

REGULATION AND THE SEPARATION OF POWERS

ARIEL BENDOR* & SHARON YADIN*

ABSTRACT

This essay argues that current regulatory roles of administrative agencies, Congress, and courts are not fully consistent with separation of powers principles. Regulatory agencies often hold all three governmental functions, including judicial-like punitive sanctioning powers and comprehensive legislative powers for setting major regulations, with almost no supervision by other branches of government. Courts tend to grant de facto immunity from judicial review to many regulatory actions of administrative agencies under different types of deference doctrines, while Congress holds merely supervisory veto power over regulations. Executive regulatory functions are also misallocated, as decisions in specific cases with particular applicability are sometimes made by the legislative branch via enactment of laws, rather than by agency action. This essay suggests an innovative theory, both descriptive and normative, of the relationship between regulation and the separation of powers, bringing together constitutional law, administrative law, and regulation scholarship.

I. INTRODUCTION

The growth of the modern regulatory state has led to substantial misalignment between constitutional separation of powers and regulatory mechanisms. Within the regulatory state framework, agencies which are part of the executive branch often hold all three governmental functions,¹ including quasi-judicial punitive sanctioning powers,² and comprehensive general legislation powers for setting major regulations, with nearly no supervision by other branches of government.³ Courts tend to grant de facto immunity from judicial review to many regulatory actions of administrative agencies under different types of deference doctrines, while Congress holds only the drastic measure of supervisory veto over regulations.⁴ Executive regulatory functions are oftentimes misallocated; regulatory orders that have only particular and not general applicability are intermittently shaped by the

✉ . Dean of the School of Graduate Studies and Frank Church Professor of Legal Research, Bar-Ilan University.

*. Associate Professor, Peres Academic Center Law School.

We are grateful to Sharon Weintal, Tomer Kenneth, and Ittai Bar-Siman-Tov for their valuable input. We also thank Hili Eilam, Emanuelle Hirschfeld Trachtingot, and Ofir Leventhal for their excellent research assistance.

1. See, e.g., Reginald Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449, 469–72 (1958).

2. See *id.* at 471–72. See discussion *infra* Section III.A.

3. See discussion *infra* Section III.B.

4. See discussion *infra* Sections III.A–B.

legislative branch via enactment of laws.⁵ This essay suggests an innovative theory, both descriptive and normative, of the relationship between regulation and separation of powers, deploying a unique combination of constitutional law, administrative law, and regulation scholarship.

Many countries around the world have become regulatory states in the past fifty years or so.⁶ While the United States entered the age of regulation at the end of the 19th century,⁷ the most explosive period of regulatory growth in the nation's history was during the 1970s, when twenty-one agencies were created.⁸ Roughly speaking, regulation is used to guide the activities of non-governmental entities that provide services and commodities to the public.⁹ Regulation is typically aimed at correcting market failures, such as monopoly powers and negative externalities.¹⁰ It is also employed to protect social values that are difficult or impossible to quantify, such as freedom of speech, privacy, and human dignity.¹¹

However, there is no unified understanding of regulation. Scholars and practitioners (including legislators, judges, and even regulators) differ in their definition of regulation.¹² The concept of regulation is even understood differently by scholars from various disciplines. For example, most legal scholarship understands regulation as governmental activities aimed at the steering of markets through laws, rules, and regulations and their governmental enforcement.¹³ By contrast, political science scholarship usually affords regulation a much broader meaning, relating to all forms of

5. See discussion *infra* Section III.C.

6. See Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL'Y 2, 139 (1997) (describing how rulemaking has replaced taxing and spending among European governments); see also Robert Baldwin et al., *Introduction to A READER ON REGULATION 1* (Robert Baldwin et al. eds., 1998) (discussing the United Kingdom as a regulatory state).

7. See Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401, 407 (2003); see also Abram Chayes, *How Does the Constitution Establish Justice?*, 101 HARV. L. REV. 1026, 1031 (1988) (describing the beginning of the age of regulation in the U.S. toward the end of the 19th century as a process in which both federal and state legislatures assumed an increasingly active lawmaking role); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77, 78 (1994) (describing the Interstate Commerce Act of 1887 as the starting point of American regulation). Almost a hundred years ago it was noted that in the U.S., public administration is controlled by the "enormous mass of administrative legislation supplementing Acts of Congress, and issued by the President and the various executive departments, bureaus, commissions and other agencies of the national administration." John A. Fairlie, *Administrative Legislation*, 18 MICH. L. REV. 181, 181 (1920).

8. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 242–43 (1990).

9. See, e.g., ANTHONY OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 1–3 (2004) (discussing the nature of regulation).

10. See *id.* at 29–46. The concept of externalities is discussed *infra* note 17.

11. See OGUS, *supra* note 9, at 46–54; CASS R. SUNSTEIN, *VALUING LIFE: HUMANIZING THE REGULATORY STATE* 173 (2014).

12. See Baldwin et al., *supra* note 6, at 2–4; Barack Orbach, *What is Regulation?*, 30 YALE J. REG. ONLINE 1, 5 (2012); Julia Black, *Critical Reflections on Regulation*, 27 AUSTL. J. LEGAL PHIL. 1, 1–35 (2002); Christel Koop & Martin Lodge, *What is Regulation? An Interdisciplinary Concept Analysis*, 11 REG. & GOVERNANCE 95 (2017); Christine Parker & John Braithwaite, *Regulation*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 119 (Mark Tushnet & Peter Cane eds., 2003).

13. See Baldwin et al., *supra* note 6; Koop & Lodge, *supra* note 12, at 9.

social control through rulemaking, monitoring, and enforcement.¹⁴ According to this inclusivist understanding, regulation can refer to governmental activity, but it can also relate to activities of non-governmental bodies (such as private organizations) that engage in rulemaking, monitoring, and even enforcement.¹⁵ Though these activities are usually not as legally binding as governmental regulation, they are not necessarily less effective.¹⁶

In this essay, we focus on the legal meaning of regulation, i.e., the function of authorized government bodies that have legislated powers to set standards, monitor compliance, enforce laws and regulations, or a combination thereof, on private bodies that operate in the markets. Regulatees include, *inter alia*, corporations, businesses, industry sectors, and non-profit organizations. Legal regulation is usually directed at steering the business and social activities of private markets, such as health, education, communications, retail, food, and electricity, which may need to be adjusted by some form of government intervention.¹⁷

Governmental intervention via regulation encompasses a variety of tools. These include price control, franchises and licenses, quality standards, market competition, information sharing, education, advisement, and negotiation with regulatees.¹⁸ These regulatory devices may be applied by different means, such as statutes, rules and regulations, directives, policy statements, guidance documents, manuals, notices, orders, decrees, opinions, letters, injunctions, and judicial decisions.¹⁹ A wide range of governmental powers is utilized in the process of regulation, including rule-making,

14. See Koop & Lodge, *supra* note 12, at 95; see also David Levi-Faur, *Regulation and Regulatory Governance*, in *HANDBOOK ON THE POLITICS OF REGULATION* 3 (David Levi-Faur ed., 2011). One of the most cited definitions of regulation is by Selznick: “Sustained and focused control exercised by a public agency over activities that are valued by the community.” Philip Selznick, *Focusing Organizational Research on Regulation*, *REG. POL’Y & SOC. SCI.* 363, 363 (Roger Noll ed., 1985).

15. See, e.g., Ronen Shamir, *Mind the Gap: The Commodification of Corporate Social Responsibility*, 28 *SYMBOLIC INTERACTION* 229, 240 (2005).

16. See, e.g., Ronen Avraham, *Private Regulation*, 34 *HARV. J. L. & PUB. POL’Y* 543 (2011); Tamar Barkay, *Regulation and Voluntarism: A Case Study of Governance in the Making*, 3 *REG. & GOVERNANCE* 360 (2009).

17. Usually based on an identified market failure—a market problem requiring correction, such as lack of competition, information asymmetry between customers and suppliers, insufficient provision of public goods, or negative externalities. See OGUS, *supra* note 9, at 29. Negative externalities are “social costs which are not reflected in the price of the product or services.” OGUS, *supra* note 9, at 268.

18. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION—TRANSCENDING THE DEREGULATION DEBATE* (1992); Neil Gunningham, *Enforcement and Compliance Strategies*, in *THE OXFORD HANDBOOK OF REGULATION* 120–21; OGUS, *supra* note 9, at 3, 121, 150, 214–15, 295, 318; Colin Scott, *Standard-Setting in Regulatory Regimes*, in *THE OXFORD HANDBOOK OF REGULATION* 104 (Robert Baldwin et al. eds., 2010).

19. See, e.g., FED. COMM. COMM’N (FCC), <https://www.fcc.gov/about-fcc/what-we-do> (last visited Oct. 24, 2018); U.S. SEC. & EXCHANGE COMM’N (SEC), <https://www.sec.gov/Article/whatwedo.html> (last visited Oct. 24, 2018); FOOD & DRUG ADMIN. (FDA), <https://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last visited Oct. 24, 2018) (all providing information regarding the tools commonly employed by these agencies).

enforcement, inspection, adjudication, and sanctioning.²⁰ Regulation therefore includes executive, legislative, and judicial functions.²¹

Our main descriptive argument in this essay is that different types of regulatory powers are currently distributed throughout the three branches of government, regardless of the characteristics of each branch, often in stark contrast to the constitutional idea of separation of powers. For instance:

- 1) Both the executive and the legislative branches perform more than one type of regulatory function.²²
- 2) All three basic governmental functions are performed by regulatory agencies,²³ which are part of the executive branch.²⁴
- 3) Congress enacts not only regulatory laws of general applicability, but also regulatory laws of particular applicability that are executive in nature.²⁵
- 4) Regulatory actions of the executive branch are subject to review by the judicial branch, but in most cases the courts adopt a deferential position, regardless of the type of the regulatory act (judicial, executive, or legislative).²⁶

Against this background, we suggest on the normative level that the allocation of powers should depend on the type of regulation.²⁷ Quasi-judicial regulatory acts, such as statutory interpretations of regulatory laws and punitive sanctioning of regulated entities (judicial regulation) should be subject to a significantly lesser degree of deference by the judicial branch.²⁸ Major regulations of general applicability (legislative regulation) should be brought before Congress for it to discuss, shape, and approve,²⁹ and decisions of particular applicability (executive regulation) should be made only by the executive branch.³⁰

20. See BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION 3 (2007). Though administrative agencies are sometimes empowered to initiate criminal procedures, this essay deals mostly with administrative procedures, such as civil monetary penalties.

