

AGAINST REMEDIAL RESTRAINT  
IN ADMINISTRATIVE LAW

*Christopher J. Walker\**

*In Remedial Restraint in Administrative Law, Professor Nicholas Bagley argues that we should replace administrative law’s ordinary remand rule with a more restrained, context-specific standard of first assessing whether the parties challenging the action were actually prejudiced by agency error. He bases this argument in part on his belief that the states challenging the Obama Administration’s sweeping executive actions on immigration suffered no harm from the Department of Homeland Security’s failure to engage in notice-and-comment rule-making. That is because, he argues, the states received notice through leaks to the media and had a chance to comment through their public complaints on cable news programs and elsewhere.*

*This Response agrees that administrative law should focus more on remedies. But of all the serious challenges facing the regulatory state today, the lack of this particular type of remedial restraint is not among them. On the contrary, the current rule-based ordinary remand rule plays an important role in preserving a proper separation of powers, in ensuring agencies exercise their congressionally delegated discretion in a nonarbitrary manner, and in facilitating a richer court–agency dialogue that allows courts to have a systemic effect on the administrative process. The benefits of the ordinary remand rule exceed any benefits of a more restrained, standard-like remedial approach. And the current rule avoids the costs of courts assessing, for instance, whether regulation by press leakage or regulation by Twitter is an acceptable, harmless substitute for notice-and-comment rulemaking.*

## INTRODUCTION

Last year, administrative law scholars and practitioners engaged in a fierce and wide-ranging debate regarding the Obama Administration’s

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\* Associate Professor of Law, Michael E. Moritz College of Law, The Ohio State University. This Response benefited greatly from comments on prior drafts from Professor Lary Garvin and Connor Raso and from conversations at the 2016 Administrative Law New Scholarship Roundtable at Michigan State, where Professor Nicholas Bagley presented an earlier draft of his article.

landmark executive actions on immigration.<sup>1</sup> These actions, under the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) guidance memorandum and its predecessor the Deferred Action for Childhood Arrivals (DACA) guidance memorandum, made available a discretionary form of relief from removal—“deferred action”—to an estimated four million of the more than eleven million noncitizens who were unlawfully present in the United States at the time.<sup>2</sup> Twenty-six states challenged certain parts of DAPA.<sup>3</sup> The Fifth Circuit ultimately upheld the district court’s nationwide preliminary injunction that enjoined those parts of DAPA pending resolution of the case on the merits.<sup>4</sup> The Supreme Court granted review of the decision.<sup>5</sup> After Justice Scalia’s death, however, the Fifth Circuit’s decision was affirmed without opinion by an equally divided Court.<sup>6</sup>

This legal challenge presented a number of discrete questions concerning core administrative law principles: Do the states have standing under Article III of the U.S. Constitution to challenge these immigration enforcement policies in federal court?<sup>7</sup> Are such policies “committed to agency discretion by law” such that they are not subject to judicial review under the Administrative Procedure Act (APA)?<sup>8</sup> Turning to the merits, are these executive actions arbitrary and capricious under the APA as contrary to the agency’s governing statute, the Immigration and Nationality Act? When granting review, the Supreme Court directed the parties to also address “[w]hether the [DAPA] Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.”<sup>9</sup> Finally, and most importantly for the purposes of this Response, should the challenged DAPA provisions have been subject to the APA’s notice-and-comment rulemaking requirements? The district court and the Fifth Circuit both ruled in the

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1. See Nicholas Bagley, Remedial Restraint in Administrative Law, 117 *Colum. L. Rev.* 253, 253–54, 270–71 (2017) [hereinafter Bagley, Remedial Restraint] (discussing issues and debates).

2. *Texas v. United States*, 809 F.3d 134, 148 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016).

3. *Id.* at 146.

4. *Id.*; see also *id.* at 146–50 (detailing DAPA and this judicial challenge).

5. *United States v. Texas*, 136 S. Ct. 906 (2016).

6. *United States v. Texas*, 136 S. Ct. at 2272, *reh’g denied*, 137 S. Ct. 285 (2016).

7. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (reiterating the three main elements for constitutional standing: injury in fact, causation, and judicial redressability). The parties also briefed and argued the additional statutory zone-of-interest standing question under the Administrative Procedure Act. See *Texas v. United States*, 809 F.3d at 162–63.

8. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (“[B]efore any review . . . [under the APA], a party must first clear the hurdle of § 701(a) [requiring that] judicial review ‘applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.’” (quoting 5 U.S.C. § 701 (1982))).

9. *United States v. Texas*, 136 S. Ct. at 906.

states' favor on this question, finding that the states had established a substantial likelihood of success on the merits of this procedural claim.<sup>10</sup>

As debates swirled around all of these questions in early 2016, Professor Nicholas Bagley advanced a provocative and somewhat contrarian position on the *Yale Journal on Regulation's* blog regarding the notice-and-comment question:

It's true that DAPA itself didn't pass through the formal notice-and-comment process . . . . It doesn't follow, however, that the administration never gave notice of DAPA or afforded the public an opportunity to comment. Quite to the contrary. Of all the possible defects in the deferred action program, lack of public input was not one of them.<sup>11</sup>

With respect to the APA's notice requirement, Professor Bagley asserted that it was sufficient that the Obama Administration "leaked the proposal to the national media and held a Rose Garden press conference."<sup>12</sup> As for the APA's public-comment requirement, it was sufficient that state officials "objected vociferously" in public, with such objections covered on CNN and Fox News.<sup>13</sup> As for the requirement that the agency respond to significant comments,<sup>14</sup> it was sufficient that "the [Justice Department's] Office of Legal Counsel released a dense and closely reasoned opinion explaining why DAPA was a lawful exercise of the President's enforcement discretion."<sup>15</sup> Even though the Obama Administration did not even attempt to engage in the procedural formalities of notice-and-comment rulemaking, Bagley concluded that the states' legal challenge on this procedural issue should fail because the APA instructs reviewing courts

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10. *Texas v. United States*, 809 F.3d at 146. The district court did not rule on the states' substantive claims, but the Fifth Circuit also concluded that the states had established a substantial likelihood of success on the merits of their substantive challenges that the DAPA provisions were arbitrary and capricious under the APA as exceeding the agency's statutory authority under the Immigration and Nationality Act. See id. at 178–86; see also *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex.), aff'd, 809 F.3d 134 (5th Cir. 2015), aff'd, 136 S. Ct. 2271 (2016).

