall authored the opinion, in which he argued that federal courts are not subject to the statutes of state legislatures. Furthermore, Congress' delegation of the power to create procedures for federal courts to those courts themselves did not represent an unconstitutional delegation of legislative power.

Weyerhaeuser Company v. United States Fish and Wildlife Service was a 2018 United States Supreme Court case that questioned whether the Endangered Species Act (ESA) granted the U.S. Fish and Wildlife Service (FWS) the authority to designate private land as critical habitat for the dusky gopher frog and whether the agency's interpretation and critical habitat designation was subject to judicial review. The court held 8-0 to vacate the decision from the United States Court of Appeals for the 5th Circuit and remand the case—directing the Fifth Circuit to consider in the first instance whether the FWS' critical habitat designation was arbitrary, capricious, or an abuse of discretion.

The case provided a potential opportunity for the U.S. Supreme Court to address judicial deference to agency interpretations of the statutes that they administer, including the Fifth Circuit's application of *Chevron* deference in the case. However, the U.S. Supreme Court declined to consider judicial deference in its decision. Instead, the court's ruling centered on judicial review—the court held that FWS' action to designate critical habitat was reviewable, but it relied on a

narrow reading of the relevant statute and did not define the limits of what constitutes discretionary agency actions, which are not subject to judicial review in all cases.

Whitman v. American Trucking Associations Inc was a case decided on February 27, 2001, by the United States Supreme Court. It involved the Environmental Protection Agency's ability to issue National Ambient Air Quality Standards under Sections 108 and 109 of the Clean Air Act. The Supreme Court reversed the ruling of the D.C. Circuit Court of Appeals, holding that the EPA's interpretation of Sections 108 & 109 of the Clean Air Act did not unconstitutionally delegate legislative power to the EPA, though the EPA's implementation policy for the 1997 Ozone NAAQS had been unlawful. The Supreme Court ordered the EPA to develop a new implementation policy, which would then be subject to judicial review.

Wickard v. Filburn was a case decided on November 9, 1942 by the United States Supreme Court. It involved a farmer who was fined by the United States Department of Agriculture and contested the federal government's authority to regulate his activities. The Supreme Court reversed the decision of a United States District Court, holding that the farmer's activities were within the scope of Congress' power to regulate because they could have an effect on interstate commerce by affecting national wheat prices and the national wheat market.

Wiener v. United States was a case decided on June 30, 1958, by the United States Supreme Court. It involved the power of the President to dismiss officers from Executive Branch entities outside the core Executive departments. Applying the precedent set in Humphrey's Executor v. United States, the court ruled unanimously that the President did not have the power to remove a member of the War Claims Commission, since it was an independent federal agency. This reversed the decision of the Court of Claims, which had ruled against Wiener.

Appendix III: legislation related to the administrative state

The Administrative Procedure Act (APA) is a federal law passed in 1946 establishing uniform procedures for federal agencies to propose and issue regulations, a process known as rulemaking. The APA also addresses policy statements and licenses issued by agencies and provides for judicial review of agency adjudications and other final decisions.[1][2][3] Prior to the APA, there were no federal laws governing the general conduct of administrative agencies.

The Antiquities Act is a federal law regulating historic landmarks and giving the President the power to create national monuments. In contrast to a national park, which must be created by an act of Congress, the Antiquities Act empowers the President to create a national monument through a presidential proclamation.

The Civil Service Reform Act of 1978 (CSRA) is legislation that implemented changes to the structure, management, and employment practices of the federal civil service. The CSRA reaffirmed the merit system selection process of the competitive civil service, decentralized administrative personnel functions, and codified a number of changes to workforce practices and procedures, including the prohibition of certain discriminatory practices. *The New York Times* described the CSRA as the "most sweeping change in Federal personnel regulations since the Civil Service Act of 1883."

The Clayton Antitrust Act is a federal law passed in 1914 amending the Sherman Antitrust Act and expanding the federal government's power to regulate trusts and monopolies.