21. See SUNSTEIN, *supra* note 8, at 227; Baldwin et al., *supra* note 6, at 22.

22. See *infra* Sections IV.A–B.

23. See *infra* Sections IV.A–B.

24. See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 773 (2013) (“The so-called independent agencies are simply a type of executive agency. To be sure, they are insulated from presidential authority, but so are many executive agencies.”); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L. J. 17, 145 n.567 (2000) (“Despite their name, independent agencies are part of the executive branch.”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1191 (“To speak of statutory interpretation in the executive branch, in contrast, is to speak of a much more diverse set of institutions (including the White House, cabinet departments, executive agencies, and independent agencies)”); 1221 n.138 (“the overwhelming majority of administrative law scholars today agree that administrative agencies are part of the executive branch.”). For a different view, according to which independent agencies are a “fourth branch,” see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

25. See discussion *infra* Section IV.C.

26. See discussion *infra* Sections IV.A–B.

27. See discussion *infra* Part V.

28. See discussion *infra* Section IV.A.

29. See discussion *infra* Section IV.B.

30. See discussion *infra* Section IV.C.

The rationale for this proposal is twofold. The first rationale is centered on the traditional idea of preventing tyranny,³¹ while the second rests on the institutional, organizational, and structural characteristics of each of the three governmental branches.³² Our proposal is not based on any notion of hierarchy among the three governmental branches, or on the relative importance of the issues that are the responsibility of each of them.

The essay proceeds as follows: Part I suggests a descriptive theory of current governmental regulatory functions. It illustrates how, while regulatory functions appear at first glance to be the sole domain of the executive branch, in reality all three branches regulate. This Part also demonstrates how judicial, executive, and legislative powers relating to regulation are distributed throughout the three branches. Part II reviews the constitutional principal of separation of powers and its underlying rationales. In this Part we show that alongside the classical rationale for separation of powers—the prevention of tyranny and the protection of freedoms—this separation is also intended to serve efficiency and effectiveness. We also show that there is no contradiction between these various objectives, which in fact complement each other. Part III describes how the separation of powers doctrine clashes with the regulatory functions of the three branches, using three main examples: the courts' deference to quasi-judicial actions of regulatory agencies, insufficient review of agency rulemaking by courts and Congress, and Congress's legislation of executive regulation. This Part deploys an original combination of constitutional and administrative law with regulation scholarship to analyze the current challenges facing the administrative state in the age of regulation, from a separation of powers perspective. Against this background, this Part also outlines general suggestions for a proper alignment of regulatory functions with the three governmental branches.

II. ADMINISTRATORS, LEGISLATORS, AND JUDGES AS REGULATORS

It is widely common, in the legal sphere and beyond, to associate regulation with the executive branch, especially administrative agencies.³³ This Part will show that the regulatory state encompasses all three branches of government, including courts and Congress, detailing the characteristics of each branch's regulatory functions. A descriptive theory of regulation portrayed in this Part suggests not only a version of the regulatory state that reaches beyond the executive, but also one that suffers from an institutional blur regarding the nature of the regulatory functions and their placement within the current constitutional scheme, as legislative, judicial, and executive functions of regulation can be found throughout the three branches.

31. See discussion *infra* Part III.

32. See discussion *infra* Part III.

33. See, e.g., Koop & Lodge, *supra* note 12.

A. AGENCIES

The United States, like most western countries, has been transformed in recent decades into a regulatory state, rich in regulatory rules and institutions.³⁴ During the 1930s, the American civil service almost doubled its number of employees as well as its budget,³⁵ and gained great power through the creation of many new government authorities in such fields as communications, securities, labor, housing, insurance, and banking.³⁶ In the 1960s and the 1970s, a wave of statutes gave rise to new rights in new areas, such as environment, energy, occupational safety, and consumer product safety.³⁷ The daily Federal Register, containing proposed and actual administrative regulations, grew from some 9000 pages in 1960 to some 75,000 pages in 1980.³⁸

Today, regulatory functions in the executive branch are abundant, and are carried out by a variety of independent agencies such as the Securities and Exchange Commission (SEC), the Federal Communications Commission (FCC), and the Consumer Product Safety Commission (CPSC), as well as by executive agencies, which are part of government departments.³⁹ Examples of executive agencies⁴⁰ include the Food and Drug Administration (FDA),⁴¹ the Occupational Safety and Health Administration (OSHA),⁴² and the U.S. Fish and Wildlife Service.⁴³

Regulatory agencies carry out all three basic governmental functions of rulemaking, adjudication, and execution.⁴⁴ A typical example of an executive power exercised by a regulatory agency is monitoring of compliance via

34. See Baldwin et al., *supra* note 6; Cary Coglianese, *Improving Regulatory Analysis at Independent Agencies*, 67 AM. U. L. REV. 733, 734 (2018); Majone, *supra* note 6; Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003).

35. See SUNSTEIN, *supra* note 8, at 23.

36. See *id.* at 24–25 (stating that seventeen new agencies were created during the 1930s in the U.S.).

37. See *id.* at 25–26, 28. This was also coupled with large increases in regulatory budgets.

38. *Id.* at 25–26, 28.

39. The distinction between executive and independent agencies is based on the agency's location in the administrative scheme and on its institutional design, especially its leadership. While "executive agencies" are cabinet agencies located in one department in the executive branch and led by a single administrator, "independent agencies" are situated outside the political arena and led by a college of commissioners, and its members cannot be removed by the president except for cause. See, e.g., Dominique Custos, *The Rulemaking Power of Independent Regulatory Agencies*, 54 AM. J. COMP. L. 615, 615–17 (2006); Alan B. Morrison, *How Independent Are Independent Regulatory Agencies*, 1988 DUKE L. J. 252, 252 (1988). However, both types of agencies essentially perform the same functions. See, e.g., Strauss, *supra* note 24, at 584–85. Independent agencies, despite their name, are, according to the common approach, part of the executive branch. See *supra* note 24 and accompanying text.

40. For a list of executive agencies see *Official U.S. Executive Branch Web Sites*, LIBR. OF CONG., <http://www.loc.gov/rr/news/fedgov.html> (last visited May 18, 2018).

41. See *supra* note 19. The FDA operates under the U.S. Department of Health and Human Services.

42. OSHA operates within the U.S. Department of Labor. See *Occupational Safety & Health Administration*, U.S. DEP'T LAB., <https://www.osha.gov/> (last visited June 6, 2018).

43. The United States Fish and Wildlife Service (USFWS or FWS) is an agency within the U.S. Department of the Interior.

44. See, e.g., Custos, *supra* note 39, at 617; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994); Strauss, *supra* note 24, at 575.

inspections⁴⁵ and disclosure schemes, in which regulatory agencies extract and analyze reports from an industry on issues such as pollution levels, safety incidents, and malfunctions.⁴⁶

Regulatory agencies also engage in massive administrative legislation⁴⁷ via rules of general applicability, enacted according to the Administrative Procedure Act (APA).⁴⁸ These rules are legally-binding,⁴⁹ creating legal rights and obligations.⁵⁰ The impact of agency rules is indistinguishable from that of statutes, since agency rules have future effect and are designed to implement, interpret, or prescribe law or policy.⁵¹ Such rules are published in the Code of Federal Regulations⁵² and in the Federal Register.⁵³

Legislative rulemaking has to follow a process that includes: (1) issuance of a notice of proposed rulemaking; (2) provision of an opportunity for submission of comments by interested members of the public; and (3) issuance of the rule, incorporating a concise, general statement of its basis and purpose.⁵⁴ Legislative rulemaking may be formal or informal.⁵⁵ While formal rulemaking requires the agency to provide an opportunity for an oral evidentiary hearing, informal rulemaking requires merely that the agency provides an opportunity to submit written comments.⁵⁶

Alongside their executive and legislative powers, administrative agencies adjudicate in regulatory matters via orders.⁵⁷ Agency adjudication can be a result of agency investigation and charges, or of allegations that a

45. See, e.g., Lee E. DeBell & David L. Chesney, *The FDA Inspections Process*, 37 FOOD DRUG COSM. L. J. 244, 245 (1982) (describing why and how FDA inspections are initiated); Daniel E. Ho et al., *Do Checklists Make a Difference? A Natural Experiment from Food Safety Enforcement*, 15 J. EMPIRICAL LEGAL STUD. 242 (2018) (analyzing health inspections in the food industry and the use of checklists during such inspections).

46. See OSHA Improve Tracking of Workplace Injuries and Illnesses Rule, 29 C.F.R. §§ 1902, 1904 (2016) (a rule that requires employers to submit data on work-related injury and illness to the agency electronically). See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

47. See Fairlie, *supra* note 7, at 181; Strauss, *supra* note 24, at 576; Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L. J. 1003, 1005 (2015). For example, to this day, the FCC has promulgated rules comprising almost 1000 pages in the Code of Federal Regulations. See David Shepardson, *U.S. Agency Scraps Unused Telegraph Regulations in Trump Rules Purge*, REUTERS (Oct. 19, 2017), <https://www.reuters.com/article/us-usa-fcc-telegraph/u-s-agency-scraps-unused-telegraph-regulations-in-trump-rules-purge-idUSKBN1CO2XE>.

48. 5 U.S.C. § 551–59, 561–70a (2012).

49. See, e.g., Scott F. Johnson, *Administrative Agencies: A Comparison of New Hampshire and Federal Agencies' History, Structure and Rulemaking Requirements*, 4 PIERCE L. REV. 435, 454 (2006); Strauss, *supra* note 24, at 576.

