

BOOK PROPOSAL—WORKING DRAFT†

BUREAUCRACY BEYOND JUDICIAL REVIEW: RETHINKING ADMINISTRATIVE LAW IN THE MODERN REGULATORY STATE

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OVERVIEW

The vast majority of federal lawmaking today takes place not in the halls of Congress but in the bureaucratic trenches—by hundreds of thousands of political and career bureaucrats in Washington, D.C., and throughout the Nation. With this rise in regulation and decline in legislation, administrative law’s importance in our everyday lives has become even more pronounced. Administrative law, after all, sets the ground rules for how federal agencies regulate and how the other government actors—the President, Congress, and the courts—supervise, review, influence, and constrain agency action. And administrative law becomes even more exciting when there is a change in presidential administration from one party to the other, and thus a change in the policy agenda and direction of federal regulation.

Administrative law as a field, however, has focused, somewhat myopically, on the role of federal courts in reviewing and constraining agency action. For example, each year thousands of law review articles are published on administrative law’s judicial deference doctrines and other standards of judicial review. Indeed, since its birth in 1984, the Supreme Court’s landmark judicial deference decision in *Chevron v. Natural Resources Defense Council* has been cited on Westlaw more than 90,000 times, including in nearly 20,000 law review articles and other secondary materials. In the last year alone, *Chevron* deference has appeared in more than 1,500 secondary materials.

This judicial focal point should come as no surprise. Federal courts, after all, serve as a critical bulwark in the modern administrative state. This book, however, will

† **Hoover Conference Participants:** I look forward to workshopping my book project on bureaucracy beyond judicial review at the July 2020 Zoom conference. To provide some additional context, I’ve included a short symposium essay I published with the *UCLA Law Review* that introduces the phenomenon of bureaucracy beyond judicial review and the impetus for this book project. This is a working draft of the book proposal, so comments are definitely welcome on the proposal or the project more generally.

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argue that it is a mistake to fixate on courts. So much of administrative law happens without courts. Put differently, federal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review. To be sure, this book will not be the first to make this observation, much less to discuss these various types of bureaucratic action that evade judicial review. Jerry Mashaw has been examining this phenomenon for decades, starting with his seminal book *Bureaucratic Justice* in the early 1980s. Indeed, no doubt sparked by Mashaw's work, internal administrative law has become a trending subfield in administrative law. That said, a more comprehensive and sustained inquiry is needed, especially for those of us intent on strengthening safeguards against bureaucratic overreach.

This book project seeks to carry forward Mashaw's legacy to engage in a more systemic investigation into bureaucracy beyond judicial review. Part II of the book will examine a number of categories of agency actions insulated from judicial review. For instance, we live in an era of regulation by compliance, in which those regulated often comply with agency guidance that never gets judicially reviewed. Agencies make important enforcement decisions—to not enforce as well as to crack down—that courts do not have the tools to patrol. Some informal agency adjudications, such as expedited removal of noncitizens at the border, escape judicial review altogether, as the Supreme Court emphasized this Term in *DHS v. Thuraissigiam*. More formal agency adjudications may be subject to judicial review. Yet, at least in the context of mass agency adjudication, less-sophisticated, often lawyerless individuals lack the wherewithal and resources to seek judicial review of agency decisions. Federal courts only see the tip of the administrative adjudication iceberg. Even in the rulemaking context, *Chevron* deference and arbitrary-and-capricious review insulate certain agency policymaking from searching judicial scrutiny. Moreover, the substantial role federal agencies play in the legislative and appropriations processes—as well as in the President's budget process—all takes place in a world without courts.

In exploring these case studies of agency action, Part II will draw on recent examples from both the Obama and Trump Administrations as well as illustrations from more distant history. It also will rely heavily on scholars' work in the administrative law field as well as important work on the subject from other fields such as history, political science, and public administration. These categories of agency action explored in Part II are certainly not all encompassing, as the world of bureaucracy beyond judicial review is broad and diverse. But they often escape anything beyond cursory attention in an introductory course on administrative law. These case studies also will provide a vital foundation for Part III, which will focus on both theoretical and concrete means of rethinking administrative law in light of this phenomenon of bureaucracy beyond judicial review.

Understanding this phenomenon should encourage us to rethink theories and doctrines in administrative law. So much scholarly attention has focused on refining judicial deference doctrines and standards of review to strike the right balance of allowing agencies to reasonably exercise their expertise yet rein in arbitrary exercises

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of agency discretion. Yet because judicial review provides no adequate safeguard against potential abuses with respect to these regulatory activities, we must turn to other mechanisms to protect liberty and the rule of law. In other words, doctrine is not sufficient, nor is a myopically court-centric theory of administrative law.

Instead, as detailed in Part III, we must develop a theory of administrative law that better incorporates the various actors who can help monitor, constrain, and protect against agency abuse in regulatory activities that are insulated from judicial review. That does not mean we give up on judicial review. For instance, judicial mechanisms could include courts utilizing their review of individual agency actions as an opportunity to play a more systemic role in agency processes. When reframed in light of bureaucracy beyond judicial review, administrative law's theory of judicial review would focus not just on the individual cases that make it to court but also on how courts can have a more systemic effect on those administrative actions that never reach the Article III federal judiciary.

Reworking judicial review theory and doctrine, moreover, is not sufficient to address the dangers of administrative law without courts. Administrative law must look beyond courts for additional safeguards. Congress, for example, could better utilize its reauthorization and oversight powers to rein in the excesses of bureaucracy beyond judicial review. Agencies could address these issues by further developing internal administrative law, such as establishing and fortifying "offices of goodness" and embracing internal procedures that increase public accountability and better protect liberty. The President could no doubt also play a meaningful role. So could civil society.

Part III will not only argue for a different theoretical framing for administrative law; it will recommend concrete reform proposals, drawing on recommendations advanced in the literature as well as developed by the Administrative Conference of the United States and the American Bar Association's Section on Administrative Law and Regulatory Practice. (The author has been heavily involved in both organizations, as a Public Member of the Administrative Conference and as the current Chair of the ABA Administrative Law Section.) These reforms underscore how, in this modern era of governance by regulation, we can and should look beyond courts to better develop adequate safeguards for our constitutional republic.

SUMMARY OF CHAPTERS

Introduction

The Introduction will familiarize the phenomenon of bureaucracy beyond judicial review. To do so, it will highlight a number of examples from the transition from the Obama Administration to the Trump Administration. The Introduction will also provide an extended overview of the book, in a manner that could be easily digested by policymakers and excerpted for classroom use. The Introduction will draw from

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and update my essay *Administrative Law Without Courts*, 65 UCLA LAW REVIEW 1620–1640 (2018), which is included with this proposal.

Part I: The Constitution of Our Modern Administrative State

Part I will present the conventional account of federal administrative law in the United States, as a law student would typically learn it in the introductory course on administrative law. It will draw from my essays *Modernizing the Administrative Procedure Act*, 69 ADMINISTRATIVE LAW REVIEW 629–670 (2017); and *An Administrative Procedure Act for the Twenty-First Century*, 27 GEORGE MASON LAW REVIEW (forthcoming 2021); as well as my forthcoming casebook *Learning Legislation and Regulation* (West Academic Press) (with Huefner and Tokaji).

1. *The Administrative Procedure Act: The Congressional Framework.* Chapter 1 will introduce what has been coined the quasi-constitution of the administrative state—the Administrative Procedure Act (APA)—and how the APA sets the default rules for agency action and judicial review thereof. Chapter 1 will also present the conventional account of Congress’s legislature and oversight role in the modern administrative state.

2. *Administrative Common Law: The Judicial Gloss.* Chapter 2 will detail how federal courts have developed administrative common law doctrines that modify, in substantial respects, the APA and how such administrative common-lawmaking affects judicial review of agency action.

3. *Presidential Administration: Executive Branch Centralized Review and Oversight.* Chapter 3 will introduce the conventional account of how the President can exercise control over the administrative state, including some discussion of the President’s appointment and removal powers and the rise of presidential review of agency regulatory activities through the Office of Information and Regulatory Affairs within the President’s Office of Management and Budget.