The Communications Act of 1934 is a federal law that aims "to provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes." The Act established regulations for the communications industry, including radio, telephone, and telegraph communications. The Act also created the Federal Communications Commission (FCC), an independent federal agency tasked with overseeing and regulating the communications industry. Since its enactment, the Act has been updated to reflect the development of new technologies, such as television and the internet.

The Congressional Review Act (CRA) is a federal law passed in 1996 that affords Congress a check on the rulemaking activities of federal agencies. The law

creates a review period during which Congress, by passing a joint resolution of disapproval later signed by the president, can overturn a new federal agency rule and block the issuing agency from creating a similar rule in the future.

The Electronic Freedom of Information Act (E-FOIA) Amendments of 1996 are a set of federal amendments to the Freedom of Information Act (FOIA) of 1966. These amendments required administrative agencies to include electronic documents within the scope of FOIA requests, to endeavor to respond to FOIA requests electronically, and to create digital reading rooms in order to provide the public with electronic access to commonly requested agency documents.

The Federal Food, Drug, and Cosmetic Act of 1938 (APA) is a federal law passed in 1938. The law established quality standards for food, drugs, medical devices, and cosmetics manufactured and sold in the United States. The law also provided for federal oversight and enforcement of these standards. The Federal Food, Drug, and Cosmetic Act of 1938 replaced the Pure Food and Drug Act of 1906, which was the first law to provide for federal regulation of the food and pharmaceutical industries.

The Federal Housekeeping Statute, codified at Title 5, Section 301 of the United States Code, is a provision of federal law authorizing the heads of federal executive departments to issue regulations concerning their departments' internal governance and operations.

The Federal Trade Commission Act (FTCA) is a federal law passed in 1914 establishing the Federal Trade Commission (FTC). It was signed into law by President Woodrow Wilson on September 26, 1914. The five-member body was created to protect consumers by preventing what it deemed unfair methods of competition between businesses and deceptive business practices. The FTC investigates “price-fixing agreements and other unfair methods of competition;” prohibits “mergers and price discriminations that threatened to lessen competition;” investigates “deceptive practices such as false advertising;” and regulates “packaging and labeling of consumer goods to prevent deception,” according to the National Archives and Records Administration. It replaced the Bureau of Corporations.

The Freedom of Information Act (FOIA) is a federal law that established policies allowing American citizens to access previously unreleased information maintained by federal government agencies. The law defines agency records subject to full or partial disclosure, outlines mandatory disclosure procedures, and grants nine exemptions to the statute.

The Independent Offices Appropriations Act (IOAA) of 1952 is a federal law that provided federal agencies with the authority to assess user fees or charges through administrative regulations. Agencies that had not been granted specific statutory authority to assess user fees prior to the law were permitted to assess user fees under the authority of the IOAA. The legislation was signed into law by President Harry Truman (D) on July 6, 1952.

The Information Quality Act (IQA), also referred to as the Data Quality Act (DQA), is a federal law passed in 2000 requiring the U.S. Office of Management and Budget (OMB) to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." The IQA amended the Paperwork Reduction Act of 1995.

The Interstate Commerce Act is a federal law passed in 1887 that created the Interstate Commerce Commission and gave it the power to regulate interstate railroads. The Commission was the first independent federal agency and existed until its abolition in 1995.

The Legislative Reorganization Act of 1946 (LRA) was federal legislation that reorganized the congressional committee structure in the largest system overhaul since its initial organization during the First Congress. The legislation reduced the number of standing congressional committees, eliminated jurisdictional overlap between committees, and established professional support staff for committees and members of Congress, among other provisions.

The National Emergencies Act (NEA) is a federal law passed in 1976 that established the ground rules for how the federal government responds to national emergencies. The NEA ended or changed earlier legal grants of emergency authority to the president.

The National Labor Relations Act of 1935, also known as the Wagner Act, is a federal law that established the legal right for workers to join labor unions and enter into collective bargaining agreements with their employers. The Wagner Act also strengthened the National Labor Relations Board (NLRB) to oversee collective bargaining activities, resolve labor disputes, ensure transparent union elections, and prohibit workplace discrimination against union members, among other provisions. The bill was signed into law by President Franklin D. Roosevelt (D) as part of the New Deal on July 5, 1935.

