ARTICLES

REFINING *CHEVRON*—RESTORING JUDICIAL REVIEW TO PROTECT RELIGIOUS REFUGEES

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TABLE OF CONTENTS

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> The right to freedom of religion undergirds the very origin and existence of the United States. Many of our Nation's founders fled religious persecution abroad, cherishing in their hearts and minds the ideal of religious freedom. They established in law, as a fundamental right and pillar of our Nation, the right to freedom of religion. From its birth to this day, the United States has prized this legacy and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution.[1]

INTRODUCTION

A. Protecting Religious Freedom

We are "a Nation founded by religious refugees and dedicated to religious freedom."[2] On this point, the United States Congress and the United States Supreme Court largely agree. But Xiaodong Li, he might be skeptical.

Li, a native and citizen of the People's Republic of China, chose to exercise his right to religious freedom in his own home by operating a

1. 22 U.S.C. § 6401(a)(1) (2000).
2. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring in judgment).

"house church," which is illegal under Chinese law.[3] Police handcuffed Li and took him to the police station. There they told him to kneel, but he refused. The police beat Li until he complied. They interrogated him for about two hours about his involvement in an illegal religious gathering. When Li was not forthcoming, the Chinese police beat him until he confessed.[4]

The police abused Li for five days until relatives posted bail. The authorities told Li that they would set a hearing in about six months, at which Li expected to be sent to prison.[5] He lost his job, and the police forced him to work in the streets cleaning public toilets without pay for nearly six months. Li eventually escaped to America and applied for asylum and withholding of deportation.[6]

Although the immigration judge (IJ) granted withholding of deportation—allowing Li to stay in America until he could safely practice his religion in China—the Board of Immigration Appeals (BIA or Board) reversed the IJ's decision.[7] The BIA concluded Li was not persecuted on account of his religion but was prosecuted for violating Chinese law.[8] Under this "creative" reading of our refugee law, any country that makes religious practice illegal can abuse practitioners with impunity. If those practitioners escape to America, the government will just send the lawbreakers back.

Li appealed the BIA's holding to the United States Court of Appeals for

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3. Xiaodong Li v. Gonzales, 420 F.3d 500, 503–04, 511 (5th Cir. 2005). After unprecedented political pressure, the Department of Justice (DOJ) agreed to ask the court to withdraw its opinion denying Li relief. Xiaodong Li v. Gonzales, 429 F.3d 1153 (5th Cir. 2005); *see also* Jonathan Robert Nelson, *Shaking the Pillars: An Asylum Applicant Shakes Loose Some Unusual Relief*, 83 INTERPRETER RELEASES 1, 1–3 (Jan. 3, 2006).

4. *Xiaodong Li*, 420 F.3d at 504–05. Although a tragic result in *Xiaodong Li* was averted for Li himself, the case still represents a threat to religious liberty. The *Xiaodong Li* court's holding remains unchanged; and there is no guarantee that the BIA, the Fifth Circuit, or other courts might not follow the same course in the future. As one commentator has observed:

> . . . Li's case leaves only a host of unresolved arguments which may be expected to echo through asylum cases for the foreseeable future. . . .
>
> The government's argument in [*Xiaodong*] *Li*, that religious persecution does not include punishment for religious practice, and that foreign states may criminally punish peaceful religious practices that violate registration laws, continues to be relevant in cases that span the globe.

Nelson, *supra* note 3, at 3.

5. *Xiaodong Li*, 420 F.3d at 505.

6. *Id*.; *see* INS v. Stevic, 467 U.S. 407, 414 (1984) ("Legislation enacted by the Congress in 1950, 1952, and 1965 authorized the Attorney General to withhold deportation of an otherwise deportable alien if the alien would be subject to persecution upon deportation."). For a discussion of asylum and withholding of deportation, see *infra* Part II.A.

7. *Xiaodong Li*, 420 F.3d at 505–06.

8. *Id*. at 506.

the Fifth Circuit. Based on its reading of the Supreme Court's holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] the Fifth Circuit held that it must defer to the BIA's decision and permit Li to be deported to China[10]—where he would face (at best) a long prison sentence and serious economic persecution, and (at worst) extensive torture.[11]

How could three very experienced and conscientious federal appellate judges render such a frighteningly Orwellian decision? In large part, the answer lies in the courts' excessive judicial deference to restrictive BIA decisions. Our courts too often misread the Supreme Court's decision in *Chevron* as tying the Judiciary's hands in refugee protection cases.[12] As a result, even extreme cases of religious persecution seemingly lack judicial review.

In theory, the United States generally accords religious expression special protection, even extending such protection to noncitizen refugees.[13] Yet despite explicit congressional concern for religious freedom, federal courts too often defer to agency decisions that fail to adequately protect religious refugees' rights.[14] Now charged with adjudicating affirmative

9. 467 U.S. 837 (1984).

10. *Xiaodong Li*, 420 F.3d at 506–07.

11. *Id.* at 506 ("The IJ concluded that if Li returned to China, it was more likely than not that he would be subject to persecution based on his religious activities in 1995."). Li's plight was hardly unique. Numerous groups, including the State Department, have documented widespread persecution in China and elsewhere on religious and other grounds. *See, e.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2007 REP. ON INT'L RELIGIOUS FREEDOM, *available at* http://www.state.gov/g/drl/rls/irf/2007 (presenting the State Department's annual report on worldwide religious persecution); Ellen S. Reinstein, *Turn the Other Cheek, or Demand an Eye for an Eye? Religious Persecution in China and an Effective Western Response*, 20 CONN. J. INT'L L. 1 (2004) (discussing current and proposed strategies for dealing with the problem of Chinese religious persecution); BROTHER YUN & PAUL HATTAWAY, THE HEAVENLY MAN: THE REMARKABLE TRUE STORY OF CHINESE CHRISTIAN BROTHER YUN (2004) (documenting years of Chinese government imprisonment, torture, and other persecution for practicing Christianity). Although this phenomenon is remarkably pervasive, it makes appallingly little impression on the modern American psyche, despite ongoing efforts by many organizations. *See, e.g.*, Jubilee Campaign, http://www.jubileecampaign.org/; Human Rights Watch, http://www.hrw.org/; Amnesty International, http://www.amnesty.org/; Voice of the Martyrs, http://www.persecution.com/.

12. *See, e.g.*, Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 530 (2003) ("In immigration cases, however, many claim that the Court is too deferential to interpretations made by the Attorney General.").

13. *See supra* notes 1–2 and accompanying text.

14. *See, e.g.*, Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 113 (2002) [hereinafter Heyman, *The Flagging Spirit of the Law*] (noting that aliens commonly lose in federal court because of "the Court's interpretation regarding relevant regulations, statutes, and international documents"); Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 775 (1992) [hereinafter Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*] (noting "the frequent application of an unduly deferential standard of review to [immigration] agency legal determinations"); Nelson, *supra* note 3, at 2–3 (citing *Xiaodong Li*, 420 F.3d at 500), *vacated by stipulation*, 429 F.3d

refugee claims,[15] the Department of Homeland Security (DHS) is often overwhelmed and arguably underfunded in that task.[16] The system is

1153 (5th Cir. 2005) (explaining that the Fifth Circuit initially, though reluctantly, upheld the BIA decision to deny asylum to Li because of a perceived *Chevron* deference requirement, but political pressure ultimately persuaded the Attorney General to ask the court to set its decision aside). *But cf.* Peter Marguiles, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 3 (2000) (contending that "[t]he United States's commitment to protecting refugees is dying a slow death," but attributing at least part of this problem to Congress).

15. For the purposes of this Article, the definition of "refugee" encompasses persons seeking refugee status abroad who then come to the United States, as well as persons seeking asylum within the United States. *See* JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 1145–46 (2d ed. 2005). Although eligibility requirements differ for and separate procedures apply to each, DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES 1 (2d ed. 1991), I will use these terms interchangeably for convenience. Additionally, cases I reference will often refer to various agencies by their familiar acronyms. But the jurisdiction of the agencies has changed substantially over the time period under discussion. *See, e.g.*, John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 611–12 (2004) ("In 1983, the Attorney General separated the immigration judges . . . from the enforcement agency, the Immigration and Naturalization Service [(INS)], and established them in an Executive Office for Immigration Review [(EOIR)] in the Department of Justice." (internal citation omitted)). Before March 2003, INS administered and enforced U.S. immigration laws; in March 2003, INS's functions were transferred from DOJ to DHS; since then, DHS has administered and enforced U.S. immigration laws. *Id.*; CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 3.02[1], [2], [3][a] (rev. ed. 2007). DHS performs its functions through three agencies: United States Citizenship and Immigration Services (USCIS), United States Immigration and Customs Enforcement (ICE), and United States Customs and Border Protection. GORDON, MAILMAN & YALE-LOEHR, *supra*, § 3.02[1]–[2]. These three agencies, for a brief period of time, were called Bureau of Citizenship and Immigration Services (BCIS), Bureau of Immigration and Customs Enforcement (BICE), and Customs and Border Protection. *See* 8 C.F.R. § 1.1(c), (x)–(z) (2007) (defining terms as used in the Immigration and Nationality Act); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeal's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 491 n.75 (2005) (explaining that INS, BICE, and BCIS were later renamed in 2003 as ICE and USCIS). USCIS, an agency of DHS, reviews applications for immigration benefits, including affirmative asylum and refugee applications. *See* GORDON, MAILMAN & YALE-LOEHR, *supra*, § 3.02[3][b][i]; *see also* Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 BYU L. REV. 541, 546 n.18 (2003) (explaining that persons denied asylum may appeal to the BIA and then to the federal courts of appeals). "If the affirmative application is denied, the alien is placed in removal proceedings," and the asylum claim comes under the jurisdiction of EOIR within DOJ. Cruz, *supra*, at 492; Mousin, *supra*, at 564. Refugee claims processed overseas are not within the jurisdiction of DHS or EOIR; they are under the jurisdiction of the Department of State. MOORE & TURNER, *supra*, at 1143.

This Article addresses refugee claims filed in the United States under the jurisdiction of DHS. In this Article, I will collectively refer to DHS, though the relevant cases may be discussing the same issue in reference to INS, which formerly executed those functions.

16. *See, e.g.*, Joseph Summerill, *Is Federal Immigration Detention Space Adequate? The Challenges Facing ICE's Custody and Detention Management Efforts*, FED. LAW., May 2007, at 38, 38 ("[T]he United States' immigration detention custody and management system has been criticized for years as being underfunded, and funding for fiscal year 2007

enormously stressed, and it is showing.[17] Unfortunately, it is not just the staff and officials operating in that system who suffer from this situation, but also some noncitizens whose legitimate claims for refugee status are haphazardly shuffled through, resulting in wrongful denials.[18] If federal appellate courts do not catch and correct these errors, innocent people suffer the type of persecution that Congress intended to prevent.[19] Yet, because of the Supreme Court's restrictive decision in *Chevron*, courts are less diligent in reviewing these cases than they should be.

B. An Interpretive Problem and the Chevron *Solution*

When a court interprets a statute that is not administered by an agency authorized to implement it, the court seeks congressional intent using the tools of statutory construction.[20] If congressional intent is clear, courts can readily determine the general purpose of a statute; however, if a court cannot clearly discern congressional intent as to a specific term or phrase, it must nonetheless say what the law is.[21] To the extent a term or phrase admits of more than one meaning within the scope of the statute's purpose, the court is, by default, engaged in policymaking and must make a policy choice to fill a gap left by Congress.[22]

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continues this trend."); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 12–22 (2006) (explaining that BIA caseloads can be extremely high and resources low; many errors made, and little meaningful review).

17. *See*, *e.g.*, Alexander, *supra* note 16, at 2 ("United States immigration courts are in crisis."); Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 2 (2007) ("That the American asylum system has fallen into disrepute is no longer a significantly contested point of debate.").

18. *See*, *e.g.*, Ming Shi Xue v. Bd. of Immigration Appeals, 439 F.3d 111, 114 (2d Cir. 2006) ("[E]ach time we wrongly deny a meritorious asylum application, concluding that an immigrant's story is fabricated when, in fact, it is real, we risk condemning an individual to persecution.").

19. *See*, *e.g.*, Michele A. Voss, *Young and Marked for Death: Expanding the Definition of "Particular Social Group" in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 235–36 (2005) (detailing the story of Edgar Chocoy, a Guatemalan youth and former gang member, who was killed in Guatemala after his request for asylum—based on his belief that his fellow gang members would kill him if he returned to Guatemala—was denied and referencing similar incidents in other asylum cases involving persons fleeing Latin American gang violence).

20. *E.g.*, Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Sav. & Loan Assoc., 878 F.2d 742, 749–52 (3d Cir. 1989) (interpreting a statute not administered by an agency involves the court's employing various tools of construction to determine congressional intent); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44, 843 n.9 (1984).

21. At this point, the court is engaged in "interpretation"—though only in the broadest, or most tenuous, sense. Still, something must be said, and it is the court's job to say it. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

22. *See Chevron*, 467 U.S. at 842–43 (holding that where the court determines that Congress has not precisely addressed a question at issue, in the absence of an administrative interpretation, the court imposes its own construction).

In contrast, when a court reaches this same impasse where Congress has assigned an agency to administer an act, the court may allow the agency to fill the gap with a policy—provided the policy is not clearly beyond the range of alternatives Congress might have chosen and assuming the agency implements the policy in an appropriate manner.[23] This result is a commonsense interpretation of the division of labor in a tripartite government. Congress holds the lawmaking power, and it may delegate that power within very broad limits.[24] The courts have some power to say what those limits are under the United States Constitution and the Administrative Procedure Act (APA),[25] but when an agency exercises such delegated power within the designated limits, courts must respect that power—rather than usurp it—no less than if it were directly wielded by Congress.[26]

The trick, of course, is drawing the line between courts and agencies regarding the division of labor as the rightful descriers of congressional "intent."[27] In *Chevron*, the Supreme Court claimed to have settled this

23. *See*, *e.g.*, RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.3, at 143–44 (4th ed. 2002) [hereinafter PIERCE, ADMINISTRATIVE LAW TREATISE] (explaining that the *Chevron* Court's holding—that where Congress enacts a statute to be administered by an agency, it has delegated to the agency the resolution of all policy disputes that Congress did not resolve—is based on political accountability). Similarly, when a court faces this dilemma and the agency in question has no lawmaking authority, a court respectfully considers the agency's statutory interpretation based on the agency's experience in the area, but the court interprets the act independently. *E.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

24. Although the notion that Congress cannot delegate to a "fourth branch" is sound in many respects, the Supreme Court has all but entombed it. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372–74 (1989) (describing the Court's treatment of the nondelegation doctrine).

25. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in various sections of 5 U.S.C.).

26. At bottom, I believe that this is what *Chevron* stands for. When Congress expressly deputized an agency to make legal rulings, it implicitly authorized policymaking as well. But the details regarding the scope of, or conditions on, that implied delegation are certainly worth further exploration. The materials that follow explore a very limited portion of those details in an admittedly more provocative than profound manner.

27. The real problem is often that congressional intent may be so vague or even completely lacking that the real question is not one of interpreting intent, but of supplying it. Numerous commentators have noted the potentially important distinction between interpretation and policymaking (or delegated legislating) in this context. *See, e.g.*, Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 895 (2007) [hereinafter Mashaw, *Agency-Centered or Court-Centered Administrative Law?*] (arguing that where Congress leaves its policy intentions vague, courts *interpret* statutes, but agencies *create* policy). I will adhere to the Court's terminology in these matters, however, to avoid inconsistencies in the discussion that may engender further confusion. Hence, where a statute may be vague, I will refer to ambiguity; where the discussion refers to the agencies' "interpretation" of a statutory term, we may well be talking about creating meaning rather than finding it; and even though *Chevron* requires courts to accept agency "interpretations" when Congress has not clearly addressed a specific, statutory issue, I adopt the Court's

important debate. The *Chevron* Court did not consciously announce a groundbreaking principle of judicial review and deference. On the contrary, the Court claimed to be merely following established precedent.[28] Yet *Chevron* has gained considerable fame for "dramatically expand[ing] the circumstances in which courts must defer to agency interpretations of statutes."[29]

Whether such an expansion was appropriate in *Chevron*, or in the thousands of cases that have followed it, is a much-debated topic. *Chevron* is now recognized as the keystone in the Court's jurisprudence of appellate review of agency action.[30] It is almost certainly the most cited and discussed case in the history of administrative law.[31] My current interest in *Chevron* arises from its impact in cases like *Li*, and from a sense that its impact is potentially quite dangerous.

C. Changing the Chevron *Attitude*

Administrative law—and the area of judicial review of agency decisions in particular—is notoriously flexible, or fluid, in many respects. As one scholar explains, there are three "systems" under which courts conduct this review: (1) a "word formula" system, in which phrases such as "arbitrary and capricious" govern the court's review; (2) an issue system, in which courts grant agencies more or less leeway in their decisionmaking according to where the issue fits in a factual-legal-policy spectrum; and (3) a category system, under which review depends on the type of process the agency employs (e.g., formal or informal rulemaking or adjudication).[32]

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convention of calling that acceptance mere "deference."

28. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984).

29. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001).

30. *See, e.g.*, Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) [hereinafter Merrill, *The* Mead *Doctrine*] (stating that *Chevron* "is the Court's most important decision about the most important issue in modern administrative law").

31. PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 23, § 3.2, at 140. *Chevron* did not arise or thrive in a vacuum. It arose in a diverse, historical context and addressed a specific factual context. It has since created a new historical context, with tens of thousands of cases and articles exploring its application in a wide array of factual situations. A Westlaw citation check, completed February 17, 2008, showed a total of 45,504 citation references. Given the magnitude of this precedential milieu, this Article can only touch on a miniscule fraction of the relevant cases and articles. I readily acknowledge that the following analysis is far from comprehensive, and the danger of overlooking important aspects of the question looms large. Also there is a polemic edge to this discussion, and some of the countervailing theoretical and practical concerns probably deserve more attention. Still, if this meager review can offer some small contribution to the greater task of understanding this vital area, then I will count it a success.

32. 3 CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 9.1–9.4 (2d ed. 1997).

The interaction of these systems is often complex,[33] and even within a given system, there is considerable vagueness and imprecision in determining and applying the standard of review. The Supreme Court has wisely admitted, for example, that the word formulas the APA employs may guide judicial review but necessarily leave room for judgment in their application.[34] Given the elasticity of this "system of systems," one observation of the relationship between the APA's "word formulas" seems applicable to the field as a whole: "The law may be said to use standards of review to express the risk of error the court should tolerate before it interferes. Or the standards may be seen as expressing a 'mood point' or the critical attitude with which the court should approach the agency decision."[35]

Not only did *Chevron* introduce a new element into the system of judicial review of agency action, but it also substantially shifted the judicial "mood point" toward agency decisions in general.[36] As one commentator aptly put it, "*Chevron* reflects a very powerful pro-agency bias."[37]

Overall, that may well be a good thing. Generally speaking, agencies are better qualified than courts for policymaking, and an inference that Congress delegated these functions to agencies is generally supportable. My focus in this Article is the *Chevron* regime's application to agency adjudicative decisions denying religious-refugee claims. The *Chevron* case itself granted substantial deference to an agency decision on a "highly technical" matter resolved by an expert agency through notice-and-comment rulemaking. Decisions denying religious-refugee claims are not "highly technical," and they are made in often unfair adjudicatory settings by an agency that is largely inexpert and ill equipped to make them.[38] Moreover, these decisions touch on the core principle of religious freedom, a principle we as a nation have historically guarded more assiduously than others because of its central importance to human freedom, dignity, and fulfillment. A significant but often overlooked fact about these cases is that only denials—never affirmances—of religious-refugee claims come before the federal courts.[39] This means that added (*Chevron*) deference to agency

33. *Id.* § 9.1.

