

# INTERNAL ADMINISTRATIVE LAW

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## ABSTRACT

*For years, administrative law has been identified as the external review of agency action, primarily by courts. Following in the footsteps of pioneering administrative law scholars, a growing body of recent scholarship has begun to attend to the role of internal norms and structures in controlling agency action. This Article offers a conceptual and historical account of these internal forces as internal administrative law. Internal administrative law consists of the internal directives, guidance, and organizational forms through which agencies structure the discretion of their employees and presidents control the workings of the executive branch. It is the critical means for shaping the discretion of officials and ensuring accountability within agencies. Internal administrative law's binding status in structuring agency decision marks it as a form of law.*

*This Article's project is one of recovery more than invention. The decade-long debate culminating in enactment of the Administrative Procedure Act (APA) reflected consistent recognition of internal controls' contributions to agency accountability. Despite this history, judicial enforcement of the APA undermined internal administrative law and constrained its content by treating the agency's articulation of internal norms that bind agency actors as triggering external judicial enforcement. At the same time, expanded White House control has made internal administrative law more centralized. Given the importance of internal administrative law to agency accountability and administrative legitimacy, the time has come for more sustained engagement with the idea of internal administrative law and measures to foster its development.*

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#### INTRODUCTION

To the parties in *United States v. Texas*,<sup>1</sup> the Obama Administration's immigration initiatives<sup>2</sup> represented either unilateral presidential usurpation

1. 136 S. Ct. 2271 (2016) (mem.) (per curiam).

2. See Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir. of U.S. Citizenship & Immigration Servs. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 3–5 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/LEC8-259V>]; see also Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/8JWQ-7RNQ>].

of lawmaking power or simply the standard executive tasks of statutory implementation and priority setting.<sup>3</sup> The Supreme Court split on which of these diametrically opposed accounts to adopt, affirming the Fifth Circuit's invalidation of the initiatives by an equally divided Court.<sup>4</sup> But from an alternative perspective, the initiatives were not just about the scope of presidential power. Instead, they raised a question that is central to modern administrative governance: What is, or should be, the role of internal administrative law in the U.S. administrative state?

Agencies act in myriad ways. Many are externally focused and aim at creating rights and imposing duties that bind third parties outside the agency.<sup>5</sup> Others, however, have an internal focus, targeting agency staff and operations or the executive branch more broadly.<sup>6</sup> Needless to say, no clear line differentiates these two; the internal and external dimensions of administrative action are closely linked and often hard to separate. Nonetheless, increasingly the internal, agency-facing sides of agency action are rising to the fore.

The immigration initiatives, enforcement policies adopted by the secretary of the Department of Homeland Security (DHS), were paradigmatic examples of internal administrative law. Adopted outside of notice-and-comment rulemaking, the policies identified several categories of undocumented aliens as priorities for deportation and others as eligible to apply for deportation relief.<sup>7</sup> Although these policies had a major impact on individuals outside of the executive branch—with an estimated five million aliens qualifying for deferred action—they were ostensibly aimed at DHS personnel and announced in the form of internal memoranda from the secretary to the heads of DHS's immigration units.<sup>8</sup>

More and more, presidents and executive branch officials rely on internal issuances and internal administration to achieve policy goals and govern effectively.<sup>9</sup> The causes of this agency move to internal administration are

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3. Compare Brief for the State Respondents at 76, *Texas*, 136 S. Ct. 2271 (No. 15-674), 2016 WL 1213267, at \*76 (arguing that the executive had unilaterally ignored immigration statutes), with Brief for the Petitioners at 74–75, *Texas*, 136 S. Ct. 2271 (No. 15-674), 2016 WL 836758, at \*74–75 (arguing that the executive complied with immigration law in creating enforcement priorities).

4. See *Texas*, 136 S. Ct. at 2272, *aff'd by an equally divided court* 809 F.3d 134 (5th Cir. 2015).

5. See, e.g., *What We Do*, NLRB, <https://www.nlr.gov/what-we-do> [<https://perma.cc/KY7P-3HLN>] (listing major categories of external-facing actions taken by the NLRB, including conducting elections, investigating charges, facilitating settlements, deciding cases, and enforcing orders).

6. See, e.g., *Casehandling Manuals Pts. 1–3*, NLRB, <https://www.nlr.gov/reports-guidance/manuals> [<https://perma.cc/7RS9-3WAW>] (providing detailed procedural and operational guidance to NLRB regional directors and their staffs for their use in addressing unfair labor practice and representation matters).

7. See Memorandum from Jeh Charles Johnson, *supra* note 2.

8. See *id.*; Memorandum from Janet Napolitano, *supra* note 2.

9. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 *YALE L.J.* 1836, 1849 (2015) [hereinafter Metzger, *Duty to Supervise*] (“Systemic administration and supervision . . .

varied: Most prominent perhaps is the overall trend towards administrative governance in response to polarized politics and legislative gridlock, a trend evident in growing reliance on regulatory measures in general, and not just on internal administrative law.<sup>10</sup> Other factors include searching judicial review and transformations in the form of regulation, such as greater privatization and devolution or the rising importance of national security and crisis governance.<sup>11</sup> Whatever the cause, the growing centrality of internal administration is evident across a broad range of substantive areas. To give just a few examples: interagency arrangements are important parts of recent environmental and financial regulation and national security initiatives;<sup>12</sup> guidance and enforcement policy play an increasingly central role in education and employment contexts;<sup>13</sup> and administrative oversight, negotiated

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are becoming even more important in contemporary regulatory and administrative contexts . . .”).

10. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1176–77 (2014) (describing internal White House review of agency decisions as a consequence of polarized politics); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 17–62 (2014) (describing how congressional gridlock has spurred agencies to employ existing statutes creatively to address new policy challenges); Kenneth S. Lowande & Sidney M. Milkis, “We Can’t Wait”: *Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 FORUM 3, 5 (2014) (describing congressional gridlock as encouraging increased use of executive power).

11. See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007) [hereinafter Mendelson, *Regulatory Beneficiaries*] (noting that the risk of an adverse judicial ruling increases agency incentives to use policymaking mechanisms not subject to judicial review); Metzger, *Duty to Supervise*, *supra* note 9, at 1849–58 (noting the importance of systemic administration and internal measures such as oversight in privatization, devolution, national security, and crisis governance contexts).

12. See, e.g., FED. ENERGY REG. COMM’N, EPA-DOE-FERC COORDINATION ON IMPLEMENTATION OF THE CLEAN POWER PLAN (2015), <https://www.ferc.gov/media/headlines/2015/CPP-EPA-DOE-FERC.pdf> [<https://perma.cc/HT58-WMMG>] (environmental regulation); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-81, DODD-FRANK REGULATIONS: REGULATORS’ ANALYTICAL AND COORDINATION EFFORTS 14–15 (2014), <http://www.gao.gov/assets/670/667633.pdf> [<https://perma.cc/6TMN-B5DM>] (financial regulation); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1169–73 (2012) (fuel economy standards); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 221–26, 228–29 (2015) [hereinafter Renan, *Pooling Powers*] (national security).

13. See, e.g., U.S. DEP’T OF LABOR, SEVERE VIOLATOR ENFORCEMENT PROGRAM 3–4 (2013), [http://www.osha.gov/dep/enforcement/svpep\\_white\\_paper.pdf](http://www.osha.gov/dep/enforcement/svpep_white_paper.pdf) [<https://perma.cc/M2Y P-G5S9>] (describing criteria for enhanced OSHA enforcement); Catherine E. Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice, Dear Colleague Letter on Transgender Rights 1 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/K6K9-Q3NL>] (“This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations.”); Renan, *Pooling Powers*, *supra* note 12, at 229–30 (describing interagency taskforce and initiative that combines environmental, FLSA, and criminal enforcement). On the increasing centrality of enforcement policy to regulation and presidential power, see Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1069–71 (2013).

agreements, and funding protocols have significantly affected the shape of contemporary federalism.<sup>14</sup> Equally, if not more, significant is the growing number of issuances from centralized entities like the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs (OIRA), governing everything from regulatory promulgation and analysis to agency use of guidance, budgeting, enforcement policy, and peer review.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> They are also heeding the insights of Jerry Mashaw, who emphasized the importance of internal agency administration decades before it was popular.<sup>18</sup>

But while administrative law scholarship and administrative reality have turned internal, the same is not true of administrative law as it is generally understood. The reigning model for administrative law doctrine continues

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14. See, e.g., Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 971–72 (2016) (identifying the importance of federal-state administrative negotiation, intergovernmental agreements, and supervision in a range of federalism contexts); Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 189–93 (2011) (describing antidiscrimination requirements for states' disbursement of federal funds).

15. See Regulatory Planning and Review, Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 note (2012); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES, 72 Fed. Reg. 3432 (Jan. 25, 2007) [hereinafter FINAL BULLETIN]; OFFICE OF MGMT. & BUDGET, M-05-03, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, 70 Fed. Reg. 2664 (Jan. 14, 2004) [hereinafter FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW]; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (2016) [hereinafter PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET].

16. The array of recent scholarship on these themes makes any comprehensive list impossible. For a few noteworthy works, see Rachel E. Barkow, Foreword, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129 (2016); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Freeman & Rossi, *supra* note 12; Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 468–71 (2015) [hereinafter Nou, *Intra-Agency Coordination*]; Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2207–42 (2016); and Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

17. See *infra* text accompanying notes 34–46.

18. See, e.g., JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 1–17, 213–17 (1983) [hereinafter MASHAW, BUREAUCRATIC JUSTICE]; Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 802 (1974).

to be external constraints on agencies imposed by Congress and the courts.<sup>19</sup> Under this model, internal administrative measures are often painted as unlawful efforts by agencies to evade external legal restrictions. Here again, the immigration initiatives are Exhibit A: in *Texas v. United States* both the federal district court and the Fifth Circuit held that DHS memos violated the externally imposed procedural constraints on agency action contained in the Administrative Procedure Act (APA).<sup>20</sup> Another prime example is the frequent complaint that agencies are using guidance and other forms of internal law to evade the procedural requirements of notice-and-comment rulemaking.<sup>21</sup>

Even when not portrayed as violating the APA, however, key features of internal administration—internal policies, procedures, practices, oversight mechanisms, and the like—are rarely viewed as part of administrative law.<sup>22</sup> Just as public administration and administrative law are distinguished as academic fields, so too are they viewed as distinct phenomena in the life of administrative agencies. The longstanding distinction between “law” and “politics” reinforces the sense that internal measures, often driven by policy concerns and political imperatives, should be excluded from the legal side of the ledger.<sup>23</sup>

Our goal in this Article is to offer a full-throated account of internal administrative law that challenges this received administration–law divide. We argue that many internal measures, ranging from substantive guidelines to management structures that allow for oversight of agency operations, qualify as forms of law. These measures not only bind and are perceived as binding by agency officials; they also encourage consistency, predictability, and reasoned argument in agency decisionmaking.<sup>24</sup> They frequently involve

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19. See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 313 (2012) [hereinafter MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION*]; Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 1 (2013).

20. *Texas v. United States*, 809 F.3d 134, 178–79 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.); *Texas v. United States*, 86 F. Supp. 3d 591, 671 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.).

21. See *infra* Section II.B.

22. See MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION*, *supra* note 19, at 278, 313.

23. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1424 (2012) (reviewing POSNER & VERMEULE, *supra*).

24. See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1122–23 (2013); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1993–2017 (2015) [hereinafter Stack, *Administrative Jurisprudence*] (defending rule of law principles of administrative governance); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6–9 (2008) (describing the influence of norms in institutions with the rule of law).

traditional lawmaking activity, including interpretation and enforcement of statutes, regulations, executive orders, treaties, and the Constitution.<sup>25</sup> Put together, they have many of the paradigmatic features of legal norms even if they lack the element of enforcement through independent courts. In arguing for the legal nature of internal administration, we are following and expanding upon the work of Jerry Mashaw, who—himself drawing on the early work of Bruce Wyman—has long advocated recognizing the status and importance of internal administrative law.<sup>26</sup>

Acknowledging the lawlike character of internal administration still leaves the concern that such internal measures are nonetheless unlawful because they undermine and conflict with external law, and in particular the APA. As a result, exploring internal administrative law's relationship to the APA is essential for assessing its current status and legitimacy. Building on our previous work on the internal administrative law and the APA,<sup>27</sup> we argue that, far from condemning internal administrative law, the APA embraced it. Preserving space for internal administrative law was an important goal of the APA and the compromise that it represented.<sup>28</sup> Unfortunately, this feature of the APA is one that courts often have ignored. Through several different doctrinal routes, courts have gradually occluded the APA's openings for internal administrative law and transformed internal measures into externally enforced constraints. At the same time, pressures for centralized White House control have led to the displacement of agencies' own internal law into versions of internal law that stem from central offices within the executive branch.

The history of internal administrative law's treatment under the APA carries broader jurisprudential and structural lessons. One lesson concerns the inherent tension of a joint internal and external law regime.<sup>29</sup> Once internal aspects of agency functioning become subject to external as well as

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25. See Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259, 268–70 (2015) (examining OIRA practice as a form of executive lawmaking); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 800–01 (2010) (discussing administrative constitutionalism).

26. See MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 18, at 9–15, 213 (evaluating internal law of administration that guides administrators as a basis for administrative justice); MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION*, *supra* note 22, at 223 (emphasizing the importance of a “robust internal law of administration”).

27. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law Before and After the APA*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 163 (Nicholas R. Parrillo ed., 2017).

28. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950) (“[The APA] settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”).

29. Scholars are increasingly suggesting the need to link internal and external constraints on agencies. See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 426 (2009) [hereinafter Metzger, *Internal and External Separation of Powers*]; Michaels, *supra* note 16, at 537–53 (describing the impact of intra-agency separation of powers on external actors).

internal regulation, these two forms of law are brought into closer connection and potential competition. With judicial enforcement of agency internal law dramatically constricting the room available for internal law, in both its agency-specific and more centralized forms, the net result may undermine rather than enhance systemic administrative legality. A second lesson is that the externalization of internal administrative law is a predictable response to the growth and entrenchment of the modern national administrative state and corresponding concerns to cabin administrative discretion.<sup>30</sup> Those concerns have increasingly surfaced of late, with the national government's turn to administration as a response to partisan polarization and legislative gridlock.<sup>31</sup> As a result, the pressures to expand external administrative law are only likely to grow.<sup>32</sup>

These dynamics create an urgent need to bring internal administrative law into the administrative law fold. Recognition of internal administrative law and the critical role it plays is essential to assess whether expansions of administrative government should be a source of concern—and if so, whether greater external constraints on agencies is the right response. To some extent, this recognition can be achieved by combining a revised historical account that acknowledges internal law's centrality to the APA system with statutory, regulatory, and doctrinal reforms that allow internal law to flourish. But a true embrace of internal administrative law requires more. It requires breaking down the current conceptual and institutional divide between administration and administrative law. A legal regime that envisions external control as the only protection against administrative abuse is fundamentally at odds with the logic of contemporary administrative governance. Such a regime will never be able to ease anxieties about the administrative state or successfully regulate the exercise of administrative power. Instead, core internal features of agencies—such as management structures, guidance, planning and coordination, civil service, professionalism, and the like—need to be recognized as central to administrative law, as they once were in administrative law's early years. As administrative law scholars are

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30. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 20–23 (1990).

31. See Bulman-Pozen, *supra* note 14, at 957–67; Farber & O'Connell, *supra* note 10, at 1176–77; Freeman & Spence, *supra* note 10, at 2–5.

32. In this regard, it is worth noting that over eighty administrative reform bills were proposed during the 114th Congress (2015–2016). See Memorandum from ACUS Interns to Reeve Bull, Research Chief, Admin. Conference of the U.S., Regulatory and Administrative Reform Legislation (Dec. 2, 2016), <https://www.acus.gov/sites/default/files/documents/Regulatory%20Reform%20Legislation%20Memo%2012-5-2016.pdf> [<https://perma.cc/X7LU-R489>]. Moreover, enactment of an omnibus measure containing most of these measures was an early priority of the new House of Representatives. Lisa Lambert, *Republicans Pass Sweeping Bill to Reform 'Abusive' U.S. Regulation*, REUTERS (Jan. 11, 2017, 7:50 PM), <http://www.reuters.com/article/us-usa-congress-regulations-idUSKBN14W02N> [<https://perma.cc/Q9YW-KNPY>].



increasingly realizing, administration needs to be recovered as part of the field of administrative law.<sup>33</sup>

The recent 2016 elections only reinforce the need for serious consideration of internal administrative law. To be sure, the federal government is now under unified Republican control, easing the incentive to resort to administrative power created by congressional gridlock.<sup>34</sup> But deep partisan division and significant obstacles to legislative enactment remain.<sup>35</sup> Moreover, a presidential transition involving transfer in party control of the executive branch, particularly one marked by a new administration's deep opposition to the policies of its predecessor, inevitably will entail significant internal executive branch action to reverse existing administrative measures. Internal administrative law will be central to those efforts, especially for actions that are not subject to external procedural requirements.<sup>36</sup> Indeed, early indications from the transition suggest that not just Obama Administration policies and regulations, but also longstanding executive branch practices and structures may be vulnerable to change during the Trump Administration.<sup>37</sup> Such a prospect might make those committed to our current

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33. For earlier works that particularly stress the need to link administration and administrative law, see, for example, Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007) (arguing *Chevron* misunderstands public administration as statutory interpretation); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010) (using the Gilded Age as focus for exploration of administration and its overlapping regimes of accountability, including legal accountability); Metzger, *Duty to Supervise*, *supra* note 9; Michaels, *supra* note 16; Robert C. Moe & Robert S. Gilmour, *Rediscovering Principles of Public Administration: The Neglected Foundations of Public Law*, 55 PUB. ADMIN. REV. 135 (1995) (discussing tensions between public administration as a legal and managerial enterprise); Nou, *Intra-Agency Coordination*, *supra* note 16; Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1098–99 (2016) [hereinafter Renan, *Fourth Amendment*] (arguing that administrative law insufficiently addresses agency action that takes nonlegislative form); and Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 577–78 (2011) (arguing that internal and external oversight strategies should complement each other).

34. See, e.g., Thomas Kaplan & Robert Pear, *House Clears Path for Repeal of Health Law*, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/13/us/politics/affordable-care-act-congress-budget.html> (on file with the *Michigan Law Review*).

35. See, e.g., Janet Hook, *Unparalleled Resistance Looms for Trump After Inauguration*, WALL ST. J.: WASH. WIRE (Jan. 10, 2017, 7:26 AM), <http://blogs.wsj.com/washwire/2017/01/10/unparalleled-resistance-looms-for-trump-after-the-inaugural> [<https://perma.cc/D7Y7-QSY8>]; David Stid, *Why the GOP Congress Will Stop Trump from Going Too Far*, WASH. MONTHLY, <http://washingtonmonthly.com/magazine/januaryfebruary-2017/why-the-gop-congress-will-stop-trump-from-going-too-far> [<https://perma.cc/C9L3-DVFL>].

36. E.g., Jordan Fabian & Jonathan Easley, *What Trump Can Accomplish on Day One*, HILL (Jan. 9, 2017, 6:00 AM), <http://thehill.com/homenews/administration/313140-what-trump-can-accomplish-on-day-one> [<https://perma.cc/TUH9-C6ZN>].

37. E.g., Coral Davenport, *Climate Change Conversations Are Targeted in Questionnaire to Energy Department*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/us/politics/climate-change-energy-department-donald-trump-transition.html> (on file with the *Michigan Law Review*) (describing efforts by the Trump transition to obtain information on career Energy Department staff involvement in climate change); Arden Farhi, *Will Donald Trump*

administrative state wary of expanding recognition of internal administrative law at this juncture, for fear of how such law might be used. Yet the concern that certain judicial review doctrines undermine internal administrative law and agencies' ability to function effectively retains traction notwithstanding a change in White House control. Equally important, we emphasize that internal administrative law both empowers and constrains. The constraints imposed by internal administrative law will be critical in resisting unlawful or excessive assertions of administrative power now, just as they have been in the past. Those constraints depend on recognition of internal administrative law's legitimacy for their continued vitality.

The Article proceeds as follows. Part I takes on the task of describing internal administrative law and justifying its status as law. It begins with setting out the wide ambit of measures that internal administrative law encompasses. The most commonly recognized forms of internal administrative law are the processes, guidelines, and policy issuances that an administrative agency adopts to structure the actions of its own officials.<sup>38</sup> Yet internal management structures, which allow for oversight of agency operations and enforcement of policies specified by agency heads, also constitute internal administrative law. Nor is internal administrative law limited to measures that exist within an agency. Transagency measures, in particular centralized White House oversight and coordination mechanisms, also qualify. This Part then defends the lawlike nature of these internal measures, emphasizing how they often involve traditional lawmaking activities and fit the criteria frequently invoked as essential to law. They are recognized as binding, and are critical for realizing traditional rule-of-law values of consistency, certainty, transparency, and reason giving. Part I concludes by identifying the role internal administrative law plays in realizing other demands on agencies, including their political accountability, managerial efficacy, and compliance with external legal demands.

Part II turns to examining internal administrative law's relationship to the APA. It looks at the decade-long debate on administrative reform, starting with the New Deal and leading up to the APA's enactment, to assess the role of internal law. This debate reveals a consistent and keen understanding of the central place of internal administrative law. While the eventual compromise struck in the APA placed greater external constraints on agencies,

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*Shut Down Any Federal Agencies?*, CBS NEWS (Nov. 23, 2016, 1:54 PM), <http://www.cbsnews.com/news/will-donald-trump-shut-down-federal-agencies> [<https://perma.cc/3CSP-XYCV>] (noting it is unlikely that President Trump would act on his campaign promises to abolish the EPA and Department of Education); Jeremy Venook, *The Trump Administration's Conflicts of Interest: A Crib Sheet*, ATLANTIC (Jan. 18, 2017), <https://www.theatlantic.com/business/archive/2017/01/trumps-appointees-conflicts-of-interest-a-crib-sheet/512711> [<https://perma.cc/B4TD-2RH3>] (describing the Trump Administration's apparent deviations from longstanding conflict of interest norms and requirements).