Part II: Case Studies on Bureaucracy Beyond Judicial Review

Part II will present a half-dozen in-depth case studies that illustrate the phenomenon of bureaucracy beyond judicial review and the tensions between this phenomenon and the conventional account of administrative law set forth in Part I. These case studies can also be organized into three broad categories: (1) agency actions where judicial review is altogether precluded by statute or law; (2) agency actions where review is available but not often sought; and (3) agency actions where review is limited by certain judicial deference principles.

4. *Rulemaking: Chevron Policymaking Space.* Chapter 4 will explore notice-and-comment rulemaking. This is the bread and butter of modern administrative law, and the APA expressly provides for judicial review of such agency actions. Yet, somewhat counterintuitively, established judicial review standards shield the substantive decisions agencies make via rulemaking from judicial scrutiny. This Chapter will focus on how *Chevron* deference to agency statutory interpretations

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creates a policy space for federal agencies that is insulated from judicial review. This Chapter will explore how this space affects bureaucratic and judicial behavior, exploring the findings from my extensive empirical work on the subject: *Administrative Law's Political Dynamics*, 71 VANDERBILT LAW REVIEW 1463–1526 (2018) (with Barnett & Boyd); *The Politics of Selecting Chevron Deference*, 15 JOURNAL OF EMPIRICAL LEGAL STUDIES 597–619 (2018) (with Barnett & Boyd); *Chevron in the Circuit Courts*, 116 MICHIGAN LAW REVIEW 1–73 (2017) (with Barnett); *Inside Agency Statutory Interpretation*, 67 STANFORD LAW REVIEW 999–1079 (2015); and *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM LAW REVIEW 703–729 (2014).

5. Subregulatory Guidance: Regulation by Compliance. Chapter 5 will turn to a trending topic in the administrative law literature: how agencies regulate by providing guidance that may be judicially reviewable yet seldom reaches courts. In recent years, there seems to be a growing use of subregulatory guidance in lieu of notice-and-comment rulemaking to make policy at the agency level. The Obama Administration's DACA/DAPA deferred-action immigration relief programs—and the Trump Administration's attempts to rescind both programs—come immediately to mind. In many contexts, as Nick Parrillo has exhaustively documented, regulated entities do not challenge subregulatory guidance for a number of reasons, including a culture of regulation by compliance. One key example to be explored in this Chapter is the Obama and Trump Administrations' distinct use of Dear Colleague Letters and other agency guidance to shape how universities handle claims of sexual harassment and assault on campus under Title IX.

6. Formal Adjudication: Mass Adjudication, Minimal Judicial Review. Chapter 6 will shift attention to the second traditional category of agency action under the APA: formal adjudication, where a statute or regulation requires an evidentiary hearing before an agency adjudicator. Like rulemaking, such administrative adjudications are generally subject to judicial review. Yet, in the context of mass agency adjudication (think, Social Security, immigration, and veterans' adjudications), federal courts see only a sliver of the cases adjudicated by the agency because individuals and entities often lack the resources or wherewithal to seek further review. The Chapter will focus on the immigration context and review the empirical work done to date that demonstrates the great disparities of outcomes in immigration adjudication. This Chapter will draw from my prior work on agency adjudication: *The New World of Agency Adjudication*, 107 CALIFORNIA LAW REVIEW 141–197 (2019) (with Wasserman); *The Death of Tax Court Exceptionalism*, 99 MINNESOTA LAW REVIEW 221–296 (2014) (with Hoffer); and *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEORGE WASHINGTON LAW REVIEW 1553–1621 (2014); as well as a current study of agency appellate systems that I am conducting for the Administrative Conference (with Wiener).

7. Informal Adjudication: Agency Adjudication Without Administrative Courts. Chapter 7 will dive into a less-covered aspect of what Melissa Wasserman and I have termed the “new world of agency adjudication”: informal administrative

adjudication where no statute or regulation requires an evidentiary hearing before an agency adjudicator. Leveraging scholarship by Jennifer Koh and other immigration scholars, this Chapter will focus on immigration adjudication at the border, where removal is expedited—i.e., generally reaching neither an Article II immigration court nor an Article III federal court. Such expedited removal was front and center in *DHS v. Thuraissigiam*, in which the Supreme Court this Term upheld the constitutionality of the lack of judicial review of expedited removal. This Chapter will also explore other contexts where agency officials adjudicate informally and judicial review is either not available or not easily accessible.

8. Enforcement: Prosecutorial Discretion and Crackdowns. Chapter 8 will explore how agency enforcement decisions are generally not judicially reviewable and how such enforcement authority has been used in both the Obama and Trump Administrations, focusing on the immigration context. While considerable scholarly attention has been paid to agency decisions not to enforce, this Chapter will also explore the phenomenon of agency over-enforcement, or “crackdowns” as Mila Sohoni has framed it.

9. Agencies as Legislators. Chapter 9 will survey the relatively uncharted terrain concerning the role of federal agencies in statutory drafting and budgeting. It turns out that federal agencies play a substantial role in helping to draft the legislation that empowers them to act. Yet, such legislative drafting assistance occurs in the shadows and is not subject to judicial review. This Chapter will detail the findings of my prior Administrative Conference [empirical study](#) on the subject and will draw substantially from my subsequent article [Legislating in the Shadows](#), 165 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1377–1433 (2017). Like the role of agencies in the legislative process, the role of agencies in the President’s budgeting process has a compounding effect of further insulating agency behavior from judicial review. Eloise Pasachoff has done groundbreaking work on the budgeting side, and her main findings will also be highlighted here.

Part III: A Path Forward

Part III will delve into the theoretical, doctrinal, and practical implications of the fact that most bureaucratic behavior escapes judicial review. One chapter will focus on each of the key actors (the three branches of the federal government and then civil society).

10. The Judicial Branch. Chapter 10 will focus on how we should reframe the role of courts. As I have argued in prior work, courts should view their role in the administrative state not only as reviewing the agency actions that reach them but also as engaging in a dialogue with the political branches. This vision reorientation is particularly important in the context of high-volume agency adjudication, where many individuals have meritorious claims but lack the wherewithal to seek judicial review. As I have documented elsewhere, federal courts possess a toolbox of dialogue-enhancing tools that they can employ when remanding flawed agency adjudications

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back to the agency. Utilization of this toolbox is one example of how judicial review in administrative law could be modified to address the present-day realities of mass agency adjudication. This Chapter will draw on my prior work cited in Chapter 6 as well as my articles *Recalibrating Judicial Review of Immigration Adjudication*, 89 GEORGE WASHINGTON LAW REVIEW (forthcoming 2021) (with Saywell); and [*Against Remedial Restraint in Administrative Law*](#), 117 COLUMBIA LAW REVIEW ONLINE 106–126 (2017).

11. *The Executive Branch.* Chapter 11 will examine potential reforms within the Executive Branch. This will include some exploration of the President’s role, including potential reforms to OIRA review of agency regulatory activities, to the budget and legislative process, and to oversight of the civil service. It will also survey the various ways in which federal agencies themselves can help protect against the dangers of bureaucracy beyond judicial review. These include further developing internal administrative law and strengthening the internal separation of powers between political appointees, career civil servants, and civil society. They also include instituting structural changes, such as creating and strengthening agency ombuds, intra-agency civil rights and civil liberties offices, and agency adjudication appellate systems. The Administrative Conference and the ABA Administrative Law Section have proposed many such changes, some of which are detailed here. The Chapter will draw substantially from my articles *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE LAW JOURNAL (forthcoming 2021) (with Wadhia); and [*Operationalizing Internal Administrative Law*](#), 71 HASTINGS LAW JOURNAL (forthcoming 2020) (with Turnbull); as well as my current Administrative Conference study on appellate systems in federal agency adjudication (with Wiener).

12. *The Legislative Branch.* Chapter 12 will turn to how scholars should focus more on the role of Congress in overseeing agency actions that might escape judicial review. Some of this oversight function is well-traversed terrain, summarized in my book review [*Restoring Congress’s Role in the Modern Administrative State*](#), 116 MICHIGAN LAW REVIEW 1101–1121 (2018). The Chapter, however, will also suggest that Congress should considering utilizing tools, such as regular reauthorization and sunset and hammer provisions, to require Congress to regularly revisit the organic statutes that govern federal agencies. This suggestion builds on my article [*Delegation and Time*](#), 105 IOWA LAW REVIEW (forthcoming 2020) (with Adler).