34. *Id.* § 10.1 (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488–90 (1951)).

35. *Id.*

36. *See, e.g.*, *id.* (observing that different standards of review result in varying levels of approval for policy decisions; for example, the reasonableness standard requires a positive conclusion that the agency's decision was reasonable while the arbitrariness standard merely requires the negative conclusion that that the agency's decision was not arbitrary).

37. Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1619 (2006).

38. *E.g.*, Alexander, *supra* note 16, at 12–20.

39. Immigration and Nationality Act, 8 U.S.C. § 1252 (2000 & Supp. 2005).

decisions invariably carries the added risk of condemning an innocent person to religious persecution.

My basic thesis is that *Chevron* created a rebuttable presumption of heightened deference to agencies that is not so strong as the Court proposed and may be rebutted in the context of religious asylum—something that either Congress or the Court should recognize. The "mood" of judicial review for denials of religious-refugee claims must be moved to a less deferential point on the risk of error spectrum. We must reduce our tolerance for risk of error when such error causes innocent people to suffer persecution on account of their religious expression.

Part II briefly introduces a few of the statutory protections for refugees and discusses *Chevron* and some of its context, and addresses the factors the Court has identified as underlying the *Chevron* analysis and questions whether those factors legitimately apply in the specific context of religious-refugee claim denials. Part III considers factors I believe the Court has not adequately considered, but which should persuade the Court or Congress to heighten judicial review of refugee cases. Finally, the Article concludes by suggesting that the fiction the *Chevron* Court crafted does not do justice to Congress's intent to protect religious refugees and should, therefore, be replaced by a more protective standard.

I. THE PUZZLE'S BIG PICTURE

A. Basic Substantive Characteristics of Refugee Claims

The Immigration and Nationality Act (INA or the Act)[40] provides two basic forms of relief from deportation[41] for a noncitizen who claims he will be persecuted if deported or removed.[42] A noncitizen may apply for

40. 8 U.S.C. §§ 1–1799 (2000).

41. Though "deportation" commonly refers to sending a noncitizen away from the United States, it is also a term of art. Under the U.S. immigration law, a noncitizen can either be "deported" or "removed." These terms are not interchangeable and carry different burdens of proof. *See id.* § 1229(e)(2)(A)–(B) (2000) (distinguishing between aliens who have been admitted to the United States and are "deportable" and aliens not admitted to the United States who are "removable"); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 10 (9th ed. 2004–2005) ("The distinction between exclusion hearings and deportation hearings has been removed, although the differences in the burden of proof remain.").

42. 8 U.S.C. §§ 1158, 1231(b)(3)(C) (2005); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) (explaining that "[§] 243(h) of the Act, 8 U.S.C. § 1253(h), requires the Attorney General to withhold deportation of an alien who demonstrates that his 'life or freedom would be threatened' on account of one of the listed factors if he is deported"). There is an additional form of relief under the Convention Against Torture (CAT) for aliens in danger of being tortured or who have been tortured overseas. 8 C.F.R. § 208.16(c) (2007); *see also* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113 (Dec. 10, 1984). This Article does not separately address CAT claims.

asylum or withholding of removal, which is also known as restriction on removal or withholding of deportation.[43] To be eligible for asylum, an applicant must satisfy the Act's definition of "refugee."[44] A "refugee" is:

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[45]

A person who fits this definition qualifies for asylum; however, the Attorney General or the Secretary of Homeland Security has discretion to grant this relief to a qualifying refugee.[46]

To be eligible for withholding of removal or deportation, a noncitizen must establish that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.[47] Under the Act, this is not discretionary relief, like asylum. DHS must withhold removal for an eligible alien.[48] Eligibility for this mandatory relief turns on the applicant's showing a "clear probability" of persecution on account of one of these five grounds.[49] Only one of the enumerated grounds needs to motivate the persecutor—and even then only partially.[50]

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43. Asylum and withholding of deportation are two distinct forms of relief. *Cardoza-Fonseca*, 480 U.S. at 428–29 n.6. However, they are usually sought simultaneously. *See* Canas-Segovia v. INS, 902 F.2d 717, 722 (9th Cir. 1990), *rev'd on other grounds*, INS v. Elias-Zacarias, 502 U.S. 478, 479 (1992) ("Withholding of deportation is mandatory once an alien establishes eligibility but the granting of asylum remains discretionary even after he establishes eligibility.").

44. 8 U.S.C. § 1158(b)(1) (2000); *see also Cardoza-Fonseca*, 480 U.S. at 423–24 (noting that the definition of "refugee" for asylum and for withholding of deportation is essentially identical to the refugee provisions in the United Nations Protocol Relating to the Status of Refugees, which served as the impetus for enacting the Refugee Act of 1980).

45. 8 U.S.C. § 1101(a)(42) (2006).

46. *Id.* § 1158(b)(1).

47. 8 C.F.R. § 208.16(b) (2007); 8 U.S.C. § 1231(b)(3)(C) (2000). The similar language found in the current § 1231(b)(3)(C) was previously contained in § 1253(h), which was amended in 1996.

48. *See* 8 U.S.C. § 1231(b)(3)(A) (2000) ("[T]he Attorney General *may not* remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." (emphasis added)); *see also Canas-Segovia*, 902 F.2d at 722 (explaining that the withholding provision of § 1253(h), "mandates that no alien shall be deported to a country in which his or her life or freedom would be threatened on account of any of five enumerated grounds").

49. Singh v. Ashcroft, 398 F.3d 396, 401 (6th Cir. 2005) (quoting Pilica v. Ashcroft, 388 F.3d 941, 951 (6th Cir. 2004)); *see also* INS v. Stevic, 467 U.S. 407, 424, 429–30 (1984) (noting that the Court "deliberately avoided any attempt to state the governing standard beyond noting that it requires that an application be supported by evidence establishing that it is more likely than not that the alien would be subject to persecution on one of the specified grounds").

50. Mohideen v. Gonzales, 416 F.3d 567, 570 (7th Cir. 2005); *see also* 3 GORDON,

The Secretary of Homeland Security or the Attorney General may grant asylum if either determines the applicant is a "refugee" within the Act's meaning.[51] This requires the applicant to prove[52] that he has "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[53]

If an alien fails to establish the well-founded fear of persecution required for a grant of asylum, he also fails to establish the clear probability of persecution required for withholding of deportation.[54] "Clear probability" means that it is more likely than not that an alien will be subject to persecution,[55] and this is a more rigorous standard than the "well-founded fear" standard for asylum.[56]

MAILMAN & YALE-LOEHR, *supra* note 15, § 34.02 (noting that the 2005 REAL ID Act amended the statutory language so that one of the enumerated grounds must be central reason for the applicant's past or future prosecution). "The [applicant] carries the burden to establish a nexus between the persecution and one of the five statutory grounds for asylum." Tamara-Gomez v. Gonzales, 447 F.3d 343, 349 (5th Cir. 2006).

51. 8 U.S.C. § 1158 (b)(1)(A) (2005).

52. The applicant's testimony alone may be sufficient to meet this burden, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts" demonstrating the applicant is a refugee. *Id.* § 1158(b)(1)(B)(ii).

53. *Id.* § 1101(a)(42); *see also* GORDON, MAILMAN & YALE-LOEHR, *supra* note 15, § 33.04 (defining "refugee" in the INA).

54. 8 C.F.R. § 208.13 (2007); *see also* Janusiak v. INS, 947 F.2d 46, 47 (3d Cir. 1991) (indicating that, because an applicant seeking restriction on deportation must establish by a "clear probability" that his or her life or freedom would be threatened, failure to fulfill the lower burden of proof of a well-founded fear results in a similar failure to fulfill the higher standard).

55. INS v. Stevic, 467 U.S. 407, 424 (1984).

56. *Janusiak*, 947 F.2d at 47. The Supreme Court has interpreted the term "well-founded" to mean that an alien need *not* prove that it is more likely than not that persecution will ensue. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (holding that the IJ and the BIA were incorrect in holding that the two standards are identical, but declining to set forth a detailed description of how the "well-founded fear" test should be applied). *See also* 8 C.F.R. § 208.13 (2007) (providing guidance as to what constitutes a well-founded fear of persecution). To satisfy this requirement, applicants must establish both that they possess a subjective fear of persecution and that an objectively reasonable person would also fear persecution under the same circumstances. *See* Lie v. Ashcroft, 396 F.3d 530, 536 (3d Cir. 2005) (explaining that to establish a well-founded fear of future persecution an applicant must first demonstrate a subjective fear of persecution through credible testimony that her fear is genuine and then show that a reasonable person in the alien's circumstances would fear persecution upon returning). The subjective prong requires a showing that the fear is genuine. *See* Mitev v. INS, 67 F.3d 1325, 1331 (7th Cir. 1995) (explaining that an applicant must show that a reasonable person in the applicant's circumstances would fear persecution). The objective prong requires a showing that the applicant would be individually singled out for persecution or a demostration that in the applicant's country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.13(b)(1) (2008). To constitute a "pattern or practice," the persecution of the group "must be systemic, pervasive, or organized." Ngure v. Ashcroft, 367 F.3d 975, 991 (8th Cir. 2004). An applicant who has demonstrated past persecution is presumed to have a well-founded fear of future persecution. 8 C.F.R.

The 1980 Refugee Act established both the asylum and withholding provisions.[57] Congress, in this law, conformed our domestic refugee law to the United Nations Protocol Relating to the Status of Refugees (UN Protocol).[58] The Refugee Act, like the UN Protocol, intends to protect noncitizens fleeing persecution.[59] Additionally, the definition of "refugee" in the asylum section, as well as the basis for withholding of removal, is essentially identical to the refugee provisions in the 1951 Convention.[60]

The Refugee Act does not define the term "persecution," but the BIA has defined the term to mean "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[61] The term is not even used in the withholding statute, but the BIA and courts apply the same definition to the requirement that an applicant for withholding show a clear probability that "his life or liberty would be threatened if he or she is returned to his country of origin."[62]

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§ 208.13. However, the government can rebut this presumption by establishing a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or that the applicant could avoid future persecution by relocating to another part of the applicant's country if relocation is reasonable. *Id.*

57. *See* Canas-Segovia v. INS, 902 F.2d 717, 722 (9th Cir. 1990).

58. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 436–37; *Stevic*, 467 U.S. at 421 (1984). The UN Protocol binds the United States to Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (the 1951 Convention). July 28, 1951, 189 U.N.T.S. 150. Although the United States has not acceded to the 1951 Convention generally, "the United States did agree to the 1967 Protocol that incorporates the terms of the 1951 Convention by reference and expands the application of the 1951 Convention." Andrew G. Pizor, Comment, Sale v. Haitian Centers Council*: The Return of Haitian Refugees*, 17 FORDHAM INT'L L.J. 1062, 1065–66 (1994).

59. *In re* S-P-, 21 I. & N. Dec. 486, 492–93 (1996).

60. *Cardoza-Fonseca*, 480 U.S. at 423–24. *See also In re* S-P-, 21 I. & N. Dec. at 492–93 (explaining that Congress sought to bring the Refugee Act of 1980's definition of "'refugee' into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees").

61. *In re* Acosta, 19 I. & N. Dec. 211, 216 (1985); *see also* Nicole Lerescu, Note, *Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(a)(42) to Include a Duress Exception*, 60 VAND. L. REV. 1875, 1879–80 (2007) (discussing the INA's definition of "persecution").

62. Won Kidane, *An Injury to the Citizen, a Pleasure to the State: A Peculiar Challenge to the Enforcement of International Refugee Law*, 6 CHI.-KENT J. INT'L & COMP. L. 116, 159 n.252 (2006); *see Stevic*, 467 U.S. at 428 n.22 (1984) (discussing at length the statutory definition in relation to the United Nations Protocol Relating to the Status of Refugees). The Circuit Courts of Appeals have extensively elaborated this definition. It encompasses persecution that is less onerous than threats to life or freedom but more onerous than mere harassment or annoyance. *See* Balazoski v. INS, 932 F.2d 638, 642 (7th Cir. 1991) (noting that persecution is broader than mere threats to life or freedom, including non-life-threatening violence and physical abuse). Between these broad margins, courts have tended to consider the subject on an ad hoc basis. *See* Marquez v. INS, 105 F.3d 374, 379 (7th Cir. 1997) (surveying the circuits' various holdings and determining that the prevailing approach is "largely ad hoc"). Courts have described persecution in different ways. Karouni v. Gonzales, 399 F.3d 1163, 1171 (9th Cir. 2005) (quoting Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995)) (describing persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as

B. Basic Procedural Parameters of Refugee Claims[63]

United States Citizenship and Immigration Services (USCIS) in DHS is now responsible for the initial administration of most immigration matters.[64] Generally, noncitizens seeking asylum or withholding apply to USCIS.[65] The decisions of the officers in USCIS are typically subject to review within the Executive Office for Immigration Review (EOIR) by IJs, whose decisions are subject to review by the BIA.[66] The BIA is an administrative tribunal authorized to hear appeals of immigration cases[67] decided by IJs.[68] Until the process was substantially revised in 2002, a three-member BIA panel exercised de novo review of IJ opinions.[69] There

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offensive"); Bace v. Ashcroft, 352 F.3d 1133, 1137 (7th Cir. 2003) (quoting Tamas-Mercea v. Reno, 222 F.3d 417, 424 (7th Cir. 2000)) (describing persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate"); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (describing persecution as "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom"). Yet, it does not include every sort of conduct our society regards as offensive. *Id.* at 1241. Finally, to qualify as "persecution," the acts in question must be "committed by the government or forces the government is either unable or unwilling to control." Abdulrahman v. Ashcroft, 330 F.3d 587, 592 (3d Cir. 2003) (internal quotation marks omitted).

63. Note that there have been many recent revisions to the aforementioned provisions that have important consequences on federal review of refugee claims; however, accounting for all of the potentially relevant nuances in refugee claims would unnecessarily distract from the main theses. *See generally* Guendelsberger, *supra* note 15, at 616–17 (explaining the limits of circuit court jurisdiction in removal proceedings); Tarik Naber, Comment, *Judicial Review Under 8 U.S.C. § 1252(a)(2)(B)(ii): How a Minority of Federal Circuit Courts Are Keeping Noncitizens Out of Court*, 40 U.C. DAVIS L. REV. 1515, 1518–19 (2007) (noting that "courts disagree about whether decisions regarding requests to continue or motions to reopen removal proceedings are among the discretionary decisions beyond federal court jurisdiction" and that a majority of courts hold that § 1252(a)(2)(B)(ii) does not bar judicial review of those decisions).

64. Cruz, *supra* note 15, at 492.

65. This is called an affirmative filing. However, noncitizens who are already in removal or deportation proceedings may file an asylum or withholding claim as a defense directly with EOIR, bypassing review of USCIS officer. *See* 8 C.F.R. § 208.1–208.4 (2007) (laying out the rules for asylum and withholding renewal); *see also* KURZBAN, *supra* note 41, at 378–92 (comparing asylum, withholding, and CAT claims before USCIS asylum officer and the IJ).

66. KURZBAN, *supra* note 41, at 378–92.

67. Exec. Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals, http://www.usdoj.gov/eoir/biainfo.htm. Most appeals filed with the BIA involve orders of removal and applications for relief from removal. *Id*.

68. 8 C.F.R. § 3.1(a)(1) (1990); *see also* ANKER, *supra* note 15, at 14 n.67 (noting that Congress created EOIR in 1983 to oversee both the IJs and the BIA). Congress directly granted the Attorney General authority in 8 U.S.C. § 1103(a). That authority has since been transferred to DHS. 8 U.S.C. § 1103(a). The congressional authority for these delegations derives from Article I of the Constitution, which grants Congress power to establish "a uniform Rule of Naturalization."

69. *See* Board of Immigration Appeals, *supra* note 67 (explaining that the BIA has been given nationwide jurisdiction to hear appeals from certain decisions rendered by IJs and by District Directors of DHS); Cruz, *supra* note 15, at 499 (noting that the BIA has

are now only fifteen Board members on the BIA.[70] The BIA's current practice is for a single Board member to issue an order that affirms without opinion (AWO) most IJ decisions.[71]

Cases that are not appropriate for consideration by a single Board member are still adjudicated by a panel of three Board members.[72] This generally occurs, however, only if the Board needs to reverse the opinion, resolve inconsistencies among opinions, or establish new precedent.[73] The Board may, by majority vote or direction of the Chairman, assign a case or group of cases for full en banc consideration. But en banc proceedings are not favored.[74]

Most of the Board's decisions are unpublished,[75] and those unpublished BIA decisions are only binding on the parties to the decision and are not precedent for unrelated cases.[76] Selected decisions that are published and adjudicated by a three-member panel or by the Board en banc—except for Board decisions that are modified or overruled by the Board or Attorney General[77]—may be designated to serve as binding precedent on the parties,

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always served at the discretion of the Attorney General).

70. EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 3 (2006), *available at* http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf [hereinafter BIA PRACTICE MANUAL]. Significantly, regulations intended to "streamline" BIA appeals substantially revised that process to handle a caseload that has grown exponentially in recent years. Guendelsberger, *supra* note 15, at 612 n.40; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2006 STATISTICAL YEAR BOOK S2 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (noting that the Board received over 42,000 appeals in fiscal year 2003).

71. If that single Board member believes the CIS or IJ opinion is substantially correct and that the case falls under, rather than materially extends, existing precedent, the Board member may summarily affirm without an opinion (AWO). 8 C.F.R. § 1003.1(e)(4) (2006); 5 U.S.C. § 706 (2000); Jessica R. Hertz, Comment, *Appellate Jurisdiction over the Board of Immigration Appeals's Affirmance Without Opinion Procedure*, 73 U. CHI. L. REV. 1019, 1023 (2006) (citing 8 C.F.R. § 1003.1(e)(4)(i) (2006)). As one observer reports:

> The 2002 reorganization produced massive, immediate effects. Summary affirmances inside DOJ increased twenty-fold, from 3 percent of the Board's decisions to 60 percent in seven months. Major changes in form were accompanied by commensurate changes in substance. Board decisions in favor of noncitizens fell from 25 percent to 10 percent. The intersection of these changes increased by thousands the number of noncitizens whose administrative appeals were rejected without written explanation.

Alexander, *supra* note 16, at 12 (footnotes omitted).

72. 8 C.F.R. § 1003.1(e)(3) (2006).

73. *See id.* § 1003.1(e)(6) (listing the six circumstances that require a three-member panel to review a case).

74. *Id.* § 1003.1(a)(5).

75. BIA PRACTICE MANUAL, *supra* note 70, at 8–10. Decisions selected for publication meet one or more of several criteria, including but not limited to the following: resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest. *Id.* at 9.

76. *Id*. at 10.

77. 8 C.F.R. § 1003.1(g) (2007).

the Board, the Immigration Courts, and DHS in all proceedings involving the same issue or issues.[78] Thus, a case must be adjudicated by a three-member panel "to establish a precedent construing the meaning of laws, regulations, or procedures."[79]

The Board's order "is final, unless and until it is stayed, modified, rescinded, or overruled by the Board, the Attorney General, or a federal court."[80] If the Board decision is adverse to DHS, then DHS may ask the Board to refer the case to the Attorney General for review.[81] Applicants whose requests for asylum or withholding that the Board denies may appeal to a United States circuit court of appeals.[82] Thus the federal circuit courts hear only denials of refugee claims.

Federal appellate courts hearing BIA appeals in refugee cases generally review agency factual findings under the substantial evidence standard.[83] The APA also directs courts to review legal questions de novo,[84] though *Chevron* has added a potentially dangerous gloss to that directive. Unfortunately, *Chevron* has also affected the judicial "mood" toward refugee cases such that courts often mistakenly apply the *Chevron* standard to simple questions of statutory interpretation and mixed questions of fact and law.[85]

78. BIA PRACTICE MANUAL, *supra* note 70, at 9.

79. *Id.* at 3–4 (citing 8 C.F.R. § 1003.1(e)(6)(ii) (2007)).