38. See MASHAW, *supra* note 22, at 252–54; BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* § 53, at 185 (Lawbook Exchange ed. 2014) (1903).

the APA did not seek to significantly displace or preempt internal administrative law but instead to preserve room for internal law's ongoing development. The APA required that internal administrative law be published but expressly exempted internal law from its procedural demands.

Part III then takes the story forward, looking at developments since the APA's enactment. Here, a very different picture emerges. A cluster of judicial doctrines has undermined the place of internal administrative law and constrained its content. Under these doctrines, the more that agencies articulate norms of internal law and management in a way that sounds binding or mandatory, the more they invite external judicial review of their actions. Agencies thus have an incentive to engage in subterfuge; to avoid external enforcement of their internal law, their internal norm setting is pushed to higher levels of generality and must deny that it seeks to constrain the discretion of agency actors. Equally important, the significant expansion of White House control over the executive branch has made internal administrative law much more centralized and less agency specific.

Part IV turns to reform. It asks how to best foster internal administrative law and restore its status to that conceived by the APA. One obvious route is to seek reform through external administrative law—new statutes or doctrinal changes that would restore space for internal administrative law and perhaps even encourage its development. But neither Congress nor the courts have shown much interest in developing internal administrative law in recent years—and questions exist as to the courts' competency to do so even if so inclined. We then take up a second route of reform, focusing internally on the president and agencies. Here, we outline areas for improvement with regard to how recent presidents have handled internal law, which provide an opportunity and challenge for the incoming administration. Ultimately these doctrinal and institutional efforts involve a conceptual and rhetorical reorientation: they entail challenging the popular and legal discourse that views administration as a persistent threat, not a system capable of law self-governance.

## I. INTERNAL ADMINISTRATIVE LAW

The meaning of "internal administrative law" seems at first intuitive. According to one standard definition, administrative law "comprises the body of general rules and principles, governing administrative agencies—governing both how they do their own work, and how the results of that work will be viewed, or reviewed, by the President, Congress, and the Courts."<sup>39</sup> Internal administrative law would seem simply that part of administrative law that occurs inside administrative agencies.

Yet on further reflection, the move to take administrative law internal is not so simple. What counts as internal administrative law can vary widely on several dimensions, such as content, source, audience, and scope. Measures

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39. PETER STRAUSS ET AL., *GELHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 11 (11th ed. 2011).

could represent internal administrative law because they govern actions within an agency, originate from within an agency, are aimed at an intra-agency audience, or some combination thereof. Internal administrative law could be limited in scope to measures that address only one agency or additionally encompass requirements that apply to the executive branch more broadly. This variation raises important definitional issues at the outset. A further set of questions concerns why internal agency measures should be considered law at all, and why internal administrative law is a category worthy of study and emphasis in the first place.

We take up these foundational questions in turn here, beginning with a description of the types of internal administrative law evident today and how the early distinction between internal and external administrative law has shifted over time. We next turn to defending internal administrative law as a form of law, and finally to identifying the crucial role it plays in advancing an agency's policy priorities and ensuring administrative accountability.

#### A. *Categories and Varieties of Internal Administrative Law*

Internal administrative law is not a novel concept. Over nearly twenty years, Jerry Mashaw has sought to move internal administrative law to the center of administrative law.<sup>40</sup> As part of this effort, Mashaw excavated from near obscurity the work of Bruce Wyman. Wyman was one of the first administrative law teachers at Harvard Law School, and his early twentieth-century treatise on administrative law helped create administrative law as a distinct field.<sup>41</sup> Wyman's treatise was built around a distinction between the internal and external law of administration. Wyman argued that "internal administrative law," not the external law of administration, was the "real subject" of inquiry.<sup>42</sup>

Wyman's treatise thus provides the fount and logical starting point for the project of evaluating internal administrative law.<sup>43</sup> For Wyman, external and internal administrative law differed in terms of their content: external administrative law concerned "the relations of the administration or of officers with citizens,"<sup>44</sup> while internal administrative law addressed "the relations of officers with each other, or with the administration."<sup>45</sup> Under Wyman's conception, internal administrative law consisted of the norms governing allocation of authority among the many actors within an agency and the practices by which their individual actions constitute collective action on the agency's behalf. Wyman saw that this law could be both written

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40. MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 18, at 1–17. For a helpful recent step in this direction, see Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 *WAKE FOREST L. REV.* 463 (2012).

41. Kevin M. Stack, *Reclaiming the "Real Subject" of Administrative Law*, *Introduction to WYMAN*, *supra* note 38, at III [hereinafter Stack, *Introduction to Wyman*].

42. WYMAN, *supra* note 38, § 4, at 14.

43. Stack, *Introduction to Wyman*, *supra* note 41, at XXIV.

44. WYMAN, *supra* note 38, § 2, at 4.

45. *Id.* §§ 2, 4, at 4, 14.

and unwritten. In its unwritten form, Wyman included “usages . . . established in every department”<sup>46</sup> that have the “force of law”<sup>47</sup> and operate as “precedents”<sup>48</sup> in orderly administration. Wyman recognized that internal administrative law in this unwritten form is sometimes discernible primarily as social fact or institutional practice—that is, part of what organizes individuals into collective or institutional action.<sup>49</sup> Wyman viewed internal law as having normative as well as positive content: it was concerned with the “proper” relations among officials,<sup>50</sup> and it established norms from which agencies or officials had to justify departures.<sup>51</sup>

When Wyman developed these distinctions at the beginning of the twentieth century, external administrative law was focused on judicial review and consisted of the common law mechanisms by which citizens could obtain relief from public officers for violation of their legal rights.<sup>52</sup> Over time, however, external administrative law expanded in scope to include a broad set of controls imposed on agencies.<sup>53</sup> As a result of the enactment of a wave of legislation that regulates administrative agencies—from the APA to the Information Quality Act—internal and external law can no longer be distinguished by their content, as they were for Wyman. Today, both internal and external administrative law may address the internal functioning of agencies, such as the procedures agencies must follow or the factors they must consider in their decisionmaking. The distinction between the two instead rests largely on source and scope: internal administrative law consists of measures governing agency functioning that are created within the agency or the executive branch and that speak primarily to government personnel. Although external administrative law similarly targets agency functioning, it comes largely from Congress and the courts and has a wider audience and binding effect—governing courts, private actors, and other interested outside parties as well as agency officials.<sup>54</sup> Yet the overlap of subject matter between internal and external administrative law means that today no clear line demarcates the two. Instead they are best identified as constituting a spectrum. At one extreme, internal administrative law has the agency as its sole source,

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46. *Id.* § 100, at 296.

47. *Id.* § 100, at 298.

48. *Id.* § 102, at 303.

49. *Id.* § 6, at 22–23.

50. *Id.* § 6, at 22.

51. Other leading administrative law scholars of the time, in particular Ernst Freund and Frank Goodnow, similarly underscored its importance. See FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 5 (1905); Ernst Freund, *Administrative Law*, in 1 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 452, 454–55 (Edwin R.A. Seligman & Alvin Johnson eds., 1930).

52. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION*, *supra* note 19, at 252–53; WYMAN, *supra* note 38, § 3, at 9–13.

53. See Mashaw, *supra* note 33, at 1366–67; Shapiro et al., *supra* note 40, at 464.

54. This restriction parallels the doctrinal distinction between legislative rules, which must be issued using notice-and-comment rulemaking and create legal rights and responsibilities outside the agency, and interpretive guidance. See *infra* Section III.A. As noted below,

object, and audience; at the other, external administrative law originates in statutes or judicial decisions, and imposes restrictions and obligations on agencies and private actors alike. But there are many points in between—for example, when agencies issue policy statements that appear aimed both internally and externally or impose internal procedural requirements that have an external effect.<sup>55</sup>

Much internal administrative law is still agency specific in the sense that it is adopted by an agency (or subpart of it) to govern its own conduct. The most easily recognized forms of internal administrative law today are the processes and guidelines that a particular agency adopts to structure the actions of its own officials and employees.<sup>56</sup> Take, for example, the process the Environmental Protection Agency (EPA) uses for developing recommendations for national ambient air quality standards under the Clean Air Act.<sup>57</sup> Although the Act imposes some procedural and substantive requirements, it leaves substantial room for the agency to decide how to proceed, and the EPA designed an elaborate process for decisionmaking.<sup>58</sup> Agencies also promulgate vast numbers of internal guidelines, instructing agency personnel on matters ranging from reimbursement to inspections to the meaning of governing statutes.<sup>59</sup> Prime examples here include the Occupational Safety and Health Administration's Field Operations Manual or the Center for Medicare and Medicaid Services' Provider Reimbursement Manual, which contain detailed instructions how agency personnel should conduct inspections and enforcement and the meaning of governing statutes.<sup>60</sup> These

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interpretive guidance is a paradigmatic form of internal administrative law. *See infra* Section III.A.2.

55. A prime example of the former are the Obama Administration's memoranda setting out criteria for granting deferred action to categories of immigrants in the country unlawfully. These were documents directed to immigration officials and employees, but plainly anticipated that immigrants in these categories would respond by filing applications for deferred action status. *See* memoranda cited *supra* note 2. As for internal procedures with external effect, see Lisa Heinzerling, *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 GEO. L.J. 927 (2014) [hereinafter Heinzerling, *Plan B Fiasco*], for a description of the FDA's deviation from usual internal procedures for approving moving a drug to over-the-counter status with respect to Plan B and the additional judicial scrutiny this deviation triggered.

56. *See* MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION*, *supra* note 22, at 252–54; WYMAN, *supra* note 38, § 53, at 185.

57. 42 U.S.C. § 7409 (2012).

58. WENDY WAGNER, *SCIENCE IN THE ADMINISTRATIVE PROCESS: A STUDY OF AGENCY DECISIONMAKING APPROACHES* 19–31 (2012), [https://www.acus.gov/sites/default/files/COR-Science-Project-Report-2-27-12-CIRCULATED-TO-COMMITTEE\\_0.pdf](https://www.acus.gov/sites/default/files/COR-Science-Project-Report-2-27-12-CIRCULATED-TO-COMMITTEE_0.pdf) [http://perma.cc/DZU3-5Q9M]; *see* Pasky Pascual et al., *Making Method Visible: Improving the Quality of Science-Based Regulation*, 2 MICH. J. ENVTL. & ADMIN. L. 429, 465–68 (2013); *see also* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1782 (2013) (noting agency discretion to choose from available regulatory instruments and procedures).

59. *See* Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468–69 (1992) (noting that “publication rules” such as technical guidelines and staff manuals are far more voluminous than formal rules).

60. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, CPL 02-00-159, FIELD OPERATIONS MANUAL (2015), [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_](https://www.osha.gov/OshDoc/Directive_pdf/CPL_)

manuals are promulgated within agencies, usually without public participation; they are aimed at agency employees charged with implementing statutes and regulatory schemes; and they address key aspects of agency functioning.

Yet internal administrative law as we conceive of it goes beyond process and policy issuances. It also includes the organizational forms agencies adopt to govern their own operations. Statutes may stipulate some basic details of agency structure, such as specific divisions or departments<sup>61</sup> and requirements for key agency personnel.<sup>62</sup> But a large number of agency oversight and review structures are agency created, ranging from informal rules governing what decisions an employee must run past her manager to formal complaint mechanisms to express requirements of sign-off by different subunits or high-level approval for certain decisions.<sup>63</sup> These internal administrative structures, deeply bureaucratic in character, are central to controlling the actions of agency personnel and determining how the agency operates.<sup>64</sup> The legal importance of administrative structures is an insight that early administrative scholars well recognized, but that then faded from view as administrative law grew more focused on courts and public administration developed into a separate field of inquiry.<sup>65</sup>

As this suggests, the range of internal administrative law is substantial. Agencies generate a vast amount of rules, procedures, and specifications

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02-00-159.pdf [https://perma.cc/R2BX-V28J]; *The Provider Reimbursement Manual – Part 1*, CMS.gov, <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021929.html> [https://perma.cc/9R6R-ZYAC].

61. See, e.g., 42 U.S.C. § 7403(a)(4) (requiring establishment of technical advisory committees on air pollution); Matthew D. McCubbins et al., *Structure and Process: Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 445–68 (1989) (detailing changes in statutorily required structures for EPA regulation of air pollution).

62. See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 927–30 (2009) (noting statutory constraints on who can be appointed to agency leadership).

63. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328–30 (2006) (internal mechanisms for staff to note disagreement with agency decision); Nou, *Intra-Agency Cooperation*, *supra* note 16, at 467–71 (describing internal clearance procedures); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 92–103 (describing tools available to ensure agency staff compliance); see also, e.g., U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-7.000 (1997) (setting authorization procedure for electronic surveillance).

64. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION, *supra* note 19, at 7; Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 409 (2007) (noting that agencies rely on handbooks, directives and other internal guidance documents to make more consistent and predictable decisions); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075 (2005) (arguing that agencies’ internal monitoring is essential for accountability).

65. See Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1520–34 (2015) [hereinafter Metzger, *Public Administration and ACUS*].

geared at agency personnel to govern how they undertake their jobs and to supervise their actions.<sup>66</sup> Some are officially promulgated and clearly identified as internally binding requirements; others emerge over time and take the form of unwritten norms and practices, as Wyman argued.<sup>67</sup> Some are obviously significant from a policy and agency-governance perspective and the subject of extensive deliberation, like the rules governing when and how U.S. attorneys can obtain wiretap authorizations.<sup>68</sup> Others are picayune and mindlessly bureaucratic, such as requirements regarding how employees apply for vacation time.<sup>69</sup> Yet all of these measures share the key characteristics of internal administrative law: they are measures generated by agencies to control their own actions and operations and aimed primarily at agency personnel. Rather than arbitrarily excluding certain measures from qualifying as internal administrative law, it seems more intellectually honest to recognize that internal administrative law contains a range of measures, some more significant for understanding how agencies function and approach their governance tasks than others.

In fact, the scope of internal administrative law is broader still, because it also includes executive branch measures that are not agency specific in the sense of adopted by an agency (or an agency subpart) to govern the agency's own conduct. It also includes the processes and policies governing inter-agency interactions, which similarly represent agency-generated efforts aimed at agency actors that seek to control how the agencies at issue function. Sometimes these processes and policies are jointly constructed, as when different agencies enter into memoranda of understanding (MOUs) that govern their interactions.<sup>70</sup> In other contexts, one agency may issue the procedures and policies that govern interagency engagement, and still in others, interagency processes may be governed more by uncodified conventions and norms.<sup>71</sup> Such interagency engagements often have a distinct substantive

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66. See sources cited *supra* note 64.

67. See WYMAN, *supra* note 38, §§ 99–101, at 294–303 (“It is the obvious fact that the rules governing administration are both written and unwritten . . . .”); Shapiro, *supra* note 19, at 5–10 (describing theories of the role of informal agency norms).

68. Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2522 (2012).

69. *Fact Sheet: Annual Leave (General Information)*, OPM.gov, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/> [<https://perma.cc/7S73-88YP>].

70. See sources cited *supra* note 12 for recent examples of MOUs.

71. See Freeman & Rossi, *supra* note 12, at 1155–73 (describing various methods of agency coordination); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 199 (2011) (providing examples of statutory mandates for inter-agency cooperation); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 820–22 (2015) (describing structures in which agencies share adjudicatory responsibilities); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1215–17 (2013) (describing convention of independent agency coordination with the White House); Daphna Renan, *The Law Presidents Make* (unpublished manuscript) (on file with authors) [hereinafter Renan, *Law Presidents Make*].



flavor, involving agencies with similar or shared statutory responsibilities.<sup>72</sup> But the fact that they are generated outside of an agency's confines does not take away from their fundamental internal character; a distinctive feature of these agreements is that they do not involve action by Congress, the courts, or other parties external to the executive branch.

By the same token, the spectrum of internal administrative law extends even further, to measures that emanate from central executive branch actors, such as the president, OIRA, and the attorney general.<sup>73</sup> These centralized issuances take familiar forms like executive orders, memoranda, bulletins, and circulars. They direct, guide, and inform how agencies operate and apply across the executive branch as a whole.<sup>74</sup> In their general and transsubstantive character, these measures perhaps most closely parallel external administrative law, yet their internal executive branch status is a critical feature of their role as mechanisms for presidential control. These issuances are also tools of management, a means by which centralized executive branch actors control the myriad area-specific agencies that make up the executive branch.<sup>75</sup> These issuances thus represent internal administrative law in a twofold sense: both as controls on agency action that emanate from within

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72. See Freeman & Rossi, *supra* note 12, at 1147–49 (describing agency coordination challenges in food safety, financial regulation, and border patrol); Marisam, *supra* note 71, at 187–90 (describing situations that produce overlapping statutory authority); Shah, *supra* note 71, at 814–20 (describing overlapping agency roles in immigration policy).

73. See Davidson & Leib, *supra* note 25, at 268–70 (noting that traditional administrative law has tended to underemphasize the role of centralized executive regulatory oversight); see also Exec. Order 12,250, 28 C.F.R. 298 (1981) (delegating to the attorney general responsibility for coordinating implementation and enforcement of Title VI and other civil rights statutes by federal agencies), reprinted in 42 U.S.C. § 2000d-1 note (2012); CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL (2017), <https://www.justice.gov/crt/case-document/file/934826/download> [<https://perma.cc/FS6L-JPBV>] (summarizing DOJ guidance and directives to federal agencies for implementing Title VI of the Civil Rights Act of 1964).

74. See, e.g., Regulatory Planning and Review, Exec. Order No. 12,866, 3 C.F.R. 638, 643 (1994) (imposing principles of regulation on agencies and creating a structure of review of agency regulation and planned regulatory actions), reprinted in 5 U.S.C. § 601 note (2012); Reducing Regulations and Controlling Regulatory Costs, Exec. Order No. 13,771, § 3(d), 82 Fed. Reg. 9339 (Jan. 30, 2017) (requiring agencies to comply with Director of OMB's cap on the total cost the agency's regulations may impose). Further examples abound, such as OMB Circulars A4 and A76, setting out requirements for how agencies should conduct the regulatory analysis required by Executive Order No. 12,866 and requirements for when agencies should contract this out. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-76 REVISED, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272–99 (2001) (describing varieties of formal tools of presidential control under Presidents Reagan, George H.W. Bush, and Clinton); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 693–719 (2016) (providing a detailed account of control mechanisms employed by Presidents George W. Bush and Obama).

75. See Metzger, *Duty to Supervise*, *supra* note 9, at 1892–93 (noting role of presidential managerial accountability through hierarchical forms of supervision); cf. Rubin, *supra* note 64, at 2120–24 (describing the mechanism of managerial accountability within agencies).

the executive branch and as requirements that force agencies to generate new internal processes, organization, and policy.

The preeminent example of this form of internal administrative law is Executive Order No. 12,866,<sup>76</sup> which sets out the system of centralized regulatory review. In addition to creating a detailed process under which agencies must submit their proposed and final rules to OIRA for review, Executive Order No. 12,866 also requires agencies to undertake cost-benefit analysis of certain rules, have regulatory policy officers involved at each stage of the regulatory process, develop a regulatory agenda, determine what their regulatory priorities are in the short-term, and coordinate with other agencies.<sup>77</sup> Yet another prominent example is the OMB's 2007 *Final Bulletin for Good Guidance Practices*, which stipulates procedures that agencies must follow in promulgating significant agency guidance, including both intraagency hierarchal review and centralized review by OMB.<sup>78</sup>

### B. *Internal Administrative Law as Law*

Internal administrative law thus includes internal procedures for agency action, structures of internal agency organization and allocation of authority, specifications for how agency actors are to make evaluations or conduct analysis, guidance about the agency's understanding of what statutes and regulations mean, informal agency practices, interagency agreements and norms, and centrally generated cross-cutting requirements for agency action. Having defined what we mean by internal administrative law, a central question rises to the fore: Why should we see this broad range of internal issuances and structures as *law*? Why not see it as simply administration and bureaucracy?

#### 1. The Characteristics and Values of Law

One important reason to call these measures law is that they share key characteristics and functions associated with law. A fundamental characteristic of law is that it provides content-independent reasons for action;<sup>79</sup> the fact that a norm is a legal norm supplies the agent to whom it is directed a

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76. 3 C.F.R. 638.

77. *Id.*

78. FINAL BULLETIN, *supra* note 15. Further examples abound, such as OMB Circulars A4 and A76, setting out requirements for how agencies should conduct the regulatory analysis required by Executive Order No. 12,866 and requirements for when agencies contract out. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-76 REVISED, PERFORMANCE OF COMMERCIAL ACTIVITIES (2003); *see also* Pasachoff, *supra* note 16, at 2207–43 (describing OMB's control of agency policymaking through the budget process).

79. *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 120–23 (2001) (providing account of law's claim to provide content independent reasons for action); JOSEPH RAZ, THE MORALITY OF FREEDOM 35 (1986).

reason to comply with its terms. The point is sometimes put even more strongly: norms must be thought independently binding to count as law.