13. *Civil Society and the Role of Regulatory Lawyers and Administrative Law Scholars.* Chapter 13 will conclude the book by turning to the role of regulatory lawyers and administrative law scholars—and civil society more generally—in protecting against the dangers of bureaucracy beyond judicial review. This Chapter will include a call for us to rethink our conception of administrative power and will sketch out both an action plan and a research agenda going forward.

CONTRIBUTION TO EXISTING LITERATURE

In recent years, two books have played an outsized role in scholarly debates in the field of administrative law in the United States. First, in *Is Administrative Law Unlawful?* (University of Chicago Press, 2014), Philip Hamburger argues that the modern administrative state is largely unlawful and that the federal courts must rein in the federal bureaucracy's excesses. The federal courts have begun to respond, with a number of Supreme Court Justices and lower-court judges citing Hamburger's book (usually in dissent) to support calls to eliminate *Chevron* and *Auer* deference to administrative interpretations of law and to reinvigorate the nondelegation doctrine to strike down as unconstitutional broad statutory grants of lawmaking authority to federal agencies.

Hamburger's treatise against the administrative state has also sparked additional scholarly commentary. For instance, in *The Dubious Morality of Administrative Law* (Rowman & Littlefield Publishers, 2020), Richard Epstein builds on Hamburger's attacks and calls for further reforms. And in a forthcoming book entitled *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press, 2020), Cass Sunstein and Adrian Vermeule defend the morality and legality of the administrative state.

The second major book is *Law's Abnegation* (Harvard University Press, 2016), in which Adrian Vermeule argues that federal courts do not matter much in the modern administrative state because, as the title suggests, they have voluntarily deferred to administrative action. Accordingly to Vermeule, this judicial abnegation is a good thing. In other words, Hamburger and Vermeule advance to sharply different conceptions of the administrative state and the federal judiciary's constraining role in modern governance.

This book will enter into that conversation to suggest that it is a mistake to fixate on federal courts. As discussed above, so much bureaucratic action happens outside of the judiciary's purview. In other words, federal courts cannot—without more—serve as the bulwark against administrative overreach that Hamburger and Epstein advocate, even if those courts resume a more engaged role that Vermeule suggests is contrary to the status quo. Scholars, policymakers, regulators, and practitioners of administrative law need to look beyond courts to the political branches and civil society.

In that sense, this book will build on Jerry Mashaw's pathbreaking work on internal administrative law. Mashaw's scholarship in this vein was the subject of a recent edited volume, *Administrative Law from the Inside Out: Essays on the Themes in the Work of Jerry Mashaw* (Nicholas R. Parrillo ed., Cambridge University Press, 2017), which explores the implications of Mashaw's scholarship on internal administrative law today. This book will also interact with Jon Michaels's *Constitutional Coup: Privatization's Threat to the American Republic* (Harvard University Press, 2017), which argues for a constitutionally required internal separation of powers within federal agencies. And it will similarly engage important

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books on the role of Congress, the President, and the civil service in the modern administrative state, such as Josh Chafetz's *Congress's Constitution: Legislative Authority and the Separation of Powers* (Yale University Press, 2017), Richard Revesz and Michael Livermore's *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (Oxford University Press, 2011), and Paul Verkuil's *Valuing Bureaucracy: The Case for Professional Government* (Cambridge University Press, 2017)—just to provide three examples.

TARGET AUDIENCE

This book will have two primary audiences: an academic audience of scholars and students of administrative law and regulation; and a more generalist audience of agency officials, judges, policymakers, and regulatory lawyers. The breadth of the subject matter covered, however, should also reach a larger academic audience of scholars and students of political science, public administration, and related fields that study the regulatory state. Many of the book's theoretical, practical, and doctrinal takeaways should also be relevant to scholars outside of the United States who study law and regulation. The book should appeal to a diverse set of readers because of the timeliness and importance of the topic. Legal concepts will be presented in straightforward terms and in a fashion that engages readers who are not trained in the law.

MANUSCRIPT DETAILS AND TIMING

I anticipate a manuscript of 80,000 to 100,000 words or approximately 250-300 pages, though I am open to shortening or lengthening the project. As noted above, portions of the manuscript will draw on my recent scholarship in various legal journals, including the reporting of findings from my various empirical studies on the federal administrative state. Those portions will be heavily revised for inclusion in the book. Other portions will include unpublished material which drafting I have already begun. I anticipate having a complete manuscript no later than January 2022, and if need be I would be willing to discuss accelerating that timeline.

AUTHOR'S BIOGRAPHY

I am the John W. Bricker Professor of Law at The Ohio State University Moritz College of Law, where I teach administrative law, federal courts, legislation and regulation, and a variety of other public law courses as well as direct the law school's Washington, D.C., summer program.

My research focuses primarily on administrative law, regulation, and law and policy at the agency level, with a mix of doctrinal, empirical, policy, and theoretical scholarship on the modern regulatory state. My scholarship has been published in the *California Law Review*, *Duke Law Journal*, *Georgetown Law Journal*, *Journal of Empirical Legal Studies*, *Michigan Law Review*, *Stanford Law Review*, and

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University of Pennsylvania Law Review, among others. My article *Legislating in the Shadows* was selected as the recipient of the 2016 American Association of Law Schools Scholarly Papers Competition Award. I have also written a report for the Administrative Conference of the United States on the role of federal agencies in the legislative process, and I am in the process of completing a coauthored Administrative Conference report on appellate review systems in federal agency adjudication. I am a regular blogger at the *Yale Journal on Regulation* and the Section Co-Editor for *Jotwell's* Administrative Law Section.

I bring to my scholarship and to the classroom extensive practical experience of having worked in all three branches of the federal government as well as in private practice. Prior to joining the law faculty in 2012, I clerked for Justice Anthony Kennedy of the U.S. Supreme Court and Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit. I also worked for several years at a litigation boutique in Washington, D.C., as well as on the Civil Appellate Staff at the U.S. Department of Justice, where I represented federal agencies and defended federal regulations in a variety of contexts.

Outside the law school, I serve as one of forty appointed Public Members of the Administrative Conference of the United States and as Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice. During Winter Semester 2017, I served as an academic fellow on the Senate Judiciary Committee, working on the Gorsuch Supreme Court confirmation as well as on regulatory reform legislation for U.S. Senator Orrin Hatch. During the summers of 2017, 2018, and 2019, I served on—and twice chaired—U.S. Senators Rob Portman and Sherrod Brown's bipartisan judicial advisory commission to help fill the federal district court vacancies in Ohio. These public and government service experiences inform my scholarship and will bring real-world experience to this book project.

I received my law degree from Stanford and a master's in public policy from Harvard's Kennedy School of Government. At Stanford, I served as managing editor of the *Stanford Law Review* and editor-in-chief of the *Stanford Law and Policy Review*. I have included my curriculum vitae to provide additional background.

U.C.L.A. Law Review

Administrative Law Without Courts

Christopher J. Walker

ABSTRACT

As part of the *UCLA Law Review's* Symposium on *The Safeguards of Our Constitutional Republic*, this Article argues that it is a mistake to fixate on courts as the core safeguard in the modern administrative state. So much of administrative law happens without courts. Put differently, federal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review. This Article surveys the phenomenon. It sketches out seven categories of such agency action, drawing on examples from both the Obama and Trump Administrations and highlighting some of the relevant scholarship. The Article concludes with a few observations concerning the implications of administrative law without courts for administrative law theory and doctrine and a call for more scholarly attention.