11. Nicholas Bagley, No Harm, No Foul in *Texas v. United States*, Yale J. on Reg.: Notice & Comment (Jan. 19, 2016) [hereinafter Bagley, No Harm, No Foul], <http://yalejreg.com/nc/no-harm-no-foul-in-texas-v-united-states-by-nicholas-bagley/> [<http://perma.cc/VQU2-AV3F>]; accord Bagley, Remedial Restraint, supra note 1, at 270–71 (repeating and further developing this argument). This Response takes at face value Bagley's framing of the agency notice and states' response, recognizing others may see the facts differently. See, e.g., Josh Blackman, Gridlock, 130 Harv. L. Rev. 241, 279–303 (2016); Josh Blackman, Immigration Inside the Law, 55 Washburn L.J. 31, 32–36 (2016).

12. Bagley, No Harm, No Foul, supra note 11.

13. Id.

14. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (explaining that under the APA "[a]n agency must consider and respond to significant comments received during the period for public comment"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("[O]ppportunity to comment is meaningless unless the agency responds to significant points raised by the public." (footnote omitted)).

15. Bagley, No Harm, No Foul, supra note 11.

that “due account . . . be taken of the rule of prejudicial error.”<sup>16</sup> In other words, “no harm, no foul.”<sup>17</sup>

In *Remedial Restraint in Administrative Law*, Bagley builds on his blog post and develops a more comprehensive and nuanced argument in favor of reinvigorating the harmless error standard for judicial review of federal agency action under the APA.<sup>18</sup> When confronted with an agency error, he argues, courts should discard the ordinary remand rule of generally vacating and remanding the agency action for further proceedings in favor of a more restrained, context-specific standard of first assessing whether the parties challenging the action were actually prejudiced by the error.<sup>19</sup> The reason for this move, he further explains, is that the costs of the rule-based approach may outweigh the benefits.<sup>20</sup> Bagley then chronicles how this standard should apply in a variety of administrative law contexts—from notice-and-comment failures to errors in agency adjudication.<sup>21</sup>

As Bagley rightly observes, we lack a vigorous debate on questions of remedies in administrative law; this area deserves much more attention by scholars, practitioners, and courts (and perhaps even Congress). *Remedial Restraint in Administrative Law* is a welcome addition to our nascent conversation,<sup>22</sup> one that should hopefully spark further conversation. Similar to Professor Kathryn Watts’s review,<sup>23</sup> however, this is roughly the point at which my agreement with *Remedial Restraint in Administrative Law* ends. This Response does not attempt to present the

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16. Id. (quoting 5 U.S.C. § 706 (2012)); see also 5 U.S.C. § 706 (“In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”).

17. Bagley, No Harm, No Foul, *supra* note 11.

18. Bagley, Remedial Restraint, *supra* note 1, at 258–60.

19. Id. at 263–65.

20. Id. at 255.

21. See id. at 265–312.

22. A number of scholars have focused recent attention on a variety of remedial issues in administrative law. On the ordinary remand rule and court–agency dialogue, see Emily Hammond Mezell, Deference and Dialogue in Administrative Law, 111 Colum. L. Rev. 1722 (2011); Christopher J. Walker, The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue, 82 Geo. Wash. L. Rev. 1553 (2014) [hereinafter Walker, Ordinary Remand Rule]. On remand without vacatur in particular, see, e.g., Ronald M. Levin, “Vacation” at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 384 (2003). On remedies in separation-of-powers structural challenges, see Kent Barnett, To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation, 92 N.C. L. Rev. 481 (2014). And most recently on the nationwide injunction, see Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction (UCLA Sch. of Law, Pub. Law & Legal Theory Research Paper Series Working Paper No. 16-54, 2016), <http://ssrn.com/abstract=2864175> (on file with the *Columbia Law Review*).

23. See Kathryn Watts, Rethinking Remedies, JOTWELL (Jan. 17, 2017), <http://adlaw.jotwell.com/rethinking-remedies/> [http://perma.cc/W5JQ-HZ7D].

comprehensive case against remedial restraint but instead focuses on two main points.

First, as discussed in Part I, one's comfort with a more restrained, standard-like approach to the APA's harmless error rule is likely correlated with one's comfort with the constitutional and normative status of the modern administrative state. Although Bagley and I share similar foundational experiences in administrative law,<sup>24</sup> we clearly do not share similar levels of comfort with the administrative state's role in American governance, much less with the role of courts in supervising federal agency action.<sup>25</sup> For those of us who are less trusting of the federal bureaucracy, we are much less likely to find agency errors harmless—especially errors related to the structures and procedures that attempt to compensate for the regulatory state's democratic deficits. The current rule-based approach of the ordinary remand rule better accounts for this distrust. And this rule-based approach is consistent with the text and structure of the APA's appellate review model, especially as the model has evolved over the decades to address various separation-of-powers concerns.

Second, as discussed in Part II, Bagley's call for remedial restraint is based in part on his intuitions about the costs and benefits of judicial review of agency action.<sup>26</sup> These intuitions seem to be shaped not only by an arresting level of trust in the modern administrative state, as noted above, but also by a striking amount of skepticism regarding judicial review's ability to constrain arbitrary agency action. My own empirical work looking inside agency statutory interpretation and examining the court-agency dialogue on remand seems to suggest otherwise.<sup>27</sup> For instance, it is reasonable to conclude that federal agencies regulate against the backdrop of judicial review. They are familiar with the judicial doctrines that govern administrative law, and they seem influenced by even variation at the margins in judicial doctrine, such as the shift from *Chevron* to *Skidmore* deference. Moreover, the call for remedial restraint does not seem to appreciate some important costs of such a standard-like ap-

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24. To name just a few similarities, we both started our careers clerking for federal judges who routinely review federal agency actions, and we worked together on the Justice Department's Civil Appellate Staff, in which capacity we defended federal agencies in a variety of regulatory contexts. Moreover, we have both represented regulated entities in judicial challenges to federal agency action.

25. Cf. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285 (2014).

26. See, e.g., Bagley, *Remedial Restraint*, supra note 1, at 255 ("It's not obvious, however, that the benefits of a rule-bound approach outweigh its costs; indeed, there's reason to fear that they don't."); id. at 257 ("Holding more agency errors harmless may not much affect agency incentives; to the extent it does, any uptick in agency misbehavior may not be sufficiently worrisome to warrant the reflexive invalidation of agency action.").