Scholars take different views on the extent to which and ways a norm must bind to count as law. Curtis Bradley and Trevor Morrison offer a very inclusive view. On their account, a norm operates as a constraint “when it exerts some force on decisionmaking because of its status as law.”<sup>80</sup> From this perspective, so long as internal administrative norms provide agency officials *a reason* for action—even if not a particularly strong reason, much less a decisive one—the norm would have sufficient constraint or authority to constitute law. At the opposite extreme, some scholars take the view that law provides *preemptory or exclusive reason* for action—that is, that the norm’s status as law displaces other reasons for action.<sup>81</sup> From this perspective, the existence of an internal norm would have to supplant and exclude other reasons for action for internal administrative law to count as law. In between these two positions is the idea that a norm’s legal status provides a *presumptively overriding (or presumptively primary) reason* for action. The presumption might be overcome by other particularly strong reasons, but law is not just one reason among many possible considerations. Instead, this view makes a more stringent demand, requiring the norm be treated as mandatory and departed from only with significant justification.<sup>82</sup>

We need not definitively resolve this dispute regarding how binding or authoritative a norm must be to qualify as law. It is enough to note that as a mode of internal ordering within hierarchical structures, internal administrative law provides at least a presumptively overriding (or presumptively primary) reason for action—the middle point of this rough continuum. Whether or not they agree with internal administrative law on the merits, lower-level agency officials consider themselves bound to follow the edicts of higher-level agency personnel.<sup>83</sup> The extent to which internal administrative law binds agency leadership is more debatable; certainly, there are many instances of agency leaders deviating from established agency policy and

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80. Bradley & Morrison, *supra* note 24, at 1122 (emphasis omitted).

81. See H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 253 (1982) (providing account of authority what would “preclude or cut off independent deliberation”); see also COLEMAN, *supra* note 79, at 121 (characterizing Hart’s conception of preemptory reasons as those that “foreclose deliberation”).

82. This view is close to that of Joseph Raz who views legal authority as preempting deliberation about the basis for the authority (so called dependent reasons), but not precluding deliberation about whether to comply in light of the overall demands on the agent. See RAZ, *supra* note 79, at 46, 57–62 (defending law as providing preemptive reasons); see also COLEMAN, *supra* note 79, at 122 (providing account of Raz’s conception of preemptive reasons); Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 838–39 (1989).

83. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1261–62 (2006); see also MARISSA MARTINO GOLDEN, *WHAT MOTIVATES BUREAUCRATS?: POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* (2000).

practices.<sup>84</sup> The scope of constraint that internal administrative law imposes on the president is even harder to determine.<sup>85</sup> But the assessment of internal administrative law's bindingness should not be made at the upper echelon of the executive branch. Below this level, agencies' hierarchical and supervisory structures ground the force of internal administrative law: internal administrative law will have as much authority as those who issue it have over those to whom it is directed.

Although such bindingness is critical, it is not the only feature that renders internal administrative measures lawlike. These measures also often advance other values traditionally associated with the rule of law—specifically the values of authorization, notice, justification, coherence, and procedural fairness.<sup>86</sup> Internal administrative structures and issuances help identify the official policies of the agency, often identifying the authorization under which the agency itself acts in the process. In so doing, these internal measures provide the public and agency staff with notice of the agency's views, including the reasons for the agency's position. These internal mechanisms also foster coherent and consistent approaches to policy and implementation across the agency and often impose processes that regularize the agency's decisionmaking.<sup>87</sup> Indeed, for those skeptical of the lawfulness of agency action and internal measures, recognizing the ways in which internal measures

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84. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1277–78 (2006) (describing OIRA's shift toward more proactive intervention in rulemaking); John Leonard Watson, *The "New" OSHA: Reinventing Worker Safety and Health*, 12 NAT. RESOURCES & ENV'T 183, 183–84 (1998) (describing implementation of a variety of new agency practices).

85. Compare POSNER & VERMEULE, *supra* note 23, at 89, with Bradley & Morrison, *supra* note 24, at 1132–37.

86. Stack, *Administrative Jurisprudence*, *supra* note 24, at 1990–93 (defending these rule of law principles as most relevant to administrative government). Another feature often identified as necessary for law is generality. But whether law must be general is quite contestable. Generality is to central to rules. Not all law takes the form of rules, however, a fact particularly true of law within the executive branch. As Brian Tamanaha has argued, requiring generality “leaves out much of law” in this context, including enabling acts, measures abolishing or restructuring an agency, or appropriations. Brian Z. Tamanaha, *A Theory of Law in the Age of Organizations* 5–8 (Wash. Univ. in St. Louis Legal Studies Research, Working Paper No. 16-07-03, 2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2808774](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808774) [<https://perma.cc/8RZC-BMGY>]. Even Lon Fuller, an advocate of the generality of law with respect to law that affects private rights, argued that in the context of affairs between managing and subordinate government officials, the virtue of generality is a matter of expediency. LON L. FULLER, *THE MORALITY OF LAW* 208 (rev. ed. 1969).

87. For our purposes here, it suffices to note that internal administrative law advances these rule of law values. A further project is to rethink what the rule of law should mean within agencies, where there is a debate about which values and what way are most important to agencies. See, e.g., EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 198–203 (2005) (arguing that regularity and consistency are less important in administrative contexts, where agencies are faced with the challenge of implementing multiple statutes each of which represents political compromises); Leighton McDonald, *The Rule of Law in the 'New Regulatory State'*, 33 COMMON L. WORLD REV. 197, 215–21 (2004) (arguing that the rule of law needs to be reconceptualized, not rejected, to address new schemes of collaborative and decentralized governance); Stack, *Administrative Jurisprudence*,

can serve the rule of law may prove most important in demonstrating their legitimacy.

## 2. Externality Is Not a Precondition for Law

Internal administrative law not only structures and constrains how agencies act, but is also an integral part of the process of by which acknowledged forms of law—statutes and judicial decisions—are interpreted and implemented within the agency.<sup>88</sup> Given all of this, the more puzzling question is really why hasn't the legal character of these internal measures been broadly recognized? Put differently, why would there be any doubt that internal administrative law is *law*?

One reason might simply be its internal character. Agencies are not just the source of internal law; they are also its targets. Although internal administrative law can have significant practical impact outside the agency, it does not purport to bind private parties; again, its primary audience is agency personnel. Agencies are also internal administrative law's prime enforcers. Although courts have sometimes found agency internal issuances to be judicially enforceable,<sup>89</sup> overwhelmingly it is agencies who enforce these measures. Indeed, as discussed above, much internal administrative law is adopted precisely to achieve this enforcement and ensure that agency and executive branch leadership is able to exert control and oversight. Intuitively, this dominant internal aspect may make internal administrative law feel too distant from the external legal system to count as law (and especially so given the still lingering identification of law with the courts).

Yet on a little scrutiny, this intuition falls apart. Each of these features—that agencies are the source, targets, and enforcers of internal administrative law—is compatible with recognizing internal administrative law as law. The suggestion that agencies cannot be a source of law is particularly implausible. This claim simply cannot be squared with the legally binding effect of long-accorded agency substantive rules and adjudicatory orders. And if we accept that at least some agency issuances can have legal force and effect, the fact that agencies are the source of internal administrative law cannot be the basis for denying its legal status. The contention that norms must create rights and obligations for private parties in order to count as law<sup>90</sup> is equally untenable. This claim erroneously conflates the characteristics of a particular form of law, private law, with the more general category of law writ large. In

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*supra* note 24 at 2004 (suggesting that notice values apply to only those action-guiding elements of administration but also ground obligation to issue prospective guidance).

88. See *infra* Section I.C.

89. See *infra* Part III.

90. See, e.g., FULLER, *supra* note 86, at 207–08 (defining law as those norms structuring the “citizen’s relations with other citizens and only in a collateral manner his relations with the seat of authority”). See generally Frederick Schauer, *Law’s Boundaries* 37 (Nov. 15, 2016) (unpublished manuscript) (on file with the *Michigan Law Review*) (noting that jurisprudence over the law two centuries has expanded boundaries of law to include “a vast range of other authoritative sources directed to interpreting and applying” formal prescriptions).

fact, much public law is directed solely at public officials; on this view, most of the Constitution would not count as law. Moreover, as Edward Rubin argues, one of the main functions of legislation in the modern state is to create institutions, allocate duties and resources to them, and provide general guidelines for how those duties are performed.<sup>91</sup> But legislation in that modern form that does not itself impose any rights or duties on individuals; it creates structures of public administration.<sup>92</sup> Assuming we are not prepared to exclude that pervasive form of legislation from the category of law, it does not make sense to maintain that creating private rights and obligations is a necessary feature of law.

Nor, finally, does the fact that internal administrative law is only internally enforced disqualify it from legal status. To begin with, the spectrum of internal administrative law—ranging from purely intraagency measures to centralized edicts—means that often there may be an external enforcement dimension, in the sense of external to the agency even if not external to the executive branch. But external enforcement in this sense is not necessary to internal administrative law's legal status. The idea that an entity's enforcement of its own norms cannot be law proves too much, as it would also serve to disqualify the common law from legal status. The common law is a body of norms developed and applied by the courts alone. The fact that there is not an external overseer does not bar the common law from being law. What matters instead is that the norms be recognized as having special force, such that an official's defiance or failure to comply with them is grounds for disapproval and sanction, whether or not an external entity judges that compliance.<sup>93</sup> For example, a Supreme Court justice's recusal decision is not reviewable by any external authority.<sup>94</sup> But the rule that a justice should not serve in a proceeding "[w]here he has a personal bias or prejudice concerning a party"<sup>95</sup> is nonetheless a legal rule, and one that the justices seek to follow.<sup>96</sup>

This, however, leaves the possibility that the combination of all three features is too much and pulls internal administrative law outside of the ambit of what we recognize as law. Yet as discussed above, within an agency, internal administrative law has the central characteristic of legal norms: it

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91. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372 (1989).

92. Peter Cane, *Public Law in the Concept of Law*, 33 OXFORD J. LEGAL STUD. 649, 665–69 (2013) (providing an account of the place of public law within an account of law in modern legal systems).

93. See Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1929–30 (2016) (noting areas of the law in which entities judge their own compliance).

94. Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 403 (2012). In this article, Vermeule more generally dispels the notion that our legal system universally requires an external enforcer.

95. 28 U.S.C. § 455(b)(1) (2012).

96. See, e.g., JOHN ROBERTS, U.S. SUPREME COURT, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–10 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/K3G7-HAK8>].

provides content-independent and binding reasons for action. To be sure, the creation of private rights, which can be enforced by external institutions, are features of traditional legal norms. But insisting on either of these requirements for norms to qualify as law, regardless of how those norms operate and are perceived, is to hold the category of law apart from contemporary legal institutions and social practices. This view denies the social practice which recognizes law as operating as a structure that organizes government institutions. Prior efforts to identify law in formal terms have been subject to the criticism that they fail to capture the various forms that law takes.<sup>97</sup> We take a more positivist and functionalist approach here, one that focuses on how norms operate within government institutions. From such a functionalist and positivist perspective, purely internal agency issuances, structures, and practices can qualify as law.

### 3. Why Law and Not Administration or Management?

Even if these internal administrative measures can be seen as law, a question still remains as to why do so. Other scholars have acknowledged the binding and authoritative power of internal administrative measures, yet resisted denominating them law. Lon Fuller, for instance, acknowledged that managerial direction was a form of social ordering like law, but insisted on a dichotomy between the two.<sup>98</sup> Fuller reserved “law” for those norms structuring the “citizens relations with other citizens and only in a collateral manner his relations with the seat of authority,” with managerial direction governing “the relations between the subordinate and his superior.”<sup>99</sup>

More recently and pointedly, Edward Rubin has argued that the category of law obscures more than it clarifies about the operation of administrative government.<sup>100</sup> He views law as beholden to a concept of regularity or coherence that he finds lacking in the statutes that underlie the administrative state—statutes that contain a host of compromises and seek multiple goals.<sup>101</sup> Just as important, Rubin argues that evaluating statutes and administrative activity in terms of law privileges attainment of legal values above all other goals, including attainment of statutory aims in an efficient and fair manner.<sup>102</sup> Rubin urges that “we should bracket the concept of law . . . [and] suspend its claim to describe some aspect of our society in a useful and

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97. See H.L.A. HART, *THE CONCEPT OF LAW* 38–41 (1961). Edward Rubin raises the same criticism against Hart’s conception of law, arguing that it excludes much of law in an administrative state. RUBIN, *supra* note 87, at 199–201.

98. FULLER, *supra* note 86, at 207 (“Let me begin by putting in opposition to one another two forms of social ordering that are often confounded. One of these is *managerial direction*, the other is *law*.”).

99. *Id.* at 207–08.

100. RUBIN, *supra* note 87, at 197–207.

101. *Id.* at 197–203.

102. *Id.* at 202.

convincing way.”<sup>103</sup> In lieu of law, he urges us to adopt an “alternative concept of policy and implementation” to allow for a more realistic evaluation of administration.<sup>104</sup> Strikingly, Rubin acknowledges the contrasting strategy we adopt here, of “expand[ing] the term ‘law’ to include the entire range of modern governmental action.”<sup>105</sup> But he rejects such an approach because “many of the actions that will be included bear no relation to law’s established meaning,” risking greater confusion in understanding government.<sup>106</sup>

No doubt conceptualizing internal administrative operations in terms of law has costs, including potentially the confusion and downplaying of policy implementation that Rubin fears. But so does a narrow understanding of law that excludes internal administration. Such an approach cordons off law as a category for understanding and evaluation of the operations of administrative agencies, the dominant lawmaking and law implementation institutions of our society. It simultaneously suggests that these core governmental institutions exist and function outside of law. Drawing a line between the world of administration and the world of law is particularly troubling at a time when administrative government is challenged as fundamentally unlawful—challenges that are often premised on a denial of the very lawlike aspects of internal administration we emphasize here, or a similarly narrow understanding of law.<sup>107</sup> In our view, explicating the ways internal administration functions as law is more likely to prove a fruitful strategy for understanding—and defending—administrative government than insisting on a conceptual distinction between law and administration.

Most broadly perhaps, in a culture that prizes the rule of law as ours does, it is difficult to ground an account of administrative legitimacy without an account of how well administrative agencies embody rule-of-law values.<sup>108</sup> Recognizing internal administration as a form of law allows such an evaluation. Any institution or set of legal norms and practices embodies rule-of-law values in matters of degree,<sup>109</sup> and some traditional rule-of-law values may seem less applicable in administrative contexts. Thus, understanding how internal administration operates as law does not preclude the

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103. *Id.* at 203.

104. *Id.*

105. *Id.* at 208.

106. *Id.*

107. See, e.g., DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION’S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* (2015); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 6–7 (2014) (arguing that administrative government “runs outside the law” and “abandons rule through and under the law”). Hamburger focuses his claim that administrative law is unlawful on the ability of agencies to bind individuals outside the agency. He expressly excludes agencies’ ability to bind executive officials within the agency from his field of concern. HAMBURGER, *supra*, at 4. But this just reinforces how far of a gulf Hamburger perceives between administration and law. Despite seeing the exercise of binding force as the central concern of law, he rejects that binding within an agency raises any lawfulness concern.

108. McDonald, *supra* note 87, at 201–17.

109. Waldron, *supra* note 24, at 44.



possibility that such internal law may operate in some unique ways and nonetheless be legitimate. But any effort to rethink what the rule of law may require in administrative contexts, or how internal administration could be reformed to better advance applicable rule of law concerns, is premised on first understanding how internal administration functions as law.

### C. *The Critical Role of Internal Administrative Law*

External administrative law provides important means of agency control. Congress subjects agencies to procedural and substantive requirements, like the APA, that courts enforce.<sup>110</sup> Congress also conducts investigations and oversight, and further constrains agencies through exercise of the appropriations power.<sup>111</sup> These are important levers of agency control. Take, for example, the external law of judicial review. Grounded in the APA and common law doctrines, judicial review grants rights to relief from administrative action that does not comply with statutory requirements.<sup>112</sup> Moreover, in the process, courts have at times read these requirements expansively and developed doctrines of reasoned decisionmaking to which agencies must adhere.<sup>113</sup> As a result, agency action can be reversed for unexplained inconsistency with published rules upon which parties have relied,<sup>114</sup> for failure to abide by the processes set out in the APA, for lack of an adequate basis in evidence, or for failure to provide a sufficient justification.<sup>115</sup>

External administrative law clearly matters. But just as clearly, external administrative law alone is insufficient to yield agency compliance and adherence to governing requirements. Judicial review can provide an articulation of these requirements as well as a record of adjudications of conforming and nonconforming conduct. Implementation and actual satisfaction of these requirements, however, depends upon the agency's own practices, not

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110. See Matthew D. McCubbins et al., *supra* note 61, at 468–81.

111. Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766 (2010); David C.W. Parker & Matthew Dull, *The Weaponization of Congressional Oversight: The Politics of the Watchful Eye, 1947–2010*, in *POLITICS TO THE EXTREME: AMERICAN POLITICAL INSTITUTIONS IN THE TWENTY-FIRST CENTURY* 47, 63 (Scott A. Frisch & Sean Q. Kelly eds., 2013) (describing the increase in congressional investigations with divided government).

112. 5 U.S.C. § 706 (2012).

113. See, e.g., Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012) [hereinafter Metzger, *Embracing Administrative Common Law*]. But see Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1369 (2016) (arguing that courts apply a far more minimal rationality review than usually acknowledged).

114. Strauss, *supra* note 59, at 1486.

115. See, e.g., 5 U.S.C. § 706(2)(A); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1207 (2015) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 549 (1978)).

merely upon how an external overseer evaluates compliance. It is the internal structures that order collective action with the agency—whether in a hierarchical or decentralized fashion, through more adjudicative or rulemaking processes, with detailed guidelines or broad standards, loose monitoring or close supervision—that provide the systems through which agencies incorporate and heed, or neglect, external administrative law.<sup>116</sup>

Part of why external law is insufficient is the simple fact that external oversight, like judicial review, happens only episodically in agency life. To be sure, some forms of agency action, like significant rulemakings, will predictably end up in court. But the vast majority of agency actions and decisions, including those that lead to the adoption of a particular rule or policy, will never be subject to review. For any given agency, much less for any given bureau within an agency, a judicial decision validating or nullifying its analysis comes only infrequently and unpredictably. Specific features of our external administrative law enhance these limitations. Only “final” agency action is subject to review.<sup>117</sup> That means litigants may obtain review only of particular discrete actions of agencies, rather than the internal programs and structures that brought about those actions.<sup>118</sup> But it is those processes, rules, and organizational measures that structure the agency’s adherence to its statutory and administrative commitments.<sup>119</sup> Thus, even if judicial review were more frequent for any particular agency, the “final” agency action limitation prevents courts from addressing those features that more broadly control how agencies operate and perform their functions.

Judicial review also necessarily operates *ex post*, sometimes many years after the agency has taken the action. This means that even for the relatively few actions that are subject to review, any remedy of a violation of external administrative law comes at a time very distant from the violation. But effective control of an agency “requires *ex ante* constraints on the agency (that is, a means of restricting the agency’s decisionmaking before it actually makes policy choices),”<sup>120</sup> not merely nullifying them many years after.<sup>121</sup> Internal

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116. See Metzger, *Duty to Supervise*, *supra* note 9, at 1893–95; Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1691–93 (2011); Rubin, *supra* note 64, at 2075.

117. 5 U.S.C. § 704; *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891–94 (1990). Ripeness doctrine has also served to preclude challenges to general policies prior to actual application. See *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57–61, 64–65 (1993).

118. *Lujan*, 497 U.S. at 891 (holding that the requirement of final agency action means that individuals “cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made”); Metzger, *Duty to Supervise*, *supra* note 9, at 1872.

119. See Metzger, *Duty to Supervise*, *supra* note 9, at 1893–95.

120. McCubbins et al., *supra* note 61, at 433.

121. See LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* (2011) (emphasizing the internalization of rules and norms as being a more effective check than external controls and describing efforts by the military to encourage such internalization, such as integrating JAG officers into command structures); Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy Decisionmaking in Administrative Agencies*, 75 U. CHI. L. REV. 75, 106 (2008) (noting that *ex ante* controls may overcome shortcomings of *ex post* monitoring).

administrative law provides that ex ante mechanism of control; it includes the internal structure and measures that guide agency action as it develops and allows quick intervention and rectification when an agency actor goes astray.

Internal administrative law is thus critical for realizing external legal accountability. It is equally essential for managerial (or bureaucratic) accountability. Managerial accountability is accountability within the agency; it represents the extent to which subordinate officials within an agency are responsible and answerable to their organizational superiors.<sup>122</sup> Unlike judicial review, the manager is present and part of the organization, not an external evaluator, and the manager's oversight can thus be relatively continuous. Moreover, the manager has power and license not merely to nullify or sanction, but to teach, to inspire, to check, to cajole, to encourage, and to remedy any wayward action.<sup>123</sup> Managerial accountability is the means through which the organization's priorities become the priorities of the individuals within it. And internal administrative law is the medium of managerial accountability. It sets the processes, priorities, check-points, parameters, factors and means by which managers evaluate lower-level employees and officials. The National Ambient Air Quality Standards (NAAQS) process, for instance, is structured to ensure oversight by high-level agency officials while also preserving independent input from agency staff, middle managers, and outside experts.<sup>124</sup> The processes employed for drug review at the FDA or cost-benefit analysis at the SEC similarly combine opportunities for staff expertise with supervision by agency leadership.<sup>125</sup>

Internal administrative law's centrality to managerial accountability and in hierarchically structuring the agency's work also underlies its importance to political accountability. Political accountability, in part, constitutes agencies' responsiveness and answerability to Congress, through hearings, attention to congressional priorities, and the like.<sup>126</sup> But political accountability for agencies is also their responsiveness and answerability to the president

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122. See MASHAW, *BUREAUCRATIC JUSTICE*, *supra* note 18, at 214; Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 115, 120–21, 128–29 (Michael W. Dowdle ed., 2006) [hereinafter Mashaw, *Accountability*]; Rubin, *supra* note 64, at 2122–25 (providing an account of hierarchical and managerial accountability within agencies)

123. See Mashaw, *Accountability*, *supra* note 122, at 121 (explaining that public administration regime is characterized by continuous, managerial monitoring in which superiors can not only sanction but remake inferiors' actions); Rubin, *supra* note 64, at 2075 (arguing that agencies' internal monitoring is essential for accountability).

124. WAGNER, *supra* note 58, at 19–26.

125. Heinzerling, *Plan B Fiasco*, *supra* note 55, at 934–39 (describing FDA procedures); see Jennifer Nou, Note, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 *YALE L. & POL'Y REV.* 601, 621–22 (2008).