50. See Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L. J. 185, 186 (1996).

51. See *id.*

52. See 44 U.S.C. § 1510(a) (2012); see also *Code of Federal Regulations*, U.S. GOV'T PUB. OFF., (annual edition), <https://www.gpo.gov/fdsys/browse/collectionCfr.action> (last visited Oct. 24, 2018).

53. See 5 U.S.C. §§ 552(a)(1)(D), 553 (2012); see also FED. REG., <https://www.federalregister.gov/> (last visited June 7, 2018).

54. See Pierce, *supra* note 50, at 186–87.

55. See *id.* at 186–87.

56. See *id.* at 187.

57. See 5 U.S.C. § 551(7) (2012). See generally Parker, *supra* note 1, at 471–72.

regulated entity violated the law.⁵⁸ Agency enforcement cases can lead to severe forms of coercive sanctions,⁵⁹ which include, *inter alia*, penalties, fines, prohibitions, requirements, limitations, taking, charges, fees, compensation, and restitution.⁶⁰ Formal agency adjudication typically involves an evidentiary hearing, held before an administrative law judge (ALJ),⁶¹ wherein parties are entitled to oral arguments, rebuttal, and cross-examination of witnesses.⁶² Agency heads review ALJ decisions *de novo* and have final decision-making authority.⁶³ Nonetheless, the vast majority of agency adjudications are not paradigmatic “formal” adjudications as set forth in the APA, but rather are informal in nature.⁶⁴ Informal adjudications still require evidentiary hearings but do not embrace all of the features set forth in the APA.⁶⁵

It is common to identify regulators with the executive branch.⁶⁶ Indeed, as discussed in this Part, a considerable portion of the regulatory roles lies in the executive domain. However, though often overlooked, both legislators and courts often participate in the regulatory process as well.⁶⁷

B. CONGRESS

Congress enacts regulatory statutes that can be divided into two types: organizational and substantive.⁶⁸ Organizational regulatory laws (or sections thereof) establish institutions, such as regulatory agencies, and grant them rulemaking,⁶⁹ monitoring, and enforcement powers.⁷⁰ For instance, the FCC, an independent agency of the U.S. government that regulates media, was formed by the Communications Act of 1934.⁷¹ By virtue of this Act, the FCC

58. See Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REFORM 103 (2018) (discussing agency powers to charge an entity or a person with a violation of law and then to also sit as judges to decide whether a violation was committed) (manuscript at 1); see also *infra* text accompanying notes 198–200.

59. See Vollmer, *supra* note 58, at 6.

60. See 5 U.S.C. § 551(10) (2012); see also Parker, *supra* note 1, at 472.

61. See Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157 (2000).

62. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. (forthcoming 2019), available at <https://ssrn.com/abstract=3129560> (manuscript at 2).

63. *Id.*

64. *Id.* at 1–3.

65. See *id.* at 2.

66. See Koop & Lodge, *supra* note 12.

67. See, e.g., Ferrel Heady & Eleanor Tabor Linenthal, *Congress and Administrative Regulation*, 26 LAW & CONTEMP. PROBS. 238, 238 (1961).

68. Scholars have used different labels for these two types of legislation. See Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 76–77 (1983) (differentiating between “internal statutes,” which are addressed toward agencies and their structure and behavior, and “external statutes,” which are meant for third parties outside of government, such as private organizations); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369, 375 (1989) (differentiating between legislation that creates agencies, funds them, defines their jurisdiction, and sets some vague guidelines for their operation, and legislation that consists of orders backed up by sanctions); see also H.L.A. HART, *THE CONCEPT OF LAW* 77–96 (1961) (distinguishing “primary” from “secondary” rules).

69. See Rubin, *supra* note 68, at 389–91; see also *supra* Section I.A.

70. See, e.g., Custos, *supra* note 39, at 615.

71. Telecommunications Act of 1934, 47 U.S.C. § 151 (1934), amended by 47 U.S.C. § 151 (1996) (“For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . .

is authorized to formulate rules and regulations,⁷² auction licenses,⁷³ monitor compliance,⁷⁴ analyze complaints,⁷⁵ conduct investigations,⁷⁶ issue orders,⁷⁷ and initiate prosecution.⁷⁸ Typically, organizational regulatory statutes authorize agencies through a mission statement from which the agency draws its legal mandate.⁷⁹ The FCC, for example, is charged with:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination . . . with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property.⁸⁰

Such statutory provisions sometimes allow for broad agency discretion under vague agency mission statements,⁸¹ and sometimes define a very specific mandate in unequivocal language.⁸² For example, Congress specifically required the FCC to complete the transformation from analog to digital television broadcasting by a specified date.⁸³

Alongside organizational statutes, there are also statutes of a substantive nature. These are set standards for regulated industries—such as rules of conduct based on values, quotas, prohibitions, permissions, requirements, obligations, and constraints—which the agency can then interpret, flesh out, and enforce.⁸⁴ The scope of discretion afforded to the agency by statutory standards depends on the language used, which can range from concrete to vague. An example of fairly vague substantive regulatory provisions can be found in the Communications Act, which stipulates that cable operators will

there is hereby created a commission to be known as the ‘Federal Communications Commission’, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.”).

72. See 47 U.S.C. § 154.

73. See 47 U.S.C. § 310(d). See generally David Seth Zlotlow, *Broadcast License Auctions and the Demise of Public Interest Regulation*, 92 CALIF. L. REV. 885 (2004).

74. See 47 U.S.C. § 154.

75. See 47 U.S.C. § 401.

76. See 47 U.S.C. § 403.

77. See 47 U.S.C. § 154.

78. See 47 U.S.C. § 401.

79. See, e.g., Stewart, *supra* note 34, at 440.

80. 47 U.S.C. § 151.

81. See, e.g., Stewart, *supra* note 34, at 440 (describing open-ended regulatory statutes in the New Deal era, which endowed the agencies with very broad powers).

82. See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols vs. Fire Alarms*, 28 AM. J. POLIT. SCI. 165, 175 (1984); SUNSTEIN, *supra* note 8, at 29–30. Rubin calls this characteristic of statutes “transitivity” (“From the perspective of the implementation mechanism, the statute’s degree of transitivity is the mechanism’s degree of discretion. A highly transitive statute gives the mechanism relatively little discretion, whereas an intransitive one gives it a great deal.”). See Rubin, *supra* note 68, at 383.

83. See Digital Transition and Public Safety Act of 2005, § 3002(a)(1)(B), *amended by* Deficit Reduction Act of 2005, Title III. See also DTV Delay Act, 47 U.S.C. §§ 309, 337 (extending the date for the completion of the nationwide DTV transition for full power stations from February 17, 2009 to June 12, 2009).

84. See also *infra* text accompanying note 174.

“limit the access of children to indecent programming”⁸⁵ and that common carriers will charge “just and reasonable” rates.⁸⁶ A contrasting example can be found in consumer protection regulation, which is mostly anchored in a series of highly specific statutes rather than in rules and regulations that are enforced by a specialized regulatory agency.⁸⁷ Statutes such as the Truth in Lending Act,⁸⁸ the Fair Credit Reporting Act,⁸⁹ and the Fair Debt Collection Practices Act⁹⁰ identify within their statutory framework which practices will be outlawed and which will not, and thus allow very little room for administrative regulation.⁹¹

C. COURTS

Courts deal with myriad issues relating to public administration. These range from agriculture to cybersecurity as well as from banking to zoning and planning.⁹² A list of the types of administrative adjudicatory disputes would be nearly endless.⁹³ Within this framework, several types of regulatory judicial roles can be identified. In other words, in addition to Congress and administrative agencies, courts also perform regulatory functions,⁹⁴ as defined in this essay.⁹⁵ In general, the regulatory role of the courts is carried out by interpreting laws and regulations as well as by setting and amending legal standards for behavior in markets through precedents.⁹⁶

Under the APA, agency action is generally subject to judicial review.⁹⁷ Regulation can be carried out by judicial review in various situations. In certain cases, courts perform constitutional review of regulatory actions by an agency.⁹⁸ In others, they execute judicial review of agency actions based on administrative law, examining the legality of agency decision-making in

85. 47 U.S.C. § 532(j).

86. 47 U.S.C. § 201(b).

87. See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 84 (2008).

88. 15 U.S.C. §§ 1601–13, 1631–49, 1661–67(f) (2006).

89. 15 U.S.C. §§ 1681.

90. 15 U.S.C. §§ 1692.

91. See Bar-Gill & Warren, *supra* note 87, at 84.

92. See Thomas D. Morgan, *Administrative Law*, 50 CHI.-KENT L. REV. 214, 214 (1973) (providing a definition of administrative law that emphasizes its broad scope).

93. See Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3, 4 (2015).

94. See Heady & Linenthal, *supra* note 67, at 238.

95. See *supra* text accompanying notes 9–11, 16–17.

96. See generally Diane Geraghty, *Administrative Law: Judicial Supervision of Administrative Decision-Making in Action*, 57 CHI.-KENT L. REV. 1 (1981); Parker, *supra* note 1, at 465, 473 (explaining how the authority of the courts to set precedents and interpret laws amounts to an announcement of a general rule of law).

97. See 5 U.S.C. §§ 701–06 (2012); see also Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 659, 664 (1985) [hereinafter Sunstein, *Reviewing Agency Inaction*].

98. See 5 U.S.C. § 706(2)(B) (2012) (“The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (B) contrary to constitutional right, power, privilege, or immunity.”); see, e.g., Zlotlow, *supra* note 73, at 912 (discussing judicial review of FCC content restrictions imposed on broadcasting license holders).

terms of procedure and rationality.⁹⁹ Generally, courts exercise judicial review of both regulatory actions and omissions (i.e., failure to regulate).¹⁰⁰

Within their regulatory functions, courts decide disputes concerning agency rulemaking¹⁰¹ and sanctioning, such as civil penalties.¹⁰² Courts are also empowered to impose criminal or civil sanctions that the regulatory agency is not authorized to impose on regulatees itself.¹⁰³ In some cases, the courts' regulatory role is fulfilled by approving and interpreting agreements made between agencies and regulated bodies.¹⁰⁴

It seems, therefore, that contrary to the conventional wisdom according to which the executive branch has a monopoly over regulatory activities and processes, all three branches engage in regulation. Though administrative agencies carry most of the regulatory workload, legislators and courts also perform important regulatory functions.