27. See, e.g., Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999 (2015) [hereinafter Walker, *Inside Agency Interpretation*]; Walker, *Ordinary Remand Rule*, supra note 22.

proach, including a significant silencing of the court–agency dialogue and an accompanying impairment of the federal judiciary to play a more systemic role in protecting regulated individuals and entities from arbitrary agency action. This systemic role is perhaps particularly important in the agency adjudication context, in which less sophisticated individuals navigate the administrative process without representation and often lack the wherewithal to seek further review of erroneous agency actions.

This Response concludes with a warning about introducing such dramatic change to administrative law without considering its effects on the rest of the modern administrative state. The ordinary remand rule does not operate in isolation, but it is just one part of a calibrated system for judicial review of federal agency action that attempts to strike the proper balance between facilitating the exercise of congressionally delegated agency discretion and reinforcing agency procedures and structures that ensure such agency discretion is not exercised in an arbitrary or capricious manner.

#### I. BUREAUCRACY AND DISTRUST

To understand the proper role of the APA’s harmless error standard in our current approach to judicial review of federal agency action, it is helpful to frame administrative law’s larger, decades-long struggle to balance agency discretion with judicial review to constrain arbitrary agency action. The Administrative Procedure Act of 1946 attempted to strike such a balance and in so doing embraced an appellate model of judicial review.<sup>28</sup> Under this model, courts review agency actions similarly to how appellate courts review trial court decisions in civil litigation.<sup>29</sup> The appellate review model in the civil litigation context is based on the record from the prior proceeding, and the reviewing court does not engage in independent fact-finding. Likewise, the standard of review reflects the comparative expertise of the various institutions, with more or less deferential review depending on whether the issue is more factual or legal, respectively. It is thus not surprising that the APA incorporates a judicial review principle that “due account shall be taken of the rule of prejudicial error.”<sup>30</sup> A similar “harmless error” rule was included in the original 1937 Federal Rules of Civil Procedure in that errors at trial are not

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28. Bagley, *Remedial Restraint*, *supra* note 1, at 258–60. See generally Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *Colum. L. Rev.* 939 (2011).

29. See Walker, *Ordinary Remand Rule*, *supra* note 22, at 1554–56 (discussing administrative law’s appellate review model in greater detail).

30. 5 U.S.C. § 706 (2012). As the Attorney General’s 1947 manual on the APA asserts, this prejudicial error rule means that “errors which have no substantial bearing on the ultimate rights of the parties will be disregarded.” U.S. Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 110 (1947).

grounds for relief “unless refusal to take such action appears to the court inconsistent with substantial justice.”<sup>31</sup>

Unlike the intrabranch relationship between appellate and trial courts, however, the relationship between courts and agencies implicates separation-of-powers concerns among all three branches of government. On the Article I front, “[t]he presumption that the reviewing court has superior competence to answer questions of law is rebutted by the fact that Congress often delegates law-elaboration authority first and foremost to the agency.”<sup>32</sup> On the Article II front, most federal agencies are squarely located within the Executive Branch, with so-called independent agencies more geographically ambiguous. As such, those federal agencies have certain law-execution discretion—separate from the congressionally delegated authority—under Article II.<sup>33</sup> Administrative law’s appellate model of judicial review has thus evolved to incorporate a number of agency-deference doctrines that reflect these separation-of-powers values. *Chevron* deference comes immediately to mind.<sup>34</sup> As Professor Thomas Merrill has explained, one reason why administrative law’s approach to judicial review has persevered is that “[t]he appellate review model has . . . proven to be flexible at the macro level.”<sup>35</sup>

A contrasting set of separation-of-powers concerns is also at play. The eras of federal lawmaking by common law and by statute have ceded to an era of federal lawmaking by regulation.<sup>36</sup> As Chief Justice Roberts remarked, “The administrative state ‘wields vast power and touches al-

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31. Fed. R. Civ. P. 61 (1937) (repealed 2007). In 2007, Rule 61 was stylistically modified to instruct that “the court must disregard all errors and defects that do not affect any party’s substantial rights.” Fed. R. Civ. P. 61 (as amended Apr. 30, 2007, effective Dec. 1, 2007).

32. Walker, Ordinary Remand Rule, *supra* note 22, at 1555 (citing, *inter alia*, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

33. See Christopher J. Walker, Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A *Brand X* Doctrine of Constitutional Avoidance, 64 *Admin. L. Rev.* 139, 173–82 (2012) (exploring these dual separation-of-powers concerns in the context of *Chevron* deference and modern constitutional avoidance). To be sure, some scholars have advanced a more robust Article II theory. See, e.g., Jack Goldsmith & John F. Manning, The President’s Completion Power, 115 *Yale L.J.* 2280, 2282 (2006) (arguing that the President has constitutional authority to fill in the holes of any statutory scheme, subject to congressional override).

34. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (instructing courts to defer to reasonable agency interpretations of ambiguous provisions in statutes the agency administers); see also Merrill, *supra* note 28, at 999 (noting “in response to the deregulation movement, the model was sufficiently elastic to permit a further modification in the appropriate division of authority in resolving questions of law, most prominently with the *Chevron* decision in 1984”).

35. Merrill, *supra* note 28, at 998.

36. See, e.g., Dakota S. Rudesill, Christopher J. Walker & Daniel P. Tokaji, A Program in Legislation, 65 *J. Legal Educ.* 70, 72 (2015) (“In 2013 alone, federal agencies filled nearly 80,000 pages of the Federal Register with adopted rules, proposed rules, and notices. By contrast, the 113th Congress [filled] . . . a total of 1,750 pages in the Statutes at Large.” (footnote omitted)).

most every aspect of daily life” such that “[t]he Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now hold over our economic, social, and political activities.”<sup>37</sup> To be sure, the Supreme Court has not overruled the nondelegation doctrine, which instructs that Congress cannot delegate legislative power to federal agencies but, instead, must delegate lawmaking power only based on an “intelligible principle.”<sup>38</sup> Yet the doctrine currently imposes no real constraints; the Court has yet to find any delegation to be unconstitutional since the APA’s enactment.<sup>39</sup> When one combines the Court’s lack of an effective doctrine to patrol excessive congressional delegations of lawmaking authority to federal agencies with “the rise and rise of the administrative state,”<sup>40</sup> it should come as no surprise that many have a deep distrust of the American bureaucracy and a fear of arbitrary exercises of agency lawmaking discretion. As Professor Aaron Nielson and I have argued, a central principle of administrative law is (or at least should be) that discretion can be dangerous.<sup>41</sup>

The appellate review model for administrative law has evolved to address some of these concerns as well. For instance, in the 1970s the model adapted to embrace “hard look” review under the APA’s arbitrary-and-capricious standard to discourage arbitrary agency action. Hard look review, as the Supreme Court has instructed, requires reasoned decisionmaking in that:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>42</sup>

As Professor Merrill has observed, this hard-look “approach required no fundamental alteration in the appellate review model. Courts simply lay-

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37. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)).

38. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

39. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (discussing nondelegation doctrine precedent); see also *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment) (“We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, but it has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition.” (citing *Whitman*, 531 U.S. at 472)).

40. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231 (1994).

41. Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 *Emory L.J.* 55, 57 (2016) (“The danger is that although discretion can be and, indeed, usually is used for the public’s benefit, it can also serve self-interested ends.”).

42. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

ered a more aggressive monitoring of the quality of agency reasoning on top of the standard review of the factual record from the original model.”<sup>43</sup>

The administrative law principles established by the Supreme Court in the 1940s in the *Chenery* decisions similarly reformed the appellate review model in light of separation-of-powers concerns. First, the Court departed from “the settled rule” in the civil litigation context that a trial court’s decision “must be affirmed if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason.’”<sup>44</sup> Instead, “[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>45</sup> Or, as the *Chenery II* Court rearticulated the rule shortly after the APA’s enactment, “A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”<sup>46</sup>

Separation-of-powers concerns, as Professor Kevin Stack has convincingly argued, motivate this first *Chenery* principle. In particular, this principle “promotes core values of the nondelegation doctrine in ways that supplement the enforcement of the intelligible principle requirement.”<sup>47</sup> It does so by increasing political accountability of the agency’s action, by helping to prevent arbitrary and capricious agency action, and by “provid[ing] assurance that accountable agency decision-makers, not merely courts and agency lawyers, have embraced the grounds for the agency’s actions, and that the agency decision-makers have exercised their judgment on the issue in the first instance.”<sup>48</sup> Professor Jon Michaels’s important work on “administrative separation of powers”—the call to view “administrative law through the lens of a secondary, sub-constitutional separation of powers that triangulates administrative power among politically appointed agency leaders, an independent civil service, and a vibrant civil society”<sup>49</sup>—further underscores the need for this *Chenery*

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43. Merrill, *supra* note 28, at 999.

44. SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

45. *Id.* at 87.

46. SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947).

47. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *Yale L.J.* 952, 958 (2007).

48. *Id.* at 958–59.

49. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *Colum. L. Rev.* 515, 520 (2015); cf. Miriam Seifter, *Complementary Separation of Powers*, 91 *N.Y.U. L. Rev. Online* 186, 199 (2016), <http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-91-Seifter.pdf> [<http://perma.cc/6KSU-BYFA>] (“Civil society, acting alone, cannot replicate Congress along relevant dimensions, but it can complement Congress and further ideals of inclusion and public engagement. It may be the energetic involvement of all of the players . . . that does the work of checking and balancing in the modern administrative state.”). For an in-depth discussion of Professor Michaels’s work on administrative

principle and related doctrines. As Professor Michaels argues, when reviewing agency action, courts should “consider whether a fair, inclusive administrative process has been short-circuited, disabled, or unduly interfered with in a manner that precludes or limits meaningful participation by all three administrative rivals.”<sup>50</sup>

The second *Chenery* principle—the ordinary remand rule—is yet another modification to the appellate review model. As the *Chenery I* Court announced, if a court concludes that an agency’s decision is erroneous, the general rule is to remand to the agency to consider the issue anew—as opposed to the court deciding the issue itself.<sup>51</sup> “[T]he guiding principle,” as the Court reiterated several years after the *Chenery* cases, “is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.”<sup>52</sup> The Court has rearticulated this ordinary remand rule over the years in a variety of administrative law contexts.<sup>53</sup> As I have explored elsewhere, the ordinary remand rule applies not only to questions of fact—as is the case in the civil litigation context—but also to questions of the application of law to fact, policy judgments, and even certain questions of law.<sup>54</sup> It is the ordinary rule, “except in rare circumstances.”<sup>55</sup> Those rare exceptions, I have argued, should be limited to when

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separation of powers, see Jon D. Michaels, *Separation of Powers All the Way Forward: The Theory and Practice of Constitutional, Administrative, and Privatized Government* (forthcoming 2017) [hereinafter Michaels, *Separation of Powers*] (on file with the *Columbia Law Review*).

50. Michaels, *Separation of Powers*, supra note 49 (manuscript at 230). It is worth noting that, like the heading of this Part, Professor Michaels analogizes administrative separation of powers to John Hart Ely’s *Democracy and Distrust*: “When thinking about republican government in an administrative rather than legislative arena, reinforcing representative democracy becomes reinforcing rivalrous administration.” *Id.* (manuscript at 229–30); see also *id.* (manuscript at 229) (“We can piggyback on the powerful but not uncontroversial *Carolene Products*/Ely approach and retool it for use in the administrative arena.” (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); John Hart Ely, *Democracy and Distrust* 102–03 (1980))).

51. *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 95 (1943) (remanding the matter to the agency because the “administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”); accord *Chenery II*, 332 U.S. at 196.

52. *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952).

53. See, e.g., *Negusie v. Holder*, 555 U.S. 511, 517 (2009) (“When the BIA has not spoken on ‘a matter that statutes place primarily in agency hands,’ our ordinary rule is to remand to ‘giv[e] the BIA the opportunity to address the matter in the first instance in light of its own expertise.” (quoting *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam))).