126. See MacDonald, *supra* note 111, at 767–70 (documenting the use of hundreds of appropriations riders on an annual basis to overturn agency policy decisions); Parker & Dull, *supra* note 111, at 52–54, 56–63 (examining trends in congressional investigations).

and, in turn, to his or her appointees within the agency.<sup>127</sup> Internal administrative law is essential for both. At the same time as they enable managerial accountability, the structures of internal administrative law also provide the means by which decisions and priorities of political leaders can be funneled down to guide and control the actions of the agency as a whole.<sup>128</sup> DHS's promulgation of immigration enforcement priorities and policies to better control immigration inspectors and other agency personnel, and ensure enforcement aligns with the policy priorities of the Obama Administration, is one prominent recent example of this phenomenon, but it is hardly alone.<sup>129</sup> Although the immigration orders came from within DHS, often the role of achieving presidential political accountability falls to internal administrative law issued by central executive branch entities like OMB or the White House.

Internal administrative law, in sum, has a heavy burden and a complex relationship with external law. It is the body of law and practice for operationalizing public goals and legality constraints within an agency. It is the means through which decisions made at the peak of the agency are translated through the agency hierarchy to have an impact on the lowest-level employees. Of course, simply identifying this role for internal administrative law does not mean that it always performs this job well. Internal administrative law also can be abused, with agency officials using internal issuances as a means of avoiding external legal or political constraints. But this possibility of abuse should not blind us from acknowledging internal administrative law's beneficial features and its critical role in ensuring the legitimacy and accountability of the administrative state.

## II. INTERNAL ADMINISTRATIVE LAW AND THE ENACTMENT OF THE APA

The Administrative Procedure Act created a default structure of administrative procedure, agency organization, and judicial review. Understanding the place of internal administrative law requires grappling with the status and place of internal administrative law under the APA. The APA has come

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127. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1763–67 (2007).

128. See Metzger, *Duty to Supervise*, *supra* note 9, at 1925.

129. See *supra* notes 1–8, 12–15 and accompanying text. To achieve this effect, internal administrative law needs to be able to bind lower-level officials, a point reinforced by OMB's 2007 bulletin on guidance. FINAL BULLETIN, *supra* note 15, at 3437, 3440 (stating that “agencies can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees without undertaking pre-adoption notice-and-comment rulemaking” and “[a]gency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence”); see also Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30,101, 30,103 (July 8, 1992) (stating that agencies may make “a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence”).

to symbolize the identification of administrative law with external constraints on agencies. But that identification, we argue in this Part, misreads the APA and the decade-long debate that produced it.

The APA arose out of efforts at administrative reform in which internal agency practice and organization were center stage. These reforms recognized the scope of internal administrative law existing at the time and the possibilities for greater coordination and consistency through an increased presidential role in administration. Two leading investigations of federal administration played a particularly important role in the lead up to the APA. One was undertaken by the President's Committee on Administrative Management (commonly known as the Brownlow Committee), and the other by the Attorney General's Committee on Administrative Procedure (the AG Committee). Both of these studies recognized and extolled internal administrative law's virtues, emphasizing the importance of internal law for improving the executive branch's operation and the quality of governance. Moreover, the APA itself clearly allows for a continuing role of internal administrative law, a result that its legislative history demonstrates was intended. While the APA did create more external administrative law than any single statute had previously or has since, the statute sought to recognize and preserve the space for internal administrative law to continue to develop within the broad confine the act established.<sup>130</sup>

#### A. *The President's Committee on Administration and Management*

Roosevelt's assumption of the presidency in 1932 marked the beginning of a dramatic expansion of the federal government. Along with that expansion came significant managerial and oversight problems.<sup>131</sup> The complicated structures of recently created agencies and opacity of their processes gave rise to challenges to agencies and their actions.<sup>132</sup> In 1936, in response to urging from public administration scholars as well as his own frustrations with coordinating the New Deal agencies and a desire for more centralized control, Roosevelt created a committee to study how to improve executive branch management.<sup>133</sup> The committee was composed of three leading figures in public administration—Louis Brownlow, the chair, as well as

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130. See *infra* text accompanying notes 208–221.

131. See HERBERT EMMERICH, *FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT* 47–48 (1971); BARRY D. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945*, at 156–57 (1983); see also LOUIS BROWNLOW, *A PASSION FOR ANONYMITY* 325 (1958) (describing discussions with FDR over creation of the committee).

132. JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 17 (2012) [hereinafter GRISINGER, *UNWIELDY*].

133. PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905–1996*, at 89–94 (2d ed. 1998) [hereinafter ARNOLD, *MANAGERIAL PRESIDENCY*]; Alasdair Roberts, *Why the Brownlow Committee Failed: Neutrality and Partisanship in the Early Years of Public Administration*, 28 *ADMIN. & SOC'Y* 3, 15–23, 28–29 (1996); see also Sidney M. Milkis, *The New Deal, Administrative Reform, and the Transcendence of Partisan Politics*, 18 *ADMIN. & SOC'Y* 433, 439–42 (1987) (arguing that FDR was committed to strengthening the president's power and national administrative capacity).

Charles Merriam and Luther Gulick.<sup>134</sup> After a year's worth of intensive study—including a trip to Italy to study the administrative successes of Mussolini's government<sup>135</sup>—the Brownlow Committee issued its recommendation and final report in January 1937.<sup>136</sup>

The Brownlow Committee report did not speak in terms of internal administrative law. Instead its lexicon was that of the newly emerged field of public administration, with the latter's emphasis on effective management, efficiency, and administrative organization.<sup>137</sup> Nonetheless, the report focused its attention on what we argue here is part of internal administrative law—specifically, the mechanisms that enable greater policy and managerial control within agencies and across the executive branch as a whole.<sup>138</sup> The urgent need to strengthen and expand such control was the report's central theme. In the eyes of the Committee, reorganizing the executive branch to provide such internal control was essential to achieve regularity, uniformity, efficacy, and above all democracy in government administration—many of which are values often identified as central to the rule of law.<sup>139</sup> As the report put it, “[S]afeguarding . . . the citizen from narrow-minded and dictatorial bureaucratic interference and control is one of the primary obligations of democratic government” and requires “so centralizing the determination of administrative policy that there is a clear line of conduct laid down for all officialdom to follow.”<sup>140</sup>

Chief among the report's recommendations was a strong call for reorganizing the executive branch to enhance presidential power: “[T]he establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management.”<sup>141</sup> The recommendation for which the Brownlow Committee is perhaps most famous was its call for an end to independent agencies—for which it coined the term a “headless fourth branch.”<sup>142</sup> According to the report, independent agencies' functions should have been transferred to executive departments, with the agencies' policy and administrative activities folded into the departments and their

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134. ARNOLD, *MANAGERIAL PRESIDENCY*, *supra* note 133, at 89–96; RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT* 11–15 (1966); Roberts, *supra* note 133, at 15–23, 28–29.

135. See IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 53–54, 93–94 (2013).

136. See PRESIDENT'S COMM. ON ADMIN. MGMT., *REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT* (1937) [hereinafter *BROWNLOW REPORT*]; see also KATZNELSON, *supra* note 135, at 54 (describing the Brownlow Committee's admiration for Mussolini's administration).

137. *BROWNLOW REPORT*, *supra* note 136, at 2–3.

138. See *id.*

139. *Id.*

140. *Id.* at 33.

141. *Id.* at 2; see also ARNOLD, *MANAGERIAL PRESIDENCY*, *supra* note 133, at 100–07; EMERICH, *supra* note 131, at 52.

142. *BROWNLOW REPORT*, *supra* note 136, at 32, 53.

adjudicatory functions retaining independence.<sup>143</sup> The report also recommended expanding the president's staff, centralizing core management functions in agencies over which the president could exercise direct control, transferring accounting and disbursement power from the comptroller general to the Treasury department, and providing the president with broad authority to reorganize the executive branch without the need for congressional involvement.<sup>144</sup> Although noting that some might see enhanced presidential power as autocratic, the Committee was adamant that greater presidential control over the executive branch was essential for democracy: "Those who waver at the sight of needed power are false friends of modern democracy. Strong executive leadership is essential to democratic government today."<sup>145</sup>

In addition to greater presidential supervision of the executive branch writ large, the report advocated restructuring individual agencies so that agency leaders could exercise greater managerial and policy control. According to the report, "It is essential to provide for direction and control of the work of each department by a small number of policy-determining officers at the head."<sup>146</sup> Included in the final report were a series of staff studies of specific features of federal agency management, written by Arthur MacMahon, which similarly emphasized the importance of stronger oversight within agencies. Agencies needed to be restructured so that the department head could "deal effectively with questions of policy, both in point of formulation and of execution,"<sup>147</sup> and "impose the coordinating supervision which is [the department's] prime reason for existence."<sup>148</sup> Put in our terms here, agency restructuring was needed to foster internal administrative law.

The Brownlow Committee issued only one staff study on administrative procedure, addressing rulemaking, and that study did not make it into the

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143. *Id.* at 46.

144. ARNOLD, MANAGERIAL PRESIDENCY, *supra* note 133, at 103–07; *see also* Roberts, *supra* note 133, at 7–10. Some of the Brownlow Committee's proposals for expanded presidential authority, such as its recommendation that the Bureau of the Budget be moved into the White House, reflected substantive policy goals that the Committee members shared with FDR. *See* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 21–22 (1995). Central among these was a desire to provide a mechanism by which the national government could play a stronger planning role in the economy. *See* Milkis, *supra* note 133, at 442–44.

145. BROWNLOW REPORT, *supra* note 136, at 53.

146. *Id.* at 39.

147. *See* Arthur W. MacMahon, *Departmental Management*, in BROWNLOW REPORT, *supra* note 136, at 247, 251; *see also* Herbert Kaufman, *Administrative Management: Does Its Strong Executive Thesis Still Merit Our Attention?*, 67 PUB. ADMIN. REV. 1041, 1041–43, 1045 (2007) (describing staff reports on internal agency management).

148. MacMahon, *supra* note 147, at 252. Interestingly, in contrast to current debates which pit political control and the civil service against one another, *see generally* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008) (describing efforts to circumvent civil service requirements in the name of political control), the Brownlow Committee saw no such conflict. It paired its calls for greater presidential and agency leadership control with a recommendation that the

Committee's final document.<sup>149</sup> Still, this rulemaking study displays a sophisticated approach that invoked several forms of internal administrative law. One was in the form of administrative structure. The report urged vesting rulemaking authority in department heads, though also subject to presidential direction.<sup>150</sup> But the report also recognized that presidential oversight could itself be used to foster greater agency use of internal law.<sup>151</sup> As a result, the report emphasized that presidents should employ their oversight powers to regularize the rulemaking process as well as "guide [department heads'] discretionary choices."<sup>152</sup> In the goal of regularization, the report urged presidents to require that "each department set up a regularized procedure for the flow of rules . . . in the course of their preparation and issuance."<sup>153</sup> These procedures should contain certain key elements, such as requirements of consultation with affected groups prior to issuance; review and clearance of proposed rules by agency lawyers, trained regulatory drafters, and technical experts; and publication of rules upon issuance.<sup>154</sup> Of particular note from an internal law perspective is the report's differentiation of substantive, interpretive, and managerial rules,<sup>155</sup> given that managerial rules and (to a lesser extent) interpretive rules are primarily directed at the agency itself. The report also urged centralized clearance of rules through the Bureau of the Budget, justifying this move as needed to ensure policy coordination across the executive branch and consistency with presidential views<sup>156</sup>—the same terms used today in defense of centralized regulatory review through OIRA.<sup>157</sup> The report thus sought to develop three distinct types of internal administrative law: presidentially devised procedures that agencies would govern rulemaking across the executive branch, agency-specific requirements developed as a result of presidential instigation, and a presidential review process that would operate once agency procedures were complete.

Roosevelt embraced the Brownlow Committee's recommendations for executive reorganization. But the legislation he proposed incorporating these

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federal civil service expand "upward, outward, and downward," to ensure that a federal government career would attract "personnel of the highest order" and allow development of expert and permanent agency management. BROWNLOW REPORT, *supra* note 136, at 7; MacMahon, *supra* note 147, at 265–70.

149. See Stephanie P. Newbold & David H. Rosenbloom, *Critical Reflections on Hamiltonian Perspectives on Rule-Making and Legislative Proposal Initiatives by the Chief Executive*, 67 PUB. ADMIN. REV. 1049, 1049–51 (2007) (discussing the rulemaking report and theorizing as to why it was not included with the other staff reports).

150. See James Hart, *The Exercise of Rule-Making Power*, in BROWNLOW REPORT, *supra* note 136, at 309.

151. *Id.* at 329–30.

152. *Id.* at 314.

153. *Id.* at 338.

154. *Id.* at 317–18, 338–41.

155. *Id.* at 319–53.

156. *Id.* at 351–52.

157. See Exec. Order No. 12866, §§ 2(b), 4, 6(b), 3 C.F.R. 638, 644–48 (1994), *reprinted as amended* in 5 U.S.C. § 601 app. at 802, 804–06 (2012).



recommendations faced a hostile response from Congress.<sup>158</sup> To some extent, this response resulted from poor timing on the part of the administration. Roosevelt put forth his famous court-packing plan just a few weeks after the Brownlow executive reorganization legislation was submitted in January 1937. Both proposals fueled charges that Roosevelt was seeking dictatorial powers, particularly against the background of the rise of fascism and totalitarianism in Europe and the Soviet Union.<sup>159</sup> The executive reorganization bill also ran into conservative opposition in signaling that the invigorated national administrative state of the New Deal was here to stay.<sup>160</sup> In the end, even Democrats voted against the bill in large numbers, and it went down to defeat in April 1938.<sup>161</sup>

Despite this lack of immediate results, the Brownlow Committee's effort to strengthen presidential powers over administration ultimately proved successful. Roosevelt himself obtained some reorganization authority a year later in 1939, and the Hoover Commission ten years later brought about a major expansion of the president's administrative capacity and managerial role.<sup>162</sup> Chaired by the former president, the Hoover Commission was created by a Republican Congress in 1947 as part of an effort to retract the broad national administrative state left by the New Deal and World War II. But to the consternation of its founders, the Hoover Commission adopted a stance similar to the Brownlow Committee.<sup>163</sup> It too urged strong internal presidential oversight of the executive branch, justifying centralized presidential managerial and policy control as necessary for political accountability.<sup>164</sup> In the Commission's words: "The President, and under him his chief lieutenants, the department heads, must be held responsible and accountable to the people and the Congress for the conduct of the executive branch. Responsibility and accountability are impossible without authority—the power to direct."<sup>165</sup> In the face of now bipartisan support, Congress enacted

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158. See ARNOLD, *MANAGERIAL PRESIDENCY*, *supra* note 133, at 107–15; POLENBERG, *supra* note 134, at 28–51.

159. BRINKLEY, *supra* note 144, at 22.

160. Among other things, the bill (following the Brownlow report) proposed creating two new federal administrative departments to accommodate the Works Progress and Public Works Administrations, two New Deal emergency relief measures that conservatives hoped would be temporary. Milkis, *supra* note 133, at 448; see also Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 *TAX L. REV.* 73, 103–05 (2015) (examining the benefits of published statement of nonenforcement by the IRS).

161. See BRINKLEY, *supra* note 144, at 22.

162. See EMMERICH, *supra* note 131, at 89–90; Peri E. Arnold, *The First Hoover Commission and the Managerial Presidency*, 38 *J. POL.* 46, 47–49 (1976).

163. See Arnold, *supra* note 162, at 47–50.

164. EMMERICH, *supra* note 131, at 88–90; RONALD C. MOE, *THE HOOVER COMMISSIONS REVISITED* 34 (1982); see ARNOLD, *MANAGERIAL PRESIDENCY*, *supra* note 133, at 128–29; GRISINGER, *UNWIELDY*, *supra* note 132, at 154. The Commission also argued for greater decentralization of operations and standards to agencies and strengthening the role of operating heads. See EMMERICH, *supra* note 131, at 90–91.

165. *THE HOOVER COMMISSION REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT* 3 (1949).

many of the Hoover Commission's recommendations for greater presidential and agency head control.<sup>166</sup>

B. *The Attorney General's Committee on Administrative Procedure*

The AG Committee pursued a different aspect of federal administration. Rather than focusing on executive branch structure and management, the AG Committee trained its attention on administrative procedure. Moreover, the AG Committee was also more reactive than the Brownlow Committee. Although also commissioned by President Roosevelt, the AG Committee was created more to fend off proposed legislative reforms than as a proactive move to cement presidential power.

The story of the AG Committee and its lead up to the APA is a familiar one.<sup>167</sup> In 1933, the American Bar Association (ABA) formed a Special Committee on Administrative Law as a means of opposing the expansion in federal government and regulation associated with the New Deal.<sup>168</sup> It was not until 1937, when the Supreme Court started to uphold the New Deal's constitutionality, that the ABA Committee turned its energies to administrative procedure.<sup>169</sup> Fueled by perceptions of Roosevelt's growing political vulnerability—in part due to the failure of Brownlow executive reorganization bill—the ABA Committee put significant effort into its campaign for administrative procedural reform.<sup>170</sup> Led by Roscoe Pound, the dean of Harvard Law School, the ABA Committee argued for greater procedural constraints and expanded judicial review as necessary to curb the “administrative absolutism” of the Roosevelt Administration.<sup>171</sup> Although separate from the debate over the executive reorganization proposal, the ABA Committee's charge of absolutism played to similar fears that Roosevelt was seeking dictatorial powers.<sup>172</sup>

The ABA incorporated its reform recommendations into proposed legislation which was then introduced in Congress in 1939.<sup>173</sup> The Walter-Logan bill, as it came to be called, required hearings for agency adjudication and rulemaking, imposed time limits on regulation, and expanded access to the courts to challenge administrative action.<sup>174</sup> Seeking to undermine the growing momentum for administrative reform, Roosevelt directed the attorney

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166. See EMMERICH, *supra* note 131, at 95–98; Arnold, *supra* note 162, at 48–50, 70.

167. For leading accounts of the background of the APA's enactment, see GRISINGER, UNWIELDY, *supra* note 132, at 59–108. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

168. Shepherd, *supra* note 167, at 1569–70.

169. *Id.* at 1580–82.

170. *Id.* at 1585–86, 1590–91.

171. *Id.* at 1590–91; *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 342 (1938).

172. Shepherd, *supra* note 167, at 1585, 1591.

173. *Id.* at 1582, 1594, 1598.

174. H.R. 6324, 76th Cong. (1939); Shepherd, *supra* note 167, at 1582–83, 1598–1600.

general to form a committee to study administrative procedure and invoked the need to await the AG committee's recommendations as grounds for vetoing the Walter-Logan bill.<sup>175</sup> The AG Committee then spent nearly two years, from 1939 to 1941, thoroughly investigating "how the Federal administrative agencies do actually conduct their business," generating twenty-seven monographs on particular agencies and programs.<sup>176</sup>

These monographs documented the pervasiveness of internal administrative law. Agencies engaged in extensive self-regulation, imposing procedures on themselves that were not required by statute.<sup>177</sup> To some extent, agencies adopted these procedures in response to judicial decisions and governing case law.<sup>178</sup> But they also perceived these additional procedures as important for good decisionmaking and effective operation.<sup>179</sup> Thus, for example, agencies engaged in rulemaking regularly provided opportunities for affected interests to comment on proposed rules, explaining that such consultation ensured "not only that the regulations may be substantially improved, but also that the tendency to violate them is greatly diminished."<sup>180</sup> Agencies developed informal dispute resolution processes as well as formal trial-type procedures for use in hearings, including procedures for internal administrative appeal and for separating hearing examiners from the rest of the agency.<sup>181</sup> Agencies even subjected themselves to hearing requirements in contexts when they were not statutorily required.<sup>182</sup> Equally significant, agencies promulgated general policies and interpretations that they then relied on in operating programs and undertaking their other statutory responsibilities.<sup>183</sup> Agencies also structured their operations, issuing "statements of their own internal organization—their principal offices, officers, and agents; their divisions and subdivisions; or their duties, functions, authority, and places of business."<sup>184</sup>

The Committee emphasized the importance of these types of internal law, arguing not just that agencies were authorized to promulgate them, but

175. H.R. Doc. No. 986, at 3–4 (1940) (noting FDR had, a year earlier, directed the attorney general to review the entire administrative process and make recommendations); Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 387–91 (2008) [hereinafter Grisinger, *Law in Action*].

176. Grisinger, *Law in Action*, *supra* note 175, at 389–90 (quoting Walter Gelhorn, "Informal Talk" to the Department of Justice et al. (Aug. 9, 1939)).

177. ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT 5 (1941) [hereinafter FINAL REPORT]; Grisinger, *supra* note 175, at 392–99, 401–02.

178. See Grisinger, *Law in Action*, *supra* note 175, at 382–85.

179. See *id.* at 401–04.

180. FINAL REPORT, *supra* note 177, at 103–05, ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, MONOGRAPH ON BUREAU OF MARINE INSPECTION, S. DOC. 76-186, at 33–34 (3d. Sess. 1940); Grisinger, *Law in Action*, *supra* note 175, at 401–02.

181. FINAL REPORT, *supra* note 177, at 61, 63, 65–66, 68–69, 107; GRISINGER, UNWIELDY, *supra* note 132, at 69–70.

182. FINAL REPORT, *supra* note 177, at 107.

183. *Id.* at 26–27.

