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# CONSTRAINING THE EXECUTIVE BRANCH: DELEGATION, AGENCY INDEPENDENCE, AND CONGRESSIONAL DESIGN OF JUDICIAL REVIEW

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**ABSTRACT**—While scholarship examining the relationship between Congress, federal agencies, and the judiciary reveals variation in the statutory details that affects administrative and judicial decision-making, few studies explore the extent to which congressional delegation decisions balance both the substantive and procedural independence of agencies against the possibility of the federal judiciary's review of administrative action.

This Article enhances scholarly understanding of delegation by providing a qualitative, theoretical, and empirical account of the circumstances under which Congress manipulates federal agency exposure to the federal judiciary. Ironically, combined with statutory provisions dictating agency independence, increasing an agency's exposure to unelected federal judges can increase administrative responsiveness to elected legislators.

Using a motivational case study of federal energy policy from the 93rd to 110th Congresses, this Article highlights how, during the legislative process, Congress's members' delegation decisions account for agency independence and administrative exposure to the courts. Based on the findings of this case study, the Article develops a new theoretical account of legislative choices over Executive Branch exposure to the federal judiciary. This Article then presents an empirical examination of significant legislation from the passage of the Administrative Procedure Act through 2016 to assess the factors influencing legislative choices regarding delegation, agency independence, and Executive Branch exposure to the judiciary.

In doing so, this Article makes several important contributions. First, by broadening scholarly discussions of agency design, delegation, and administrative responsiveness to elected officials, the Article illustrates how underappreciated factors—including political volatility, technical uncertainty, and administrative structure—influence the parameters under which Congress delegates. Along with agency independence, political coalitions strategically adjust the availability of judicial review to account

for the practical realities of governance. Specifically, political coalitions increase administrative exposure to the courts as political volatility and the autonomy of agency leadership increase. Political coalitions decrease agency exposure to the courts as the complexity of the administrative policy arena increases and the availability of political review decreases.

Considered in its entirety, this Article suggests that legislative decisions regarding judicial exposure can enhance or diminish the effectiveness of other statutory and constitutional tools of democratic accountability, such as administrative procedures or oversight. Simply put, the level of administrative exposure to the judiciary has profound implications for the American separation of powers system of governance.

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## INTRODUCTION

In 2023, Congress narrowly avoided a financial crisis by striking a political deal that suspended the nation's borrowing limit.[1] The deal turned on securing the vote of pivotal Senator Joe Manchin (D-W. Va.), who was

[1] Jim Tankersley & Alan Rappeport, *New Details in Debt Limit Deal: Where $136 Billion in Cuts Will Come From*, N.Y. TIMES (last updated June 2, 2023), https://www.nytimes.com/2023/05/29/us/politics/debt-ceiling-agreement.html [https://perma.cc/65UJ-A5TT] (detailing legislation suspending the debt ceiling for two years).

"front and center" in the lengthy negotiating process.[2] Senator Manchin played an integral role in helping Democratic President Joe Biden and Republican Speaker of the House Kevin McCarthy build a legislative coalition to secure the passage of a bill allowing the federal government to borrow money until 2025.[3]

The final legislation was wide-ranging and, among other things, touted by Republicans as "Rein[ing]-In the Runaway Bureaucracy."[4] Yet the legislation also contained a curious provision protecting certain bureaucratic decisions from federal judicial review.[5]

Specifically, during the negotiating process, Senator Manchin secured statutory language that expedited the completion of the Mountain Valley Pipeline, a natural gas transmission pipeline that would link important natural gas fields in Manchin's home state of West Virginia to the Transco pipeline, which runs from the Gulf Coast of Texas to New York City.[6] Initially considered by the Federal Energy Regulatory Commission (FERC) in 2014, numerous challenges to the project in federal court had repeatedly suspended its construction.[7] Among other things, litigation involved

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[2] Luke Broadwater, *Can Joe Manchin Broker a Debt Deal as Republicans Try to Unseat Him?*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/politics/joe-manchin-debt-deal.html [https://perma.cc/2AAV-AY3Z] (quoting Sen. Susan Collins (R-Me.)).

[3] Burgess Everett & Jennifer Haberkorn, *Sinema and Manchin's Covert Debt Deal Operation*, POLITICO (June 2, 2023, 4:30 AM), https://www.politico.com/news/2023/06/02/sinema-manchin-senate-debt-limit-vote-00099840 [https://perma.cc/Y9A6-2SRD].

[4] Press Release, U.S. House Budget Comm., The Fiscal Responsibility Act Budget Committee Summary and Overview (May 30, 2023), http://budget.house.gov/press-release/the-fiscal-responsibility-act-budget-committee-summary-and-overview [https://perma.cc/QB9K-7BHW]. For example, the statute contained provisions relating to the Department of Education's administration of student loan programs and the Department of Agriculture's administration of the Supplemental Nutrition Assistant Program. BUDGET MODEL, UNIV. OF PA. WHARTON SCH., THE FISCAL RESPONSIBILITY ACT OF 2023: BUDGET COST ESTIMATES OF THE DEBT CEILING AGREEMENT (May 31, 2023), https://budgetmodel.wharton.upenn.edu/issues/2023/5/31/the-fiscal-responsibility-act-of-2023 [https://perma.cc/PBY4-QQBX].

[5] Marcia Coyle, *Did Congress Invade the Judicial Power to Protect a Pipeline?*, NAT'L CONST. CTR.: CONST. DAILY BLOG (July 25, 2023), https://constitutioncenter.org/blog/did-congress-invade-the-judicial-power-to-protect-a-pipeline [https://perma.cc/YRW5-4AR8].

[6] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324, 137 Stat. 10, 47–48 (2023); *Transmission & Gulf of Mexico, Operations*, WILLIAMS, https://www.williams.com/pipeline/transco/ [https://perma.cc/89J2-XMVX]; Li Cohen, *Debt Limit Deal Would Allow Controversial Mountain Valley Pipeline's Completion to Be Expedited*, CBS NEWS (last updated May 30, 2023, 3:33 PM), https://www.cbsnews.com/news/debt-limit-deal-would-permit-expediting-completion-of-controversial-west-virginia-mountain-valley-pipeline-project/ [https://perma.cc/E2DL-ML2F]; *Overview*, MOUNTAIN VALLEY PIPELINE, https://mountainvalleypipeline.info/overview/ [https://perma.cc/T548-HHVF].

[7] Report of Mountain Valley Pipeline LLC Request to Initiate NEPA Pre-Filing Process, Docket No. PF15-3 (Oct. 27, 2014), http://elibrary.ferc.gov/eLibrary/docketsheet?docket_number=pf15-3&sub_docket=all&dt_from=1960-01-01&dt_to=2024-06-11&chklegadata=false&pagenm=dsearch&date_

questions regarding the adequacy of the U.S. Fish and Wildlife Service's environmental analyses,[8] the Army Corps of Engineers' permitting processes,[9] and the U.S. Forest Service's and Bureau of Land Management's federal rights-of-way decisions.[10]

The final language of the bill not only directed FERC and the Secretaries of Agriculture, the Interior, and the Army to maintain all authorizations, permits, opinions, and other approvals or orders necessary for the construction of the pipeline, but also provided that "no court shall have jurisdiction to review any" of these actions.[11]

Although critics of the bill accused the enacting coalition of strategically manipulating federal court jurisdiction for political gain, Senator Manchin and his colleagues' use of this type of statutory language is not unprecedented.[12] Between 1947 and 2014, over 35% of politically or policy-significant laws that delegated authority to federal agencies contained provisions relating to judicial review of agency policy and process.[13] Those provisions govern, *inter alia*, who has standing to sue; what relief interested persons may seek; when and where a party must file a challenge to an agency action; which arguments the parties may proffer; how much deference courts must grant agency decisions when reviewing them; and even whether federal

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range=custom&search_type=docket&date_type=filed_date&sub_docket_q=allsub [https://perma.cc/LQ3R-7SDY]; PAUL W. PARFOMAK & ADAM VANN, CONG. RSCH. SERV., IN12032, MOUNTAIN VALLEY PIPELINE: PAST THE FINISH LINE 1 (2024).

[8] Appalachian Voices v. U.S. Dep't of the Interior, 25 F.4th 259, 263–64 (4th Cir. 2022).

[9] Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 639 (4th Cir. 2018); Sierra Club v. U.S. Army Corps of Eng'rs, 981 F.3d 251, 255 (4th Cir. 2020).

[10] Mountain Valley Pipeline, LLC v. Wilderness Soc'y, 144 S. Ct. 42 (2023); Appalachian Voices v. U.S. Dep't of the Interior, No. 23-1384, 2023 WL 4784194 (4th Cir.), *vacated*, *Mountain Valley Pipeline*, 144 S. Ct. 42; Wilderness Soc'y v. U.S. Forest Serv., No. 23-1592(L), 2023 WL 4784199 (4th Cir.), *vacated sub nom.*, *Mountain Valley Pipeline*, 144 S. Ct. 42.

[11] Fiscal Responsibility Act § 324. The Act did provide that the D.C. Circuit Court of Appeals shall have original and exclusive jurisdiction over any claims alleging the invalidity of this provision, something we return to in Part IV. *Mountain Valley Pipeline*, 144 S. Ct.at 48.

[12] Lydia Wheeler, *Judiciary Used as 'Bargaining Chip' in Debt Limit Pipeline Deal*, BLOOMBERG L. (May 31, 2023, 9:41 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X1AF73FK000000?bna_news_filter=us-law-week#jcite [https://perma.cc/M9N9-5D2C].

[13] Pamela J. Clouser McCann, Charles R. Shipan & Yuhua Wang, *Measuring the Legislative Design of Judicial Review of Agency Actions*, 39 J.L. ECON. & ORG. 123, 135 (2023). A law qualifies as "significant" if it was recognized by both the legislative wrap ups of the *New York Times* and *Washington Post*, or by public policy scholars as having a great impact but being underestimated in importance at the time of passage, according to Mayhew's two criteria. *Id*. at 131–32; DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002, at 44 (2d ed. 2005) (describing data at pages 37–50 and providing extensive technical detail and justification of research choices at 227–52). Updated data through 2022 are available online. *Datasets and Materials:* Divided We Govern, YALE UNIV., https://campuspress.yale.edu/davidmayhew/datasets-divided-we-govern/ [https://perma.cc/LDH6-DHUA].

courts can review agency actions at all.[14] The provisions contemplate all manner of agency proceedings—promulgation of new rules and revision of existing ones; decisions to issue licenses, sanctions, and orders; and agency actions that arise out of both formal and informal adjudication.[15]

These statutory provisions are important—one way that Congress asserts its constitutional authority within the American separation of powers system is by regulating federal courts' abilities to hear cases involving administrative action.[16] Indeed, as with the Mountain Valley Pipeline Project, Congress occasionally even eliminates a federal court's jurisdiction while litigation is pending.[17]

Nevertheless, much of the scholarship that explores delegation tends to overlook these important aspects of statutes, instead focusing on the structural or procedural features that enhance and limit elected officials'—and, in particular, the President's—control of the administrative state.[18] Comparatively less scholarship has explored the statutory provisions that expose agencies to the federal court system and thus indirectly affect the Legislature's influence over administrative policymaking. This oversight in the literature is puzzling, as judicial exposure is an omnipresent aspect of administrative law.[19]

The Administrative Procedure Act (APA) sets a baseline for judicial review of agency action.[20] When enacted in 1946, however, the statute

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[14] *See* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES 37 (June 2, 2022); *see also* Clouser McCann et al., *supra* note 13, at 127–31.

[15] For a broad description of agency actions and proceedings, see Administrative Procedure Act, 5 U.S.C. § 551.

[16] *See* JOANNA R. LAMPE, CONG. RSCH. SERV., R44967, CONGRESS'S POWER OVER COURT DECISIONS: JURISDICTION STRIPPING AND THE RULE OF *KLEIN* 1 (2024).

[17] Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 888–916 (2011). While Congress can influence judicial outcomes by amending statutory law that delegates authority to an agency, it cannot, by limiting jurisdiction, undermine the authority of the judiciary by dictating a rule of decision. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871).

[18] *See, e.g.*, DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997, at 4 (2003); Jason A. MacDonald, *Agency Design and Postlegislative Influence over the Bureaucracy*, 60 POL. RSCH. Q. 683 (2007); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971 (2015); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991).

[19] *See* SIEGEL, *supra* note 14, ix.

[20] 5 U.S.C. § 706, in combination with 28 U.S.C. § 1331, grants federal courts jurisdiction for claims arising under federal law. *See, e.g.*, Axon Enter., Inc. v. FTC, 598 U.S. 175, 185 (2023) (holding federal courts have jurisdiction to review constitutional challenges to agency's structure and existence). Over time, the Supreme Court has interpreted the APA's review provisions as embodying a presumption of

avoided deep-seated political disagreements regarding the procedural requirements for administrative policymaking; since then, Congress has in turn largely avoided resolving those disagreements through amendments to the Act itself.[21] Instead, Congress uses agency- or program-specific statutory provisions, such as that in the Mountain Valley Pipeline example, to manipulate judicial review beyond the APA's parameters and to further legislative policy objectives.[22] Statutory provisions that alter judicial exposure—for example, by precluding judicial consideration of specific agency actions or granting a specific court exclusive jurisdiction—can reinforce legislative interests by changing the mechanisms for policy review.[23] The Supreme Court largely has recognized the constitutionality of

reviewability of agency action. *E.g.*, Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967) (surveying caselaw and finding judicial review barred only when there is "persuasive reason to believe that such was the purpose of Congress"); Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986) (recognizing a strong presumption of review of agency actions); Sackett v. EPA, 566 U.S. 120, 128 (2012) (same). However, this presumption is just that—a presumption that may be overcome by specific statutory language or other indicators of congressional intent to adjust judicial review. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984); *see also* William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1907 (2023) (arguing APA's text and structure create presumption of judicial review of agency action); Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 15 (2022) (explaining the scope of judicial review provided by § 706); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1292 (2014) (noting the Court has occasionally "found sufficient statutory evidence" to rebut presumption); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 742–43 (1990) (citing *Block* for proposition that presumption may be overcome when congressional intent to do so is "fairly discernible" (quoting 467 U.S. at 351)).

[21] *See* Emily S. Bremer, *The Administrative Procedure Act: Failures, Successes, and Danger Ahead*, 98 NOTRE DAME L. REV. 1873, 1873, 1886 (2023); Noah A. Rosenblum, *Making Sense of Absence: Interpreting the APA's Failure to Provide for Court Review of Presidential Administration*, 98 NOTRE DAME L. REV. 2143, 2174–75 (2023) (explaining that the presidency was not as much a driver of administrative action at the time of the APA's enactment as it is today).

[22] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 650–51 (2013); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347, 360–61 (1997); Charles R. Shipan, *The Legislative Design of Judicial Review*, 12 J. THEORETICAL POL. 269, 271 (2000) (conducting "a game-theoretic analysis" to examine how the Legislature utilizes judicial review to effectuate policy choices).

[23] William N. Eskridge Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 176 (1992); Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1550–51 (2018); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1, 16–17 (1990); Shipan, *supra* note 22, at 271–72. *See generally* Robert M. Howard, *Controlling Forum Choice and Controlling Policy: Congress, Courts and the IRS*, 35 POL. STUD. J. 109 (2007) (discussing how Congress controls tax policy by directing litigation to tax courts).

such provisions, including (albeit indirectly) the provision involving the Mountain Valley Pipeline.[24]

What motivates Congress to enact these provisions in the first place? And how do legislative coalitions balance the inclusion of these provisions against other delegation decisions and/or structural aspects of administrative governance? To answer these questions, we explore how, when delegating, Congress strategically uses the federal judiciary as a check on policymaking by the Executive Branch. Specifically, we examine judicial review as an ex ante solution to an ex post control problem.[25] We are the first, to our knowledge, to theoretically model and empirically assess the combined effect of these ex ante choices on the resulting administrative policy outcomes and strategies.[26]

We use a mixed-methods approach consisting of a qualitative case study, theoretical model, and statistical analysis to evaluate how Congress balances the independence of federal agencies against the possibility of the federal Judiciary's review of administrative action when delegating. Mixed-methods research combines different kinds of data and methods of analysis whose findings reinforce a common explanation of complex phenomena in governance.[27] By integrating qualitative, theoretical, and empirical accounts of legislative decision-making, we capitalize on the strengths and overcome the weaknesses of each method individually.[28]

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[24] *E.g.*, United States v. Fausto, 484 U.S. 439, 448–49 (1988) (observing that judicial review limitations in the Civil Service Reform Act of 1978 reflected Congress's considered judgment); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 218 (1994) (upholding the constitutionality of Congress's preclusion of district court review for Mine Act claims); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 489–90 (2010) (discussing situations where agency review is exclusive, thereby displacing judicial review); *Axon Enter.*, 598 U.S. at 185–86 (same); *see also* Amy Howe, *Supreme Court Rules in Favor of Mountain Valley Pipeline*, SCOTUSBLOG (July 27, 2023, 12:36 PM), https://www.scotusblog.com/2023/07/supreme-court-rules-in-favor-of-mountain-valley-pipeline/ [https://perma.cc/4EHA-SFYJ].

[25] *See* Shipan, *supra* note 22, at 271; Spiller, *supra* note 22, at 360; Joseph L. Smith, *Judicial Procedures as Instruments of Political Control: Congress's Strategic Use of Citizen Suits*, 31 LEGIS. STUD. Q. 283, 298–99 (2006).

[26] Certainly, foundational work has established the institutional and procedural arrangements that guide legislative design of administrative action and has discussed the role of the courts in enforcing legislative bargains. *See infra* notes 46–64 and accompanying text. However, this scholarship does not contemplate the combined, strategic use of agency independence and statutory provisions that adjust agency exposure to the courts as an aspect of delegation, neither does it model nor systematically and empirically estimate how aspects of the political environment affect such use.

[27] *See generally* Jaakko Kuorikoski & Caterina Marchionni, *Mixed-Methods Research and Variety of Evidence in Political Science*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF POLITICAL SCIENCE 266, 266 (Harold Kincaid & Jeroen Van Bouwel eds., 2023).

[28] Scholars recognize this research strategy as effective to gather the insights required to support evidence-based analysis of the political world. *E.g.*, PATRICIA BURCH & CAROLYN J. HEINRICH, MIXED

Our analysis makes several important contributions. First, we broaden scholarly understanding of administrative policymaking by including all three branches of government in a theoretical model of delegation. When unelected administrative officials make policy decisions, the democratic principles embedded in the Constitution require those administrators to be responsive to the preferences of those who hold elected office.[29] Ironically, statutory provisions that increase the Executive Branch's exposure to the judiciary, itself an unelected body, can increase administrative responsiveness to Congress.[30] We provide an account of the circumstances under which the Legislature is more likely to do so.

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METHODS FOR POLICY RESEARCH AND PROGRAM EVALUATION 4 (2016) ("[D]ata and findings generated from a more fully integrated mixed method approach provide the kinds of rich information and insights that are essential to supporting evidence-based policy and practice.").

[29] *See* U.S. CONST. art. II, § 1, cls. 1–2; *see also* Collins v. Yellen, 594 U.S. 220, 251–52 (2021) (observing President must have at-will removal power over the Federal Housing Finance Agency Director); Gundy v. United States, 588 U.S. 128, 136 (2019) (upholding congressional delegation where Attorney General's discretion was limited); *Free Enter. Fund*, 561 U.S. at 497–98 (2010) (holding dual for-cause limitations on President's removal power over agency and board violates separation of powers principles); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 475–76 (2001) (finding no impermissible delegation of legislative power to EPA); Loving v. United States, 517 U.S. 748, 771 (1996) (explaining how the intelligible-principle rule prevents Congress from impermissibly delegating broad legislative power); Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (discussing the limits of Congress's delegation of power to the U.S. Sentencing Commission); Morrison v. Olson, 487 U.S. 654, 695 (1988) (considering whether the Independent Counsel Act impermissibly insulated an independent counsel from presidential oversight); Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 865–66 (1984) (finding that Congressional and presidential oversight over unelected bureaucrats outweighs separation of powers concerns), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024); United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 574 (1939) (upholding congressional delegation to Secretary of Agriculture where Congress provided sufficiently precise direction); Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (discussing presidential removal powers over an officer with quasi-judicial functions); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (holding delegation permissible where Congress provided intelligible guiding principle); Myers v. United States, 273 U.S. 52, 163–64 (1926) (holding President has exclusive removal powers over Executive Branch officials); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 216–17 (Library of America, Arthur Goldhammer trans., 2004) (1835) (describing the desirable characteristics of public officers within American democracy); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 258–60 (1989) (arguing that the Constitution's construction of accountability reflects bureaucratic responsiveness to constituency demands filtered through the White House and Congress); MAX WEBER, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills eds., 1946); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487, 1488 (2015) (explaining how Presidents and Congress are held responsible for agency blunders). Throughout this Article, we refer to these principles as "democratic accountability."

[30] *See* Eskridge & Ferejohn, *supra* note 23, at 187 (observing that judicial review encourages agencies to act more in line with congressional preferences, relative to presidential preferences, than they otherwise would); Ferejohn & Shipan, *supra* note 23, at 17 (finding judicial review shifts agency policymaking outcomes toward the median member of Congress); Shipan, *supra* note 22, at 271 (demonstrating that Congress can increase the utility of delegating through strategic adjustments to judicial review).

In addition, we offer a more complete explanation of how variation in agency structure, in combination with administrative exposure to the federal courts, influences congressional decisions to delegate policy authority to the Executive Branch. Since the creation of the Interstate Commerce Commission in 1887, Congress has insulated certain agencies such as FERC from politics in the hope of promoting policy expertise.[31] A vast majority of scholarship that explores the relationship between such insulation and delegation is limited to consideration of a few agency design choices that influence political control (e.g., appointments, removals, appropriations, and hearings).[32] Yet, there exists a tremendous diversity in statutory text that helps Congress address varied problems resulting from delegation to the bureaucracy.[33] In broadening scholarly discussions of agency design, delegation, and administrative responsiveness to account for this diversity, we highlight the underappreciated statutory features (including judicial

[31] Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1115–16, 1119, 1132 (2000).

[32] *See, e.g.*, Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG 119, 141–47 (1996) (examining, among other factors, the role of presidential appointment and removal powers in executive control of agencies); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 766 (2010) (analyzing budgetary limitation riders as a tool for controlling agencies); Jerry L. Mashaw, *Of Angels, Pins and For-Cause Removal: A Requiem for the Passive Virtues*, 2020 U. CHI. L. REV. ONLINE 13, 13 (discussing the constitutionality of for-cause removal); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1824 (2012) (analyzing the interplay between appropriations and removal restrictions as tools for influencing agencies); Alan E. Wiseman, *Delegation and Positive-Sum Bureaucracies*, 71 J. POL. 998, 999 (2009) (focusing on Office of Information and Regulatory Affairs review and intervention as a means of influencing agency policymaking).

[33] *See, e.g.*, Breger & Edles, *supra* note 31, at 1151–52, 1202–03 (exploring different statutory structures relating to, for example, budget submissions to Congress or enforcement); Keith S. Brown & Adam Candeub, *Partisans and Partisan Commissions*, 17 GEO. MASON L. REV. 789, 789 (2010) (explaining how political affiliation requirements can help Congress influence agency policymaking); DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 9 (2001) (showing how Congress can manipulate agency size); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 773–74 (2013) (exploring how the diversity of agency form can make agencies more or less independent from the President); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 294 (1993) (discussing how Congress devalued the administrative state by choosing a judicial enforcement model for EEOC litigation); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 462 (2008) (discussing the impact of Congress designating agencies as independent); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1364 (1988) (discussing statutory requirements involving appropriations); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 664 (1984) (exploring how statutes influence the independence of an agency's judgment).

review provisions) that influence the parameters under which the Legislature delegates.

Furthermore, we highlight how recent Supreme Court decisions reflect these same considerations. Cases such as *Axon Enterprise, Inc. v. FTC*,[34] *Biden v. Nebraska*,[35] *Collins v. Yellen*,[36] *Corner Post v. Board of Governors of the Federal Reserve System*,[37] *Department of Commerce v. New York*,[38] *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[39] *Gundy v. United States*,[40] *Kisor v. Wilkie*,[41] *Loper Bright Enterprises v. Raimondo*,[42] *Ohio v. EPA*,[43] *SEC v. Jarkesy*,[44] *Seila Law LLC v. Consumer Financial Protection Bureau*,[45] *United States v. Arthrex, Inc.*,[46] and *West Virginia v. EPA*[47] (just to name a few) have altered the constitutional landscape of administrative action and have laid the basis for future litigation over delegation, agency structure, and the procedural frameworks under which federal agencies operate. As put by Professor Gillian Metzger, administrative law today is the "legal equivalent of mortal combat, where foundational principles are fiercely disputed and basic doctrines are offered up for 'execution.'"[48]

While legal scholars have provided important insights into the dynamics of this battle,[49] academic research largely has viewed Supreme

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[34] 598 U.S. 175 (2023).

[35] 143 S. Ct. 2355 (2023).

[36] 594 U.S. 220 (2021).

[37] 144 S. Ct. 2440 (2024).

[38] 588 U.S. 752 (2019).

[39] 561 U.S. 477 (2010).

[40] 588 U.S. 128 (2019).

[41] 588 U.S. 558 (2019).

[42] 144 S. Ct. 2244 (2024).

[43] 144 S. Ct. 2040 (2024).

[44] 144 S. Ct. 2117 (2024).

[45] 591 U.S. 197 (2020).

[46] 594 U.S. 1 (2021).

[47] 597 U.S. 697 (2022).

[48] Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 1 (quoting Kisor v. Wilkie, 588 U.S. 558, 592 (2019) (Gorsuch, J., concurring in the judgment)).

[49] *E.g.*, Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 470 (2011) (arguing the Court has strictly enforced the power and authority of each branch of government, while at the same time being deferential to Congress); Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 483 (2023) (noting that nondelegation and federalism concerns largely have driven the Roberts Court's use of Constitution-based canons of statutory interpretation); Rebecca L. Brown & Lee Epstein, *Is the US Supreme Court a Reliable Backstop for an Overreaching US President? Maybe, but Is an Overreaching (Partisan) Court Worse?*, 53 PRESIDENTIAL STUD. Q. 234, 234, 249–50 (2023) (finding that the Roberts Court has been the most "anti-president" Court since the start of the modern Court in 1937); Ronald M. Levin, *The Major Questions Doctrine:*

Court consideration of delegation, agency design, and federal agencies' overall exposure to the courts in isolation. We demonstrate how, when viewed as part of a cohesive whole, the Court's recent administrative law decisions are consistent with our theoretical and empirical frameworks of congressional decision-making.

This Article begins a discussion of how elected officials balance the need for neutral, expert administrative decision-making against the desire for administrative policy to be responsive to political actors' preferences. Part I reviews important scholarly insights on elected officials' strategic calculus when delegating to federal agencies and highlights how statutory provisions that adjust the exposure of agencies to the federal courts fit into this literature. As with other accountability mechanisms, judicial review has distinct costs and benefits that legislators must balance when making the decision to delegate.

Part II presents a motivational case study of the legislative process to explore the complexity of congressional delegation to the administrative state. Specifically, Part II examines developments in federal energy policy from the 93rd to 110th Congresses. This qualitative examination of legislative decision-making enables an understanding of the context in which political coalitions make delegation decisions. As our introductory example suggests, federal energy policy in the modern era reflects politics in general, as shifting political coalitions compete over complex issues related to government regulation across a wide variety of topics, including antitrust, environment, national security, and taxation.[50] Part II's case study suggests that legislative considerations of judicial exposure often coincide with issues of administrative responsiveness and coalitional uncertainty.

Utilizing insights from the case study, Part III develops a new theoretical account of legislative choices over Executive Branch exposure to the federal judiciary across all policy areas. This Part expands upon an existing model of delegation to craft a novel theory of legislative decisions to craft statutes that change agency exposure to the courts beyond the APA's

*Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 903–05 (2024) (exploring inconsistencies in the Court's reasoning in major questions cases and discussing the implications of those inconsistencies for administrative governance); Lidiya Mishchenko, *A Functional Approach to Agency (In)Action*, 75 SMU L. REV. 117, 117 (2022) (noting the Court's "frenzied" approach to reviewing administrative action); Stephanie P. Newbold, *A Transformative Era: The Roberts Court, Constitutional Interpretation, and Public Administration*, 52 ADMIN. & SOC'Y 862, 864 (2019) (analyzing Roberts Court decisions in the context of public administration); Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1123–25 (2021) (describing how the Court's efforts to square administrative statutory interpretation with legislative intent affects how agencies implement the law).