AUTHOR

Associate Professor of Law, Michael E. Moritz College of Law, The Ohio State University. This Article incorporates and builds on the author's remarks at the *UCLA Law Review's* Symposium on *The Safeguards of Our Constitutional Republic*. For helpful comments on prior drafts, thanks are due to Michael Asimow, Nick Bagley, Michael Herz, Rebecca Ingber, Sharon Jacobs, Kati Kovacs, Lisa Manheim, Jennifer Mascott, Nina Mendelson, Jon D. Michaels, Jennifer Nou, Anne Joseph O'Connell, Nick Parrillo, Miriam Seifter, Peter Shane, Peter Strauss, Kathryn Watts, John Weinberg, and David Ziff, as well as participants of the *UCLA Law Review* symposium, the Third Annual Administrative Law New Scholarship Roundtable, and the University of Washington Law Faculty Workshop.



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INTRODUCTION

Administrative law is always an exciting field. But it is even more electric when there is a change in presidential administration from one party to the other. The new administration brings with it a policy agenda that typically departs in significant respects from its predecessor's. To implement that agenda, federal agencies provide critical infrastructure, resources, and expertise, and to do so they engage in a range of regulatory activities. Administrative law sets forth the rules of the game for how federal agencies engage in these regulatory activities and how the other government actors—the President, Congress, and the courts—supervise, review, influence, and constrain agency action.

With the transition from the Obama Administration to the Trump Administration, those in the political and legal trenches now perceive and leverage administrative law quite differently. Painting in broad strokes, Democrats have rediscovered the power of federal courts as a check on executive power and discretion. The nationwide injunction, for example, is great again!¹ Blue-state federalism and states' rights have reemerged to counterbalance federal bureaucratic sprawl. As federal agencies engage in (de)regulatory activities, administrative procedures are back in vogue to protect liberty and the rule of law. To see examples of these shifts in progressives' use of administrative law, one need only peruse the various posts on the popular *Take Care* blog, which was launched “in direct response to the recent assaults on the rule of law in America by President Donald J. Trump and his Administration.”²

Republicans, by contrast, have rekindled their interest in judicial review's “passive virtues,”³ including Article III standing and other justiciability doctrines that attempt to cabin judicial review to concrete cases or controversies. The nationwide injunction is not so great anymore. Enthusiasm for unitary executive theory has been reinvigorated, with calls for more

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1. See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421–22 (2017) (tracing the modern rise of the nationwide injunction and advocating for its abandonment).
 2. *About Us*, TAKE CARE, <https://takecareblog.com/about-us> [<https://perma.cc/8L7F-7YQL>]. For examples of these shifts, see *infra* notes 6–7 and accompanying text.
 3. See generally Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961) (calling on the Supreme Court to reinvigorate the use of “passive virtues”—“certain doctrines whose chief content is a generalization on the timing and limits of the judicial function”).

centralized review of federal regulatory actions⁴ and condemnation of bureaucratic resistance in the “deep state” (that is, the civil service).⁵ Administrative discretion (and the accompanying judicial deference) returns as a core feature of the Executive Branch’s Article II prerogative.

Federal courts have been at the center of many administrative law headlines in the Trump Administration to date. For instance, state and local governments have sued the Administration over the travel ban, rescission of the Deferred Action for Childhood Arrivals program (DACA), and threats to withdraw federal funding for sanctuary cities.⁶ Lawsuits have been filed to challenge executive orders regarding centralized review of federal regulatory actions, efforts to narrow the more-than-one-million acres of national monuments the Obama Administration had designated, and the President’s selection of his Office of Management Budget Director to be acting director at the Consumer Financial Protection Board—just to name a few.⁷

This judicial focal point should come as no surprise, and it is not unique to this particular presidential administration. Federal courts, after all, serve as a critical bulwark for our constitutional republic. Perhaps in part for that reason, the vast majority of administrative law scholars continue to fixate on judicial

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4. See, e.g., Alden F. Abbott, *White House Review of Independent Agency Rulemaking: An Essential Element of Badly Needed Regulatory Reform*, HERITAGE FOUND. (Dec. 22, 2017), <https://www.heritage.org/sites/default/files/2017-12/LM-223.pdf> [<https://perma.cc/2WRA-BFZQ>] (applauding the Administration’s centralized review of agency rulemaking and encouraging such centralized review to be extended to so-called independent agencies).
 5. See, e.g., Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018) (defining and defending the federal civil service against recent “deep state” attacks).
 6. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (reversing a district court’s preliminary injunction against the travel ban executive order); *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 138 S. Ct. 1182 (2018) (denying without prejudice the government’s request for certiorari review before judgement in challenge to DACA-rescission executive action); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (granting in part nationwide injunction against the Justice Department’s attempt to impose new conditions on annual federal grant relied on by a so-called “sanctuary city”).
 7. See, e.g., *Pub. Citizen Inc. v. Trump*, 297 F. Supp. 3d 6, 13 (D.D.C. 2018) (dismissing for lack of standing challenge to the Trump Administration’s executive order that requires repealing two regulations for every new one.); *English v. Trump*, 279 F. Supp. 3d 307, 311–12 (D.D.C. 2018) (denying the CFPB deputy director’s motion for a preliminary injunction to enjoin the OMB director from displacing her as acting director of the CFPB); Courtney Tanner, *Here’s a Breakdown of the 5 Lawsuits Filed Against Trump That Challenge His Cuts to 2 Utah National Monuments*, SALT LAKE TRIB. (Dec. 10, 2017), <https://www.sltrib.com/news/politics/2017/12/11/heres-a-breakdown-of-the-5-lawsuits-filed-against-trump-challenging-his-cuts-to-two-utah-national-monuments> [<https://perma.cc/J34W-WHX2>].

review of agency action.⁸ For example, each year dozens upon dozens (perhaps hundreds?) of law review articles are published on administrative law's deference doctrines and other standards of judicial review.⁹ (I cast no stones here, as I too have fixated on courts and deference.¹⁰)

In my contribution to this symposium on the safeguards of our constitutional republic, however, I argue that it is a mistake to fixate on courts. So much of administrative law happens without courts. Put differently, federal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review. I am not the first to make this observation, much less to discuss these various agency actions.¹¹ Internal administrative law, for example, has become a hot subfield in administrative law.¹² But a more sustained inquiry is needed, especially for those of us intent on strengthening safeguards against bureaucratic overreach.

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8. There are many notable exceptions. For instance, Jon Michaels and Gillian Metzger contend that the modern administrative state is not just constitutionally permissible but in at least some respects constitutionally obligated. See JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* (2017); Gillian E. Metzger, *The Supreme Court 2016 Term: Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). Philip Hamburger, by contrast, argues that the administrative state is unlawful when federal agencies exercise prerogative power to affect private rights, such that courts must intervene to protect liberty. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). And Adrian Vermeule argues law's abnegation, in that courts basically just defer to agency action. ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016).
 9. See, e.g., Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014) (observing that *Chevron*, the seminal case on judicial deference to administrative interpretations of law, "is the most-cited administrative law decision of all time"). Indeed, Westlaw KeyCite reports that *Chevron* has been cited more than 85,000 times since its birth in 1984. Over the last year (as of September 13, 2018), *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), has been cited in more than 400 law review articles and 1700 total secondary sources.
 10. See, e.g., Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).
 11. Earlier this summer, for example, a number of administrative scholars contributed to a book that honors and builds on Jerry Mashaw's pioneering work on examining administrative law and practice from inside the regulatory state. See ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW (Nicholas R. Parrillo ed., 2018).
 12. See, e.g., Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1243 (2017) ("Administrative law scholarship has also gone internal. Agency design and coordination, centralized White House control, the civil service and internal separation of powers, internal supervision, the role of agency guidance—these are just some of the topics now receiving sustained scholarly analysis. By focusing on the internal life of agencies, today's scholars are retracing the steps of administrative law pioneers at the turn of the nineteenth century." (footnotes omitted)).

The ambition of this Article, however, is quite modest. My primary goal is to survey the phenomenon of administrative law without courts. I illustrate this phenomenon with examples from seven broad categories: (1) agency guidance and regulation by compliance; (2) agency enforcement discretion; (3) informal agency adjudication; (4) formal agency adjudication; (5) agency rulemaking with *Chevron* policy space; (6) agency legislative drafting assistance; and (7) agency budgeting and appropriations. These categories are certainly not all encompassing, as the world of administrative law without courts is broad and diverse. In sketching out these categories of agency action, I draw on examples from both the Obama and Trump Administrations and highlight some of the relevant scholarship. The Article concludes with a few implications of this phenomenon for administrative law theory and doctrine, an outline of alternative potential safeguards, and a call for more scholarly attention.