III. SEPARATION OF POWERS BETWEEN LIBERTY AND EFFICIENCY

The U.S. Constitution divides authority among the legislative, executive, and judicial branches.¹⁰⁵ In accordance, the separation of powers doctrine differentiates between three types of authority—legislating, enforcing, and determining particular applications of the law¹⁰⁶—and allocates each authority to a different governmental branch.¹⁰⁷ At the federal level, Congress legislates, the president is responsible for executing the laws, and

99. See, e.g., Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 815 n.4 (2000). Under the APA, an agency action can be challenged in court on the basis that it is arbitrary, capricious, or an abuse of discretion; contrary to a statute; or that the agency failed to follow required legal procedures. See 5 U.S.C. §§ 706(2)(A), (C)–(F) (2012).

100. See, e.g., Clay J. Garside, *Forcing the American People to Take the Hard NOx: The Failure to Regulate Foreign Vessels under the Clean Air Act as Abuse of Discretion*, 79 TUL. L. REV. 779, 798–800 (2005) (discussing the EPA's failure to regulate new motor vehicle engines and the reviewing court's decision); see also 5 U.S.C. § 551(13) (2012).

101. See, e.g., Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 427–28, 434 (2009) (describing the Supreme Court's evolving doctrines for judicial review of agency rulemaking).

102. Civil penalties are a monetary settlement between the agency and a private party subsequent to a regulatory violation, using a trial-type hearing. It is subject to administrative review by the agency heads. See David Schmeltzer & William Kitzes, *Administrative Civil Penalties Are Here to Stay—But How Should They Be Implemented?*, 26 AM. U. L. REV. 847, 856–58 (1977).

103. See generally *id.*; Louis L. Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 865–66 (1963) (explaining how judicial enforcement decrees work in relation to different regulatory actions of administrative agencies).

104. See, e.g., Phillip G. Oldham, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393, 393, 406, 408 (1995) (describing consent decrees that function as a contractual regulatory tool used by agencies to achieve a public interest goal, and discussing the courts' role in interpreting such decrees). In general, consent decrees are contracts between litigants that courts enter as judgments to settle litigation. See *id.* at 393.

105. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 525 (2015).

106. See Strauss, *supra* note 24, at 577.

107. *Id.*

the courts apply the laws and interpret them in order to decide cases and controversies.¹⁰⁸

In constitutional theory, separation of powers is a means to certain ends.¹⁰⁹ The classical rationale for the separations of powers is that it aims to prevent tyranny in facilitating a system of checks and balances.¹¹⁰ According to this conception, the parameters and procedures for making, enforcing, and applying laws were designed to prevent tyranny by separating power among several branches, and providing each branch with the ability to check any abuse of power by the other branches.¹¹¹

Preventing tyranny and protecting liberty are not the only justifications for the separation of powers. Another important rationale for the separation of powers is that the resulting institutional and procedural design of each of the three branches makes for greater effectiveness in each. The Constitution divides governmental powers not only to create checks and balances among the branches, but also to maximize the likelihood that the mission assigned to each branch will be implemented effectively.¹¹² As Mark Graber points out:

The separation of powers became the vehicle by which Congress delegated or sloughed off, depending on one's perspective, responsibilities to other governing institutions on the theory that those institutions were better suited to make the policy in question than the national legislature.¹¹³

It was even argued that efficiency had the biggest impact on the Framers,¹¹⁴ and that they embraced separation of powers more to facilitate greater administrative efficiency than out of anxiety over executive tyranny.¹¹⁵ The Framers hoped that separation of powers would promote efficiency in government by assigning functions to those branches best

108. *Id.*; see ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1 (3rd ed. 2006).

109. See Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J. L. & PUB. POL'Y 1, 6 (1993).

110. See, e.g., *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."); William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Governance*, in *SEPARATION OF POWERS—DOES IT STILL WORK?* 65, 66 (Robert A. Goldwin & Art Kaufman eds., 1986) (stating that the goal of constitutionalism is to protect liberty and avoid tyranny).

111. See Derek Funk, *Checking the Balances: An Examination of Separation of Powers Issues Raised by the Windsor Case*, 46 ARIZ. ST. L.J. 1471, 1473 (2014).

112. Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 393 (1993).

113. Mark A. Graber, *Separation of Powers*, in *THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION* 224, 242 (Karen Orren & John W. Compton eds., 2018).

114. William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 718 (1984).

115. See Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 115 (1971); see also Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1125 (2004) ("To be sure, the separation of powers does not only serve to filter majority sentiment. Hamilton and Madison argued that it enhanced governmental efficiency.").

equipped to perform them.¹¹⁶ Separation of powers facilitates a certain degree of specialization of labor, enabling each branch to operate more efficiently.¹¹⁷

An extreme approach—perhaps too extreme—regarding the importance of efficiency as a basis for banning Congress from interfering with the executive branch is presented by Steven Calabresi and Christopher Yoo:

The Constitution gives and ought to give all the executive power to one, and only one, person: the president of the United States. According to this view, the Constitution creates a unitary executive to ensure energetic enforcement of the law and to promote accountability by making it crystal clear who is to blame for maladministration. The Constitution's creation of a unitary executive eliminates conflicts in law enforcement and regulatory policy by ensuring that all of the cabinet departments and agencies that make up the federal government will execute the law in a consistent manner and in accordance with the president's wishes.¹¹⁸

Against this approach it can be contested that absolute elimination of conflicts in law enforcement and regulatory policy is not possible. The distinctions between the enactment of laws and their enforcement and between legislation and establishing executive policies are not always sharp. While it is quite easy to classify direct decisions regarding national security and foreign policy within the exclusive domain of the executive branch,¹¹⁹ it is doubtful to what extent strict rules based on rigid classifications can promote efficiency and effectiveness.

Ostensibly, there is a contradiction between the two objectives of separation of powers—preserving liberty and promoting efficiency. Protection of freedoms and prevention of governmental arbitrariness are not always consistent with efficiency and effectiveness, just as efficiency and effectiveness can be considered to be undermined by the division of governmental power into three branches that are not necessarily coordinated. In the words of Chief Justice Burger in *Immigration and Naturalization Service v. Chadha*:¹²⁰

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices

116. See Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 408 (2000).

117. AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 64 (2005).

118. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3 (2008).

119. See, e.g., Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J. L. & PUB. POL'Y 487, 488 (2001) (noting that "the Constitution vests the President with the plenary authority, as Commander-in-Chief and the sole organ of the nation in its foreign relations, to use military force abroad, especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States.").

120. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.

A different approach suggests that there is no discrepancy between the goals of efficiency and effectiveness, on the one hand, and the preservation of freedom and the prevention of governmental arbitrariness on the other, and that these different goals actually complement one another. Jeremy Walderon reconciles the two justifications for the separation of powers, and to some extent combines them into a single rationale:

The idea is instead of just an undifferentiated political decision to do something about X, there is an insistence that anything we do to X or about X must be preceded by an exercise of legislative power that lays down a general rule applying to everyone, not just X, and a judicial proceeding that makes a determination that X's conduct in particular falls within the ambit of that rule, and so on. Apart from the integrity of each of these phases, there is a sense that power is better exercised, or exercised more respectfully so far as its subjects are concerned, when it proceeds in this orderly sequence.¹²¹

In this vein, we suggest that separation of powers can promote both freedom and efficiency simultaneously. Liberties are protected by the division of powers between different governmental branches (and between the federal branches and the states), so that none of them have absolute governmental powers. Efficiency and effectiveness are achieved in that each of the authorities is organized in a manner suited to its function and carries out functional decision-making processes.

A. LEGISLATION

The institutional structure of Congress and the legislative process are characterized by numerous gatekeepers and veto points,¹²² as well as overlapping factions and coalitions.¹²³ These functions serve, inter alia, the constitutional arrangements for the division of Congress into two houses, the requirement of quorum, and the veto power of the president. Additionally, the internal rules of each house require that bills are subjected to three readings and a discussion in each house, allowing the minority in the Senate to block legislation with a filibuster.¹²⁴

121. Jeremy Walderon, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 434–35 (2013).

122. See Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 513–14 (1981); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 141 (2005).

123. See Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretations*, 64 U. CIN. L. REV. 911, 920 (1996).

124. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 68–81 (2006).

“All these rules impose restraints and create hurdles in the legislative process, thereby constraining Congress’s ability to pass legislation.”¹²⁵ They are designed to ensure essential democratic principles by limiting the majority party’s ability to translate its policy agenda into legislative action.¹²⁶ Accordingly, “to function well, a legislative process needs to strike a balance between deliberation and inclusiveness, on the one hand, and expeditiousness and decisiveness, on the other.”¹²⁷

This design of legislative procedures does not necessarily preclude effectiveness. Legislation mainly comprises general rules of an abstract nature, which regulate many future concrete cases that have not yet occurred at the time the law is enacted. It must serve a broad public, and is thus characterized by a high degree of stability. Furthermore, there are only a limited number of laws, while there is enormous scope for concrete executive decisions to adapt them to changing circumstances. Thus the legislative process, while cumbersome, is not inefficient.

B. ENFORCEMENT

“The executive branch is structured for speed and decisiveness.”¹²⁸ It is organized as a hierarchical bureaucracy under the control of the elected president and his or her cabinet.¹²⁹ The executive branch’s unity and ability to act quickly, operationally, and decisively grant it “energy.”¹³⁰ In Alexander Hamilton’s words:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-

125. Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 812–13 (2010).

126. *Id.* at 815–16.

127. Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, in 2 RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA’S POLARIZED POLITICS 55, 83 (Pietro S. Nivola & David W. Brady eds., 2008).

