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

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[†] ***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.

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

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

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 defaults 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

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 unchartered 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

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

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

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.