I. AGENCY GUIDANCE AND REGULATION BY COMPLIANCE

As Nicholas Parrillo explained in his recent empirical study on agency guidance, “[g]uidance—the umbrella category covering what the Administrative Procedure Act calls ‘general statements of policy’ and ‘interpretative rules’—is a ubiquitous and essential feature of countless agency programs.”¹³ The conventional understanding is that agency guidance does not have the force of law, and thus is not judicially reviewable absent the agency’s application of that guidance in an enforcement action or adjudication.¹⁴

Whether agency guidance is actually nonbinding on regulated parties is subject to considerable debate. For instance, earlier this year, Associate Attorney General Rachel Brand went meta by issuing guidance on agency guidance. Motivated by concerns that agency guidance is used to create binding rules, she directed the Justice Department to “not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch” and to “not use its enforcement authority to effectively convert agency guidance documents into binding rules.”¹⁵

13. Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. U.S. 4 (Oct. 12, 2017), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf> [<https://perma.cc/MFJ9-L768>].

14. See Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 266–69 (2018).

15. Memorandum for Heads of Civil Litig. Components, U.S. Attorneys, from Rachel Brand, Assoc. Attorney Gen., U.S. Dep’t of Justice, *Re: Limiting Use of Agency*

Regardless of whether agency guidance can be formally binding yet escape judicial review, it often functionally binds regulated parties in a way that is insulated from judicial review. I will coin this phenomenon “regulation by compliance.” As Parrillo has exhaustively documented, even when agency guidance is not legally binding, regulated parties often have strong incentives to comply due to significant risks of agency enforcement, certain agency preapproval requirements, the need to maintain a good relationship with the agency, or “intra-firm constituencies for compliance beyond legal requirements.”¹⁶

Consider one example from the Obama Administration. In 2011, the Department of Education’s Office of Civil Rights issued a “Dear Colleague Letter” on how universities should handle claims of sexual harassment and assault on campus under Title IX.¹⁷ This Dear Colleague Letter is quintessential agency guidance: It lacks the force of law, and on its face it purports only to provide guidance for regulated parties. In 2014, twenty-eight Harvard law professors took to the opinion page of the Boston Globe to proclaim that the procedures mandated by the Dear Colleague Letter, which Harvard University implemented, “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”¹⁸

Considering that this agency guidance is not legally binding and legal experts at Harvard concluded that the agency’s position is problematic, why did Harvard and the rest of higher education comply? The answer is simple: The Obama Administration’s Office of Civil Rights threatened to eliminate all federal funding for universities and colleges that did not comply.¹⁹ And it made

Guidance Documents in Affirmative Civil Enforcement Cases 1, 2 (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download> [<https://perma.cc/MZD6-483H>].

16. See Parrillo, *supra* note 13, at 37–89 (documenting these compliance incentives).
17. Letter from Russlynn Ali, Assistant Sec’y, Office of Civil Rights, U.S. Dep’t of Educ., to Colleague 1–2 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/J3WM-WMYK>]. See generally Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 897–905 (2016) (detailing development of this agency guidance on Title IX).
18. Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.
19. See Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness For All Students Under Title IX* 1–2 (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1&isAllowed=y> [<https://perma.cc/AFL9-2KGA>].

that threat even more credible by investigating universities to ensure compliance.²⁰

Hence, universities complied. Indeed, “[t]errified, administrators not only complied; they over-complied.”²¹ To be sure, the universities may have been able to obtain judicial review. They could have refused to comply, and then challenged in court the agency’s enforcement decision or the federal government’s withdrawal of all federal funding. But the stakes (losing all federal funding) were obviously too high. And it certainly does not encourage regulated parties to seek judicial review when, under the *Auer* deference doctrine, the reviewing court may well have to defer to the agency’s regulatory interpretation advanced in agency guidance “unless plainly erroneous or inconsistent with the regulation.”²²

The Office of Civil Rights’s use of Dear Colleague Letters is just one example of how federal agencies use nonbinding agency guidance to regulate in a way that is insulated from judicial review. In that context, the threat of losing all federal funding for failure to comply is a major factor that discourages judicial review. In other contexts, as the Parrillo study exhaustively documents, regulators such as the Consumer Financial Protection Bureau, the Environmental Protection Agency, the Federal Trade Commission, and the Occupational Safety and Health Administration extensively utilize nonbinding agency guidance to regulate parties who might not receive any federal funding. These regulated parties nevertheless face pressures to comply for the reasons discussed above, including the fear of one-off agency enforcement proceedings.²³

In discussing these potential dangers of agency guidance, I do not mean to suggest that we should abandon it—far from it. Agency guidance serves important purposes in helping regulated entities know how to comply with the law and structure their operations around that increased clarity. My point is

20. See Gersen & Suk, *supra* note 17, at 901–02 (noting that “dozens of [Office of Civil Rights] investigations into whether the procedures at various schools were complying with requirements introduced in the [Dear Colleague Letter] soon followed”).

21. BARTHOLET ET AL., *supra* note 19, at 2; see also Gersen & Suk, *supra* note 17, at 902 (“In a scramble to be considered compliant and stave off or resolve [Office of Civil Rights] investigations, schools rushed to rewrite their policies and procedures to satisfy the [Dear Colleague Letter]’s commands . . .”).

22. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); accord *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). See generally Walker, *supra* note 10, at 105–09 (documenting exceptions to *Auer* deference that have developed in the case law and summarizing recent criticisms of *Auer* deference).

23. See Parrillo, *supra* note 13, at 37–89 (discussing these agencies’ use of guidance and documenting compliance incentives).

that agency guidance is greatly insulated from judicial review, and, as Parrillo observes, to date administrative law scholarship on guidance has largely focused on judicial decisionmaking and thus “misses much about the everyday workings of guidance that pervade the administrative state, for it focuses on the tiny fraction of guidance documents that get challenged in litigation, and only on the kinds of facts about guidance that reach the courts.”²⁴

II. AGENCY ENFORCEMENT DISCRETION

It may seem counterintuitive to categorize agency enforcement as a category of administrative law without courts. After all, the outcome of an agency enforcement action is subject to judicial review as final agency action.²⁵ Indeed, the Supreme Court has even established doctrines and standards for preenforcement review of certain agency actions.²⁶

What is generally not reviewable, however, is the agency’s decision whether to exercise its enforcement powers. As the Court held in *Heckler v. Chaney*, agencies enjoy a form of prosecutorial discretion—a “presumption that agency decisions not to institute [enforcement] proceedings are unreviewable . . .”²⁷ Yet agency decisions not to enforce do not just benefit the potential enforcers. They often harm those who would have benefitted from the enforcement action—the consumers, investors, employees, and so forth, whose rights and interests go unprotected because of the regulators’ decision not to enforce the laws against the relevant regulated entities.

As Mila Sohoni has recently explored, this agency discretion extends not only to underenforcement but also to overenforcement. Or, as Sohoni calls it, “crackdowns”: “an executive decision to intensify the severity of enforcement of existing regulations or laws as to a selected class of offenders or a selected set of offenses.”²⁸ Consider the Trump Administration’s immigration enforcement crackdown in San Francisco and surrounding cities. Earlier this year reports swirled that the goal was to arrest more than 1500 noncitizens and that the crackdown was partially motivated by California’s decision to become a sanctuary state and thus not to fully cooperate with the federal government to enforce immigration law. Indeed, the Acting Director of the Immigration and

24. *Id.* at 5.

25. 5 U.S.C. § 704 (2012) (providing judicial review of final agency actions).

26. *See, e.g.,* *Abbott Labs. v. Gardner*, 387 U.S. 136, 149–56 (1967) (setting forth standards for preenforcement review under the Administrative Procedure Act).

27. 470 U.S. 821, 837 (1985).

28. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 33 (2017).