80. *Id.* at 8.

81. 8 C.F.R. § 1003.1(h) (2007); Guendelsberger, *supra* note 15, at 616 & n.63; *see* David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 480 n.4, 485 n.28 (2007) (explaining that, although the Secretary of Homeland Security now carries out immigration enforcement functions, the ultimate authority to decide matters of law, such as BIA decisions, remains with the Attorney General).

82. Diallo v. Mukasey, 508 F.3d 451, 453–54 (8th Cir. 2007); Elbahja v. Keisler, 505 F.3d 125, 128 (2d Cir. 2007).

83. *See* 5 U.S.C. § 706(2)(E) (2000) (providing that reviewing courts must set aside agency decisions that the court finds "unsupported by substantial evidence" when that case is subject to §§ 556 and 557 of the APA or "otherwise reviewed on the record of an agency hearing provided by statute"); INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (stating that appellate courts must uphold BIA evidentiary determinations supported by "reasonable, substantial, and probative evidence") (quoting 8 U.S.C. § 1105a(a)(4) (2000)).

84. 5 U.S.C. § 706 (2000).

85. *See, e.g.*, Hamama v. INS, 78 F.3d 233, 239 (6th Cir. 1996) (stating that the court would apply *Chevron* to its de novo review of a BIA decision that involved application of fact to law and holding that the *Chevron* approach was appropriate in reviewing these types of BIA decisions); Guendelsberger, *supra* note 15, at 626 (stating that the appellate courts ordinarily follow the substantial evidence test to determine whether the evidence supports agency decisions "on mixed questions of fact and law"); KOCH, *supra* note 32, § 12.22 (noting that courts must distinguish between legal and factual components of decisions).

C. Chevron*'s Interpretive Context*

1. The Governing Law

Congress has plenary power to regulate many areas of national life, including immigration,[86] and it has delegated authority to regulate those areas to various agencies.[87] Significantly, however, Congress has also dictated the scope of federal judicial review of those agencies' actions.[88] Section 706 of the APA embodies Congress's delegation of judicial review authority and requires that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[89] This includes "hold[ing] unlawful and set[ting] aside agency action[s], findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence" in cases involving formal adjudication.[90]

Thus, when a court reviews an agency action, it must follow this

86. *See* PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 179 (2d ed. 2002) (stating that immigration law is not only highly developed, complex, and "almost entirely a creature of statute," but also that it implicates a "sovereign attribute"—the power to exclude aliens—which confers upon Congress plenary power to pass laws and regulations governing aliens that would not be acceptable if applied to citizens); John H. Reese, *Bursting the* Chevron *Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 FORDHAM L. REV. 1103, 1108–09 (2004) (discussing Professor Nathanson's concept that courts limit their role in reviewing agency decisions to "questions of the ultimate meaning of the statute" and inferring that such a concept satisfies separation of powers obligations and maintains courts' independent role in interpreting the law); Rubenstein, *supra* note 81, at 484–85 (defining the plenary doctrine as judicial recognition that it is Congress's role to determine immigration policy and stating that Congress has delegated much of this authority to agencies). *Contra* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (exploring the constitutional underpinnings of American immigration law and asserting that the political branches should not be free to deport aliens on constitutionally suspect grounds); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (suggesting that the plenary doctrine is a form of harmful dicta); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that the plenary power doctrine rests on unsound foundational cases and that the Court should therefore reject the doctrine).

87. *See* Miranda Alvarado v. Gonzales, 449 F.3d 915, 923 (9th Cir. 2006) ("Congress delegated plenary authority to the Attorney General to enforce the INA.") (citing 8 U.S.C. § 1103(a) (2000)); Hall v. INS, 253 F. Supp. 2d 244, 248 (D.R.I. 2003) ("The plenary authority of Congress may be delegated in part to the Executive Branch.") (citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)).

88. *See, e.g.*, Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference*, 54 ADMIN. L. REV. 173, 181 (2002) [hereinafter Weaver, *The Emperor Has No Clothes*] ("Congress's only explicit statement on the judicial role is set forth in the APA . . . .").

89. 5 U.S.C. § 706 (2000).

90. *Id.* § 706(2)(A), (E).

congressionally mandated regime. Curiously, some courts operating under the APA's aegis—like the *Chevron* Court—fail to even mention it.[91] Still, many of the cases that the *Chevron* Court applied in its decision[92] actually followed the APA, and the *Chevron* Court certainly did not rule the APA unconstitutional. Thus the APA clearly remains relevant, albeit in a way that the *Chevron* Court failed to explain.

The key to *Chevron* is that, when a statute contains either an ambiguity that the Court cannot decipher using its arsenal of interpretive devices, or a "gap" in the statutory scheme, Congress is signaling its intent that the agency, rather than the Court, should supply the missing meaning. *Chevron* created the fiction that silence or indecipherable ambiguity constitutes an implicit congressional delegation of authority to the agency, rather than to the courts, to say, in the first instance, "what the law is."[93]

This may seem shocking, given the APA's explicit mandate for the courts to review agency legal decisions.[94] But the Court in *Chevron* essentially distinguished legal interpretation, which is the court's domain, from policymaking, which, under the circumstances of that case, the Court ceded as the duly delegated realm of the agency.[95] To see how and why

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91. In *Chevron*, the Court expressly stated it was conforming its decision to precedent. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984). In the section of its opinion on the scope of judicial review of agency action, the Court cited twenty-four of its prior cases (and one text) on that topic, but not the APA.

92. *See id*. at 842–45. Comprehensively reviewing those cases probably would provide substantial illumination of the foundation for *Chevron*'s judicial review standard, but at too great a cost for purposes of this Article. For those who are interested, see Reese, *supra* note 86, who has ably undertaken much of that task.

93. *Chevron*, 467 U.S. at 842–43.

94. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 241–42 n.2 (2001) (Scalia, J., dissenting) ("Title 5 U.S.C. § 706 provides that, in reviewing agency action, the court shall 'decide all relevant questions of law'—which would seem to mean that all statutory ambiguities are to be resolved judicially."); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193 (1998) ("*Chevron* was an APA case, so any attempt to justify its rule should begin with the APA. The doctrine runs into trouble immediately."); Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 3 (2006) (noting the conflict between *Chevron* and the APA).

95. *Chevron*, 467 U.S. at 865–66.

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)). *See generally* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 232 (1992) [hereinafter Herz, *Deference Running Riot*] (concluding that the *Chevron* decision "merely refines longstanding principles most evident in the distinction between standards for judicial review of interpretive and legislative

this occurred, and what this means for refugee claims, we must examine at least the broad contours of the case and its context.

*2. The Pre-*Chevron *Landscape*

Before *Chevron*, the Supreme Court had developed what many have characterized as a confusing standard for reviewing agency decisions.[96] As a rule, courts prior to *Chevron* determined the degree of deference they accorded agency decisions based on a variety of factors,[97] sometimes deferring to "reasonable" agency interpretations and sometimes merely "considering" those interpretations without according them any real deference.[98] In *Skidmore v. Swift & Co.*,[99] for example, the Court addressed the extent to which it should defer to an agency's opinion of a statute administered by the agency when that opinion was contained in an interpretive letter regarding an issue in private litigation.[100] The Court stated that a reviewing court need not adopt certain agency interpretations of the acts the agency administers—at least when Congress has delegated only executive authority to the agency; however, courts should respectfully consider such insights as "persuasive precedent."[101]

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rules").

96. *See, e.g.*, Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1297 (2002) ("Before *Chevron*, courts may or may not have based their interpretations of statutes on those provided by administrative agencies, or they may have been unclear as to their reasoning.").

97. *See, e.g.*, KOCH, *supra* note 32, §§ 9.2, 10.1, 11.1, 12.1, 12.33 (asserting that a system—consisting of three different interrelated systems—has evolved and that this system determines how much scrutiny courts afford administrative decisions); 2B NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 56A:12 (6th ed. 2000) (stating that the courts, prior to *Chevron*, "had looked to multiple contextual factors" to determine when they should defer to administrative agencies on questions of statutory interpretation).

98. Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1255 (1989).

99. 323 U.S. 134 (1944).

100. One noteworthy aspect of *Skidmore* is that the weight given the agency's view depends on the scope of its delegated authority. Another aspect is that courts need not defer to agencies acting through merely informal procedures. *See id.* at 139–40 (stating that, although an administrator's decision does not bind the Judiciary, a court should still consider a decision's thoroughness, its validity, and its consistency with other decisions in determining whether, and to what extent, the court should give weight to the decision in private litigation).

101. *Skidmore*, 323 U.S. at 140. As stated *supra*, one aspect of *Skidmore* is that the weight given to the agency's view depends on the scope of its delegated authority. Another aspect is that courts need not defer to agencies acting through merely informal procedures. These are both important facets of *Skidmore*. Taken together, they clarify that a reviewing court need not adopt as "binding precedent," so to speak, informal agency interpretations of the acts the agency administers—at least when Congress has delegated only executive authority to the agency—but courts should respectfully consider such insights as "persuasive precedent." *See generally id.* (stating that an administrator's decisions

Chevron significantly flattened this roughly contoured landscape, taking what was often a multifaceted standard and largely replacing it with a two-step rule, described in the following Part.[102] Yet, the various strains of judicial disposition toward agency legal interpretations that met in *Chevron* have also largely survived it. This fact—particularly the survival of *Skidmore* deference[103]—is significant in the ultimate analysis of *Chevron*'s

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"constitute a body of experience and informed judgment" and that the judiciary and litigants should be able to rely upon those decisions for guidance). Given the INA's clear delegation of both rulemaking and adjudicatory authority to INS, now DHS, *Skidmore* deference is generally not a relevant consideration in asylum and withholding cases. *But see, e.g.*, Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 142–44 (noting that because IJ/BIA decisions are not binding on the agency, courts should not consider them authoritative interpretations entitled to *Chevron* deference).

That courts need not defer to most informal agency actions was more recently illustrated in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (denying *Chevron* deference to an agency opinion letter because *Chevron* applies only to agency actions having the "force of law," such as "formal adjudication or notice-and-comment rulemaking"); *cf.* Mead Corp. v. United States, 185 F.3d 1304 (Fed. Cir. 1999), *rev'd*, 533 U.S. 218 (declining to defer to Customs' interpretation of tariff classifications, where those interpretations were issued through processes less formal than IRS revenue rulings). At least one circuit has held, however, that *Christensen*'s reference to formal adjudication or rulemaking was only an illustrative example of agency action entitled to *Chevron* deference, not a comprehensive list of agency acts due deference, so the court could extend *Chevron* deference to an informal INS adjudication. Gonzalez *ex rel*. Gonzalez v. Reno, 215 F.3d 1243, 1245 n.3 (11th Cir. 2000).

102. *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 226 (2001). Others find *Chevron* a less radical departure from precedent. *See, e.g.*, KOCH, *supra* note 32, § 12.30, 12.32 (arguing that *Chevron* did not transform "the law with respect to review of interpretations of law"). For example, Professor Reese discerned a macromeaning/micromeaning divide in the Court's earlier decisions whether to defer to an agency decision. *See* Reese, *supra* note 86, at 1106–37 (asserting that the Court based *Chevron* upon well-settled principles of law and did not intend that it "be a revolutionary decision"). Under this view, courts, as the ultimate arbiters of "what the law is," decide whether an agency is acting within the scope of its authority. That is, the court independently determines the act's purpose to resolve macromeaning questions.

Analyzing *Gray v. Powell*, 314 U.S. 402 (1941), and *NLRB v. Hearst*, 322 U.S. 111 (1944), as representative of the pre-*Chevron* landscape, Professor Reese concludes that they embody the following model of judicial review, which follows essentially the same allocation of judicial and agency authority that Professor Nathanson observed:

> (1) When an agency uses its delegated authority (duty) to make a "determination" of the meaning of a statutory term as applied in a formal adjudication in the "usual administrative routine" (micromeaning), and
>
> (2) When it does so reasonably or rationally on the record and "with reference to the purpose of the Act" (macromeaning), or "with respect to the ends sought to be accomplished by the legislation" (macromeaning), or with "a reasonable basis in law" (macromeaning),
>
> (3) A reviewing court will defer to the agency's determination.

Reese, *supra* note 86, at 1115. This explanation fits *Chevron* within its precedential milieu, rather than radically beyond it. It does not seem, however, that courts applying *Chevron* generally take all the opportunities to determine the macromeaning issues this view suggests they could. Consequently, *Chevron* is probably better viewed—as a practical matter—as the revolutionary ruling most scholars and courts believe it to be.

103. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001) (holding that Customs

proper scope in the context of reviewing religious-refugee claims.

D. The Chevron *Case*

At this point, the facts of *Chevron* are well understood and do not require rehashing. But in short, *Chevron* involved a dispute between the Court of Appeals for the District of Columbia and the Environmental Protection Agency (EPA) over who had authority to interpret the phrase "stationary source" in the 1970 Clean Air Act Amendments.[104] In administering the statute, the EPA determined that the Act did not define the phrase in the relevant context.[105] So pursuant to its authority under the Environmental Protection Act, the EPA promulgated a rule interpreting the phrase broadly.[106] The court agreed that Congress failed to explicitly define the term and that the legislative history did not "squarely address" or resolve the issue of the term's meaning.[107] But the court concluded that the purpose of the statute required a narrower interpretation and so replaced the EPA's interpretation of the statute with its own.[108]

The Supreme Court reversed. According to the Court, the Judiciary's role was not to give static meaning to an otherwise ambiguous statutory term.[109] Instead, the Court defined the judicial role as determining whether

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ruling letters are eligible only for *Skidmore* respect, not *Chevron* deference). *But see id.* at 250 (Scalia, J., dissenting) (arguing *Skidmore* is an "anachronism" that did not survive *Chevron).*

104. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845–46 (1984).

105. *Id*. at 841.

106. Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766, 50,766–71 (Oct. 14, 1981) (codified at 40 C.F.R. §§ 51–52 (1981)); *see* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 684–85 (2007) (detailing the EPA's promulgation of the "bubble rule" in *Chevron*).

107. *Chevron*, 467 U.S. at 841.

108. *Id.* at 841–42.

109. *Id.* at 842. The D.C. Circuit found the EPA's interpretation contravened the statutory purpose of improving air quality in nonattainment areas, *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 727–28 (D.C. Cir. 1982), and the Supreme Court's reversal constituted a potentially significant devaluation of the importance of congressional purpose in statutory construction. *See* Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 114 (discussing the impact of *Chevron* on the way the Supreme Court has interpreted statutes dealing with immigration and aliens). It may also be noteworthy that when the *Chevron* Court discussed its role in reviewing agency decisions pursuant to explicit congressional delegation, its two lead citations were *United States v. Morton*, 467 U.S. 822, 834 (1984), and *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981). *Chevron*, 467 U.S. at 843–44. In *Morton*, the Court held that when Congress directly instructed an agency to "construe the statute by regulation," courts "must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *Morton*, 467 U.S. at 834. To determine whether the regulations in question were "plainly contrary to the statute," the Court examined not only the language of the statute as a whole,

Congress expressed a clear intent regarding a statutory term's meaning and deferring to a reasonable agency interpretation in the absence of such intent.[110]

Under *Chevron*'s first step, the court plays an important gatekeeper role regarding congressional intent: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[111] It is only if the court applies those tools and finds that Congress had no clear intent on the given issue (i.e., Congress failed to address the issue or did so in an incurably vague manner) that it must take the next step and defer to a "permissible" or "reasonable" agency interpretation.

With this second step *Chevron* broke new ground. There was ample precedent for *Chevron*'s first step,[112] but the Court had never before held

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but its legislative history and underlying purpose as well. *Id.* at 833–34. *Schweiker* followed essentially the same approach. *Schweiker*, 453 U.S. at 43–48; *cf.* NationsBank, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (assessing whether agency interpretation is "reasonable in light of the legislature's revealed design").

110. *Chevron*, 467 U.S. at 842–43. This is the infamous "two-step" approach in *Chevron*'s deference analysis. As is often the case, however, labeling something and understanding it are two entirely different matters. Leaving aside the considerable debate over whether the *Chevron* Court should have said what it did—that is, whether the decision was wise or unwise—there is ample controversy over what exactly *Chevron* said. This is understandable. Not only does the decision purport to rest on precedent it seems to contradict, but it also manifests significant internal inconsistency.

111. *Id.* at 843 n.9.

112. *See Chevron*, 467 U.S. at 843 n.9 (listing pre-*Chevron* cases supporting the proposition that the Judiciary "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement") (citing FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981)); SEC v. Sloan, 436 U.S. 103, 117–18 (1978) (explaining that an agency interpretation that is "both consistent and longstanding" is entitled to some deference "as a general principle of law," but such deference is not always enough "to overcome the clear contrary indications of the statute itself"); Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) (asserting that the courts need not grant deference to an agency assertion of authority that exceeds the authority that Congress intended to grant); Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 272 (1968) (noting that an agency's statutory construction is entitled to deference unless the courts determine that the agency construction conflicts with congressional intent); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (describing the agency's interpretation of legal standards as conferring on the Judiciary "enlightenment gained from administrative experience," but asserting that the Judiciary must set forth the final meaning of legal standards); Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946) (asserting that the Judiciary, and not the agency, decides the limits of that agency's statutory authority); Burnet v. Chi. Portrait Co., 285 U.S. 1, 16 (1932) (noting that administrative constructions not only do not bind federal courts but also that courts will consider a construction that "is not uniform and consistent . . . only to the extent that it is supported by valid reasons"); Webster v. Luther, 163 U.S. 331, 342 (1896) (stating that a practical interpretation of statute that an agency constructs is entitled to the "highest respect" but noting that such a construction cannot "defeat the obvious purpose of the statute").

> The Judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a

that it *must* defer to an agency's statutory interpretation under these circumstances.

To make this leap, the Court created a fiction of implied congressional delegation. That delegation gives primary interpretive authority to agencies to make policy relatively free from judicial interference. The *Chevron* Court inferred this implicit delegation from the fact that Congress authorizes agencies in certain circumstances to make legally binding pronouncements through rulemaking or adjudication. Although Congress assigned agencies the task of administering statutory schemes—and this may imply some lawmaking authority—Congress also explicitly assigned courts the task of overseeing that administration and, arguably, that lawmaking authority in the APA. As various commentators have observed, congressional delegation of lawmaking authority to agencies may be predicated, at least in part, on the understanding that courts will meaningfully review the agencies' work.[113] Removing meaningful judicial review on the grounds that Congress has delegated primary interpretive authority to an agency may thus undercut the delegation theory itself.[114] It is the nature and extent of deference that courts must extend to agencies at this juncture that has generated the most controversy over *Chevron*'s framework for judicial review of agency policymaking.[115]

The various conditions or rationales that the Court cited for the implied delegation on which this heightened deference rests are continuing causes of this controversy. The first condition is certainly the easiest to grasp, at least in the abstract:[116] "the decision as to the meaning or reach of the

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> court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 843 n.9.

113. *E.g.*, Herz, *Deference Running Riot*, *supra* note 95; Barron & Kagan, *supra* note 102, at 218; *see also* SINGER, *supra* note 97, §§ 53.03, 56A:16 ("Historically, the acceptance of broad delegations has rested in part on the assumption that agency action is subject to meaningful judicial review.").

114. *See generally* Barron & Kagan, *supra* note 102 (discussing *Mead*'s impact on the nondelegation doctrine).