184. *Id.* at 26.

further that agencies had a “duty . . . to issue such information.”<sup>185</sup> It also was clear the Committee considered these issuances to be part of administrative law. As the Committee put it:

Rules and regulations are not the only materials of administrative law. There are, in addition, the statutes . . . the decisions of each agency . . . the agencies’ reports to Congress . . . the interpretative rulings made by the agencies or their general counsel . . . press releases, notices, speeches, and other statements of policy . . . and the decisions of the courts.<sup>186</sup>

The Committee agreed on the importance of judicial review, arguing that judicial review should generally be available “to speak the final word on interpretation of law . . . at least . . . [to] inquir[e] whether the administrative construction is a permissible one.”<sup>187</sup> But it emphasized that “reliance must be placed on controls other than judicial review,” including “internal controls in the agency,” in order “[t]o assure enforcement of the laws by administrative agencies [stays] within the bounds of their authority.”<sup>188</sup> Moreover, “even in the sphere in which judicial review is available important private interests must still be left to the practically unreviewable judgment of the administrative tribunals and reliance be placed on other controls for the fair exercise of that judgment.”<sup>189</sup>

In the end, the AG Committee concluded that little basis existed to support claims of administrative abuse.<sup>190</sup> To the contrary, the Committee’s Final Report maintained that “[i]n the best existing practices are embodied the fundamentals of fair administration.”<sup>191</sup> Of particular note, the Committee recommended that agencies increase and improve their use of internal law.<sup>192</sup> The Committee encouraged agencies to “stat[e] for the guidance of agency officials those policies which have been crystallized, and which the responsible officers need only apply to the case at hand.”<sup>193</sup> Combined with periodic reporting, such policy statements would allow agency heads to delegate and decentralize administration while preserving sufficient central oversight. This would also enable agency heads to retain control and focus on those matters for which policy was undecided or difficult to apply.<sup>194</sup> The Committee also encouraged greater internal law development outside individual agencies. It recommended creation of an Office of Federal Administrative Procedure, to ensure continued study greater uniformity, and

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185. *Id.*

186. *Id.*

187. *Id.* at 78.

188. *Id.* at 76.

189. *Id.* at 77.

190. Grisinger, *Law in Action*, *supra* note 175, at 392.

191. FINAL REPORT, *supra* note 177, at 5.

192. *Id.* at 26.

193. *Id.* at 23.

194. *Id.*

practical improvements in administrative procedure from within the executive branch.<sup>195</sup>

As important to the Committee was that this internal law be published. It took a strong position in favor of publication, stating “that whenever a policy has crystallized within an agency sufficiently to be embodied in [an internal] memorandum or instruction to the staff . . . it should be put into the form of a definite opinion and published [for the public] as such.”<sup>196</sup> Here the Committee found current agency practice to be wanting, stating that “[a]n important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure.”<sup>197</sup> The Committee condemned such secrecy: “[T]he officers of some of the agencies are controlled in their dealings with outsiders by instructions or memoranda which they are not at liberty to disclose. Rarely, if at all, is there justification for such a practice.”<sup>198</sup> Instead, once agency policy was “sufficiently articulated to serve as real guides to agency officials,” it should be published.<sup>199</sup>

The Committee’s proposed bill recommended a number of changes in how specific agencies and programs operated, but it did not suggest procedures or requirements that would apply across the executive branch as a whole.<sup>200</sup> It concluded such a unified code would be inappropriate given the diversity among agencies and types of administrative action.<sup>201</sup> The more conservative Committee members disagreed with this stance, and three of them produced a minority report proposing such a general code of administrative procedure.<sup>202</sup> Strikingly, however, the Committee was unanimous on the importance of agencies increasing their use and dissemination of internal law. Indeed, the Committee’s dissenting members invoked the Brownlow Report in support of their view that “[m]ore important than any other matter in day-by-day administration and adjudication is the necessity for the delegation of authority within an agency.”<sup>203</sup>

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195. *Id.* at 6, 123–24.

196. *Id.* at 29; see also A.H. Fuller, *Administrative Law Investigation Comes of Age*, 41 COLUM. L. REV. 589, 593 (1941) (commenting on the Committee’s insistence on publication and criticizing it as too categorical).

197. FINAL REPORT, *supra* note 177, at 25.

198. *Id.* at 29.

199. *Id.* at 27.

200. In addition to recommending creation of the Office of Federal Administrative Procedure and requiring that rules and interpretations be available to the public, the majority bill provided for new hearing officers to preside at adjudications and for a right to petition an agency for a rulemaking. Shepherd, *supra* note 167, at 1633–34.

201. FINAL REPORT, *supra* note 177, at 108; Shepherd, *supra* note 167, at 1632–33.

202. Shepherd, *supra* note 167, at 1632, 1634–36. A fourth member also dissented, taking an even more conservative position and recommending additional agency constraints. *Id.* at 1632–33.

203. FINAL REPORT, *supra* note 177, at 218–19.

C. *The APA*

Shortly after the AG Committee issued its report, separate bills representing the recommendations of the Committee's majority and minority were introduced in Congress, along with a yet more restrictive measure based in part on Walter-Logan.<sup>204</sup> But it was not until 1946 that the APA was enacted.<sup>205</sup> Despite the gap in time, the APA represented a culmination of the efforts at administrative reform dating back to the ABA and Brownlow Committees of the 1930s.<sup>206</sup> Still the AG Committee, and in particular the minority's recommendations, were the APA's closest progenitor.<sup>207</sup>

Like the minority's proposed bill, the APA created a set of minimum procedures for agency action, procedures which the agencies could add to and further specify to suit their needs. Critically, however, the APA's drafters did not view this legislative stipulation of minimum procedures as a rejection of agency internal law. Instead, the Senate report on the APA described the legislation as "an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them."<sup>208</sup> To be sure, these minimum procedures codified the best agency practices, and those agencies that did not yet follow these procedures would now have to adopt them.<sup>209</sup> But the APA only imposed a floor, not a ceiling, and it left agencies with ample room with which to keep developing their own procedures and other forms of internal law.

The APA contained two primary references to internal law. The first, in section 3 of the Act, required agencies to publish their substantive rules and internal law in the Federal Register. This included the agency's policy statements, interpretations, and "the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available."<sup>210</sup> Matters relating solely to internal management of the agency were exempted.<sup>211</sup> Section 3 was

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204. Shepherd, *supra* note 167, at 1632–33, 1636.

205. Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 500–04, 551–59, 561–84, 591–96, 701–06); Shepherd, *supra* note 173, at 1636–41, 1674.

206. H.R. REP. NO. 79-1980, at 241–42, 245–48 (1946); Grisinger, *Law in Action*, *supra* note 180, at 384, 404–08. For analyses of the political background and calculations behind the APA's enactment, see GRISINGER, UNWIELDY, *supra* note 136, at 59–108, and Shepherd, *supra* note 167, at 1560, 1649–83.

207. Shepherd, *supra* note 167, at 1649.

208. H.R. REP. NO. 79-1908, at 16 (1946), reprinted in SENATE COMM. ON THE JUDICIARY, 79TH CONG., LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, 1944–46, at 233, 250 (1946) [hereinafter LEGISLATIVE HISTORY OF THE APA].

209. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) [hereinafter AG MANUAL] (noting that informal rulemaking procedures "have already been extensively employed by Federal agencies").

210. Administrative Procedure Act, Pub. L. 79-404, § 3(a), 60 Stat. 237, 238 (1946).

211. *Id.* These publication requirements supplemented those of the Federal Register Act, which had required publication of final orders, regulations, licenses and certificates. See Federal Register Act of 1935, Pub. L. No. 220, §§ 4–5, 49 Stat. 500, 501 (1935).

significantly altered by the Freedom of Information Act in 1946, and perhaps as a result, the APA's original publication requirements have faded from view and instead its procedural impositions are front and center.<sup>212</sup> Yet when the APA was enacted, section 3 got top billing. The congressional reports on the APA described section 3 as "among the most important, far-reaching, and useful provisions of the bill."<sup>213</sup> In particular, the Senate Judiciary Committee report connected section 3's publication requirement to the fact that the APA left agencies free to develop internal law and procedures. Given that "the bill leaves wide latitude for each agency to frame its own procedures," publication of those procedures became "essential for the information of the public."<sup>214</sup>

The second internal law reference came in section 4 of the APA, which addressed rulemaking. As remains true today, the 1946 Act imposed notice-and-comment requirements on substantive rulemaking, but specifically excluded rules relating to agency management and personnel, "interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice."<sup>215</sup> This exemption of internal law contrasted notably with the Walter-Logan bill, which had subjected all rulemaking to both notice-and-comment and hearing requirements.<sup>216</sup> It also differentiated the APA from the AG Committee minority's bill, which mandated public rulemaking procedures for policy statements as well as substantive rules.<sup>217</sup> This exemption from even notice-and-comment requirements ensured that agencies would be free to develop internal law.<sup>218</sup> Indeed, this was one of the main reasons why Congress included the exemption. The Senate Report listed the "desire[ ] to encourage the making of such rules" as the first reason "for the exclusion of rules of organization, procedure, interpretation, and policy"<sup>219</sup> from notice-and-comment rulemaking procedures.

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212. See Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

213. See S. REP. NO. 79-752, at 12 (1946), *reprinted in* LEGISLATIVE HISTORY OF THE APA, *supra* note 208, at 185, 198; H.R. REP. NO. 79-1908, at 17, 21, *reprinted in* LEGISLATIVE HISTORY OF THE APA, *supra* note 208, at 233, 251, 255; see also Ashley Sellers, *Administrative Procedure Act: Extent of Compliance with Section 3*, A.B.A. J., Jan. 1947, at 7, 7 (reporting that section 3 commanded more attention thus far than any of the Act's other provisions).

214. H.R. REP. NO. 79-1908, *reprinted in* LEGISLATIVE HISTORY OF THE APA, *supra* note 208, at 233, 256.

215. Administrative Procedure Act § 4(a). In addition, section 12 of the APA stated: "Every agency is granted the authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise." *Id.* § 12.

216. See 92 CONG. REC. 2135, 2150-51 (1946).

217. See FINAL REPORT, *supra* note 177, at 225.

218. See S. REP. NO. 79-752, at 13 (1946) (stating exemptions from notice-and-comment rulemaking and leaving it up to agency discretion to determine what procedures to use in issuing these types of rules), *reprinted in* LEGISLATIVE HISTORY OF THE APA, *supra* note 208, at 185, 199; H.R. REP. NO. 79-1908, at 23 (1946) (explaining that agencies have wide latitude to continue to develop procedure), *reprinted in* LEGISLATIVE HISTORY OF THE APA, *supra* note 208, at 233, 257; AG MANUAL, *supra* note 209, at 30.

219. S. REP. NO. 79-248, at 18 (1946).

Thus, despite imposing external procedural requirements on agencies, the APA also embraced internal law. It displaced internal law that directly conflicted with its procedural mandates, but these mandates did not force much change to existing practices.<sup>220</sup> And beyond its procedural minima, the APA intentionally left agencies free to develop internal law. It only demanded that agencies publish the internal law they developed.<sup>221</sup> But the APA's embrace of internal law was no aberration. It reflected a consistent recognition, traceable back to early works on administrative law through the Brownlow and AG Committees, of the critical role that internal administrative law plays in controlling and directing administrative power.

### III. INTERNAL ADMINISTRATIVE LAW AFTER THE APA

Despite the effort in the APA to allow agencies to continue to develop internal administrative law, doctrines that courts developed enforcing the APA and their application of free-standing principles of judicial review have substantially constrained the content and place of internal law. These judicial doctrines make external enforcement or even procedural invalidation a function of how lawlike or manifestly binding the agency's self-regulation is. Judicial enforcement and invalidation are opposed treatments but they create similar net results. These doctrines prevent agencies from establishing norms that purport to bind agency officials' exercise of discretion without also inviting courts to police the agency's compliance with those norms. In that sense, internal law exists only provisionally until the moment of external enforcement. Agencies now frequently cloak their internal law in documents disclaiming an intention to create a binding norm. At the same time, as judicial doctrines have imposed these calculations on agencies, central executive officers, such as OMB and OIRA, have imposed more requirements on agencies' internal law so that internal administrative law now contains more norms imposed by central agencies than ever before.

This Part describes this accumulating regulation of internal administrative law that followed the enactment of the APA. We begin with perhaps the most important of these judicial doctrines—the distinction between rules that require notice and comment and those that do not. That doctrine confronts agencies with the prospect of procedural invalidation of their internal law. We then turn to other judicial doctrines that trigger external enforcement of the internal law, including judicial construction of the APA's exclusion of judicial review for decisions “committed to agency discretion by law,”<sup>222</sup> as well as the *Accardi*<sup>223</sup> doctrine. We finally turn to central executive

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220. See GRISINGER, UNWIELDY, *supra* note 136, at 11.

221. See Sellers, *supra* note 213, at 8. The publication of agencies' own organization and procedures was a massive effort, much of it collected in a single 966-page issue of the Federal Register published on September 11, 1946. See 11 Fed. Reg. 177 (Part II) (Sept. 11, 1946).

222. 5 U.S.C. § 701(a)(2) (2012).

223. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).



branch regulation and more general consequences this regime has for internal administrative law.

A. *Procedural Invalidation: Legislative v. Nonlegislative Rules*

As noted above, the APA exempts from notice and comment several types of rules, collectively referred to as nonlegislative rules, which include what the APA calls interpretive rules, general statements of policy, and rules of agency procedure and management.<sup>224</sup> These exemptions mean that courts and agencies must distinguish between those rules which fall within notice and comment (legislative rules) and those that do not (nonlegislative rules).

The distinction between legislative and nonlegislative rules is critical for internal administrative law, a point not lost on the drafters of the statute. Much of the internal administrative law that agencies generate is designed to fall within the APA's categories of nonlegislative rules, issued without notice and comment. As a result, the stakes for how courts distinguish legislative and nonlegislative rules are very real. If courts take an encompassing view of what counts as a legislative rule, much internal administrative law would face the prospect of procedural invalidation.

The risks posed by an overly broad treatment of legislative rules are well known,<sup>225</sup> but so far the Supreme Court been cautious in policing this boundary. In the 2015 decision *Perez v. Mortgage Bankers Ass'n*,<sup>226</sup> the Court struck down a relatively extreme incursion on agency internal law, a D.C. Circuit doctrine which required an agency to use notice-and-comment rulemaking to adopt a new interpretation of a regulation that deviates significantly from a prior agency interpretation.<sup>227</sup> The Court firmly reiterated that because the APA does not require notice and comment for interpretive rules, the courts were not free to require that additional procedure whether or not the interpretation was the agency's first or represented a change of course.<sup>228</sup> Moreover, the Court emphasized that imposing this procedural requirement beyond what the APA mandates would violate the "basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."<sup>229</sup> The *Perez* decision thus enforces the principle that under the APA courts are not authorized to manage the procedure by why agencies develop internal law.

At the same time, however, the *Perez* Court explicitly declined to provide guidance on how the line between legislative and nonlegislative rules

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224. 5 U.S.C. § 553(a)(2) (exempting matters of agency management); *id.* § 553(b)(3)(A) (exempting interpretive rules, general policy statements, and procedural rules).

225. 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 17.3, at 1572–76 (5th ed. 2010) (criticizing effects on agencies of overly inclusive test for legislative rules).

226. 135 S. Ct. 1199, 1203 (2015).

227. *Id.*

228. *Id.* at 1207.

229. *Id.* (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 544 (1978)).

should be drawn.<sup>230</sup> And the most that the Supreme Court has previously offered on the distinction is simply a reiteration of the formal legal difference between these two types of rules: legislative rules bind third parties with the force of law, whereas interpretive rules do not have the force of law.<sup>231</sup> Lower courts, when faced with the frequently litigated question of whether an agency statement required notice and comment, have attempted to fill the void by relying on a host of factors, such as whether the rule has “the force of law,”<sup>232</sup> whether the agency expressly invokes its legislative rulemaking authority,<sup>233</sup> the “substantial impact” of the statement,<sup>234</sup> and the basis for enforcement without the rule.<sup>235</sup>

In applying these factors, however, a frequent judicial reflex is to examine the extent to which a statement limits the agency’s own discretion or binds its officials and staff. Measures that “narrow [the agency decisionmaker’s] field of vision” and are “of a kind calculated to have a substantial effect on ultimate [agency] decisions,”<sup>236</sup> “in purpose or likely effect [will] . . . narrowly limit[ ] administrative discretion,”<sup>237</sup> do not “genuinely leave the agency and its employees free to exercise discretion,”<sup>238</sup> or show that the “agency intends to bind itself to a particular legal position”<sup>239</sup> point toward the statement being a legislative rule.<sup>240</sup>

The Fifth Circuit’s decision in *Texas v. United States* provides a good illustration of this strain of precedent. At issue in the case was DHS’s policy,

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230. *Id.* at 1204.

231. *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995); *see also Perez*, 135 S. Ct. at 1204 (declining to provide a distinction and citing *Guernsey*).

232. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108–09 (D.C. Cir. 1993).

233. *Id.* at 1109.

234. *Texas v. United States*, 809 F.3d 134, 176 (5th Cir. 2015) (quoting *U.S. Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984)).

235. *See Am. Mining Cong.*, 995 F.2d at 1111–12 (suggesting (1) whether there would be a basis for enforcement without the rule, (2) publication in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, and (4) whether the rule effectively amends a prior legislative rule as critical factors). The D.C. Circuit has subsequently made clear that publication in the Code of Federal Regulations is not a significant factor. *See Health Insurance Ass’n v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (explaining that C.F.R. publication only a “snippet” of evidence). For an overview of judicial treatment of this distinction, *see generally* 1 RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* § 6.4, at 432–66 (5th ed. 2010) (discussing the distinction between legislative and nonlegislative rules); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 *YALE L.J.* 276 (2010); John F. Manning, *Nonlegislative Rules*, 72 *GEO. WASH. L. REV.* 893 (2004).

236. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112–13 (D.C. Cir. 1974).

237. *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987) (quoting *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666–67 (D.C. Cir. 1978)).

238. *Texas*, 809 F.3d at 176.

239. *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (citing *U.S. Tel. Ass’n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994)).

240. *See id.*

with which President Obama closely associated himself, setting forth enforcement priorities as well as categories of undocumented immigrants for deferred action. The Fifth Circuit upheld a district court's nationwide stay of the policy in part on the ground that the policy was a legislative rule and therefore had to be promulgated through notice-and-comment proceedings, which had not been used.<sup>241</sup> In so holding, the Fifth Circuit focused on whether the policy constrained the discretion of lower-level officials—in the court's words, whether the policy “genuinely leaves the agency and its decision-makers free to exercise discretion.”<sup>242</sup> Reading the policy as binding lower-level officials and denying them genuine discretion in deferred action decisions, the court required notice and comment. Under this logic, agency policies or internal law that structure or bind the discretion of lower-level decisionmakers—as many policies for the efficient ordering of a hierarchical bureaucracy aim to do—would require notice and comment.

On this line of thought, the more an agency's statement structures the agency's discretion and purports to bind the agency itself, the more likely the statement is to be judged a legislative rule and thus procedurally invalid if not issued using notice and comment. But binding the agency, or more precisely constraining exercises of discretion by lower-level staff, is one of the basic tasks of internal administrative law. By thus requiring agencies to structure their discretion through notice-and-comment rulemaking, the courts have deviated significantly from the APA,<sup>243</sup> which subjected internal administrative law only to publication requirements.

### B. *Externalization: Reviewability and Accardi*

Judicial doctrines do not only threaten invalidation of internal administrative law; both reviewability doctrines and the *Accardi* doctrine treat internal law as authoring external review by the courts of the agency's compliance.

#### 1. Reviewability

The APA precludes judicial review of agency action that is “committed to agency discretion by law.”<sup>244</sup> When courts ask whether the agency action is “committed to agency discretion by law,”<sup>245</sup> the governing test asks

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241. *Texas*, 809 F.3d at 146.

242. *Id.* at 171 (quoting *Prof'l & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995)).

243. For a thorough examination of policy statement and interpretive rule exceptions to the notice-and-comment requirement, see Ronald M. Levin, *Rulemaking and the Guidance Exception* (Apr. 4, 2017) (unpublished manuscript) (on file with the *Michigan Law Review*). Levin provides a careful defense of the view that an agency binding itself, whether through a policy statement or interpretive rule, does not make the agency guidance a legislative rule requiring notice and comment. See *id.* 29–35, 65–69.

244. 5 U.S.C. § 701(a)(2) (2012).

245. *Id.*

whether the statutory delegation is “drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion,”<sup>246</sup> or as it also put, “drawn in such broad terms that in a given case there is not law to apply.”<sup>247</sup>

The paradigm application evaluates the statutory delegation to determine whether the statute itself provides a judicially manageable standard.<sup>248</sup> Courts have looked beyond statutory language, and concluded that there is “law to apply” when the agency itself creates a law with respect to which the court can evaluate the agency’s conduct, typically in a legislative rule.<sup>249</sup> And courts have gone further still and found that nonlegislative rules and policies could trigger review.

In determining whether internal law can trigger reviewability, a court evaluates the extent to which the norm binds the agency or constrains its discretion in a mandatory way. With regard to enforcement policies, for instance, the Supreme Court advised in *Heckler v. Chaney* that if an agency statement “indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is ‘law to apply’ under § 701(a)(2), and courts may require that the agency follow that law.”<sup>250</sup> More generally, courts examine the degree to which the internal policy aims to constrain the agency’s choices:

In determining whether an agency’s statements constitute “binding norms,” we traditionally look to the present effect of the agency’s pronouncements. . . . We also examine *whether the agency’s statements leave the agency free to exercise its discretion. Pronouncements that impose no significant restraints on the agency’s discretion are not regarded as binding norms.* As a general rule, an agency pronouncement is transformed into a binding

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246. *Lincoln v. Vigil*, 508 U.S. 182, 190–91 (1993) (first citing *Webster v. Doe*, 486 U.S. 592, 599–600 (1988); and then citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), *abrogated by* *Califano v. Sanders*, 430 U.S. 99 (1977)); *see also* *Heckler v. Chaney*, 470 U.S. 821, 834–35 (1985).

247. *Webster v. Doe*, 486 U.S. 592, 599–600 (1988); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *see also* *Heckler*, 470 U.S. at 834–35. The “no law to apply” formulation has some unfortunate implications, *see* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 705–09 (1990), but has not been abandoned.