Customs Enforcement (ICE) publicly stated: “California better hold on tight”; if state and local officials “don’t want to protect their communities, then ICE will.”²⁹

As this example illustrates, deciding when and where to dedicate enforcement resources is a powerful regulatory tool. When agencies decide not to enforce the law, those who would have benefited from enforcement suffer. Conversely, as here, when agencies decide to crack down, the objects of the crackdown suffer, whereas similarly situated regulated parties do not, for reasons beyond the control of the regulated. Yet, as Sohoni concludes, this agency enforcement decisionmaking is substantially insulated from judicial review because the “conventional rubric of constitutional adjudication cannot sensibly be applied to a crackdown.”³⁰

III. INFORMAL AGENCY ADJUDICATION

In January of 2017 when the Trump Administration announced its travel ban for certain noncitizens, the ACLU and other organizations sent dozens if not hundreds of lawyers to airports across the country to represent those individuals and attempt to prevent their removal from the United States.³¹ The application of this travel ban at the border raises a number of questions about administrative law without courts.

First, there is the question of how to categorize this agency action. It is certainly not rulemaking or agency guidance. It is not a formal adjudication with an evidentiary hearing before an administrative law judge or the equivalent. Nor is it an agency enforcement action. Instead, the act of banning a noncitizen from the United States falls under the diverse and opaque category of informal adjudication—a category of agency action where the role of courts

29. Hamed Aleaziz, *Feds Planning Massive Northern California Immigration Sweep to Strike Against Sanctuary Laws*, SF GATE (Jan. 17, 2018, 7:04 AM), <https://www.sfgate.com/bayarea/article/Feds-planning-massive-Northern-California-12502689.php> [https://perma.cc/M58N-4SBU?type=image].

30. Sohoni, *supra* note 28, at 95. A related category of administrative law without courts concerns regulation by settlement or deal. See, e.g., Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466 (2009) (exploring how federal agencies responded by the financial crisis by making deals with regulated entities); Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1172 (2014) (discussing how federal “[a]gencies also work to keep cases out of court entirely by relying heavily on settlement”).

31. See, e.g., Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump’s Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html>.

and other procedural protections vary dramatically.³² Second, there is the question of what would have happened if the lawyers had not arrived and a noncitizen was erroneously refused entry. The noncitizen would not have been brought before a judge but, instead, would have just been refused entry into the United States. Finally, questions abound concerning the role of judicial review after removal.

Albeit not in this specific context, this final question is explored in much greater detail in an important article by Jennifer Lee Koh.³³ In fiscal year 2016, immigration judges, which are agency adjudicators within the Executive Office for Immigration Review, received 328,112 cases and concluded 273,390.³⁴ “Yet,” Koh documents, “the vast majority of cases in which the government issues removal orders against noncitizens never reach the immigration courts.”³⁵ For instance, about 83 percent of removal orders in fiscal year 2013 were in the form of reinstatement of prior removal orders or expedited removal at the border.³⁶ As Koh explains, “[t]hat 83% figure reflects removal orders issued by front-line immigration officers acting as investigator, prosecutor, and judge, thus bypassing the immigration courts entirely.”³⁷ For our purposes, it is not just that these agency removal actions take place outside of the formal agency adjudicative process in the immigration courts. Under the Immigration and Nationality Act, Congress has also severely limited judicial review of reinstatement of removal and expedited removal orders.³⁸

These types of immigration adjudication comprise just one example of informal adjudication in the administrative state. Federal agencies engage in millions of less formal adjudicative activities each year where no evidentiary hearing is required.³⁹ The landscape of informal agency adjudication is vast

32. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3129560> [<https://perma.cc/QP9W-GG6V>] (categorizing in Part I various types of agency adjudication in the modern administrative state).

33. Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017).

34. EXEC. OFFICE FOR IMMIGRATION REV., FY 2016 STATISTICS YEARBOOK A2 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download> [<https://perma.cc/3L73-KC36>].

35. Koh, *supra* note 33, at 183.

36. *Id.* at 184.

37. *Id.*

38. See *id.* at 201–02, 207–08 (detailing how the INA severely limits judicial review of expedited removal and reinstatement of removal); see also, e.g., 8 U.S.C. § 1252(e) (2012).

39. For instance, the Internal Revenue Service (IRS) routinely makes tax deficiency determinations following an audit, but without a legally required evidentiary hearing. See Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99

and varied, with varying levels of procedural protection within the agency and through judicial review.⁴⁰ Informal adjudication in the immigration context, however, is a particularly vivid illustration of administrative law without courts.

IV. FORMAL AGENCY ADJUDICATION

In the realm of formal agency adjudication, one perhaps would not anticipate discovering administrative law without courts. After all, formal adjudication involves trial-like agency proceedings before an administrative law judge or some other agency adjudicator, where the parties have the statutory right to seek judicial review of the agency's final decision.⁴¹ This is a broad and ranging universe of agency actions, with nearly 2000 administrative law judges and more than 10,000 non-ALJ adjudicators who have diverse titles, such as administrative judge, immigration judge, hearing officer, and presiding official.⁴²

But even formal agency adjudication can be insulated from judicial review because individuals and entities often lack the resources or wherewithal to seek further review. This is particularly true for mass agency adjudication (think immigration, Social Security, and veterans' adjudications), where only a fraction of cases ever reaches federal courts.

MINN. L. REV. 221, 235–37 (2014) (describing IRS tax deficiency adjudicatory process and subsequent judicial review). Although the number of IRS deficiency determinations does not appear to be publicly available, we know that the IRS audits/reviews around 5 percent—more than five million returns—of the returns filed each year. See, e.g., NAT'L TAXPAYER ADVOCATE SERVICE, 2016 ANNUAL REPORT TO CONGRESS 28 fig.S.6 (2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1.pdf (reporting that 6,825,987 of the 146,777,623 returns filed in 2014 were audited or reviewed to some extent by the IRS). And in fiscal year 2016, for instance, the IRS imposed civil penalties on nearly 40,000 filers. *Id.* at 42 tbl.7.

40. For a classic account of informal agency adjudication, see Paul R. Verkuil, *A Study of Informal Adjudication Procedure*, 43 U. CHI. L. REV. 739 (1976).

41. See Walker & Wasserman, *supra* note 32, at 7–17. For present purposes, this category of formal adjudication includes both formal adjudication governed by the Administrative Procedure Act and any other agency adjudication where a statute or regulation requires an evidentiary hearing. See Michael Asimow, *Adjudication Outside the Administrative Procedure Act*, ADMIN. CONF. U.S. 2–3 (Sept. 16, 2016) <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-updated-draft-report.pdf> [<https://perma.cc/6CE7-GW83>] (adopting same definition of formal adjudication).

42. See Wasserman & Walker, *supra* note 32, at 13–17

Let us return to immigration adjudication.⁴³ As noted in Part III, immigration courts decide roughly 300,000 cases per year.⁴⁴ Ingrid Eagly and Steven Shafer have found that roughly two in five immigrants in removal proceedings in immigration court had legal representation, and less than half of those represented had legal representation at all of their agency hearings.⁴⁵ Immigrants represented by counsel are more likely to prevail. Indeed, “detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts.”⁴⁶ Importantly, similarly situated immigrants who had legal representation were fifteen times more likely to seek relief from removal, and five-and-a-half times more likely to secure such relief, than those without representation.⁴⁷ Simply put, legal representation matters in immigration adjudication, and many do not have it.

There are also great disparities of outcomes in immigration adjudication. David Hausman, for example, has found stark inconsistencies of outcomes among immigration judges and the failure of the Board of Immigration Appeals (and the federal courts) to correct those individual errors and systemic disparities.⁴⁸ Some immigration judges are significantly more generous than others in allowing time for an immigrant to obtain legal counsel, and unrepresented immigrants are less likely both to win before the agency and to ultimately seek further review within the agency or in federal court. Hausman’s study reinforces prior empirical work that has richly described these significant disparities in immigration adjudication as the “refugee roulette.”⁴⁹

So what does this mean for the phenomenon of administrative law without courts? Because noncitizens often navigate agency adjudication without legal representation, “it is much more likely that individuals will not seek judicial review of erroneous agency decisions—either because they lack the sophistication to navigate the judicial process or have otherwise procedurally

43. This discussion of immigration adjudication draws substantially from Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 IOWA L. REV. ONLINE 84 (2016).