128. See Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1564 (2009).

129. See, e.g., Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When the United States Complies with WTO Rulings*, 39 YALE J. INT’L L. 201, 215 (2014) (“The executive branch is structured as a hierarchy.”); David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409, 1420 (2009) (“An executive branch composed of more than one person could be structured in one of two ways. First, the executive branch could feature a ‘horizontal executive,’ in which the multiple members of the executive branch are roughly equal or at least concurrent in exercising powers granted to them. Second, the executive branch could feature a ‘hierarchical executive,’ in which there are other members of the executive branch, but there is a singular figure that rules over the other members of the executive branch. The switch in the form of the executive in 1787 was from horizontal to hierarchical, but even a hierarchical executive was meant to create the potential for heterogeneity among high-level executive officers.”); Susan Rose-Ackerman, Diane A. Desierto & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers Without Checks and Balances in Argentina and the Philippines*, 29 BERKELEY J. INT’L L. 246, 247 (2011) (describing the position taken in the 1937 Brownlow Report on administrative management, prepared for President Franklin Delano Roosevelt).

130. See Pearlstein, *supra* note 128, at 1580–81.

handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy ... A feeble execution is but another phrase for a bad execution.¹³¹

According to the theory of the unitary executive, “at a minimum, the theory requires that the president retains sufficient power to ensure the faithful execution of the law by those who serve under him.”¹³² While the phrase “executive power” was most often used as a shorthand for the power to execute laws,¹³³ widely speaking the executive branch makes decisions, implements, and enforces the law in individual cases.¹³⁴ Thus, “[b]ecause legislators could not act with the unity, speed, and secrecy necessary to govern effectively, an executive with these attributes was required.”¹³⁵ Furthermore, a key component of the executive branch is not only taking action, but also directing resources toward their most efficient uses—given budgetary and other constraints.¹³⁶

C. ADJUDICATION

The institutional structure of the courts and judicial proceedings are suited to the basic function of adjudication, making decisions in factual and legal disputes in accordance with the law. It seems that certain characteristics of the judicial process make judges more likely to reach correct and just outcomes than politicians or administrators.¹³⁷ For example, judges decide cases and controversies on law and facts, unlike legislators or members of the executive branch who make decisions in accordance with the views and preferences of the electorate.¹³⁸ The unique characteristics of the judicial

131. THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

132. See Robert E. Johnston, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 GEO. WASH. L. REV. 609, 620 (1994).

133. See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 702 (2003).

134. See *Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 386, 393 (1988) (“[Y]ou get outside the legislative process and you have an enacted statute, the President and the executive branch then have other obligations that they must carry out, which is to implement that law as it has been enacted.”); see also Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 887–96 (2015) (explaining the role of executive agencies to implement the empowering laws).

135. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 402–03 (1996).

136. See Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1724 (2009).

137. See Irwin P. Stotzky, *The Truth About Haiti*, 26 CONN. J. INT’L L. 1, 42 (2010) (“[T]here are two main justifications for interposing a measure of due process between the coercive deprivation of a good and the individual who is the victim of it. The first is an intrinsic value resulting from the fact that the individual in question is not merely an object to be manipulated, but rather is part of a dialogue in which the prosecution tries to convince him of the rightness of the coercion, as part of a cooperative search for truth. The second justification ascribes to due process an instrumental value; it is viewed as a mechanism for the impartial application of laws. Both justifications, of course, complement each other. To have a dialogue in which the person affected is an active part of the power process is the best way of achieving impartial applications of the law.”).

138. For distinguishing the judicial from the political, see Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 531–32 (1982) (“At least four institutional characteristics tend to give greater coherence and continuity to general

process, which are not present or are of limited importance in legislative or executive procedures, include, inter alia, taking precedent as a starting-point¹³⁹ (“rights, once established, tend to remain established”);¹⁴⁰ finality and *res judicata*;¹⁴¹ institutional judicial independence¹⁴² (including “the terminal character of many judicial appointments,” as well as “the freedom of judges from close annual supervision by appropriations committees”);¹⁴³ impartiality of the judge between the parties involved in the process;¹⁴⁴ the right of the parties to be heard and present evidence;¹⁴⁵ “the guarantee against being tried in absentia, the possibility of appeals, the availability of legal assistance;”¹⁴⁶ in certain cases, trial by jury;¹⁴⁷ immunity to witness statements made during judicial hearings as well as to prosecutors, jurors, and clerks of courts;¹⁴⁸ and all the many other procedural protections and due

concepts and past precedents in the judicial process than in executive or legislative functions. First, the judge’s training and role emphasize the continuity of tradition. Judges are not free to disregard the language of the text or prior decisions as political activists may do; they must justify their decisions by reference to a received tradition. Second, individual judicial decisions are largely immune from direct challenge in electoral politics. Federal judges are appointed for life and even in states where judges are elected, campaigns are rarely waged on the merits of a specific decision. Third, the judicial method emphasizes the element of rationality. Judges must connect the particular decision to the received tradition by a process of reasoning, and the power of the individual decision will be measured, at least in part, by the extent to which the judge is able to convince readers of the strength of the connection. Fourth, judges (and probably all lawyers) are reluctant to rethink old solutions. Many modern courts are more willing to overrule precedents than the Supreme Court was during the prohibition era, but the predominate techniques are limitation, qualification, and exception, rather than rejection.”).

139. Roger J. Traynor, *The Well-Tempered Judicial Decision*, 21 ARK. L. REV. 287, 290 (1967); see also Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 50 HASTINGS L. J. 771, 774 (1999). See generally Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000).

140. Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1151 (2012).

141. The doctrine of *res judicata* means that a final judgment is conclusive as to issues and facts raised in a later action if those issues and facts were already litigated and determined in a judgment. See Robert S. Zinn, *Res Judicata—Should It Apply to a Judgment Which Is Being Appealed*, 33 ROCKY MTN. L. REV. 95, 95 (1960).

142. See generally Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995).

143. See, e.g., Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 58 (1982). For the differences between judges, legislators, and administrators concerning accountability see, e.g., Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 420–25 (1981).

144. See Stotzky, *supra* note 137, at 42–43.

145. See generally Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063 (1999). See also Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. OF LEGAL ANALYSIS 227, 250 (2010) (“[C]ourts are designed to investigate individual grievances and . . . such an investigation is crucial for protecting the right to a hearing. This suitability of courts, however, is not accidental; it is an essential characteristic of the judicial process. Courts provide individuals an opportunity to challenge what individuals perceive as a violation of their rights.”).

146. Stotzky, *supra* note 137, at 42.

147. See, e.g., Connie Milonakis & Sabeena Rajpal, *Right to Jury Trial*, 31 ANN. REV. CRIM. PROC. 1613, 1613–14 (2002).

148. See, e.g., K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L. J. 95, 98–99 (1995). However, in *Butz v. Economou*, 438 U.S. 478, 512–13 (1978), the Supreme Court held that “adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for

process guarantees and safeguards that characterize court proceedings.¹⁴⁹ In addition, judicial process:

[i]s individually engageable: a single person with a claim of right can utilize the process without having to attract support from others. The process is mandatory: courts must consider and rule on properly presented claims of right ... And finally, the process is non-majoritarian: claimants do not have to demonstrate majority support to have their rights enforced.¹⁵⁰

However, despite the design of the structure and decision-making procedures of each of the branches to serve the core functions imposed on it, the branches and functions are not neatly organized in reality.¹⁵¹ The rise of the administrative regulatory state has led to much delegation of legislative authority to executive agencies, which promulgate regulations without meeting the requirements of bicameralism and presentment.¹⁵² Indeed, as a rule-maker, the executive branch bears resemblance to the legislative branch, while as an adjudicator, it shares similarities with the judiciary.¹⁵³ In addition, Congress invests in the executive branch the power to adjudicate a wide range of issues,¹⁵⁴ including claims against the government and even disputes among private parties.¹⁵⁵ In practice, then, the regulatory state blurs institutional separation of powers, as all three branches of government participate in regulating markets. Though executive agencies and independent regulatory commissions have greater regulatory authority,¹⁵⁶ regulatory activity and process inherently comprise legislative, adjudicative, and executive powers.¹⁵⁷

damages.” See, e.g., Joseph Romagnoli, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 *FORDHAM L. REV.* 1503 (1985).

149. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L. J.* 1672, 1679 (2012) (“[T]he executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights had to be preceded by certain procedural protections characteristic of judicial process.”).

150. Siegel, *supra* note 140, at 1150–51; see also *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985), in which the factors deemed by the Supreme Court characteristic of the judicial process were: (a) the potential for harassment or intimidation in the performance of the individual’s functions; (b) “the presence [or lack thereof] of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional behavior”; (c) potential for political influence; (d) appropriate precedent; (e) “the adversary nature of the process”; and (f) “the correctability of error on appeal.”

151. See *supra* Part I.

152. See Laurence H. Tribe, *The Legislative Veto Decision: A Law by any Other Name?*, 21 *HARV. J. ON LEGIS.* 1, 11 (1984); Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 *ALA. L. REV.* 689, 717 (2006).

153. See Dominik Steiger, *A Constitutional Theory of Imperative Participation: Delegated Rulemaking, Citizens’ Participation and the Separation of Powers Doctrine*, 79 *ALB. L. REV.* 1, 13 (2015).

154. See, e.g., Christopher B. McNeil, *Executive Branch Adjudications in Public Safety Laws: Assessing the Costs and Identifying the Benefits of ALJ Utilization in Public Safety Legislation*, 38 *IND. L. REV.* 435, 435 (2005).