248. *See, e.g., Webster*, 486 U.S. at 599–601 (determining whether provisions of the National Security Act precluded review of statutory exercise of discretion by the Director of the CIA).

249. *See, e.g., INS v. Yuch-Shaio Yang*, 519 U.S. 26, 32 (1996) (asserting that unfettered agency discretion becomes reviewable when the agency announces and follows, by rule or adjudication, a settled course of action); *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016) (noting that “courts look to the statutory text, the agency’s regulations, and informal agency guidance that govern the agency’s challenged action” to determine if there is law to apply). Courts continued to treat the question of reviewability in isolation from the constitutional prohibition on delegation of legislative authority where an agency may not cure an unconstitutional delegation by supplying a standard to guide its conduct. *See Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 473 (2001).

250. *Heckler*, 470 U.S. at 834–35.

norm if so intended by the agency and agency intent, in turn, is “ascertained by an examination of the statement’s language, the context, and any available extrinsic evidence.”<sup>251</sup>

The D.C. Circuit’s decision in *Clifford v. Pena*<sup>252</sup> illustrates the court treating internal law as a basis for reviewability. In *Clifford*, labor unions challenged a decision by the Maritime Administration (MARAD) to grant a waiver to allow a domestic carrier to employ foreign-built vessels flying foreign flags in international shipping. The court concluded that the statute granting MARAD’s waiver authority was stated in such broad terms that it did not provide a basis for review.<sup>253</sup> But MARAD had previously issued, outside of notice and comment, a guidance document listing factors to guide its own evaluation of when to grant a waiver.<sup>254</sup> The court concluded that that “[t]he agency’s policies . . . have thus provided standards rendering what might arguably be unreviewable agency action reviewable.”<sup>255</sup> In *Clifford* and decisions like it, agency action that was otherwise unreviewable, as Harold Krent observes, “becomes reviewable if the agency’s discretion is limited by preexisting agency rules, including those rules that do not have the force and effect of law.”<sup>256</sup>

In short, to the extent an agency’s internal pronouncements appear to do the work of internal law—to establish norms that bind agency actors, or confine, structure, and constrain the agency’s discretion—they risk creating grounds for external judicial review of the agency’s compliance. This is not to say that there are no valid grounds for judicial review of agency internal law. Agency internal law must be consistent with the governing statutory scheme and nonarbitrary—and, assuming the internal law at issue satisfies finality and other jurisdictional prerequisites, those requirements can and are enforced through judicial review.<sup>257</sup> There is a difference, however, between allowing that internal law may be reviewed for its validity and viewing internal law as authorizing its own external enforcement against the agency.

251. *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (emphasis added) (citations omitted).

252. 77 F.3d 1414, 1417 (D.C. Cir. 1996) (citing factors provided in *Certain Bulk Operators*, 25 Shipping Reg. Rep. (Pike & Fischer, Inc.) 1261, 1264 (Mar. Admin. Nov. 15, 1990)).

253. *Id.* at 1417 (commenting that the statutes conferred “unrestricted and undefined” power that gave no law to apply).

254. *Id.* (referencing *Certain Bulk Operators*, 25 Shipping Reg. Rep. (Pike & Fischer, Inc.) 1261, 1264 (Mar. Admin. Nov. 15, 1990)) (“[T]he Maritime Administration has supplied a list of factors to guide its § 804(b) judgment.”).

255. *Id.*; see also *Diebold v. United States*, 947 F.2d 787, 789–90 (6th Cir.1991); *Mass. Pub. Interest Research Grp., Inc. v. U.S. Nuclear Regulatory Comm’n*, 852 F.2d 9, 16 (1st Cir. 1988); *Padula*, 822 F.2d at 100 (noting that “[j]udicially manageable standards may be found in formal and informal policy statements and regulations as well as statutes . . . .”); *Chong v. Dir., U.S. Info. Agency*, 821 F.2d 171, 175–76 (3d Cir. 1987).

256. Harold J. Krent, *Reviewing Agency Action for Inconsistency with Prior Rules and Regulations*, 72 CHI.-KENT L. REV. 1187, 1206 (1997); see also decisions cited *supra* note 255.

257. See, e.g., *Cuomo v. Clearing House Ass’n*, 557 U.S. 519 (2009) (reversing an agency interpretive rule that conflicted with the governing statute); *Scenic Am., Inc. v. U.S. Dep’t of Transp.*, 836 F.3d 42, 56–57 (D.C. Cir. 2016) (upholding agency guidance against challenge as

## 2. *Accardi* and *Ruiz*

The external enforceability of agency's internal law also arises in applications of the well-established *Accardi* principle. The *Accardi* principle obliges an agency to comply with its own rules.<sup>258</sup> More specifically, it authorizes a court to invalidate agency action that does not comply with the agency's own rules. The *Accardi* duty existed before the APA's enactment and has a foundation independent of the statute, though it can also be viewed as enforcing the APA's authorization to invalidate any agency action that is "not in accordance with law."<sup>259</sup>

The *Accardi* doctrine, as Elizabeth Magill argues, provides a mechanism for agencies to make credible commitments to a self-constraining or self-regulatory policies.<sup>260</sup> When the agency adopts policy in a legislative rule, the agency also elects to trigger external enforcement—by litigants and the judiciary—of the agency's own compliance.<sup>261</sup> In this way, the doctrine reinforces an agency's capacity to entrench its policies against presidential preferences and changes in presidential administration; policy adopted through a legislative rule continues to constrain the agency until the agency amends it through a legislative rule, requiring a new round of notice and comment.<sup>262</sup>

If *Accardi* applies only to legislative rules, the doctrine allows an agency to deliberately trigger external judicial enforcement by issuing a legislative rule and thus to precommit itself to complying with that rule or going through notice-and-commit rulemaking to change it. But if the *Accardi* obligation applies to nonlegislative rules as well, the doctrine creates a cost for agencies whenever they adopt internal law: by adopting internal law, the agency creates the predicate for judicial review of its compliance.<sup>263</sup> Purely internal law is therefore precluded.

The Supreme Court has sent mixed signals about the scope of *Accardi*'s application to internal law. On the one hand, the Supreme Court has acknowledged the way in which external enforcement could affect agencies' use of internal law. For instance, in *United States v. Caceres*, the Court declined to apply *Accardi* and force the IRS to comply with its own manual

invalid under § 706 as arbitrary and contrary to law), *petition for cert. filed*, No. 16-739 (U.S. Dec. 5, 2016).

258. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267–68 (1954); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006).

259. 5 U.S.C. § 706(2)(a) (2012); see Merrill, *supra* note 259, at 599 (taking the position that the *Accardi* principle "is a principle of federal law when the mechanism of enforcement is federal," and thus a judicial gloss on § 706).

260. Elizabeth Magill, Foreword, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 873–74 (2009).

261. *Id.* at 874.

262. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 590–92 (2003).

263. See Magill, *supra* note 260, at 879 (noting that ambiguity about *Accardi*'s application to nonlegislative rules reduces agencies precommitment choices).

setting forth requirements for Justice Department approvals for monitoring of conversations.<sup>264</sup> Consistent with the long recognition of the value of internal administrative law, the Court opined that “it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration . . . than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form.”<sup>265</sup>

On the other hand, the Supreme Court and lower courts have also invalidated agency action for failure to comply with nonlegislative rules. The Supreme Court’s 1974 decision in *Morton v. Ruiz*<sup>266</sup> can be read this way. *Ruiz* examined the validity of the Bureau of Indian Affairs’ denial of benefits to an individual because he lived outside of a designated reservation. The agency’s manual required the agency to publish the requirements for eligibility, and the agency had not published its rule requiring that claimant live on the reservation. The Court reversed based in part on this failure.<sup>267</sup> “Where the rights of individuals are affected,” the Court wrote, “it is incumbent upon agencies to follow their own procedures.”<sup>268</sup> In addition, the Court concluded that the policy should have been published under the APA, which requires publication of policies affecting individuals.<sup>269</sup> *Ruiz* thus vindicates the APA’s insistence on publication of its substantive policies. But *Ruiz* can also be read as imposing a judicially enforceable obligation to comply with an internal procedural manual that was nonlegislative in character, at least where individual interests were clearly affected.<sup>270</sup>

*Ruiz*’s status remains unclear. In some decisions subsequent to *Ruiz*, the Supreme Court has rejected arguments that other nonlegislative internal law falls under *Accardi*. The *Caceres* decision concerning the IRS manual postdated *Ruiz*, and the Court has also declined to require compliance with a Social Security Administrative Claims Manual requirement.<sup>271</sup> But the Supreme Court also has not overruled or repudiated *Ruiz*. Notwithstanding some statements limiting *Accardi* to legislative rules,<sup>272</sup> lower courts have

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264. 440 U.S. 741 (1979); *see also* *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970) (refusing to enforce filing requirements imposed by regulation on the ground they were intended to provide the agency with information and did not create procedural rights).

265. *Caceres*, 440 U.S. at 756.

266. 415 U.S. 199 (1974) (per curiam).

267. *Id.* at 202–05, 231–36.

268. *Id.* at 235.

269. *Id.* at 232 (first citing S. REP. NO. 79-752, at 12–13 (1945); and then citing H.R. REP. NO. 79-1980, at 21–23 (1946)).

270. *See id.* at 235 (noting the BIA Manual was to a legislative rule and had not been issued through notice and comment); Merrill, *supra* note 258, at 584 (noting *Ruiz*’s significance as imposing a duty to conform to even a nonlegislative rule).

271. *Schweiker v. Hansen*, 450 U.S. 785, 789–90 (1981) (per curiam).

272. *See Viet. Veterans of Am. v. Sec’y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) (concluding that it makes sense to restrict doctrine to rules requiring notice and comment).

held that procedural rules that affect individual rights as well as other non-legislative rules are binding against the agency.<sup>273</sup>

This uncertainty about the scope of *Accardi*'s application imposes deliberation costs for agencies. It prompts agencies to consider, for each exercise of internal lawmaking, whether the internal law will be a basis for later judicial enforcement. The agency—or its lawyers—may conclude that the internal law will not trigger an *Accardi* obligation or may to adopt the internal law regardless. Either way, *Accardi* creates a specter of external enforcement when the agency creates internal law.

### C. Executive Branch Regulation of Internal Law

Following the enactment of the APA, central executive branch actors have also created more regulation of individual agencies' own internal law. The most significant executive branch regulation of agency law and policymaking is Executive Order No. 12,866, which provides for presidential regulatory review.<sup>274</sup> In the spirit of the Brownlow Report, the order creates a detailed scheme for centralized review of agency rulemaking and imposes substantive and analytic requirements on agencies.<sup>275</sup> By structuring the regulatory analysis agencies must undertake, Executive Order No. 12,866 may be the most significant single source of internal administrative law for federal agencies today.<sup>276</sup> OMB also exercises extensive control over which programs and projects agencies include in their budgets. This managerial and policymaking control is achieved both through OMB's issuing express internal law to which agencies must adhere in proposing their budgets, as well as through OMB's ultimate approval control over these agency budget requests.<sup>277</sup> Unlike agency-specific internal law, these instantiations of internal law are centralized and transsubstantive.

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273. See, e.g., *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000) (requiring the Social Security Administration (SSA) to comply with a manual even though the manual lacked force of law); *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) (noting that *Accardi*'s "ambit is not limited to rules attaining the status of formal regulations," citing *Ruiz*, and endorsing *Accardi*'s application to nonlegislative rules that affect private rights); *United Space All. v. Solis*, 824 F. Supp. 2d 68, 83–84 (D.D.C. 2011) ("Procedural rules that affect individual rights are similarly binding" and citing cases); see also Magill, *supra* note 260, at 878 (noting that courts have applied *Accardi* to nonlegislative rules); Merrill, *supra* note 258, at 593 (noting cases in which D.C. Circuit finds nonlegislative rules binding an agencies). It is important to note that *Accardi* is not the only doctrine which may trigger judicial enforcement of internal law. For instance, unjustified departures from guidance can be held to be arbitrary and capricious. See Manning, *supra* note 235, at 935–36 (arguing that an agency would not have less obligation to justify its departure from a nonlegislative rule than its departure from an agency precedent).

274. Exec. Order No. 12,866, 3 C.F.R. 623 (1994), reprinted in 5 U.S.C. § 601 note (2012).

275. *Id.*

276. For an examination of OIRA's practices of review as part of a transsubstantive jurisprudence of administration, see Davidson & Leib, *supra* note 25, at 283–86.

277. See Pasachoff, *supra* note 16, at 2209–23 (2016) (providing a detailed account of OMB's Circular A-11 governing agency budget submissions and OMB's review of those submissions as means of control over agencies' managerial and policymaking priorities).



Presidents and other central executive branch actors have also regulated the process agencies can use in issuing internal law as well as the content of that law. An interest in greater oversight and publicity for guidance documents motivated President George W. Bush to amend Executive Order No. 12,866 to require certain guidance documents to be reviewed by OIRA.<sup>278</sup> While President Obama revoked that Bush Executive Order,<sup>279</sup> the *Bulletin* which OMB issued to implement it in 2007<sup>280</sup> remains in effect.

The OMB *Bulletin* includes detailed requirements that apply to many forms of agency internal law.<sup>281</sup> Like the drafters of the APA, the *Bulletin* expressly recognizes the benefits of this form of internal law. When “used properly,” the *Bulletin* observed, guidance documents “can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct.”<sup>282</sup> But the *Bulletin* also suggests that many guidance documents are poorly designed and implemented. It notes that guidance documents generally receive less internal scrutiny and public consideration than legislative rules, and are also less often reviewed by courts.<sup>283</sup>

The regulatory regime the *Bulletin* adopts is an interesting counterpoint to judicial doctrine that broadly sweeps agency internal law into the notice-and-comment category. The *Bulletin* obliges agencies to maintain a website with their guidance documents—the equivalent of a publication in our digital era—and imposes a host of procedural requirements for issuing guidance documents with significant impact.<sup>284</sup> Akin to judicial doctrine, it instructs that guidance generally should not include “mandatory language” and imposes notice-and-comment requirements, but only for economically significant guidance and even there in a modified, less onerous form.<sup>285</sup> Most strikingly, the *Bulletin* takes a directly opposing stance when it comes to agency staff, allowing an agency to use mandatory language when the “language is addressed to agency staff and will not foreclose agency consideration of the positions advanced by affected private parties.”<sup>286</sup> Indeed, the *Bulletin* expressly acknowledges the importance of agencies being able to bind their employees as a matter of supervisory powers without undertaking notice and comment.<sup>287</sup> In fact, the *Bulletin* provides that agency employees

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278. Exec. Order No. 13,422, 3 C.F.R. 191 (2008), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010).

279. Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted in* 5 U.S.C. § 601 note (2012).

280. FINAL BULLETIN, *supra* note 15.

281. *See id.* at 3439 (defining guidance documents as those agency statements of general applicability and future effect other than regulations that set forth policy on statutory, regulatory, and technical issues).

282. *Id.* at 3432.

283. *Id.* (noting the importance of these procedures for guidance).

284. *Id.* at 3439–40.

285. *Id.* at 3440.

286. *Id.* at 3436.

287. *Id.* at 3437.

“should not depart from significant agency guidance” without adequate justification and supervisory agreement<sup>288</sup>—in effect, it creates a duty to comply with the *Accardi* principle imposed by the executive branch on itself.

The *Bulletin* expressly disavows its own enforceability in court, or its creation of any private rights; like the regulatory review executive order, it is truly internal executive branch administrative law, enforced only through oversight of agencies by OMB.<sup>289</sup> While the *Bulletin* does not sweep widely, it does displace aspects of agency-specific internal law—as to both agency process for issuing significant guidance documents and the content of such guidance.

#### D. *Impact on Internal Administrative Law*

Taken together, these judicial doctrines—the legislative–nonlegislative rule distinction, reviewability, and *Accardi*—significantly regulate agencies’ internal law. They create the following matrix for an agency. The agency may opt to formalize its own internal administrative law in the form of legislative rule. If it does so, then it becomes a basis for judicial review and clearly triggers external judicial enforcement under *Accardi*. But if the agency issues internal administrative law outside of notice and comment, it runs the risk of either procedural invalidation or triggering judicial review of its compliance. The more clearly internal law constrains the agency’s discretion, the greater the risk of procedural invalidation for not employing notice and comment or of external judicial enforcement. Indeed, the very features that give internal law its character as a form of law—that it creates presumptively overriding reasons for compliance by agency actors—also provide the grounds for judicial review of agencies’ compliance and invalidation.

This matrix creates incentives for agencies to be less specific, less decisive, and less clear in their internal documents. From the perspective of internal law, those are the wrong incentives. Most directly, to the extent that agencies craft their internal law to avoid judicial cognizance, this doctrine undermines the capacity of internal administrative law to serve its political, managerial and legal accountability roles. Clarity, not vagueness, is needed for these roles. More insidiously, agency officials’ need to make sense of abstract and vague internal law will prompt them to develop a set of understandings of what that internal really means or requires. These specifications are inevitably less public and transparent than the official internal law itself. While developing an operational understanding is an inevitable feature of administration, judicial doctrines that provide incentives for agencies to be more abstract actually widen the gap between the internal law on the books and the internal law in action.

Tracing the impact of these incentives on agency action is difficult. Recent empirical research shows that agencies are not turning to guidance

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288. *Id.* at 3436, 3440. Mandatory language is also allowed when the agency is describing a statutory or regulatory requirement. *Id.*

289. *Id.* at 3437, 3440.

strategically to avoid the costs of notice and comment,<sup>290</sup> a concern many observers had expressed.<sup>291</sup> But the import of those studies for internal law is less clear. These studies focus on agency action aimed at regulating the behavior of private parties. An important reason that an agency might not switch to guidance in that context is that it affirmatively seeks to create a national set of obligations for third parties, and a notice-and-comment rule is the more effective means of doing so. As a result, these studies do not specifically address how these doctrinal regimes influence agency choices around internal law that purports to bind only agency internal agency actors. With respect to internal law, the concern is not that agencies are responding to judicial review by turning to public guidance over rules, but rather that these doctrines push internal law out of the public eye altogether, with agencies specifying their operational demands in a set of undisclosed understandings. Such accumulation of private operational understandings not only undermines the rule of law value of publicity but also increases the risk of arbitrariness and inconsistency in administration.

Some evidence of agencies' desire to escape this matrix comes from their turn to boilerplate disclaimers. Beginning in the early 1990s, agencies have included boilerplate disclaimers of both the external enforceability and bindingness of their guidance documents.<sup>292</sup> These disclaimers disavow creating any enforceable right,<sup>293</sup> imposing any legal obligation on the

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290. See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Rulemaking Volume and Speed, 1950-90*, 80 GEO. WASH. L. REV. 1414, 1461-64 (2012) (finding little evidence for agency pivot from rulemaking to guidance); Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 805-07 (2010) (finding that EPA, FDA, FCC, OSHA, and IRS did not increase issuance of guidance strategically, though agencies did issue more guidance as presidential terms waned). *But cf.* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 936 (2008) (suggesting that volume of agency rulemaking shows it is not ossified).

291. See, e.g., H.R. REP. NO. 106-1009, at 9 (2000) (“[A]gencies have sometimes improperly used guidance documents as a backdoor way to bypass the statutory notice-and-comment requirements for agency rulemaking . . . .”); 1 C.F.R. § 305.92-2 (1992) (“The Conference is concerned . . . about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding . . . . [But these pronouncements do] not offer the opportunity for public comment . . . .”); Transcript of Oral Argument at 13-14, *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015) (No. 13-1041), 2014 WL 6749784, at \*13-14 (“[B]ut part of what’s motivating it is a sense that agencies more and more are using interpretive rules and are using guidance documents to make law and that there is—it’s essentially an end run around the notice and comment provisions.” (Kagan, J.)); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166-167 (2000) (arguing that agencies avoid ossified rulemaking processes by use of nonbinding guidance).

292. See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000); see also Mendelson, *Regulatory Beneficiaries*, *supra* note 11, at 400 (noting that particularly since 2000, guidance documents at the EPA and other agencies have included these disclaimers).

293. See, e.g., 8 C.F.R. § 287.12 (2009).

agency,<sup>294</sup> or binding the agency to comply.<sup>295</sup> Some courts have disregarded these disclaimers where the internal document otherwise purported to have binding consequences.<sup>296</sup> Nevertheless, their persistence provides an explicit expression of an agency's interest in issuing internal law without at the same time triggering judicial review for compliance with it. These disclaimers can be seen as a last-ditch plea for the realm of internal management and processes that the APA sought to preserve. When effective, they provide an efficient way for agencies to retain their guidance documents as their own internal law but only at the cost of formally disclaiming the documents' lawlike character.

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Central to the administrative state at its birth, internal administrative law occupies an uncertain status today. Despite being formally protected by the APA's exemptions, judicial doctrine now significantly constrains agencies' use of and reliance on internal administrative law. This result is unfortunate—not simply for agencies' ability to act effectively but also for ensuring the legality, regularity, consistency, and accountability of agency action.

#### IV. FOSTERING INTERNAL ADMINISTRATIVE LAW

Up to now, we have defended the concept of internal administrative law and described its rise before and in the APA and its fall thereafter, despite the APA's sanction. In this Part, we consider what reforms are necessary to secure the status of internal administrative law, both restoring it to its APA-protected role and encouraging its further development. We begin by considering external reforms, either from Congress or the courts, that could foster internal administrative law. We then turn to potential internal reforms, either by the president and central executive branch entities or by agencies themselves, to strengthen and further develop internal administrative law. All of these have potential for strengthening internal law, yet in the end, what may be most needed is an ideological and conceptual transformation that recognizes both internal administration's lawlike character and its importance for ensuring the rule of law in today's world of administrative governance.