The Paperwork Reduction Act (PRA) of 1980 is a federal law that established policies to minimize the burden on individuals, private entities, and local

governments associated with information collection requests from federal government agencies. The bill also aimed to improve the quality of information collected by the government and minimize the costs associated with information management. The PRA was signed into law by President Jimmy Carter on December 11, 1980.

The Pendleton Act is a federal law passed in 1883 reforming the civil service and establishing the United States Civil Service Commission. It ended the *spoils system* of political patronage and established competitive examinations for hiring civil servants.

The Privacy Act of 1974 or simply Privacy Act is a federal law passed in 1974 regulating the collection and use of personal information by federal executive agencies

The Regulation Freedom Amendment is a proposed amendment to the United States Constitution. It would require a majority vote from both houses of Congress in order to implement a new regulation if a quarter of the members of either House declared their opposition. The amendment is similar to the REINS Act but could apply to all regulations instead of just major ones.

The Regulatory Flexibility Act (RFA) is a federal law passed in 1980 requiring federal agencies to consider the effects of regulation on small entities such as small businesses, nonprofit organizations, and local governments. The RFA directed agencies to consider regulatory alternatives for small entities and to consider their input and needs during the rulemaking process. The RFA applies to almost all agencies of the federal government; agencies involved in military and foreign affairs activities are exempted.

The Regulations from the Executive in Need of Scrutiny Act, also known as the REINS Act, is a legislative proposal designed to restrain the administrative state by amending the Congressional Review Act (CRA) of 1996. Under the CRA, Congress has the authority to issue resolutions of disapproval to nullify agency regulations. The REINS Act would broaden the CRA not only to allow Congress to issue resolutions of disapproval, but also to require congressional approval of certain major agency regulations before agencies could implement them. The REINS Act defines major agency regulations as those that have financial impacts on the U.S. economy of $100 million or more, increase consumer prices, or have significant harmful effects on the economy. Former Wisconsin Governor Scott Walker signed the first state-level REINS Act into law on August 9, 2017.

The Sherman Antitrust Act is a federal law passed in 1890 that banned trusts and monopolies in industry, authorizing the federal government to dissolve trusts and break up monopolies as part of its power to regulate interstate commerce.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) is a federal law passed in 1996 providing for greater participation of small businesses in the federal regulatory process. It amended and expanded the Regulatory Flexibility Act (RFA) of 1980, which required federal agencies to consider the effects of regulation on small entities such as small businesses, nonprofit organizations, and local governments. The SBREFA permitted judicial review of alleged agency violations of the RFA. It also established requirements for federal agencies to provide small businesses with compliance assistance and opportunities for input in the regulatory process.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) is the law that empowers the Federal Emergency Management Agency (FEMA) to respond to disasters.

The Truth in Regulating Act (TIRA) was a federal law passed in 2000 establishing a pilot program for the U.S. Government Accountability Office (GAO) to conduct independent reviews of economically significant rules proposed and issued by federal agencies. Under TIRA, the chair or ranking member of a congressional committee with jurisdiction over the issuing agency could submit a review request to GAO.

The Unfunded Mandates Reform Act (UMRA) of 1995 is a federal law that aimed to minimize the imposition of federal unfunded mandates on businesses and state, local, and tribal governments. The UMRA also sought to improve communication and collaboration between the federal government and local entities. President Bill Clinton (D) signed the UMRA into law on March 22, 1995.

Appendix IV: Executive orders related to the administrative state

Executive Order 12044: Improving Government Regulation was a presidential executive order issued by President Jimmy Carter (D) in 1978. E.O. 12044 was the first executive order that directed agencies to review existing regulations and determine whether or not they should be retained, modified, or repealed—a process known as retrospective regulatory review. Though the order was revoked by President Ronald Reagan (R) in 1981, it established a precedent for retrospective regulatory review that has been altered and amended by subsequent presidential administrations.