[50] *See* Thomas W. Gilligan & Keith Krehbiel, *Complex Rules and Congressional Outcomes: An Event Study of Energy Tax Legislation*, 50 J. POL. 625, 625–26 (1988); David B. Spence, *Regulation, "Republican Moments," and Energy Policy Reform*, 2011 BYU L. REV. 1561, 1561 (2011).

baseline.[51] The theoretical model is the first of its kind to contemplate a political coalition that delegates policymaking authority to an agency and (a) specifies the parameters of political influence on agency leadership; (b) determines the amount of discretion an agency has to gather information on administrative policy; and (c) manipulates agency exposure to the judiciary.

The model presented in Part III is beneficial not only because it examines differences in agency structure alongside judicial review provisions, but also because it results in a series of testable expectations regarding when Congress is likely to utilize the judiciary as a check on the administrative state. The model highlights the key roles that uncertainty, agency independence, and judicial exposure play in legislative drafting decisions. Specifically, political coalitions increase agency exposure to the courts as political volatility increases and decrease exposure when the administrative policy arena is complex. Furthermore, political coalitions adjust agency exposure to the courts in combination with agency independence. As Congress places ex ante constraints on political influence over agency leadership, the Legislature increases the agency's exposure to the courts. Yet, as Congress enables ex post political review of agency policy, the Legislature also increases the possibility of judicial review.

Part IV empirically examines the theoretical expectations from Part III. Part IV uses a dynamic measure of judicial exposure developed by Professors Pamela J. Clouser McCann, Charles R. Shipan, and Yuhua Wang to explore congressional use of judicial review provisions in major legislation from the passage of the Administrative Procedure Act through 2016.[52] This Part also accounts for agency independence using estimates of statutory autonomy developed by Professor Jennifer L. Selin that quantify limitations on the ability of political actors to influence agency leadership and agency design features that limit political review of an agency's policy process.[53] After describing variation in these measures across agencies, Part IV estimates a statistical model to assess whether political volatility, technically challenging policy areas, and agency independence influence legislative choices regarding judicial exposure. This model largely confirms the theoretical expectations presented in Part III.

Part V contextualizes our analysis within broader constitutional debates over power and authority in the federal government. Specifically, Part V

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[51] *See* Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995).

[52] Clouser McCann et al., *supra* note 13, at 123.

[53] Selin, *supra* note 18, at 974–82.

argues that, like Congress, the Supreme Court considers delegation, agency design, and administrative exposure to the courts in chorus.

Considered as a whole, this Article provides qualitative, theoretical, and empirical insight into "the concept of bureaucracy beyond judicial review."[54] While it could be tempting for legal scholars to view our analyses from the perspective of judges, this Article tells a story from the perspective of the political branches. Part I's discussion of important scholarly insights on how Congress designs an accountable administrative state and Parts II, III, and IV's qualitative and quantitative analyses illuminate the factors that affect the Legislature's strategic decisional process when delegating to the Executive Branch. In contrast to claims that relationships between overseers and administrative agencies do not systematically vary in accordance with agency structure,[55] legislative choices ex ante over agency structure and exposure to the judiciary impact overseers' ex post control over administrative policy.

These insights on the nature of political decision-making have important implications for how the judiciary grapples with the practical realities of delegation in the American constitutional system. Part V places our analyses in the context of recent developments in administrative law, highlighting the fact that, like Congress, the Supreme Court contemplates delegation, agency structure, and judicial review together as part of a larger separation of powers story.

The Article concludes with insights into how delegation, agency structure, and administrative exposure to the judiciary intertwine in underappreciated ways.

## I. DESIGNING AN ACCOUNTABLE ADMINISTRATIVE STATE

When establishing federal agencies staffed by unelected administrators, elected officials must weigh the desirability of bureaucratic responsiveness against the benefits of policy expertise.[56] Politicians face the same challenge when deciding how to delegate authority to administrative agencies to implement policy. When delegating this policy authority to the Executive Branch, legislators seek to maximize their political goals and to protect

[54] Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, DAEDALUS, Summer 2021, at 155, 158.

[55] Strauss, *supra* note 33, at 591–92.

[56] Jennifer L. Selin, *Political Control of Regulatory Authorities*, *in* HANDBOOK OF REGULATORY AUTHORITIES 193, 193 (Martino Maggetti, Fabrizio Di Mascio & Alessandro Natalini eds., 2022); Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, W. EUR. POL., Jan. 2002, at 125, 129–31; Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 216–17 (1887).

future policy outcomes from political threat.[57] Yet, delegation invites the possibility that an agency becomes more expert in policy than elected officials and that the agency may use this expertise to make decisions that differ from legislative preferences.[58]

To offset this possibility, Congress employs various institutional arrangements to provide the Legislature with information about administrative program implementation, facilitate discovery of agency noncompliance with statutory mandates, and make the threat of legislative sanction for poor performance more credible.[59] However, because

[57] *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 9 (1999) (discussing the situations in which Congress elects to delegate); JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY 80 (2002) (contending that, when crafting legislation, legislators account for the possibility that "other political actors, particularly judges, may subvert bureaucratic decisions"); Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POL. SCI. 509, 521 (1992) (describing as a potential explanation for politicians' creation of agencies the ability to mitigate "ex post problems"); Bawn, *supra* note 51, at 62 (analyzing what motivates Congress to choose between agency micromanagement and deference); Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON. & ORG. 101, 119–20 (1997) (discussing the costs and benefits generated for legislators); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293, 308 (2004) (empirically finding that "bosses delegate . . . to make good outcomes more likely").

[58] *See, e.g.*, D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 17 (Benjamin I. Page ed., 1991) (discussing bureaucrats' ability to evade legislative intent); Francis E. Rourke, *Variations in Agency Power*, *in* BUREAUCRATIC POWER IN NATIONAL POLITICS 244, 247–48 (Francis E. Rourke ed., 3d ed. 1978) (describing agency personnel's pursuit of power); MAX WEBER, *supra* note 29, at 233–34 (describing how the use of bureaucratic expertise in administration can subvert legislative control).

[59] R. Douglas Arnold, *Political Control of Administrative Officials*, 3 J.L. ECON. & ORG. 279, 280–81 (1987); Jonathan Bendor, Serge Taylor & Roland Van Gaalen, *Politicians, Bureaucrats, and Asymmetric Information*, 31 AM. J. POL. SCI. 796, 797 (1987); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751–52 (2007); EPSTEIN & O'HALLORAN, *supra* note 57, at 9–10; David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 698–99, 715–16 (1994); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721, 728–729 (1985); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243–44 (1987) [hererinafter McCubbins et al., *Administrative Procedures*]; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442–43 (1989) [hererinafter McCubbins et al., *Structure and Process*]; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 284 (John E. Chubb & Paul E. Peterson eds., 1989) [hereinafter Moe, *The Politics of Bureaucratic Structure*]; Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, *in* ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 116, 128 (Oliver E. Williamson ed., 1990); Matthew Potoski, *Managing Uncertainty Through Bureaucratic Design: Administrative Procedures and State Air Pollution Control Agencies*, 4 J. PUB. ADMIN. RSCH. & THEORY 623, 625 (1999).

monitoring and sanctions are imperfect and costly, these strategies in isolation are likely ineffective.[60]

Thus, Congress also employs statutory provisions that specify how much autonomy the Legislature wishes to grant administrators and the extent to which other political actors can influence agency policy.[61] Whether legislators design agencies to mirror the current political climate at the time a statute is enacted, stack the deck in favor of some constituent groups, or limit the amount of policy discretion given to an agency, scholars explain these provisions in an agency's authorizing statute as the result of strategic political choices.[62] These provisions matter not only because of their effect on the relationships between agencies and their democratically elected principals, but also because they affect administrators' desire and capacity to implement delegated authority.[63]

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[60] McCubbins et al., *Administrative Procedures*, *supra* note 59, at 248–51; McCubbins & Schwartz, *supra* note 59, at 168–69.

[61] *See, e.g.*, LEWIS, *supra* note 18, at 9 (discussing how statute specificity curbs administrator discretion); Bawn, *supra* note 57, at 107 (discussing statutory controls, such as requiring agencies to justify decisions with information "only available from a group with an interest in the outcome"); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 100 (1992) (describing how an agency's design can "determine which interest groups will have ready access to the agency, and on what terms"); McCubbins, *supra* note 59, at 725–27 (identifying four means by which Congress can rein in agency discretion: defining the regulatory setting, prescribing the regulatory scope, identifying available tools, and specifying procedural requirements); McCubbins et al., *Structure and Process*, *supra* note 59, at 440–42 (discussing how politicians control the influence of third parties by structuring agency dependence on constituent information); Moe, *The Politics of Bureaucratic Structure*, *supra* note 59, at 284 ("The whole point of structural choice is to anticipate, program, and engineer bureaucratic behavior."); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 6 (discussing ex ante controls, such as decision criteria, procedures, timetables, and personnel requirements).

[62] *E.g.*, EPSTEIN & O'HALLORAN, *supra* note 57, at 7–9 (describing the trade-offs motivating these strategic choices as "transaction cost politics"); Bawn, *supra* note 51, at 63 (noting that the "choice between control and expertise will vary depending on technical features of the policy and the political environment"); Bawn, *supra* note 57, at 119–20 (observing that legislators' incentives are shaped by the political environment); Thomas H. Hammond & Christopher K. Butler, *Some Complex Answers to the Simple Question 'Do Institutions Matter?': Policy Choice and Policy Change in Presidential and Parliamentary Systems*, 15 J. THEORETICAL POL. 145, 185 (2003) (concluding that the interaction of institutional rules and legislative preferences influence public policy); McCubbins et al., *Administrative Procedures*, *supra* note 59, at 255 (describing how legislators "create a decisionmaking environment that mirrors the [existing] political circumstances" to ensure ongoing consistency); McCubbins et al., *Structure and Process, supra* note 59, at 432 (observing how structure and process determine the influence of different interests).

[63] B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213, 231–32 (1988) (noting that bureaucracies are bounded by both elected principals and a "legitimate representational task"); Bawn, *supra* note 51, at 66 (finding that greater independence incentivizes agency effort and performance); Bawn, *supra* note 57, at 114–16 (discussing how statutory control provisions curb agency discretion).

Much of the literature that examines the statutory provisions designed to promote an accountable bureaucracy focuses on statutory language that enhances or limits administrative responsiveness to the Executive and Legislative Branches. Yet, as our introductory example indicates, statutes also include provisions that dictate agencies' relationships with the Judicial Branch.

Congress has used legislation to adjust the jurisdiction of federal courts in virtually every period in American history, and, as federal litigation has increased, the importance of statutory provisions that structure judicial review has grown.[64] Just as the congressional appropriations process and the White House Office of Management and Budget's review of agency budgets, legislative materials, and economically significant regulations influence agency processes and outputs,[65] judicial review creates pressure on agencies to adjust their policy processes and use of resources strategically to ward off legal challenges.[66]

"The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[67] Because the potential for litigation influences the Executive Branch by placing constraints on agency policy decisions, the presence of the courts also shapes congressional policy choices with regard to agency design and delegation.[68] Exposing an agency

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[64] Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895–97 (1984).

[65] *See, e.g.*, Alexander Bolton & Sharece Thrower, *The Constraining Power of the Purse: Executive Discretion and Legislative Appropriations*, 81 J. POL. 1266, 1269 (2019) ("Budget size is theoretically and empirically linked to agency outputs . . . ."); MacDonald, *supra* note 32, at 780 (analyzing how limitations riders provide mechanisms for agency control); Selin, *supra* note 18, at 975 (referring to appropriation as "[a]rguably the most important congressional tool for controlling administrative agencies").

[66] Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1157 (2018); Jonathan S. Gould, *Cost-Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695, 758 (2023); Emerson H. Tiller, *Controlling Policy by Controlling Process: Judicial Influence on Regulatory Decision Making*, 14 J.L. ECON. & ORG. 114, 115 (1998).

[67] LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

[68] *See* Eskridge & Ferejohn, *supra* note 23, at 187 (suggesting Congress has traditionally favored judicial review as a means to prevent agencies from shifting policy away from statutory commands towards the preferences of the Executive Branch); Ferejohn & Shipan, *supra* note 23, at 17 (finding presidential veto and judicial review both have significant effects on agency policymaking); Shipan, *supra* note 22, at 289–90 (concluding the Legislature may achieve more favorable outcomes by strategic use of judicial review); James F. Spriggs II, *Explaining Federal Bureaucratic Compliance with Supreme Court Opinions*, 50 POL. RSCH. Q. 567, 582 (1997) (finding federal agencies rarely engage in noncompliance despite suggestions by scholars that agencies are incentivized to follow policy goals rather than political superiors); John R. Wright, *Ambiguous Statutes and Judicial Deference to Federal Agencies*, 22 J. THEORETICAL POL. 217, 235–36 (2010) (discussing how ambiguous statutes affect judicial review of agency decisions).

to the courts can reinforce coalitional decision-making and increase agency responsiveness to political actors by providing a forum for review of administrative policy that grants supremacy to the enacting coalition's preferences as expressed through statutory text.[69]

Judicial exposure offers an opportunity for additional review of agency action (or not, as in the case of our introductory example), and litigation can offer information about the consequences of administrative decision-making, particularly when agency structure or operations otherwise prevent policy evaluation.[70] However, delegation decisions that expose agencies to the courts are not without cost.[71] Litigation, or even the possibility of litigation, represents a delay in implementation as agencies spend time and resources developing an administrative record that withstands the complexity of legal requirements for policymaking.[72] Additionally, exposure to the courts brings—unelected Article III judges—key actors into the policy process who serve lifetime appointments, may often lack substantive knowledge in a particular field, and are relatively decentralized in their decision-making.[73]

Thus, like with other accountability mechanisms, when considering administrative exposure to the judiciary, legislators balance their own preferences against the need for agencies' specialized expertise or responsiveness to the political climate. The statutory provisions that govern agencies' relationships with the courts result from strategic decisions by legislative coalitions that seek to enfranchise certain constituencies and, in doing so, anticipate the possibility of bureaucratic drift from legislative preferences that results both from internal agency operations and judicial

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[69] Eskridge & Ferejohn, *supra* note 23, at 187; Ferejohn & Shipan, *supra* note 23, at 17; John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 579–80 (1992); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1405 (2004).

[70] James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interactions*, 45 AM. J. POL. SCI. 84, 97 (2001); Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 75 (2020); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1038–39 (2004).

[71] Ian R. Turner, *Working Smart and Hard? Agency Effort, Judicial Review, and Policy Precision*, 29 J. THEORETICAL POL. 69, 73 (2017).

[72] Rosemary O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 ADMIN. L. REV. 549, 563–69 (1989); Dawn M. Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 J. POL. 1053, 1060 (2008). *See* Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POL. SCI. 336, 349 (1995) (observing EPA abatement actions declined 93% as agency shifted resources to litigating).

[73] Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1209 (1992).

review.[74] Simply, legislators factor the possibility of litigation resulting from administrative decision-making into delegation decisions.[75] As a result, the relative variation and uncertainty associated with both agency and court actions play an important role in how the Legislature delegates authority.[76]

## II. ENERGY POLICY AS A MOTIVATING EXAMPLE

Although a rich literature has provided scholars with a framework for considering the statutory designs that promote the democratic accountability of administrative agencies, at times this framework can oversimplify the multifaceted nature of coalitional decision-making in the legislative process. Given the wide range of actors that operate in today's political environment, how do members of Congress determine how legislative choices will map onto real-world outcomes? What factors influence how legislators balance different aspects of agency design to address political volatility or the uncertainty that results from delegating in technically complex policy areas? To explore the intricacies of delegation, we examine the development of federal energy policy in the modern era.

Our intensive study of a single policy area to understand a broad set of political phenomena has several benefits.[77] These benefits include uncovering salient issues in complex policy processes that we can later explore using more structured methods, such as theoretical or empirical modeling.[78] The study places government actors' behavior in context to identify new variables and motiving theoretical expectations about the way the world works. In doing so, the study highlights legislation that Congress enacted as well as bill proposals that died in committee.[79] Such considerations are important for painting a comprehensive picture of the legislative process.

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[74] Chutkow, *supra* note 72, at 1060 (finding that Congress's strategic decisions to remove court jurisdiction reflects a concern over unwanted pressure on administrative agencies); Marion Dumas, *Taking the Law to Court: Citizen Suits and the Legislative Process*, 61 AM. J. POL. SCI. 944, 946 (2017) (considering the Legislative and Judicial Branches as part of a system that can help promote the voices of political constituencies); Joseph L. Smith, *Judicial Procedures as Instruments of Political Control: Congress's Strategic Use of Citizen Suits*, 31 LEGIS. STUD. Q. 283, 283 (2006) (arguing that Congress uses its authority to manipulate judicial review to shape public policy outcomes).

[75] Engstrom, *supra* note 22, at 638.

[76] Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1045 (2006).

[77] John Gerring, *What Is a Case Study and What Is It Good For?*, 98 AM. POL. SCI. REV. 341, 342 (2004).

[78] SARAH J. TRACY, QUALITATIVE RESEARCH METHODS: COLLECTING EVIDENCE, CRAFTING ANALYSIS, COMMUNICATING IMPACT 7 (3d ed. 2024).

[79] *See* ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 20–21 (2005).

The interactions uncovered in the case study are generalizable to other domains.[80] Energy politics reflect politics in general, where a range of interests compete over economies of scale and government regulation.[81] Exploring the legislative history of energy policy is useful to highlight broader political concerns, especially when considering complex legislative activity.[82] Most pieces of energy legislation contain provisions related to a wide variety of topics, including antitrust, the environment, national security, tax, trade, and transportation. As a result, constituencies and coalitional makeups vary across bills. Additionally, there are numerous federal agencies to which political coalitions delegate energy policy, and they exist with varying structural and procedural constraints.

Across time, federal energy policy has seen waves of regulation and deregulation. While the energy policy of the United States has traditionally depended heavily upon fossil fuels, variation in policy and focus has reflected shifts in fossil fuel availability and pricing, advances in technology, and variation in consumer preferences.[83] Early in the history of federal energy policy, administrative agencies were primarily concerned with enforcement rather than policymaking, and politicians relied on the states and courts to provide market corrections.[84] However, as energy policy became more technically and politically complex, Congress increasingly relied on federal agencies for policymaking.[85]

Professor Bruce I. Oppenheimer divides congressional action on energy policy into periods that correspond with the political and institutional environments in which the Legislature operated.[86] Largely following this

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[80] *See generally* Andrew Bennett & Colin Elman, *Qualitative Research: Recent Developments in Case Study Methods*, 9 ANN. REV. POL. SCI. 455, 467 (2006) (describing the concept of generalizability).

[81] *See* Janice A. Beecher, *The Prudent Regulator: Politics, Independence, Ethics, and the Public Interest*, 29 ENERGY L.J. 577, 580 (2008) (discussing the paradigmatic qualities of regulatory politics more broadly); John S. Moot, *Economic Theories of Regulation and Electricity Restructuring*, 25 ENERGY L.J. 273, 280 (2004) (discussing the diverse interests captured by an economic theory of regulation); Brad Sherman, *A Time to Act Anew: A Historical Perspective on the Energy Policy Act of 2005 and the Changing Electrical Energy Market*, 31 WM. & MARY ENV'T. L. & POL'Y REV. 211, 215–16 (2006) (discussing how economies of scale, monopolies, and regulation explain the energy market).

[82] Gilligan & Krehbiel, *supra* note 50, at 626; Spence, *supra* note 50, at 1561.

[83] SAM H. SCHURR, BRUCE C. NETSCHERT, VERA F. ELIASBERG, JOSEPH LERNER & HANS H. LANDSBERG, ENERGY IN THE AMERICAN ECONOMY, 1850–1975: AN ECONOMIC STUDY OF ITS HISTORY AND PROSPECTS 1–2 (Virginia D. Parker ed., 1960).

[84] Robert A. Jablon, Anjali G. Patel & Latif M. Nurani, Trinko *and* Credit Suisse *Revisited: The Need for Effective Administrative Agency Review and Shared Antitrust Responsibility*, 34 ENERGY L.J. 627, 628–29 (2013).

[85] Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 167.

[86] Bruce I. Oppenheimer, *Congress and Energy Policy 1960–2010: A Long-Term Evaluation*, *in* THE U.S. SENATE: FROM DELIBERATION TO DYSFUNCTION 199, 200–02 (Burdett A. Loomis ed., 2011).

categorization, we begin our analysis with the 93rd Congress (1973–1975), when oil shocks and the transitional phase of subcommittee government in the U.S. House of Representatives and more individualized behavior in the U.S. Senate disrupted the traditional mode of energy policymaking.[87] We end our case study with the 110th Congress (2007–2009), when the increased resources of party leaders to mobilize majority coalitions, along with renewed attention to environmentalism and national security, created an opportunity for activism in energy policy.[88]

We provide a broad overview of political discourse and a summary of significant developments in energy policy over this time period. We also trace the legislative history of each piece of significant legislation that contains a unique judicial exposure provision applying to one of twelve existing or former agencies with energy-related missions.[89] In doing so, we identify House and Senate hearings and debates, conference reports, and other congressional materials relating to this legislation utilizing ProQuest Legislative Insight, legislative histories compiled by the U.S. Government Accountability Office and available via Westlaw, and contemporaneous media coverage of Congress utilizing materials included in the Newspaper and Current Periodical Reading Room of the Library of Congress.

We stress that, while fairly detailed, our account is not a comprehensive study of energy-related events or policies. Nor is it a study of judicial review of energy-related administrative action. Instead, the study is designed to provide qualitative context for theoretical development regarding coalition building in Congress and delegation decisions made by the Legislature.

### *A. 1970s: Jurisdictional Disputes and Executive Reorganization Leading to Increased Judicial Exposure as a Tool for Regulatory Accountability*

Early in the 1970s, it was comparatively easy for politicians to propose energy legislation. In 1973, members of OPEC initiated an oil embargo in retaliation for various countries' support of Israel in the Yom Kippur

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[87] Charles O. Jones & Randall Strahan, *The Effect of Energy Politics on Congressional and Executive Organization in the 1970s*, 10 LEGIS. STUD. Q. 151, 153 (1985); Oppenheimer, *supra* note 86, at 201.

[88] Oppenheimer, *supra* note 86, at 202; Sherman, *supra* note 81, at 223; Spence, *supra* note 50, at 1569–71.

[89] As included in the Clouser McCann et al., *supra* note 13, dataset: Atomic Energy Commission, Department of Energy and seven of its bureaus (Federal Energy Regulatory Commission, Loan Programs Office, National Nuclear Security Administration, Office of Acquisition Management, Office of Electricity Delivery and Energy Reliability, Office of Energy Efficiency and Renewable Energy, Office of Nuclear Safety Enforcement), Federal Power Commission, Nuclear Regulatory Commission, and Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects. While other agencies undoubtedly administer energy policy (e.g., the Department of Agriculture's Rural Utilities Service), we leave consideration of those agencies for future scholarship.

War.[90] The ensuing oil crisis, bolstered by American dependence on foreign oil, put pressure on government officials to address energy policy.[91] Yet mobilizing sufficient majorities to resolve key issues was difficult because, not unlike in today's politics, energy policy became wrapped up in larger disputes between congressional leadership and committees.[92] Congressional responses to the energy crisis took on the "character of the Oklahoma land rush," as members of Congress and lobbyists from a variety of sectors clamored to take control of energy policy.[93]

President Richard Nixon focused the debate in 1973 when he created a new Federal Energy Office in the Executive Office of the President and called for energy legislation to reorganize existing federal regulatory agencies and to create new ones to address energy policy.[94] Congress took the first step towards reform with the Energy Reorganization Act of 1974, which created the Energy Research and Development Administration, the Nuclear Regulatory Commission, and the Energy Resources Council.[95] Congress also created the Federal Energy Administration as a temporary agency to deal with the energy crisis, later extending its life through 1977.[96]

In 1975, Congress passed the Energy Policy and Conservation Act (EPCA), which delegated tremendous authority to the Executive Branch to direct energy policy.[97] While often recognized for establishing the Strategic Petroleum Reserve and Corporate Average Fuel Economy (CAFE) standards, the EPCA also delegated authority to the Executive Branch as a political compromise. Uncertainty with respect to the appropriate level of regulation of the oil industry, the future political power of various stakeholders, and the electoral ramifications of the new policies led energy policy to become the subject of controversy and public debate.[98] Historically powerful segments of the energy industry were vilified as harming

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[90] *Oil Embargo, 1973–1974*, U.S. STATE OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1969-1976/oil-embargo [https://perma.cc/SNZ9-B6NQ].

[91] William D. Smith, *Energy: Not One Crisis, but Many*, N.Y. TIMES, Jan. 6, 1974, at 49.

[92] Bruce I. Oppenheimer, *Policy Effects of U.S. House Reform: Decentralization and the Capacity to Resolve Energy Issues*, 5 LEGIS. STUD. Q. 5, 12–16 (1980); Oppenheimer, *supra* note 86, at 206–07.

[93] Jones & Strahan, *supra* note 87, at 153.

[94] Special Message to the Congress Proposing Emergency Energy Legislation, 1 PUB. PAPERS 922 (Nov. 8, 1973).

[95] Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233.

[96] Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96; Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976).

[97] Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975).

[98] *See generally* DOROTHY S. ZINBERG, UNCERTAIN POWER: THE STRUGGLE FOR A NATIONAL ENERGY POLICY xvii (1983) (suggesting that designing a comprehensive energy policy to account for industry concerns, public attitudes, and government interests in times of uncertainty is "misguided and unrealistic").

consumers, and many members of Congress felt politically vulnerable.[99] Due to such uncertainty, delegation to the Executive Branch attracted support across party lines.[100]

Yet such a large delegation of authority created its own set of problems, both in the Executive and Legislative Branches. The need for coordination across multiple agencies, some having only temporary authorization, created difficulties for the administration in establishing a coherent and strategic national energy policy.[101] These difficulties prompted President Gerald Ford to propose the creation of a new Department of Energy (DOE).[102] Two months later, President Jimmy Carter presented Congress with a proposal to reorganize the Executive Branch to create a DOE and then publicized it in a prime time address to the nation.[103] The plan was complex, "contain[ing] more than 100 interdependent proposals aimed" not only at administrative organization but also at regulating energy supply and demand.[104]

Additionally, the broad authority Congress originally delegated to the Executive Branch generated oversight concerns for the Legislature. One of the primary motivating factors behind Congress's response to President Carter's proposal was a shared recognition that policy was too separated across the Executive Branch, and that Congress was not situated institutionally to overcome the oversight challenges created by such dispersion.[105] Members of both parties expressed that too many congressional committees oversaw too many government agencies, all with

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[99] BRUCE A. BEAUBOUEF, THE STRATEGIC PETROLEUM RESERVE: U.S. ENERGY SECURITY AND OIL POLITICS, 1975–2005, at 4–6 (2007).

[100] *See* John E. Chubb, *U.S. Energy Policy: A Problem of Delegation*, *in* CAN THE GOVERNMENT GOVERN?, *supra* note 59, at 47.

[101] EXEC. OFF. OF THE PRESIDENT, THE ORGANIZATION OF FEDERAL ENERGY FUNCTIONS: A REPORT FROM THE PRESIDENT TO THE CONGRESS v (Jan. 1977).

[102] *Id.*

[103] TERRENCE R. FEHNER & JACK M. HOLL, DEP'T OF ENERGY, DEPARTMENT OF ENERGY 1977-1994: A SUMMARY HISTORY 21 (1994); The Energy Problem: Address to the Nation, 1 PUB. PAPERS 656 (Apr. 18, 1977).

[104] STAFF OF CONG. BUDGET OFF., 95TH CONG., PRESIDENT CARTER'S ENERGY PROPOSALS: A PERSPECTIVE xiii (Staff Working Paper, 2d ed. June 1977).