115. Although often referred to as the "*Chevron* doctrine," the Court sometimes refers to this construct as the "*Chevron* framework." *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (describing the *Chevron* doctrine as a framework that governs a court's acceptance or rejection of an agency's statutory construction); United States v. Haggar Apparel Co., 526 U.S. 380, 382 (1999) (describing *Chevron* as a framework that is "the beginning of the legal analysis").

116. It is commonly observed that this distinction between interpreting a statute and making policy is the crux of *Chevron*, but it has also been observed that making that distinction may be impossible. *See, e.g.*, Herz, *Deference Running Riot*, *supra* note 95, at 196–97 (stating that the policy justification for judicial deference to agency decisions is about lawmaking rather than interpretation and that *Chevron* leaves such lawmaking to the agency).

statute . . . involve[s] reconciling conflicting policies."[117] This makes inherent sense. If there is no need to reconcile conflicting policies—i.e., no ambiguity or gap that could be filled by two competing terms that both serve policies within the statute's scope—then there is no need for agency input. Courts can, and must, enforce the single policy choice presented in such situations on their own.[118]

If this condition is met, a court should defer when "a full understanding of the force of the statutory policy in the given situation . . . depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations."[119] This is the "agency expertise" rationale for judicial deference to agency decisions. That courts should give some deference to agencies depending on the agency's expertise on the specific issue is uncontroversial, but how critically courts should assess that expertise has long been open to debate.[120] One of the Court's larger purposes in *Chevron* may have been to significantly limit, if not end, that debate.[121]

The Court also reasoned that deference was appropriate because of agencies' indirect political accountability and the courts' relative lack of such accountability.[122] Policymaking is essentially lawmaking. That legislative function is best executed by a body that answers to the electorate or its elected representatives.[123]

The final element of the doctrine the Court recited was compound. The Court held that it generally should not disturb an agency's "reasonable

117. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

118. *Id.* at 843 n.9.

119. *Id.* at 844.

120. The nondelegation and related arguments against deference to "expert" agencies have been pretty much laid to rest. *See, e.g.*, Herz, *Deference Running Riot*, *supra* note 95, at 188. *But see* Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944) (noting that appellate review of agency actions and lower court decisions involves similar problems and asserting that this similarity sometimes leads to uncertainty as to what an appellate court should do). Still, it is interesting to examine as a matter of simple logic the courts' assertions that agencies, not courts, are the expert decisionmakers in this context, and to consider the implications of a lack of agency expertise or the irrelevance of agency expertise to a specific issue's resolution. I will indulge this line of speculation below but continue tracing the *Chevron* Court's analysis at face value for now.

121. *See Chevron*, 467 U.S. at 865–66 (drawing the boundaries within which the judiciary operates when it reviews an agency's statutory construction by stating that courts must not decide cases on the basis of "the judges' personal policy preferences" and must reject a challenge to an agency's statutory construction when that challenge "centers on the wisdom of the agency's policy" choice); *see also, e.g.*, Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 743 (2002) (noting that *Chevron* justified its holding based on agency expertise, but concluding that the ultimate basis for the ruling is implied congressional delegation of interpretive authority to agencies).

122. *Chevron*, 467 U.S. at 865–66.

123. *Id.*

accommodation of conflicting policies that were committed to the agency's care by the statute," but it would reject such choices if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[124] Thus, the agency must act reasonably in reconciling conflicting policies and that resolution must not conflict with congressional intent as reflected in the statute, its legislative history, or its manifest purpose.[125]

E. Chevron *and the INA*

The Supreme Court has plainly expressed its opinion that refugee cases are generally within *Chevron*'s domain.[126] Yet the Court has not adequately examined whether the rationale of *Chevron* logically and justly extends to religious-refugee cases. Before conducting that inquiry, I will briefly examine two representative cases in which the Supreme Court applied *Chevron* to BIA refugee decisions.

1. Cardoza-Fonseca

Fifteen years after its decision in *Chevron*, the Court invoked the *Chevron* standard to reverse the BIA's interpretation of the withholding and asylum statutes in *INS v. Cardoza-Fonseca*.[127] The INA required the Attorney General to withhold deportation of an alien who demonstrated her "life or freedom would be threatened" on account of one of the protected factors.[128] The Act vested the Attorney General with discretion to grant asylum to an alien if she proved that it was "more likely than not [she] alien would be subject to persecution" in her native land.[129] The BIA interpreted these standards to be identical—specifically, it believed that the "more likely than not" standard in the withholding statute governed asylum applications.[130] The BIA contended that an alien must prove "a clear probability of persecution" to merit either type of relief.[131]

Finding guidance in the language, structure, and legislative history of the

124. *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961)).
125. *E.g.*, United States v. Haggar Apparel Co., 526 U.S. 380 (1999).
126. INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999).
127. 480 U.S. 421, 424 (1987).
128. *See* 8 U.S.C. § 1232(b)(3) (2000) (listing religion as one of the protected categories).
129. INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987) (citing 8 U.S.C. §§ 1253(h), 1158(a), 1101(a)(42)).
130. *Cardoza-Fonseca*, 480 U.S. at 423. In *INS v. Stevic*, 467 U.S. 407 (1984), the Court had already held that satisfying the asylum statute's standard of a "well-founded fear of persecution" would not entitle an alien to withholding of deportation.
131. *Cardoza-Fonseca*, 480 U.S. at 425.

INA, the Court rejected the BIA's interpretation.[132] As to the language and structure of the statute, the Court found that Congress intentionally used the different phrases in the two separate provisions to convey very different meanings. The "well-founded fear" standard for asylum claims clearly denoted a subjective element lacking from the entirely objective "clear-probability" standard for withholding of deportation.[133] The Court found that because the "plain language" of the statute contradicted the BIA's position, it was obligated to reject that position.[134]

Having corrected the BIA's "purely legal" interpretation of the statute,[135] the Court remanded for the BIA to apply the statute correctly to the facts[136]—a process a court would then review only to determine whether the record compelled a contrary finding.[137]

2. Aguirre-Aguirre

In *INS v. Aguirre-Aguirre*,[138] the Court revisited the application of *Chevron* in the INA context. There, although the IJ had held that a Guatemalan native would be subject to a clear probability of persecution if deported, the BIA reversed the grant of withholding, finding that the applicant "committed a serious nonpolitical crime," which rendered him ineligible for withholding under 8 U.S.C. § 1252(2).[139] The applicant had been involved in various politically motivated actions in his native Guatemala that involved extensive destruction of public and private property, as well as some assaults on civilians. In making its finding, the BIA relied on a test that it had developed in a prior case, interpreting the statutory phrase to refer to acts whose common law or criminal character outweighed their political nature.[140]

The Court of Appeals for the Ninth Circuit reversed in a split opinion, holding that the BIA failed to adequately consider (1) that court's precedent

132. *Id.* at 423–24, 427–46, 449. The Court cited the BIA's inconsistency in interpreting these provisions as an additional ground to not defer to the agency. *Id.* at 446 n.30.

133. *Id.* at 430–31.

134. *Id.* at 431–32. The Court further noted that although the statute's plain language presumptively indicated Congress's intent, the Court had to review the legislative history to see whether it rebutted that presumption. *Id.* at 423 n.12.

135. *Id.* at 448.

136. *Id.* at 426, 450.

137. 5 U.S.C. § 706 (2)(B) (2000).

138. 526 U.S. 415 (1999).

139. *Id.* at 418. As the Court later noted, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), revised this and other related provisions and recodified the withholding provision at 8 U.S.C. § 1231(b)(3) (1994 & Supp. III). *Aguirre-Aguirre*, 526 U.S. at 420.

140. *Aguirre-Aguirre*, 526 U.S. at 422–23.

on the issue, (2) the persecution Aguirre-Aguirre faced if deported, and (3) the relationship between Aguirre-Aguirre's alleged crimes and his political objectives.[141] The Supreme Court reversed, however, holding that the Ninth Circuit failed to accord the BIA the deference *Chevron* required.[142]

The Supreme Court quoted the INA's mandate that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[143] Additionally, the INA dictated that the Attorney General must determine whether the statutory conditions for withholding have been met.[144] On its face, one might read this language to preclude judicial review of BIA decisions altogether.[145] The Court evidently did not believe that that was a correct interpretation of this language.

First, the *Aguirre-Aguirre* Court clearly stated that the agency was merely due *Chevron* deference, which still entails some judicial review.[146] In fact, the *Aguirre-Aguirre* Court conducted such a review, essentially evaluating the reasonableness of the agency's interpretation in light of the "text and structure" of the statutory provision in question.[147]

It is also worth noting that the same statutory language regarding the Attorney General's interpretive authority was in effect for the Court's decision in *Cardoza-Fonseca*, where the Court independently decided the legal question of statutory interpretation and expressly rejected the agency's reading.[148]

Moreover, in deciding whether *Chevron* applied, the Court again discussed some of the major concerns supporting *Chevron* deference—

141. *Id.* at 423; *see also* Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 140 (explaining that the Ninth Circuit found error in BIA's failure to analyze the "causal nexus in determining what drove [Aguirre-Aguirre's] actions").

142. *Aguirre-Aguirre*, 526 U.S. at 424.

143. *Id.* (citing 8 U.S.C. § 1103(a)(1) (1994 & Supp. III)).

144. *Id.* (citing 8 U.S.C. § 1253(h)(1)–(2) (2000)).

145. *See, e.g.*, Merrill & Hickman, *supra* note 29, at 843 ("These provisions, the latter in particular, would seem to qualify as *express* delegations of interpretational power to the Attorney General, eliminating any need to invoke a *Chevron*-like presumption of implied interpretational power at all."). Yet in numerous cases involving agency interpretation of this Act, the Court has applied its *Chevron* analysis. *See Aguirre-Aguirre*, 526 U.S. at 425 (citing INS v. Abudu, 485 U.S. 94, 110 (1988)). *See generally* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000) (discussing the practical effects of *Chevron* deference on foreign affairs law).

146. For example, the Court expressly referenced its dicta in *Cardoza-Fonseca* that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" *Aguirre-Aguirre*, 526 U.S. at 425 (quoting *Cardoza-Fonseca*, 480 U.S. at 448–49).

147. *Aguirre-Aguirre*, 526 U.S. at 425–32.

148. Finally, and admittedly less forcefully, the factors supporting an implied delegation would be irrelevant if the Court viewed this language as an express delegation. Yet the Court discussed at least some of those factors in its decision to defer. *See Cardoza-Fonseca*, 480 U.S. at 430–32.

political accountability and expertise—that it had developed in *Chevron*. Thus *Aguirre-Aguirre* stands for the proposition that *Chevron* applies to at least some BIA adjudicative decisions[149] regarding refugees—they are neither exempt from *Chevron*'s scope nor completely insulated from judicial review.[150]

Indeed, as further discussed below, the Court has stated that it believes that *Chevron* deference is especially applicable to the BIA's immigration decisions because of their perceived political implications and potential effect on foreign relations.[151] This may be a good prudential argument on its face, but as the following Part indicates, this belief is actually more controversial than the Court let on.

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149. The extension of *Chevron* deference to an agency "interpretation" in the adjudicative context—rather than the formal rulemaking context of *Chevron* and its progeny to this point in time—was in itself a major development. *See, e.g.*, Merrill & Hickman, *supra* note 29, at 842 ("The extension of *Chevron* to interpretations rendered in adjudications is potentially a major clarification of the scope of the doctrine."). As further discussed, it may also be viewed as a mistake.

150. It is clear *Aguirre-Aguirre* was correct in refusing to grant preclusive effect to the INA language found in 8 U.S.C. § 1103(a)(1). In its broader context, that provision states:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this Chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this Chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. § 1103(a)(1) (2000). Thus, this passage merely allocates authority between the Secretary of Homeland Security and the Attorney General. It does not empower the Attorney General to interpret legal matters free of judicial review. This is clear not only from the plain language of the statute, but from its legislative history as well. The Congressional Record from 1952, which addressed a prior version of this provision explains that

> [W]ithin their respective spheres of jurisdiction with respect to the administration and enforcement of the provisions of the bill, both the Attorney General and the Secretary of State are vested with authority to issue such regulations as may be necessary for performing their functions under the provisions of the bill. However, rulings by the Attorney General, as the chief law-enforcement officer of the Nation, with respect to all questions of law shall be controlling. For example, rulings which may be issued by the Attorney General relating to those provisions of the bill governing the admissibility of aliens will be controlling with respect to a determination of aliens who are admissible and will be binding on the Secretary of State with respect to determinations of whether an alien is eligible for a visa. On the other hand, the Secretary of State will have control over all questions relating to the manner in which the powers, duties, and functions of consular and diplomatic officers are to be administered.

H.R. REP. NO. 82-1365, at 35 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1313, 1687.

151. *Aguirre-Aguirre*, 526 U.S. at 425 (citing INS v. Abudu, 485 U.S. 94, 110 (1998)).

II. THE PIECES OF THE *CHEVRON* FRAMEWORK THE COURT HAS PLACED ON THE TABLE AND THEIR RELATION TO RELIGIOUS-REFUGEE ADJUDICATIONS

A. Introduction

The *Chevron* Court gave several reasons why it should infer that Congress delegated primary interpretive and policymaking authority to the agency in that case,[152] and both courts and commentators have adduced additional reasons supporting *Chevron*'s inferred delegation doctrine. The *Chevron* Court stated that "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[153] The Court further explained that policy decisions are political decisions, and although judges sometimes make policy decisions, the political branches are better qualified in this area.[154] In support of extending *Chevron* deference to BIA decisions on those matters, others have cited a desire for uniformity in federal administrative law as a ground for judicial deference and—in the context of asylum and withholding cases—deference to the Executive Branch on matters of foreign policy.[155]

But the *Chevron* framework is a judicial fiction.[156] It is a rebuttable presumption that the Court created to solve a problem.[157] And although commentators discuss this fictive presumption in terms of an implied congressional delegation and a manifestation of the separation of powers principle, neither the Constitution nor any statute requires it.[158]

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152. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

153. *Id.* at 865 (citations omitted).

154. *Id.* at 865–66. Here, the *Chevron* Court quoted its opinion in *Tenn. Valley Auth. v. Hill*—which in turn quoted Sir Thomas More from "A Man for All Seasons"—for the proposition that the Constitution vests policy decisions in Congress, not the courts. *Id.* at 866. *Assuming* Congress has actually delegated its policymaking authority to an agency, invoking such lofty and incontrovertible sentiments to support deference to an unelected agency may be justified. But that does not answer when such a serious delegation may safely be inferred, and the Court was not justified in donning More's mantle to *create* such an assumption.

155. *See infra* Parts III.C.2, III.C.5.

156. *See*, *e.g.*, Herz, *Deference Running Riot*, *supra* note 95 (describing how the *Chevron* doctrine's boundaries have been overinterpreted).

157. Merrill & Hickman, *supra* note 29, at 888 ("Because the delegation of interpretational authority recognized in *Chevron* is only an implied delegation, it can be overcome by evidence that Congress in fact intends a different allocation of interpretational authority.").

158. *See*, *e.g.*, Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275, 1277 [hereinafter Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?*] ("*Chevron*'s required

Significantly, even if one indulges the fiction that congressional failure to clearly address an issue expresses congressional intent to delegate authority to an agency to address the issue, one has not actually advanced the inquiry as to the circumstances of that delegation. That is, assuming Congress intended the agency to fill the statutory gap, did it intend the agency to do so subject to traditional judicial review—as expressly indicated by Congress in the APA, no less—or did Congress somehow tacitly intend to alter that arrangement as the *Chevron* Court held in 1984?[159] Several commentators quite understandably have observed that the former line of reasoning is at least as convincing as the latter.[160]

Chevron is an ironic fiction in several respects, but one irony pervades the entire presumption: the *Chevron* Court apparently interpreted a gap in the Clean Air Act as implicitly delegating to the EPA the authority to interpret that Act.[161] On its face, at least, if the *Chevron* Court followed its own counsel, it should have remanded to the EPA for a determination of whether—as a matter of policy not explicit in the Environmental Protection Act—this gap in the Environmental Protection Act should be interpreted to contain such an implied delegation.[162]

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deference, properly understood, is a judicially self-imposed, prudential limitation."); *id.* at 1283–89 (explaining that *Chevron*'s theoretic basis is unfounded and unhelpful).

159. The *Chevron* Court cited no new statute supporting its new understanding of congressional intent regarding judicial review, and it did not reverse its prior cases permitting a substantially broader scope of judicial review even when agencies had filled gaps in the statutes they authoritatively administered.

160. Herz, *Deference Running Riot*, *supra* note 95; Barron & Kagan, *supra* note 102, at 218; Krotoszynski, *supra* note 121, at 747.

161. As Professor Duffy has pointed out:

> There is one argument that does avoid a conflict between *Chevron* and Section 706. Under this view, *Chevron* is a presumption that, when a statute contains an ambiguity, it should be interpreted as implicitly delegating, to the administrative agency with jurisdiction over the statute, the lawmaking authority necessary to resolve the issue. This defense of *Chevron* has been offered by Justice Scalia and others . . . . The theory avoids the problem with Section 706 because the court *does* interpret the statute de novo; the court just finds that the statute gives the agency the power to make the rule of decision.

Duffy, *supra* note 94, at 197–98. As post hoc rationalizations go, this reasoning is entirely plausible. It is not what the Court said it was doing, however, and it does not foreclose other explanations.

162. Had the Court applied the factors it said were relevant to finding an implied delegation, it might have decided that the gap in the Act indicates that the agency had primary authority to fill that gap with an interpretation of its authority. Although the agency arguably lacked expertise in that (presumably less technical) area, the general conferral of lawmaking power on the agency and the agency's alleged political accountability were still present. In short, under the *Chevron* framework, because this decision about the agency's interpretive authority was a *policy* decision, the Court was supposedly less qualified than the agency to make it. But there is powerful precedent against this eventuality as well. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'") (quoting Federal Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973)); *see also* ACLU v. FCC, 823

In any event, the unstable limits of the *Chevron* doctrine are a matter of serious concern. The Court has tinkered with the doctrine, commentators have probed and praised and criticized it, and lower federal courts have applied it in various ways. As either a rule or a standard,[163] its amorphous nature is not unique in the law. But failing to contain it within certain bounds can cause unnecessary and unacceptable human suffering. Certainly, the *Chevron* doctrine may be helpful and appropriate in certain circumstances.[164] But as a mere presumption, it can be rebutted on several grounds. And as a prudential doctrine, it would be imprudent to apply it on some occasions. In religious-refugee cases, these premises arguably are met. The discussion below shows that the grounds for deference in *Chevron* were not so strong as the Court implied and those grounds are even weaker in the very distinguishable context of religious-refugee claims.[165]

F.2d 1554, 1567 n.32 (D.C. Cir. 1987) ("[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power."); Nagahi v. INS, 219 F.3d 1166, 1171 (10th Cir. 2000) (noting that Congress did not delegate to INS the authority to regulate the scope of judicial power). Alternatively, if one views the *Chevron* Court as interpreting a gap in the APA rather than in the Clean Air Act, there would be no question of deferring to an agency, because none is charged with administering, much less making, law regarding the APA. Yet even this alternative view again has the Court making policy. Indeed, the Court would be making policy about the scope of its own power, which is what it has held an agency cannot do. *See Adams Fruit Co.*, 494 U.S. at 650. But again, Professor Duffy's interpretation of *Chevron*'s relationship to the APA is the most elegant answer to these objections. *See* Duffy, *supra* note 94.

163. *See* Merrill, *The* Mead *Doctrine*, *supra* note 30, at 819 (noting that "the rules versus standards debate has replicated itself once again"). As noted above, *Chevron* presumably sought to simplify the law of judicial review with a relatively comprehensive rule. Given the Court's language in *Chevron* and its subsequent handling of the case—with elaborate discussions of the factors supporting the allegedly implied delegation on which the rule rests—the *Chevron* "rule" seems to have many standard-like qualities.