E.O. 12044 aimed "to adopt procedures to improve existing and future regulations," according to its stated purpose. The order required agencies to (1) develop simple, efficient regulations, (2) identify proposed rules with an associated significant impact, (3) issue economic impact statements for economically significant proposed rules, and (4) review existing agency regulations to determine whether or not the regulations had achieved policy goals. President Carter signed E.O. 12044 on March 23, 1978.

Executive Order 12291: Federal Regulation was a presidential executive order issued by President Ronald Reagan (R) in 1981 that required executive agencies to perform a cost-benefit analysis for all major rules and centralized the regulatory review process by directing the Office of Management and Budget (OMB) to serve as a central clearinghouse for the review of agency regulations. The order aimed "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations," according to the stated purpose. E.O. 12291 was revoked in 1993 by President Bill Clinton (D), who issued a modified regulatory review program under E.O. 12866.

Executive Order 12498: Regulatory Planning Process is a presidential executive order issued by President Ronald Reagan (R) in 1985 that aimed to ensure that federal agencies developed regulations consistent with the goals and policies of the presidential administration. The order required federal administrative agencies to submit annual regulatory plans to the Office of Management and Budget (OMB) for preclearance prior to initiating the rulemaking process. E.O 12498 remained in effect under President George H.W. Bush (R), but was revoked by President Bill Clinton (D) in 1993.

Executive Order 12866: Regulatory Planning and Review is a presidential executive order issued by President Bill Clinton in 1993 establishing principles and processes to govern federal agency rulemaking, regulatory planning, and regulatory review. It was designed to guide presidential oversight of regulatory and administrative policy. E.O. 12866 outlines a rulemaking philosophy for federal agencies, describes several processes for coordinating regulatory planning among agencies, and provides for the incorporation of public comments into the rulemaking process and the public release of documents related to the regulatory review process. The order also authorizes the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) to review what it considers all new and preexisting significant regulatory actions.

Executive Order 13132: Federalism is a presidential executive order issued by President Bill Clinton (D) in 1999 that aims to limit the issuance of administrative regulations with associated federalism implications. The order defines federalism implications as "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The order also aims to support the policies of the Unfunded Mandates Reform Act, a federal law signed by Clinton in 1995 that established policies aimed at minimizing the imposition of unfunded mandates from the federal government on businesses and state, local, and tribal governments. E.O. 13132 revoked President Ronald Reagan's (R) 1987 executive order on federalism, E.O. 12612, while preserving the majority of Reagan's language.

Executive Order 13258: Amending Executive Order 12866 on Regulatory Planning and Review was a presidential executive order issued by President George W. Bush (R) in 2002 that adjusted existing regulatory planning and review procedures. E.O. 13258 amended President Bill Clinton's (D) Executive Order 12866 by removing the role of the vice president from its regulatory planning and review procedures. Bush's order also made several changes to the group of presidential regulatory policy advisers listed in E.O. 12866. In 2009, President Barack Obama (D) revoked E.O. 13258 and another of Bush's regulatory executive orders when he issued Executive Order 13497.

Executive Order 13422: Further Amendment to Executive Order 12866 on Regulatory Planning and Review is a presidential executive order issued by President George W. Bush (R) in 2007 that aimed to strengthen presidential oversight of the regulatory review procedures established in 1993 by President Bill Clinton (D) under E.O. 12866. The Congressional Research Service stated that

E.O. 13422 contained "the most significant changes to the presidential regulatory review process since 1993."

Bush's order made several alterations to E.O. 12866, including new requirements for agencies to identify specific market failures associated with proposed regulations, to provide monetary values for the total estimated impacts of annual regulatory plans, and to obtain approval from the Office of Information and Regulatory Affairs (OIRA) for guidance documents with associated significant economic impacts, among other provisions. President Barack Obama (D) revoked E.O. 13422 in 2009.

Presidential Executive Order 13497: Revocation of Certain Executive Orders Concerning Regulatory Planning and Review is a presidential executive order issued by President Barack Obama (D) in 2009 that rescinded two executive orders issued by his predecessor, President George W. Bush (R). Bush's orders, E.O. 13258 of 2002 and E.O. 13422 of 2007, were amendments to President Bill Clinton's (D) Executive Order 12866 of 1993.