155. See Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 *CASE W. RES. L. REV.* 1083, 1085 (2015).

156. See Graber, *supra* note 113, at 244.

157. See, e.g., *id.* at 239; MORGAN & YEUNG, *supra* note 20 (defining regulation as: “Deliberate attempts by the state to influence socially valuable behavior which may have adverse side-effects by establishing, monitoring, and enforcing legal rules.”); see also Baldwin et al., *supra* note 6, at 17–18

IV. REGULATORY FUNCTIONS AND SEPARATION OF POWERS

According to the *Chevron* decision,¹⁵⁸ courts usually defer to an agency's interpretation of statutes.¹⁵⁹ While *Chevron* proponents, as well as opponents, present worthwhile arguments,¹⁶⁰ the *Chevron* doctrine should be normatively assessed in a much wider perspective. In this Part we show that regulatory agencies are deferred to in matters of statutory interpretations not only by courts but also by other governmental branches, and in most governmental functions. Administrative agencies are deferred to regarding extensive, fundamental rulemaking, including tariff-setting, which is considered quasi-legislative and affects competition and consumer welfare, and quasi-judicial regulatory decisions, such as sanctioning. While deference to agencies in regulatory matters is typical of the modern administrative state, in some cases governmental branches other than the executive also take regulatory powers that do not befit their institutional nature. This happens, for example, when Congress legislates in matters that are executive in nature.¹⁶¹

This Part aims to illuminate the problems in the current distribution of regulatory powers among the three branches, from the perspective of the separation of powers theory. It illustrates three main conflicts between the allocation of regulatory powers and the separation of powers doctrine. The first conflict focuses on the courts' extensive deference to agency actions that are quasi-judicial; the second deals with insufficient congressional and judicial review of agency rulemaking regarding major regulations; and the third discusses Congress's legislation of executive-in-nature regulation, rather than general laws. A general outline is suggested for reconciling each of these three conflicts.

A. DEFERENCE OF THE COURTS TO AGENCIES' QUASI-JUDICIAL ACTIONS

Courts perform various regulatory roles.¹⁶² The courts' regulatory roles are intensified the more activist the judicial review is, and the closer it is to de novo review.¹⁶³ However, the standard approach to judicial review of

(describing regulatory enforcement activities as inspecting, advising, educating, warning, prosecuting, seizing, and destroying goods and shutting down business activity).

158. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The decision is considered the most cited administrative law case in history. See Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 *FORDHAM L. REV.* 607, 612 (2014); Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 *J. L. & POL.* 211, 218 (2017); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 *U. CHI. L. REV.* 823, 823 (2006).

159. See *Chevron*, 467 U.S. at 842–44.

160. See, e.g., Christopher J. Walker, Symposium, *Challenging Administrative Power: Attacking Auer and Chevron Deference: A Literature Review*, 16 *GEO. J.L. & PUB. POL'Y* 103 (2018).

161. See *infra* Section III.C.

162. See *supra* Section I.C.

163. De novo review means that the reviewing court interprets the statutory law and applicable facts independently of the agency's interpretation. Usually, pure questions of law are reviewed de novo, while questions of fact and mixed questions of fact and law are reviewed under a deferential standard. See Andrew H. Baida, *Agency Deference and Expertise*, 39 *MD. B.J.* 20, 22 (2006).

agency activities is deferential,¹⁶⁴ though the precise scope of deference is ill-defined.¹⁶⁵ Therefore, when reviewing agency decisions, the judiciary holds a relatively modest regulatory role.¹⁶⁶ Separation of powers requires, however, that there should be greater judicial deference to executive regulatory functions than to quasi-judicial (and quasi-legislative) agency regulatory actions.¹⁶⁷ Yet, deference doctrines are applied by courts expansively in matters of agency sanctioning and agency statutory interpretation, which are judicial in nature.¹⁶⁸

The courts' deference to quasi-judicial agency action is most identified with the *Chevron* decision.¹⁶⁹ Under the *Chevron* doctrine—which was developed in a clear regulatory setting¹⁷⁰—when a federal statute is ambiguous, courts defer to the agency's interpretation of the statute, provided the interpretation is reasonable.¹⁷¹ According to the *Chevron* doctrine, statutory ambiguities represent implicit delegations of authority by Congress to the agency, permitting it to shape and implement policies.¹⁷² Though Congress has “all legislative Powers,”¹⁷³ it is assumed that it may delegate to agencies the power to interpret statutes and flesh out a statutory scheme through regulations.¹⁷⁴

The debate over deference, rooted in *Chevron*, reflects longstanding divisions over the proper relationship between agencies, courts, and Congress in the administrative state.¹⁷⁵ While some find *Chevron* deference a necessity, others believe that courts should not defer to administrative agencies in questions of law.¹⁷⁶ As Chief Justice Marshall proclaimed in *Marbury v. Madison*, “It is emphatically the province and duty of the judicial department to say what the law is.”¹⁷⁷ The Supreme Court's newest member, Justice Neil Gorsuch, wrote in this vein as a circuit court judge, that *Chevron* “seems no less than a judge-made doctrine for the abdication of the judicial duty,” and that allowing agencies to offer authoritative statutory

164. See Asimow, *supra* note 93, at 9.

165. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 501 (2nd ed. 2001); see also Miles & Sunstein, *supra* note 158, at 824–25, 827–28 (asserting that liberal and conservative judges hold different views on the scope of deference); Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349 (2013) (arguing that courts' practice of deference is highly unpredictable).

166. See Oldham, *supra* note 104, at 393 (“[C]ourts prior to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* were much more concerned with ‘supervising’ agency choices. In a post-*Chevron* world, courts should recognize that their role is more limited.”).

167. Article III of the Constitution provides that “[t]he 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.” U.S. CONST. art. III, § 1.

168. Courts' deference to agency legislative regulatory functions is discussed below. See *infra* Section III.B.

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

170. See Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 433 (2006).

171. See *Chevron*, 467 U.S. at 842–44.

172. See *id.* at 844.

173. U.S. CONST. art. I, § 1.

174. See Larkin, *supra* note 158, at 212.

175. See Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1273 (2008).

176. See, e.g., May, *supra* note 170, at 434; Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1075 (2016).

177. 5 U.S. (1 Cranch) 137, 177 (1803).

interpretations threatens to transfer “the job of saying what the law is from the judiciary to the executive.”¹⁷⁸ Though judicial deference to agency interpretations is rooted in the separation of powers rationale of the chief executive’s political accountability,¹⁷⁹ as well as in agency expertise,¹⁸⁰ *Chevron* extends such strong deference that it creates de facto agency immunity.¹⁸¹

Whereas *Chevron* is the most renowned regulatory deference doctrine, it is certainly not the only one. Courts also defer to agency enforcement actions that involve quasi-judicial sanctioning of the regulated entities.¹⁸² The relationship between administrative agencies and courts has been described in this regard as a partnership in which the agency is the “active partner with primary responsibility for judging.”¹⁸³ Under principles of “prosecutorial discretion,” agency sanctioning decisions are practically unreviewable by courts.¹⁸⁴ For example, judicial review of civil penalties imposed by an agency is limited in scope to a determination of whether the agency’s ruling is supported by substantial evidence.¹⁸⁵ This means that de novo review is mostly applied only when agency fact-finding procedures are inadequate.¹⁸⁶

The regulatory-enforcement-deference doctrine was reinforced by *Heckler v. Chaney*.¹⁸⁷ The *Chaney* court ruled that agency decisions regarding initiation or withholding enforcement actions are an unreviewable exercise of prosecutorial discretion.¹⁸⁸ The court reasoned that regulatory enforcement actions are usually based on a delicate examination of several factors by the agency, such as bureaucratic efficiency, probability of success, and the agency’s enforcement strategy, and concluded that courts are ill-suited to perform such an analysis.¹⁸⁹

Yet, complete deference of courts in regard to regulatory enforcement actions would disrupt the core of the judiciary’s role. Such deference “systematically disturbs the existing balance of authority within the administrative state by improperly shifting power from reviewing courts to agencies.”¹⁹⁰ This is especially true in light of the sanctioning nature of many regulatory enforcement tools. License revocation, for example, has a significant penal component,¹⁹¹ and civil penalties are considered more a mode of punishment than a remedy.¹⁹² Though many regulatory violations

178. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016).

179. See *May*, *supra* note 170, at 435.

180. See *id.*

181. See *id.*

182. See Sunstein, *Reviewing Agency Inaction*, *supra* note 97, at 654.

183. See *Jaffe*, *supra* note 103, at 868.

184. *Id.* at 665.

185. See Schmelzter & Kitzes, *supra* note 102, at 856, 860.

186. See *id.* at 866.

187. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

188. *Id.* at 827–35.

189. See *id.* at 832–33.

190. Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 157 (1996).

191. See *Jaffe*, *supra* note 103, at 872 (explaining that license revocation is used not only to control the licensee but also to warn others, and thus it has a significant “penal” component).

192. See *Lawson*, *supra* note 44, at 1247; Charles L. Hay, *OSHA Penalties—Some Constitutional Considerations*, 10 IDAHO L. REV. 223, 231–32 (1974).

are labeled “civil” merely for the convenience of regulatory enforcement,¹⁹³ regulated entities are not tried criminally in these cases, but rather are accorded the safeguards applicable in civil suits.¹⁹⁴ Mostly, however, excessive deference by the courts to agency enforcement actions is ill-suited to the characteristics of both agencies and courts, not only because fairness requires that agency enforcement decisions are checked for errors, including over-zealousness and disproportionality, but also due to the court’s ability to right injustice.¹⁹⁵ As commented by Louis Jaffe, regarding court deference to agency license revocation, “[i]t is not in accord with current concepts of justice that the exercise of such drastic powers should be totally beyond revision, particularly where exercised by our monolithic, policy-oriented agencies.”¹⁹⁶

Furthermore, a typical enforcement activity of a regulatory agency encompasses all three governmental functions, including adjudication, within the same body, and even among the same people within that body,¹⁹⁷ in a manner that seriously challenges separation of powers theory.¹⁹⁸ The concentration of powers is illustrated in Gary Lawson’s portrayal of the Federal Trade Commission’s enforcement activities:

The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission’s rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission’s findings warrant an enforcement action, the Commission issues a complaint. The Commission’s complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission.¹⁹⁹

Indeed, in applying its judicial role, “the agency wears two very different hats at once—a quasi-judicial, neutral decisionmaker and one of the parties to the ‘case.’”²⁰⁰

We therefore suggest that courts’ current deference to agency in quasi-judicial decisions is over-inclusive. Our proposal is that quasi-judicial regulatory actions by administrators, such as interpretations of regulatory statutes and sanctioning, be reviewed by courts *de novo*. In that vein, a bill titled “Separation of Powers Restoration Act” (SOPRA) was recently introduced to Congress, suggesting that courts “decide [de novo] all relevant

193. See Jonathan I. Charney, *Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 480, 482 (1974); Hay, *supra* note 192, at 234; Jaffe, *supra* note 103, at 872–73.