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294. See, e.g., U.S. ENVTL. PROT. AGENCY, 816-R-04-006, IMPLEMENTATION GUIDANCE FOR THE FILTER BACKWASH RECYCLING RULE (2004).

295. See, e.g., U.S. FISH & WILDLIFE SERV., LAND-BASED WIND ENERGY GUIDELINES (2012), [http://www.fws.gov/ecological-services/es-library/pdfs/WEG\\_final.pdf](http://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf) [<https://perma.cc/4QCW-9FKJ>].

296. See *Appalachian Power*, 208 F.3d at 1022–23 (concluding EPA guidance was final agency action and invalid despite disclaimer).

### A. External Reforms: Congress and the Courts

Congress and the courts are the logical place to start in an effort to foster internal administrative law: Congress because of its power to impose requirements to which courts, the president, and agencies must all adhere; and the courts because of the central role judicial doctrine has played in undermining space for internal administrative law. A range of reforms are imaginable, from reinforcing the APA's protection of internal law to more radical moves to encourage agencies to enhance their internal law. The harder challenge is convincing Congress and the courts to move in this direction of reinforcing internal law, as opposed to simply imposing new external constraints on agencies.

#### 1. Congress

Congress enacted the APA, and in theory Congress could remedy the courts' deviation from the APA's protection of internal administrative law through new legislation. Congress could clarify, for example, that agencies may issue rules that bind internally without triggering notice-and-comment requirements. More radically, Congress could significantly revise the APA's judicial-review provisions to have courts focus more on the adequacy of agencies' management and oversight systems and decisionmaking processes, and less on scrutinizing the particular agency actions that such systems and processes produce.<sup>297</sup> And Congress could regulate in other ways to enhance perceived deficiencies in agency internal functioning, through imposition of consultation, analysis, or reporting requirements. Indeed, Congress has already done some of the latter, through general measures such as the Information Quality Act (IQA),<sup>298</sup> the Government Performance and Result Act<sup>299</sup> and recent amendments,<sup>300</sup> and agency-specific requirements.<sup>301</sup> The IQA, for example, expressly seeks to develop internal administrative law, instructing agencies and OMB to adopt guidelines to ensure "the quality, objectivity, utility, and integrity of information . . . disseminated by Federal

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297. For discussion of how judicial review currently ignores systemic aspects of agency functioning, see Metzger, *Duty to Supervise*, *supra* note 9, at 1871–73, and William H. Simon, *The Organizational Premises of Administrative Law*, 78 *LAW & CONTEMP. PROBS.* 61 (2015).

298. Information Quality Act, Pub. L. No. 106-554 app. C, § 515, 114 Stat. 2763, 2763A-153–154 (2000) (codified at 44 U.S.C. § 3516 note).

299. Pub. L. No. 103-62, § 2(a)–(b), 107 Stat. 285, 285 (1993) (codified as amended at 31 U.S.C. § 1101 note (2012)); *see also* Simon, *supra* note 297, at 84–88 (discussing GPRA and other statutes focusing on governmental performance).

300. GPRA Modernization Act of 2010, Pub. L. No. 111-352, § 2, 124 Stat. 3866, 3866–67 (2011) (codified at 5 U.S.C. § 306 (2012)).

301. *See, e.g.*, 12 U.S.C. § 5512(b)(2) (2012) (requiring the Consumer Financial Protection Bureau to consult with prudential financial regulators before issuing consumer protection rules and that it undertake a cost-benefit assessment of certain requirements before it imposes them); 44 U.S.C. §§ 3544–45 (requiring agencies to comply with cybersecurity standards and report to OMB on their cybersecurity efforts, with OMB required to report to Congress).

agencies” and requiring agencies to allow private parties to petition to correct information that allegedly fails to meet the guidelines.<sup>302</sup>

These measures suggest the important role Congress potentially could play, not just in protecting agency efforts to create purely internal law against judicial incursion, but also in requiring greater agency creation of internal law in the first place. In practice, however, congressional intervention seems unlikely to be a successful strategy for reinvigorating internal administrative law. The history of the APA suggests that imposing new, judicially enforceable requirements on agencies’ internal functioning will simply exacerbate external administrative law’s permeation into formerly internal spheres.<sup>303</sup> If past practice holds, congressional efforts to redirect judicial review to focus on systemic agency functioning may instead serve to open up new areas of agency life to judicial scrutiny without any corresponding pullbacks. To be sure, the record of judicial response to internal law measures is not uniformly in favor of judicial enforcement. Despite repeated efforts by industry and business groups, so far the courts have not held that the IQA is judicially enforceable.<sup>304</sup> Still, history provides a cautionary tale about the potential judicial consequences of congressional internal law intervention, as the express exemption of internal measures from the APA’s procedural requirements did not prevent courts from asserting a number of controls on internal lawmaking.<sup>305</sup> Even congressional efforts to guard against judicial intrusion by limiting judicial review are likely to face significant resistance.<sup>306</sup>

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302. Information Quality Act § 515. OMB has responded to the IQA by, among other actions, imposing peer review requirements on agencies on any “influential scientific information that the agency intends to disseminate.” FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, *supra* note 15, at 2666, 2675; see also CURTIS W. COPELAND & ERIC A. FISCHER, CONG. RESEARCH SERV., RL32680, PEER REVIEW: OMB’S PROPOSED, REVISED, AND FINAL BULLETINS (2005). The IQA has proved contentious, with critics arguing that it is unnecessary, given preexisting agency mechanisms to guarantee information quality, and has been abused by industry to serve antiregulatory goals. See, e.g., SIDNEY A. SHAPIRO ET AL., CTR. FOR PROGRESSIVE REFORM, CPR WHITE PAPER 601, OSSIFYING OSSIFICATION: WHY THE INFORMATION QUALITY ACT SHOULD NOT PROVIDE FOR JUDICIAL REVIEW 2–3, CPR White Paper 601 (2006), [http://www.progressivereform.org/articles/CPR\\_IQA\\_601.pdf](http://www.progressivereform.org/articles/CPR_IQA_601.pdf) [<https://perma.cc/S5P9-6C9Z>]; James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL’Y 521, 521 (2003) (arguing that OMB’s IQA guidelines “should increase transparency and public participation in agency information activities”); Wendy E. Wagner, *The “Bad Science” Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, LAW & CONTEMP. PROBS., Autumn 2003, at 63.

303. See *supra* Part II.

304. E.g., *Salt Inst. v. Leavitt*, 440 F.3d 156 (4th Cir. 2006) (holding that no private right of action exists to enforce the IQA); see also *Harkonen v. U.S. Dep’t of Justice*, 800 F.3d 1143 (9th Cir. 2015) (avoiding addressing the justiciability issue by finding agency action at issue not covered by the IQA); *Prime Time Int’l Co. v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010) (holding that agency action at issue did not violate the IQA and thus not deciding whether IQA is subject to judicial enforcement).

305. See *supra* Part III.

306. See, e.g., *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967), *abrogated by Califano v. Sanders*, 430 U.S. 99 (1977).

Equally important, Congress is often unwilling to forego judicial review and external constraints. Political theorists emphasize how judicial review supports congressional control of agencies, by ensuring enforcement of statutorily imposed requirements.<sup>307</sup> Contemporary political reality bears out this point. Current efforts at administrative reform overwhelmingly seek to expand judicial review, and sometimes congressional scrutiny, as a means of constraining administration.<sup>308</sup> The bills that have gained support in the most recent Republican Congresses and face new prospects of enactment in the coming congressional term under unified government<sup>309</sup>—the Separation of Powers Restoration Act of 2016,<sup>310</sup> the Regulatory Accountability Act 2015,<sup>311</sup> and the Regulations from the Executive in Need of Scrutiny Act of 2015 (REINS Act)<sup>312</sup>—are all about expanding external administrative law. Underlying these proposals are deep ideological disagreements over regulation and intense political party polarization. Similar partisan battles during the Obama Administration have caused appointment delays, budget showdowns, and skepticism of career bureaucrats.<sup>313</sup> The current period of unified government creates a prospect for the enactment of a major, transsubstantive legislation. What remains to be seen is whether the appetite for increased regulation of agency procedure and heightened external review of agency action remains when agencies will be implementing policies more aligned with the political preferences of those seeking further constraints on administration.

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307. Daniel B. Rodriguez & Barry R. Weingast, *Is Administrative Law Inevitable?* 40–41 (Mar. 2, 2009) (unpublished manuscript), <http://escholarship.org/uc/item6mx3s46p> [<https://perma.cc/GA9D-CKHJ>].

308. See, e.g., Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2 (as passed by House, July 12, 2016) (specifying that courts shall decide “de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies”); Regulations from the Executive in Need of Scrutiny Act of 2015, H.R. 427, 114th Cong. §§ 801(b), 805(b) (as passed by House, July 28, 2015) (providing that a major rule shall not take effect unless Congress enacts a joint resolution of approval); Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. §§ 3–7 (as passed by House, Jan. 13, 2015) (imposing great procedural constraints on agency rulemaking and heightened standards of judicial review). The IQA appears to have had a similar, antiregulatory motivation. Enacted without debate as an appropriations rider, the statute was justified on contentious industry concerns about “bad science” and has served to increase industry’s ability to challenge information in rulemakings. See Wagner, *supra* note 302, at 68–69, 73–77, 95–96.

309. See *supra* note 32 (discussing current version of the Regulatory Accountability Act, combining these individual measures and recently passed by the House).

310. H.R. 4768, 114th Cong. (2016).

311. H.R. 185, 114th Cong. (2015).

312. H.R. 427, 114th Cong. (2015).

313. See Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 *DUKE L.J.* 1645, 1649–52, 1683 (2015) (describing contribution of partisanship as well as other factors to ongoing delays despite filibuster reform); Lauren French et al., *Boehner Ends Stalemate*, *POLITICO* (Mar. 3, 2015), <http://www.politico.com/story/2015/03/dhs-funding-billhousevote-115693.html> [<http://perma.cc/5WG4-3758>] (describing Republican effort to overturn immigration policies through appropriations restrictions).

More modest reforms hold greater potential to improve the place of internal administrative law. Daniel Farber and Anne Joseph O'Connell make one such proposal, calling on Congress to institute regular GAO investigations into agency functioning.<sup>314</sup> Given GAO's close identification with Congress, and its familiarity with how administrative agencies function, requiring regular GAO investigations could prove a mechanism to improve internal administration.<sup>315</sup> But the actual internal benefits of such a requirement would turn on nonpoliticization of the investigations by Congress, as well as agency attentiveness to GAO concerns—both of which seem unlikely in the current partisan climate.<sup>316</sup>

More generally, Congress could also create strong internal monitors, able to police agency performance from the inside and in real-time, as several scholars have urged in the national security context.<sup>317</sup> Congress has made some steps in this direction, for example in 2004 creating the Privacy and Civil Liberties Oversight Board (PCLOB) as an independent agency within the executive branch to advise the president and other senior executive branch officials on privacy and civil liberties issues raised by national security policies.<sup>318</sup> On a more widespread basis, Congress created agency inspector generals to police allegations of wrongdoing, and the Merit Systems Protection Board to adjudicate claims against civil service employees.<sup>319</sup> The PCLOB and other internal monitors serve important functions but have sometimes run into the shoals of partisanship and agency resistance.<sup>320</sup> Even these ostensibly internal entities lack true insider status, in that they often

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314. Farber & O'Connell, *supra* note 10, at 1180–83.

315. See Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 373–74 (2002) (describing GAO's authority and congressional reliance on GAO). GAO frequently studies overall agency performance. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-747, MANAGING FOR RESULTS: AGENCIES' TRENDS IN THE USE OF PERFORMANCE INFORMATION TO MAKE DECISIONS (2014), <http://www.gao.gov/assets/670/666187.pdf> [<http://www.gao.gov/assets/660/651052.pdf>]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS (2012), <http://www.gao.gov/assets/660/651052.pdf> [<https://perma.cc/TU8V-UQY7>].

316. See Fisher, *supra* note 315, at 374–94 (detailing past agency resistance to GAO requests and fights between the executive branch and GAO during the Bush II Administration); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1750 (2015) [hereinafter Metzger, *Agencies, Polarization, and the States*] (noting recent politicization of congressional investigations).

317. See, e.g., Schlanger, *supra* note 63, at 54–56 (discussing how Congress creates offices in agencies to protect important values that are not central to the agencies' mission, the powers of such offices, and their weaknesses); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013) (examining inspector generals, their ties to Congress, and effectiveness as internal monitors).

318. Renan, *Fourth Amendment*, *supra* note 33, at 1118–23.

319. See Inspector General Act of 1978, 5 U.S.C. app. § 5a (2012); 5 U.S.C. §§ 1201–1206 (2012) (Merit Systems Protection Board).

320. See Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SECURITY J. 112, 166 (2015) (emphasizing PCLOB's lack of enforcement power); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*,



have independence protections against presidential control and are in practice more accountable to Congress.<sup>321</sup> Indeed, it is often their external connections that arguably give these entities influence and authority within the executive branch.<sup>322</sup> As a result, congressional reforms of this type, though potentially yielding important benefits for how agencies function, may serve to reinforce skepticism about the role of pure internal administrative law.

## 2. The Courts

Two different lines of judicial reforms could help foster internal administrative law. The first follows from Part III's analysis of how judicial doctrine progressively narrowed the space available for internal law following the enactment of the APA. This history provides several ready recommendations for doctrinal revision. Perhaps most important, courts should abandon their current approach of treating agency attempts to bind internal agency officials as grounds for characterizing an agency rule as a legislative rule requiring notice and comment. As argued above, that doctrinal move creates the wrong incentives for agencies when it comes to developing and refining their internal law. In addition, courts should limit the application of the *Accardi* doctrine to the agency's own legislative rules. That would clarify that the agency's choice to trigger external enforcement would follow from its choice of policymaking form, but would not create the threat of external enforcement as a condition of internal bindingness. Finally, courts should not treat guidance that aims to structure agency discretion as necessarily triggering review under APA section 5. Rather, in line with the limitation of *Accardi*, courts should only treat the agency's legislative rules as establishing "law to apply" for the purpose authorizing judicial review of agency action. This too would make the agency's choice set clear: procedural form would dictate whether the agency sought to trigger external enforcement. But the fact that an agency has decided to cabin its own discretion—a necessary and critical feature of administrative governance under law—should not serve to invite judicial insistence that an agency adhere to such constraints if it concludes they are no longer appropriate. Each of these reforms would help to restore the status of internal law that the APA sought to protect, and, of particular importance to the Supreme Court, closely track the text of the APA.<sup>323</sup>

The second line is more ambitious, and would go beyond judicial acceptance to judicial encouragement of internal administrative law. Currently, judicial deference is often a function of the formality of the

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50 HARV. C.R.-C.L. L. REV. 289, 316–24 (2015) (detailing ideological divides hampering the PCLOB).

321. See Renan, *Fourth Amendment*, *supra* note 33, at 1119; Sinnar, *supra* note 320, at 316.

322. See Metzger, *Internal and External Separation of Powers*, *supra* note 29, at 444–45.

323. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (admonishing lower court for imposing requirements beyond those mandated by the text of the APA); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009) (same); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 525 (1978) (same).

procedure through which the agency acts.<sup>324</sup> That structure incentivizes the agency to demonstrate its deliberation and responsiveness in a given context, but does not prioritize the quality of the agency's overall administration. Review (and deference) are determined without attempting to incentivize agencies to pay attention to some features important to internal law, in particular structures of internal management, the agency's internal deliberative process or use of expert staff, or the extent to which the vetted its proposed decision with internal and external constituencies. To the extent that agencies are responsive to judicial review incentives, deference doctrines could be a useful lever to employ to foster greater agency attention to internal law. Moreover, given that current deference doctrines are largely the result of judicial creation, working off the APA's judicial-review provisions, courts need not wait for new legislation to act.<sup>325</sup>

Reasons exist, however, to be wary of relying on the courts to actively foster internal administrative law. Judges rarely have expertise or institutional competency in identifying good internal management structures or understanding internal agency dynamics. To the contrary, a repeated complaint laid against judicial review of administrative action is that courts have failed to consider how judicial doctrines affect agencies internally and misguidedly sought to remake administrative agencies in a judicial rather than bureaucratic image.<sup>326</sup> Compared to Congress, the president, and agencies themselves, the courts may be particularly ill-suited to the task of fostering new and beneficial forms of internal administrative law.

Indeed, the judicial resistance to internal administrative law detailed in Part III suggests that courts may well be unwilling to adopt the more modest doctrinal reforms described above to reinstate the APA scheme for internal law, at least absent a congressional mandate. The judicial retrenchment of internal administrative law reflects broader themes in the evolution of administrative law—both the anxiety about the powers of the administrative state, as expressed by courts' willingness to review more aspects of administrative life, and the increasingly centralized control over agencies by the president and his or her offices. The judicial doctrines that eventually came to regulate and externalize agencies' internal commitments are of a piece with other ways in which courts extended the scope of their oversight of

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324. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) (conditioning *Seminole Rock/Auer* deference on agency's position reflecting its "fair and considered judgment"); *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001) (suggesting that notice-and-comment rulemaking and formal adjudication presumptively warrant *Chevron* deference); Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1277–81 (2016) (providing standard of review under *Chevron*, *Mead*, *Seminole Rock/Auer*, and *Skidmore* showing that these doctrines grant greatest deference to the agency's most deliberate statements).

325. See 5 U.S.C. § 706 (2012); Metzger, *Embracing Administrative Common Law*, *supra* note 113, at 1296–97.

326. See MASHAW & HARFST, *supra* note 30, at 224–25; Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1019–57 (2000) (describing the "discrete pathological effects" of judicial review on agency action, including agenda disruption and forced ossification); Magill & Vermeule, *supra* note 16, at 1041, 1061.

agency actions, such as expanding access to judicial review and increasing demands for rational justification by agencies.<sup>327</sup> The judicial warrant for monitoring and regulating a wide swath of internal administrative law also reflects some degree of judicial distrust or ignorance of agencies' capacities for self-governance. Indeed, this asserted judicial control law has a juristic character.<sup>328</sup> As opposed to recognizing agencies' practices as a form of law on its own, judicial enforcement of agency internal law asserts that the law is what the courts can review and see. This posture degrades forms of legal ordering that do not create the sort of rights enforceable in court as less than law.

### B. *Internal Reforms: The President and the Agencies*

The limited prospects for congressional and judicial reform suggests that internal measures, coming either from the president and central executive branch entities or from agencies, will prove critical to any project of fostering internal administrative law.

#### 1. Administering Central Executive Branch Law

In line with the recommendations of the Brownlow Report and later Hoover Commission,<sup>329</sup> presidents have increased their control over agencies in large part through executive orders and other executive actions that have imposed uniform internal law requirements on agencies. Such central executive branch internal law is the primary means by which presidents assert their policy priorities, management, and supervision over agencies. But when the operation of internal law appears in the guise of centralized executive branch policies, it takes on a more political complexion—more obviously the product of asserted political needs to control agency action than a project of agency self-organization and commitment. Internal law risks appearing as simply a vehicle for substantive politics, not a form of law, and especially so during changes in presidential administration. As a result, the president's management of these centralized policies must be all the more attentive to the rule-of-law values including transparency, argumentation, and consistency. There is much room for improvement in how presidents have administered their internal law, in particular with respect to transparency, norms of reasoned elaboration, and precedent in centralized executive branch agencies.

Transparency remains a problem for the principal offices that administer this internal law—OMB, OIRA, and the Office of Legal Counsel (OLC).

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327. See Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267, 276 (1990).

328. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

329. See *supra* Section II.A.

Despite OIRA's investment in a much more sophisticated "Regulatory Review Dashboard"<sup>330</sup> with information about how many agency rules are under review and their stage of development, its disclosures remain inadequate. OIRA's public disclosures do not include a complete picture of the rules subject to review; some rules only appear on it after significant delay, some are held back from transmittal by the White House, and some items simply never appear.<sup>331</sup>

But the transparency problems at OIRA have a far greater scope. The regulatory review order requires that when the OIRA believes the agency's action is inconsistent with the president's policies or priorities, it must explicitly inform the agency in writing,<sup>332</sup> provide a "written explanation" for the return of a rule,<sup>333</sup> require the agency to identify "in plain, understandable language" changes in the rule that OIRA required,<sup>334</sup> and make available all documents exchanged between OIRA and the agency.<sup>335</sup> Scholars have documented that neither the Bush nor the Obama Administrations followed many of these requirements,<sup>336</sup> and that OIRA review has often stalled rules well beyond the ninety days provided in the executive order.<sup>337</sup> This, too, raises transparency issues. When regulations are delayed, it is often not clear, as Lisa Heinzerling argues, which office—OIRA itself, other White House offices, the head of another agency, etc.—is source of the delay.<sup>338</sup> Similar problems of transparency arise in the OMB's exchanges with agencies over budgeting,<sup>339</sup> which are governed by a confidentiality norm imposed by

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330. *Dashboard*, OFF. INFO. & REG. AFF., <http://www.reginfo.gov> [<https://perma.cc/4KE2-DS2X>].

331. Lisa Heinzerling, *Who Will Run the EPA?*, 30 YALE J. ON REG. 39, 42 (2012) [hereinafter Heinzerling, *Who Will Run the EPA?*] (providing evidence of these problems).

332. Exec. Order No. 12,866 § 4(c)(F)(5), 3 C.F.R. 638, 643 (1994), *reprinted in* 5 U.S.C. § 601 note (2012).

333. *Id.* § 6(b)(3), 3 C.F.R. 647.

334. *Id.* § 6(a)(3)(E)(iii), 3 C.F.R. 646.

335. *Id.* § 6(b)(4)(D), 3 C.F.R. 647; *see also* Davidson & Leib, *supra* note 25, at 305 (calling attention to this requirement).

336. *See* Davidson & Leib, *supra* note 25, at 305 (noting OIRA's neglect of these transparency requirements); Heinzerling, *Who Will Run the EPA?*, *supra* note 331, at 41 ("The Obama administration follows almost none of these rules on transparency."); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 700 (2016) (explaining failures to comply).