164. Despite the critical thrust of this Article, I agree with the majority of commentators that *Chevron* is basically sound. *See, e.g.*, Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 864 (1994) [hereinafter Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*] ("Agencies, as creatures of statute, often forge those policies that cannot practicably be embodied in their legislative charters. This is part of what they do and should do."). In short, I take *Chevron* as essentially correct, but not as correct as it superficially appears, nor so universally applicable.

165. One might point to certain pre-*Chevron* cases, such as *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), and assert that the post-*Chevron* Court has not radically changed its handling of refugee claims. Even before *Chevron*, the Court had sometimes required a deferential reasonable-person standard for review of a Board decision construing provisions of the immigration law. *See* Guendelsberger, *supra* note 15, at 618 (stating that in *Jong Ha Wang*, the Court found that the Ninth Circuit had overstepped its bounds by substituting its own interpretation of "extreme hardship" for that of the Board). *But see* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 19–20 (1990) (noting that *Chevron* directs courts to review cases only for reasonableness, rather than to decide them independently, as might have happened before the decision). That point is debatable, but it is not particularly germane to the question of whether our

B. The Chevron *Framework Factors*

Until *Chevron*, neither Congress nor the Court materially distinguished between agency lawmaking and agency policymaking. Applying a variation of *Chevron*'s own reasoning to the Court, rather than the agency, one could say that the *Chevron* Court decided in 1984 that Congress did not address this "precise issue" in the APA, thus implicitly leaving it for the Court to fill this gap it "found" in the Act. That is, through silence, Congress was tacitly inviting the Court to fill this gap through judicial policymaking. One could argue, however, that the Court simply should have interpreted the term "law" in the APA as including "policy," as Congress and the Court presumably had done since the APA was adopted decades prior. Although settling this argument would require substantial investigation of the APA's text and history, the latter view seems more convincing on its face than *Chevron*'s long-dormant secret-invitation-to-judicial-policymaking view.

The *Chevron* Court obviously chose for itself a gap-filling role. Why it did so remains unclear,[166] but the issue is largely moot. The question of why the Court also chose a gap-filling role for agencies to which courts must substantially defer is also unclear, though highly relevant.[167]

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current method of handling of religious refugee claims is correct. Although there are arguments against the type of subject matter exceptionalism in the *Chevron* framework, *see generally* Hickman, *supra* note 37, there are arguments for it as well. *See* Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, *supra* note 164, at 870 ("Because of the enormous variety of administrative agencies and because of the extraordinary diversity of their subject areas and kinds of institutional actions, it is simply silly to talk about an administrative law. And, if that is true, it is fanciful to believe the Supreme Court can create any single standard to guide review courts.").

166. *See, e.g.*, Krotoszynski, *supra* note 121, at 735 ("Since the Supreme Court handed down its landmark decision in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, legal academics, practicing attorneys, and federal court judges have puzzled over the precise rationale undergirding the requirement that reviewing courts defer to reasonable agency interpretations of ambiguous statutes.").

167. The Court in *Mead* clarified several points about the *Chevron* framework, but it left unclear the relationship of the framework's components. For example, if an agency fills a gap in a statute it is charged with administering, the agency may or may not receive *Chevron* deference. *See* United States v. Mead Corp., 533 U.S. 218, 227–28 (2001) (citing Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1994) (asserting that the measure of deference to an agency has varied, depending on issues such as the agency's care, consistency, formality, relative expertise). If an agency uses its formal lawmaking power to fill a gap in a statute it is charged with administering, it typically does receive *Chevron* deference. *Mead*, 533 U.S. at 229–31. When an agency uses informal lawmaking power (ILMP) instead of formal lawmaking power, it generally receives only *Skidmore* respect. Christensen v. Harris County, 529 U.S. 576, 587 (2000). Sometimes, however, even if an agency does not use its formal lawmaking power to fill a gap in a statute it is charged with administering, it receives *Chevron* deference, *see Mead*, 533 U.S. at 231 ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.") (citing NationsBank, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57, 263 (1995)), though it is more likely to get

As the Court stated in *Mead*, it has "recognized a variety of indicators that Congress would expect *Chevron* deference" in a given case.[168] The relative importance of various factors to finding *Chevron* deference is not entirely clear, however.[169] *Chevron* mentioned several, and the Court has appended others to the list over the years, but none of these pronouncements has come with explicit explanations of its import. Consequently, courts and commentators have ascribed various uses and levels of significance to these factors.[170] There is still a need to place these factors in an intelligible relationship to one another and to ascertain their importance to the threshold *Chevron* question.

Chevron rested its decision to defer to agency policymaking on expertise and political accountability grounds, as well as an implied congressional delegation of primary agency authority to add meaning to the statute it was charged with administering.[171] Then came *Mead*.[172] In its iteration of the

Skidmore respect, *see Christensen*, 529 U.S. at 587 (finding that informal interpretations, such as those in policy statements and agency manuals, do not warrant *Chevron* deference). *But see Mead*, 533 U.S. at 254 (Scalia, J., dissenting) (asserting that *Chevron* deference should always be given to informal agency proceedings and that the Court's statement in *Christensen* was merely dicta). Thus, it appears that, as a general rule, formal lawmaking power is a sufficient—but not necessary—condition for *Chevron* deference. But the exceptions to this rule are unclear, as is the necessity or sufficiency of the other factors the Court had identified as part of the *Chevron* framework.

168. 533 U.S. at 237.

169. *See, e.g.*, Krotoszynski, *supra* note 121, at 735, 754 (noting that "judicial review will have to rely upon a sliding scale of deference, depending on the indicia of expertise associated with a particular agency decision").

170. The factors are relevant to whether *Chevron* deference applies at all, and they also come into play in Step Two (the "reasonableness" analysis). *See, e.g.*, Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1286 (1997) (noting that the abuse of discretion review considers, in part, whether the agency took the relevant factors into account); *Mead*, 533 U.S. at 228 (discussing factors such as the agency's "formality" and "expertness" as traditionally affecting the court's deference); *id.* at 229 (noting that *Chevron* identified "additional reason for judicial deference" in "generally conferred authority and other statutory circumstances"); *id.* at 237 (noting that "circumstances pointing to implicit congressional delegation present a particularly insistent call for deference").

171. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (noting that sometimes Congress explicitly delegates authority to agencies and that sometimes it implicitly does so, and holding that the Court defers when agencies must choose between conflicting policies and when a full understanding of issues depends on an agency's superior understanding); *id.* at 862 (finding legislative history consistent with an agency's broad discretion in implementing a statute); *id.* at 865–66 ("The regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies"); *id.* at 865–66 (noting that the lack of judicial expertise and democratic accountability, along with congressional delegation of policymaking responsibilities, warrants deference to an agency's choice of policy within statutory parameters); *see also* KOCH, *supra* note 32, § 12.31 (explaining that expertise and political accountability underlie *Chevron* deference); PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 23, at 144 (implying that political accountability is fundamental to *Chevron* deference); Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, *supra* note 14, at 788 ("Perhaps most importantly, Justice Stevens, *Chevron*'s

Chevron framework, *Mead* appeared to narrow the general rule to require only that an agency use the formal lawmaking power Congress had delegated to it to be entitled to *Chevron* deference.[173] The Court mandated deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[174] The other *Chevron* factors did not seem to enter the inquiry, at least not directly.

In addressing when it should find such a delegation, the Court held it

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author, has expressly referred to the deference afforded in that case as having been 'predicated on expertise.'") (citing Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 642 n.30 (1986) (plurality opinion)); Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 319 (2004) [hereinafter Herz, *The Rehnquist Court*] ("Justice Stevens's opinion in *Chevron* itself seemed to set out a prudential, judge-made rule; he justified this judicial practice in light of the agency's superior expertise and accountability."). In what appeared to be a bit of revisionist history, *Mead* stated that *Chevron* added "an additional reason" to existing reasons to defer more forcefully to agencies in certain circumstances. That reason was Congress's implied delegation of authority: it was "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Mead*, 533 U.S. at 229. Although unclear, this may imply that factors are cumulative.

172. *Mead*, 533 U.S. at 218.

173. *See id.* at 221, 226–27, 229 (limiting the conditions under which *Chevron* deference should occur). Professor Merrill, who has provided numerous cogent insights into *Chevron* and its legacy, has made the following observation regarding *Mead*'s role in clarifying that legacy:

> Throughout the opinion, the Court . . . makes clear the ultimate question in every case is whether Congress intended the agency, as opposed to the courts, to exercise primary interpretational authority. This should put to an end to the speculation that *Chevron* rests on something other than congressional intent, such as the doctrine of separation of powers or a judge-made canon of interpretation.

Merrill, *supra* note 30, at 812 (citations omitted); *accord* Merrill & Hickman, *supra* note 29, at 863–64, 867–70. I agree with Professor Merrill's characterization of the ultimate inquiry in the quoted passage and the fact *Chevron* does not rest on the separation of powers. I do not see the concern with congressional intent and the activity of the Justices in creating the *Chevron* framework as mutually exclusive, however. That the Court, not Congress, created the *Chevron* framework is undeniable, as is the fact that it did so to effectuate congressional intent. *Cf. Mead*, 533 U.S. at 236 ("Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety."). These are the bases for most judge-made interpretive rules; and although they raise objections to the practice, Merrill and Hickman recognize that this at least supports an analogy to other judicial canons of construction. *See* Merrill & Hickman, *supra* note 29, at 869 (reasoning that other judicially developed norms also "approach the level of mandatory duties"). Professor Callahan's more extensive analysis of this specific issue is ultimately the more persuasive. *See generally* Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?*, *supra* note 158 (maintaining that *Chevron* deference should be applied flexibly, rather than mechanistically, because *Chevron*'s limitation on the federal courts' interpretive authority was a self-imposed restriction).

174. *Mead*, 533 U.S. at 226–27; *see also id.* at 221, 229 (finding that *Chevron* deference could be applied to a tariff classification only because of the ruling's persuasiveness, since Congress had not intended the agency action in that case to carry the force of law).

"may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[175] The reason these formal methods are good indicia of congressional intent to delegate primary interpretive authority to agencies is that they carry what the Court called the "force of law."[176] That is, formal methods have a sufficiently substantial precedential effect—they bind the parties and perhaps the public—such that the Court can infer Congress intended them to "bind" the Court as well.[177]

The formal-informal procedure factor is not dispositive, however. As *Mead* also noted, other factors may be indicative of congressional intent to delegate to an agency the "primary interpretive authority" *Chevron* posited;[178] and the Court has bestowed *Chevron* deference even when the agency did not engage in formal administrative activity.[179] Citing one of its prior cases, the Court in *Mead* admitted that it "sometimes" finds the implied delegation on which *Chevron* deference largely rests even when an agency does not employ its formal procedures.[180] *Mead* also noted that the

175. *Mead*, 533 U.S. at 227.

176. *See id.* at 226–27, 232–33 (indicating that the agency's "interpretation claiming deference [must be] promulgated in the exercise of that authority").

177. *See id.* at 232 (noting that the general rulemaking power delegated to the Customs Service "authorizes some regulation with the force of law," but this regulation by letter ruling is not the type of legislative activity that would naturally bind more than the parties to the ruling and indicating that, even though a ruling may be precedent in later transactions, "precedential value alone does not add up to *Chevron* entitlement"); *id.* at 236 n.17 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, do not warrant *Chevron*-style deference.") (citing Christensen v. Harris County, 529 U.S. 576, 587 (2000)).

178. *Id.* at 230 n.11.

179. *Id.* at 231 (indicating that no "administrative formality was required and none was afforded") (citing NationsBank, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–57 (1995)); *accord id.* at 252–53 (Scalia, J., dissenting) (citing several other such cases); Merrill & Hickman, *supra* note 29, at 842 n.43 (listing examples of *Chevron*'s application to informal decisions).

180. *Mead*, 533 U.S. at 231 (citing *NationsBank*, 513 U.S. 251); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (noting that formality of process is only one indicator of delegation). In his *Mead* dissent, Justice Scalia pointed out that the majority's admission does not go far enough, and that there are numerous cases where this is true. *Mead*, 533 U.S. at 253–54 (Scalia, J., dissenting). He contended this demonstrates that it is not the agency's use of formal procedures that determines *Chevron* deference, but merely whether the agency has spoken authoritatively. *Id.* I believe he was at least half right. He was certainly correct in asserting that the Court has not been consistent in requiring formal procedures before according an agency's policy pronouncements *Chevron* deference; but it seems incorrect to say that formal procedures are irrelevant to the agencies' policymaking in the *Chevron* analysis any more than that they are irrelevant to the agencies' lawmaking. Moreover, if they were deemed irrelevant, agencies would arguably tend to make less use of them, with this tendency possibly leading to their eventual abandonment. It is hard to believe this was Congress's intent.

sheer volume of a certain type of decision the agency issues is also an important factor in determining whether Congress intended such rulings to have the force of law.[181]

This raises the question of the relationship and relative significance of the various factors the Court has traditionally relied on in justifying *Chevron* deference. Both the *Mead* rule regarding the near-requisite use of formal lawmaking procedures and the exception allowing some informal procedures reveal something about the factors influencing the *Chevron* inference.

The general rule that an agency must use relatively formal procedures to earn *Chevron* deference tells us these procedures are important to the Court's willingness to infer a delegation of policymaking power, but it does not tell us why formal procedures are important.[182] The reason is probably that Congress, like the Court, believes lawmaking should be a formal and fair process, and not the random acts of an authority figure.[183] This basically implies that the more agencies act like surrogate legislators, the more they should be treated as such.

The exception to *Mead*'s statement of the *Chevron* framework—granting *Chevron* deference to informal agency action—is more puzzling. In his *Mead* dissent, Justice Scalia cites examples of this exception as proof that the majority's reading of *Chevron* is illegitimate.[184] Curiously, the *Mead* majority failed to explain why Scalia was wrong. If there is a unifying theme to these cases, it seems to be that the Court was satisfied with the agency official's legitimacy as a delegatee of congressional power (as Justice Scalia observed),[185] and, interestingly, that the EPA's ruling in

181. *Mead*, 533 U.S. at 233–34. This is significant for BIA cases, because fifteen members are responsible for tens of thousands of decisions annually. *See, e.g.*, *Perversities and Prospects: Whither Immigration Enforcement and Detention in the Anti-Terrorism Aftermath?*, 9 GEO. J. ON POVERTY L. & POL'Y 1, 31 (2002) (remarks of Steven Lang) ("[EOIR] oversees the [BIA], which has twenty [now fifteen] appellate judges . . . and some 100 staff attorneys. The BIA handles close to 30,000 cases, or a little over ten percent of the amount of cases handled by the immigration courts.").

182. Nor does it solve the mystery of why formal procedures sometimes are not important.

183. *Mead* essentially indicated as much: "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead*, 533 U.S. at 230. The expectation of deliberation and of fairness may also relate to the presumed exercise of expertise and political accountability.

184. *Id*. at 243–56 (Scalia, J., dissenting).

185. In the cases Justice Scalia cited (where the Court had applied the *Chevron* framework in the absence of an agency's use of formal lawmaking procedures), the Court did not explain why it applied *Chevron*. Only in one case did the Court give any real indication, pointing to agency expertise. *See id.* at 260 (stating that there is a "tradition of great deference" to the agency head) (citing NationsBank, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)).

question comported with the statute's purpose.[186] *Mead* remains a mystery in this regard.[187]

Mead also failed to meaningfully address the factors *Chevron* identified as substantially supporting the heightened deference that *Mead* established. Yet *Mead* did not expressly jettison those factors as insignificant either, and they may retain some importance to the *Chevron* framework. These factors are clearly not sufficient conditions to support *Chevron* deference—they generally are predicates for mere *Skidmore* deference.[188] But the question remains whether they are necessary conditions of *Chevron* deference.

One might suspect the *Chevron* factors are not important. If Congress wanted courts to defer to inexpert agencies that could operate with impunity from the democratic process, for example, courts would have to oblige that congressional whim, absent constitutional objections.[189] *Chevron* deference is based on an inference of what Congress did do, however—not what it might be able to do at the outer reaches of its authority or wisdom. The Court presumably imputes only reasonable intent to Congress when making inferences of this sort.[190] The Court has long

186. After all, the EPA's interpretation of the Clean Air Act amendments violated the Act's purpose and led to the Supreme Court reversal in *Chevron*, giving rise to the *Chevron* framework. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840–42 (1984). Of course, using statutory purpose to uphold, rather than reverse, an agency's interpretation is not directly comparable. Specifically, the Court's reliance here on statutory purpose might be read as a reference to the "reasonableness" or "permissibility" of the agency's interpretation under *Chevron* Step Two. In any event, there are compelling arguments for the Court to more diligently police agencies with reference to statutory purpose, particularly in the immigration context. *See* Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 114–15, 125, 130, 143–46 (observing that some federal immigration laws have been enacted with the intent to bring domestic law into conformity with international obligations, but that domestic practice has been "muddled" in its interpretation of international law).

187. *See Mead*, 533 U.S. at 237 n.18 ("It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule."); Merrill, *The* Mead *Doctrine*, *supra* note 30, at 814 ("[T]he number and correct characterization of the factors invoked in the majority opinion [of *Mead*] is open to debate."); *id.* at 817 ("Once more, however, the [*Mead*] Court did not suggest the uniformity [factor] is either a necessary or sufficient condition of finding the relevant type of delegation."); Note, *The Two Faces of* Chevron, 120 HARV. L. REV. 1562, 1562 (2007) [hereinafter *Two Faces*] (indicating that many observers still consider expertise as a basis for applying the *Chevron* framework); *id.* at 1563, 1576–78 (observing that appellate courts still rely on an expertise rationale for the *Chevron* framework).

188. *See Mead*, 533 U.S. at 234–35 (indicating that *Chevron* did not eliminate *Skidmore*).

189. *See* Krotoszynski, *supra* note 121, at 742–43 (noting that *Chevron* deference is not contingent on proof that an agency decision actually reflects and incorporates expertise). *But cf.* Levin, *supra* note 170, at 1263, 1276 (contending *Chevron*'s Step Two should be understood to require courts to assess the agency's reasoning—"arbitrariness review").

190. *See, e.g.*, Bellevue Hosp. Ctr. v. Leavitt, 443 F.3d 163, 178–79 (2d Cir. 2006) (suggesting that interpretation of a statute includes reasonable inferences of congressional intent); United States v. Vasquez-Velasco, 15 F.3d 833, 839 (9th Cir. 1994) (same).

found it reasonable to defer to an agency that has, and demonstrates, both superior expertise and accountability.[191] And it is eminently reasonable to infer that Congress shares that belief.[192]

Another argument that *Mead* obviated the other *Chevron* factors, however, is that Congress barred any judicial inquiry into these factors when it made the explicit delegation of lawmaking power on which the implicit delegation rests. That is, the explicit delegation proves Congress was satisfied with the agency's expertise, accountability, etc., for both lawmaking and policymaking purposes. Indeed that is the most straightforward explanation for the *Mead* rule (though it makes *Chevron* less coherent). If that were so, however, the *Mead* majority would have agreed with Justice Scalia: once the delegation is made, the Court's inquiry is essentially at an end.[193] The majority's failure to agree indicates the conferral of authority is usually, but not always, conditioned on its proper use, among other things. And the *Chevron* factors may be relevant to that part of the inquiry as well.[194]

In the end, then, we are left with the impression that the other *Chevron* factors might still matter, although the keystone clearly is an inference that agencies have primary statutory gap-filling authority when Congress has expressly conferred lawmaking power on the agency, and the agency has acted pursuant to that conferral. As much as Justice Scalia dreads it, the

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191. *See* KOCH, *supra* note 32, § 9.2, at 6 (suggesting that courts will defer to agency decisions when the facts indicate that the agency utilized its expertise).