194. See Charney, *supra* note 193, at 480.

195. See Jaffe, *supra* note 103, at 870.

196. *Id.* at 876.

197. Lawson, *supra* note 44, at 1248.

198. See *id.* at 1248–49.

199. *Id.* at 1248.

200. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 113 (1998).

questions of law, interpret constitutional and statutory provisions”²⁰¹ While agencies are certainly expert in regulatory matters, they are not equally expert in the law. Both independent and executive agencies are extremely well-informed and well-equipped to handle executive regulatory matters, such as permits regarding pollution levels, or determining the ways in which employers report workplace safety incidents to the regulatory agency.²⁰² They are not, however, as well-suited to decide on matters of law, such as punishing regulatory violators or interpreting the meaning of a regulatory law enacted by Congress. While efficiency mandates that agencies hold such quasi-judicial powers, this vast compromise in delegation of power must be met with appropriate judicial restraints employed by courts.

B. INSUFFICIENT REVIEW OF AGENCY RULEMAKING

Another regulatory deference doctrine, called the “filed rate doctrine,” applies to quasi-legislative agency actions.²⁰³ Under the filed rate doctrine, which originated in *Keogh v. Chicago & Northwestern Railway Company*,²⁰⁴ rates and tariffs of services that are regulated by the executive are protected from private claims.²⁰⁵ The doctrine, which prevents consumers from filing suits against regulated bodies alleging that a regulated rate is unreasonable or unlawful,²⁰⁶ is applied in markets such as transportation, insurance, telecommunications, and utilities.²⁰⁷ In such markets, a service is usually granted a monopoly by the government, and in exchange, the price of the utility is regulated by the government.²⁰⁸ The regulated tariff is based on the cost of providing the service.²⁰⁹

The filed rate doctrine has been widely accepted by the courts, which have completely deferred to regulatory decision-making in such civil cases.²¹⁰ As a result, a utility with a tariff on file with an agency can depend on the filed rate doctrine to ensure that “disputes regarding service under the tariff will be resolved by regulatory agencies and not by courts.”²¹¹ Accordingly, the doctrine’s principal purpose has been described by some commentators as “keeping regulation to the regulators.”²¹² However, some

201. See Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong., 1st Sess., § 2 (2017).

202. See, e.g., OSHA Improve Tracking of Workplace Injuries and Illnesses Rule, *supra* note 46.

203. A filed rate is a mandatory tariff that is filed with a government agency that regulates charges. The filed rate doctrine also limits private litigation against corporations regarding such regulated tariffs. See Julia Gorodetsky, *Analogy by Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction*, 23 TUL. ENVTL. L.J. 1, 11–13 (2009) (a description of the development of the filed rate doctrine in adjudication).

204. *Keogh v. Chi. & N.W. Ry. Co.*, 260 U.S. 156 (1922).

205. See Allan Kanner, *The Filed Rate Doctrine and Insurance Fraud Litigation*, 76 N.D. L. REV. 1, 2 (2000).

206. See *id.*

207. See *id.*

208. Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1592 (2003).

209. *Id.*

210. See Kevin M. Decker, *Recent Development in Minnesota Law: Filed-Rate Doctrine: Leaving Regulation to the Regulators*, 34 WM. MITCHELL L. REV. 1351, 1353 (2008).

211. Rossi, *supra* note 208, at 1594.

212. Decker, *supra* note 210, at 1352.

critics strongly argued against the doctrine, claiming that it “seriously limits judicial enforcement of competition and consumer protection.”²¹³

The Courts’ shield of regulatory agencies in regard to setting rates is so vast, it is often referred to as the “non-justiciability” doctrine, that defines certain topics as inappropriate or unsuitable for adjudication by court.²¹⁴ This massive deference is awarded to administrative regulators even though rate setting is considered a legislative²¹⁵ rather than purely executive function, which is the core function of the executive branch.²¹⁶

Congress also tends to award excessive independence to regulatory agencies in terms of their rulemaking and setting tariffs powers, and provides hardly any review or supervision. Generally, Congress supervises administrative agencies in many respects. For example, Congress holds hearings, publishes reports, investigates, commissions studies, conducts field observations, and adopts legislation that restrains or directs administrative regulation.²¹⁷ Congress can also confirm or reject presidential nominees to head the agency and holds the power to constrain the agency’s actions or block its agenda.²¹⁸ The very formulation of an agency, its legal powers, and its budget, which are subject to congressional discretion, are themselves highly powerful mechanisms of supervision over administrative agencies.²¹⁹ However, in regards to administrative rulemaking by regulatory agencies, congressional supervision is very limited, including matters of utility rates and tariffs, which are mostly delegated to administrative agencies.²²⁰

The supervisory relationship of Congress to the agencies is governed by the “Congressional Review Act 1996” (CRA).²²¹ The CRA requires agencies to submit final rules to Congress, which Congress can subsequently overturn.²²² The Act allows Congress, with a majority in each chamber and the president’s signature, to overturn agency action.²²³ The CRA also prevents the agency from ever implementing similar action in the future.²²⁴ However, this congressional authority is merely supervisory and highly

213. Rossi, *supra* note 208, at 1592.

214. See Vonda Mallicoat Laughlin, *The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L. J. 373, 376 (2012).

215. See Decker, *supra* note 210, at 1367 (citing a court ruling that recognized ratemaking as a legislative function); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 139 (2013) (noting that rates for the transportation of natural gas could have been decided by Congress but this authority was instead delegated to the executive).

216. Article II of the Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1.

217. See McCubbins & Schwartz, *supra* note 82, at 166; Rubin, *supra* note 68, at 392.

218. See Rubin, *supra* note 68, at 392.

219. See *id.* at 394. Such organizational regulatory laws are discussed *supra* in Section I.B.

220. See generally Decker, *supra* note 210; Gorodetsky, *supra* note 203; Rossi, *supra* note 208.

221. The CRA was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801–08 (2012)).

222. However, Congress’s authority to overturn agency rules under the Congressional Review Act was seldom used before President Donald Trump entered office. See Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J. L. & PUB. POL’Y 187, 190–91 (2018); see also *infra* note 225.

223. 5 U.S.C. §§ 801–02 (2012).

224. *Id.* § 801.

passive, as it grants Congress a veto right over agency regulations that is rarely used.²²⁵

It follows, therefore, that regulations that have great impact on the economy and consumers, such as those protecting competition and consumer welfare, are almost exclusively in the hands of regulatory agencies. The agencies currently enjoy massive legislative delegation of power from Congress, as well as almost complete court deference. The outcome is regulatory legislation that is virtually unchecked by other branches of government.

Yet a recent legislative proposal termed the “Regulations from the Executive in Need of Scrutiny Act” (REINS Act)²²⁶ calls for much greater involvement of Congress in administrative regulation. The REINS Act would require that any “major rule,” as defined in the bill,²²⁷ be approved by an affirmative vote of Congress, rather than be subject, as is currently the situation, to a “legislative veto,” in which agency rules go into effect unless Congress votes to nullify it.²²⁸ The REINS Act has the potential to reclaim Congress’s overly-delegated legislative powers from regulatory agencies.²²⁹

While delegation of legislative powers is important in the age of the regulatory state, delegating the legislation of major regulations to administrative agencies is not aligned with the separation of powers. Congress should therefore take back its constitutional legislative powers by actively engaging in shaping agency regulations, especially those that have major impact on the general public. These include regulations that have resulted, as defined in the REINS Act, in:

- (1) an annual cost on the economy of \$100 million or more . . . (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or
- (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.²³⁰

225. See, e.g., *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2176 (2009); Siegel, *supra* note 215, at 145. However, a considerable change in this respect occurred under the Trump administration, as Congress repealed fifteen rules under the CRA during 2017. See, e.g., Cary Coglianesi, *Let’s Be Real About Trump’s First Year in Regulation*, REG. REV. (Jan. 29, 2018), <https://www.theregreview.org/2018/01/29/lets-be-real-trumps-first-year-regulation>.

226. H.R. 26, 115th Cong. (2017). Currently the bill has passed the House.

227. A “major rule” is defined as any rule that the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in: (1) an annual cost on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. See *id.* § 804 (amended by Sec. 3 of the House amendments, May 1, 2017).

228. Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1448 (2015); Siegel, *supra* note 215, at 141; see also REINS Act § 802.

229. For a more detailed discussion of the REINS Act see Siegel, *supra* note 215, at 141.

230. See *supra* note 227.

This definition applies not only to every major regulation in terms of costs, but also to regulations that may affect competition and consumer protection, such as utilities rate-setting.

Unlike the current law, according to which Congress only has a veto right over agency regulations, Congress should take a more central role in the legislative process of regulations by holding public hearings and reviewing proposed regulations thoroughly and independently from the agency. Under this proposed scheme, regulatory agencies will not have the power to independently legislate major regulations, but merely the authority to bring legislative proposals to Congress. Congress will not only approve or veto the agency's proposal, but will also actively consider its scope, meaning, implications, details, and wording.

C. CONGRESS'S LEGISLATION OF EXECUTIVE-IN-NATURE REGULATION

While the abundant scholarship on separation of powers deals mostly with congressional delegation of legislative powers to agencies,²³¹ Congress's violation of executive powers is much less discussed.²³² In the regulatory context, congressional encroachment on the executive domain occurs when Congress or state legislators legislate regulatory rules that are executive in nature—i.e., rules that have particular, rather than general, applicability.