54. See Walker, *Ordinary Remand Rule*, supra note 22, at 1561–79 (tracing the evolution of the ordinary remand rule).

55. *Orlando Ventura*, 537 U.S. at 16 (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985))).

there are “inadequate or erroneous subsidiary findings”<sup>56</sup> that the court is fairly confident do not affect the outcome, when the agency lacks the authority to decide the issue, or when Congress has provided for a trial de novo of the issue.<sup>57</sup>

These two *Chenery* principles, taken together, provide important context for the scope of the APA’s harmless error charge that “due account shall be taken of the rule of prejudicial error.”<sup>58</sup> In other words, it is not at all clear, especially in light of these separation-of-powers concerns, that, “[a]s a matter of what the APA says, . . . harmless error review should be as central to administrative law as it is to conventional litigation.”<sup>59</sup>

Bagley is certainly correct, though, that the APA’s harmless error rule has developed as a “rule-like approach to administrative remedies” as opposed to a more context-based standard that includes a robust investigation into the prejudice caused by the agency error.<sup>60</sup> In light of the *Chenery* principles and related adaptations to administrative law’s appellate review model, the inquiry into whether an agency error is harmless has largely been limited to an agency’s “inadequate or erroneous subsidiary findings,”<sup>61</sup> and even then only when the reviewing court is confident that those minor errors would not affect the outcome.<sup>62</sup> Remand is, as the Supreme Court has often repeated, the general rule, “except in rare circumstances.”<sup>63</sup>

56. Henry J. Friendly, *Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 Duke L.J. 199, 224.

57. The first two exceptions are discussed in Walker, Ordinary Remand Rule, *supra* note 22, at 1566–68, 1620, and the third in Stephanie Hoffer & Christopher J. Walker, The Death of Tax Court Exceptionalism:

[T]here is another exception of particular relevance here: when APA § 706(2)(F) applies and “the facts are subject to trial de novo by the reviewing court.” . . . Logically, then, if the reviewing court is empowered to conduct a trial de novo, the court is not required to remand (though it retains discretion to do so) because de novo review allows the court to take the unusual step of substituting its judgment for that of the agency.

99 Minn. L. Rev. 221, 267 (2014) [hereinafter Hoffer & Walker, Death of Tax Court Exceptionalism] (quoting 5 U.S.C. § 706(2)(F) (2012)) (footnote omitted).

58. 5 U.S.C. § 706.

59. Bagley, Remedial Restraint, *supra* note 1, at 259. To be sure, Bagley notes a number of these separation-of-powers concerns, see *id.* at 260–62, and how they have limited the APA’s harmless error rule. He argues that these concerns have resulted in “the rule of prejudicial error ha[ving] gone missing.” *Id.* at 262. This Part, however, explains that the harmless error standard has not gone missing; it just plays a much more limited role in light of these constitutional concerns than it might in the context of civil litigation.

60. *Id.* at 257.

61. Friendly, *supra* note 56, at 224.

62. See Walker, Ordinary Remand Rule, *supra* note 22, at 1566–68.

63. *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)); accord *Negusie v. Holder*, 555 U.S. 511, 523 (2009); *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam).

Such an approach to harmless error, although perhaps less searching than in the civil litigation context, is fully consistent with the text and structure of the APA. In light of the separation-of-powers concerns that motivate judicial review of agency action, it turns out that most agency errors will be deemed harmful, especially errors with respect to agency processes and structures. Some errors may well rise to the level of structural error—to borrow from the criminal law context—such that no showing of prejudice is required.<sup>64</sup> For other errors not considered to be structural enough to exempt them entirely from the harmless error inquiry, concerns about due process, bureaucratic legitimacy, or administrative separation of powers may persuade courts to adopt a “strong” presumption of prejudice.<sup>65</sup>

Many of the agency errors Bagley highlights as meriting a more searching prejudice inquiry can be considered structural errors—or at least errors affecting substantial procedural rights so as to require at least a strong presumption of prejudice. On the rulemaking front, if the agency is required to utilize notice-and-comment rulemaking but fails to do so (such as was at issue in *United States v. Texas*), that goes to the heart of the administrative process.<sup>66</sup> It is not about an error at trial, to borrow from the civil and criminal contexts, but a lack of a trial entirely. At the very least “[t]he entire conduct of the [agency proceeding] from beginning to end is obviously affected” by the lack of notice-and-comment rulemaking.<sup>67</sup> Judicial inquiry into whether the parties were harmed when they received notice by press leakage and were able to voice their con-

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64. For examples of structural errors in the criminal law context, see *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (“Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly a [structural] error [when harmless error analysis does not apply], the jury guarantee being a ‘basic protectio[n]’ whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function.” (citation omitted)); *Waller v. Georgia*, 467 U.S. 39, 49 (1984) (holding “the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee”); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (“No matter what the evidence was against him, he had the right to have an impartial judge.”); *United States v. Kimbrel*, 532 F.3d 461, 469 (6th Cir. 2008) (“‘Structural’ errors [such as the *Batson* error here], by contrast, which affect the ‘entire conduct of the trial from beginning to end,’ are not subject to harmless-error review.” (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991))).

65. Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 *Cornell L. Rev.* 261, 311 (2016) (arguing “a strong presumption against the validity of postpromulgation notice and comment best respects the balance between an express statutory command for prepromulgation notice and comment and a particularized harmless error rule”).

66. See Bagley, *Remedial Restraint*, *supra* note 1, at 269–74 (discussing examples of errors in rulemaking).

67. *Fulminante*, 499 U.S. at 309–10 (1991) (explaining judicial bias and lack of representation for a criminal defendant are structural errors).

cerns on cable television news shows has no place in the context of structural error.<sup>68</sup>

This seems to be Professor Watts's main critique of the argument: This kind of reasoning, in my mind, threatens to eviscerate Section 553 of the APA, allowing informal dialogue between an agency and interested parties to substitute for Section 553's carefully defined procedures. Effectively, it would allow the *LA Times*, *Fox News*, *CNN* and other media channels to displace the Federal Register as the place where interested parties must look to find—and to learn how and when to comment on—proposed agency rules. That is not consistent with the APA. Nor would it help to bolster the public's perception of the legitimacy of agency decisionmaking.<sup>69</sup>

There is both a structural and a public legitimacy point here. As Professor Watts further explains, "Procedural fastidiousness, in my mind, plays a very important role in bolstering public perceptions of agency legitimacy and attending to agencies' democracy deficit."<sup>70</sup> If Bagley's context-specific standard were adopted, a reviewing court may well have to assess in the next case whether rulemaking by Twitter is a proper, harmless substitute for notice-and-comment rulemaking.