[105] *See* Edward J. Grenier Jr. & Robert W. Clark III, *The Relationship Between DOE and FERC: Innovative Government or Inevitable Headache?*, 1 ENERGY L.J. 325, 330–37 (1980) (describing the difficulties in establishing the boundaries of authority within overlapping jurisdictions, explicating the Senate's concern with a powerful Cabinet-level official that would cater to political interest, and describing the House compromise plan for increasing accountability to Congress via a new quasi-independent regulatory agency); Oppenheimer, *supra* note 92, at 26–27 (detailing the complexities of decentralization within Congress for issues as substantively and politically complex as energy policy). *See generally* Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight,* 58 AM. J. POL. SCI. 387, 388 (2014) (finding that increasing the number of committees involved in agency policymaking "undercut[s] the ability of Congress to respond collectively to the actions of the presidency" or the administrative state).

disaggregated authority to direct energy policy.[106] Some members also expressed concern that President Carter's reorganization proposal was motivated by a desire to further executive power rather than by policy objectives.[107]

As a result, in working towards the passage of the Department of Energy Organization Act (DOE Act), Congress revised Carter's proposal to transfer power to regulators. A series of political maneuvers transferred policies originally intended to be within the purview of executive authority to independent regulatory actors.[108] While placing policymaking authority in the hands of independent agencies alleviated concerns of executive overreach, Congress worried that such independence would lead to a lack of accountability.[109]

Reliance on the courts solved this problem. Members of both parties in Congress wanted stakeholders directly affected by future administrative policymaking to have an opportunity for redress. While agency independence could potentially limit political interference on behalf of stakeholder interests, Congress viewed judicial oversight as a remedy to issues of bureaucratic responsiveness. For example, previous lawsuits brought by a variety of stakeholders challenging regional power marketing administration policies had helped clarify laws, defined the types of projects to which various existing statutes applied, and provided important information on the allocation of federal regulatory authority.[110] Legislators hoped that exposing the newly organized Executive Branch to the courts would have similar effects.

The creation and development of the Federal Energy Regulatory Commission (FERC) is a nice example of this. Both the Ford and Carter Administrations had advocated for a reformulation of the Federal Power Commission (FPC)—an independent regulatory agency established in the 1930s to help regulate hydroelectric projects, electric utilities, and natural

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[106] *E.g.*, *Plain Talk by Rep. William Goodling*, HANOVER EVENING SUN, June 9, 1977, at C-6. For a summary of how different committees exercise such authority, see generally Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187 (2018).

[107] *Department of Energy Organization Act: Hearings on S. 826 and S. 591 Before the S. Comm. on Governmental Affs.*, 95th Cong. 105–06 (1977) [hereinafter *Department of Energy Organization Act Hearings*].

[108] Clark Byse, *The Department of Energy Organization Act: Structure and Procedure*, 30 ADMIN. L. REV. 193, 197–99 (1978); Grenier & Clark, *supra* note 105, at 332–35.

[109] Representative Elliott H. Levitas (D-Ga.) explained, "Indeed, one of the problems we have had with independent regulatory commissions is the lack of any real accountability on the part of the members of those commissions." 123 CONG. REC. 17307 (1977) (discussing commissions in the context of agency design in energy policy).

[110] Clinton A. Vince & Nancy A. Wodka, *Recent Legal Developments and Legislative Trends in Federal Preference Power Marketing*, 7 ENERGY L.J. 1, 3–4 (1986).

gas—so that it would be more responsive politically.[111] The House and Senate agreed, with the House finding that the FPC had exhibited "a conscious disregard of its" responsibilities.[112] Even Richard Dunham, the FPC Chairman at the time, acknowledged in a Senate hearing on the issue that "the Commission appears to be completely discredited in the eyes of" Congress.[113] In response, Congress used the DOE Act to replace the FPC with FERC. Congress designed FERC as an independent regulatory agency led by five commissioners with fixed terms and limited the President's removal power over the commissioners to for-cause removal only.[114] But Congress placed the agency within the new DOE, hoping that doing so would expose the agency to political interests. Despite this choice, Congress remained alarmed at the reach of FERC's policy authority and used the Natural Gas Policy Act of 1978 to restrict FERC's ability to direct natural gas prices.[115]

Yet members of Congress found the courts to be an even more powerful weapon to check FERC than adjustments to the agency's statutory authority. In 1978, Congress enacted the Public Utilities Regulatory Policy Act (PURPA) and specifically articulated its intent "to preserve jurisdiction of Federal and State courts to resolve" antitrust actions involving electricity companies "without deferring to the Commission."[116] When describing the justification for such judicial exposure, Representative John Dingell (D-Mich.) put it this way: "Remember, the procedures are often more important than the substance."[117] The presence of the courts and the threat of litigation would thus force the agency to slow its policymaking, develop a full administrative record, and be more responsive to stakeholders. This was incredibly important in the context of the uncertainty created by new programs and agencies such as FERC.

Balancing administrative structure and accountability came up again a year later, this time with the Nuclear Regulatory Commission (NRC). On March 28, 1979, the United States experienced the most serious accident in

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[111] Grenier & Clark, *supra* note 105, at 326–28.

[112] H. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, H. COMM. ON INTERSTATE AND FOREIGN COM., 94TH CONG., REP. ON FEDERAL REGULATION AND REGULATORY REFORM 379 (Subcomm. Print 1976).

[113] *Department of Energy Organization Act Hearings*, *supra* note 107, at 167.

[114] Department of Energy Organization Act, Pub. L. No. 95-91, § 401, 91 Stat. 565, 582–83 (1977).

[115] Natural Gas Policy Act of 1978, Pub. L. No. 95-621, § 121, 92 Stat. 3350, 3369–70; *see New Department Given Wide Energy Powers*, *in* CONGRESSIONAL QUARTERLY ALMANAC 609 (33d ed. 1979) (discussing the new law and noting Congress's refusal to grant FERC discretion to set energy prices for concern of political influence).

[116] H.R. REP. NO. 95-1750, at 68 (1978) (Conf. Rep.).

[117] 123 CONG. REC. 17321 (1977).

U.S. commercial nuclear history when a reactor in a nuclear power plant near Middletown, Pennsylvania partially melted down.[118] In the wake of the incident, President Carter authorized a Commission on the Accident at Three Mile Island.[119] The Commission produced a report in October of that year that identified a number of human and mechanical errors that led to the partial meltdown and spent a large amount of time examining the NRC as the agency with the largest role in the regulation of nuclear power.[120] The Commission proposed restructuring the NRC into a new agency with a single administrator, strengthening the NRC's advisory committees, and creating an oversight committee on nuclear reactor safety.[121] Congress responded to the Commission's report with a proposal to merge the NRC into the newly created Department of Energy.[122] While this proposal ultimately failed, similar legislation was repeatedly introduced unsuccessfully on the matter over the next decade.[123]

Debate over the responsiveness of a variety of federal agencies with respect to nuclear energy continued in the context of uranium production. In 1988, Senate Minority Whip Alan Simpson (R-Wyo.) lamented over the DOE's failure to respond to legislative mandates involving the issue:

> [N]o response was forthcoming. None at all. Notwithstanding the critical importance of the uranium industry to our national security and energy security, as well as the clear and unambiguous statutory requirement . . . . Because of that failure to respond, . . . the uranium producers, after lengthy and time-consuming efforts to persuade the Department of Energy to take the statutorily required action, were forced as a last resort to seek relief through the courts.[124]

Similar language highlighting the importance of enabling aggrieved stakeholders to supplement political pressure with litigation to prompt

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[118] PRESIDENT'S COMM'N ON THE ACCIDENT AT THREE MILE ISLAND, THE NEED FOR CHANGE: THE LEGACY OF TMI 1 (1979).

[119] Exec. Order No. 12,130, 44 Fed. Reg. 22027 (Apr. 11, 1979).

[120] PRESIDENT'S COMM'N ON THE ACCIDENT AT THREE MILE ISLAND, *supra* note 118, at 10–11, 19–22.

[121] *Id.* at 61–62.

[122] *Nuclear Safety Research and Development Act of 1980: Hearing Before the Subcomm. on Energy Rsch. & Prod. of the H. Comm. on Sci. & Tech.*, 96th Cong. 60–63 (1980) (discussing the division of authority between DOE and FERC at the time and inquiring into the possibility of shifting authority between agencies).

[123] These proposals included, *inter alia*, replacing the NRC, as suggested by the Commission report; restructuring the agency to address internal conflict between the operations and investigations units with the NRC; and creating a Nuclear Safety Board charged with investigatory power. MARSHALL J. BREGER & GARY J. EDLES, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS 195–202 (2015).

[124] 134 CONG. REC. 5495 (1988).

administrative action was common in legislative debates across parties and chambers.[125]

Legislators also repeatedly recognized that reviewing courts would scrutinize agency procedure much more than substance and that courts often lacked the authority to provide adequate policy-based remedies. Congressional deliberations of uranium enrichment illustrate this tension. Enriched uranium is important both for civil nuclear power generation and for the development of nuclear weapons. As a result, multiple agencies are involved in implementing federal policy in this area. The NRC licenses and inspects uranium enrichment plants, the DOE assesses the impact of sales or transfers of excess uranium inventories (including those acquired through U.S. Department of Defense (DOD) programs), and the DOE's National Nuclear Security Administration maintains the U.S. nuclear weapons stockpile and responds to domestic and international nuclear emergencies.[126] Performance of each of these tasks requires a multitude of specialists, from computer and laboratory scientists to diplomats and military commanders. Legislators did not introduce courts into this complicated web. As Senator Bill Bradley (D-N.J.) noted, "When you try to short circuit these mechanisms by going through a national court system, you accentuate the problem."[127] Because uranium enrichment policy requires balancing the input of a variety of experts in different fields, as well as both foreign and domestic policy interests, judicial oversight devoid of such expertise was not desirable.

### *B. 1980s and 1990s: Judicial Oversight Focusing on Procedure over Substance in the Wake of Deregulation*

After the turmoil of the 1970s, the next few decades of energy policy were rather calm. Relatively cheap energy decreased the political pressure on policymakers, and there was general economic prosperity and a prevailing political ideology that favored economic deregulation.[128] There was little motivation for new energy legislation, as members of Congress were largely

[125] *E.g.*, *Environmental Issues at Department of Energy Nuclear Facilities: Hearing Before the S. Comm. on Governmental Affs.*, 100th Cong. 18 (1987) (statement of Anthony J. Celebreeze Jr., Att'y Gen. of Ohio) ("Without the specter of court action, I think there is a reduced indication or reduced encouragement on the part of the agency to do something about the problem.").

[126] *See, e.g.*, 42 U.S.C. §§ 2132–2133, 2210b, 2243, 2297f; 50 U.S.C. §§ 2401, 2455a.

[127] 134 CONG. REC. 5708 (1988).

[128] Oppenheimer, *supra* note 86, at 201; *see also* Richard J. Pierce Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1499–1500 (2012) (detailing the development of "hard look" review of agency rulemaking).

unwilling to expose coalitional cleavages at a time of relative political and economic stability.[129]

As a result, the deregulatory movement that characterized the 1980s and affected airlines, trucking, railroads, telecommunications, and banking left large parts of the energy sector untouched.[130] However, throughout the 1980s, members of Congress grew increasingly frustrated with the energy agencies for their failure to respond to legislative oversight.[131] Judicial review became a solution to the accountability problem and shifted divisive choices away from the Legislature. Put simply by Senator Wyche Fowler (D-Ga.), "The judiciary has an oversight function."[132]

Energy policy came under additional scrutiny in the wake of Iraq's 1990 invasion of Kuwait and the resulting Gulf War. Volatility in international oil prices and political instability in the region brought the United States' dependence on imported oil into the national spotlight again, and there were widespread calls for a more coherent energy policy.[133] In 1991, President George H.W. Bush proposed removing administrative obstacles to domestic energy production and distribution.[134] In his address to a Joint Session of Congress at the end of the Gulf War, the President acknowledged the uncertainty created by the Gulf crisis and called on Congress to "move forward aggressively on our domestic front" and to enact legislation to, among other initiatives, develop a new national energy strategy.[135]

President Bush sent his 200-plus page plan to Congress, emphasizing deregulation and tax breaks to oil, gas, and coal industries to increase domestic output.[136] Additionally, the plan touched on aspects of oil drilling, automobile mileage, nuclear power, alternative fuel production, and the

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[129] Oppenheimer, *supra* note 86, at 210; *see* Donald F. Santa Jr. & Patricia J. Beneke, *Federal Natural Gas Policy and the Energy Policy Act of 1992*, 14 ENERGY L.J. 1, 1 (1993) (describing the Energy Policy Act of 1992 as "the first comprehensive energy policy legislation enacted in over a decade").

[130] *See, e.g.*, Moot, *supra* note 81, at 273–74.

[131] *See, e.g.*, *Department of Energy Abolishment Act: Hearing on S.1678 Before the S. Comm. on Energy & Nat. Res.*, 104th Cong. 5 (1996) (statement of Rep. Todd Tiahrt) (noting that the DOE had a long history of management problems and was not an efficient or successful department).

[132] 138 CONG. REC. 1783 (1992).

[133] Santa & Beneke, *supra* note 129, at 9–10.

[134] Thomas W. Lippman, *Bush Unveils Energy Strategy Emphasizing Fossil, Nuclear Power Production*, WASH. POST (Feb. 21, 1991, 12:00 AM), https://www.washingtonpost.com/archive/politics/1991/02/21/bush-unveils-energy-strategy-emphasizing-fossil-nuclear-power-production/ace7f2ba-a4f2-4d5b-afd7-8f5b4a3be2ee/ [https://perma.cc/5SZB-EPSK].

[135] Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict, 1 PUB. PAPERS 218, 221 (Mar. 6, 1991).

[136] Keith Schneider, *Bush's Energy Plan Emphasizes Gains in Output over Efficiency*, N.Y. TIMES, Feb. 9, 1991 (§ 1), at 1.

electric utility industry.[137] Less than two months later, legislators introduced a bill in the House, and President Bush signed the Energy Policy Act into law a little over a year later. The bill was 358 pages long and addressed 149 different subjects.[138] One of the most consequential actors in the development of the legislation was a "shadow group" known as TUG, the Transmission Unbundling Group, which encompassed individuals at the DOE, FERC, and Congress.[139] The group not only worked on the text of the bill but also helped construct the political coalition necessary to enact the legislation.[140]

Unsurprisingly, the pressure for, and subsequent pursuit of, such swift action was accompanied by inherent uncertainty regarding the legislation's long-term policy and political implications. In a joint statement submitted to Congress by the DOE and the NRC supporting the nuclear licensing reform aspects of the legislation, the two agencies indicated that implementation would take at least eighteen months or more if faced with the potential for court challenges, as the agencies would need to develop the appropriate record.[141] Members of Congress acknowledged the agencies' threat of delay, but the final bill nevertheless contained a provision stating that any "order allowing or prohibiting a [nuclear] facility to begin operating under a combined . . . license . . . shall be subject to judicial review."[142]

Legislators recognized that litigation (or even the possibility of it) might delay the implementation process, but that it also provides information about policy when the political consequences are uncertain. However, legislators publicly criticized litigation, warning that "the courts drone on and on with

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[137] Thomas W. Lippman, *Utility Industry Overhaul: Surprisingly Static-Free: Approving Energy Bill, House Acted in Harmony to Jettison 57 Years of Regulatory Policy*, WASH. POST (June 10, 1992, 8:00 PM), https://www.wapo.com/archive/politics/1992/06/11/utility-industry-overhaul-surprisingly-static-free/2dd1ecfd-856b-4f5e-9bb3-052ef5e06d66/ [http://perma.cc/2HKQ-JM6S]; Philip H. Abelson, *National Energy Strategy*, 251 SCIENCE 1405, 1405 (1991).

[138] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

[139] Lippman, *supra* note 137.

[140] *See id.*

[141] 138 CONG. REC. 1763 (1992).

[142] Energy Policy Act § 2805; *see* 138 CONG. REC. 1440, 1446 (1992) (statement of Sen. James M. Jeffords) ("I mean today in Washington, almost 20 years after the supposed violation of the regulation took place, we still have enforcement actions winding their way through the courts, over 20 years after the supposed violation started. This is even more complicated than that, Mr. President, because you have more parties involved. You have refiners and importers, vehicle manufacturers and service station owners, providers, and all these are dealing with all these credits and they are trying to trace through fuels that become combined . . . ."); *id.* at 1767–68 (statement of Sen. Pete V. Domenici); *Licensing and Standardization for Nuclear Powerplants: Hearing Before the Subcomm. on Nuclear Regul. of the S. Comm. on Env't & Pub. Works*, 101st Cong. 33–35 (1990) (statement of Hon. Dale E. Kline, Chairman, Nuclear Regulatory Commission) (discussing the potential for judicial review in the context of nuclear-licensing delays).

years of litigation,"[143] or, more colorfully, that citizens will "spend[] billions, and billions, and billions of dollars paying lawyers to challenge [the law,] . . . producing vague language that can be played with by lawyers until hell freezes over."[144] Such rhetoric from both sides of the aisle was an attempt by members of Congress to show their constituents that they tried to discourage the administrative delay in implementing statutory law.[145]

Typically, though, discussions of judicial exposure centered on procedure and took place in the context of new administrative arrangements. In this (subtler) way, legislators signaled their willingness to let agencies spend time building a full administrative record before implementing policy. For example, during debates over the Energy Policy Act, legislation was introduced to abolish FERC and transfer its duties to an administrator who reported directly to the Secretary of Energy.[146] The legislation appeared to be in response to the agency's chronic delay tactics and unpredictability.[147] However, the legislation was introduced with little political preparation, and major power brokers in Congress and the energy sector opposed the move.[148] Instead of abolishing the agency, Congress amended PURPA and provided for additional exposure of the agency to the courts.[149]

The resulting Energy Policy Act of 1992 was recognized as a move to deregulate electric utilities, and FERC responded to the signal by accelerating deregulation through a series of major orders (Orders 888,[150]

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[143] 138 CONG. REC. 1758 (1992) (statement of Sen. J. Bennett Johnston).

[144] *Id.* at 2530 (statement of Sen. Malcolm Wallop).

[145] Such rhetoric is commonplace in civic affairs. Lloyd F. Bitzer, *Political Rhetoric*, *in* 15 LANDMARK ESSAYS ON CONTEMPORARY RHETORIC 1 (Thomas B. Farrell ed., 1998) (arguing that political rhetoric illustrates the hard struggle determining the use of power and authority); *see also* Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 536 (2020) (describing the performative aspects of oversight as a mechanism of constitutional politics).

[146] *Natural Gas Ratepayers Relief Act of 1991: Hearing on S. 933 Before the Subcomm. on Energy Regul. and Conservation of the S. Comm. on Energy and Nat. Res.*, 102d Cong. 48 (1991).

[147] *See* Santa & Beneke, *supra* note 129, at 16–17; *see also* John S. Moot, *Electric Utility Mergers: Uncertainty Looms over Regulatory Approvals at the FERC*, 12 ENERGY L.J. 1, 3 (1991) (describing the unpredictability of FERC in the area of electric utility mergers).

[148] BREGER & EDLES, *supra* note 123, at 203.

[149] *Compare* Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 111(d), 92 Stat. 3117, 3121–22 (providing mandatory standards for the state and nonregulated electric utilities), *with* Energy Policy Act of 1991, Pub. L. No. 102-486, § 111, 106 Stat. 2776, 2795 (increasing the entities' obligations under PURPA § 111(d)). *See, e.g.*, Energy Policy Act of 1991 § 714 (imposing recordkeeping and access requirements and providing federal district courts jurisdiction to enforce compliance).

[150] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21540 (Apr. 24, 1996) (codified at 18 C.F.R. pts. 35, 385).

889,[151] and 2000[152]).[153] Ironically, deregulation dramatically expanded FERC's regulatory authority to oversee electric utilities.[154] FERC stopped enforcing claims of individual firms' unfair market practices.[155] Instead, FERC reaffirmed its position as the agency that regulates whether, as a whole, energy markets supported unfair practices.[156] From a strategic perspective, regulating markets (as opposed to firms) had a broader reach.

FERC's enforcement actions under its new (de)regulatory authority, justified by the agency as consistent with its legal duty to assure just and reasonable electric rates, were repeatedly challenged in court.[157] For the most part, federal courts (including the Supreme Court[158]) upheld agency decision-making but affirmed the ability of various stakeholders to challenge FERC's actions, forcing the agency to consider the possibility of litigation when making decisions.[159]

### *C. 2000s: Forging Coalitional Compromise Across Sectors*

As in the 1970s, a series of crises in the twenty-first century highlighted the need for legislation while politicians clamored to claim credit for addressing their constituents' concerns. While more polarized and cohesive political parties and strengthened party leadership resulted in fewer jurisdictional disputes within Congress, these same aspects made forging legislative compromise, particularly in the Senate, difficult.[160] As a result, Congress tended to enact energy legislation built around specific areas of broader consensus.

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[151] Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct, 61 Fed. Reg. 21737 (Apr. 24, 1996) (codified at 18 C.F.R. pt. 37).

[152] Regional Transmissions Organizations, 89 FERC 61,285 (Dec. 20, 1999).

[153] *See* Hon. Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1, 7–8 (2005) (noting that, in response to developments in the electricity industry after the Energy Policy Act, FERC instituted fundamental changes in policy).

[154] Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1790 (2016).

[155] *See id.* at 1793. Instead, FERC encouraged the formation of regional Independent System Operators to help oversee such claims. *Id.* at 1792–93.

[156] *See id.* at 1793.

[157] Kelliher, *supra* note 153, at 18.

[158] *E.g.*, New York v. Fed. Energy Regul. Comm'n, 535 U.S. 1 (2002) (upholding FERC's decision not to regulate bundled retail transmissions).

[159] *E.g.*, La. Energy & Power Auth. v. Fed. Energy Regul. Comm'n, 141 F.3d 364, 369 (D.C. Cir. 1998) (finding plaintiffs had standing but deferring to FERC on the merits); California *ex rel.* Lockyer v. Fed. Energy Regul. Comm'n, 383 F.3d 1006, 1011 (9th Cir. 2004) (finding plaintiffs properly invoked court jurisdiction to review final FERC orders under 16 U.S.C. § 8251(b) but upholding the agency's authority to administer market-based energy tariffs).

[160] Oppenheimer, *supra* note 86, at 201.

For example, in 2000 and 2001, "California experienced extraordinarily high wholesale electric prices" and gas costs driven by soaring demand, generation failures, flawed electric-power-market rules, and market manipulations.[161] The resulting power shortage was so severe that Secretary of Energy Bill Richardson issued a rare emergency order—subsequently extended by Bush Administration Secretary Spencer Abraham—requiring out-of-state power suppliers to generate, deliver, and transmit electric energy as needed to address the crisis.[162] Then, in 2003, approximately 50 million customers in the Northeastern United States and Southern Canada experienced the largest electrical blackout ever suffered in North America.[163] Bi-national investigations into the event found that the causes of the outage were similar to previous electric crises and that, without significant policy change, the United States could expect an increased number of large-scale blackout events.[164]

However, the complexity of the problems, as well as the sheer number and conflicting preferences of federal and state politicians, regulators, and stakeholders, made drafting meaningful policy change difficult. For example, the Bush Administration's National Energy Policy Development Group included Vice President Dick Cheney; the Secretaries of Agriculture, Commerce, Energy, the Interior, State, Transportation, and the Treasury; the Administrators of the Federal Emergency Management Agency and the EPA; the Director of the Office of Management and Budget; and several other key executive officials.[165] In 2003 interviews about a possible legislative solution to the nation's energy problems, Bush Administration energy advisor Matthew Simmons said, "I don't think there is one," and

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[161] FED. ENERGY REGUL. COMM'N, FINAL REPORT ON PRICE MANIPULATION IN WESTERN MARKETS: FACT-FINDING INVESTIGATION OF POTENTIAL MANIPULATION OF ELECTRIC AND NATURAL GAS PRICES, at I-1 (Mar. 2003).

[162] Dep't of Energy, Amended Order Pursuant to Section 202(c) of the Federal Power Act (Jan. 17, 2001), https://www.energy.gov/sites/default/files/202%28c%29%20order%20January%2017%2C%202001%20-%20California.pdf [https://perma.cc/YF6H-PB8Q]; Dep't of Energy, Amendment No. 2 to January 11, 2001, Order Pursuant to Section 202(c) of the Federal Power Act (Jan. 23, 2001), https://www.energy.gov/sites/default/files/202%28c%29%20order%20January%2023%2C%202001%20-%20California.pdf [https://perma.cc/RH9M-XCJH].

[163] Peter Fox-Penner, Opinion, *A Year Later, Lessons from the Blackout*, N.Y. TIMES (Aug. 15, 2004), https://www.nytimes.com/2004/08/15/opinion/a-year-later-lessons-from-the-blackout.html [http://perma.cc/4B9L-WNEK].

[164] U.S.-CANADA POWER SYSTEM OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA: CAUSES AND RECOMMENDATIONS 103, 110 (Apr. 2004); U.S.-CANADA POWER SYSTEM OUTAGE TASK FORCE, FINAL REPORT ON THE IMPLEMENTATION OF THE TASK FORCE RECOMMENDATIONS 4 (Sept. 2006).

[165] NAT'L ENERGY POL'Y DEV. GRP., RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE (2001).

Senator John McCain (R-Ariz.) sarcastically called an early attempt at legislative compromise the "No Lobbyist Left Behind Act."[166]

The post-9/11 political environment further complicated matters.[167] Many recognized that the nation's energy infrastructure was vulnerable to terrorist attacks due to its relatively centralized grid system—only three major electricity networks covered the entire United States.[168] The California Energy Crisis and the 2003 Blackout highlighted not only the electric grid's vulnerability but also the economic damage a sustained crisis could cause. For example, six months into the California Crisis, the Los Angeles County Economic Development Corporation estimated that the costs to the economy totaled approximately $1.7 billion, and Federal Reserve Chairman Alan Greenspan warned politicians about the long-term effects on the country's economic expansion.[169] Furthermore, the establishment of the Department of Homeland Security blurred the lines of electric infrastructure protection responsibilities, simultaneously creating both jurisdictional overlap across several agencies and a lack of regulatory authority across those same agencies to require utilities to implement security initiatives.[170]

A consensus formed around the need to provide regulatory certainty without subjecting utility companies to destabilizing litigation.[171] Litigation involving electric utilities or firms heavily engaged in gas and electricity markets had increased dramatically in the late 1990s, in part due to a combination of deregulation, utility restructuring, and growth in wholesale energy trading.[172] Unclear jurisdictional lines with respect to administrative authority, the decentralized nature of the judiciary, and inconsistent rulings across and within federal and state courts made regulation and enforcement unpredictable.[173]

In 2005, Congress passed the Energy Policy Act, an omnibus bill that included tax incentives for domestic energy production (including nuclear development), repealed restrictions on interstate utility holding companies,

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[166] Justin Stolte, *The Energy Policy Act of 2005: The Path to Energy Autonomy?*, 33 J. LEGIS. 119, 120 & n.11 (2006).

[167] Jacob Dweck, David Wochner & Michael Brooks, *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 ENERGY L.J. 473, 474 (2006).

[168] Sherman, *supra* note 81, at 219–20.

[169] *California's Electricity Crisis: Hearing Before the S. Comm. on Energy and Nat. Res.*, 107th Cong. 9, 114 (2001).

[170] AMY ABEL, CONG. RSCH. SERV., RS21958, GOVERNMENT ACTIVITIES TO PROTECT THE ELECTRIC GRID 3 (2004).

[171] *See, e.g.*, NAT'L ENERGY POL'Y DEV. GRP., *supra* note 165, at 3-3 (recommending corresponding legislation).

[172] James G. Bohn, *Securities Litigation in the Utility Sector*, 26 ENERGY L.J. 473, 473 (2005).