Substantive regulatory laws enacted by Congress are largely of general applicability.²³³ Such laws typically set regulatory standards for an entire industry, such as drug companies²³⁴ or publicly traded companies.²³⁵ These types of laws do not single out one specific company or other entity, as befitting general rules.²³⁶ However, contrary to common perceptions, every so often Congress or state legislators enact laws that constitute specific regulatory arrangements applying only to particular entities.²³⁷ These “private” laws include, *inter alia*, statutes that provide corporations with special benefits, such as public funds, tax exemptions, and regulatory exemptions.²³⁸

231. The problem of legislative delegation in regulatory issues is discussed *supra* in Section III.B.

232. For a discussion of the judicial precedent in such matters, see *infra* text accompanying note 255 *et seq.* An example of such a discussion can also be found in scholarship. See Susan M. Davies, *Congressional Encroachment on Executive Branch Communications*, 57 U. CHI. L. REV. 1297 (1990) (discussing Congress's encroachment on the executive's ability to communicate with anyone, including the president, about its activities, involving a testimony before Congress); see also Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 323 (1987) (discussing judicial decisions that “struck down congressional assumption or limitation of ‘executive’ powers”).

233. See *supra* Section I.B.

234. See, e.g., The Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 (2015).

235. See, e.g., The Securities Act of 1933, 15 U.S.C. § 77a (2012).

236. See Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014). Lon Fuller considered vague, unclear, retroactive statutes, as well as specific statutes that lack generality, as examples of the immorality of law. See LON FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1977). For an interpretation of Fuller in this context see Rubin, *supra* note 19, at 386–87, 397–98.

237. See Parker, *supra* note 1, at 468; Zoldan, *supra* note 236, at 625, 630, 632.

238. Parker, *supra* note 1, at 468; Zoldan, *supra* note 236, at 637.

Yet the enactment of these kinds of regulatory arrangements of particular applicability is executive in nature, rather than legislative. Designing regulatory norms that apply only to a specific entity is a function most suited for administrative regulators, not Congress or state legislators. Such private laws conflict with the separation of powers doctrine: “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”²³⁹

Furthermore, Congress is not the right institution for deciding particular regulatory cases because it lacks the responsiveness to dynamic problems that may arise in the regulatory arena.²⁴⁰ Within the regulatory state framework, regulators have to be attuned to rapidly changing technological, economic, social, and environmental challenges. One of the most famous theories in regulation scholarship—“responsive regulation”²⁴¹—concerns the demands on regulators to keep up with regulatees and respond quickly to changes in their behavior, such as non-compliance.²⁴² Responsiveness is a common feature of regulatory agencies in the executive branch. Congress, on the other hand, is slow in regulating industries via statutes,²⁴³ which requires setting in motion a long process of legislation (which may or may not bear fruit).²⁴⁴

Legislators also lack the expertise, know-how, and experience in dealing with highly specific executive regulatory issues.²⁴⁵ Administrative agencies, on the other hand, are institutionally suitable for dealing with highly detailed and complex regulatory issues, such as deciding on a specific regulatory exemption for a certain publicly traded company or a specific workplace safety standard regarding a particular firm.²⁴⁶ Administrative agencies also enjoy vast institutional experience with companies that play an important role in regulated industries, which gives the agencies an obvious advantage in resolving conflicts and problems in specific cases, sometimes through close negotiations.²⁴⁷ Such close relationships with regulated industries suit regulatory agencies much more than legislators, because the agency is inherently situated in a position of close scrutiny, inspection, and

239. MONTESQUIEU, *op. cit.* Parker, *supra* note 1, at 458, 469; *see also supra* Part II.

240. *See, e.g.*, Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 *YALE L. J.* 1395, 1400–01 (1975).

241. AYRES & BRAITHWAITE, *supra* note 18.

242. *Id.* at 35–40. This influential book was the basis of many subsequent publications. *See, e.g.*, Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 *MODERN L. REV.* 59 (2008); NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* 138 (1998).

243. *See, e.g.*, Cutler & Johnson, *supra* note 240, at 1410; *see also supra* Part II.

244. *See* Cutler & Johnson, *supra* note 240, at 1410 n.48.

245. *See* James O. Freedman, *Expertise and the Administrative Process*, 28 *ADMIN. L. REV.* 363, 364 (1976) (discussing the need for expertness, specialization, and responsiveness to changing conditions and emergencies in the New Deal era).

246. *See id.* (citing James M. Landis, who asserted that expertness can only be based on civil servants who enjoy long continuance in office).

247. Such negotiations may take place under “contractual regulation,” which refers to agreements made between regulators and regulatees regarding compliance, enforcement, supervision, or rulemaking. *See, e.g.*, ANDREW P. MORRIS, BRUCE YANDLE & ANDREW DORCHAK, *REGULATION BY LITIGATION* (2009); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 *U. PA. L. REV.* 473 (1999); Jody Freeman, *The Contracting State*, 28 *FLA. ST. U. L. REV.* 155, 191–92, 194 (2000).

supervision²⁴⁸ regarding the regulated entities and also holds leverage in the form of sanctioning,²⁴⁹ stringent rules and regulations, and harsh scrutiny.²⁵⁰ Once the conflict is resolved, the agency is also best suited to revoke an individual regulatory exemption or benefit due to its responsiveness, speed, and expertise.²⁵¹ The agency is also better placed than Congress or state legislators to gather facts pertaining to a particular regulatory conflict that requires a specific-applicability norm.²⁵² This is because unlike Congress, most agencies have thousands of employees,²⁵³ equipped with adequate skills for gathering facts. Moreover, the agencies enjoy a hierarchical structure that allows an effective devolution of decision-making to specialized administrative divisions, sections, and units.²⁵⁴

A fairly recent Supreme Court case illustrates the importance of separation of powers between the legislator and the executive in matters that are executive in nature. In *Zivotofsky v. Kerry*,²⁵⁵ the court addressed the case of a Jerusalem-born U.S. citizen whose parents asked the American embassy to list his place of birth as “Israel” on his passport and were declined.²⁵⁶ The embassy’s position was based on U.S. executive branch policy at the time not to recognize any country as having sovereignty over Jerusalem.²⁵⁷ In contrast, the Foreign Relations Authorization Act stated that the place of birth of a U.S. citizen born in Jerusalem will be recorded as Israel.²⁵⁸ The Supreme Court held that the Act is unconstitutional, since it contradicts the executive branch’s exclusive power to recognize foreign sovereigns, and held that Congress had breached executive powers.²⁵⁹ The *Zivotofsky* ruling, for the first time in history, upheld executive branch action in the face of congressional prohibition.²⁶⁰

Though not a decision of a regulatory nature, *Zivotofsky* sets a highly important standard for separation of powers between Congress and the executive. Executive-in-nature regulatory matters should be left to the executive. Congress should not be allowed to violate the roles of regulatory

248. Generally, regulatory norms are monitored for compliance by administrative agencies through, e.g., inspections, reports filled by the industry, surveys, consumer complaints, reviews, and examinations. See, e.g., ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 228 (2nd ed. 2012); Rory Van Loo, *Regulatory Monitors*, COLUM. L. REV. 1, 25 (forthcoming 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168798 (highlighting the prominent role in the modern administrative state played by regulatory agencies’ powers of monitoring via examiners and inspectors). See also *supra* notes 45–46 and accompanying text.

249. See, e.g., Schmeltzer & Kitzes, *supra* note 102.

250. See *supra* notes 45–46 and accompanying text.

251. See Freedman, *supra* note 245 (discussing these traits of administrative agencies).

252. See, e.g., Andrew Dudley, *Opening Borders: Congressional Delegation of Discretionary Authority to Suspend or Repeal the Laws of the United States*, 41 ARIZ. ST. L. J. 273, 298–99 (2009).

253. See discussion *supra* Section I.A.

254. See, e.g., WILLIAM BROOKE GRAVES, PUBLIC ADMINISTRATION IN A DEMOCRATIC SOCIETY 37 (1950).

255. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

256. *Id.* at 2083.

257. *Id.* at 2084.

258. See Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1365–66 (2002), declared unconstitutional in *Zivotofsky*, *supra* note 255.

259. *Zivotofsky*, *supra* note 255, at 2096.

260. See Esam Ibrahim, *The Dangers of Zivotofsky II: A Blueprint for Category III Action in National Security and War Powers*, 11 HARV. L. & POL’Y REV. 585, 585 (2017).

agencies in deciding specific cases. The main criteria for determining whether Congress has encroached on a regulatory agency's role in executing the law is the nature of the regulatory norm. While Congress holds a legislative regulatory power of general applicability, administrative agencies should decide exclusively on specific regulatory issues that have no general applicability. Such congressional encroachment on the executive is contradictory to the constitutional separation of regulatory powers.

V. CONCLUSION

The multi-layered and wide-ranging regulatory powers currently held by administrative agencies are not only deferred to by courts, but also lack proper supervision and active involvement by Congress. Major regulations are practically the sole domain of agencies, which are virtually immune to judicial and congressional review. Indeed, There is “a difficulty in understanding the relationships between the agencies that actually do the work of law-administration, whose existence is barely hinted at in the Constitution, and the three constitutionally named repositories of all governmental power—Congress, the president, and the Supreme Court.”²⁶¹

Though these three constitutional branches all have regulatory roles, the American model of the regulatory state places most of its regulatory powers in the hands of administrators—multifunctional agencies²⁶²—that “are accountable to the people only through an indirect, two-step relationship.”²⁶³ While, on the one hand, Congress under-participates in the legislative process of setting major regulations, it also encroaches on the executive branch's power by enacting “private” laws that apply to specific cases (and not to the general public).

We suggest a different construction of the regulatory state. However, this essay should not be read as promoting “anti-administrativism” or “anti-government²⁶⁴” theories, or as a call for the “deconstruction of the administrative state,” which President Trump's administration proclaimed as one of its main objectives.²⁶⁵ Rather, we propose a more balanced approach to the division of labor between the three governmental branches that reconciles essential regulatory functions with the values of separation of powers.

261. Strauss, *supra* note 24, at 575.

262. Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1239 (1989).

263. *Id.* at 1240.

264. Or “contemporary anti-administrativism,” as Gillian Metzger characterizes current judicial and academic criticism of regulatory agencies and the growing magnitude and power of the administrative state. See Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017).

265. See Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State'*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html.