44. EXEC. OFFICE FOR IMMIGRATION REV., *supra* note 34, at A2.

45. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7–8 (2015).

46. *Id.* at 9.

47. *Id.*

48. See David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1191–97 (2016).

49. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

defaulted meritorious claims in the administrative process.”⁵⁰ Courts never have the opportunity to directly help these individuals. Their ability to correct agency errors directly is limited to the subset of cases where individuals have the wherewithal to seek judicial review.

As I have documented elsewhere, federal courts possess a toolbox of dialogue-enhancing tools that they can employ when remanding flawed agency adjudications back to the agency.⁵¹ For instance, in cases where courts are skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some circuit courts require the agency to provide notice of its final determination, retain panel jurisdiction over the matter, or set deadlines for an agency response to the remand. Others suggest (or order) that administrative judges be replaced on remand, certify issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions. Some circuits, moreover, obtain concessions from the government at argument to narrow the potential grounds for denial of relief on remand.⁵² These “tools help the reviewing court play a more active role in improving equity, efficiency, and consistency [in the agency adjudication system] generally rather than just in the limited number of cases that make it to [a federal court].”⁵³ Utilization of this toolbox is one example of how judicial review in administrative law could be modified to address the present-day realities of mass agency adjudication.

V. AGENCY RULEMAKING WITH *CHEVRON* POLICY SPACE

Like formal adjudication, one may not naturally think of rulemaking as implicating administrative law without courts.⁵⁴ In the context of informal or notice-and-comment rulemaking, the Administrative Procedure Act generally commands federal agencies to subject proposed rules to public notice and comment before they become final; those final rules are then subject to judicial review.⁵⁵

50. Walker, *supra* note 43, at 93.

51. See Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014).

52. See *id.* at 1590–600 (identifying and discussing these dialogue-enhancing tools).

53. Hoffer & Walker, *supra* note 39, at 268 (exploring this toolbox in the context of tax adjudication).

54. Part V draws substantially from Christopher J. Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. LAND USE & ENVTL. L. 551, 553–57 (2017).

55. See 5 U.S.C. § 553 (2012) (detailing notice-and-comment rulemaking procedures); *id.* § 702 (providing for judicial review of final agency action).

Judicial review of agency statutory interpretation, however, is cabined by *Chevron* deference: If the underlying statute is ambiguous, courts only assess the reasonableness of the agency's interpretation.⁵⁶ Put differently, as the *Chevron* Court did, the reviewing "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."⁵⁷ Agencies thus have *Chevron* policymaking "space" to regulate without judicial interference.⁵⁸

Two related empirical questions follow from this understanding of *Chevron* space: First, how do federal agencies utilize this policymaking space that is insulated from judicial review? And, second, how do courts approach this space? I address each in turn.

To explore this first question and better understand how federal agencies approach rulemaking, in 2013 I surveyed 128 federal agency rule drafters at seven executive departments and two independent agencies.⁵⁹ The survey consisted of 195 questions related to agency statutory interpretation and rule drafting. Among the twenty-two interpretive tools included in the survey, *Chevron* deference was the most known by name (94 percent) and most reported as playing a role in agency rule drafting (90 percent).⁶⁰

Chevron's supremacy is important for understanding how federal agencies approach rulemaking. The agency respondents appreciated that if a statutory provision is ambiguous, the agency—not the court—is the primary interpreter of the statute, and that the agency's interpretation of the statutory ambiguity will likely prevail on judicial review so long as it is reasonable.⁶¹ Interestingly, the respondents seemed to suggest that federal

56. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

57. *Id.* at 843 n.11.

58. *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (explaining that *Chevron* "create[s] a space, so to speak, for the exercise of continuing agency discretion"); accord Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight", 112 COLUM. L. REV. 1143, 1145 (2012).

59. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

60. *Id.* at 1019 fig.1, 1020 fig.2. The next most recognized tools were: the ordinary meaning canon (92 percent), *Skidmore* deference (81 percent), and the presumption against preemption of state law (78 percent). *Id.* at 1019 fig.1. After *Chevron*, the tools most reported as playing a role in rule drafting were: the whole act rule (89 percent), the ordinary meaning canon (87 percent), *Mead* doctrine (80 percent), *noscitur a sociis* (associated words canon) (79 percent), and legislative history (76 percent). *Id.* at 1020 fig.2.

61. See *id.* at 1051–52. The agency respondents, however, noted that not all ambiguities create such *Chevron* space, as ambiguities related to major questions, preemption of state law,

agencies act differently when they believe they are entitled to *Chevron* space. Nearly nine in ten rule drafters strongly agreed or agreed that they think about subsequent review when drafting statutes.⁶² The agency respondents, moreover, understood quite well how administrative law's distinct deference doctrines affect agency win-rates on judicial review.⁶³ Indeed, roughly two in five rule drafters surveyed agreed or strongly agreed—with another two in five somewhat agreeing—that a federal agency is more “aggressive” in its interpretive efforts if it is confident that *Chevron* deference applies, as opposed to some less-deferential standard such as *Skidmore* or de novo review.⁶⁴

With respect to the second question, this *Chevron* space seems to make a difference in court, at least at the circuit-court level. In the largest dataset to date on *Chevron* deference, Kent Barnett and I have coded every published circuit court decision from 2003 through 2013 that refers to *Chevron* deference—for a total of more than 1300 decisions. The findings from our study are set forth elsewhere.⁶⁵ For present purposes, however, it is worth focusing on one set of findings regarding the effect of *Chevron* deference in the circuit courts: There is a difference of nearly 25 percentage points in agency-win rates when judges decide to apply the *Chevron* deference framework, as compared to when they refuse to do so.⁶⁶ That is to say, at least in the opinions where *Chevron* was referenced, agency interpretations were significantly more likely to prevail under *Chevron* (77.4 percent) than *Skidmore* (56.0 percent) or de novo review (38.5 percent).⁶⁷ As for *Chevron*'s policymaking space, once the

and constitutional questions may not do so. See Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 MO. L. REV. 1095, 1109–14 (2016) (exploring findings). Yet agency respondents almost all agreed that ambiguities relating to implementation details or relating to the agency's area of expertise indicated congressional intent to create *Chevron* space for the agency. Walker, *supra* note 59, at 1053–55, 1053 fig.10.

62. Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722 (2014).

63. See *id.* at 723 (reporting that 38 percent strongly agreed, 45 percent agree, and another 17 percent somewhat agreed that “[i]f *Chevron* deference (as opposed to *Skidmore* deference or no deference) applies to an agency's interpretation of an ambiguous statute it administers, the agency is more likely to prevail in court”).

64. *Id.* at 722–24, 722 fig.3. Under *Skidmore* deference, an agency's interpretation does not control so long as it is reasonable but, instead, is given “weight” based on “the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. . . .” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

65. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 5 (2017).

66. *Id.* at 6.

67. *Id.* at 30 fig.1.

circuit courts got to *Chevron*'s second step, agencies prevailed 93.8 percent of the time.⁶⁸

In sum, the agency rule drafters surveyed embraced the idea that *Chevron* deference creates a space for agency policymaking that is insulated from searching judicial review and provided some support for the intuition that agencies regulate more aggressively when they believe their interpretive efforts fall within this *Chevron* space. The circuit courts, likewise, seem to recognize this *Chevron* space as a limit of judicial review of agency statutory interpretations.

VI. AGENCY LEGISLATIVE DRAFTING ASSISTANCE

Federal agencies also help make law in a judicially unreviewable manner by assisting Congress in drafting statutes.⁶⁹ Federal agencies are substantially involved in the legislative process by submitting substantive legislation to Congress and by providing confidential technical drafting assistance on legislation drafted by congressional staffers.⁷⁰ Courts, of course, review enacted statutes to determine their meaning and their constitutionality. But courts are not permitted by statute or judicial doctrine to review how agencies participate in the statutory drafting.⁷¹ They do not assess if agencies self-delegate lawmaking authority by leaving statutory mandates broad and ambiguous, much less the role agencies may play in drafting statutes that eliminate judicial review of agency action altogether.