[173] *See* Dweck et al., *supra* note 167, at 474–77.

and streamlined procedures for energy production on federal lands.[174] The legislation amended the Federal Power Act, Natural Gas Act, and Natural Gas Policy Act to give FERC new and exclusive licensing, regulatory, and enforcement authority across the energy market.[175] This expanded authority subjected a host of new transactions and actors to federal regulation.[176]

To offset the uncertainty created by these changes, Congress also centralized the jurisdiction of the courts and provided for expedited judicial review. For instance, while the Act provided FERC with exclusive authority over the construction and operation of liquified natural gas (LNG) import terminals, it also provided for direct appeal of agency decisions to the United States Courts of Appeals and limited the possibility of state court litigation involving LNG projects.[177]

This change in exposure to the judiciary, combined with FERC's relative independence, led to backlash from legislators. Prior to the enactment of the Energy Policy Act, Senators Joe Biden (D-Del.), Mike DeWine (R-Ohio), Herb Kohl (D-Wis.), Charles Schumer (D-N.Y.), Erlen Spector (D-Pa.), and Strom Thurmond (R-S.C.) had sent bipartisan letters to both President Bill Clinton and President George W. Bush drawing attention to FERC's lack of responsiveness to political concerns over the agency's energy sector antitrust policies.[178] Then, in 2007, these Senators pointed to a history of federal courts' preclusion from making substantive rulings on the issue and proposed legislative language enabling courts to bring administrative policy in line with congressional preferences.[179]

At the same time, there was a concerted effort by key stakeholders to widely disseminate open letters advocating for change.[180] For example, in the debate over electricity-market restructuring, thirty-five former public service commissioners from twelve different states and nine former FERC commissioners circulated letters promoting legislative action that would

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[174] MARK HOLT & CAROL GLOVER, CONG. RSCH. SERV., RL33302, ENERGY POLICY ACT OF 2005: SUMMARY AND ANALYSIS OF ENACTED PROVISIONS 1, 3 (2006).

[175] Michael D. Hornstein & J.S. Gebhart Stoermer, *The Energy Policy Act of 2005: PURPA Reform, the Amendments and Their Implications*, 27 ENERGY L.J. 25, 25 (2006); Todd Mullins & Chris McEachran, *Adjudication of FERC Enforcement Cases: "See You in Court?,"* 36 ENERGY L.J. 261, 263 (2015).

[176] Dweck et al., *supra* note 167, at 476, 481; Allan Horwich, *Warnings to the Unwary: Multi-Jurisdictional Federal Enforcement of Manipulation and Deception in Energy Markets After the Energy Policy Act of 2005*, 27 ENERGY L.J. 363, 364 (2006).

[177] Dweck et al., *supra* note 167, at 477.

[178] 153 CONG. REC. S7591–93 (daily ed. May 9, 2007).

[179] *Id.* at S5792. This proposal did not make it into the final version of the Energy Independence and Security Act of 2007.

[180] Beecher, supra note 81, at 583–84.

prompt adjustments in regulatory policy.[181] Economists from the nation's leading universities and national trade associations representing the electric supply industry adopted similar tactics.[182] Together, these letters addressed the role of political actors, federal agencies, and the courts in structuring electric power markets.

This criticism of electric market regulation and FERC decision-making continued throughout the next decade. Many felt that the agency was overly secretive in its investigations and enforcement decisions, and that the length and cost of the agency's decision-making process was becoming prohibitive for stakeholders.[183] For example, in nomination hearings for Cheryl LaFleur and Norman Bay as FERC Commissioners, both Senators John Barrasso (R-Wyo.) and Lisa Murkowski (R-Alaska) expressed concerns that FERC's investigation and enforcement processes had become "lopsided and unfair."[184] Additionally, Senators Martin Heinrich (D-N.M.) and Joe Manchin (D-W. Va.) questioned the agency's ability to work with other federal agencies such as the EPA and the DOD, states and state commissions, and key industry stakeholders to ensure that FERC's policy decisions accounted for a complex set of preferences.[185]

While most legislators felt that increasing the agency's exposure to judicial review would result in better clarity and openness with respect to the agency's decision-making processes and thus improve perceptions of (if not actual) fairness, the agency pushed back.[186] In response to questions about FERC's implementation of the Energy Policy Act of 2005, agency officials noted that "subsequent court decisions [over the nine years since the Act was passed] have effectively prevented the Commission from exercising" its authority.[187]

In addition to electric-market concerns, the 2000s were marked by evolving considerations regarding the natural environment. As with electric-

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[181] Open Letter from State Pub. Serv. Comm'rs to U.S. Elec. Policymakers, Empowered Electricity Consumers Are Driving Markets (Nov. 7, 2007); Open Letter from Vicky A. Bailey, Linda Breathitt, Nora Mead Brownell, James J. Hoecker, Jerry J. Langdon, William L. Massey, Elizabeth Anne Moler, Donald F. Santa, and Pat Wood III to Policymakers (May 31, 2007).

[182] Memorandum from Paul L. Joskow, Professor of Econ. & Dir., Ctr. for Energy & Env't Pol'y Rsch., Mass. Inst. of Tech., et al. to Magalie R. Salas, Sec'y, Fed. Energy Regul. Comm'n (June 26, 2006); Open Letter from Paul L. Joskow, Professor of Econ. & Dir., Ctr. for Energy & Env't Pol'y Rsch., Mass. Inst. of Tech., et al. to Policymakers (June 26, 2006).

[183] Mullins & McEachran, *supra* note 175, at 276, 284.

[184] *LaFleur and Bay Nominations: Hearing Before the S. Comm. on Energy and Nat. Res.*, 113th Cong. 20, 28 (2014) [hereinafter *LaFleur and Bay Nominations Hearing*].

[185] *Id.* at 24, 27.

[186] Mullins & McEachran, *supra* note 175, at 292.

[187] *LaFleur and Bay Nominations Hearing*, *supra* note 184, at 56 (statement of Cheryl A. LaFleur, Member, Fed. Energy Regul. Comm'n).

market regulation, political dialogue on environmental issues in part reflected a series of crisis events resulting from natural gas and oil drilling, transmission, and distribution. The failure of federal agencies such as the Department of Transportation's Office of Public Safety to respond effectively to a series of natural gas pipeline accidents that caused significant fatalities and injuries, approximately $700 million in property damage, and long-term environmental consequences led to calls for change.[188] While the Executive Branch complained that a lack of enforcement authority hampered federal agencies' regulatory power, the Legislature pointed out that the agencies had failed to implement several statutory mandates to address pipeline safety.[189] In a series of bills designed to address the problem, Congress subsequently restructured key aspects of pipeline regulation across multiple agencies—including the DOE—but did not significantly alter those agencies' exposure to the courts.

The most monumental energy-related environmental crisis of the era occurred in 2010, when an explosion of the Deepwater Horizon offshore drilling rig produced the largest oil spill ever to occur in U.S. waters.[190] Critics characterized the governmental response to the disaster as slow, riddled with administrative complexity, and rife with intergovernmental conflict that led to blame-shifting.[191] In the immediate aftermath of the spill, congressional committees held more than sixty hearings on the issue, and members of Congress introduced more than 150 legislative proposals.[192] These bills proposed reorganizing and restructuring federal agencies overseeing offshore oil and gas operations,[193] increasing the time period for filing a petition for judicial review of certain administrative decisions,[194] and even amending state court jurisdiction over oil-spill liability.[195] Ultimately, Congress enacted pieces of legislation that broadened the Executive

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[188] *See* U.S. GEN. ACCOUNTING OFF., GAO/RCED-00-128, PIPELINE SAFETY: THE OFFICE OF PIPELINE SAFETY IS CHANGING HOW IT OVERSEES THE PIPELINE INDUSTRY 11 (2000).

[189] *Id.* at 51–60; U.S. GEN. ACCOUNTING OFF., GAO-02-517T, PIPELINE SAFETY: STATUS OF IMPROVING OVERSIGHT OF THE PIPELINE INDUSTRY 3 (2002); OFF. OF INSPECTOR GEN., U.S. DEP'T OF TRANSP., REP. NO. RT-2000-069, AUDIT REPORT: PIPELINE SAFETY PROGRAM 2 (2000).

[190] JONATHAN L. RAMSEUR, CONG. RSCH. SERV., R41531, DEEPWATER HORIZON OIL SPILL: THE FATE OF THE OIL (last updated Oct. 4, 2011).

[191] *See* Thomas A. Birkland & Sarah E. DeYoung, *Emergency Response, Doctrinal Confusion, and Federalism in the Deepwater Horizon Oil Spill*, 41 PUBLIUS 471, 487 (2011).

[192] JONATHAN L. RAMSEUR, CONG. RSCH. SERV., R42942, DEEPWATER HORIZON OIL SPILL: RECENT ACTIVITIES AND ONGOING DEVELOPMENTS 12 (last updated Apr. 17, 2015).

[193] Implementing the Recommendations of the BP Oil Spill Commission Act of 2011, H.R. 501, 112th Cong. § 102 (2011).

[194] *Id.* § 213.

[195] Oil Spill Victims Redress Act, H.R. 2386, 112th Cong. § (3)(3) (2011); Oil Spill Victims Redress Act, S. 594, 112th Cong. § 3(3) (2011).

Branch's regulatory authority,[196] increased the maximum amount of civil penalties for violations of pipeline-safety requirements,[197] increased appropriations for administrative enforcement actions related to oil-spill incidents (including litigation expenses connected to Deepwater Horizon),[198] and even tweaked the discovery process in certain judicial proceedings involving allegations of human error that could lead to future oil spills.[199]

The disaster also increased scrutiny of the Department of Interior's Minerals Management Service, which had been the subject of much attention after a series of three inspector general (IG) reports described a wide-ranging ethics scandal involving "[s]ex, [d]rug [u]se and [g]raft."[200] In response to the IG reports, Congress considered (but did not pass) several bills that would reorganize the safety and environmental regulatory agencies with jurisdiction over onshore and offshore federal lands.[201] Within one month of the Deepwater Horizon oil spill, the Obama Administration initiated its own reorganization plan and called on Congress to legislate.[202] While Congress did pass a series of bills designed to provide short-term solutions to the disaster, the lasting policy changes were administrative in nature.[203]

### *D. Lessons Learned: Using Judicial Exposure to Balance Accountability and Uncertainty when Congress Delegates*

Our brief review of energy policy in the 93rd to 110th Congresses is illustrative for several reasons. First, and perhaps most important for theoretical development, our motivational study suggests that the modern Legislature is reactionary in that Congress responds to policy problems with legislation. While this may seem an obvious observation, it has important implications for how scholars think about delegation and legislative drafting

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[196] *E.g.*, Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, § 702, 124 Stat. 2905, 2980 (requiring promulgation of regulations that "reduce the risks of oil spills in operations involving the transfer of oil from or to a tank vessel").

[197] Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2(a), 125 Stat. 1904, 1905 (2012).

[198] Coast Guard Authorization Act of 2010, Pub. L. No. 111-212, 124 Stat. 2302, 2336.

[199] *Id.* § 703.

[200] HENRY B. HOGUE, CONG. RSCH. SERV., R41485, REORGANIZATION OF THE MINERALS MANAGEMENT SERVICE IN THE AFTERMATH OF THE DEEPWATER HORIZON OIL SPILL 1–2 (2010); Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES (Sept. 10, 2008), https://www.nytimes.com/2008/09/11/washington/11royalty.html [https://perma.cc/2CCH-3Z6Q].

[201] HOGUE, *supra* note 200, at 4–5.

[202] Press Release, The White House, Fact Sheet: Deepwater Horizon Oil Spill Legislative Package (May 12, 2010), https://obamawhitehouse.archives.gov/the-press-office/fact-sheet-deepwater-horizon-oil-spill-legislative-package [https://perma.cc/E568-QW9K].

[203] *See* RAMSEUR, *supra* note 192, summary.

more generally. The consequential decisions within the Legislature rarely center on *whether* to delegate, but rather on *how* to delegate.

While the content of proposed legislation is debated, shaped, and rewritten in Congress, the initial proposals for delegation may come from the Executive Branch.[204] Our case study highlights the key role that Presidents Nixon, Carter, Bush, and Barack Obama played in setting the legislative agenda for significant energy legislation. As proposals are packaged and debated during the legislative process, however, the multidimensional nature of legislative coalitional development provides opportunities for strategic gatekeeping, agenda manipulation, and amendments.[205] That means observations of legislative action or nonaction usually result from debate on the parameters of delegation; even when there is widespread agreement among political actors on the need for legislation, bills often die because of disagreement on specifics.

Relatedly, the deliberative nature of Congress means that the Legislature can get stuck in cyclical responses to policy problems. For example, Congress may delegate in response to constituent calls for quick action, subsequently observe administrative outcomes resulting from said delegation, and then opt to revisit the parameters of the original legislation when the Legislature has more information.[206]

Because parties may agree on legislation but differentiate between the terms of a law and its implementation, the degree of an agency's insulation from elected officials and judicial actors can become a key factor in the legislative process.[207] One of the primary challenges the modern

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[204] *See, e.g.*, JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 24–25 (updated 2d ed. 2011) (discussing presidential resources to set policy agendas); MARK A. PETERSON, LEGISLATING TOGETHER: THE WHITE HOUSE AND CAPITOL HILL FROM EISENHOWER TO REAGAN 1–2 (1990) (discussing the relationship between the President and Congress in policymaking); *see also* Jason S. Byers, Jamie L. Carson & Ryan D. Williamson, *Policymaking by the Executive: Examining the Fate of Presidential Agenda Items*, CONG. & PRESIDENCY, July 22, 2019, at 1, 1 (indicating that a President's policy proposals are most commonly addressed in tandem with Congress's, but that the level of polarization, presidential approval, composition of government, and type of issue addressed affect presidential–congressional partnerships). *But see* Andrew J. Taylor, *Domestic Agenda Setting, 1947–1994*, 23 LEGIS. STUD. Q. 373, 390 (arguing that party leaders in the congressional majority party, as opposed to the President, are increasingly setting the domestic agenda items).

[205] Jeffery C. Talbert & Matthew Potoski, *Setting the Legislative Agenda: The Dimensional Structure of Bill Cosponsoring and Floor Voting*, 64 J. POL. 864, 866–67 (2002) (arguing that the pre-floor issue agenda is much more multidimensional than legislative decisions as revealed in floor voting).

[206] Jasmine Farrier, *The Contemporary Presidency: Executive Ambition Versus Congressional Ambivalence*, 40 PRESIDENTIAL STUD. Q. 310, 311 (2010).

[207] *See* LEWIS, *supra* note 18, at 9–11 (discussing the relationship between agency insulation and policy durability); Epstein & O'Halloran, *supra* note 59, at 698 (identifying insulation as a key consideration for lawmakers); Clouser McCann et al., *supra* note 13, at 125–26 (discussing Congress's choice in insulating agencies from judicial review); Turner, *supra* note 71, at 73 (finding that oversight institutions like judicial review impact agency policymaking).

Legislature faces when delegating is to design an institutional framework that accounts for a pluralistic landscape of coalitional preferences and provides for multiple, overlapping opportunities for review of administrative implementation.[208]

This means that, in crafting significant legislation in the modern era, legislators simultaneously account for coalitional makeup and administrative preferences, while also enabling key stakeholders to challenge policy implementation in the future. Uncertainty regarding how the major policy questions of today will be implemented tomorrow makes this difficult.[209] While scholarship addressing this problem has largely focused on the role of agency structure and administrative procedures, adjusting the availability of judicial review through statute can help alleviate these challenges for two reasons. First, exposing agencies to the court system using agency- or program-specific statutory provisions can help distribute particularized benefits to key constituents.[210] Second, because stakeholders play an active role in the monitoring process by providing politicians with a source of information independent from the Executive Branch, legislators can supplement monitoring opportunities by enabling those same groups to litigate.[211] Both aspects of judicial review have the potential to change agency operations in a way that favors the enacting coalition.

As our case study suggests, legislators recognize the importance of enabling key stakeholders to supplement political pressure with litigation in order to prompt administrative action. Legislative discussions of judicial exposure tend to take place in the context of calls for swift legislative action or of bills that address new issues or create new administrative arrangements. In these circumstances, the political dynamics are often uncertain. For example, environmental disasters such as the Deepwater Horizon oil spill create situations where historically powerful stakeholders simultaneously become adversaries of the government and future partners in administrative

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[208] *See* Gilligan & Krehbiel, *supra* note 50, at 633; Engstrom, *supra* note 22, at 638.

[209] *See* Engstrom, *supra* note 22, at 663 (noting the difficulty of any institutional actor to accurately respond to complex policy problems); *see also* Grenier & Clark, *supra* note 105, at 337–38 (explaining the difficulty of creative oversight legislation by connecting the dysfunction of two administrative agencies to such legislation).

[210] Joseph L. Smith, *Congress Opens the Courthouse Doors: Statutory Changes to Judicial Review Under the Clean Air Act*, 58 POL. RSCH. Q. 139, 147 (2005).

[211] *See* JOHN MARK HANSEN, GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919–1981, at 11–12 (1991); McCubbins & Schwartz, *supra* note 59, at 166; Banks & Weingast, *supra* note 57, at 519; Howard, *supra* note 23, at 111–12. Indeed, Professor Jarrod Shobe's interviews with congressional staff and federal administrators found that those who work within agencies on litigation are in a key position to shape legislation to influence judicial review. Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 517–18 (2017).

action.[212] This can be difficult for legislators to navigate and is compounded by the fact that regulatory change and administrative restructuring also can involve shifts in policy risks. Such shifts not only have political consequences but can result in changes in stakeholders' decisions to litigate and affect the likelihood that certain types of actors will prevail in court.[213]

Recognition of these complexities is important when theorizing about delegation. In some ways, exposing administrative decision-making to the courts beyond the strictures of the APA can reinforce the particularized interests of Congress. Judicial principles such as standing encourage court decisions based on the claims of individual litigants.[214] On the flip side, judicial decisions may be inconsistent because litigation challenging administrative action can be filed across federal court districts and circuits that differ in ideological composition.[215]

Regardless of whether a litigant challenges an agency's regulation, implementation, or enforcement actions, legislators recognize that litigation can provide information about policy when the political consequences of delegation are uncertain. Litigation is itself a multistage process, including initial pleadings, discovery, pre-filed expert testimony, hearings, cross-examinations, briefings, deliberation, and judicial opinion writing.[216] Each stage of the process offers an opportunity for public disclosure of information, and, due to the procedural requirements of the legal system, the nature of information provided at each stage is specific, concrete, and particularized.[217] Furthermore, the information is usually exchanged by repeat players who not only participate in multiple cases, but also regularly interact with each other outside of the judicial process, formally and informally, through professional networks, meetings, and associations.[218]

In this way, coalitional decision-making that contemplates an agency's exposure to the judiciary resembles that involving other forms of oversight. Delegating policy authority to the Executive Branch requires consideration of multidimensional issues, recognition of the ideological preferences of a wide variety of actors, and anticipation of how administrative decision-

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[212] John Wyeth Griggs, *BP Gulf of Mexico Oil Spill*, 32 ENERGY L.J. 57, 60 (2011).

[213] *See* Bohn, *supra* note 172, at 481–83.

[214] Rogers, *supra* note 70, at 87–88; Schuck, *supra* note 85, at 188–89.

[215] *See* Bruff, *supra* note 73, at 1200, 1205–07; Brandice Canes-Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts*, 47 AM. J. POL. SCI. 205, 206 (2003). Of course, the Supreme Court can step in to address such inconsistencies. We engage with this possibility in Part V.

[216] *See generally* Scott Hempling, *Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers*, 36 ENERGY L.J. 1 (2015) (explaining each of the steps involved in regulatory litigation).

[217] *See* Rogers, *supra* note 70, at 87.

[218] Zaring, *supra* note 70, at 1029, 1063.

makers will respond to their environment.[219] Reconciling these factors results in political compromise that provides future opportunities for ex post monitoring and sanctions of agency performance.[220]

## III. BALANCING AGENCY INDEPENDENCE AND JUDICIAL OVERSIGHT

While Part II's motivational case study of energy policy suggests that Congress manipulates federal agency exposure to the courts in response to the political environment and in combination with statutory provisions that dictate agency independence from elected officials, how generalizable are these insights to congressional delegation decisions in other policy contexts?

We utilize a theoretical model to explore how political coalitions reconcile the benefits of administrative autonomy, the need for administrative responsiveness to elected officials, and the possibility of litigation over agency action across all administrative agencies in the Executive Branch. Game-theoretic models derive explanatory power from their ability to capture the complex realities of governance by incorporating relevant aspects of interactions between political actors.[221] These simplified models allow researchers to focus on how key features of the real world work in concert with or even in opposition to each other.

Such models also force scholars to identify and explain the assumptions researchers often make when examining these interactions. Because the almost infinite intricacies of the political world are often far too complicated for any single actor to understand directly, theoretical models can provide scholars with insights and guidance into the decisions elected officials, key stakeholders, and administrators make.[222] In this way, a theoretical model of delegation is beneficial because it requires scholars to think about the instrumental aspects of the political environment that influence the legislative process.

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[219] *See, e.g.*, Gilligan & Krehbiel, *supra* note 50, at 629–31, 649 (providing examples of legislative consideration of these factors).

[220] John D. Huber, Charles R. Shipan & Madelaine Pfahler, *Legislatures and Statutory Control of Bureaucracy*, 45 AM. J. POL. SCI. 330, 334 (2001); Craig Volden, *A Formal Model of the Politics of Delegation in a Separation of Powers System*, 46 AM. J. POL. SCI. 111, 126 (2002). *See, e.g.*, Epstein & O'Halloran, *supra* note 59, at 709 (providing an example in the context of congressional trade-agreement vetoes in the Nixon Administration); *see also* Bendor & Meirowitz, *supra* note 57, at 303 (concluding that, in delegation, the optimal control scheme varies with the costs of ex post monitoring and sanction); Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J.L. ECON. & ORG. 536, 538 (2002) (suggesting that, in equilibrium, legislatures account for the costs of agency subversion when delegating discretionary authority to agencies).

[221] *See* MARTIN J. OSBORNE, AN INTRODUCTION TO GAME THEORY 1–3 (2004).

[222] *See* KENNETH A. SHEPSLE, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 9 (2d ed. 2010).

We build upon Professor Kathleen Bawn's 1995 model of delegation, which considers administrative independence as a legislative decision to limit an agency's potential to drift from congressional preferences.[223] In Professor Bawn's model, because policies must be mapped onto real-world outcomes, when the enacting political coalition limits the leeway of an agency by "stack[ing] the deck" with structural and procedural constraints, administrators have fewer opportunities for agency drift and realized outcomes are closer to what a nondelegated policy would have provided.[224] Since it was published, Professor Bawn's model and her accompanying insights have contributed to a rich literature that examines the legislative choices involving the balance of political control of administrative agencies and bureaucratic expertise.[225] The model has provided scholars with a means for theorizing about the complex relationship between different types of uncertainty (i.e., expectations about how policy and politics vary) and agency design features.

An underappreciated aspect of the model is its consideration of agency independence in two dimensions. Professor Bawn's model highlights two features of agency autonomy: structural and procedural independence. These two forms of independence reflect legislative design decisions relating to ex ante constraints placed on key agency decision-makers (structural independence) and constraints on the enacting coalition's ex post ability to review and correct agency policy (procedural independence).[226] We not only

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[223] Bawn, *supra* note 51, at 70.

[224] *Id.* at 63.

[225] *See, e.g.*, J. Bendor, A. Glazer & T. Hammond, *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235 (2001); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998); Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); Stéphane Lavertu & David L. Weimer, *Integrating Delegation into the Policy Theory Literature*, 37 POL'Y STUD. J. 93 (2009); Martino Maggetti & Koen Verhoest, *Unexplored Aspects of Bureaucratic Autonomy: A State of the Field and Ways Forward*, 80 INT'L REV. ADMIN. SCIS. 239 (2014); Terry M. Moe, *Delegation, Control, and the Study of Public Bureaucracy*, 10 FORUM 1 (2012); Matthew C. Nowlin, Maren Trochmann & Thomas M. Rabovsky, *Advocacy Coalitions and Political Control*, 50 POL. & POL'Y 201 (2022).

[226] We note here that our consideration of "procedural independence" differs from classic considerations of administrative procedure. While we contemplate procedural independence in terms of agency design features that enable Congress or the President to review agency policy, Congress also adjusts administrative procedures such as the procedural requirements for rulemaking or adjudication and then pairs those requirements with judicial review provisions. For example, when passing the Toxic Substances Control Act (TSCA), Congress "went out of its way" to create administrative procedures and standards for judicial review that differ from those of the APA. *See* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1213–14 (5th Cir. 1991). Fifteen years later, Congress amended the TSCA's procedural requirements, but these "fixes" were largely viewed as insufficient, in part because of political interference in agency decision-making. Rachel Rothschild, *Unreasonable Risk: The Failure to Ban*

explore these two dimensions but incorporate recent insights on administrative agencies' exposure to the federal judiciary as well.

### *A. Designing Administrative Autonomy: Structural, Procedural, and Judicial Independence*

First, agency-authorizing statutes can include a variety of structural constraints for key administrative decision-makers, such as how agency leadership is selected, structured, or removed (e.g., partisan requirements, fixed terms, multimember board) and where in the Executive Branch an agency sits (e.g., Executive Office of the President).[227] Many scholars consider these to be defining features of agency independence.[228]

Yet, even among agencies led by multimember boards, "there is substantial variation in the structural features that influence how accountable agencies are to elected officials."[229] Contrast, for example, the Federal Crop Insurance Corporation (FCIC) with the Federal Reserve Board (FED). The FCIC's authorizing statute places the agency within the Department of Agriculture under the management of a Board of Directors.[230] Of the seven voting members of the Board, three simultaneously serve in leadership positions at the Department of Agriculture,[231] while the other four must be active crop insurance policyholders who represent different geographic areas and a cross-section of agricultural commodities and who hold their office at the pleasure of the Secretary of Agriculture.[232] The FED, alternatively, exists outside of the executive departments and is run by a multimember Board of Governors whose members serve fourteen-year staggered terms and cannot

*Asbestos and the Future of Toxic Substances Regulation*, 47 HARV. ENV'T L. REV. 529, 592–93 (2023). Fruitful future research could examine congressional decision-making that pairs adjustments to the procedural requirements of the APA with adjustments to an agency's exposure to federal courts.

[227] Selin, *supra* note 18, at 973–74.

[228] *See*, *e.g.*, BREGER & EDLES, *supra* note 123, at 4 (identifying removal as the prime consideration for independence); LEWIS, *supra* note 18, at 3 (discussing structural arrangements, such as party-balancing and fixed-term requirements); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259 (listing "the bipartisan appointment requirement; the fixed term requirement; and the requirement that removal be limited to express causes" as characteristic of independence); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) (focusing on the appointment process's impact on independence).

[229] Lewis & Selin, *supra* note 29, at 1510.

[230] 7 U.S.C. §§ 1503, 1505(a).

[231] Those three members are "[t]he Under Secretary of Agriculture responsible for the Federal crop insurance program[,] . . . [o]ne additional Under Secretary (as designated by the Secretary [of Agriculture])," and the Department's Chief Economist. *Id.* § 1505(a).

[232] *Id.*

be removed but for cause.[233] Elected officials are widely recognized to have more influence over the FCIC than the FED.[234]

However, the structure of an agency's leadership is not the only aspect of agency independence. Authorizing statutes also specify an agency's procedural independence. Procedural independence results from an agency's discretion to gather information and expertise on policy choices and outcomes.[235] More specifically, these are provisions designed to insulate agency decisions from political review and/or political adjustments to agency policy ex post (e.g., the appropriations process, Office of Management and Budget (OMB) review).[236]

Consider, for example, the difference between the SEC and ICE. The SEC is relatively independent procedurally.[237] Among other things, the agency is exempt from regulatory and legislative-communications review by OMB and operates outside of the traditional appropriations process.[238] In contrast, statutory language involving ICE contains no provisions limiting political review. ICE submits annual budget requests through OMB to congressional appropriations committees each year, regularly provides analyses to Congress on a wide variety of issues, and often reflects the preferences of the current presidential administration its policies .[239]

As we highlighted in our examination of energy policy, legislators vigorously debate the structural and procedural aspects of agency autonomy. We expect, therefore, that decisions about structural and procedural independence are linked to and create tension for political coalitions. This tension is the crux of the delegation decision: balancing an agency's need for flexibility to develop and maintain technical expertise with the worry that

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[233] 12 U.S.C. § 242.

[234] *See* Lewis & Selin, *supra* note 29, at 1506.

[235] Bawn, *supra* note 51, at 62–63.

[236] Selin, *supra* note 18, at 974–75. Increasingly, provisions that fall within this category have come under constitutional scrutiny. See Part V for further discussion.

[237] An issue the Supreme Court acknowledged (but failed to address directly) in the 2023–2024 term. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023); SEC v. Jarkesy, 144 S. Ct. 2117, 2124–25 (2024). For further discussion of judicial consideration of agency independence alongside provisions that expose agencies to the courts, see our discussion in Part V.

[238] *See* 15 U.S.C. § 78ee(m).