Bush's amendments adjusted the list of presidential regulatory policy advisers, increased regulatory review requirements, and increased the review powers of regulatory policy officers (RPOs) and the Office of Information and Regulatory Affairs (OIRA). Obama's E.O. 13497 revoked both of Bush's amendments, returned the language of E.O. 12866 to its original form, and directed the heads of the Office of Management and Budget (OMB) and the executive departments to rescind all regulations, guidelines, and other policies implementing Bush's orders.

Executive Order 13563: Improving Regulation and Regulatory Review is a presidential executive order issued by President Barack Obama (D) in 2011 that aims "to improve regulation and regulatory review," according to its stated purpose. The order seeks to streamline overlapping or duplicative agency regulations, reaffirm the cost-benefit analysis provisions of President Bill Clinton's (D) E.O. 12866, and improve public participation in the rulemaking process, among other provisions.

Presidential Executive Order 13610: Identifying and Reducing Regulatory Burdens is a presidential executive order issued by President Barack Obama (D) in 2012 that set out policies and procedures for federal agencies to conduct retrospective review of existing regulations. It was a follow up to Obama's 2011 E.O. 13563 which, among other things, required agencies to develop retrospective review plans and submit them to the Office of Information and Regulatory Affairs.

Executive Order 13765: Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal is a presidential executive order issued by President Donald Trump (R) in January 2017 that confirmed the intention of the Trump administration to repeal the Affordable Care Act (ACA). Pending repeal, the order gave broad authority to the head of the Department of Health and Human Services (HHS) and the heads of other federal agencies to grant waivers, deferrals, or exemptions in an effort to delay provisions of the ACA that could result in what the administration described as fiscal or regulatory burdens on individuals, providers, or government entities.

Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs was a presidential executive order issued by President Donald Trump (R) in January 2017 that established a regulatory budget by instituting a regulatory cap on federal agencies for the remainder of fiscal year 2017, including a requirement that agencies eliminate two old regulations for each new regulation issued. The order also put forth procedures for the Office of Management and Budget (OMB) to determine annual regulatory cost allowances for agencies beginning in fiscal year 2018.

President Joe Biden (D) revoked E.O. 13771 on January 20, 2021, via E.O. 13992.

Executive Order 13772: Core Principles for Regulating the United States Financial System was a presidential executive order issued by President Donald Trump (R) in 2017 that put forth a set of standards, or core principles, to guide regulatory actions that impact the financial industry. The core principles aimed to foster economic growth, advance the domestic and international competitiveness of American companies, and streamline financial regulations, among other priorities. The order also directed the secretary of the U.S. Department of the Treasury to provide the president with periodic reports reviewing how the order's core principles were reflected in existing financial regulations, recommending regulatory improvements, and noting any actions taken to promote the core principles.

President Joe Biden (D) revoked E.O. 13772 on February 24, 2021, via E.O. 14018.

Executive Order 13777: Enforcing the Regulatory Reform Agenda was a presidential executive order issued by President Donald Trump (R) in February 2017 that established new regulatory reform officers and regulatory reform task forces to oversee the implementation of E.O. 13771, Trump's first executive order issued in January 2017 that instituted regulatory caps and allowances for federal agencies. The order broadly aimed "to lower regulatory burdens on the American people by implementing and enforcing regulatory reform," according to the text.

President Joe Biden (D) revoked E.O. 13777 on January 20, 2021, via E.O. 13992.

Executive Order 13781: Comprehensive Plan for Reorganizing the Executive Branch is a presidential executive order issued by President Donald Trump (R) in March 2017 that instructed the director of the U.S. Office of Management and Budget (OMB) to develop and propose a plan to reorganize the federal executive branch and eliminate unnecessary agencies and programs. The order instructed the OMB director to seek input on the proposal from the public and from agency officials, and to consider features such as the redundancy of an agency or program and whether the costs of a government program outweigh its benefits.

Executive Order 13783: Promoting Energy Independence and Economic Growth was a presidential executive order issued by President Donald Trump (R) in March 2017 that established the Trump administration's policy for energy regulation. The order stated that "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." E.O. 13783 also called for an agency-wide review of all rules related to domestic energy development and rescinded a number of regulations concerning energy and climate policy.