337. *See* Watts, *supra* note 336, at 699 (describing delays in OIRA review under in the Obama Administration).

338. Heinzerling, *Who Will Run the EPA?*, *supra* note 331, at 40.

339. *See* Pasachoff, *supra* note 16, at 2251–61 (arguing that the scope of OMB's confidentiality requirements on the important question of how agency budget are negotiated and established sweeps well beyond what is necessary).

OMB,<sup>340</sup> as well as in OLC's provision of legal advice through less formal processes than its traditional opinion writing.<sup>341</sup>

Transparency is particularly important to internal law's recognition as law, so these gaps pose serious problems. Going forward, both retaining and complying with the disclosure and reason-giving requirements of the regulatory review executive order would be a good place to start.<sup>342</sup> That level of transparency is also critical for this centralized form of internal law to promote, not obscure, political accountability between the president's offices and the agencies.

Lack of transparency is not the only feature of central executive branch internal law that requires attention. The legal demands of justification and reason giving also apply to internal forms of control.<sup>343</sup> Reason giving serves many different functions, one critical role being to provide a source of constraint. When public authorities give reasons, they make a prima facie commitment to acting within the scope of those reasons.<sup>344</sup> This implies that departures, changes in course, or reversals carry a burden of justification; generally, public authorities must provide reasons for the change that respond in part to the reasons originally offered.

To be sure, the weight of the constraint of prior reasons varies in different aspects of the legal system. In traditional common law practice, precedent binds in the sense of providing exclusive or at least overriding reasons for action for a subsequent decisionmaker, to the extent the decisionmaker is faced with similar circumstances.<sup>345</sup> But reason giving can also operate more permissively—as it does, for instance, under the APA's arbitrary-and-capriciousness standard of review.<sup>346</sup> As the Court has emphasized, that standard recognizes that agencies can and will change position, and simply

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340. PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET, *supra* note 15, § 22, at 1 (requiring this confidentiality); *see also* Pasachoff, *supra* note 16, at 2224–27 (providing a detailed account of these confidentiality provisions in comparison to other budget confidentiality provisions).

341. Renan, *Law Presidents Make*, *supra* note 71, at 20–27, 61–62 (documenting a qualitative shift away from formal opinions and a quantitative drop in number of opinions issued, raising question about corresponding decline in transparency).

342. Davidson & Leib, *supra* note 25, at 305–06 (arguing for compliance with these requirements to create transparency in OIRA's work); Heinzerling, *Who Will Run the EPA?*, *supra* note 331, at 43 (arguing for compliance with the executive order as a starting point).

343. *See* text accompanying notes 89–95.

344. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 400–01 (2012) (arguing that formal statements of reasons given to justify their regulations should guide their interpretation); *see* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995).

345. Larry Alexander & Emily Sherwin, *Judges as Rule Makers*, in COMMON LAW THEORY 27, 28–29 (Douglas E. Edlin ed., 2007) (describing precedent as providing preemptive authority over subsequent decisionmakers).

346. 5 U.S.C. § 706 (2012).

requires that an agency provide a reasoned explanation for its current approach, which entails that the agency acknowledge the change and provide reasons for it.<sup>347</sup>

Within the executive branch, the norms of precedent at OLC have received greatest attention. This is not surprising; the case for common law-style adherence to precedent is easy to see with regard to OLC, at least when it engages in its traditional, formal opinion writing on particular facts.<sup>348</sup> The formal statement of reasons in OLC's opinions provides ready guidance to subsequent generations of lawyers, and OLC treats its prior opinions as having the weight of precedent.<sup>349</sup> In the past few years, OLC has written fewer opinions and appears to be shifting its work more to informal, context-specific advice.<sup>350</sup> That informal, situational advice represents a decline in the common law model. Unlike OLC, OIRA does not currently embrace any form of precedent with regard to its past decisions in the context of regulatory review—for instance in prompt or review letters. Nestor Davidson and Ethan Leib argue that it should, contending that having OIRA treat its decisions as bodies of precedent would “enable[ ] meaningful reliance on the decision made, help[ ] justify binding agencies in the future, and provide[ ] an organized way to depart from precedent when that is salutary.”<sup>351</sup> Whether formally accorded the weight of precedent or not, a commitment to internal administrative law supports OIRA treating its decisions as at least within the obligation of reasoned elaboration. That approach would allow departures from prior practice, but also reinforce that OIRA is elaborating law, not merely making ad hoc decisions. In short, the principle of reasoned elaboration encompasses not just agencies, but also their central executive branch overseers.

The recent change in presidential administration puts the need for these reforms in high relief. As is true of many presidential transitions that involve a change in political control of the White House, the new Trump Administration has made clear that it intends to significantly change substantive policy in a wide array of contexts.<sup>352</sup> It can do so in ways that make transparent

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347. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–15 (2009); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). Sometimes it may require more. See *Encino*, 136 S. Ct. at 2126 (requiring heightened justification when prior policy engendered reliance interests); *Fox*, 556 U.S. at 515 (requiring heightened justification when agencies new policy “rests upon factual findings that contradict those which underlay its prior policy”).

348. See Davidson & Leib, *supra* note 25, at 273; Renan, *Law Presidents Make*, *supra* note 71, at 8–12 (identifying OLC written opinions as a form of precedent-based, case-specific common law).

349. See Trevor W. Morrison, *Stare Decisis in the Office of the Legal Counsel*, 110 COLUM. L. REV. 1448, 1470–74 (2010).

350. Renan, *Law Presidents Make*, *supra* note 71, at 27 (showing a drop in OLC opinion writing since 2000).

351. Davidson & Leib, *supra* note 25, at 299–303 (arguing that OIRA's decisions should be treated as establishing precedents to which it is bound).

352. See, e.g., Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

the source of the changes and provide justification for the grounds for a new approach, both as to matters of fact and policy choice. Proceeding in that way, the new administration could help to strengthen internal administrative law of the executive branch. Alternatively, however, the new presidential administration may opt to change substantive direction without paying heed to these internal constraints and legality values, leaving any enforcement of administrative-law norms of reasoned decisionmaking solely for the courts. Doing so would yield the benefit of faster policy change, but at the cost of an opportunity to embed norms of administrative legality that are important checks against abuse of executive power.

## 2. Fostering Agencies' Internal Administrative Law

The president has a second critical role to play with respect to internal law. As the Brownlow Committee urged in its report,<sup>353</sup> the president can also be pivotal in fostering and enabling the agency's development of its own internal administrative law. Doing so requires confronting natural presidential incentives to centralize control. Presidents are held accountable for the federal government's operation, and thus have strong incentives to assert control over agency action.<sup>354</sup> Few institutional incentives push in the opposite direction, except for limited capacity, at least if increased presidential control does not result in discernibly worse outcomes.<sup>355</sup> Yet centralized preemption of an agency's own processes and decision rules can have harmful systemic consequences. It can erode the agency's capacity to develop those rules, and thereby undercut agency performance. Just as significantly, it can send the message that responsibility for abiding by internal norms of constraint is merely a matter of compliance with executive directives, not ultimately and inevitably an agency responsibility.

The challenge is finding a mechanism to force active deliberation about the appropriate balance between imposing central executive branch norms and allowing space for agencies to develop their own internal law. More sustained and structured engagement with the balance between decentralization and devolution of internal administrative law is needed. Existing executive orders and executive branch policy do not require that the White House explicitly assess either how centralization contributes to the president's capacity to supervise agency implementation or how centralization undermines agencies' own incentives to self-correct and innovate with regard to their internal law. As a result, the costs and benefits of centralization now register at best in ad hoc ways, through successes or observed failures.

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353. See *supra* text accompanying notes 136–146.

354. Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 244–45 (John E. Chubb & Paul E. Peterson eds., 1985).

355. DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES BUREAUCRACY, 1946–1997*, at 4, 25–27 (2003) (noting that presidents are held accountable for “the success or failure of the entire government” and for their performance as managers of federal bureaucracy).

Public law has adopted a variety of mechanisms to try to provide greater deliberation about the effect of centralizing—usually through federalizing—that could provide models for the executive branch. At one extreme are analysis and consultation requirements. For instance, several executive orders require agencies to consult with state, local, and tribal officials before “imposing regulatory requirements that might significantly” affect those entities, and to assess and minimize those effects.<sup>356</sup> These requirements aim to ensure that agencies are actively engaged with states and give states the responsibility of persuading an agency that greater centralization is not required. More demanding protections are also used. For instance, the Unfunded Mandates Reform Act of 1999 subjects a bill to a procedural objection in the legislative process—a point of order—if the bill imposes costs above an inflation-adjusted threshold on states.<sup>357</sup>

A similar requirement of assessing and potentially minimizing the impact of centralization on agency internal law could be imposed on central executive branch actors. To be sure, the two contexts are notably distinct. Constitutional federalism principles underlie these requirements that agencies assess and minimize the impact of their actions on states. By contrast, the Constitution arguably demands a certain degree of central executive branch supervision of agency action; here, constitutional values may weigh in favor imposition of burdens, not against.<sup>358</sup> Still, the constitutional concern with supervision of federal power also mandates internal oversight and control mechanisms within agencies themselves.<sup>359</sup> Moreover, having to justify centralized requirements would provide the president an important opportunity to deliberate about and articulate what constitutional supervision requirements entail, at both the presidential and agency levels.<sup>360</sup> The president thus has responsibility not only to model adherence to executive branch internal law, but also to expressly evaluate the costs and benefits of greater centralization or decentralization of internal administrative law.

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356. Exec. Order. 12,866 §§ 1(b)(9), 5–6, 3 C.F.R. 638–40 (1994) (stating principle of regulations and requiring consultation and authorizing review to ensure reduction of burdens of federal regulation on state, local, and tribal entities), *reprinted in* 5 U.S.C. § 601 note (2012); *see also* Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693–94 (May 20, 2009) (requiring agencies to fully consider the legal bases for their actions and state prerogatives before preempting state law); Exec. Order No. 13,132, 3 C.F.R. 206 (1999) (requiring that federal regulation allow maximum possible discretion to states and generally requiring that federal regulation no unduly trammel on state prerogatives).

357. 2 U.S.C. § 658d(a)(2) (2012).

358. For an argument articulating this structural constitutional principle, see Metzger, *Duty to Supervise*, *supra* note 9.

359. *Id.* at 1879–82.

360. *See id.* at 1925–29 (describing need for engagement on the proper scope of presidential supervision, in both the courts and executive branch).



### 3. Agency Self-Reform

A final yet essential mechanism for fostering internal administrative law—and its role in establishing legitimacy—depends upon the agency. Agencies already generate a vast amount of internal administrative law, as detailed above.<sup>361</sup> Agencies do so because internal administrative law is essential for them to be effective in performing their functions and achieving their policy goals. Agency leaders' desire to control lower-level agency personnel provides them with an additional reason to generate internal law. But internal administrative law can also serve as a means by which lower-level staff can inform, influence, and potentially constrain their political leaders. A prime example here are no-action letters, used extensively by the SEC and other agencies; generated by staff and rarely vetted beforehand by the agency's commissioners, such letters are a means by which staff can bring pressing issues to the commissioners' attention along with the staff's suggestions on how to proceed.<sup>362</sup> More pointedly, staff can rely on past letters and other issuances, or statements of existing practice and policy, to resist efforts by new agency heads to change approach or influence the direction of the agency on open questions.<sup>363</sup> Internal review and complaint mechanisms and day-to-day managerial supervision can serve the interests of personnel throughout the agency, in flagging issues that need more attention and identifying performance weaknesses.

In sum, agencies have no shortage of reasons to generate internal administrative law. But that does not mean that agencies have the same incentives to ensure that the measures they generate score high on rule-of-law metrics, such as regularity, coherence, and justification.<sup>364</sup> Agencies generally identify the statutory and regulatory authorities for their actions. But agencies do less well on other fronts, such as transparency, clarity, and consistency. To some extent, these failures are a reflection of the doctrinal developments discussed in Part III. For example, it seems unlikely that in practice CIS inspectors would have discretion to deny deferred action to immigrants who met DAPA's criteria,<sup>365</sup> but DHS likely denied DAPA's binding character for fear of triggering notice-and-comment requirements.

Yet agencies may deviate from rule-of-law values for less acceptable reasons. They may forego clarity and publicity in order to avoid having to defend their policies and decisions, or to preserve maximal room to maneuver in the future. They may seek to exploit loopholes to avoid procedural burdens, such as packaging measures that impose new legal requirements on the

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361. See *supra* Section I.A.

362. Cf. Jennifer Nou, Subdelegating Powers 4 (unpublished manuscript) (on file with authors) (describing how internal SEC rules have delegated decisionmaking authority to subordinates within the agency).

363. See *id.*

364. See *supra* text accompanying note 87.

365. See Barkow, *supra* note 16, at 1156 (suggesting as much).

public as interpretive rules or policy statement.<sup>366</sup> Moreover, presidential policy priorities play a major role in agency decisionmaking—a role that has become more significant in the face of legislative gridlock and greater presidential turn to administration to advance policy goals, and may not wane even in a period of unified government.<sup>367</sup> Yet agencies rarely acknowledge presidential involvement or the impact of presidential preferences in their justifications for their actions.<sup>368</sup>

Such deficiencies are problematic not simply because they make agency action seem legally illegitimate and less “lawlike.” Equally important, when agencies are not forthright about the nature and reasons behind their actions, they lose an opportunity to engage publicly on the nature of law in the administrative realm or to push back at the equation of law with external constraint. Instead, agencies play into the narrative of administration as unprincipled and unlawful, making imposition of external administrative law seem all the more pressing. Hence, an essential element for fostering internal administrative law will be for agencies to ensure that their internal law meets the highest standards of transparency and reasoned elaboration by engaging openly about the nature of law within the administrative state. That approach may well open agencies up to external attack; agencies that openly acknowledge how resource constraints, constituency interests, and presidential politics factored into their actions are likely to face legal challenges and congressional investigation. But external constraints will likely result even if agencies hide the internal factors that bind and guide their decisions, as courts and Congress turn to external means to impose legality on the administrative state.

### C. *Internal Administrative Law and Political Culture*

These reforms hold potential to strengthen internal administrative law. Fundamentally, however, a deeper transformation is needed. Underlying the courts’ resistance to internal administrative law lies distrust of administrative governance. Efforts to constrain internal law through judicial review are of a piece with the courts’ broader development of administrative law. Long animated by fears of agency capture and constitutional concerns of unchecked administrative power, the courts expanded judicial review and procedural constraints on agencies over the last fifty years.<sup>369</sup> In recent years,

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366. 5 U.S.C. § 553 (2012).

367. Kagan, *supra* note 74, at 2344–45; Metzger, *Agencies, Polarization, and the States*, *supra* note 316; *see also* Farber & O’Connell, *supra* note 10.

368. *See* Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1146–59 (2010); Katherine A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 23–26 (2009) (providing examples of agencies not disclosing political influences in justifying their decisions).

369. *See* Metzger, *Embracing Administrative Common Law*, *supra* note 113, at 1295, 1298–1305; Kevin M. Stack, *The Statutory Fiction of Judicial Review of Administrative Action in the United States*, in EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE 317, 318–22 (Christopher Forsyth et al. eds., 2010).

this distrust of administrative government has become explicit in the judiciary, with several justices invoking “the danger posed by the growing . . . administrative state”<sup>370</sup> and administrative “arrogation of power,”<sup>371</sup> to justify refusals to defer to administrative determinations.

But distrust of administrative agencies is by no means limited to the courts. Congress has repeatedly fulminated against administrative agencies in oversight hearings and proposed bills requiring greater scrutiny of administrative action.<sup>372</sup> Many recent political attacks on agencies have a decidedly partisan cast and frequently appeared to be fueled by Republican opposition to Obama Administration initiatives.<sup>373</sup> Particularly given the extent to which administrative agencies are now a critical and well-established part of the nation’s institutional firmament, it is important not to exaggerate the extent of opposition to national administrative government.<sup>374</sup> Still, the anti-administration meme has deep roots in American political culture,<sup>375</sup> and as

370. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting); see also *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217–21 (2015) (Thomas, J., concurring in the judgment) (arguing that *Seminole Rock/Auer* deference to agency interpretations of agency rules undercuts necessary judicial checks on executive power and is at odds with separation of powers); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 44 (on file with authors) (characterizing these concurring and dissenting opinions as “rest[ing] on the overriding fear that the executive will abuse its power”).

371. *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part).

372. See, e.g., Coral Davenport & Julie Hirschfield Davis, *Move to Fight Obama’s Climate Plan Started Early*, N.Y. TIMES (Aug. 3, 2015), <http://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html> (on file with the *Michigan Law Review*) (describing attacks on EPA’s Clean Power Plan for “blatantly disregard[ing] the rule of law” and having been “drawn up by radical bureaucrats”); David Montgomery & Alan Blinder, *States Sue Obama Administration Over Transgender Bathroom Policy*, N.Y. TIMES (May 25, 2016), <http://www.nytimes.com/2016/05/26/us/states-texas-sue-obama-administration-over-transgender-bathroom-policy.html> (on file with the *Michigan Law Review*) (noting challenges to the Department of Education’s transgender student guidance as “so far beyond any reasonable reading of the relevant congressional text such that the new rules, regulations, guidance and interpretations functionally exercise lawmaking power reserved only to Congress”); see also *supra* text accompanying note 270. For a leading example of scholarship in this vein, see HAMBURGER, *supra* note 107.

373. See, e.g., Coral Davenport, *Republican Governors Signal Their Intent to Thwart Obama’s Climate Rules*, N.Y. TIMES (July 2, 2015), <https://www.nytimes.com/2015/07/03/us/republican-governors-signal-their-intent-to-thwart-obamas-climate-rules.html> (on file with the *Michigan Law Review*) (noting that lawsuit against Clean Power Plan was brought by Republican governors and that congressional Republicans were urging Republican state leaders to oppose the plan); Reid Wilson, *Red States Push Back on Federal Transgender Guidance*, MORNING CONSULT (May 18, 2016), <https://morningconsult.com/2016/05/18/red-states-push-back-federal-transgender-guidance> [<https://perma.cc/6FQC-SS8Z>] (describing conservative opposition to DOE transgender guidance).

374. See Sunstein & Vermeule, *supra* note 370, at 54 (noting that these dissents and concurrences do not have “any great prospect of becoming the law any time soon”).

375. See Rubin, *supra* note 64, at 2, 114–19; Jeremy Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 718–22 (2016) (book review).

the 2016 presidential election cycle illustrates, retains political salience. Attacking federal agencies, in addition to the regulations they produce, is popular. From this perspective, the idea of internal administrative law is an oxymoron. The forces of internal administration act in an unprincipled self-aggrandizing fashion, and external constraints are essential to preserving separation of powers and the rule of law.<sup>376</sup>

As a result, preservation of space for internal administrative law requires a deeper ideological and conceptual transformation than political or judicial reforms can provide. It entails acknowledging the legal character of internal administration and the central role that internal administration plays in preserving the rule of law. That, in turn, requires rejecting the false idea that external enforcement is essential to law.<sup>377</sup> It also necessitates more forthright legal and political acknowledgement of the inevitability and constitutionality of administrative agencies, for once we acknowledge that we live in an administrative world, the need for internal administrative law becomes apparent. In short, to appreciate and protect internal administrative law, we must appreciate and affirm the need for administrative government.

#### CONCLUSION

Our defense of internal administrative law is conceptual, historical, and reformist. At a conceptual level, internal administrative law plays a critical role in connecting the values and ambitions we hold for administrative government with its practice; it is the set of internal structures that implement basic commitments to legality and political accountability within administrative agencies. In this way, internal and external law can operate synergistically: internal law implements external law within the agency. Moreover, despite the absence of judicial enforcement, these internal structures and norms operate as a form of law—a system of internal constraints of importance equal to the external administrative law of courts and legislation. The scope of administrative agency activity that never darkens the door of a court simply highlights the cost of neglecting internal structures and treating the court's review as the central moment of administrative law.

The history of internal administrative law prior to and following the enactment of the APA provides a cautionary tale on the role of legislation in structuring the complex relation between internal and external administrative law, and the ways in which internal administrative law remains vulnerable to external administrative law. Prior to the enactment of the APA in 1946, external administrative law took the form of a few area-specific statutes and an accumulating set of judicial doctrines working in company with nonstatutory causes of action. Such predominantly judicial external law made no pretense of addressing internal agency life. Instead, it focused on scrutinizing

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376. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213–22 (2015) (Thomas, J., concurring in the judgment); *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1339–42 (2013) (Scalia, J., concurring in part and dissenting in part).

377. See *supra* Section I.B.

the legality of agencies' ultimate decisions and actions. As a result, it neither swept aside internal law nor created external enforcement of the wide array of internal agency policies and processes. The situation changed with the introduction of the APA which, despite its protection of internal law, provided multiple occasions for courts to consider the internal workings of agencies and gave judicial review a solid statutory foundation. With that foundation, little held courts back from drawing more aspects of internal agency life and systems of accountability into their purview. They preempted and displaced internal law, and increased the costs for agencies to create internal administrative law.

This history prompts question of reform: How can we foster and protect internal administrative law within a legal culture that has come to prioritize external law? As Congress has shown little appetite or capacity for protecting spheres of agency autonomy, the key actors in creating a space for internal administrative law will be the president and the courts, whose tendencies towards greater centralization or expansions of judicial review exact significant costs to administrative legality and accountability. In this sense, we show the costs of externalization and the need for deliberation on the appropriate balance of central and agency-specific administrative law. Agencies, too, have a role and challenge: given their unique place as both the source and target of internal law and their responsiveness to political change, they have a special burden in striving to organize their internal operations in accordance with the highest values of law. This embrace of internal administrative law, and its agenda of reform, redirects the project of administrative law towards its foundation as a field that seeks to comprehend the operative constraints on administrative institutions, not only those imposed from outside.