Bagley's other rulemaking examples do not fare much better. He argues that a context-specific harmlessness standard should apply to "logical outgrowth" challenges, in which a regulated entity challenges a final rule for lack of fair notice because the final rule is not a logical outgrowth of the proposed rule.<sup>71</sup> Again, notice is a critical procedural right embedded in the APA's notice-and-comment rulemaking process. It should be structural error if the public is not given fair notice of the final rule, or at the very least this procedural right should be considered so fundamental so as to impose a strong presumption of prejudice. This is particularly important because the substantive standard for a logical outgrowth challenge already encompasses a prejudice inquiry: whether the public had fair notice.<sup>72</sup>

The same is true of challenges to legislative rules that are published without a notice-and-comment period and then subjected to a postpromulgation comment period.<sup>73</sup> Public comment on a proposed rule is a core

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68. It is important to underscore that individuals challenging agency action, as discussed in the Introduction, must still establish that they were injured in fact by the agency's actions for the purposes of standing under Article III and that their interests are within the zone of interests for purposes of judicial review under the APA.

69. Watts, *supra* note 23.

70. *Id.* See generally Louis L. Jaffe, *Judicial Control of Administrative Action* 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, if not valid.").

71. See Bagley, *Remedial Restraint*, *supra* note 1, at 274–83 (discussing examples).

72. See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) ("The object [of the logical outgrowth rule], in short, is one of fair notice.").

73. See Bagley, *Remedial Restraint*, *supra* note 1, at 283–92 (discussing examples).

procedural right, subject to limited statutory “good cause” exceptions.<sup>74</sup> In their seminal treatment of this issue, Mark Thomson and Professor Kristin Hickman argue that “[t]he potential consequences of ignoring notice and comment, combined with the agency’s ability to prevent such a defect in the first place, makes it fair to put the burden of proving harmlessness on the agency.”<sup>75</sup>

Bagley is on firmer ground in arguing that some inadequacies in agency explanations are harmless. After all, the Supreme Court’s articulation of hard-look review expressly recognizes that not all inadequate explanations merit remand; instead, courts should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”<sup>76</sup> This approach is consistent with Judge Henry Friendly’s exception to the ordinary remand rule for “inadequate or erroneous subsidiary findings.”<sup>77</sup> Of course, Bagley is not just talking about agency explanations that are “of less than ideal clarity.” Instead, his main explanatory error is when an agency erroneously declares that a statute is unambiguous.<sup>78</sup> Under D.C. Circuit precedent in *Prill v. NLRB*, the court will remand such errors for the agency to consider anew as opposed to the court deciding the interpretation issue itself in the agency’s favor.<sup>79</sup>

There are certainly agency costs to the *Prill* remand doctrine. As Professors Daniel Hemel and Aaron Nielson have recently explained, however, there are also a number of important benefits that arguably outweigh these costs, including imposing incentives on agencies not to engage in strategic behavior.<sup>80</sup> Professor Michaels’s theory of administrative separation of powers, discussed above, underscores another set

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74. Administrative Procedure Act 5 U.S.C. § 553(b) (2012) (“Except when notice or hearing is required [], this subsection does not apply . . . when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”).

75. Hickman & Thomson, *supra* note 65, at 313. There are compelling arguments that this widespread postpromulgation notice practice, absent a proper good cause justification, is a structural error such that prejudice should not be questioned.

76. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

77. Friendly, *supra* note 56, at 224; accord Walker, Ordinary Remand Rule, *supra* note 22, at 1566–68.

78. See Bagley, Remedial Restraint, *supra* note 1, at 296–301.

79. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985). The Supreme Court seems to have endorsed a variant of this doctrine in *Negusie v. Holder*, in which it remanded an interpretation question to the agency because the agency had erroneously believed prior judicial precedent foreclosed any statutory ambiguity. 555 U.S. 511, 514 (2009); see also Walker, Ordinary Remand Rule, *supra* note 22, at 1578–79 (discussing *Negusie* and its separation-of-powers foundation).

80. Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. Chi. L. Rev. (forthcoming 2017) (manuscript at 38–49), <http://ssrn.com/abstract=2869606> (on file with the *Columbia Law Review*) (developing their case for the benefits of this doctrine).

of costs and benefits surrounding the *Prill* remand doctrine: Such remand ensures that the agency's statutory interpretation is not just the product of the agency litigators and political appointees but that it results from widespread participation of all three administrative rivals—political appointees, civil service, and civil society.<sup>81</sup>

In sum, Bagley is no doubt correct that the current rule-based approach to remand in administrative law leads to some additional costs, including a heightened risk of false positives—cases in which relatively harmless agency errors are remanded to the agency, resulting in additional delay or even the agency's abandonment of the regulatory effort. He has certainly flagged a few of the most egregious examples of agency errors that seemed to impose little, if any, harm on the regulated entities seeking judicial review. But for those concerned about bureaucracy and distrust, we are much more troubled about false *negatives*—cases in which there are harmful agency errors that nevertheless are ignored because the court erroneously finds no prejudice. Bagley's more restrained, context-based standard would certainly increase the rate of false negatives. That there is even a debate about the harmfulness of rulemaking by press leakage should prove this point. In a federal system now dominated by lawmaking by regulation and by courts charged with protecting against arbitrary exercises of agency discretion, calls for more remedial restraint in administrative law focus on eliminating the wrong type of errors.

## II. THE COSTS OF REMEDIAL RESTRAINT

For those who are not convinced that the modern administrative state poses sufficient dangers to retain the current rule-based approach to judicial remedies for agency errors, it is worth considering some of the other costs of shifting to a more restrained, standard-like approach. For ease of organization, this Part divides such costs between rulemaking and adjudication, though the costs undoubtedly overlap both categories of agency action.

### A. *For Agency Rulemaking*

As detailed in Part IV of *Remedial Restraint in Administrative Law*, Bagley's call for remedial restraint is based, at least in part, on his skepticism about the effect of judicial review on agency behavior. Simply put, he believes that, on the margins, "holding more agency errors harmless might not much affect agency incentives."<sup>82</sup>

Having interviewed and surveyed hundreds of agency officials over the last few years, I do not share Bagley's deep skepticism about the effects of changing the harmless error rule on agency incentives, especially considering the role of thousands of civil service lawyers who work

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81. See *supra* notes 49–50 and accompanying text.