President Joe Biden (D) revoked E.O. 13783 on January 20, 2021, via E.O. 13990.

Executive Order 13789: Identifying and Reducing Tax Regulatory Burdens is a presidential executive order issued by President Donald Trump (R) in April 2017 that established a policy calling for tax regulations to provide taxpayers with clarity and guidance. The order also required the U.S. Department of the Treasury to conduct a regulatory review of all tax regulations issued since January 1, 2016, and to develop recommendations aimed at streamlining regulations and reducing the regulatory burden for taxpayers. The Treasury Department, in consultation with the U.S. Office of Management and Budget (OMB), was also required to review and reconsider existing exemptions for certain tax regulations from the regulatory review process.

Executive Order 13836: Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining was a presidential executive order issued by President Donald Trump (R) in May 2018 that aimed to streamline processes for federal collective bargaining negotiations. The order put forth negotiating timelines and established the Interagency Labor Relations Working Group, among other provisions. The executive action broadly sought to "assist

executive departments and agencies in developing efficient, effective, and cost-reducing collective bargaining agreements," according to the order.

President Joe Biden (D) revoked E.O. 13957 on January 22, 2021, via E.O. 14003.

Executive Order 13837: Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use was a presidential executive order issued by President Donald Trump (R) in May 2018 that aimed to minimize taxpayer costs associated with federal collective bargaining activities. The executive action sought to "ensure that taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest," according to the order.

President Joe Biden (D) revoked E.O. 13957 on January 22, 2021, via E.O. 14003.

Executive Order 13839: Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles was a presidential executive order issued by President Donald Trump (R) in May 2018 that aimed to streamline the discipline and dismissal processes for poor-performing federal employees. The executive action sought to advance "the ability of supervisors in agencies to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections," according to the order.

President Joe Biden (D) revoked E.O. 13839 on January 22, 2021, via E.O. 14003.

Executive Order 13843: Excepting Administrative Law Judges from the Competitive Service is a presidential executive order removing administrative law judges (ALJs) from the hiring requirements of the competitive civil service and reclassifying them as part of the excepted service. It was issued by President Donald Trump (R) in July 2018.

The reclassification of ALJs as members of the excepted service allows agency heads to directly appoint ALJs and select candidates who meet specific agency qualifications.
The order was issued in light of the United States Supreme Court's June 2018 decision in *Lucia v. SEC*, which held that ALJs are officers of the United States who must be appointed by the president, the courts, or agency heads rather than hired by agency staff.

Executive Order 13875: Evaluating and Improving the Utility of Federal Advisory Committees was a presidential executive order issued by President Donald Trump

(R) on June 14, 2019, that directed agencies to eliminate non-statutory advisory committees whose missions have been accomplished, whose subject matter has become obsolete, whose primary functions have been assumed by another entity, or whose costs outweigh benefits.

President Joe Biden (D) revoked E.O. 13875 on January 20, 2021, via E.O. 13992.

Executive Order 13891: Promoting the Rule of Law Through Improved Agency Guidance Documents was a presidential executive order issued by President Donald Trump (R) on October 9, 2019, that aimed to prohibit federal administrative agencies from issuing binding rules through guidance documents.

President Joe Biden (D) revoked E.O. 13891 on January 20, 2021, via E.O. 13992.

Executive Order 13892: Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication was a presidential executive order issued by President Donald Trump (R) on October 9, 2019, that aimed to curb what the order referred to as administrative abuses by requiring federal administrative agencies to provide the public with fair notice of regulations.

President Joe Biden (D) revoked E.O. 13892 on January 20, 2021, via E.O. 13992.

Executive Order 13893: Increasing Government Accountability for Administrative Actions by Reinvigorating Administrative PAYGO was a presidential executive order issued by President Donald Trump (R) on October 10, 2019, that aimed to ensure that "agencies consider the costs of their administrative actions, take steps to offset those costs, and curtail costly administrative actions."

President Joe Biden (D) revoked E.O. 13893 on January 20, 2021, via E.O. 13992.