192. *See* Note, *Two Faces*, *supra* note 187, at 1566 ("*Chevron*'s references to expertise are thus best viewed as projecting motivations onto Congress in an attempt to explain the congressional delegation that is really at the heart of the inquiry."). Because the issue is whether the Court should infer a congressional intent to delegate, it may remain relevant that because the prudential *Chevron* factors are a necessary predicate for mere *Skidmore* respect, they are, *a fortiori*, a necessary predicate for *Chevron* deference. It would certainly be anomalous to contend that a court must defer under *Chevron* to an agency that did not merit *Skidmore* respect (again, as a matter of inferring reasonable congressional intent, rather than absolute congressional power). Given the reasonableness of basing the Court's traditional deference inquiry on these factors, it would be reasonable to believe these factors also underlie Congress's (fictional) decision to delegate to an agency the sort of authority to which courts must defer. As Professor Krotoszynski has observed:

> Under the theory of *Mead*, an agency decision that reflects the benefit of open participation among affected entities and careful application of agency expertise would receive only limited deference in the absence of either an express or implied delegation of lawmaking power. At the same time, a poorly conceived agency decision, made with limited or nonexistent public participation, might enjoy *Chevron* deference if the reviewing court finds an express or implied delegation of lawmaking authority. This turns judicial review of agency efforts at statutory interpretation into a bad farce.

Krotoszynski, *supra* note 121, at 753.

193. *See Mead*, 533 U.S. at 240 (Scalia, J., dissenting) (theorizing that once a court determines that *Chevron* does not apply, uncertainty begins).

194. *Cf. supra* notes 171, 187, 192 (noting numerous post-*Mead* courts and commentators referring to the importance of *Chevron* factors).

totality of the circumstances may still be relevant to construing congressional intent,[195] as it pretty much always has been.[196] Thus, until Congress or the Court declares otherwise, we should consider all the *Chevron* factors relevant.[197] And those factors are certainly relevant to

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195. *Mead*, 533 U.S. at 240 (Scalia, J., dissenting); *cf.* Note, *Two Faces*, *supra* note 187, at 1563 ("[T]he Supreme Court's *Chevron* jurisprudence seems motivated primarily by separation of powers concerns, with agency expertise relevant only at the margins of the doctrine, whereas in the circuit courts, expertise plays a more central role in the deference decision."); *id.* at 1571 ("The Supreme Court reintroduced a consideration of expertise in *United States v. Mead Corp.* by reincorporating *Skidmore* into the web of *Chevron* doctrine."). However, as the Court later explained:

> The use of expertise in the *Mead* inquiry is appropriate only when the agency has not issued its interpretation through a safe harbor, which the Court in *Mead* recognized as a clear indication that Congress intended to delegate to the agency the ability to interpret with the force of law.

Id. at 1572–73.

196. *See Mead*, 533 U.S. at 237 n.18 ("[T]he limit of *Chevron* deference is not marked by a hard-edged rule.").

197. At present, the *Mead* rule should usually lead to *Chevron* deference to the BIA's policy decisions on refugee claims in lower courts because the agency uses formal adjudications with the force of law—at least in published, three-member panel cases—and the Court has held that use of such adjudications is a "very good indicator" *Chevron* deference is due. *Id.* at 229. Apparently, however, some lower courts themselves are less convinced this should be the case. *See* Note, *Two Faces*, *supra* note 187, at 1563, 1574–84 (showing that circuit courts rely on agency expertise as the foundation of the *Chevron* framework). Although I believe the other *Chevron* factors and the "anti-*Chevron* factors" discussed below offer a somewhat good indicator that *Chevron* deference is not due in this specific context, I concede *Mead* is currently a major obstacle to this argument. Still, the Court has not consistently applied *Chevron* and could recognize a limited exception to *Mead* based on the unique or nearly unique circumstances these cases present. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) ("[T]he existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute."); Merrill, *The* Mead *Doctrine*, *supra* note 30, at 834 ("[A] number of Justices have ignored *Chevron* or applied a watered down version of *Chevron*."); PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 23, at 175 (asserting that the Court has been inconsistent in applying *Chevron*); *cf.* KOCH, *supra* note 32, § 12.32[2] (Supp. 1997) (*Mead* established the "traditional" *Chevron* approach, which "recognizes the comparative advantages of each institution rather than relying on formulaic doctrine"). It is even possible that a lower court might find such an exception appropriate, as the *Mead* Court itself acknowledged:

> It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule. But *Chevron* itself is a good example showing when *Chevron* deference is warranted, while this is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done.

Mead, 533 U.S. at 237 n.18. Additionally, of course, these factors may be highly relevant in *Chevron*'s Step Two. *See, e.g.*, Anthony, *supra* note 165, at 29–30 (naming factors that courts often identify when assessing agency reasonableness, such as the importance of agency expertise in a technical or complex area, or the need to reconcile conflicting policies). These factors may also be relevant when *Skidmore* analysis is appropriate. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 268 (2006) (applying *Skidmore* deference rather than *Chevron* deference because the rule at issue was not promulgated pursuant to agency authority).

whether Congress should address this issue of judicial review in religious-refugee cases.

1. Agency Expertise as a Basis for Deference

The *Chevron* Court stated that deference to an agency is justified when the agency's expertise is necessary to fully understand the "force of the statutory policy in the given situation."[198] This was relevant in *Chevron* because the Court found the statute at issue to be "lengthy, detailed, technical, [and] complex."[199] Few would argue that point, and I am not one of them. I would also agree with the Court that the EPA, like many other agencies, has numerous personnel more qualified than federal judges to sort out many of the "technical" matters that cases like *Chevron* involve.[200]

The *Chevron* opinion did not expressly consider, however, that the *Chevron* framework requires those experts to explain complex technical matters to a reviewing court in a way that the court can understand, so the court can determine whether the agency's policy choice was reasonable or "permissible."[201] Theoretically at least, once a court comes to such an understanding of the issue, it should have the necessary technical information and understanding to make an informed choice. Indeed, making choices—i.e., exercising judgment—is generally the area of judges', not technicians', expertise. In situations where this is true, the argument for deference seems to lose its force. As a logical matter, the expert agency's necessary act of resolving the complexity into sufficient simplicity so that a decision can be made and properly evaluated obviates the need to rely on technicians to make the actual decision. That the information considered in making a choice is "technical" does not necessarily mean that the choice itself is. The choice itself, as in *Chevron*, may be more a matter of social policy than science.

198. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (quoting United States v. Shimer, 367 U.S. 374, 382–83 (1961)). Professor Callahan notes: "Justice Stevens, *Chevron*'s author, has expressly referred to the deference afforded in that case as having been 'predicated on expertise.'" Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, *supra* note 14, at 788 (quoting Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 642 n.30 (1986)).

199. *Chevron*, 467 U.S. at 848; *see id.* at 865 (noting that "the regulatory scheme is technical and complex").

200. There is, however, an open empirical question of whether agency directors or their delegates universally employ that expertise in setting policy.

201. *Chevron*, 467 U.S. at 843. Pre-*Chevron* law—the APA—also required an agency to explain in reasonable detail both the substance and methods for its decision to a reviewing court. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (finding that an agency's decision may be upheld, even if it lacks clarity, so long as the reasoning behind the decision may be discerned); Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951) (allowing courts to set aside decisions when the record and testimony do not demonstrate that the decision was justified).

It is possible, then, to discount the agency's technical expertise as a factor counseling judicial deference, at least in some cases. The crux of the matter, however, is that even to the extent that the court gains sufficient technical "expertise" from reviewing the agency's reasoning, the choice that the court must make is a policy decision. The real question is whether the agency is the greater expert at such decisionmaking.[202]

One might argue that deciding which choice is better for the country as a matter of policy—the potentially greater economic development associated with a "bubble concept" of stationary sources or the greater protection of air quality associated with the alternative—is something that the EPA is better suited to do than is a federal appellate court. One might also argue the contrary. In its discussion of agency expertise, however, the Court failed to even acknowledge the potential dispute. Rather, the Court simply asserted that because technical matters were at issue, the Court should defer to the agency. This statement did not further the debate; it substantially obscured it.[203] The real decisions at issue may not really be the type of "technical" decisions the *Chevron* Court invoked as part of its deference rationale. Economic growth versus environmental preservation is a public policy decision that no amount of "technical" training can really qualify a decisionmaker to resolve.[204] Whether this is true as a practical matter in all cases is a separate inquiry, but the premise should be explored more carefully than it was in *Chevron*.

Finally, even if we take the rule at face value, its inevitable corollary is that when such expertise is not necessary for a full understanding of the issue, this ground for deference is lacking.[205] This situation may arise in at least two ways. First, the issue before the Court may not be so technical or complex that only the expert agency can understand its meaning. Second, the agency—or more precisely, the decisionmaker—may not actually

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202. Like the Court, I treat the Judiciary's expertise in making political judgments relative to the Executive and Legislative Branches—the "political accountability factor"—separately from the technical expertise factor.

203. As the following Part discusses, the Court also found that prudential concerns—with separation of powers overtones, no less—also underlie the argument that qualified agencies should make these policy decisions.

204. Indeed, the only reason this dilemma arose was because our democratic, representative Congress, the ultimate public policy expert, could not solve it. *See Chevron*, 467 U.S. at 842 (noting that Congress did not resolve the issues surrounding the definition of "stationary source"). If one does not tautologically *assume* the congressional delegation one is deciding whether to infer, there is no apparent reason to believe that this agency—an unelected technocracy—is particularly qualified to make this socioeconomic and moral decision.

205. The Court has held that "practical agency expertise is one of the principal justifications behind *Chevron* deference." Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990); *see also* KOCH, *supra* note 32, § 3.3 (noting that expertise and political accountability underlie *Chevron* deference).

possess the expertise required to competently judge the "technical" or "complex" issue in a given case. Both situations arise with some frequency in cases where courts presently afford agencies *Chevron* deference, including religious-refugee cases.

For example, the BIA and DHS must often decide whether persecution occurred or is likely to occur.[206] In this context, the legitimacy of indulging the *Chevron* fiction at all is certainly questionable. To be sure, IJs can properly act as factfinders: determining what happened, assessing the credibility of witnesses, and fulfilling other traditional factfinder roles, subject to judicial review under the "substantial evidence" test.[207] But when it comes to judging whether those facts fit the definition of the legal term "persecution,"[208] what evidence, or even intuition, do we really have that the BIA has more expertise than the federal courts in what amounts to judging the severity of punishment? The Constitution delegates assessment of whether punishment is "cruel and unusual," for instance, directly to the federal courts.[209] The federal courts hear battery, rape, and murder cases on a regular basis. One might argue that a beating is a beating, and, therefore, a federal judge is at least as qualified as an IJ or Board member in assessing the severity of such a punishment. On that ground alone, courts could distinguish *Chevron* in cases where the presence of persecution is the issue.

When it comes to interpreting related terms, such as "religion" or "on account of," courts should have even less reason to defer to agencies. There is no basis here for the fiction that Congress implicitly delegated to the BIA the task of interpreting terms like "religion" in the refugee statutes, rather than assuming that the plain provision of the APA expressly delegates such a common legal task to the courts. The BIA has no special expertise in this area, but the federal courts have grappled with the issue for over a century.[210] Nor can one rationally argue that Congress intended the

206. 8 U.S.C. § 1158 (2000).

207. *Id*.

208. Construction of the term is itself an unusual mix of agency and judicial interpretations. In the asylum context, the agency has defined it to mean "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *In re* Acosta, 19 I. & N. Dec. 211, 222 (1985). In the withholding context, the term is no longer actually present in the statute; yet the courts have read it into the statute and deferred to the agency's definition from the asylum context. *See, e.g.*, INS v. Stevic, 467 U.S. 407, 410–11, 413 (1984) (citing the BIA's holding that the respondent had failed to submit sufficient evidence that his deportation would result in "persecution").

209. U.S. CONST. amend. VIII.

210. *See, e.g.*, Davis v. Beason, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."). I must hasten to acknowledge that our First Amendment Religion Clause jurisprudence, in particular, has not been a model of clarity in comprehending "religion"; but the courts have a recognized expertise in dealing with that term's legal meaning, and there is no good reason to presume Congress has foreclosed their exercise of that experience in this particular context.

term to have a different meaning here than elsewhere in our law, such that it intended the BIA to fabricate a new and different meaning than the one our courts have developed.

Finally, assuming all the foregoing arguments lack sufficient power to sway, there is independent evidence of Congress's intent on this topic. Congress passed the International Religious Freedom Act of 1998 (IRFA),[211] in part, because it was dissatisfied with the protection that the BIA affords religious refugees.[212] That Act specifically focused on the need for further training of BIA officials responsible for handling religious-refugee claims.[213]

Although IRFA provided for additional training to remedy a lack of IJ expertise in handling religious-refugee claims, to date, that training has had little effect. Courts and commentators have broadly decried the pronounced lack of expertise, and even bias, that the IJs and BIA officials who handle refugee cases too often display.[214] And although any miscarriage of justice is unfortunate, the errors these officials make in denying refugees' rights are particularly tragic because a growing number of these people have already been abused and generally have no constituency to protect them from further abuse.[215]

Several cases have detailed the outrage voiced over the current state of affairs by not only practitioners and asylum advocates, but also by numerous federal appellate judges.[216] In a remarkable break from tradition,

211. International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified as amended at 22 U.S.C. §§ 6401–6481 (2000)).

212. *Id.* § 6401(a)(4)–(6).

213. *Id.* § 6472. As Professor Mousin summarized, IRFA "reveals congressional frustration with previous asylum and refugee adjudications." Mousin, *supra* note 15, at 544.

214. Although there are undoubtedly many dedicated and competent individuals serving in those positions, even they are often overwhelmed by caseloads that defy expert treatment. *See, e.g.*, Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 No. 48 INTERPRETER RELEASES 2005, 2006 (2005) (reflecting on the problems arising from the immense number of immigration cases in 2005); Margaret Graham Tebo, *Asylum Ordeals: Some Immigrants Are "Ground to Bits" in a System That Leaves Immigration Judges Impatient, Appellate Courts Irritated and Lawyers Frustrated*, A.B.A. J., Nov. 2006, at 36, 38–39 (discussing mounting criticism of IJs by circuit judges).

215. Not only do they lack powerful interest groups that many of those who appear before other administrative tribunals have, they often lack lawyers, which may well be attributable to a lack of funds, so that the poorest of the oppressed get the least justice. *See, e.g.*, Cruz, *supra* note 15, at 494 (noting that "during 2003, a majority of individuals . . . in removal proceedings[] lacked representation"); Tebo, *supra* note 214, at 36, 40 (citing a study that found that 64% of asylum petitions were denied for applicants represented by counsel, but 93.4% were denied for pro se applicants); Mary Meg McCarthy, *Asylum May Be a Matter of Life and Death*, A.B.A. J., Dec. 2000, at 63 ("According to a recent study by the Georgetown Center for International Migration, asylum seekers represented by counsel are six times more likely to prevail in their cases than those without legal representation.").

216. *See, e.g.*, Rexha v. Gonzales, 165 F. App'x 413, 418 n.3 (6th Cir. 2006) ("[H]orror stories persist of nasty, arrogant, and condescending immigration courts."); Zehatye v.

several circuit court of appeals judges have vehemently chastised various INS adjudicators—IJs, BIA members, and occasionally even government lawyers—for churlish or otherwise unprofessional behavior toward asylum seekers. The courts sometimes even address them by name in their opinions.

One of the more notorious opinions in this genre is *Benslimane v. Gonzales*,[217] a Seventh Circuit opinion authored by Judge Posner in 2005. Writing for the majority, Judge Posner noted that that in just one year the Seventh Circuit had reversed the government in forty percent of its immigration cases[218]—a truly "staggering" figure compared to the eighteen percent rate in civil cases. Hopefully other circuits have somewhat lower reversal rates,[219] but even one circuit experiencing a reversal rate that suggests refugees might as well flip a coin as go through a DHS hearing is reason to be seriously concerned. And as Judge Posner pointed out, criticism of the BIA has "frequently been severe" from all quarters. The Seventh Circuit has often condemned the Board's shortcomings—from opinions that did not grasp the "basic facts of [the] case" to conclusions that were "hard to take seriously."[220] The Second, Third, and Ninth Circuits have been no kinder.[221]

One can understand, then, Judge Posner's conclusion that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[222] And studies have revealed other

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Gonzales, 453 F.3d 1182, 1194–95 (9th Cir. 2006) (listing various cases in which courts harshly criticized woefully inadequate DHS decisions); Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005) (criticizing DHS decisions as having "fallen below the minimum standards of legal justice" and cataloging numerous cases to that effect).

217. 430 F.3d 828 (7th Cir. 2005).

218. *Id.* at 829.

219. Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 956 & n.198 (2006) (claiming lower rates elsewhere, but failing to account for the possibility that courts may be failing to reverse erroneous BIA decisions out of excessive deference); *cf.* Xiaodong Li v. Gonzales, 420 F.3d 500, *vacated by stipulation*, 429 F.3d 1153 (5th Cir. 2005) (deferring reluctantly under *Chevron* to a BIA decision the court found questionable); Sadeghi v. INS, 40 F.3d 1139 (10th Cir. 1994) (deferring to the BIA in a difficult case due to the *Chevron* framework).

220. *Benslimane*, 430 F.3d at 829 (quoting Ssali v. Gonzales, 424 F.3d 556 (7th Cir. 2005); Grupee v. Gonzales, 400 F.3d 1026 (7th Cir. 2005)).

221. Judge Posner could have also cited cases from other circuits. *See, e.g.*, Mece v. Gonzales, 415 F.3d 562, 564 (6th Cir. 2005) ("[*A*]*ny* reasonable adjudicator would necessarily conclude that the petitioners suffered 'persecution' because of 'political opinion' within the meaning of [the statute.]"); Chaib v. Ashcroft, 397 F.3d 1273, 1280 (10th Cir. 2005) (holding that "the IJ failed to support with substantial evidence his finding that Petitioner lacked credibility"); Zewdie v. Ashcroft, 381 F.3d 804, 807 (8th Cir. 2004) ("[T]he immigration judge failed to articulate a reasoned analysis based on the recorded evidence for denying [the petitioner's] claims.").

222. *Benslimane*, 430 F.3d at 830. Lest anyone think the good judge too intemperate for his forceful reaction here, *Benslimane* was hardly the first time he had encountered gross

types of concerns, including such gross disparities in the adjudication of immigration cases that systemic bias among IJs is evident.[223] As one experienced observer of the system notes: "[E]ven government officials will admit that the immigration service 'is notorious for having the most serious and pervasive management and misconduct problems of any segment of the Justice Department.'"[224]

Obviously, deferring to such decisionmakers when refugees' lives are on the line is at least an unappealing prospect, if not a grave moral affront. Inferring that Congress intended blind obedience to blind adjudicators is certainly questionable. Courts may infer a delegation of *Chevron* authority in other administrative contexts based on the agency's expertise. But in the context of religious-refugee claims, courts face a serious contraindication to that inference.[225]

2. Uniformity as a Basis for Deference

Some have argued that *Chevron*'s inference that Congress wants agencies rather than courts to "interpret" gaps in statutes is also supported by the theory that *Chevron* achieves more uniformity in federal law.[226] The appeal of this argument—like the defer-to-the-experts-when-the-going-gets-technical argument—is self-evident. Because the Supreme Court rarely reviews agency decisions, circuit courts generally have the last word in these cases. The various circuits can, and very often do, create divergent views of the law in a given area.[227] Because federal agencies practice

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adjudicatory negligence in INS decisions. In *Guchshenkov v. Ashcroft*, he wrote of two consolidated petitions on appeal that they "reflect the continuing difficulty that the board and the immigration judges are having in giving reasoned explanations for their decisions to deny asylum," and he bemoaned the "systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum." 366 F.3d 554, 556, 560 (7th Cir. 2004). He found one of the IJ's conclusions "absurd." *Id.* at 558. And he said of the other's, "There is very deep confusion here." *Id.* at 559.

223. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 300, 389 (2007).

224. Cruz, *supra* note 15, at 493.

225. Admittedly, we can interpret Congress's concern for the quality of administrative performance in this area as reflecting its desire to improve decisions by IJs, who should decide most matters affecting refugees. But that still does not warrant *Chevron*'s inference that agency decisionmakers get primary authority in this area. Also, these concerns are admittedly more directly relevant to the reasonableness inquiry of *Chevron*'s Step Two or to a *Skidmore* analysis.

226. United States v. Mead Corp., 533 U.S. 218, 234 (2001); Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118–26 (1987) [hereinafter Strauss, *One Hundred Fifty Cases per Year*].

227. *See, e.g.*, Guendelsberger, *supra* note 15, at 622 ("When a circuit court relies on an exception to *Chevron* deference to reject an agency interpretation, the practical effect is to create a patchwork immigration law with different results depending upon controlling circuit authority.").

nationwide, it is preferable to have one legal standard governing that practice, rather than a motley collection of standards that vary based on the happenstance of federal circuit jurisdiction.[228] The greater the courts' deference to agencies, the greater the likelihood the agencies will create such uniform standards: Less deference means less likelihood such a nationally uniform standard will emerge.[229] That is the theory at least.

But this theory has its limits. Like the expertise and accountability theories, it fails to account for *Skidmore* deference. The *Skidmore* line of cases involves agency decisions that would lead to greater uniformity under this theory, yet the courts refuse to grant substantial deference to the agencies despite that advantage.[230] Similarly, the theory fails to account for the courts' interpretation of federal statutes not administered by any agency. Finally, to the extent that an agency decides matters in notice-and-comment rulemaking, it may produce relatively consistent rulings in the manner this theory contemplates. But when the agency rules by adjudication, there is less reason to expect substantially greater uniformity than when courts adjudicate the same issues.[231] In fact, the Court has cited agencies' internal inconsistency as a reason to not grant full *Chevron* deference to an agency decision.[232]

Beneath the surface, forces work to create even greater cracks in the uniformity argument's façade. A recent study offers compelling evidence that IJ decisions simply lack the desired uniformity.[233]

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228. *See, e.g.*, Strauss, *One Hundred Fifty Cases per Year*, *supra* note 226, at 1112 ("Varying instructions from different courts of appeals not only interfere with the instruction to achieve uniformity, but also make it more difficult for the agency to manage its own resources and to guide and motivate the enormous bureaucracy for which it is responsible.").

229. *See id*. (arguing that *Chevron* is essential for uniformity of decisions across the circuits).

230. Of course, even having greater uniformity—which is what *Chevron* effects relative to *Skidmore*—is better than having less, but my point here is that it is not a critically substantial consideration and it is not being met by deferring to this agency in any event.

231. *See generally* Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, *supra* note 164, at 865 n.19 ("Indeed, immigration decisionmaking does not result from the operation of a cohesive, unitary body, but is both ideologically and even geographically diffused. This assuredly belies the notion that the law, at the agency level, speaks with one voice.").

232. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.") (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."). It is interesting to consider how the Court might implement this "considerably less deference" standard. Does this imply a downgrade to *Skidmore* respect? If not, it may imply that the standard for judicial review is not the binary system—*Chevron* or *Skidmore*—that is generally deemed to prevail in the post-*Chevron* world.

233. Ramji-Nogales et al., *supra* note 223, at 389; *see also* Alexander, *supra* note 16, at 21–25 (documenting substantial nationwide inconsistency of IJ decisions).

3. The Ossification Issue

In *Mead*, Justice Scalia entered another of his forceful dissents, protesting what he viewed as the displacement of the "*Chevron* doctrine" with the "*Mead* doctrine."[234] The *Mead* Court saw a delegation of congressional policymaking authority in congressional authorization "to make rules carrying the force of law."[235] The Court held it would infer such a delegation given signs such as "an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[236]

Justice Scalia had several problems with the *Mead* rule, but he found most troubling the threat that it would "lead to the ossification of large portions of our statutory law."[237] Although this was not a concern that *Chevron* raised in support of its rule, Justice Scalia complained that under the majority's holding agencies must both receive from Congress the authority to act with the force of law using certain procedures and use those procedures before earning the Court's deference under *Chevron*. He believed that the mere existence of authority was sufficient to enshroud the agency decision with the respect *Chevron* established. He feared that once the Court interpreted ambiguous statutory provisions, agencies would be unable to reinterpret them to adapt to changed conditions, as they could under *Chevron*. Under the pre-*Mead Chevron* rule, as Justice Scalia saw it, ambiguity equated with flexibility for the agency to change the statute's meaning as circumstances changed. The agency was, after all, making law as it filled statutory gaps, and it could make any reasonable law it wanted without judicial interference. Under the *Mead* rule, once the Court spoke, the meaning was fixed, and the agency could not reinterpret the term if it believed circumstances warranted it.[238]

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234. United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting). Specifically, Justice Scalia believed the following:

> What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference.

Id. (citation omitted).

235. *Id.* at 226–27 (majority opinion).

236. *Id.* at 224.

237. *Id.* at 247 (Scalia, J., dissenting).

238. *See id.* at 247–48. Justice Scalia did acknowledge the possibility that an agency whose interpretation the Court rejected merely for failure to follow the proper lawmaking procedure could then reissue its interpretation in the proper form and thus "overrule" the Court, but he found this prospect particularly distasteful. *Id.* at 248–49; *cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–84 (2005) (permitting

Others have expanded on this "ossification" concern. Professor Sunstein, for example, has noted that "[n]ew developments involving technological capacity, economics, the international situation, or even law may affect regulatory performance."[239] Given Congress's limited ability to respond practically to these potentially changed circumstances, agencies properly combine "the judicial virtue of continuing attention to individual contexts and new settings with the legislative virtue of a fair degree of electoral accountability."[240]

Although these concerns for administrative flexibility are worth discussing, they highlight the prudential nature[241] of the *Chevron* doctrine.[242] These are policy arguments about the distribution of power—specifically about the power to give meaning to statutes.[243] And, although

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agencies to override court interpretations of statutes, where the court did not find that statute unambiguous).

> Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable). The precedent has not been "reversed" by the agency, any more than a federal court's interpretation of a State's law can be said to have been "reversed" by a state court that adopts a conflicting (yet authoritative) interpretation of state law.

Id. at 983–84.

239. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2088 (1990). Of these potential fields of concern, changes in the "international" arena seem the most likely source of potential hazard in the refugee context. Indeed, the others seem irrelevant, though some might argue for economic considerations potentially trumping the humanitarian considerations of our refugee law. In any event, I have addressed at least some aspects of this international issue in Part III.C.5., *infra*. When it comes to agencies making independent, explicit policy judgments favoring economics over human rights, I believe we should err on the side of limiting that discretion and making Congress clearly strike that balance, as the immigration/refugee rule of lenity counsels.

240. Sunstein, *supra* note 239, at 2089.

241. *See, e.g.*, Herz, *The Rehnquist Court*, *supra* note 171, at 320 ("[T]he *Chevron* doctrine can only be explained as a judge-made rule that reflects an assessment of the particular circumstances in which courts or agencies have a relative advantage in making a decision."); Barron & Kagan, *supra* note 102, at 212 ("*Chevron* is a congressional doctrine only in the sense that Congress can overturn it; in all other respects, *Chevron* is a judicial construction, reflecting implicit policy judgments about what interpretive practices make for good government.").

242. These concerns also apply to the "uniformity" argument discussed in the preceding subsection.

243. One might also view the argument as another reason to infer congressional intent to delegate. That is, we might infer Congress implicitly made the policy choice to allow agencies, rather than courts, to fill statutory gaps because that is the better policy and because we should presume Congress chose the better of the two policies. (This assumes, without any convincing basis, that allowing agencies to change the meaning of statutory terms (with practically the same freedom Congress could) is, indeed, a wise policy.)

they are obviously intelligent arguments, made by very intelligent individuals, they have their foibles as well.

The fundamental notion here—that agencies must retain some flexibility to address changing circumstances—is sound. Administrators cannot stop what they are doing and consult with Congress or the courts every time a new problem arises. Few doubt that agencies can and must make decisions on novel issues with relative freedom. Noting that "Congress is unable to amend every statute to account for these changes [in circumstances]," Sunstein favorably characterizes agencies' flexibility in making adaptive, individualized decisions as "judicial."[244] Yet, this suggests that courts are at least as qualified to exercise this flexibility in judging the fitness of agencies' adaptations to changed circumstances. The problem, of course, is that if parties adversely affected by agency action believe that they have a relatively better chance of getting those decisions reversed, then they will initiate more litigation. Restricting judicial review minimizes this expense. This is a legitimate policy argument, but it is one that Congress presumably knows of and has failed to adopt as law in most contexts.[245]

Justice Scalia's primary concern is that once a court does say what a statute means, the agency is bound by that meaning and cannot adapt it to changes that may arise.[246] This "problem" inheres in all judicial review of agency decisions, however, and Justice Scalia does not contest that it

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Ultimately, however, Congress has expressed—rather than implied—its intent regarding judicial review in the APA; and to the extent there is a gap in the APA regarding gap-filling authority, it is more honest to say Congress had no intent regarding the issue than to say that it had a supposedly "wise" intent. But even should one decide to infer congressional intent regarding how to fill this putative gap in the APA, looking at the language, structure, and history of that Act, I suspect one would conclude Congress expected meaningful judicial review of all agency legal decisions. *Cf.* United States v. Mead Corp., 533 U.S. 218, 251 n.4, 252 (2001) (Scalia, J., dissenting) (dismissing the notion that traditional judicial deference to an agency "provides affirmative indication of congressional intent" by characterizing the idea as "challeng[ing] the intellect and the imagination"); Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, *supra* note 14, at 775 (noting that, by routinely applying a deferential standard of review to agency legal determinations in asylum cases, courts "sanction administrative disregard for Congress's intentions with respect to how these claims should be evaluated").

244. Sunstein, *supra* note 239, at 2088–89. Professor Sunstein also focuses on the agencies' "legislative" virtue of "a fair degree of electoral accountability," *id*. at 2089, which I have addressed in Part III.C.4, *infra*.

245. *See* Guendelsberger, *supra* note 15, at 616–17 (summarizing IIRIRA restrictions on judicial review of certain BIA decisions). Indeed, Congress's express limitation of this restriction on judicial review in these specific areas arguably supports the inference that it does not intend the restriction to apply generally.

246. *See Mead*, 533 U.S. at 247–48 (asserting that *Mead* will reduce flexibility because "[o]nce the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now says what the court has prescribed"); *cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that an agency retains discretion to interpret a statute notwithstanding a prior court decision unless the prior court held that "its construction follows from the unambiguous terms of the statute").

should exist in those cases where Congress has not supposedly delegated interpretive authority to an agency.[247] Despite this whiff of overbreadth, there is a problem with courts hobbling agencies' mobility in an ever-changing regulatory environment. This problem can exist, however, only if (1) a court has ruled on a statutory meaning (2) without deferring to the relevant agency's interpretation, (3) circumstances change in a way that impacts the areas in dispute, and (4) the agency decides an interpretation somehow contrary to the court's (but still within the statute's scope) better fits the new situation. Again, it is an unanswered, empirical question how often this might actually occur. But, assuming it would become a substantial problem, one might reasonably expect Congress to correct it. Congress would not have to do so in the ungainly piecemeal fashion to which Professor Sunstein and others rightly object, but could issue a blanket statement regarding this facet of the judicial review problem.[248] Until then, it is no more valid to assume the problem is substantial than to assume that it is not, as eight of nine Justices in *Mead* ultimately concluded.[249]

4. Political Accountability as a Basis for Deference

a. The Democratic Principle Rationale

When it comes to making the policy decision that lies at the end of any consideration of "technical" data an agency marshals in its decisionmaking process, the court will face the "political accountability" issue.[250] Congress

247. Justice Scalia merely has a different view of when that occurs, and under his view, it occurs less often than the *Mead* majority opined.

248. *See, e.g.*, Sunstein, *supra* note 239, at 2088 (arguing that common law courts are less well suited than administrators to apply statutes to the constantly changing regulatory environment).

249. Further, if one focuses on this issue in the context of religious refugee claims, the four-step scenario outlined above becomes much narrower, and it is reasonable to expect the likelihood of any resulting problem's being "substantial" to diminish exponentially. Again, it appears Congress has accounted for this problem to the extent it cared to in the IIRIRA, and inferring it intended to implicitly restrict judicial review beyond those explicit provisions is insupportable.

250. *Chevron* featured this reason prominently. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984). But the Court has subsequently vacillated on its importance. *See, e.g.*, *Mead*, 355 U.S. at 229–30 (supporting judicial deference to agency interpretation of ambiguous statutory language where such deference is based upon implicit, as well as explicit, delegations of legislative authority from Congress); Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 761 (2007) [hereinafter Bressman, *Deference and Democracy*] (arguing that *Chevron*'s holding should be understood as a judgment about the ways that the Executive exercised its political authority rather than whether and how Congress delegated power to the agency).

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court famously held that judicial deference to agency interpretations of ambiguous

and the President are democratically elected. Federal judges are appointed, essentially for life. Congress has first crack at policy choices arising under statutes, but it may delegate them to the executive agency (or even to an "independent" agency). Although agency personnel are no more elected than judges, they are at least appointed by, and indirectly answerable to, the public through the elected branches.[251] Although one can only wonder when the last time an agency adjudicator's decision led to any actual political accountability, the agency is arguably better entitled to determine what policies are in the public interest.[252] That is one of the more significantly featured rationales the *Chevron* Court proffered for its new deference rule:

> The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[253]

This rationale is certainly appealing on its face.[254] As with the expertise

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statutes is appropriate largely because the executive branch is politically accountable for those policy choices. In recent cases, the Court has not displayed unwavering commitment to this decision or its principle of political accountability.

Id. (citing *Chevron*, 467 U.S. at 865–66).

251. *See* Duffy, *supra* note 94, at 191 n.396 (asserting that there is general agreement that "policy considerations of expertise and accountability" support the *Chevron* doctrine). *See generally* Bressman, *Deference and Democracy*, *supra* note 250, at 762 ("Scholars have widely endorsed *Chevron* and especially the principle of political accountability on which it rests.") (footnote omitted).

252. *See* Duffy, *supra* note 94, at 191 (noting that "the agency's expertise and political accountability may make it a preferable body for the formulation of policy" (quoting Herz, *Deference Running Riot*, *supra* note 95, at 194)); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489 (1996) ("The grounds for the [*Chevron*] presumption are policy-laden: agencies are likely to know more about the subject matter that they are regulating, and (at least when they are part of the executive branch) are more democratically accountable."); Sunstein, *supra* note 239, at 2087 (describing *Chevron* as based on the greater "fact-finding capacity and electoral accountability" of agencies); *Chevron*, 467 U.S. at 865–66 (noting that the political branches are responsible to a constituency so that federal judges have a duty to respect their legitimate policy choices). In later cases, such as *FDA v. Brown & Williamson Tobacco Corp.*, the Court has held such deference is justified because "'[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones,' and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 866); *see also* Rust v. Sullivan, 500 U.S. 173, 187 (1991) (calling for increased latitude and deference to agencies' policy choices).

253. *Chevron*, 467 U.S. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)). In *Tennessee Valley Authority*, the Court merely held it could not reject a clear congressional policy choice as unwise or inappropriately serving the public interest—that is, the Court cannot overrule Congress when Congress acts within its constitutional authority. 437 U.S. at 194–95.

254. Numerous commentators have observed the appeal of this rationale and emphasized its significance to the *Chevron* framework. *See* Bressman, *Deference and Democracy*, *supra* note 250, at 762 & n.1 (2007) (citing Elena Kagan, *Presidential*

(and uniformity) argument, however, that superficial appeal deserves further scrutiny.[255]

As the Court in *Chevron* itself noted—courts sometimes "reconcile competing political interests."[256] For example, this reconciliation occurs when courts must construe a statute presenting two reasonable policy choices and Congress has not assigned an agency to administer the statute. The same is true, of course, for all the courts' common law determinations that have any policy implications. There is no real question, then, of courts suffering a constitutional disability when it comes to deciding policy questions, and *Chevron*'s intimation of such a problem in the above-quoted passage seems to be an unwarranted rhetorical flourish.[257] Indeed, the

Administration, 114 HARV. L. REV. 2245, 2373–74 (2001) (asserting that political accountability and public policymaking closely track each other and that the gaps Congress leaves in political accountability reside with the President); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 102–03 (1994) (observing that the allocation of political power goes to those deemed accountable and asserting that unitariness in political accountability is necessary to ensure that the framework maintains "the original constitutional commitments"); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91–99 (1985) [hereinafter Mashaw, *Prodelegation*] (discussing the value of broad delegations of power to administrative agencies and concluding that broad delegations of power may improve responsiveness to voters); Pierce, *supra* note 98, at 1256 (asserting that "agencies must be made politically accountable to the people" in order "to reconcile the administrative state with the principles of democracy"); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) [hereinafter Sunstein, *Beyond* Marbury] (stating that the "executive has significant advantages over the courts" in resolving statutory ambiguities not only because the Executive has technical expertise and political accountability but also because the Executive has advantages in determining how changed circumstances should apply); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978–79 (1992) [hereinafter Merrill, *Judicial Deference*] (referring to this factor as "democratic theory" and explaining that "agency decisionmaking is always more democratic than judicial decisionmaking because all agencies are accountable (to some degree) to the President, and the President is elected by the people"); John F. Manning, *Constitutional Structures and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 690–91 (1996) (explaining why "less representative courts" should defer to "more representative agencies"); Barron & Kagan, *supra* note 102, at 234 ("The Court's approach, when measured against the values of accountability and discipline, denies deference to actions that have earned it and gives deference to actions that do not deserve it.").

255. *See* Bressman, *Deference and Democracy*, *supra* note 250, at 799 (stressing the need to understand those circumstances where "the Court has determined that political accountability is insufficient to support judicial deference" to better explain the reasons that political accountability justifies judicial deference). "Justice Scalia criticizes this 'separation of powers' or 'policy making' approach as a justification for allowing agencies to make controlling interpretations because one of the traditional principles of statutory interpretation is the consideration of statutory purposes." Claire R. Kelly & Patrick C. Reed, *Once More unto the Breach: Reconciling* Chevron *Analysis and De Novo Judicial Review After* United States v. Haggar Apparel Company, 49 AM. U. L. REV. 1167, 1192 n.161 (2000) (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515).

256. *Chevron*, 467 U.S. at 865.

257. Thus, the rule *Chevron* quotes (from *Tennessee Valley Authority*) does not answer

Court has abandoned the political-accountability rationale in certain circumstances and declined to afford an agency *Chevron* deference even when it otherwise appears appropriate.[258]

Of course, the fact that the *Chevron* Court may have overstated its case does not mean it did not have one. Other things being equal—i.e., absent any clear indication of congressional intent regarding either the policy choice to be made or the agent to make it—weighing the relative democratic credentials of an agency official as a factor in favor of inferring a delegation makes sense. But it is only a factor—not a constitutional bedrock principle, as *Chevron* implied. And it must be considered in light of other factors, which *Chevron* and later courts have sometimes failed to fully recognize.[259]

The irony of this failure is highlighted by *Chevron*'s citation of *Skidmore*.[260] *Skidmore*-type cases involve interpretations by agencies that are democratically more "legitimate" than federal courts, yet courts give little to no deference to those agencies' interpretations.[261] Hence, although agencies bear a "democratic" patina from the fact that elected officials create and ultimately oversee them, this does not automatically provide the sort of political accountability warranting *Chevron* deference. Nor is the fact that those appointing and overseeing elected officials can be unelected the decisive factor in finding an agency politically accountable and thus entitled to *Chevron* deference.[262] Agencies making decisions entitled to

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the question whether Congress delegated a policy choice to an agency; it merely states that *when* Congress has made a clear policy choice, the courts must honor it. The *Tennessee Valley Authority* rule *assumes* a valid exercise of lawmaking authority. It does not dictate how to determine whether such lawmaking authority has been delegated or, more importantly, to whom. Clearly, *Tennessee Valley Authority* does not actually answer the *Chevron* question. It may, in fact, obscure it, as is further discussed below. *See Chevron*, 467 U.S. at 866 (quoting *Tenn. Valley Auth.*, 437 U.S. at 195).