82. Bagley, *Remedial Restraint*, *supra* note 1, at 313–14.

throughout the federal regulatory state. For instance, in 2013 I administered a 195-question survey of federal agency rule drafters that covered a variety of topics related to agency statutory interpretation and rule drafting.<sup>83</sup> The survey was administered at seven executive departments (Agriculture, Commerce, Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (Federal Communications Commission and Federal Reserve). In total, 128 agency rule drafters replied, resulting in a thirty-one percent response rate. Although confidentiality concerns imposed significant methodological limitations on the survey—including anonymity as to the individual respondent and the respondent's respective agency—the survey responses shed considerable light on how judicial review affects agency behavior in the rulemaking context.<sup>84</sup>

First and foremost, nearly nine in ten rule drafters surveyed strongly agreed (46%) or agreed (41%)—and another 11% somewhat agreed—that “[w]hen drafting rules and interpreting statutes, agency drafters such as yourself think about subsequent judicial review.”<sup>85</sup> Moreover, these rule drafters know their judicial deference doctrines. Among all twenty-two interpretive tools tested in the survey, *Chevron* deference was the most known by name (94%) and most reported as playing a role in rule drafting (90%).<sup>86</sup> The next most known tools were: the ordinary meaning canon (92%), *Skidmore* deference (81%), and the presumption against preemption of state law (78%).<sup>87</sup> The tools most reported after *Chevron* deference as playing a role in rule drafting were: the whole act rule (presumption of consistent usage throughout statute) (89%), the ordinary meaning canon (87%), the *Mead* doctrine (by concept) (80%), *noscitur a sociis* (associated-words canon) (79%), and legislative history (76%).<sup>88</sup>

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83. The full findings are reported in Walker, *Inside Agency Interpretation*, supra note 27. See also Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *Fordham L. Rev.* 703 (2014) [hereinafter Walker, *Chevron Inside the Regulatory State*] (further exploring findings related to administrative law's deference doctrines); Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 *Mich. L. Rev. First Impressions* 61 (2015) (exploring findings related to regulatory interpretation). The survey was modeled on Professors Lisa Bressman and Abbe Gluck's pioneering study on congressional drafting. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 *Stan. L. Rev.* 725 (2014); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *Stan. L. Rev.* 901 (2013).

84. For more on the study methodology and its accompanying limitations, see Walker, *Inside Agency Interpretation*, supra note 27, at 1013–18.

85. Walker, *Chevron Inside the Regulatory State*, supra note 83, at 722 (quoting the survey question).

86. Walker, *Inside Agency Interpretation*, supra note 27, at 1061–63.

87. *Id.* at 1019 fig.1.

88. *Id.* at 1020 fig.2.

When most of the rule drafters surveyed indicated they think about judicial review and “use” administrative law doctrines when regulating, they seem to suggest that judicial review affects agency behavior. For instance, the rule drafters surveyed understood quite well how different deference doctrines affect agency win rates in courts: About four in five strongly agreed (38%) or agreed (45%)—and another 17% somewhat agreed—that “[i]f *Chevron* deference (as opposed to *Skidmore* deference or no deference) applies to an agency’s interpretation of an ambiguous statute it administers, the agency is more likely to prevail in court.”<sup>89</sup> Indeed, two in five rule drafters surveyed agreed (31%–33%) or strongly agreed (7%–10%)—and another two in five somewhat agreed (40%–45%)—that a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies.<sup>90</sup>

These findings, especially considering the study’s methodological limitations, only scratch the surface of the complex relationship between courts and agencies. Much more work needs to be done. But the findings are consistent with my own qualitative experience in interviewing agency officials for this study and others.<sup>91</sup> Agency officials, especially agency lawyers, pay close attention to judicial developments in administrative law and think about judicial doctrines when regulating. Since they are attentive to shifts at the margins in judicial review doctrines, such as the shift from the rule-based *Chevron* doctrine to the standard-like *Skidmore* doctrine, I suspect that federal agencies would similarly respond to a shift from a rule-based remand rule to a context-specific standard. To be sure, not every judicial message is received clearly, nor is every judicial command followed perfectly. Agencies no doubt engage in strategic behavior

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89. Walker, *Chevron* Inside the Regulatory State, *supra* note 83, at 723 (quoting the survey question). Recent empirical work in the circuit courts seems to confirm the agency rule drafters’ impressions that the deference doctrines indeed affect agency win rates. See Kent Barnett & Christopher J. Walker, *Chevron* in the Circuit Courts, 115 Mich. L. Rev. (forthcoming 2017) (manuscript at 6), <http://ssrn.com/abstract=2808848> (on file with the *Columbia Law Review*) (finding, inter alia, nearly a twenty-five percentage point difference in agency win rates when the circuit courts applied *Chevron* deference than when they refused to apply it).

90. Walker, *Chevron* Inside the Regulatory State, *supra* note 83, at 722–24 & fig.3. These findings are presented in percentage ranges because the survey explored this issue with two questions that were worded in slightly different ways. See *id.* at 723–24.

91. These findings are also consistent with Connor Raso’s empirical work on how agencies avoid complying with statutory rulemaking procedures. In reviewing judicial decisions regarding agency rulemakings from 1995 through 2012, Raso finds that agencies are much more likely to avoid statutory rulemaking requirements—more than 90% of the time—when there is a low threat of a lawsuit. Connor Raso, Agency Avoidance of Rulemaking Procedures, 67 Admin. L. Rev. 65, 68–69 (2015). Raso thus concludes that judicial review is a necessary though “inconsistent and highly imperfect enforcement mechanism.” *Id.* at 127.

to preserve their regulatory actions from judicial override.<sup>92</sup> But deep skepticism about the ability of judicial review to check arbitrary agency behavior seems overstated.

B. *For Agency Adjudication*

Another cost of remedial restraint—and the accompanying decline in judicial remands based on agency errors—concerns the court–agency dialogue. As Professor Emily Hammond has explored in the rulemaking context, and I have explored in the agency adjudication context, the ordinary remand rule facilitates an important dialogue between courts and agencies.<sup>93</sup> This dialogue brings judicial expertise, aided by input from the parties to the lawsuit and other friends of the court, to the administrative process on remand. Indeed, courts have developed a number of tools to enhance their dialogue with federal agencies on remand without upsetting the separation-of-powers balance between courts and agencies. For instance, in cases in which courts are skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some circuits require the agency to provide notice of its final determination, retain panel jurisdiction over the matter, or set deadlines for an agency response to the remand. Others suggest that administrative judges be replaced on remand, certify issues for decision on remand, or set forth hypothetical answers in dicta or concurring opinions.<sup>94</sup> Similar tools can be used to mitigate the delay or other agency costs on remand that seem to motivate Bagley’s call for remedial restraint.

