

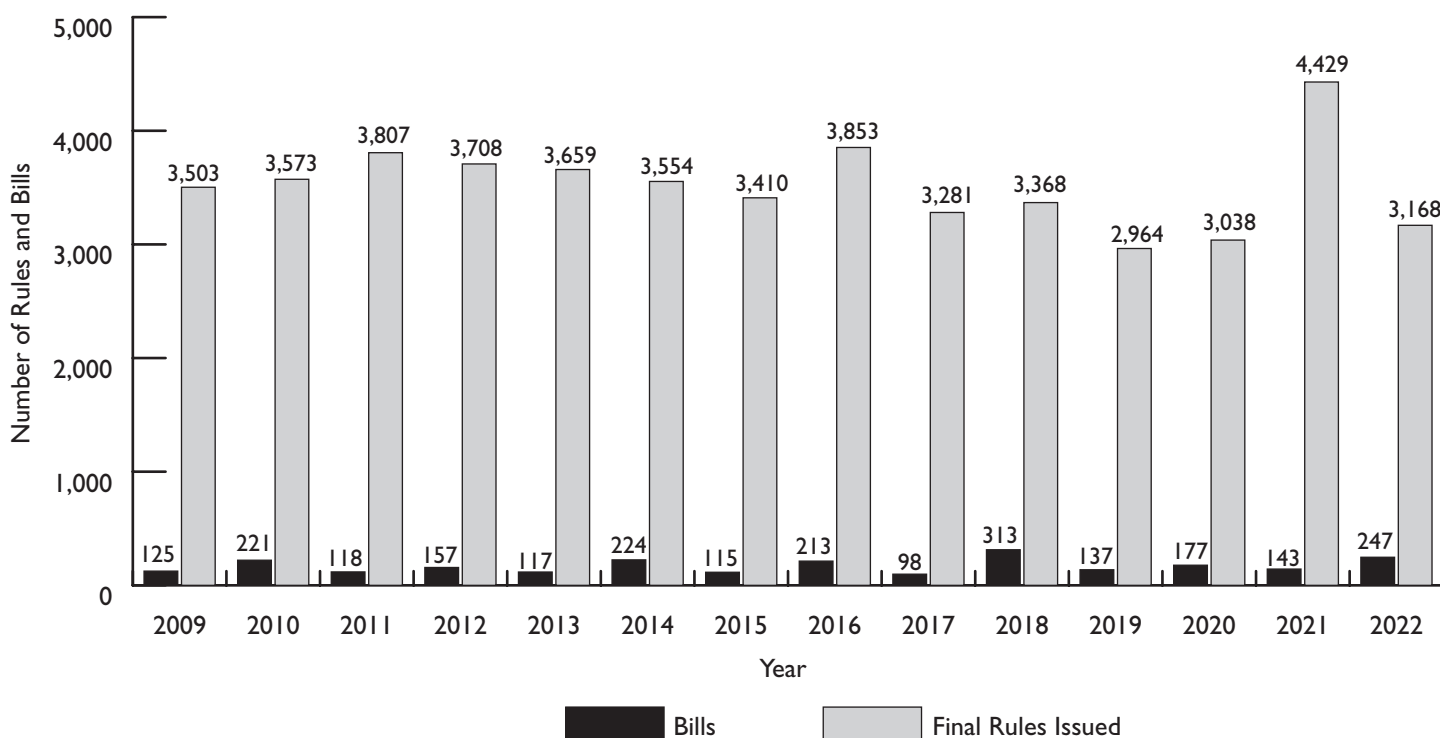
Regulation without Representation: The “Unconstitutionality Index” — 13 Rules for Every Law

Administrative agencies, not Congress, do most U.S. lawmaking, despite Article I of the Constitution stipulating otherwise.⁴²⁴ Congress is to blame here, as it routinely enacts weighty legislation that should be closely attended, then delegates substantial law-making power to agencies.

From an agency’s perspective, the primary measure of its productivity is the body of regulation it produces.⁴²⁵ That gives agencies ample incentive to expand turf by regulating even without an actual need for it.

The Unconstitutionality Index is the ratio of rules issued by agencies relative to laws passed by Congress and signed by the president during a calendar year. In calendar year 2022, federal regulatory agencies issued 3,168 final rules, compared with Congress’s passing 247 bills. In 2021, Congress passed 143 bills, and in 2020 it passed 177 bills.⁴²⁶ That means 13 rules were issued for every law passed in 2022, after 17 and 31 rules for every law in 2020 and 2021, respectively (see Figure 26).⁴²⁷

Figure 26. The Unconstitutionality Index, 2009–2022



Source: *Federal Register* data from National Archives and Records Administration and from Crews tabulation at <http://www.tenthousandcommandments.com>. Public Laws data compiled from Government Printing Office, Public and Private Laws at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>; and from National Archives, Previous Sessions: Public Law Numbers at <http://www.archives.gov/federal-register/laws/past/index.html>.

Numbers of rules and laws can vary for many reasons. A regulation in one year could be the result of legislation passed years prior, possibly under a different administration. The White House notes that the effects of recent infrastructure and inflation legislation will be expected to be felt in 2023.⁴²⁸

The Unconstitutionality Index provides useful context about the balance of power between the legislature and the executive branch. The average flow over the past decade has been 22 rules issued by federal agencies for every law passed by Congress.