



Rulemaking and the Congressional Review Act

I. Brief Overview of the Briefing Series

- **A. Topics & approach:**
 - Originalist and textualist framework for exploring constitutional structure and the role of Congress in regulating the Executive Branch and the practice of administrative agencies
 - General overview of Congress's role under Article I of the Constitution in creating executive branch entities and authorizing agency action
 - Article II vesting of executive power in the President to oversee administrative agency activity including rulemaking
- **B. Role of agency rulemaking** as one component of congressionally authorized Executive Branch activity

II. Rulemaking – Origins & Mechanics

- **A. Constitutional Context –**
 - Article II establishes no executive offices other than for the President & Vice President and indicates that Congress must create such offices “by Law”
 - Article I vests Congress with all legislative authority, including the power to:
 - Raise revenue
 - Appropriate funds & pay debt
 - Regulate Commerce
 - Make all “necessary & proper” laws
- **B. Statutory Context**



- Administrative Procedure Act (enacted in 1946 & still unsubstantially changed)
- Rulemaking v. Adjudication
- Formal v. Informal Rulemaking
 - “Notice & Comment” Rulemaking v. Agency Policy & Interpretation, 5 U.S.C. § 553
 - Procedural Requirements
 - Proposed Rule
 - Comment Period
 - “Logical Outgrowth” between the final published rule & the proposed rule that adequately reflects submitted comments
 - Trump Administration efforts to reduce reliance on informal policy statements & increase transparency
 - Judicial Review of procedure, law, & substance

III. Rulemaking Reviewed in the Courts

- Statutory authorization of rulemaking by specific agencies—E.g., *West Virginia v. EPA*, major questions, & delegation)
- Administration policies found unlawful by the Court including the OSHA vaccine mandate, the eviction moratorium, and the Clean Power Plan
- Other notable recently challenged actions including student debt elimination & Title 42 border policies

IV. Congressional Review Act (“CRA”)

- Process of Review
 - “Legislative vetoes” disapproved by the Supreme Court in 1983
 - Streamlined legislative disapproval of rules under the CRA in response

- Application of the Act
 - Executive/congressional lineup generally required to apply the Act
 - Examples of its successful use in the past
- Consequences of disapproval of a regulation under the CRA
- Absence of judicial review
- Prospects for close review & oversight of agency authorization and rulemaking authority in the current Congress