[239] *E.g.*, Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 392–93 (2017) (describing President Obama's use of administrative discretion to achieve consistent, overarching policy goals with respect to immigration); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511 (2009) (observing the President retains ability to shape immigration policy despite their inability to set admission and removal criteria).

such freedom provides policy outcomes that diverge from what elected officials want.[240]

Statutory provisions that create structural independence by placing ex ante constraints on elected officials' ability to appoint or remove key agency leadership can promote impartiality, policy continuity, and the development of administrative expertise.[241] Allowing agencies the autonomy to develop their expertise, though, also offers them the leeway to drift away from the enacting coalition's original intent or the initial purpose of an authorizing statute—perhaps in a direction that political actors would have never wanted.[242]

Procedural provisions that place ex post limits on political review of agency policy can influence administrative performance and often are a way for politicians to credibly commit not to intervene in an agency's policy in the future.[243] Specifically, allowing agencies procedural autonomy offers administrators freedom from the constraints of reporting regularly to elected officials and to redirect resources to pilot test programs, gather new information, or even think outside the box in other dimensions.[244] However, this latitude offers them the flexibility to move away from legislative intent.

An aspect of delegation not contemplated by Professor Bawn but highlighted in Part II's motivational study is elected officials' attempts to balance structural and procedural independence with statutory decisions to adjust the exposure of agencies to the courts. The prospect of litigation can promote administrative adherence to legislative commands and reinforce

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[240] Bawn, *supra* note 51, at 62.

[241] *See, e.g.*, Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 881 (2007) (noting removal powers incentivize expertise creation); John B. Gilmour & David E. Lewis, *Political Appointees and the Competence of Federal Program Management*, 34 AM. POL. RSCH. 22, 42 (2006) (finding that agencies whose managers serve for fixed terms tend to have substantially higher management grades than agencies without fixed terms); DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 197 (2008) (arguing that presidents use appointments to increase control over agency activities, even if such politicization harms overall agency performance).

[242] Epstein & O'Halloran, *supra* note 59, at 697–99.

[243] *See* George A. Krause, David E. Lewis & James W. Douglas, *Politics Can Limit Policy Opportunism in Fiscal Institutions: Evidence from Official General Fund Revenue Forecasts in the American States*, 32 J. POL'Y ANALYSIS & MGMT. 271, 271–72 (2013); GARY J. MILLER & ANDREW B. WHITFORD, ABOVE POLITICS: BUREAUCRATIC DISCRETION AND CREDIBLE COMMITMENT 21 (2016); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19, 24 (2010) (noting that agency independence may encourage stability as policy decisions are not subject to future changes in the political landscape); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 613 (2010) (observing that limiting political review of agency decisions allows officials to make "difficult yet ultimately beneficial decisions that politicians would not").

[244] *See* Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 658–59 (2021).

standards embedded in statutory language, particularly in agencies that implement delegated authority promoting nonmarket or non-commodity values (e.g., protecting the environment).[245]

Recognizing this, Congress often crafts statutory language that manipulates agency exposure to the courts by specifying time limits on filing for review of final agency decisions, granting a specific court exclusive jurisdiction, or even (as our introductory example suggests) precluding judicial review of specific agency actions.[246] However, legislators cannot realistically anticipate precisely how judicial exposure will affect agency policy.[247] For example, similar to the tension between other forms of ex post review and the development of agency expertise, court oversight can produce perverse incentives for agencies to invest less effort when faced with a high likelihood of litigation.[248] FERC provides a nice illustration. In the 1990s, FERC's redesignation of a case for hearing was often referred to as the agency's decision to place a problem in "second floor storage" (a reference to the floor of FERC's building where adjudication occurred).[249] It was the agency's hope that, while in "storage," the disputes that gave rise to the problem would resolve themselves.

Relatedly, our review of energy policy suggests that legislative considerations of judicial exposure often coincide with issues of administrative responsiveness to elected officials and their constituents. When an agency is not responsive to the needs of stakeholders (and, by extension, the legislators who represent them), the courts provide an alternative mechanism for policy review.[250] Statutory exposure to the judiciary can influence administrative operations and force an agency to adopt procedures that make the agency more susceptible to the influence of the Legislature and key stakeholders.[251]

The informational and procedural aspects of judicial review are particularly important for legislators contemplating delegation when agency

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[245] Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 522–24.

[246] Clouser McCann et al., *supra* note 13, at 128–29; SIEGEL, *supra* note 14, at 42, 55, 85.

[247] *See* Anthony M. Bertelli & Sven E. Feldmann, *Structural Reform Litigation: Remedial Bargaining and Bureaucratic Drift*, 18 J. THEORETICAL POL. 159, 160 (2006).

[248] Ian R. Turner, *Working Smart and Hard? Agency Effort, Judicial Review, and Policy Precision*, 29 J. THEORETICAL POL. 69, 81 (2017).

[249] Richard J. Pierce Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN L. REV. 7, 13 (1991).

[250] *See* Moe, *The Politics of Bureaucratic Structure*, *supra* note 59, at 277–79 (explaining the incentive structure that drives the relationship between stakeholders and legislators and results in strategic legislative choices regarding administrative structure).

[251] Jeffrey L. Brudney & F. Ted Hebert, *State Agencies and Their Environments: Examining the Influence of Important External Actors*, 49 J. POL. 186, 201 (1987).

structure or operations create a lack of political access. When an agency is relatively insulated from political influence, the agency's structure can render Congress unhelpful when administrative decisions negatively affect regulated entities—legislators have a harder time putting pressure on agency personnel and processes. In these situations, the lack of oversight and political pressure agencies can allow an agency to drift from legislative preferences on a particular statutory mandate or even fail to provide policymaking information.[252]

Additionally, exposure to the courts can beget more exposure to the courts, as judicial decisions elaborate on administrative law in a way that expands the opportunities for future judicial action.[253] Indeed, the time period of our case study exhibited marked development in administrative law jurisprudence. Seminal cases restructured the relationship between the Legislative and Executive Branches and reset the parameters of judicial review of administrative action.[254] Such restructuring continues today, clarifying the constitutional boundaries for legislative design of agency structure, delegation, administrative policymaking, and judicial review of agency action.[255]

However, agency exposure to the courts is not always the answer. Legislative design of agency exposure to the courts differs from other forms of ex post review in crucial ways. First, and most obviously, elected officials statutorily provide for a review mechanism that does not involve them directly. Legislators recognize that judicial exposure brings key actors into the policymaking process who may lack policy expertise and structure their decision-making in a narrow way.

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[252] Jablon et al., *supra* note 84, at 630.

[253] Schuck, *supra* note 85, at 181.

[254] *E.g.*, Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) (limiting courts' ability to force procedures on agencies); Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) (recognizing agency power to interpret statutes), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Auer v. Robbins, 519 U.S. 452 (1997) (recognizing agencies' authority to interpret their own rules); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001) (discussing the parameters of permissible delegation); United States v. Mead Corp., 533 U.S. 218 (2001) (setting the limits of *Chevron* deference); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (deferring to agency expertise on defining telecommunications services); FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (deferring to agency judgment on banning expletives from broadcasts).

[255] *See, e.g.*, Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023) (finding agency review schemes do not displace courts' authority to review challenges to agency constitutionality); Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416 (2024) (upholding the Consumer Financial Protection Bureau's funding mechanism); *Loper Bright Enters.*, 144 S. Ct. 2244 (overruling *Chevron*); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 (2020) (holding for-cause removal of single agency director to be unconstitutional); West Virginia v. EPA, 597 U.S. 697 (2022) (applying the major questions doctrine to limit EPA regulatory authority).

Federal judicial review consists of a dialogue between unelected judges who serve lifetime appointments and elected officials' constituents (broadly construed). Petitioners for review of agency actions typically are external stakeholders who vary in their resources, capacity, and use of judicial venues to push for change.[256] Not surprisingly, groups advantaged in the electoral process also tend to enjoy greater legal leverage in judicial review.[257] Statutory language relating to exposure likely contemplates and reinforces this reality. Just as structural constraints offer external groups varying influence over agency leaders,[258] exposing agencies to the courts by widening standing, adding court options, and lengthening filing deadlines changes the influence of external groups on agency decisions.

Furthermore, litigation (or even the threat of litigation) represents a delay in the implementation process as agencies spend time building an administrative record that supports a decision sustainable in court.[259] This delay does not necessarily translate into better policy. The quality of agency decision-making and the effort the agency invests depends on agency, policy, and environmental characteristics.[260]

Simply, the circumstances under which courts review final agency actions differ from procedural oversight. Notably, judges (who are less connected to constituents) operate under different constraints than elected officials since complaints to the courts must meet certain initial standards. While political actors may largely raise any issue at any time in the context of political review, legal complaints to the court system must specify an unresolved case or controversy resulting in a particularized injury brought by an actor (or set of actors) that is capable of judicial resolution. As a result, there is some degree of temporal distance between when an enacting coalition provides for agency exposure to the judiciary and the filing of a lawsuit—not to mention its resolution.

Further complicating matters, the federal Judicial Branch contains 108 distinct courts,[261] each with its own identity, set of legal and policy

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[256] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284–85 (2006).

[257] Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1722–23 (2012).

[258] Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1331–36 (2023).

[259] The scope and breadth of the administrative record is critical for judicial review, as lawsuits filed against agencies revolve around the record the agency created when completing the challenged action. Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 KAN. L. REV. 1, 11 (2018).

[260] Turner, *supra* note 248, at 71.

[261] *FAQs: Court Information*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/faqs-court-information [https://perma.cc/9NLP-HCD8].

preferences, and informal norms. This decentralization, combined with the number of procedural and substantive claims that arise in administrative law, may muddle agency decision-making.[262] For example, beyond the widely recognized Supreme Court decisions that dictate the parameters of executive action, routine court orders concerning preliminary case management or discovery issued by district court judges across the country can serve as "checks" on administrative decision-making.[263]

As a result, as exposure to the judiciary increases, agencies may redistribute resources toward understanding the complexity of the legal requirements for policymaking instead of toward understanding and managing the technical complexity of the policy area, its problems, and policy solutions.[264] Faced with possible litigation, agencies place more power and influence in the hands of attorneys, who tend to be policy generalists, and transfer authority away from administrators with substantive policy expertise.[265] When agencies devote fewer resources to technical expertise and knowledge acquisition, the precision of agency policy choices decreases.[266] Reduced policy precision leads to agencies having less information about how the state of the world translates from a policy choice into a real-world outcome. Simply, agencies increase their error rate.

In sum, pushing oversight to the courts likely influences administrative choices, but also results in less direct coalitional control and an impact that is further downstream than with procedural design features. Thus, the statutory provisions that adjust agency exposure to the courts reflect strategic decision-making by the delegating coalition. While this Article's Online Technical Appendix provides formalization of our novel model of delegation that highlights these coalitional choices, in the Sections that follow, we describe the model's mechanics and construct a set of testable hypotheses regarding an enacting coalition's decision to write statutory provisions that increase administrative exposure to the judiciary and how that exposure can complement or supplement agency independence.

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[262] *See* Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1209 (1992).

[263] Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 942 (2022).

[264] *See, e.g.*, Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POL. SCI. 336, 359–60 (1995) (finding that EPA personnel resisted top-down political directives and devoted more resources to litigation when faced with executive and legislative efforts at political control).

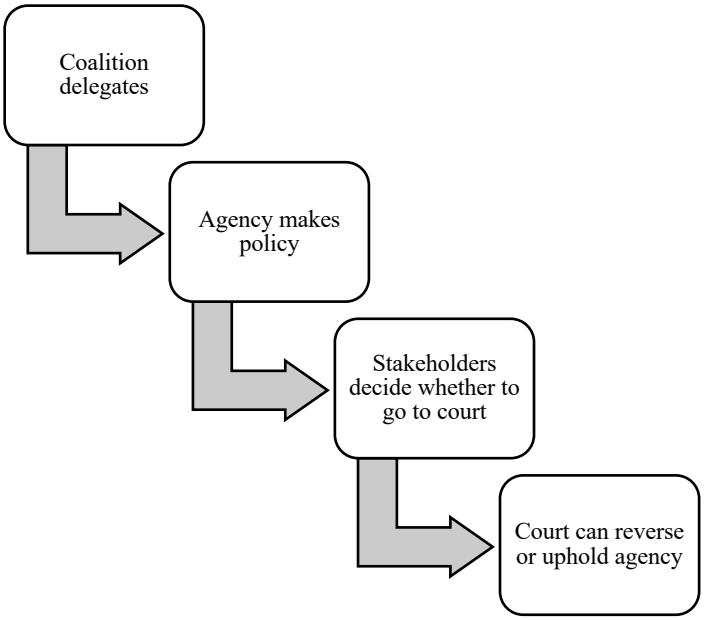
[265] O'Leary, *supra* note 72, at 566; Scott Limbocker, William G. Resh & Jennifer L. Selin, *Anticipated Adjudication: An Analysis of the Judicialization of the US Administrative State*, 32 J. PUB. ADMIN. RSCH. & THEORY 610, 614 (2022).

[266] Turner, *supra* note 248, at 86.

### *B. A Model of Delegation*

In the model, there are two strategic players: an agency and a political coalition. The agency is made up of career administrators but is influenced by external groups through appointed agency leadership. The political coalition is a group of actors (including the pivotal members of both chambers of Congress and the President) with the power to legislate policy choices. When delegating authority to an administrative agency, the coalition bases its choices over agency independence and judicial exposure on expectations of how policies link to outcomes and how administrators will implement policy. The agency, in comparison, chooses how to implement its delegated authority based on its induced preferences and its own prediction about how the policy will map onto outcomes. Figure 1 provides a simple depiction of the stages of the game.

FIGURE 1: A MODEL OF DELEGATION




First, the political coalition delegates policymaking authority to an agency. The statute that delegates substantive authority also specifies three things: structural independence, procedural independence, and judicial exposure of the agency. We assume that the political coalition can never completely strip an agency of its own preferences over policy, but the coalition can severely limit the impact of these preferences with agency

design and judicial review. Through decisions over structural and procedural independence, the political coalition attempts both to sway the induced policy preferences of the agency (by stacking the types of political appointments and terms of agency leaders, for instance) and the variance of agency policy outcomes (by constraining or optimizing agency capacity to acquire information and reduce predictive errors). The coalition's decisions about judicial exposure impact possible policy outcomes (e.g., if a court reverses agency choices) and operate as a constraint on how agencies make decisions since an agency may reallocate resources to bolster the administrative record. Because the courts can enter the administrative fray regardless of statutory constraints on court oversight (if only to review frivolous pleadings and dismiss the case), the level of judicial exposure can never be zero.[267]

After the coalition has set the contours of both agency independence and court exposure, the agency acts upon its delegated authority via the policy-implementation process. To account for the progression of policy implementation after policy enactment, we include a stylized action by "Nature" revealing the agency's induced preferences. Depending on the state of the world (i.e., Nature), the coalition may have made larger or smaller mistakes in its own predictions or expectations about how administrative appointments impact what the agency sees as the ideal policy choice, which the model takes into account. Given the context of statutory independence and judicial exposure, the agency decides how to implement policy. Subsequently, Nature reveals the technical errors in the policy choices of the agency and those of the coalition's expectations as policy outcomes are realized in the world.

At some point during this implementation process, stakeholders decide whether to petition a court for review of agency decisions. These stakeholders may be the same or different than those who were involved in the political coalition's initial decision to delegate or who assert influence over agency leadership. We simplify the stakeholders' choice to litigate in the model to be a probability equivalent to a coin flip, affected by judicial exposure and an exogenous parameter (i.e., a weighted coin). Notably, at the lowest level of judicial exposure for an agency, the enacting coalition effectively precludes judicial review of administrative policymaking.[268] As exposure increases, we assume that litigation reveals the effects of agency

[267] *See, e.g.*, Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371–73 (1953) (discussing what courts can do even if Congress has restricted or precluded jurisdiction).

[268] Contextually, decreasing an agency's exposure to the courts moves the agency's exposure below the minimum threshold established by the APA.

policy and the preferences of key stakeholders. In this way, judicial exposure provides information to the political coalition regarding the need to revise policy choices (i.e., returning to their previous delegation decision).

Finally, if stakeholders petition for review, the court may or may not reverse agency choices. We do not give the court an ideological or legal identity, meaning the reviewing court may be any single district court judge or panel of appellate judges across the federal judiciary. Our only assumption is that the reviewing court's level of technical expertise is the same as or less than that of the agency.

Of central importance for consideration of our model, we do not limit litigation to challenges of agency rulemaking or judicial review under a particular doctrine. Even though no administrative law decision has received more scholarly attention than *Chevron U.S.A. Inc. v. NRDC*[269] (and now *Loper Bright Enterprises v. Raimondo*[270]), we move beyond exclusively contemplating interpretations of an agency's statutory authority. Federal agencies routinely implement (and courts regularly review) policy under their own regulations[271] or under a statutory framework that all parties accept as constitutional.[272]

Indeed, the vast majority of administrative action occurs outside of the established rulemaking and adjudicatory provisions of the APA.[273] Theoretical consideration of modern judicial review of administrative policymaking should account for the empirical reality that litigation over final agency actions includes questions regarding the parameters of statutory and regulatory authority, as well as agency implementation decisions under that authority.[274]

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[269] 467 U.S. 837 (1984); Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014).

[270] 144 S. Ct. 2244 (2024).

[271] Kisor v. Wilkie, 588 U.S. 558 (2019) (holding that *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), are not overruled, and directing courts to defer to an agency's reasonable reading of its own genuinely ambiguous regulations).

[272] Indeed, Professor Jennifer L. Selin's ongoing study of a random sample of over 800 economically significant rules suggests that about 90% of all litigation filed in federal courts after the rules' effective dates challenges agency implementation of regulatory (as opposed to statutory) authority. *See* Jennifer L. Selin, *Marbury v. Madison* 2.0: Agency Independence and Judicial Review of Administrative Policymaking (Nov. 14, 2022) (unpublished manuscript) (on file with author).

[273] *See, e.g.*, MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 89 (2019) (noting an estimation that 90% of the federal government's work is conducted outside the boundaries of the APA).

[274] Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 537 (2005) (observing that modern administrative governance is not only about the delegation of authority but also agency action).

In our model, uncertainty plays a crucial role in all forms of administrative policymaking. As noted above, one of the benefits of a theoretical model is to distill the complexities of political decision-making by capturing underappreciated aspects of governance, including the fact that policymaking is not an exact science. Our model highlights the uncertainty of all actors in the administrative arena: elected officials, agencies, stakeholders, and judges. Specifically, we model the uncertainty of (a) the enacting coalition with respect to an agency's policy preferences; (b) the ability or interest of stakeholders to petition the courts; (c) the substance of judicial decision-making; and (d) how policy translates to real-world outcomes.

Contemplation of the inherent uncertainty of the political world along with structural, procedural, and judicial exposure choices is crucial. In its ideal form, the democratic accountability of the administrative state requires not only that elected officials have the ability to induce the responsiveness of administrators directly, but also that administrative decision-making as a whole reflects the information all actors have about the state of the world at the time of legislative enactment.[275] Furthermore, for a theoretical model to provide even a partly accurate description of the administrative process, it must account for the diverse interests that regularly engage with agency policymaking.[276]

Not only do these actors and their choices alter the policymaking environment of federal administrators, but they also likely impact agencies' strategic choices with respect to implementation decisions and the acquisition of expertise. It is possible that even long after political coalitions delegate authority to administrators, the balance of agency independence and exposure to (or insulation from) the courts continue to play a role in agency activities and, ultimately, the policy outcomes realized from these choices.

### *C. Considering Judicial Exposure and Agency Independence*

Scholars often view ex ante statutory limits on an agency's ability to make policy and ex post review mechanisms as substitutes.[277] Yet different agency design mechanisms—including agency exposure to courts—that political coalitions include in statutes delegating authority to the Executive

[275] Sean Gailmard & John W. Patty, *Formal Models of Bureaucracy*, 15 ANN. REV. POL. SCI. 353, 369–70 (2012).

[276] Wagner, *supra* note 257, at 1721.

[277] John D. Huber & Charles R. Shipan, *Politics, Delegation, and Bureaucracy*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 849, 853 (Robert E. Goodin ed., 2011).

Branch can also complement each other, depending on circumstances.[278] For example, previous research demonstrates that, in high-capacity agencies, coalitions grant agencies discretion to use their expertise but then rely on ex post enforcement mechanisms to promote responsiveness to elected officials and their constituents; yet in low-capacity agencies, the relationship is different.[279] As we noted in the previous Section, when delegating policy authority, the political coalition's choice of the degree of agency autonomy to build into statutes depends on factors such as technical expertise, optimal use of information, and procedural due process considerations.[280]

Our model differs from its predecessors with its inclusion of two direct agency ex ante control levers (i.e., agency independence in two dimensions) and the courts as an ex post oversight mechanism. In this Section, we derive empirically testable hypotheses from our model regarding congressional delegation decisions that include adjustments to federal agencies' exposure to the courts. These expectations first demonstrate how political volatility and the technical complexity of a policy area influence a legislative coalition's decision to expose an agency to the judiciary (all else equal). We then highlight the trade-offs between structural independence, procedural independence, and judicial exposure.

*1. Judicial Exposure as a Response to Uncertainty*

At its most basic, statutory exposure of administrative policymaking to the judiciary is valuable because it provides parties affected by an agency's actions the opportunity for assessment of the legality of those actions.[281] From a political coalition's perspective, this opportunity is beneficial because there is a direct avenue for possible redress through the courts if agencies fail to meet key constituents' demands or concerns.[282] That means the institutional design of both administrative structure and judicial review reflects the political process, including the concentration of stakeholder interests.[283]

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[278] *See* Bawn, *supra* note 57, at 108; *see also* Maxim Ivanov, *Informational Control and Organizational Design*, 145 J. ECON. THEORY 721 (2010) (demonstrating empirically that informational control and delegation can be either complements or substitutes).

[279] John D. Huber & Nolan McCarty, *Bureaucratic Capacity, Delegation, and Political Reform*, 98 AM. POL. SCI. REV. 481, 489 (2004).

[280] Bawn, *supra* note 57, at 105.

[281] Elizabeth Fisher, Pasky Pascual & Wendy Wagner, *Rethinking Judicial Review of Expert Agencies*, 93 TEX. L. REV. 1681, 1684 (2015).

[282] Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1550–51 (2018).

[283] *See* Neil Komesar & Wendy Wagner, *The Administrative Process from the Bottom Up: Reflections on the Role, If Any, for Judicial Review*, 69 ADMIN. L. REV. 891, 894 (2017). Although

When the enacting coalition is uncertain about how administrative actors will exert their authority or how constituents will respond to new regulatory schemes, the judicial process provides an attractive opportunity for additional "fire alarms" regarding the impact of agency policy.[284] The debates over the Clean Air Act Amendments of 1990 illustrate this point. For example, after campaigning as an environmentalist, President George H.W. Bush proposed amendments to the Clean Air Act that congressional Democrats soon countered with their own set of amendments.[285] In addition to the political disagreement between the two branches and the inherent uncertainty of a new presidential administration, there were conflicts over the proposals resulting from likely regional disparity in state and local government responses to the amendments.[286] In sum, the expected impacts of policy choices were uncertain. Exposing agencies to the courts is an attractive strategy when, in cases such as this, the political world is rife with turmoil, the political parties in the majority change often, and the strength of stakeholders is in flux.

Governance in a federalist constitutional system only exacerbates these complications. An increasing pattern in the modern era is the federal delegation of policy authority to federal agency partnerships with the states.[287] Congress has developed a variety of tools, including creative and evolving use of administrative structure, to induce states to implement delegated authority in a way that aligns with coalitional preferences.[288] In fact, delegation to the states may itself be a form of political control, as

stakeholders with high levels of capacity can more easily engage with all three branches of government, political coalitions can and do manipulate the ease with which those with fewer resources can use the courts. Smith, *supra* note 210, at 139–40.

[284] *See* Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 823 (2008); Rogers, *supra* note 70, at 87. *See generally* McCubbins & Schwartz, *supra* note 59 (developing the concept of fire alarm oversight).

[285] Anne Cronin, *An Accounting: The Environment's Gains and Losses*, N.Y. TIMES, Dec. 4, 1988 (§ 4), at 5.

[286] Arrangements where "national policies are carried out by subnational agencies . . . [have] the potential to create more competition of vested interests in the administration of law." Nuno Garoupa & Jud Mathews, *Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review*, 62 AM. J. COMPAR. L. 1, 11 (2014).

[287] Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 LAW & SOC'Y REV. 939, 939 (2007); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 462 (2012); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 537 (2011).

[288] PAMELA J. CLOUSER MCCANN, THE FEDERAL DESIGN DILEMMA: CONGRESS AND INTERGOVERNMENTAL DELEGATION 7, 234 (2016).

studies suggest that state administration of federal programs is more responsive to both political and stakeholder influence.[289]

To account for these dynamics, current political coalitions may rely on the judicial process to obtain additional information regarding the impact of specific policy choices, particularly as administrative implementation unfolds nationwide.[290] The prospect of litigation not only incentivizes an agency to develop its administrative record more carefully but also potentially promotes the coalition's policy goals by forcing stakeholders to disclose large amounts of information and may even shape the behavior of regulated entities.[291]

This logic extends to uncertainty resulting from the involvement of multiple political actors and varying state interests in a single policy. In these circumstances, judicial review again works as an information-gathering opportunity for the political coalition. Continuing our example of the Clean Air Act Amendments of 1990, following a fierce political battle, the Amendments provided for higher levels of the EPA's exposure to the courts than previous iterations of such legislation.[292] Furthermore, by relying on external stakeholders and the courts to fill in the blanks when Congress delegates, political coalitions shift the locus of blame away from elected policymakers—likely a needed boon when elections are closely contested and political futures are undecided.[293] This leads us to our first empirically testable hypothesis:

*Hypothesis 1. As political volatility increases, judicial exposure increases.*

However, like any other ex post review process, judicial exposure can induce important, yet subtle, changes in agencies' incentives to investigate policy issues.[294] This can introduce a cost for political coalitions. Administrators may refrain from delving into complicated problems, or even

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[289] David M. Hedge, Michael J. Scicchitano & Patricia Metz, *The Principal-Agent Model and Regulatory Federalism*, 44 W. POL. Q. 1055, 1067 (1991); Lael R. Keiser, *State Bureaucratic Discretion and the Administration of Social Welfare Programs: The Case of Social Security Disability*, 9 J. PUB. ADMIN. RSCH. & THEORY 87, 100–01 (1999); John T. Scholz & Feng Heng Wei, *Regulatory Enforcement in a Federalist System*, 80 AM. POL. SCI. REV. 1249, 1264–65 (1986).

[290] *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 8–9 (2011) (arguing federalism-sensitive governance is an interactive process that requires judicial guidance to facilitate bargaining); *see also infra* Part IV.

[291] Zambrano, *supra* note 70, at 75.

[292] Clouser McCann et al., *supra* note 13, at 123.

[293] *See, e.g.*, MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 46–47 (2d ed. 1989) (discussing how members of Congress can take credit and avoid blame by drafting vague delegations and intervening when necessary).

[294] Sean Gailmard & John W. Patty, *Participation, Process and Policy: The Informational Value of Politicised Judicial Review*, 37 J. PUB. POL'Y 233, 235 (2017).

dispense with large portions of their statutory mandates as agencies divert resources toward preparing for possible court challenges.[295]

Additionally, judges are less likely to have substantive policy knowledge in a particular field and, out of respect for the authority of the political branches of government, tend to avoid making substantive policy decisions.[296] Such review can neutralize the considerable amount of expertise administrative agencies accumulate. As a result, in some policy areas, judicial exposure fails to provide the type of oversight legislators find valuable and adds the cost of draining limited agency resources.[297]

An enacting coalition may therefore worry that if an agency is continually dragged into court battles, policy implementation will be inefficient or ineffectual. This means the coalition will likely consider the need for specialized administrative knowledge. A coalition faced with circumstances where policy implementation relies on a comparatively high degree of agency expertise and capacity will choose to protect agency acquisition of expertise by shielding it from the external pressures enabled by possible court proceedings.[298] With a degree of insulation from the judiciary, administrators can direct more resources to implementation efforts and knowledge generation. Thus, our second hypothesis states:

*Hypothesis 2: As technical complexity increases, judicial exposure decreases.*

Hypotheses 1 and 2 contemplate a political coalition's decision when delegating policy authority to adjust an agency's exposure to the judiciary in the context of uncertainty but hold constant agency structure. In our next set of hypotheses, we consider how the coalition's choices to overexpose an agency to the courts varies with structural and procedural independence.

