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Administrative Law: In Search of the Public Interest

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In a rapidly changing jurisprudential landscape, litigants are pressing novel challenges to the structure of administrative agencies and the scope of their delegated statutory authority.[2] Recent Supreme Court opinions have invited such challenges, but they provide little guidance to lower courts. Justice Gorsuch made one of the bluntest overtures in his dissent in *Gundy v. United States*,[3] where he called for reconsideration of the nondelegation doctrine[4]—a call that now has been publicly endorsed by a majority of current justices.[5]

Against the rising chorus of demands that courts rein in broad statutory delegations to administrative agencies, this Chapter examines the broadest delegation of all: the "public interest" standard. Legal scholars have decried the public-interest standard

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[1] Excerpted and adapted from Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. REG. 759 (2023).

[2] *See, e.g.*, Jarkesy v. S.E.C., 34 F.4th 446 (5th Cir. 2022) (addressing whether the nondelegation doctrine precludes agency discretion to elect whether to enforce statutory mandates through administrative adjudication or litigation in federal court); Consumers' Research v. F.C.C., 67 F.4th 773 (6th Cir. 2023) (addressing whether the Universal Service Fund created pursuant to the Communications Act and Telecommunications Act violates the nondelegation doctrine); Consumers' Research v. F.C.C., 63 F.4th 441 (5th Cir. 2023) (same).

[3] 139 S. Ct. 2116 (2019).

[4] *Id.* at 2131 (Gorsuch, J., dissenting) (rejecting the prevailing nondelegation doctrine).

[5] Writing for three justices, Justice Alito concurred with the judgment in *Gundy* but indicated that he would be willing to "reconsider the [nondelegation] approach we have taken for the past 84 years." *Id.* (Alito, concurring). Justice Kavanaugh, in a statement respecting denial of certiorari five months later, praised "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine" in *Gundy* and noted that his dissent "raised important points that may warrant further consideration in future cases." Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J.).

as "vacuous,"[6] "empty,"[7] and "so vague that it can mean whatever [regulators] say it means on any given day."[8] It has been suggested that the indeterminacy of the public-interest standard and the scope of discretion it lodges in agency officials "would surely shock . . . the founders of our nation."[9] Indeed, some nondelegation revivalists have set their sights squarely on the public-interest standard as "easy kill number one."[10]

But that is not so simple. Regulation in the public interest has a long history in the U.S. legal system.[11] More than 1,200 public-interest standards appear in the U.S. Code (and legions more in state statutes). Agencies apply public-interest standards in the work they do every day. This Chapter moves beyond the rhetoric by conducting a grounded inquiry into how agencies implement public-interest standards in the statutes they administer. My findings provide insights to inform courts' analysis of legal challenges to these and other broad statutory delegations.

Using data from agency adjudications under four different statutory schemes dating from the early 1900s through the early 2000s, I conducted a qualitative study centering on four questions:

> (1) How do agencies define the public interest?
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> (2) What claims do agencies make about the scope of their authority under the public-interest standard?
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> (3) What justifications do agencies and the parties before them make about why a particular outcome is—or is not—in the public interest?

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[6] Gary Lawson, *Delegation and Original Meaning,* 88 VA. L. REV. 327, 328 n.8 (2002).
[7] Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 474 (1985).
[8] Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?,* 53 FED. COMM. L.J. 427, 453 (2001).
[9] *Id.* at 428.
[10] Gary Lawson, *Delegation and the Constitution*, 22 REGUL. 23, 29 (1999).
[11] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

(4) What arguments about the public interest do agencies tend to find most persuasive?

I analyzed nearly a century's worth of adjudications from three federal agencies and one state agency administering public-interest standards under the Interstate Commerce Act (administered first by the Interstate Commerce Commission and later by the Surface Transportation Board), the Federal Communications Act (administered by the Federal Communications Commission), the Federal Water Power Act (administered by the Federal Energy Regulatory Commission), and the California Water Commission Act (administered by the California State Water Resources Control Board). These statutes regulate either merger review in heavily regulated industries or natural-resource allocation.

My four key findings suggest that agencies do not use broad statutory delegations such as the public interest to make lawless power grabs. First, agencies applying statutory public-interest standards exhibit rational and predictable patterns that comport with rule-of-law values of transparency and consistency. By and large, agencies explicitly define what constitutes the public interest in their respective statutory contexts, and these definitions remain stable over time. Agencies firmly ground these definitions in a close reading of the enabling statute in which the public-interest standard is embedded, and agencies are highly responsive to feedback from courts and legislatures in articulating their understanding of the public interest. Significant changes to agencies' public-interest definitions are almost always triggered by statutory amendments or judicial decisions, not undertaken on the agencies' own initiative.

Second, agencies tend to be modest about the scope of their own public-interest authority. Agencies rarely assert broad, discretionary authority under a public-interest standard, and they often explicitly recognize that their decisionmaking authority is cabined either by statute or case law.

Third, parties and agencies in adjudicatory proceedings articulate defensible and customary justifications for why a particular outcome is—or is not—in the public interest. The justifications fall into discrete categories. The most common category encompasses claims about the efficiency of various outcomes, including arguments about how the agency's decision would affect costs, prices, quality, competition, and growth in regulated markets, as well as arguments about net costs and

benefits. Another category includes procedural arguments about the public interest, e.g., arguments about open access to agency proceedings, support or buy-in by stakeholders, and parties' willingness to accommodate one another's interests. A final category comprises arguments about the public interest in advancing substantive values, such as defending national security or protecting affected communities, the environment, and workers' rights. While some substantive values raised in adjudicatory proceedings are extra-statutory, most are required considerations under the agency's authorizing legislation.