Agency provision of technical drafting assistance may present special dangers of such self-delegation. Elsewhere I have described this process as “legislating in the shadows,”⁷² as the congressional requester generally expects the technical drafting assistance request and response to remain confidential—not to be disclosed to the other party in Congress, the public, and oftentimes, even the White House. The vast majority of legislative drafting conducted by federal agencies today is not agency-initiated substantive legislation, but confidential agency technical drafting assistance.⁷³ Moreover, agencies report

68. *Id.* at 6.

69. Part VI draws substantially from Walker, *supra* note 54, at 557–59.

70. See Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting*, ADMIN. CONF. U.S. 5–11 (Nov. 2015), <https://ssrn.com/abstract=2655901>.

71. Cf. Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 129 (2015) (“Another approach to the executive’s role in [statutory] drafting might suggest that, at least in some situations, courts should grant greater deference to agencies.”).

72. Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

73. Adoption of Recommendations, 80 Fed. Reg. 78,161 (Dec. 16, 2015) (“While agencies can be the primary drafters of the statutes they administer, it is more common for agencies to

that they provide technical assistance on the vast majority of proposed legislation that directly affects them and on most such legislation that gets enacted.⁷⁴

This legislating in the shadows has important implications for administrative law doctrine and theory. For instance, it may cast some doubt on the foundations for judicial deference to agency statutory interpretations. Because “agencies are intimately involved in drafting the legislation that ultimately delegates to those agencies the authority to interpret the legislation,” I have argued, “many of the agency self-delegation criticisms raised against *Auer* deference could apply with some force to agency statutory interpretation and *Chevron* deference as well.”⁷⁵

For the purposes of this Article, it is sufficient to appreciate that federal agencies often play a substantial role in drafting statutes that empower the agencies to regulate and that these legislative activities are not subject to judicial oversight. This judicially insulated legislative role may well compound the problematic lack of judicial review for the categories of agency action discussed in Parts I through V. After all, all of these agency actions are, at least in part, creatures of statutes—statutes that the agencies themselves helped create.

VII. AGENCY BUDGETING AND APPROPRIATIONS

Like the role of agencies in the legislative process, the final category of administrative law without courts has a compounding effect of further insulating agency behavior from judicial review: how federal agencies secure funding to engage in their various regulatory activities. Agency funding implicates two separate yet interrelated processes: Congress’s appropriations legislative process and the President’s budget process. Federal agencies are involved in both. Neither process, much less agency involvement in either process, is subject to judicial review.

First, under its power of the purse, Congress engages in an annual appropriations process to provide funding to agencies to carry out their statutory mandates. Congress can affect agency behavior by augmenting or

respond to Congressional requests to provide technical assistance in statutory drafting.”); see also Walker, *supra* note 70, at 43–90 (providing cases studies on agency technical drafting assistance at ten federal agencies: the Departments of Agriculture, Commerce, Homeland Security, Education, Energy, Health and Human Services, Housing and Urban Development, and Labor as well as the Federal Reserve and the Pension Benefit Guaranty Corporation).

74. Walker, *supra* note 70, at 13–16.

75. Walker, *supra* note 72, at 1380.

cutting funding for particular agency activities as well as by inserting substantive riders in appropriations legislation to forbid certain agency uses of appropriated funds.⁷⁶ It turns out that, similar to regular legislation discussed in Part VI, federal agencies play substantive and technical drafting roles in appropriations legislation, thus potentially influencing Congress's decisions as to how much money the agencies have to pursue, among other things, the regulatory activities discussed in Parts I through V.⁷⁷

Second, as Eloise Pasachoff has masterfully documented, the President's budget process "is a key tool for controlling agencies" that allows the White House "to get in the stream of every policy decision made by the federal government."⁷⁸ Pasachoff details how various agency officials within the President's Office of Management and Budget (OMB) have substantial influence over the budget process, and how the budget process lacks meaningful public transparency.⁷⁹ Agencies play a meaningful role in the process, though OMB career servants "take a front-line position in directing agency action."⁸⁰

Congressional appropriations and the President's budget processes robustly shape agency behavior. Both processes merit more sustained scholarly attention and investigation. Neither, however, is subject to judicial review, which reinforces the thrust of this Article concerning the vast and varied amount of regulatory activity that affects us on a daily basis yet escapes judicial scrutiny.

CONCLUSION

It is a mistake for administrative law to fixate on judicial review as the core safeguard for our constitutional republic. As this Article has sketched out, so much of administrative law happens without courts. We live in an era of regulation by compliance, in which those regulated often comply with agency

76. See Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1107–08 (2018) (reviewing JOSH CHAFETZ, CONGRESS'S CONSTITUTION, LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017)).

77. See Walker, *supra* note 70, at 10–11, 38–39; see also Adoption of Recommendations, *supra* note 73, at 78, 162 ("Appropriations legislation presents agencies with potential coordination problems as substantive provisions or 'riders' may require technical drafting assistance, but agency processes for reviewing appropriations legislation are channeled through agency budget or finance offices.").

78. Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2186 (2016) (internal quotation marks omitted).

79. See *id.* at 2207–43, 2251–62.

80. *Id.* at 2263–64.

guidance that never gets judicially reviewed. Agencies make important enforcement decisions—to not enforce and to crack down—that courts do not have the tools to patrol. Some informal agency adjudications, such as expedited removal of noncitizens at the border, escape judicial review.

More formal agency adjudications may be subject to judicial review. Yet, at least in the context of mass agency adjudication, less-sophisticated, often lawyerless individuals lack the wherewithal and resources to seek judicial review of agency decisions. Even in the rulemaking context, *Chevron* “space” insulates certain agency policymaking from searching judicial scrutiny. Finally, the substantial role federal agencies play in the regular and appropriations legislative processes—as well as in the President’s budget process—all takes place in a world without courts.

Understanding this phenomenon of administrative law without courts should encourage us to rethink theories and doctrines in administrative law. So much scholarly attention has focused on refining judicial deference doctrines and standards of review to strike the right balance of allowing agencies to reasonably exercise their expertise yet reining in arbitrary exercises of agency discretion.⁸¹ If judicial review provides no safeguard against potential abuses with respect to these regulatory activities, we must turn to other mechanisms to protect liberty and the rule of law. Doctrine is not sufficient, nor is a myopically court-centric theory of administrative law.

Instead, we must develop a theory of administrative law that incorporates the various actors who can help monitor, constrain, and protect against agency abuse in regulatory activities that are insulated from judicial review. That does not mean we give up on judicial review. For instance, judicial mechanisms could include, as discussed in Part IV, courts utilizing their review of individual agency actions as an opportunity to play a more systemic role in agency processes. When reframed in light of administrative law without courts, administrative law’s theory of judicial review would focus not just on the individual cases that make it to court but also on how courts can have a more systemic effect on those administrative actions that never reach judicial review.

Reworking judicial review theory and doctrine, moreover, is not sufficient to address the phenomenon of administrative law without courts. Administrative law must look beyond courts for additional safeguards. Congress, for example, could better utilize its oversight powers to rein in

81. See *supra* note 9 and accompanying text.

instances of administrative law without courts.⁸² Agencies could address these issues by further developing internal administrative law,⁸³ exploring structural changes such as establishing and fortifying “offices of goodness,”⁸⁴ and strengthening internal separation-of-powers between political appointees, career civil servants, and civil society.⁸⁵ The President could no doubt also play a meaningful role.

This Article does not endeavor to develop these various potential safeguards in the modern administrative state, much less advance a theoretical framework that takes into account the phenomenon of administrative law without courts. Instead, my goal in this symposium contribution has been more modest: to introduce and categorize this phenomenon and to demonstrate the pressing need for further theoretical development and empirical investigation. In the modern era of governance predominated by regulation, we must look before beyond courts to discover adequate safeguards for our constitutional republic.

82. See generally CHAFETZ, *supra* note 62; see also Walker, *supra* note 76, at 1104 (“The [congressional] tools Chafetz has identified are quite powerful in shaping the principal-agent relationship between Congress and federal agencies and thereby influencing the vast regulatory activity discussed at the outset.”).

83. See generally Metzger & Stack, *supra* note 12.

84. See Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014).

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