

# U.C.L.A. Law Review

## Administrative Law Without Courts

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### 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.

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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!<sup>1</sup> 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.”<sup>2</sup>

Republicans, by contrast, have rekindled their interest in judicial review's “passive virtues,”<sup>3</sup> 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 actions<sup>4</sup> and condemnation of bureaucratic resistance in the “deep state” (that is, the civil service).<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> (I cast no stones here, as I too have fixated on courts and deference.<sup>10</sup>)

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.<sup>11</sup> Internal administrative law, for example, has become a hot subfield in administrative law.<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup>

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.”<sup>15</sup>

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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.”<sup>16</sup>

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.<sup>17</sup> 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.”<sup>18</sup>

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.<sup>19</sup> And it made

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*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 for 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.<sup>20</sup>

Hence, universities complied. Indeed, “[t]errified, administrators not only complied; they over-complied.”<sup>21</sup> 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.”<sup>22</sup>

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.<sup>23</sup>

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

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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.”<sup>24</sup>

## 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.<sup>25</sup> Indeed, the Supreme Court has even established doctrines and standards for preenforcement review of certain agency actions.<sup>26</sup>

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 . . .”<sup>27</sup> 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.”<sup>28</sup> 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

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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.”<sup>29</sup>

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.”<sup>30</sup>

### 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.<sup>31</sup> 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

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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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> “Yet,” Koh documents, “the vast majority of cases in which the government issues removal orders against noncitizens never reach the immigration courts.”<sup>35</sup> 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.<sup>36</sup> 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.”<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> The landscape of informal agency adjudication is vast

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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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

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.

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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](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.<sup>43</sup> As noted in Part III, immigration courts decide roughly 300,000 cases per year.<sup>44</sup> 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.<sup>45</sup> 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.”<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.”<sup>49</sup>

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

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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.”<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup> 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].”<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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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.<sup>56</sup> 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."<sup>57</sup> Agencies thus have *Chevron* policymaking "space" to regulate without judicial interference.<sup>58</sup>

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.<sup>59</sup> 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).<sup>60</sup>

*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.<sup>61</sup> Interestingly, the respondents seemed to suggest that federal

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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.<sup>62</sup> The agency respondents, moreover, understood quite well how administrative law's distinct deference doctrines affect agency win-rates on judicial review.<sup>63</sup> 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.<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> 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).<sup>67</sup> As for *Chevron*'s policymaking space, once the

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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.<sup>68</sup>

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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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,”<sup>72</sup> 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.<sup>73</sup> Moreover, agencies report

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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.<sup>74</sup>

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.”<sup>75</sup>

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

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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.<sup>76</sup> 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.<sup>77</sup>

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."<sup>78</sup> 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.<sup>79</sup> Agencies play a meaningful role in the process, though OMB career servants "take a front-line position in directing agency action."<sup>80</sup>

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

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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.<sup>81</sup> 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

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

instances of administrative law without courts.<sup>82</sup> Agencies could address these issues by further developing internal administrative law,<sup>83</sup> exploring structural changes such as establishing and fortifying “offices of goodness,”<sup>84</sup> and strengthening internal separation-of-powers between political appointees, career civil servants, and civil society.<sup>85</sup> 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.

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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).

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