Fourth, despite the wide range of arguments made about what is in the public interest, the types of justifications that the agencies typically found most compelling were efficiency-related arguments. In most contexts studied, economic arguments were the most-raised and most-accepted justifications for why a particular outcome is in the public interest. Long before the late-1900s economic critique of regulation and the imposition of regulatory cost-benefit analysis requirements by executive order, the agencies in this study and the parties in administrative proceedings framed their public-interest claims primarily in terms of economics and efficiency. By contrast, agencies rarely considered substantive values in their public-interest analyses unless the statute mandated such considerations. And even then, values-based concerns were rarely outcome-determinative; at most, values provided atmospherics. These findings suggest that agencies are not exploiting broad public-interest standards to impose their own values. Indeed, they suggest that agencies might fail to fully realize the values embodied in statutory law.

My empirical findings are consistent with nearly a century of case law repeatedly upholding public-interest standards against legal challenge. In rejecting an early challenge to a statutory public-interest standard, the Supreme Court observed: "It is a mistaken assumption that [the public-interest criterion] is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary."[12] My study confirms the Court's intuition. Agencies

[12] Fed. Radio Com. v. Nelson Bros., 289 U.S 266, 285 (1933); *see also* N.A.A.C.P. v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) ("This Court's cases have consistently held that the use of the words 'public

ground definitions of the public interest in their statutory authority and respond to legislative amendments of that authority. Further, they rarely consider substantive values outside the four corners of their statutory authority in making public-interest determinations.

The Court has invoked two additional arguments for rejecting challenges to public-interest standards. First, the Court has reasoned that the public-interest standard is no less discernible or definite than other commonly used legal standards that delegate decisionmaking power to agencies, such as "just and reasonable";[13] "public convenience and necessity";[14] or "reasonableness."[15] To require more of the public-interest standard "would be to insist on a degree of exactitude which not only lacks legal necessity but also conflicts with the requirements of the administrative process."[16] Second, the Court has recognized the important role that public-interest standards play in the administrative process, facilitating regulation in complex areas where implementation demands expertise and flexibility.[17]

None of the cases upholding the constitutionality of various statutory public-interest delegations was decided using the "intelligible principle" standard—the lodestar of contemporary nondelegation doctrine. Indeed, while decisions rejecting these constitutional challenges rest on foundational nondelegation principles regarding the appropriate exercise of legislative and executive power, they do not address whether the "public interest" is a sufficiently intelligible principle to cabin agency discretion. Instead, they take a more holistic approach to nondelegation, considering a range of different factors to assess the shape and size of the authority agencies actually exercise under their public-

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interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation.").

[13] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).

[14] N.Y. Cent. Secs. Corp. v. United States, 287 U.S. 12, 25 (1932).

[15] *Id.*

[16] *Sunshine Anthracite Coal*, 310 U.S. at 398.

[17] *See* Fed. Comms. Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940) (acknowledging the vagueness of the public interest standard but insisting that it is "as concrete as the complicated factors for judgment in such a field of delegated authority permit").

interest delegations.[18] My findings illustrate the utility of this approach by providing concrete evidence that agency authority can take modest shape and size even under a broad statutory public-interest standard.

My findings also undercut the rationale driving the Court's broader project to rein in the powers of administrative agencies. This project is animated by a highly stylized caricature of administrative agencies as power-hungry usurpers, lying in wait for any statutory opening that will allow them to pounce on citizens' liberties and "churn out new laws more or less at whim."[19] This caricature explains the Court's renewed interest in the nondelegation doctrine. It underlies the formalist turn the Court has taken in appointment and removal cases. It fuels the Court's antipathy toward longstanding deference doctrines. And it underwrites the Court's official embrace of the major-questions doctrine, which it explained is necessary to police "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[20]

The picture of administrative agencies that emerges from my study looks very different from this cartoon. Acting under what is considered the broadest of statutory delegations, the agencies studied exercised restraint and sought limits on their authority rather than loopholes to exploit it. The agencies explicitly defined what constitutes the public interest in their respective contexts, grounding their definitions in statutory law. These definitions remained mostly stable over time, with significant changes occurring not through agencies' own initiatives but in response to statutory amendments or judicial decisions. Agencies also refused to entertain arguments raised by parties that strayed far beyond the boundaries of these constraints and ventured into the territory of values and morality. These implementation practices are consistent with rule-of-law and separation-of-powers principles and should

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[18] For further elaboration of this approach, *see* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849 (2019).

[19] N.F.I.B. v. Dep't of Labor, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (fretting that an agency "may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment"); *accord* West Virginia v. EPA, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring).

[20] *West Virginia*, 597 U.S. at 724.

temper concerns about the breadth of statutory public-interest delegations of authority. To be sure, as the Court has made clear, agencies cannot cure an unconstitutionally broad delegation by adopting a narrowing construction of their statutory authority. But these agency practices and interpretations are not narrowing constructions; they are simply the agencies' best—and only—understanding of the meaning of these statutes. It would surely stun agency officials to learn that these statutes give them unbounded powers.

What do my findings mean for judges? First and foremost, they call for attention to context and institutional nuance when addressing nondelegation questions and other questions implicating the scope of agency power. Formalist abstraction and heated anti-administrative rhetoric obscures important dimensions of these issues. Second, they suggest that judges should identify the rich panoply of values that statutory schemes seek to advance and should hold agencies accountable for adequately considering those values in their decisionmaking processes. Just because agencies are staying within statutory lines does not mean that they are painting the full picture envisioned by Congress.

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