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[295] Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1193 (1981).

[296] *E.g.*, Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 577 U.S. 260 (2016) (deferring to agency judgment); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) (same); Chem. Mfrs. Ass'n v. NRDC, 470 U.S. 116 (1985) (same); Heckler v. Chaney, 470 U.S. 821 (1985) (same); Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) (same), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) (same).

[297] Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 228–29 (1996).

[298] *See generally* Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 186–88 (2014) (arguing that accountability mechanisms can reward "bad" administrative actions, including "pandering," "posturing," "persistence," "populism," and "political correctness" (emphasis omitted)).

### 2. *Judicial Exposure as an Accountability Mechanism for Structurally Independent Agencies*

When a political coalition reduces its ability to exert pressure on leadership directly by designing an agency with structural features that promote the independence of key agency leadership, the coalition looks for supplemental ways of influencing agency decision-making. Providing for agency exposure to the courts in explicit statutory provisions that go beyond the statutory baseline of the APA offers an attractive option. The coalition affords an agency more room to deploy administrators' practical and technical knowledge through structural independence but offers stakeholders an ex post opportunity to raise concerns over agency actions. Additionally, it shifts responsibility for hard policy choices to agencies and the judicial system.[299]

Although further downstream and outside of congressional control, courts allow external stakeholders to inform policymakers in the judicial venue when agencies make choices that may depart from preferred legislative outcomes. Furthermore, exposure to the courts forces agencies to strategically adjust their priorities and account for not only their own policy preferences and expertise but also the possibility of litigation based on legislative preferences embedded in statutory language.[300]

Through litigation, courts and agencies engage in dialogue that can lead to a better understanding of policy, particularly in risk regulation.[301] As Part I suggests, congressional debate surrounding the creation of the relatively insulated FERC recognized the courts' important role in resolving uncertainty concerning antitrust issues involving electric and gas utilities.[302] Members of Congress found judicial exposure attractive in part because few political actors could anticipate the consequences of a complicated regulatory scheme on stakeholders or the energy market. The uncertain enacting coalition sought to utilize the judicial process as an information-gathering opportunity. We summarize these considerations in the following hypothesis:

> *Hypothesis 3: As agency structural independence increases, judicial exposure increases.*

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[299] *See* FIORINA, *supra* note 293, at 46 ("[S]ome agency, existing or newly established, must translate a vague policy mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations and, incidentally, the trampling of numerous toes.").

[300] Garoupa & Mathews, *supra* note 286, at 8.

[301] Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1725–26 (2011).

[302] *Supra* Section I.C.

However, at times, a political coalition delegates authority to an agency but reserves the coalition's right to oversee policy and builds in multiple opportunities to correct agency mistakes during the implementation process, including judicial review.[303] This leads to our final hypothesis.

*3. Pairing Judicial Exposure with Political Review*

Designing administrative accountability involves the use of diffuse mechanisms of control that provide the opportunity for negotiation and deliberation among a pluralistic landscape of coalitional preferences at both the federal and state levels.[304] This incentivizes agencies to be aware of how their decisions translate to outcomes in the regulated world. While well-designed administrative structures make it less likely that ex post political review mechanisms will uncover any consequential agency malfeasance,[305] review of agency decision-making is at times desirable to reinforce the importance of agency sensitivity to a dynamic political landscape. Subjecting an agency to review—political or judicial—manipulates the agency's policy-enactment costs, thus making the agency more sensitive to stakeholder competition and other evolving environmental realities.[306]

On the flip side, in the context of the need for swift agency action or when little is known about what policy approaches can best improve situations or crises, insulating agencies from the courts can act as an expertise amplifier when agencies are also given procedural leeway.[307] Reducing ex post political and judicial exposure can offer agencies the opportunity to move swiftly and to innovate. Our final hypothesis contemplates this sensitivity:

*Hypothesis 4: As agency procedural independence increases, judicial exposure decreases.*

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[303] *See, e.g.*, Meazell, *supra* note 301, at 1727, 1729 (noting that judicial review enables participation in the administrative process, provides an opportunity for translations of agency science, helps agencies understand whether they communicated their decisional processes clearly, and aids each branch of government to ensure that technical information relevant to administrative policy is understood).

[304] Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1671 (2023).

[305] Bawn, *supra* note 57, at 108.

[306] Garoupa & Mathews, *supra* note 286, at 2; Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1441–42 (2011).

[307] *E.g.*, Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 301(b)(1), 110 Stat. 3009, 3577 (amending 8 U.S.C. § 1182(a)) (providing the Attorney General with discretion to waive statutory standards with respect to unlawful admission of immigrants and specifying that no court shall have jurisdiction to review such a decision or action); *id.* § 302(a) (amending 8 U.S.C. § 1225) (limiting both administrative and judicial review over claims attacking the validity of orders of removal if an immigration officer determines a person claiming asylum does not have a credible fear of persecution).

In this sense, the political coalition recognizes that ex post review—whether it be by elected officials or by unelected judges—is akin to "the pupil correcting the teacher."[308]

## IV. ESTIMATING THE RELATIONSHIP BETWEEN JUDICIAL EXPOSURE AND AGENCY STRUCTURE

Using Part II's motivational example, Part III develops a general theory of congressional decision-making when the Legislature delegates policy authority to the Executive Branch. This theory applies across time and policy areas. To test our broadly applicable hypotheses derived from the theory, we require measures of statutory design features that include all federal agencies' exposure to the judiciary as well as their structural and procedural independence.

We explore the presence of these judicial exposure provisions and provisions that specify agency independence using measures developed by Professors Pamela J. Clouser McCann, Charles R. Shipan, and Yuhua Wang, and Professor Jennifer L. Selin. We then estimate the relationship between (a) congressional decisions to delegate while specifying judicial exposure and (b) agency independence, while (c) holding constant uncertainty as measured by political volatility and technical complexity.

### *A. A Dynamic Measure of Judicial Exposure*

Approximately one-third of all significant laws enacted from the passage of the APA until 2016 incorporate details about judicial exposure of administrative decision-making.[309] As a result, there are over 650 statutory provisions in the current U.S. Code that govern how federal courts review federal administrative agencies' actions.[310] These statistics reinforce our theoretical assumption that political coalitions contemplate judicial review above and beyond the parameters of the APA.

We utilize data collected by Professors Clouser McCann, Shipan, and Wang to measure the statutory provisions enacted from 1947 to 2016 that adjusted an agency's exposure to the courts.[311] Using a detailed coding scheme, the authors observed a variety of features of statutory language that Congress uses while delegating authority to adjust federal agencies' exposure to the judiciary. This data accounts for five categories of provisions in significant legislation, including the statutory language governing the

[308] Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 8 (2015).

[309] Clouser McCann et al., *supra* note 13, at 155.

[310] SIEGEL, *supra* note 14, at 3.

[311] Clouser McCann et al., *supra* note 13, at 135.

scope and reviewability of agency actions and procedural aspects of the judicial process, such as standing, venue, and time limits for litigation.[312]

While this Article's Online Technical Appendix provides more information about the research of Professors Clouser McCann, Shipan, and Wang, we provide an example from the data for context. In response to a series of mine disasters in the late 1960s that resulted in the death and injury of hundreds of miners, Congress considered and ultimately enacted legislation to improve the health and safety conditions of persons working in the coal mining industry.[313] While both the House and the Senate passed bills during the legislative process addressing the substantive issue of mine safety, the two chambers disagreed significantly with respect to the procedural aspects governing how federal agencies would interpret their newly delegated authority.[314]

In fact, one of the main points of contention at the reconciliation conference on the disagreement between the two chambers was whether the judicial review provisions of the APA would govern administrative decisions made under the Act.[315] Ultimately, the Federal Coal Mine Health and Safety Act limited appeals of the Secretary of the Interior's orders under the Act to those filed within thirty days in appellate courts in the District of Columbia or the circuit in which the affected mine was located.[316] According to Professors Clouser McCann, Shipan, and Wang, this decision by the political coalition regarding administrative exposure to the judiciary balanced the uncertainty legislators and their constituents had about the future impacts of the legislation against the need for review of administrative decisions.[317]

Professors Clouser McCann, Shipan, and Wang's research is valuable not only because their impressive data collection highlights legislative decisions such as this, but also because they estimate each federal agency's exposure to federal courts over time (i.e., a dynamic agency exposure index).[318] One of the problems confronting scholars who seek to measure overall agency exposure to the courts as designed by Congress is that a *combination* of statutory provisions dictates overall exposure and ultimately affects administrative action on a daily basis. Just like measures of how

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[312] *Id*. at 127.

[313] H.R. REP. NO. 91-563, at 2–3 (1969); Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742.

[314] *See* H.R. REP. NO. 91-761, at 64–65 (1969) (Conf. Rep.).

[315] *See id*. at 70.

[316] Federal Coal Mine Health and Safety Act of 1969 § 106(a).

[317] Clouser McCann et al., *supra* note 13, at 129.

[318] *Id.* at 124–25. The scholars relied on a mixed Bayesian latent-variable model to estimate an overall exposure to the courts by year and agency based on the presence and absence of various types of judicial review provisions.

liberal or conservative a judge is in comparison to other members of the judiciary, or estimates of the political ideology of a certain agency, law clerk, or government official,[319] observed actions (in this case, by the Legislature) are imperfect indicators of a larger latent concept.[320] Specifically, Professors Clouser McCann, Shipan, and Wang faced the problem of classifying patterns of the presence, or absence, of specific statutory language to capture the latent concept of judicial exposure.

To overcome these hurdles, the authors utilized a dynamic econometric latent-trait model to estimate the associations between these observed provisions, thereby providing an overall estimate of exposure to the courts by law and agency based on all combinations of the presence and absence of these provisions, as well as the manner in which they varied.[321]

Figure 2 depicts the relationship between the statutory provisions coded by Professors Clouser McCann, Shipan, and Wang and the ultimate measure of agency exposure to the courts. The dots indicate coefficients, and the lines estimate the precision associated with those coefficients.

In general, the variables relate to judicial exposure in traditionally expected ways. For example, statutes that specify a court reviews final agency action de novo are positively correlated with judicial exposure. In contrast, statutes that preclude judicial review of certain agency programmatic decisions are negatively correlated with judicial exposure.

Other provisions may seem redundant given other aspects of law (such as the judicial review provisions of the APA). For example, statutes that specify that review will occur in a district court, that a court should review and set aside agency actions that are arbitrary and capricious, or that an agency's factual findings must be supported by substantial evidence simply restate the baseline standards for judicial review.[322] Yet, in contrast to the suggestion by some that these provisions result from legacy legislative-drafting templates,[323] when viewed in combination with the concept of

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[319] *E.g.*, Adam Bonica, Adam S. Chilton, Jacob Goldin, Kyle Rozema & Maya Sen, *The Political Ideologies of Law Clerks*, 19 AM. L. & ECON. REV. 96 (2017) (estimating the political ideologies of law clerks); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo of the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002) (estimating dynamic Supreme Court Justice ideologies); Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303 (2018) (measuring the perceptions of agencies' ideological leanings).

[320] *See* Kevin M. Quinn, *Bayesian Factor Analysis for Mixed Ordinal and Continuous Responses*, 12 POL. ANALYSIS 338, 339 (2004).

[321] Clouser McCann et al., *supra* note 13, at 140. Each agency enters the dataset the first time a congressional statute provides language with respect to its regulatory authority, beginning in 1947, and exits the dataset if the agency is terminated. *Id.* at 142 n.42.

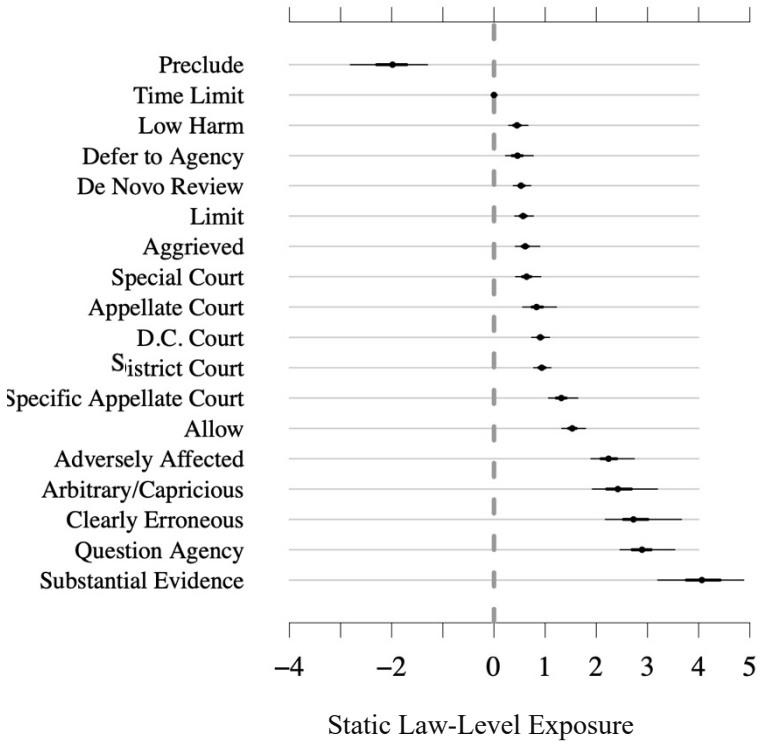
[322] SIEGEL, *supra* note 14, at 38–42, 52, 143.

[323] *Id.* at 41.

judicial exposure, these redundant provisions appear to be conscious decisions by Congress to prime courts to take a closer look at the administrative record.

The estimates range from –0.571 to 1.719, with values below zero indicating statutory language that insulates an agency from the courts and with positive values indicating statutory language that exposes the agency's actions to judicial review. On average, the agencies that are least exposed to the judiciary include the Department of State's U.S. Agency for International Development and the Department of Homeland Security's Federal Emergency Management Agency, whereas agencies with higher estimates include the Consumer Product Safety Commission and the National Transportation Safety Board.

FIGURE 2: AGENCY EXPOSURE TO THE COURTS




*Note.* This plot provides the estimated median location for each type of statutory language as the dot and the 95th (thick bar) and 90th (thin bar) percentile credible intervals. These medians provide the estimated contribution of each type of language (i.e., loading) to overall exposure to the court.

Because of the lengthy time frame and the potential for change in judicial exposure (both in meaning and context), the authors' dynamic model estimates an agency's exposure to the courts for each year the agency is in existence, accounting for any changes to those manifest traits across any new statutory provisions in that year that delegate authority to that agency.[324] This dynamic measure is useful for studying research questions such as ours, which are "contingent on the evolution of legislative–executive or legislative–judicial interactions."[325]

We begin our analysis by illustrating how individual agencies' statutory exposure to the courts can vary over time. Given our motivating example of energy policy in Part II, we begin with the estimated dynamic judicial exposure index with FERC (Figure 3). We then explore the Department of Housing and Urban Development's (HUD's) and the National Aeronautics and Space Administration's (NASA's) exposure to the courts over time (Figures 4 and 5). We choose to highlight these illustrative agencies because, in combination with FERC, they represent different administrative structures (i.e., commission, department, administration), perform different administrative functions (i.e., rulemaking, adjudication, investigation), operate in different policy areas, and thus have different constituency bases. The agencies also vary in terms of when and how Congress decides to structure the agencies' relationships with the courts.[326] The y-axis in each Figure depicts the judicial exposure estimate, and the x-axis indicates time in years.

Figure 3 presents the judicial exposure estimate for FERC and its predecessor, the FPC. The agencies' exposure to the courts was at its lowest towards the end of the FPC's life when the agency came under fire for its leadership positions being sought "as stepping stones to further preference, or to positions of importance within the industries subject to regulation" and when the agency had a backlog of twenty to twenty-five years' worth of matters awaiting decision.[327] In an attempt to address the problem, the agency underwent several organizational changes, and Congress gave the agency leeway to do so with less exposure to the courts.[328]

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[324] For more information, see *infra* Online Technical Appendix 16–17.

[325] Clouser McCann et al., *supra* note 13, at 142.

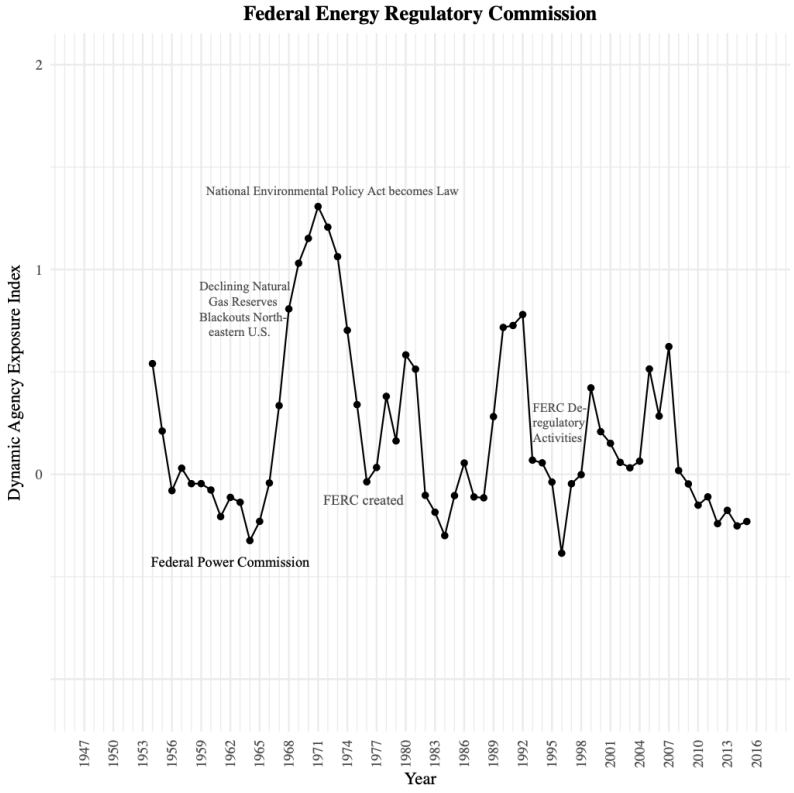
[326] *E.g.*, Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 111, 88 Stat. 633, 650 (specifying the terms of review of HUD determinations that a recipient of assistance no longer complies with the requirements for such assistance); Act of Dec. 18, 2010, Pub. L. No. 111-314, § 20137, 124 Stat. 3328, 3343 (specifying the removal of actions for personal injury damages by negligent or wrongful acts of NASA medical professionals filed in state courts to the federal district courts).

[327] Philip L. Cantelon, *The Regulatory Dilemma of the Federal Power Commission, 1920–1977*, FED. HIST., Jan. 2012, at 61, 73–74; Charles Curtis, *Forty Years of FERC*, 38 ENERGY L.J. 413, 414 (2017).

[328] Cantelon, *supra* note 327, at 75–76.

However, historic blackouts in the Northeastern United States and declining natural gas reserves in 1965–1970 generated political volatility, particularly at the state and local level, and we see steadily increasing exposure of the FPC to the courts.[329] As noted in our case study, upon the elimination of the FPC and the creation of FERC, judicial exposure also followed predictable patterns. For example, Congress responded to the political uncertainty created by FERC's deregulatory actions in the 1990s with increased agency exposure to the courts, although not to the heights reached during the reformulation of the FPC.[330]

FIGURE 3: JUDICIAL EXPOSURE FOR FERC




The ebbs and flows of judicial exposure are not unique to energy policy. For example, Figure 4 depicts the cycle of HUD's exposure to and insulation from the courts. HUD provides a nice comparison to FERC because, while

[329] *Id.* at 77.

[330] *See supra* notes 150–159 and accompanying text.

it is not an independent regulatory commission, HUD regularly directs, conducts, or oversees administrative reviews or inspections (most notably through its Real Estate Assessment Center)[331] and regulates and adjudicates (most notably under the National and Fair Housing Acts).[332]

The estimates of HUD's exposure to the courts show variation over time, although HUD's average estimates are higher than FERC's. This mean observation is unsurprising given that HUD's organizational structure is comparatively political procedurally (i.e., it is exposed to much more ex post political review).[333]

FIGURE 4: JUDICIAL EXPOSURE FOR HUD


The variation in HUD's exposure over time reflects political uncertainty. When Congress consolidated the Federal Housing Administration and the Public Housing Administrations into a new

331 42 U.S.C. §§ 1437a, 1437d, 1437z-1.

332 12 U.S.C. §§ 1701–1750aa; 42 U.S.C. §§ 3601–3631.

333 *See infra* notes 334–341 and accompanying text.

Department of Housing and Urban Development in 1965, the Legislature complemented its own ex post review mechanisms with judicial exposure to the courts.[334] In fact, HUD's exposure to the courts was in the 75th percentile of the distribution of the dynamic agency exposure index. After departmentalization, HUD's judicial exposure consistently decreased throughout the next decade as uncertainty about the political implications of how it would administer policy also decreased. However, "after years of obscurity," a number of policy and political scandals plagued HUD in the 1980s and 1990s.[335] We see a concurrent increased level of judicial exposure in response to this political volatility, reaching a peak in 1997.

In contrast to FERC and HUD, some agencies exhibit much less variability in exposure to the courts. As an example of such an agency, Figure 5 depicts NASA. While administrative lawyers may think of NASA as a nonobvious choice to highlight, the agency's unique policy mission combined with its role in the joint issuance and maintenance of a government-wide procurement regulation (the Federal Acquisition Regulations System) make it an interesting contrast to FERC and HUD.[336] For example, Congress has legislated in ways that dictate litigation of NASA's claims over property rights in inventions related to the agency's work;[337] the agency's liability insurance and financial responsibility requirements for death, bodily injury, or property damage related to commercial space launch activities;[338] and its role in debarment and suspension of contractors for procurement fraud.[339]

Not only is the agency's exposure to courts more stable over time, but the agency's average level of exposure is lower than that of FERC and HUD. This may reflect the technical complexity required for administration of the

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[334] Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965); *e.g.*, Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 1341, 82 Stat. 476, 584–85 (permitting litigation over flood insurance program policies); Kenneth L. Scott, *Third-Party Beneficiary Analysis in Federal Housing Law: In Search of Uniformity*, 25 WASH. U. J. URB. & CONTEMP. L. 203 (1989) (describing third-party-beneficiary claims under federal housing law).

[335] Gwen Ifill, *After Years of Obscurity, HUD Emerges in Scandal; Cabinet Members, Aides, Contractors Tainted*, WASH. POST, May 30, 1989, at A7 (describing fraud in HUD's housing assistance, coinsurance, and community-development block-grant programs); *see also* Robert L. Jackson, *Ex-Official Pleads Guilty in HUD Corruption Probe*, L.A. TIMES, June 18, 1993, at 20 (detailing charges against Thomas T. Demery, former HUD Assistant Secretary for Housing, of "steering $15 million worth" of subsidies to a developer in exchange for a $100,000 second mortgage on his home).

[336] 41 U.S.C. §§ 1302–1303.

[337] Act of Dec. 18, 2010, Pub. L. No. 111-314, § 20135, 124 Stat. 3328, 3339.

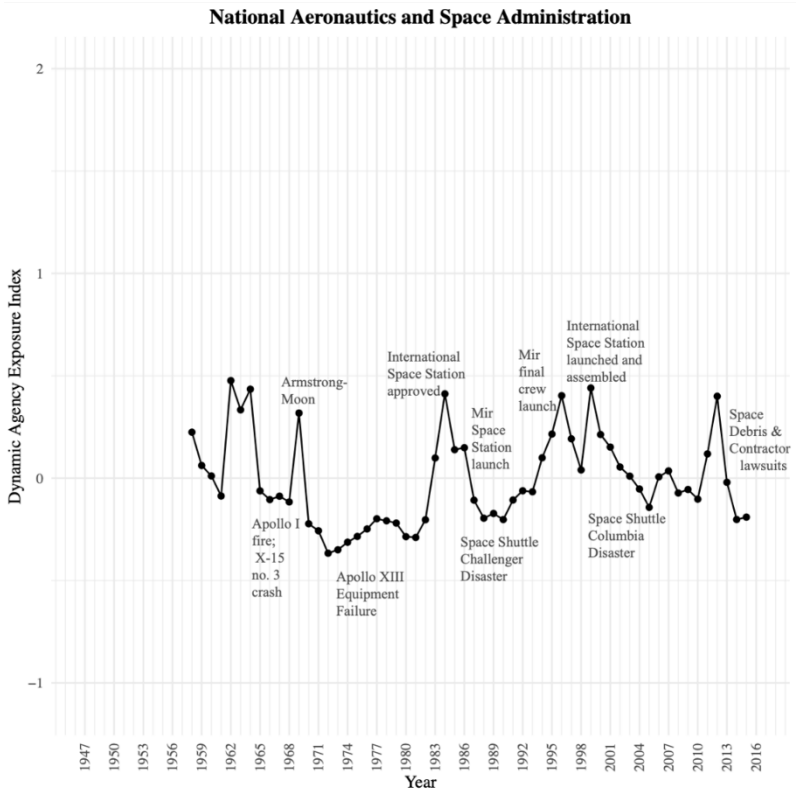
[338] Act of July 5, 1994, Pub. L. No. 103-272, § 70112, 108 Stat. 745, 1336; U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, § 106, 129 Stat. 704, 707 (2015).

[339] *Acquisition and Integrity Program*, NASA (June 21, 2024), https://www.nasa.gov/organizations/acquisition-integrity-program/ [https://perma.cc/GM46-MUWJ].

agency's statutory responsibilities and the difference in the agency's policy responsibilities.

Of note, NASA was least exposed to the courts while it was (with varying real-world outcomes) pursuing its lunar-landing missions.[340] For example, the agency's judicial exposure was lowest in the years following the Apollo 1, Challenger, and Columbia disasters. In the wake of each of the three incidents, studies revealed that pressure to meet impracticable scheduling goals in space flight led the agency to compromise safety and ignore the advice of technical experts within the agency.[341]

FIGURE 5: JUDICIAL EXPOSURE FOR NASA




[340] Project Apollo culminated with a human trip to the moon in 1969, and NASA completed five more successful landing missions through 1972. *Explore NASA's History*, NASA, https://www.nasa.gov/history/explore-nasas-history [https://perma.cc/G2HT-BFUK].

[341] Amy K. Donahue & Rosemary O'Leary, *Do Shocks Change Organizations? The Case of NASA*, 22 J. PUB. ADMIN. RSCH. & THEORY 395, 407–08 (2011).

In sum, not only do dynamic estimates of agency exposure to the courts correlate in ways that demonstrate face validity, but it appears that political coalitions adjust the level of administrative exposure to the courts across time and agencies. Yet, is this variation consistent with our hypotheses?

### *B. Measuring Structural and Procedural Independence*

We account for agency insulation using the estimates of statutory independence developed by Professor Jennifer L. Selin that quantify (1) structural limitations placed on the ability of elected officials to appoint or remove key agency personnel and (2) agency design features that limit political review of an agency's policy process.[342] Professor Selin's two dimensions of agency independence correspond nicely with our considerations of an agency's structural and procedural autonomy.

Like Professors Clouser McCann, Shipan, and Wang's measure of agency exposure to the courts, Professor Selin's measure of agency independence utilizes information collected from statutory law to analyze a latent trait (independence). Specifically, Professor Selin uses a Bayesian latent-variable model to capture the relationship between observed features of agency design found in statutory law and two distinct dimensions of agency independence.[343]

The first set of estimates (Decision Makers Dimension) relates to the ability of political actors to influence the structure of key agency leadership and, therefore, help set an agency's ideal point.[344] We equate these estimates to our model's consideration of congressional decisions regarding structural independence. Agency design features such as multimember governing boards, fixed and staggered terms, and conflict-of-interest provisions correlate with increased structural autonomy.[345] In contrast, statutory provisions that specify that leadership serves at the pleasure of the President (removable at will) or that designate an agency as a bureau within the executive departments correlate with decreased independence.[346] Thus, an agency with low estimates on this dimension tends to have appointments that are influenced by external actors and, therefore, reflect elected officials' preferences. Agencies with the least independent structures include the Department of Homeland Security, and agencies with the most independent structures include the Federal Reserve Board.

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[342] Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 972 (2015).

[343] *Id.* at 976–77.

[344] *Id.* at 977–78.

[345] *Id.* at 978.