Executive Order 13924: Regulatory Relief To Support Economic Recovery was a presidential executive order issued by President Donald Trump (R) on May 19, 2020, that aimed to support economic recovery from the coronavirus pandemic by directing federal agencies to remove regulatory barriers to economic activity and adhere to a set of fairness principles in adjudication and enforcement.

President Joe Biden (D) revoked E.O. 13772 on February 24, 2021.

Executive Order 13957: Creating Schedule F in the Excepted Service was a presidential executive order issued by President Donald Trump (R) on October 21,

2020, that directed agencies to reclassify federal civil service employees in the competitive service who serve in policy-related roles as members of the excepted service.

President Joe Biden (D) revoked E.O. 13957 on January 22, 2021, via E.O. 14003.

Executive Order 13960: Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government is a presidential executive order issued by President Donald Trump (R) on December 3, 2020, that established principles for the use of artificial intelligence in the federal government and put forth a process to implement the principles through common agency guidance.

Executive Order 13979: Ensuring Democratic Accountability in Agency Rulemaking was a presidential executive order issued by President Donald Trump (R) on January 18, 2021, that aimed to increase executive control of agencies by preventing career staff at agencies from authorizing regulations.

President Joe Biden (D) revoked E.O. 13979 on February 24, 2021, via E.O. 14018.

The Executive Order on Protecting Americans From Overcriminalization Through Regulatory Reform is a presidential executive order issued by President Donald Trump (R) on January 18, 2021, that aims to require agencies to notify regulated people when violating regulations carries criminal penalties.

Executive Order 13990: Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis is a presidential executive order issued by President Joe Biden (D) on January 20, 2021, that aims "to improve public health and protect our environment," according to the order. E.O. 13990 featured the following agency directives:

- The order required all agency heads to review any agency activity under the Trump administration that would be considered to be inconsistent with the Biden administration's environmental policies and consider suspending, revising, or rescinding those actions.
- The order required the secretary of the interior, in consultation with other government actors, to consider whether it would be appropriate to restore the boundaries and conditions of Bears Ears National Monument, Grand Staircase-Escalante National Monument, and Northeast Canyons and Seamounts Marine National Monument to those that existed under the Obama administration.
- The order required the secretary of the interior to place a temporary moratorium on the federal oil and gas leasing program in the Arctic

National Wildlife Refuge and review the program for environmental impacts.
- The order established an Interagency Working Group on the Social Cost of Greenhouse Gases tasked with developing and promulgating social costs of carbon, nitrous oxide, and methane for agencies to apply during cost-benefit analysis.
- The order revoked the March 2019 presidential permit for the construction and operation of the Keystone XL pipeline.
- The order revoked a series of executive orders, presidential memoranda, and draft agency guidance concerning environmental policy issued during the Trump administration, including Executive Order 13783, which established the Trump administration's policy for energy regulation.

Executive Order 13992: Revocation of Certain Executive Orders Concerning Federal Regulation is a presidential executive order issued by President Joe Biden (D) on January 20, 2021, that repealed what the administration considers to be regulatory policies that hindered the federal government's ability to confront the coronavirus pandemic, economic recovery, racial justice, and climate change.

Executive Order 14003: Protecting the Federal Workforce is a presidential executive order issued by President Joe Biden (D) on January 22, 2021, that revoked executive orders issued by former President Donald Trump (R) that the Biden administration claims undermined the merit system protections of the federal civil service and hindered collective bargaining activities. The order also directed the head of the U.S. Office of Management and Budget (OMB) to provide recommendations to the president to promote a $15/hour minimum wage for federal employees.

Executive Order 14018: Revocation of Certain Presidential Actions is a presidential executive order issued by President Joe Biden (D) on February 24, 2021, that revoked a series of executive orders and presidential memoranda issued by former President Donald Trump (R), including two executive orders related to regulatory practice.

Executive Order 14025: Worker Organizing and Empowerment is a presidential executive order issued by President Joe Biden (D) on April 26, 2021. The order established a task force that aims "to encourage worker organizing and collective bargaining," according to the order.