This court–agency dialogue can assist the agency in developing better procedures and arriving at a better substantive outcome in the case remanded. But the dialogue serves an even more important objective, especially in the agency adjudication context, of allowing the federal judiciary to play a more systemic role in protecting regulated individuals and entities from arbitrary agency action. Agency adjudication in a variety of regulatory contexts has been plagued with inconsistency in that similarly situated individuals are not treated the same. Caseloads can be crushing on agency adjudicators, training and competency can vary greatly across adjudicators, internal agency oversight via the administrative appeals process may be ineffective, and the regulated individuals

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92. Indeed, agency lawyers have developed a playbook for successfully navigating judicial review of agency action. See Christopher J. Walker, *How to Win the Deference Lottery*, 91 *Tex. L. Rev.* 73, 77–87 (2012) (detailing the playbook).

93. See Meazell, *supra* note 22, at 1739–72; Walker, *Ordinary Remand Rule*, *supra* note 22, at 1585–99.

94. See Walker, *Ordinary Remand Rule*, *supra* note 22, at 1590–99, 1607–14 & tbl.2.

often have varying levels of expertise to successfully navigate the administrative process.<sup>95</sup>

Remand and court–agency dialogue play a particularly important systemic role in agency adjudication contexts in which many individuals do not have legal representation and often lack the wherewithal to seek further review of erroneous agency actions. I have previously made this point in the context of immigration (and tax) adjudication:

[H]aving a systemic effect is particularly important for immigration adjudication and in other agency adjudication contexts where less-sophisticated individuals navigate the agency process, oftentimes without legal representation. In those circumstances, it is much more likely that individuals will not seek judicial review of erroneous agency decisions—either because they lack the sophistication to navigate the judicial process or have otherwise procedurally defaulted meritorious claims in the administrative process. Only by remanding and forcing the agency to correct systemic errors can the court help these individuals who fail to seek judicial review.<sup>96</sup>

To be sure, under Bagley’s more restrained remand standard, many cases would still be remanded, and through those remanded cases, the court–agency dialogue would continue. But, as discussed in Part I, there would certainly be fewer remands and more false *negatives*—cases in which the agency error was erroneously deemed harmless. Perhaps more importantly, the increased focus on the harms of the parties before the court could shift attention away from the systemic harms caused by the agency’s insufficient processes, erroneous substantive positions, or otherwise arbitrary and capricious actions. The rule-based ordinary remand rule and accompanying court–agency dialogue help address these systemic problems by leading to improved consistency and quality of determinations not just in cases that eventually reach the courts but, more importantly, in the (much greater number of) cases that are never appealed.

#### CONCLUSION

The modern administrative state poses many dangers to democracy and to the American form of government. Most federal lawmaking these days occurs by regulation. Such regulation is subject to very deferential judicial review. Although Congress continues to exert some control over federal agencies via oversight and appropriations, substantive legislative

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95. See, e.g., Hoffer & Walker, *Death of Tax Court Exceptionalism*, *supra* note 57, at 268–89 (discussing disparities in tax adjudication context); Christopher J. Walker, *Referral, Remand, and Dialogue in Administrative Law*, 101 *Iowa L. Rev. Online* 84, 94–95 (2016) [hereinafter Walker, *Referral*] (same for immigration adjudication).

96. Walker, *Referral*, *supra* note 95, at 93; accord Hoffer & Walker, *Death of Tax Court Exceptionalism*, *supra* note 57, at 279–81 (making a similar argument in the tax adjudication context).

efforts to direct regulatory lawmaking have become virtually nonexistent in recent years. (And when Congress does legislate, the federal agencies that are affected by the legislation play a substantial, often confidential, role in drafting it.<sup>97</sup>) The charitable view of current lawmaking by regulation is that federal agencies have had to get more creative with their stale statutory mandates to address changed circumstances while still respecting the bounds of such congressional delegations. The more cynical view is that federal agencies believe they “*can’t afford to wait* for Congress” to provide statutory authority and permission to address the problem, instead opting to “go[] ahead and mov[e] ahead without them” via regulation.<sup>98</sup>

Of all these challenges facing administrative law today, the lack of remedial restraint (at least as Bagley conceives of it) is not among them. On the contrary, the rule-based ordinary remand rule plays an important role in preserving a proper separation of powers, in ensuring agencies exercise their congressionally delegated discretion in a nonarbitrary manner, and in facilitating a richer court–agency dialogue that helps courts have a systemic effect on the administrative process. The benefits of the ordinary remand rule far exceed any benefits of a more restrained standard-like remedial approach. And this rule-based approach avoids the costs of courts assessing, for instance, whether regulation by press leakage or regulation by Twitter should be an acceptable, harmless substitute for notice-and-comment rulemaking.

If Bagley’s call for remedial restraint does gain traction, however, it is important to assess how his proposal would affect the rest of administrative law. As Nielson has recently noted in a related context, *Seminole Rock* (or *Auer*) deference “does not exist in a vacuum but rather is part of an interconnected network of administrative law doctrines. When one part of the network is changed, that change reverberates across administrative law. Prudence suggests that [the] Supreme Court should understand those interconnected consequences *before* changing important doctrines.”<sup>99</sup> Administrative law already has a number of doctrines in place to address Bagley’s concerns about the agency delay and inefficiency caused by judicial review.

*United States v. Texas*, discussed in the Introduction, is illustrative. Article III’s standing requirement calls for the challengers to demon-

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97. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. Pa. L. Rev. (forthcoming 2017) (manuscript at 3), <http://ssrn.com/abstract=2826146> (on file with the *Columbia Law Review*).

98. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 Tex. Rev. L. & Pol. 213, 269 (2015) (emphasis in original) (internal quotation marks omitted) (quoting President Barack Obama regarding the executive actions on immigration at issue in *United States v. Texas*).

99. Aaron L. Nielson, *Beyond Seminole Rock*, 105 Geo. L.J. (forthcoming 2017) (manuscript at 7), <http://ssrn.com/abstract=2821341> (on file with the *Columbia Law Review*).

strate an injury in fact (fairly traceable to the agency's action and likely to be redressed by the judicial relief sought). The APA requires that the challengers' interests fall within the zone of interests of the statute. The APA exempts from judicial review agency actions committed to agency discretion by law. And judicial review under the APA and related judicial deference doctrines is highly deferential—much more so than appellate review in the civil litigation context.

Accordingly, introducing a much more searching harmless error standard could risk upsetting this calibrated system for judicial review that strives to balance congressionally delegated agency discretion with judicial review to prevent such agency discretion from being exercised in an arbitrary or capricious manner. The current calibration is not perfect, but it is much better than the more remedially restrained system for which Bagley advocates.