[346] *Id.*

The second set of estimates (Policy Decisions Dimension) relates to ex post review of agency policy.[347] We liken these to procedural independence, as provisions that remove an agency from OMB review and the congressional appropriations process or allow the agency to litigate on its own are positively correlated with independence on this dimension.[348] Indeed, in a study of over 2,300 administrators' perceptions of political influence, Professor Selin found that as an agency's estimate on this dimension increases (indicating more procedural independence), the influence of the White House and congressional Democrats and Republicans on administrative policy decreases.[349] Agencies with the least procedural independence include the Office of the United States Trade Representative and the Office of National Drug Control Policy. The Commodity Futures Trading Commission ranks among the agencies with the most procedural independence.

In contrast to the judicial exposure index, Professor Selin's measures for each dimension are static. Her estimates are based off statutory provisions as detailed in the 2013 U.S. Code.[350] While this could be concerning given that our analysis of congressional delegation extends from 1946 (adoption of the APA) to 2016, the use of a static measure is only problematic if agency structure on these two dimensions varies across time. Recent work by Professors Scott Limbocker, Mark D. Richardson, and Professor Selin suggests that is not the case.[351] Indeed, using the same model specification as in Professor Selin's earlier work, Professors Limbocker, Richardson, and Selin estimated structural and procedural independence in 1977, 1997, and 2017 in the fifteen executive departments and the EPA (the agencies to which Congress delegates most often) and found agency design to be relatively stable across time.[352]

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[347] *Id.* at 977–78.

[348] *Id.* at 978.

[349] *Id.* at 980–81.

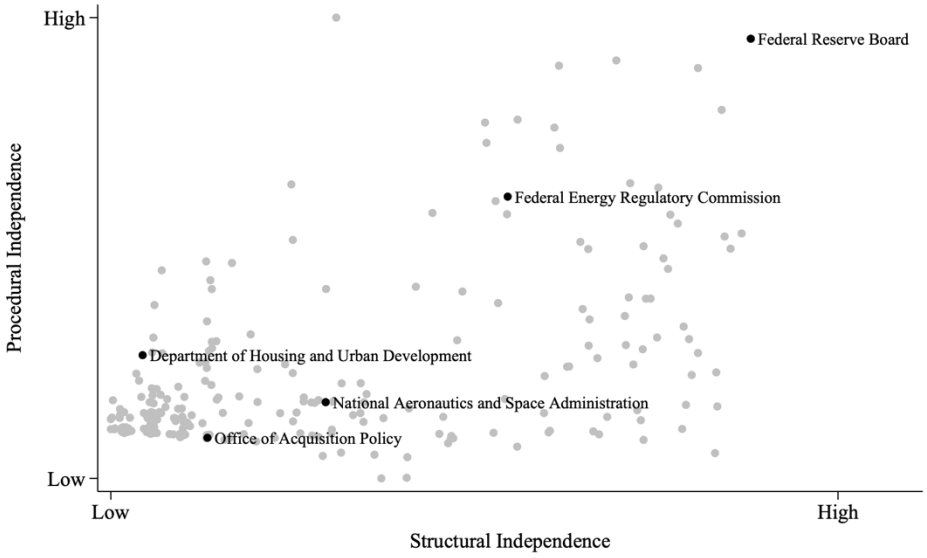
[350] *Id.* at 972.

[351] Scott Limbocker, Mark D. Richardson & Jennifer L. Selin, *The Politicization Conversation: A Call to Better Define and Measure the Concept*, 52 PRESIDENTIAL STUD. Q. 10 (2022).

[352] *Id.* at 23. While this finding may appear to contrast with Professor Selin's earlier work, there are important differences in the two analyses. In her 2015 article, Professor Selin compared a random sample of agencies *as initially designed* to their structure in 2013 and found stability in design for structural independence, but some variation for procedural independence. Selin, *supra* note 342, at 982–84. In their 2022 work, Professors Limbocker, Richardson, and Selin analyzed variation across time in the structure of agencies *already in existence* and found no statistically distinguishable difference across time for the estimates on either dimension. Limbocker et al., *supra* note 351, at 23. Given that Congress most regularly delegates to existing (rather than new) agencies, there is little concern about our use of the Selin measure, which includes hundreds more agencies than the dynamic Limbocker, Richardson, and Selin estimates.

To illustrate further how agencies vary across both structural and procedural independence, Figure 6 plots all agencies in Professor Selin's dataset (in light grey) and then highlights the same three agencies as discussed in the preceding Section with respect to judicial exposure: FERC, HUD, and NASA (in black). For comparison, the Figure also highlights one of the most independent agencies (the Federal Reserve Board) and one of the most political agencies (the Office of Federal Contract Compliance Programs) in the federal Executive Branch on both dimensions.[353] Structural independence is on the x-axis and procedural independence is on the y-axis.

FIGURE 6: AGENCY INDEPENDENCE




On both dimensions, FERC is more independent than the other highlighted agencies. Structurally, the agency's relatively high estimate reflects the fact that the Commission is composed of five members, no more than three of whom belong to the same political party, who serve staggered, five-year terms and are protected from removal by for-cause provisions.[354] However, unlike other agencies with similar leadership structures located

[353] The Federal Reserve Board is generally recognized as one of the most independent agencies in the administrative state. Selin, *supra* note 342, at 979. In contrast, the Office of Federal Contract Compliance Programs is a bureau within the Department of Labor that "[o]ffers compliance assistance to federal contractors and subcontractors to help them understand" the requirements of federal contracting. *About Us*, U.S. DEP'T OF LAB.: OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/about [https://perma.cc/3K57-7HXJ].

[354] 42 U.S.C. § 7171(b).

outside of the executive departments, FERC's placement within the DOE makes it less independent structurally than more traditional regulatory commissions.[355]

With respect to procedural independence, FERC's statutory design ranks it more autonomous than 95% of all federal agencies. For example, not only is the agency identified as an "independent regulatory agency" and thus exempt from OMB regulatory review, it transmits its annual authorization and appropriation requests as well as all other legislative communications concurrently to Congress and the Secretary of Energy, President, or OMB.[356] Additionally, "attorneys designated by the Chairman of the Commission may appear for, and represent the Commission in, any civil action brought in connection with" the agency's policy responsibilities.[357]

In contrast to FERC, HUD's statutory design places it among the most political agencies in the federal government. The agency is the least independent structurally of all executive departments. The agency's statute is devoid of provisions that restrict the ability of external actors to influence leadership.[358] Procedurally, HUD also ranks low with respect to independence, although not as low as some of its executive department counterparts. This is the result of the fact that the agency is permitted to establish fees and charges to cover certain enforcement costs and maintains several working capital funds to cover operating costs, including such amounts as may be necessary for disaster assistance.[359] Such provisions make the agency less reliant on congressional appropriations, a key source of accountability.[360]

NASA's statutory design reflects the tension between a need for expertise and control in administrative policy. The agency manages the nation's civil space program, a mission that not only requires scientific knowledge but also sensitivity to the geopolitical implications of agency policies. As a result, in terms of structural independence, the agency ranks among the top third of all agencies in the federal government. The agency's

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[355] *See id.* § 7171(a).

[356] *Id.* § 7171(j); 44 U.S.C. § 3502(5); *see* Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); *see also* Memorandum from Jim Jukes, Assistant Director for Legis. Ref., Off. of Mgmt. & Budget, to Pol'y Officers & DADs, Off. of Mgmt. Budget, Agencies with Legislative and Budget "Bypass" Authorities – Information (Feb. 20, 2001).

[357] 42 U.S.C. § 7171(i).

[358] *See id.* §§ 3531–3550.

[359] *Id.* §§ 3535(a), (f), (j), 3539.

[360] *See, e.g.*, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 422 (2024) (recognizing that, when designing the Consumer Financial Protection Bureau, "Congress diminished this accountability by providing the Bureau a standing source of funding outside the ordinary annual appropriations process").

Administrator must come from civilian life and the Administrator is permitted to appoint hundreds of scientific and engineering personnel without regard to traditional civil service laws.[361]

Yet, these experts do not act with unfettered discretion. Not only must NASA keep the President and the DOD fully informed of its activities, but if the Secretary of Defense concludes that NASA's actions are adverse to national defense policy, the Secretary may refer the matter to the President, who then makes a final decision.[362] This unique dispute resolution scheme provides external actors with leverage to review and shape agency activities, either through actual review or through the agency's anticipated reactions to the DOD and the President.[363] Thus, the agency's procedural independence estimate is comparatively low.

### *C. Empirical Models of Judicial Exposure*

Our motivational case study, theoretical model, Figures 2–5, and accompanying discussions suggest that judicial exposure, structural independence, and procedural independence vary across agencies and time. We explore this variation empirically with a statistical model of congressional use of the judiciary as an accountability mechanism for the administrative state.

Part III's theoretical model contemplates two types of uncertainty: political volatility and technical complexity. Our motivating example in Part II and our discussion of FERC, HUD, and NASA in this Part also highlight the importance of these two factors. While uncertainty is inherently difficult to capture empirically, we use two measures widely recognized by political scientists to account for the precariousness of administrative policymaking.

As a proxy for political volatility, or uncertainty in the political world, we include a traditional measure of state party competition that accounts for the degree to which parties revolve in and out of state legislative and executive branches.[364] Scholars generally agree that the American political system has become increasingly interconnected in that political behavior is

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[361] 51 U.S.C. §§ 20111(a), 20113(b).

[362] *Id.* § 20114.

[363] Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 2044–45 (2019).

[364] Kim Quaile Hill, *Democratization and Corruption: Systematic Evidence from the American States*, 31 AM. POL. RSCH. 613, 618 (2003); Gregory Shufeldt & Patrick Flavin, *Two Distinct Concepts: Party Competition in Government and Electoral Competition in the American States*, 12 STATE POL. & POL'Y Q. 330, 331 (2012).

uniform across levels and geographic units of government.[365] Measured both objectively through electoral outcomes and distribution of party identification across the electorate and subjectively via members' of Congress and the media's perceptions about "the likelihood of shifts in party control," party competition motivates national legislators' strategic actions.[366] For example, state-level factors influence voting behavior in national elections[367] and even coalitional development in Congress.[368] As a result, increasing competition in the states yields higher levels of blame shifting among elected officials[369] as well as changes to party platforms.[370]

We use the four-year "folded Ranney" index, which takes the running four-year average of each state's Democratic gubernatorial candidate's vote proportion, the proportion of seats won by state legislative Democrats, and the number of years there is unified Democratic control of state government.[371] We then take the absolute value of the difference from 0.5 (the midpoint of evenly divided control) such that the variable runs from low competition (0.5) to high (1.0). We average this variable across all states to measure political uncertainty. By using this measure of state-level party

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[365] *E.g.*, William Claggett, William Flanigan & Nancy Zingale, *Nationalization of the American Electorate*, 78 AM. POL. SCI. REV. 77, 77, 81 (1984) (analyzing "universality of political behavior across all areas of the nation"); DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 1–2 (2018) (documenting modern nationalized political behavior); Steven Rogers, *National Forces in State Legislative Elections*, 667 ANNALS AM. ACAD. POL. & SOC. SCI. 207, 207–09 (2016) (quantifying the impact of national politics on state elections); Donald E. Stokes, *Parties and the Nationalization of Electoral Forces*, *in* THE AMERICAN PARTY SYSTEMS: STAGES OF POLITICAL DEVELOPMENT 182, 182–83 (William Nisbet Chambers & Walter Dean Burnham eds., 1967) (discussing how national politics and partisanship influence local elections).

[366] FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 5 (2016).

[367] *See, e.g.*, Burton A. Abrams, Note, *The Influence of State-Level Economic Conditions on Presidential Elections*, 35 PUB. CHOICE 623, 628–29 (1980) ("[V]oters behave as if they hold presidents accountable for changes in state-level economic conditions."); Thomas L. Brunell & Brett Cease, *How Do State-Level Environmental Policies Impact the Voting Behavior of National Legislators?*, 100 SOC. SCI. Q. 289, 304 (2019) (presenting findings that "highlight how state-level regulatory environmental policy can affect voting for similar policies at the federal level").

[368] SARAH A. TREUL, AGENDA CROSSOVER: THE INFLUENCE OF STATE DELEGATIONS IN CONGRESS 4, 21–23 (2017).

[369] *See generally* ALAN ROSENTHAL, GOVERNORS AND LEGISLATURES: CONTENDING POWERS (1990) (evaluating varying balances of power between governors and state legislatures).

[370] Daniel J. Coffey, *More than a Dime's Worth: Using State Party Platforms to Assess the Degree of American Party Polarization*, 44 PS: POL. SCI. & POL. 331, 333–34 (2011).

[371] The Ranney Index file is available for download at Carl Klarner, *Other Scholars' Competitiveness Measures*, HARVARD DATAVERSE (Sept. 10, 2013), https://dataverse.harvard.edu/dataset.xhtml;jsessionid=45d141011c8b3000df2324da7be0?persistentId=doi%3A10.7910%2FDVN%2FQSDYLH&version=&q=&fileTypeGroupFacet=%22Tabular+Data%22 [https://perma.cc/YPR9-SDXA]. *See* Austin Ranney, *Parties in State Politics*, *in* POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 61, 63–64 (Herbert Jacob & Kenneth N. Vines eds., 1965); Shufeldt & Flavin, *supra* note 364, at 331.

competition, consistent with scholarship on the matter, we presume that national political actors are assessing the pulse of overall political uncertainty by examining how often party control is switching across the states. We expect that as this political volatility increases, an agency's judicial exposure also increases.

FIGURE 7: POLITICAL VOLATILITY

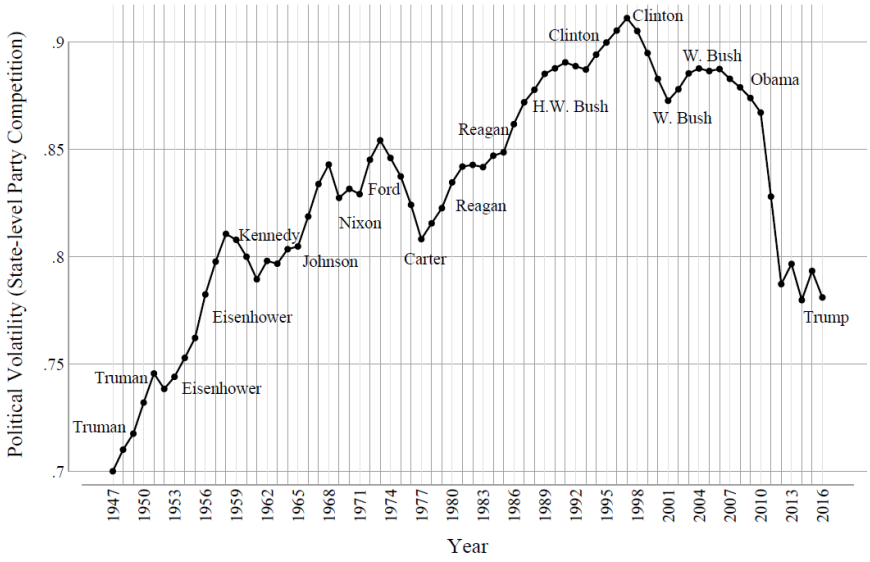


Figure 7 demonstrates that political volatility, measured by the extent to which parties revolve in and out of state government, largely has increased since the passage of the APA but decreased significantly in the past two decades. This is similar to both public and scholarly accounts of the dynamics of American government. Historical studies of sociopolitical instability in the United States are consistent with the patterns illustrated in Figure 7.[372] Whether measured as the "unexpected and/or unpredictable changes in the . . . gains (or losses) in rights, legal protections, and political" responsiveness of social groups across time[373] or the major economic stresses

[372] *See, e.g.*, Peter Turchin, *Dynamics of Political Instability in the United States, 1780–2010*, 49 J. PEACE RSCH. 577, 584–85 figs.3(a) & 4(a) (2012) (depicting violent group-level conflict within the United States).

[373] BAODONG LIU, POLITICAL VOLATILITY IN THE UNITED STATES: HOW RACIAL AND RELIGIOUS GROUPS WIN AND LOSE 3, 5–6 (Shauna Reilly & Stace Ulbig eds., 2022) (placing the political volatility of the 2008–2020 period in broader historical contexts).

that place pressure on state revenues,[374] political volatility steadily increased throughout the twentieth century. Then, since the turn of the century, the American electorate sorted along partisan and geographic lines, and political volatility decreased.[375] Not coincidentally, since that time (the end of the Clinton Administration), Congress became the most gridlocked since the passage of the APA.[376]

To capture the degree of technical complexity, or the degree to which Congress is uncertain over technical aspects of a particular policy, we rely on a measure of staffing within agencies. Specifically, we use the logged difference in the proportion of agency staff that are professionalized compared to those that are clerical or do not require an advanced degree (classified as "blue collar" by the Office of Personnel and Management).[377] In effect, we assume that agencies with highly technical policy areas have higher levels of professionalized (e.g., advanced professional degrees) staff. Because this is a less direct measure of the complexity of the policy arena, as a proxy we dichotomize this variable and designate those agencies with higher than the 75th percentile of the distribution of professional staff across each decade as a one, and those at or below the 75th percentile of professionalized staff as a zero. We expect that more judicial exposure will correlate with more technical agencies.

Of course, there are alternative explanations and confounding characteristics that likely influence the level of an agency's exposure to judicial review. We include Congress (biannual), agency, and policy-area indicators to account for unobserved relationships between the President and Congress or policy-specific characteristics and common temporal shocks. We also include agency-level indicators to control for unobservable within-

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[374] W. MARK CRAIN, VOLATILE STATES: INSTITUTIONS, POLICY, AND THE PERFORMANCE OF AMERICAN STATE ECONOMIES 1 (2003) (finding recurring episodes of stress in 1990–1991, 1982, and 1975).

[375] *See, e.g.*, Samuel J. Abrams & Morris P. Fiorina, *Party Sorting: The Foundations of Polarized Politics*, *in* AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 113, 113 (James A. Thurber & Antoine Yoshinaka eds., 2015) (finding that American political parties are "more internally homogeneous and more distinct from each other" in the modern era); Ethan Kaplan, Jörg L. Spenkuch & Rebecca Sullivan, *Partisan Spatial Sorting in the United States: A Theoretical and Empirical Overview*, J. PUB. ECON., July 2022, at 1, 9 (documenting the accelerated geographic sorting of the American electorate along party lines).

[376] Sarah Binder, *Polarized We Govern?*, *in* GOVERNING IN A POLARIZED AGE: ELECTIONS, PARTIES, AND POLITICAL REPRESENTATION IN AMERICA 223, 224 (Alan S. Gerber & Eric Schickler eds., 2017).

[377] Our formula is ln(1 + proportion of professionalized staff – proportion of clerical + blue collar staff). The latest measure of professionalized staff is from 1971. We utilize the most historical measure to account for agencies in the time periods before these years. Gary E. Hollibaugh Jr., Gabriel Horton & David E. Lewis, *Presidents and Patronage*, 58 AM. J. POL. SCI. 1024, 1029 (2014); Jennifer L. Selin, Cody A. Drolc, Jordan Butcher, Nicholas L. Brothers & Hanna K. Brant, *Under Pressure: Centralizing Regulation in Response to Presidential Priorities*, 52 PRESIDENTIAL STUD. Q. 340, 355 (2022).

agency traits that are constant over time and could confound our estimates. Table 1 reports our estimation of a model of judicial exposure using ordinary least squares regression analysis.[378] To account for the fact that some public laws include delegation to more than one agency, we rely on robust standard errors clustered by public law number.

Our empirical model suggests that legislative choices regarding judicial exposure significantly and substantively correlate with agency independence and political uncertainty. We find that, as agencies' structures become increasingly insulated, we see a positive and statistically significant correlation with exposure to the courts. As structural independence increases by one unit, there is an approximately 2% increase in court exposure.[379] While this may not seem like a large increase, it can have profound effects on certain administrative programs. For example, increasing structural independence by one unit correlates with the equivalent of Congress delegating authority to an agency and, rather than relying on the APA or 28 U.S.C. § 1331 (federal question jurisdiction), expressly authorizing litigation over an agency's decision-making *and* requiring judicial review to occur de novo.[380]

[378] The results reported in Table 1 are robust to a variety of modeling choices, including the use- or omission-of-year, congressional, and policy-area fixed effects, as well as the exclusion of the Treasury. However, we find that excluding agency-level fixed effects changes our estimates. This indicates the likelihood of unobservable variables that impact both agency independence and judicial exposure but do not vary (much) within an agency over time. As a result, Table 1 includes agency fixed effects, as excluding those indicators would bias our estimates.

[379] The percent increase is found by dividing the coefficient in the table (0.05) by the length of the dependent variable (2.29 units) and multiplying by 100.

[380] Calculated based on the 0.05 increase in the Department of Agriculture's exposure after the passage of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

TABLE 1: MODEL OF JUDICIAL EXPOSURE

| Event | Model 1: Estimated Coefficient (s.e.) | Model 2: Estimated Coefficient (s.e.) | Model 3: Estimated Coefficient (s.e.) | Model 4: Estimated Coefficient (s.e.) |
|---|---|---|---|---|
| **Structural Independence** | 0.048 ** (0.010) | 0.048 ** (0.010) | 0.049 ** (0.009) | 0.048 ** (0.010) |
| **Procedural Independence** | –0.077** (0.004) | –0.077** (0.004) | –0.078** (0.004) | –0.077** (0.004) |
| **Political Volatility** (State-Level Electoral Competition) | 0.590** (0.136) | 0.614** (0.133) | 0.482** (0.075) | 0.597** (0.142) |
| **Technical Complexity** (Professionalization of Agency Staff) | –0.071* (0.008) | –0.071* (0.008) | –0.071* (0.008) | –0.071* (0.008) |
| **Constant** | 0.100 (0.107) | 0.090 (0.104) | 0.216 (0.062) | 0.122 (0.111) |
| Agency Fixed Effects | ✓ | ✓ | ✓ | ✓ |
| Congress Fixed Effects | ✓ | ✓ | | ✓ |
| Policy-Area Fixed Effects | ✓ | | ✓ | ✓ |
| Clustered Standard Errors (Public Law) | ✓ | ✓ | ✓ | ✓ |
| Time (Years since 1945) | ✓ | ✓ | ✓ | ✓ |
| $Time^2$ | ✓ | ✓ | ✓ | ✓ |
| $Time^3$ | ✓ | ✓ | ✓ | ✓ |
| Excludes Treasury | | | | ✓ |
| Number of Observations | 19,623 | 19,623 | 19,623 | 19,210 |
| AIC | 18,120 | 18,083 | 18,128 | 18,064 |
| Adj. $R^2$ | 0.368 | 0.369 | 0.367 | 0.332 |

*Note.* Ordinary least squares coefficient estimates are provided in the table with standard errors in parentheses, the dependent variable is judicial exposure by agency-year. Standard errors are robust and clustered on public law number with * $p < 0.05$ and ** $p < 0.01$.

With respect to procedural independence, we find a negative and statistically significant correlation with exposure to the courts. The substantive effects are roughly 1.5 times larger than those of structural independence. A one-unit increase in the limitations placed on the ability of political officials to review agency policy correlates with an approximately

0.08-point (3.36%) decrease in exposure to the courts. This is the equivalent of limiting litigation to a specified set of procedural circumstances, such as barring litigation over an agency's actions under newly delegated authority unless the claimant (a) files suit within two years of the date the final notice is published in the Federal Register and (b) during rulemaking, files a sufficiently detailed comment to put the agency on notice of the issue on which the claimant will be seeking judicial review.[381]

Table 1 also supports our expectation that political volatility correlates significantly with increased agency exposure to the courts. With a one percentage point increase in how often parties revolve in and out of power across the country, we see a 25% increase in exposure.

Finally, in support of our theory, we find that technical uncertainty correlates with a statistically significant decrease in an agency's exposure to the courts. The substantive effect of technical uncertainty is a 3% decrease in court exposure. While a small effect, this may be the result of our admittedly blunt proxy measure of the concept.

Overall, we find support for the empirically testable hypotheses developed in Part III. Our results, combined with the insights from Part II's motivational case study and Part III's theoretical model, have important implications for scholarly consideration of delegation, agency structure, and administrative policymaking.

## V. WHAT DOES THE COURT SAY?

Congressional decisions regarding agency independence and Executive Branch exposure to the court system have received increasing public and legal scrutiny over the past decade. For example, following Fannie Mae and Freddie Mac's return to profitability in 2012, shareholders of the two government-sponsored enterprises (GSEs) filed a series of lawsuits challenging agreements between the Department of the Treasury and the Federal Housing Finance Agency (FHFA) requiring the GSEs to share their profits with the U.S. government.[382] At issue in the lawsuits were provisions of the Housing and Economic Recovery Act that simultaneously barred litigation involving the FHFA decisions on the matter and established the

[381] Calculated based on the 0.087 decrease in the EPA's exposure after the passage of the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

[382] Kalvis Golde, *Fannie Mae and Freddie Mac Shareholders Return to the Court After* Collins, SCOTUSBLOG (Aug. 19, 2022, 6:40 PM), http://www.scotusblog.com/2022/08/fannie-mae-and-freddie-mac-shareholders-return-to-the-court-after-collins/ [https://perma.cc/K8KZ-HQ6Q].

FHFA as an independent agency with a single director removable only for cause.[383]

In *Collins v. Yellen*, the Supreme Court held that the FHFA's structural design placed an unconstitutional restriction on the President's removal power.[384] The Supreme Court simultaneously recognized that, when enacting the Recovery Act, Congress intentionally and "sharply circumscribed judicial review" and empowered the FHFA to exercise "broad investigative and enforcement authority" outside of traditional and annual congressional review through the appropriations process.[385] Put another way, the Court acknowledged that, when delegating authority to the FHFA, Congress balanced structural and procedural independence with the level of judicial exposure.

*Collins v. Yellen* is not unique in this regard. In recent years, there has been a significant increase in litigation that challenges administrative action in the context of broader constitutional debates over the power and authority of each branch of government.[386] This litigation has repeatedly made its way to the Supreme Court, with the Court interpreting the judiciary's own statutorily defined role to ensure that agency decisions are not arbitrary, capricious, or otherwise unlawful to safeguard the political accountability of the administrative state.[387]

In part, this reflects the Court's concern over shifting power away from Congress and the courts in favor of the Executive Branch.[388] Faced with the expansion of the Executive Branch to advance presidential agendas in

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[383] The Housing and Economic Recovery Act of 2008 bars courts from "tak[ing] any action to restrain or affect the exercise of powers or functions of the [Federal Housing Finance] Agency as a conservator or a receiver." 12 U.S.C. § 4617(f); *see, e.g.*, Collins v. Mnuchin, 896 F.3d 640, 645 (5th Cir.) (noting the case is the "latest in a series of shareholder challenges" to the agreement between the FHFA and Fannie Mae and Freddie Mac), *reh'g en banc granted*, 908 F.3d 151 (5th Cir. 2018), *aff'd in part, rev'd in part, and remanded*, 938 F.3d 553 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 193 (2020), *aff'd in part, vacated in part, rev' in part and remanded sub nom.*, Collins v. Yellen, 594 U.S. 220 (2021); Roberts v. Fed. Hous. Fin. Agency, 889 F.3d 397, 400 (7th Cir. 2018) (finding FHFA's role as sole conservator precluded judicial review); Robinson v. Fed. Hous. Fin. Agency, 876 F.3d 220, 224 (6th Cir. 2017) (concluding claims against the Treasury are barred if equitable relief sought would restrain FHFA's conservator power); Perry Cap. LLC v. Mnuchin, 848 F.3d 1072, 1080 (D.C. Cir.), *amended by* 864 F.3d 591 (D.C. Cir. 2017) (finding shareholders' claims were barred by statutory review).

[384] 594 U.S. at 250.

[385] *Id.* at 230–31, 237.

[386] Metzger, *supra* note 48, at 2.

[387] *See* 5 U.S.C. § 706; Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1752 (2021).

[388] Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 78 (2022).

an increasingly partisan and polarized climate,[389] the Court has reviewed legislative decisions regarding agency independence and judicial exposure as part of a tripartite dialogue in which the actions of each governmental branch contribute to a larger discussion about the American constitutional system of separated powers.[390] Simply, Congress writes the law, and "[i]t is emphatically the province and duty" of the courts to interpret it.[391]

This Part argues that, like Congress, the Supreme Court considers three aspects of administrative policymaking in context when performing its province and duty: (a) delegation, (b) agency design, and (c) administrative exposure to the courts. While contemporary and scholarly discourse tends to consider these issues as separate, we highlight how Supreme Court opinions, when viewed together, illustrate a deep connection in the development of legal doctrine consistent with this Article's explanation of congressional decision-making.[392]

While provocative, this Part's argument is unsurprising given a Court that seeks to shift the balance of constitutional power away from the Executive Branch and towards the Framers' vision of Congress as the first branch. As the Court noted in 2022, "agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."[393] The Court's emphasis on statutory language not only recognizes an enacting coalition's delegation decisions and preferences, but it also places the administrative state in a constitutional world that prioritizes Congress and the judiciary.[394]

### *A. Congressional Delegation*

This Article provides a theoretical and empirical account of why and how a legislative coalition delegates authority to the Executive Branch. Yet our insights regarding congressional delegation decisions have important

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[389] Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 551 (2018); Metzger, *supra* note 48, at 2.

[390] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989); Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 600 (2006).

[391] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[392] *See generally* Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 166 (2019) (exploring the interconnectedness of administrative law doctrines through recent Supreme Court decisions).

[393] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 117 (2022) (per curiam).

[394] *See, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263, 266 (2022) (arguing that recent administrative law cases are "separation of powers cases in the guise of disputes over statutory interpretation" and that these cases shift "enormous" power to the judiciary).

implications for judicial approaches to claims that Congress has unconstitutionally delegated its legislative authority.

Constitutionally, Congress may not transfer to another branch powers which are "strictly and exclusively legislative," but it may confer discretion on executive agencies to implement and enforce the laws if the delegating statute provides an intelligible principle to which the agency authorized to act may conform.[395] As recently noted by the Supreme Court in *Gundy v. United States*, across time, the Court "ha[s] over and over upheld even very broad delegations" under this standard.[396] The Court has had a fair number of opportunities to revisit the standard, but it has refrained from doing so, particularly in cases where an agency's authority to act under a particular statute has long been recognized.[397]

That said, the Court expects Congress to speak clearly when delegating, particularly when addressing issues of economic and political significance.[398] The embrace of this so-called "major questions doctrine" has made courts reluctant to read broad delegations into ambiguous statutory text.[399] As put by the Court in *West Virginia v. EPA*, legislation that delegates authority to the Executive Branch "is generally not an 'open book to which the agency [may] add pages and change the plot line.'"[400]

While the Court has made clear its belief that the enacting coalition should consider the trade-offs of economically and politically significant policy and make for itself (rather than delegating to the Executive Branch) highly consequential decisions, the Court's decisions on this matter largely

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[395] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–45 (1825); *e.g.*, Field v. Clark, 143 U.S. 649, 692–94 (1892); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Yakus v. United States, 321 U.S. 414, 425 (1944); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Gundy v. United States, 588 U.S. 128, 135 (2019).

[396] 588 U.S. at 146.

[397] Biden v. Missouri, 595 U.S. 87, 97 (2022). *But see* FCC v. Consumers' Rsch., 109 F.4th 743 (5th Cir.), *cert. granted*, 145 S. Ct. 587 (2024) (granting certiorari to determine the constitutionality of delegations to the FCC under the Telecommunications Act and thus presenting an opportunity for the Court to revise this standard).

[398] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117 (2022).

[399] *E.g.*, West Virginia v. EPA, 597 U.S. 697, 723 (2022); Biden v. Nebraska, 600 U.S. 477, 503–04. That said, most nondelegation challenges raised in the lower courts have not been successful. *See* Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755, 760 (6th Cir. 2023); Bradford v. U.S. Dep't of Lab., 101 F.4th 707, 728 (10th Cir. 2024); Consumers' Rsch. v. FCC, 88 F.4th 917, 928 (11th Cir. 2023). *But see Consumers' Rsch.*, 109 F.4th at 786 (holding that the Universal Service Fund Tax mechanism does not survive a nondelegation challenge).

[400] 597 U.S. at 723 (alteration in original) (quoting Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).

have engaged with the *Executive Branch's* interpretations of an enacting coalition's preferences as expressed through statutory language.[401]

The Court has not (as of yet) directly engaged with expressed *congressional* intent that (a) considers the trade-offs of economically and politically significant policy and (b) still delegates with relatively broad language that capitalizes on agency expertise, but (c) relies on other statutory features, such as structural and procedural independence or judicial exposure, to offset such ambiguity.

However, the Court's recent decisions hint at the fact that the Justices implicitly assume that congressional delegation decisions mirror our theoretical and empirical framework. For example, in *Loper Bright*, the Court recognized that Congress often enacts statutes expressly delegating to an agency the authority to give meaning to statutory language, or empowering an agency to interpret a statute within the limits of terms such as "appropriate" or "reasonable."[402] Such recognition is consistent with the Court's longstanding acknowledgment that agencies develop considerable expertise and knowledge when acting under delegated authority,[403] particularly in highly technical policy areas such as energy, food and drugs, and telecommunications.[404]

Even some of the Justices' recent skepticism of delegated power posits a legislative process similar to the one depicted in this Article. For example, in his *Gundy* dissent, Justice Neil Gorsuch argued that delegation should be viewed in the context of three guiding principles.[405] First, Congress must write statutes in a way that enables oversight—whether that means oversight by the Legislature, judiciary, or the public—to ensure that agency decisions adhere to the enacting coalition's preferences.[406] Second, when Congress delegates authority to regulate private conduct, it must make such regulation dependent on executive fact-finding.[407] Third, Congress's authority may overlap with that of another branch, and in these instances, there is no

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[401] *Id.* at 724; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). For example, the landmark case *Loper Bright Enterprises v. Raimondo* addressed the National Marine Fisheries Service's interpretation of the Magnuson–Stevens Fishery Conservation and Management Act. 144 S. Ct. 2244, 2254, 2263 (2024).

[402] 144 S. Ct. at 2263.

[403] *E.g.*, Kisor v. Wilkie, 588 U.S. 558, 571 (2019); Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 152–53 (1991); United States v. Mead Corp., 533 U.S. 218, 228 (2001); FCC v. Schreiber, 381 U.S. 279, 290 (1965).

[404] *E.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1002–03 (2005); Chem. Mfrs. Ass'n v. NRDC, 470 U.S. 116, 134 (1985); Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 577 U.S. 260, 292 (2016); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

[405] Gundy v. United States, 588 U.S. 128, 157–59 (2019) (Gorsuch, J., dissenting).

[406] *Id.* at 158.

[407] *Id.*

separation of powers concern if the matter is already within the scope of executive power.[408]

These precisely reflect the narrative of Parts II, III, and IV of this Article. As Part II illustrates, a key factor in congressional decision-making is how to design a policy framework that accounts for the enacting coalition's preferences and provides for multiple, overlapping opportunities for review. Part III demonstrates how the enacting coalition achieves such review while creating room for the Executive Branch to obtain additional information regarding the impact of specific congressional policy choices. Part IV illustrates Congress's reliance over time on the judiciary to enforce the enacting coalition's preferences in the wake of these executive actions.

### *B. Agency Independence*

Historically, litigation that challenges the constitutionality of delegation has involved agencies that simultaneously assert that their actions fall within their statutory authority and claim structural or procedural independence.[409] This pattern continues through today but is often missed by observers who focus on the Court's narrow findings in each case without considering them in the context of agency design.[410] As a result, there is little consensus on exactly how far Congress can push the boundaries of the combination of agency independence, delegation, and exposure to the judiciary.[411]

For example, in *Department of Transportation v. Association of American Railroads*, the Court entertained a challenge of nondelegation principles in the context of the government corporation known as Amtrak.[412] Entities such as Amtrak (as well as GSEs like Fannie Mae and Freddie Mac) share many of the structural characteristics of independent regulatory commissions and operate outside of traditional political review processes, including government-wide managerial mandates designed to promote a more efficient and effective bureaucracy.[413] In addition, government

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[408] *Id.* at 159.

[409] *E.g.*, NBC, Inc. v. United States, 319 U.S. 190, 224 (1943) (evaluating the authority of the FCC); Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 619 (1944) (assessing Congress's delegation of authority to the Federal Power Commission); Am. Power & Light Co. v. SEC, 329 U.S. 90, 104–06 (1946) (upholding delegation of authority to the SEC).

[410] *See* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2544 (2011).

[411] *See generally* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 3–4 (2021) (describing the ambiguity in the scope of agency independence in recent years).

[412] 575 U.S. 43, 46 (2015).

[413] JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 56–59 (2d ed. Oct. 2018).

corporations and GSEs can sue and be sued in their own right (i.e., they do not rely on the Department of Justice for litigation purposes).[414] Even given their arguably private and corporate-like structures and names, the Court has been clear that such entities are agencies "for purposes of separation-of-powers analysis."[415]

In conducting such analyses, the Court has zeroed in on the enacting coalition's design of the structural and procedural constraints that pose barriers to political accountability. For example, recent Supreme Court cases such as *Consumer Financial Protection Bureau v. Consumer Financial Services Ass'n of America, Ltd.* and *Ohio v. EPA* have implicitly accepted congressional decisions to create statutory schemes that vest "sweeping" authority in an agency or even envision an agency implementing its authority in partnership with the states.[416] Rather than focusing on delegation itself, these decisions have examined how Congress has balanced delegation of that authority with agency design features that cultivate structural or procedural independence.

*1. Structural Independence*

Traditionally, the Court has explicitly or implicitly assumed that statutory provisions which promote structural independence indicate a desire for the enacting coalition to place policy authority into the hands of nonpartisan experts whose decision-making is informed by experience.[417] This assumption largely is consistent with Congress's intent over the past several decades.[418]

Recently, however, the Court has entertained litigation that raises constitutional questions about this practice and its overall effect on the political accountability (and particularly, accountability to the President) of the administrative state.[419] Cases such as *Collins v. Yellen*, *Seila Law LLC v. Consumer Financial Protection Bureau*, and *Free Enterprise Fund v. Public*

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414 *Id.* at 58.

415 *Ass'n of Am. R.Rs.*, 575 U.S. at 51.

416 Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 422 (2024); Ohio v. EPA, 603 U.S. 279, 283 (2024). Indeed, such delegation may be a form of political control, as scholars suggest that state administration of federal programs is more responsive to both political and stakeholder influence. *See* Alejandro E. Camacho & Robert L. Glicksman, *Designing Regulation Across Organizations: Assessing the Functions and Dimensions of Governance*, 15 REGUL. & GOVERNANCE S102, S108 (2021); CLOUSER MCCANN, *supra* note 288, at 234.

417 *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 623–24 (1935).

418 *See* Bressman & Thompson, *supra* note 243, at 612; Datla & Revesz, *supra* note 33, at 777; JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938); Verkuil, *supra* note 228, at 260.

419 *See* Eidelson, *supra* note 387, at 1752, 1756; Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 757 (2022); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 686–87 (2016).

*Company Accounting Oversight Board* have curbed congressional practice to enact statutory provisions that simultaneously delegate broad authority and restrict the President's constitutional appointment and removal powers (one of the key mechanisms of democratic accountability that justify the constitutionality of the administrative state).[420]

Critics of these decisions argue that such cases have helped shift power toward the President and the more political agencies in the Executive Branch, as well as threatened to undermine the expert decision-making Congress desires.[421] There is also real concern that limiting Congress's ability to utilize statutory provisions that promote structural independence may reverberate throughout the administrative hierarchy. For example, civil servants in politicized agencies are less likely to engage in behaviors that build policy expertise and are more likely to turn over.[422] That said, it is not entirely clear that independent agencies are more expert or that structural independence helps an agency attract, develop, and retain a skillful workforce.[423]

For the purposes of our Article, the actual effect of structural independence on the administrative workforce is not determinative. Instead, what matters is that Congress believes structural independence affects the average ideal point of agency leaders and that this ideal point plays a role in an agency's policy processes.[424] Neither of these points are hefty assumptions.

However, if the Court continues to limit Congress's ability to enact statutory provisions that promote structural independence, Congress likely will respond by compensating with adjustments to procedural independence or judicial review.[425] In addition, we posit that Congress may utilize another mechanism of control—delegation to the states.[426] This is a legislative choice

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[420] Collins v. Yellen, 594 U.S. 220, 250 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 232 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).

[421] *See* Brief of Current and Former Members of Congress as Amici Curiae in Support of Affirmance at 20–21, *Seila Law LLC*, 591 U.S. 197; Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 647 (2020).

[422] Mark D. Richardson, *Politicization and Expertise: Exit, Effort, and Investment*, 81 J. POL. 878, 888 (2019).

[423] Devins & Lewis, *supra* note 258, at 1311, 1331.

[424] *See infra* Online Technical Appendix.

[425] Whatever the actual effect of recent Supreme Court cases on agency independence, the general belief is that limiting Congress's ability to enact structural independence provisions increases presidential power. Timothy G. Duncheon & Richard L. Revesz, Seila Law *as an Ex Post, Static Conception of Separation of Powers*, 2020 U. CHI. L. REV. ONLINE 97, 104.

[426] Studies suggest that state administration of federal programs is more responsive to both political and stakeholder influence than federal administration. *See, e.g.*, Atlas, *supra* note 287, at 939 (comparing state-imposed environmental penalties with federal penalties); Bullman-Pozen, *supra* note 287, at 489

not directly contemplated by the Court in the context of its recent decisions on delegation and agency independence.[427]

For the past two centuries, members of Congress have designed federal administration to incorporate state governments.[428] Today, approximately 81% of major federal statutes establish administrative partnerships between the national government and the states.[429]

Our extensions of the theoretical model presented in Part III suggest that Congress can utilize the states as an additional mechanism of structural design so that the ideal point of administrative decision-makers is in line with the enacting coalition's preferences. Briefly, in this extended model, Congress makes decisions about how much authority to delegate to the states and how much to delegate to a federal agency.[430] The relationship between the political coalition and the authority to which it delegates not only affects this decision, but also influences policy outcomes.[431] These options also change depending on a statute's intersection with other laws and judicial views on state and federal jurisdiction.[432] The expanded range of options makes choices over delegation more complex—more actors introduces a wider range of preferences into the political calculus and also increases the likelihood that administrative decision-makers will be pulled in competing directions when implementing policy.[433]

As a result, the intergovernmental relationships created when Congress delegates to the states may be more important considerations than many

(arguing that, when state and federal executive policies differ, states can act "as faithful agents of Congress"); Gluck, *supra* note 287, at 569 (suggesting that decentralizing the administration of federal law can create a broader, deeper network of institutions and public officials invested in the statute's success).

[427] For discussion of the fragmented and overlapping delegations of authority at the national level that diverge from the one-agency model of delegation contemplated by the courts, see generally Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); and Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201.

[428] Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2025 (2008); *see, e.g.*, Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1649–50 (2007) (discussing the 1807–1809 embargo's compliance with state commercial regulation).

[429] Pamela J. Clouser McCann, *The Strategic Use of Congressional Intergovernmental Delegation*, 77 J. POL. 620, 625 (2015) (describing the use of significant legislation as the unit of analysis); *see also supra* note 13 (defining major ("significant") legislation).

[430] CLOUSER MCCANN, *supra* note 288, at 36–37.

[431] Camacho & Glicksman, *supra* note 416, at 103.

[432] MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 5–6 (Daniel J. Elazar ed., 1966).

[433] Hedge et al., *supra* note 289, at 1075.

other forms of control.[434] Part III's theoretical model provides a framework to explore these interactions, whether they involve the relationship between Congress and federal agencies, federal agencies and the states, or Congress and the states. It also raises important constitutional questions for a Court that is not only concerned with the expansion of the Legislature's policy design choices.[435] How the Court will consider such creative solutions in the context of delegation and other agency design features remains an unanswered question.

*2. Procedural Independence*

Every member of the Court appears to recognize the necessity of future decisions on the limitations of congressional design of structural independence in the context of delegation.[436] While political coalitions and the Court will continue to make consequential choices about structural independence, it is often the case that Congress is uncertain about how delegated policy will map onto real-world outcomes.

The Court also concerns itself with such uncertainty. For example, in *Ohio v. EPA*, the Court recognized that the EPA's final actions likely ran "afoul of . . . long-settled standards" regarding the meaning of the Clean Air Act and documented public comments which highlighted concerns over the agency's (un)certainty with respect to how policy implementation would play out and affect interested persons across the country.[437]

This Article demonstrates that, faced with such uncertainty, the enacting coalition relies on statutory provisions that shape an agency's relative procedural independence and help shed light on how delegated authority affects interested persons. As noted by the Congressional Research Service (CRS)—the legislative agency that assists congressional committees and members of Congress at every stage of the legislative process—Congress's ability to control administrative agencies through the exercise

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[434] *See* Scott R. Furlong, *Political Influence on the Bureaucracy: The Bureaucracy Speaks*, 8 J. PUB. ADMIN. RSCH. & THEORY 39, 53 (1998); Kutsal Yesilkagit & Sandra van Thiel, *Political Influence and Bureaucratic Autonomy*, 8 PUB. ORG. REV. 137, 151 (2008); Kutsal Yesilkagit & Sandra van Thiel, *Autonomous Agencies and Perceptions of Stakeholder Influence in Parliamentary Democracies*, 22 J. PUB. ADMIN. RSCH. & THEORY 101, 116 (2012).

[435] *E.g.*, Printz v. United States, 521 U.S. 898, 925–27, 935 (1997); Bond v. United States, 572 U.S. 844, 858–60 (2014); N.J. Thoroughbred Horsemen's Ass'n, Inc. v. NCAA, 584 U.S. 453, 477–79 (2018); Haaland v. Brackeen, 599 U.S. 255, 287–89 (2023); Sackett v. EPA, 598 U.S. 651, 679–81 (2023); Trump v. Anderson, 601 U.S. 100, 110–12 (2024).

[436] *See* Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 390 (2020).

[437] 603 U.S. 279, 293 (2024).

of legislative power largely stems from delegation, structural design, and procedural limits on agency decision-making (including agency funding).[438]

Recall that this Article's conception of procedural independence is the same as CRS's depiction. Parts II, III, and IV consider the agency design features that enhance or limit procedural independence to be those related to political review of agency policy, not the procedural frameworks that govern administrative action (although the two are not mutually exclusive).

The Court largely has left congressional decision-making on the procedural independence dimension intact, with one giant exception: adjudication.[439] Part II of this Article documents lawmakers' consideration of agency action through adjudication as something that insulates agency decision-making from political review (recall FERC placing cases in "second floor storage").[440] In addition to procedural review mechanisms such as OMB and appropriations review, Parts III and IV consider statutory provisions that require an agency to make decisions through formal adjudication or use administrative law judges (ALJs) to conduct hearings. In large part, this is because of the APA's requirement of separation of functions and protections against ex parte contact.[441]

Yet recent cases such as *United States v. Arthrex, Inc.* and *SEC v. Jarkesy* have raised the salience and questioned the constitutionality of the procedural independence provisions that structure adjudication.[442] Interestingly, this is the aspect of procedural independence that is the most like structural independence.

Adjudication involves thousands of Executive Branch officials with legal authority to issue orders—ALJs, administrative patent and trademark judges, immigration judges, veterans law judges, etc.—and the line of authority between the President and these officials is often attenuated by the nuance of congressional delegation and agency design.[443] Reflecting the blurred lines of authority, the Supreme Court has sought to define a constitutional baseline for the direction and supervision of adjudication.[444]

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[438] TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 3–4 (last updated Dec. 19, 2018).

[439] *E.g.*, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 420–21 (2024) (upholding funding mechanism as compliant with Appropriations Clause).

[440] *Supra* Section III.A.

[441] 5 U.S.C. §§ 554, 557.

[442] United States v. Arthrex, Inc., 594 U.S. 1, 6 (2021); SEC v. Jarkesy, 603 U.S. 109, 139 (2024).

[443] MATTHEW A. GLUTH, JEREMY S. GRABOYES & JENNIFER L. SELIN, ADMIN. CONF. OF THE U.S., PARTICIPATION OF SENATE-CONFIRMED OFFICIALS IN ADMINISTRATIVE ADJUDICATION 2–3, 23–24 (June 7, 2024).

[444] *See* Edmond v. United States, 520 U.S. 651, 662–63 (1997); *Arthrex*, 594 U.S. at 23.

However, at least two important questions remain unanswered with respect to this Article's conception of congressional design of procedural independence. First, it is unclear whether Congress can place adjudicative authority outside the hands of a presidential appointee who is confirmed by the Senate (PAS), so long as a PAS official directs and supervises that non-PAS adjudicator. [445] Second, the extent to which Congress can limit PAS officials' review of non-PAS adjudicators remains an uncertain constitutional question.[446]

More fundamentally, the constitutionality of non-PAS adjudicators (such as ALJs) who operate under the unique civil service provisions that limit political influence is in doubt.[447] Of note, the litigation that raises this constitutional question does so in combination with delegation and structural independence. For example, in *Jarkesy*, the Supreme Court examined the constitutionality of a statute that enabled the SEC to, when implementing its statutory authority, choose between adjudicating civil penalty enforcement actions alleging securities fraud within the agency or to pursue such actions in federal court.[448] The Court, reinforcing its view of the constitutional role of the judiciary, held the agency must pursue such allegations in federal court.[449]

Interestingly, in the same case, the Court had the opportunity to revisit the nondelegation doctrine and to clarify the constitutional position of non-PAS adjudicators such as ALJs but did not do so.[450] Many expect the Court to take up the latter in the near future.[451]

If so, the Court's actions in this regard would reflect what public administration scholars refer to as the "judicialization" of administrative action.[452] In response to the growth of the modern administrative state both

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[445] GLUTH ET AL., *supra* note 443, at 26–27.

[446] *Id.*

[447] Lucia v. SEC, 585 U.S. 237, 251–52 (2018); Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 469 (2020). Furthermore, there are also new questions regarding the constitutionality of broader statutory provisions that create terms of service and protections from removal for political reasons to promote nonpartisan, expert administration informed by experience. *E.g.*, Jennifer L. Selin & Paul R. Verkuil, *The Importance of Removal Restrictions in a Schedule F World*, 13 REGUL. REV. DEPTH 1, 2–3 (2024).

[448] 603 U.S. 109, 115–20 (2024).

[449] *Id.* at 139.

[450] The lower court had determined that Congress violated the nondelegation doctrine and that ALJs violated separation of powers principles because of double for-cause protections. *Id.* at 2127–28.

[451] *E.g.*, Christopher J. Walker, *What* SEC v. Jarkesy *Means for the Future of Agency Adjudication*, YALE J. ON REGUL. (June 27, 2024), https://www.yalejreg.com/nc/what-sec-v-jarkesy-means-for-the-future-of-agency-adjudication/ [https://perma.cc/NL7F-363P]; Matthew Lee Wiener, *What Is Left of Agency Adjudication After* Jarkesy*?*, REGUL. REV. (July 29, 2024), https://www.theregreview.org/2024/07/29/wiener-what-is-left-of-agency-adjudication-after-jarkesy/ [https://perma.cc/F83T-FE9D].

[452] Newbold, *supra* note 49, at 863.

in terms of size and authority, the Court has carved a larger role for itself through review of the enforcement of procedural protections for persons who come into contact with federal agencies.[453]

Thus, consistent with this Article's depiction of congressional decision-making, litigation over agency adjudication has become part of a complex scheme of review of agency decisions that often seems prospective in nature.[454] Returning to Part III's theoretical model of delegation, some have proposed that Congress should react to the Court's revision of procedural independence by utilizing the Legislature's structural design tools.[455] But what happens when political coalitions, in balancing an agency's structural and procedural independence, decide to limit judicial review of that agency's decision under its delegated authority?

### *C. Judicial Exposure*

The Supreme Court often evaluates challenges to the administrative actions of relatively independent agencies in connection with challenges to the constitutionality of statutory provisions that adjust their exposure to the courts.

This is unsurprising, as statutory provisions regarding judicial exposure ultimately center around the extent to which a legislative coalition desires a particular administrative action to be subject to political control, particularly with respect to "hot-button" issues.[456] This Article's introductory discussion of the Mountain Valley Pipeline provides one such example, and Part II's motivational case study provides a thick description regarding the context in which Congress drafts provisions that adjust agencies' exposure to federal courts.

Since *Thunder Basin Coal Co. v. Reich*, the Court largely has upheld statutory design features that adjust judicial exposure so long as (a) Congress does not foreclose all meaningful review of administrative action, (b) the statute is specific regarding the litigation over which agency actions the Legislature wishes to foreclose, and (c) the adjustments to exposure rely on the agency's (as opposed to judicial) expertise.[457]

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[453] David H. Rosenbloom, *Public Administrators and the Judiciary: The "New Partnership,"* 47 PUB. ADMIN. REV. 75, 76–77 (1987).

[454] *Id.*

[455] *See, e.g.*, Melissa F. Wasserman, Aaron L. Nielson & Christopher J. Walker, *Saving Agency Adjudication*, 106 TEXAS L. REV. (forthcoming 2025).

[456] *See* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1786 (2020); Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2079 (2023).

[457] 510 U.S. 200, 212–13 (1994).

These are the exact same things that Congress considers when delegating. Part II's qualitative case study—built into Part III's theoretical model and demonstrated empirically in Part IV—shows that, when delegating, Congress not only contemplates the possibility of judicial review, but also recognizes the Court's shifts with respect to delegation and agency independence.

Almost every major Court decision regarding congressional decisions to adjust administrative exposure to the judiciary involves consideration of structurally or procedurally independent agencies.[458] *Axon Enterprise, Inc. v. FTC* provides a good example. In a series of challenges to the enforcement authority of the SEC and the FTC, the Court sidestepped claims that the agencies' combined structure and procedural processes violated "fundamental, even existential" constitutional separation of powers principles.[459] Instead, the Court focused on whether Congress's design of a statutory review scheme that limited judicial exposure of certain administrative decisions was constitutional.[460]

In doing so, the Court highlighted the distinction between the role of agency expertise in the administrative implementation of delegated authority and the judiciary's responsibility to interpret constitutional issues that may arise from that implementation. Regarding its task as one to "decide if a claim is 'of the type' Congress thought belonged within a statutory scheme" that emphasized administrative expertise regarding policy over the judiciary's responsibility to interpret challenges that resolve constitutional separation of powers questions, the Court interpreted the judicial exposure provisions narrowly and held that they did not preclude federal district courts from entertaining claims challenging the agencies' structural and procedural design.[461]

## CONCLUSION

The literature in law, political science, and public administration has largely overlooked the puzzle of why Congress would want to insulate an agency from both political and judicial review. While scholars have long

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[458] *E.g.*, United States v. Fausto, 484 U.S. 439, 442 (1988) (involving decisions of the Merit Systems Protection Board); Elgin v. Dep't of the Treasury, 567 U.S. 1, 7 (2012) (same); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) (considering the constitutionality of the Public Company Accounting Oversight Board, an entity within the SEC); Collins v. Yellen, 594 U.S. 220, 237 (2021) (evaluating challenges to statutory provisions that limited the Federal Housing Finance Agency's exposure to the courts); Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023) (considering exposure provisions relating to decisions of the Federal Trade Commission).

[459] 598 U.S. at 180 (2023).

[460] *Id.* at 186.

[461] *Id.* at 188 (quoting *Thunder Basin*, 510 U.S. at 212).

recognized the benefits of insulating an agency from ex post political review, few have considered agency insulation from judicial review in the context of other agency design decisions. We take a first step toward filling this gap by analyzing when Congress is most likely to draft legislation that adjusts Executive Branch exposure to the court system. We find that legislative choices over agency exposure serve to supplement more traditional mechanisms of political control. Specifically, levels of judicial exposure vary with agency insulation and the need for expertise.

Practically, one might question the wisdom of Congress placing ex post control of agency policymaking in the hands of another branch of government, particularly a branch over which the Legislature can exert little influence. Such considerations are only complicated by traditions of judicial deference to the administrative state. Our analysis suggests an answer to this question.

Congress has a variety of tools it can utilize to influence the performance of federal agencies. Not only do these tools enhance the democratic accountability of the "fourth branch," but they also help Congress acquire information on policy and help legislators pursue their electoral goals. By crafting legislation that alters the level of agency exposure to the judiciary, Congress can enhance or diminish methods such as administrative procedures and "fire-alarm" oversight. Ex ante statutory decisions regarding judicial exposure can provide an additional mechanism for the ex post review of agency policy, reveal hidden political information about the consequences of agency policy, and enhance agency expertise. Simply put, these provisions have important implications for the American separation of powers system.

## ONLINE TECHNICAL APPENDIX

The Online Technical Appendix is hosted on Digital Commons and can be accessed at https://scholarlycommons.law.northwestern.edu/nulr/vol119/iss5/3/.