258. As Professor Bressman has noted: "In recent cases, the Court has not displayed unwavering commitment to the *Chevron* decision or its principle [of political accountability]." Bressman, *Deference and Democracy*, *supra* note 250, at 762; *see also id.* at 761 (referencing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Gonzales v. Oregon*, 546 U.S. 243 (2006), as cases "in which the administrations possessed strong claims of accountability yet the Court did not defer to the agency determinations," and where "the Court justified its refusal of deference by contending that the questions were too extraordinary for Congress implicitly to have delegated").

259. Moreover, at the risk of entertaining cynicism, one suspects it is a much-exaggerated principle, in that "erroneous" agency policy choices probably often escape any meaningful political review, and even if detected are probably rarely corrected as a practical matter. We may more confidently believe, however, that the less public input going into the agency choice, the more likely it is to be both erroneous and uncorrected.

260. *Chevron*, 467 U.S. at 865 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1924)).

261. *See* Duffy, *supra* note 94, at 203 n.458 ("*Skidmore* gives an agency nothing more . . . than courts give to respected lower court judges, academic commentators, or members of the bar.").

262. Scholars have also suggested that courts should defer to agencies because

only *Skidmore* respect have both these credentials but do not thereby merit *Chevron* deference.

As the Court and commentators have explained, the agency's use of formal lawmaking procedures is an important indicator that *Chevron* deference is due.[263] That is, it appears the method of agency decisionmaking—by allowing adequate public input—gives the political accountability factor significant weight.[264] We should view this input element as an important aspect of the political accountability factor underlying *Chevron* deference—perhaps more important than the *Chevron* framework recognizes.

One statutorily authorized method for an agent to act as a lawmaker on Congress's behalf is notice-and-comment rulemaking, which gives the public notice and an opportunity to be heard.[265] Significantly, this approach most closely resembles the legislative model of lawmaking. It is, therefore, the means by which an agency logically can command the most

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(1) agencies are in closer contact with Congress, and their decisions thus better reflect congressional intent; and (2) either Congress or the Executive can more readily correct any policy errors the agency might make. *See, e.g.*, *id.* at 194–97 (arguing that the APA does not support the *Chevron* framework for agency deference). Neither of these variations on the political-accountability theme is convincing. As to the first, the arguments against using a statute's legislative history as an interpretive guide—for example, that the views of individual legislators or even of committees do not necessarily reflect the intent of the body as a whole—apply with much greater force to postenactment conversations with individuals that are held off the public record. As to the second, if an agency creates a policy that does not comport with congressional intent, Congress can—theoretically, at least—correct it. But Congress could do that whether the error was committed by the agency or a court, so there should arguably be little to no concern for political accountability in determining judicial review of agency decisions. Granted, if an executive agency makes a policy decision where Congress had no intent—and therefore feels no need to "correct" the agency's decision—it is more legitimate to have another elected branch decide on that policy than the court—unless Congress intended the Court to decide it. But that lack of a need for accountability does not strengthen the *Chevron* Court's argument on this issue; and, again, *Skidmore*—and arguably the APA itself—gainsay that argument as dispositive.

As noted above, one might also question whether, as a practical reality, any alleged accountability ever actually occurs. That is, how often does an executive agency—much less an independent agency—interpret a statutory provision in such a way that the electorate coerces change from an elected branch on the issue? Without empirical answers to such questions, the court is merely speculating about the importance of political accountability.

263. Scholars have also noted, however, that Congress has long allowed both formal and informal agency procedures without any indication that this affected the scope of judicial review. *See, e.g.*, Barron & Kagan, *supra* note 102, at 220 (noting that Congress has allowed agencies to promulgate policy using formal and informal procedures and has not indicated whether the method an agency uses affects the standard for judicial review).

264. *See* United States v. Mead Corp., 355 U.S. 218, 226–27 (2001) (holding that an agency's interpretation of a statutory provision qualifies for *Chevron* deference "when it appears that Congress delegated authority to the agency generally" and the agency exercised the delegated authority in interpreting the statute).

265. *See, e.g.*, PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 23. *But see* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988).

compelling respect for its delegated lawmaking. Simply put, when an agency empowered by Congress to act in Congress's stead acts like Congress, the courts more properly treat the agency like Congress—i.e., a legitimate lawmaker—than when the agency fails to operate in a congressional manner.[266]

Another lawmaking method agencies employ is the adjudicative approach. In this forum, it is generally only the parties who receive notice and a hearing. Although judges make law this way, legislatures do not. As we have seen, the public's ability to have input at the front end of the lawmaking process is significant in inferring congressional delegation of lawmaking power—and not merely the end result accountability. So it is only logical to infer a greater delegation when the agency affords the public greater input to the policymaking process, and lesser deference when it allows less public input.

Yet, the *Chevron* framework fails to make this logical distinction. It accords equal deference to agency decisions rendered by either approach.[267] Clearly, "[a]ll procedures are not created equal. At one end of the spectrum, notice-and-comment rulemaking guarantees formalities that mimic the legislative process (and then some). Thus, notice-and-comment rulemaking best ensures the transparency, deliberation, and consistency that produce fair and reasonable laws."[268] The *Chevron* framework generally draws a line at a certain point along that spectrum. Notice-and-comment rulemaking is at the high end of the deference spectrum—i.e., on the *Chevron* side—then comes formal adjudication, and beyond that an imaginary line seems generally to be crossed into mere *Skidmore*

266. *See, e.g.*, Merrill & Hickman, *supra* note 29, at 846 (asserting that more formal agency decisions—those the agency adopts pursuant to procedural formalities—may receive *Chevron* deference because they have the "force of law," but less formal agency action frequently lacks such force and receives *Skidmore* respect); Barron & Kagan, *supra* note 102, at 211 ("The presumption against deference for informal agency action appears especially strong when an agency acts in an individual case only, in effect adopting the decision-making paradigm associated with judges rather than legislators."); *In re* Appletree Markets, Inc., 19 F.3d 969, 973 (5th Cir. 1994) ("Absent executive rulemaking, it remains the duty of courts to construe the statute in order to divine congressional intent.").

267. *See Mead*, 355 U.S. at 230 n.12 (referencing both notice-and-comment rulemaking and formal adjudication cases); INS v. Aguirre-Aguirre, 526 U.S. 415, 416 (1999) (applying *Chevron* deference to case-by-case adjudication). *But see* Merrill & Hickman, *supra* note 29, at 842 ("[I]t would be a mistake to read *Aguirre-Aguirre* as having established that all interpretations adopted by agencies in adjudications are eligible for *Chevron* deference."); *id.* at 878 ("All courts agree that agencies with grants of legislative rulemaking authority are entitled to *Chevron* deference, and most courts have concluded that agencies that have authority to render binding adjudications are entitled to *Chevron* deference.").

268. Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) [hereinafter Bressman, *How* Mead *Has Muddled Judicial Review*].

deference, with various exceptions.[269]

Moreover, as other commentators have observed, the notion that agency power to adjudicate betokens an implicit congressional delegation to do so free of meaningful judicial review is especially fictitious.[270] The agencies in question were granted no new power to make law in their adjudications since the APA's passage, and the post-*Chevron* Court's "discovery" of such power is questionable.[271]

Thus, although agencies have long been permitted to "make law" through adjudication,[272] there are good arguments that courts should treat only the policies that agents of Congress create when they allow more democratic input—like legislators[273]—as lawmaking to which courts should defer.[274]

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269. *Id.* at 1444–45.

270. *See, e.g.*, Herz, *Deference Running Riot*, *supra* note 95; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 542 (2003) [hereinafter Bressman, *Beyond Accountability*] (describing the "serious shortcomings" of adjudication used for formulating policy); Bressman, *How* Mead *Has Muddled Judicial Review*, *supra* note 268, at 1449, 1480–81 (comparing notice-and-comment rulemaking to formal adjudication and determining that in some cases the latter is a "second-best approach for formulating generally applicable standards"); Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 183 (1993) [hereinafter Weaver, *Some Realism*].

271. *See* Weaver, *Some Realism*, *supra* note 270, at 184–85. The debate over the ultimate authority of adjudicative rules may have been settled in *SEC v. Chenery Corp.*, 322 U.S. 194, 201–03 (1947), *see, e.g.*, Bressman, *How* Mead *Has Muddled Judicial Review*, *supra* note 268, at 1481, but it was a long, vigorous one, which further indicates the congressional intent *Chevron* inferred is fictional. *See, e.g.*, Weaver, *Some Realism*, *supra* note 270, at 185 n.46 (citing numerous commentators who have decried agencies' use of adjudication rather than rulemaking to create law); *see also* Bressman, *How* Mead *Has Muddled Judicial Review*, *supra* note 268, at 1481 n.228 ("Of course, agencies remain free to select any procedure they desire. But they cannot expect the same legal treatment regardless of their choice." (citation omitted)).

272. *See* discussion *infra* Parts C.4.a, C.6.

273. *See* Merrill & Hickman, *supra* note 29, at 842 & n.42 ("Some commentators have argued that *Chevron*'s notion of an implied delegation of interpretative authority can be reconciled with other features of administrative law only if *Chevron* is limited to legislative rulemaking.") (citing Duffy, *supra* note 94, at 199–203, and Herz, *Deference Running Riot*, *supra* note 95, at 200–03); *accord Mead*, 533 U.S. at 232 (distinguishing a letter ruling from the type of agency decision that merits *Chevron* deference because the former does not "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling").

274. One authority on the issue has cogently framed the major arguments thus:

> [A]djudication certainly affords important procedural protections to individual litigants. Yet, adjudication, as a general matter, has serious shortcomings for formulating policy. It applies new rules retroactively to the parties in the case. It also excludes other affected parties in the development of policy applicable to them, unless included through the venues of intervention or amicus curiae filings. To the extent it excludes such parties, it also excludes the information and arguments necessary to define the stakes and educate the agency. It tends to approach broad policy questions from a narrow perspective—only as necessary to decide a case—which decreases the comprehensiveness of the resulting rule and increases the risk

Pressing this point a step further, to the extent the input element of political accountability matters for inferring a *Chevron* delegation, federal court adjudications involve more democratic input than agency adjudications, like refugee hearings.[275] At the least, they generally do not involve less.

Agencies often create rules through processes similar to those used by the courts—although generally with somewhat lower due process and evidentiary standards. But courts need not treat them as duly promulgated legislation as a result. When it comes to rules that agencies create ad hoc in adjudication, as in the adjudication of refugee claims, *Chevron* deference is less appropriate.

b. The Actual Accountability Problem

Another aspect of the political accountability problem the Court has not satisfactorily addressed is who ultimately exercises the allegedly delegated authority and how accountable that actor actually is. The *Chevron* Court admitted that the accountability it relied on in deciding to defer to an agency was indirect at best.[276] But as commentators have noted, this admission is still deficient in several respects. This is because "*all* agencies operate outside of the direct control of any of the other branches of government."[277] Professors Barron and Kagan have elaborated on the point

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> that bad facts [and, as may be the case when poor litigants go up against the federal government, bad lawyering] will make bad law. Similarly, it elaborates policy in a narrow manner—on a case-by-case basis—which decreases predictability and opportunities for planning. It also announces policy in the form of an order rather than codifying it in the Federal Register, thus decreasing accessibility. And, it depends for all of this on the existence of circumstances that lead to the initiation of a proceeding or succession of proceedings.

Bressman, *Beyond Accountability*, *supra* note 270, at 542. In *Aguirre-Aguirre*, for example, the claimant's counsel did not even file a brief with the BIA. INS v. Aguirre-Aguirre, 526 U.S. 415, 422 (1999).

275. *See supra* note 219 and accompanying text (discussing the frequent lack of considered input even by a party to a hearing regarding asylum or withholding).

276. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 856 (1984) (acknowledging that federal agencies are only accountable to the people through the Chief Executive); *cf.* Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?*, *supra* note 158, at 1287 (explaining that *Chevron* implicates similar concerns to those of the separation of powers doctrine).

277. Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 814 (1991) (citing Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–96 (1987) [hereinafter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions*]). Caust-Ellenbogen elaborates this thesis in various insightful ways. For example:

> The very idea that an administrative agency reflects majoritarian values is at odds with prevalent conceptions of agency action. Our modern conception of agencies suggests that agencies act out of the exercise of expertise or as a result of "capture"

that political accountability in agency decisions—and particularly adjudications—is generally so low the Court should institute a "*Chevron* nondelegation doctrine."[278] They stress that *Chevron* ignores agencies' hierarchical structures, failing to distinguish between decisions made by cabinet secretaries and civil servants.[279] They suggest courts should focus on the actual decisionmaker within an agency and defer only when the individual to whom Congress actually delegated authority "personally assumed responsibility for the decision prior to issuance."[280]

This approach, like any other, has shortcomings.[281] But it is more thorough and precise than the Court's assessment of *Chevron*'s alleged political accountability factor.

And in the context of BIA decisions on refugee claims, the force of this argument is amplified. For example, as Professor Heyman points out, the "expertise" that is supposed to partially justify *Chevron* deference lies with the regular decisionmakers—the IJs and BIA officers.[282] Yet, these decisionmakers are at the bottom of the accountability hierarchy outlined by Barron and Kagan.[283] Juxtaposing these observations, the accountability and expertise factors offset one another in refugee claim adjudications in a manner *Chevron* and its progeny utterly fail to account for.

So there are inherent flaws in the political accountability rationale, especially in the realm of agency adjudication. There is also the added

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> by the target of regulation. Neither of these exercises of power is consonant with majoritarianism. In the former conception, agencies are elite organizations, immune from politics. In the latter conception, agencies act at the behest of the group that they are regulating, not at the behest of the public.

Id. (footnotes omitted). His convincing analysis concludes thus: "Although the Constitution might favor legislative action because of majoritarian concerns, there is no support for the extension of majoritarian concerns to render administrative determinations superior to those of courts." *Id.* at 815.

278. Barron & Kagan, *supra* note 102, at 236.

279. *Id.* at 234–36 (footnotes omitted).

280. *Id.* at 235.

281. For example, it has practical implementation problems, which the authors acknowledge, *id.* at 229, and accounts for only half of the "elected official" element of the political accountability factor while ignoring the public input element, as discussed in the immediately preceding Part.

282. Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 124 ("Countless opinions refer to the Attorney General's decisions, but in reality, immigration judges and the Board make most decisions."); *cf. id.* at 143 ("Deference should be highest when agencies demonstrate serious focus on the issues."). It is important to recall, however, that many of these regular decisionmakers have been decried as inexpert and biased. It is also important to recognize that mere experience is not expertise. Further, the streamlining regulations have largely concentrated power even lower in the organization. *See* Cruz, *supra* note 15, at 501 (quoting former Board Member Rosenberg: "[T]he regulations markedly elevate the position and authority of the immigration judges and diminish the BIA's appellate role . . . .").

283. Barron & Kagan, *supra* note 102, at 243–44; *see also* Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 143 ("Political accountability was so low [in *Aguirre-Aguirre*] that the signature line of the Board opinion in Petitioner's brief says 'signature illegible.'").

dilemma of this factor and the alleged expertise factor offsetting one another in refugee cases. Under these circumstances, it is clear that—as Professor Heyman concluded—deference to BIA decisions based on the political accountability rationale "has simply gone too far."[284] BIA adjudicators are not political actors, but decisionmakers, whose job "is to decide cases on principle, not to formulate foreign policy in the guise of deciding cases."[285]

5. The Foreign Relations Rationale for the Chevron *Deference Fiction*

A related rationale for *Chevron* deference to BIA decisions is the concern that these decisions potentially implicate foreign affairs. Therefore, the Court reasons, they are properly within the Executive Branch's bailiwick, and courts should defer to the BIA under *Chevron*.[286]

As an initial matter, the courts have generally recognized in Congress a plenary power to legislate in this area.[287] To the extent Congress has made foreign relations decisions in the Refugee Act, the Court's duty to merely enforce congressional intent is clear.[288] Where Congress has delegated interpretive authority to an agency, the agency has authority—just like under any other statute. Where Congress has delegated interpretive authority to the courts, courts have congressional authority in this area. So, the fact that foreign affairs may be implicated, in itself, does little to advance the inquiry into Congress's intent.

Yet when the real issue is lawmaking, rather than interpretation, it appears sensible to assume Congress might have preferred the Executive Branch to take the lead over the Judicial Branch because of the expertise and accountability advantages the Executive is presumed to possess.[289]

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284. Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 142 (footnotes omitted).

285. *Id.*

286. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (emphasizing the importance of judicial deference to the Executive Branch in the immigration context where officials make decisions that implicate foreign policy).

287. Rubenstein, *supra* note 81, at 485 n.29.

288. *See, e.g.*, Slocum, *supra* note 12, at 516 n.3 ("The Supreme Court has 'long recognized the power to expel or exclude [noncitizens] as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 210 (1953)); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 101–02 & n.21 (1976) ("[T]he power over [noncitizens] is of a political character and therefore subject only to narrow judicial review."); *cf.* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.").

289. *But see* Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, *supra* note 14, at 785 (arguing that Congress probably did not intend the courts to infer *Chevron* deference because of the "highly political decisionmaking" in asylum claims).

Again, however, although this assumption is fundamentally valid, it is not so strong as it first appears.

In *Aguirre-Aguirre*, for example, the Court stated that immigration cases can present heightened political and foreign policy concerns that the Judiciary may be ill-suited to address.[290] Here, the Court merely assumed a fact not in evidence, and despite its apparent appeal, the evidence might not support the assumption. In the first place, even assuming there may be potential foreign relations implications for some refugee decisions,[291] it is an open empirical question how many that might actually be. One suspects it is not a large number.[292]

Perhaps even more telling, however, is that, although the Court believed it must defer to the BIA's judgment in these matters, the Court did not actually investigate the BIA's views on this issue. Had the Court done so, it could have found that the BIA had eloquently expressed its view (in a published opinion, unlike the BIA's unpublished decision[293] in *Aguirre-Aguirre* that the Supreme Court found authoritative):

> A decision to grant asylum is not an unfriendly act precisely because it is not a judgment about the country involved, but a judgment about the reasonableness of the applicant's belief that persecution was based on a protected ground. This distinction between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies) should not be confused in charting an approach to determining motive. While it is prudent to exercise great caution before condemning acts of another state, this is not a reason for narrowly applying asylum law.[294]

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290. *Aguirre-Aguirre*, 526 U.S. at 425.

291. For better or worse, our government has unquestionably used refugee law as a tool of foreign policy. *See, e.g.*, PHILIP G. SCHRAG, A WELL-FOUNDED FEAR, THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA (2000); PETER KOEHN, *Persistent Problems and Political Issues in U.S. Immigration Law and Policy*, *in* REFUGEE LAW AND POLICY 67, 67–87 (Vep P. Nanda ed., 1989). But the fact that refugee law has been so used by the Executive Branch does not answer the critical question of whether that was Congress's intent when it passed the Refugee Act, because it is Congress that has plenary power in this area.

292. To prove the point one way or the other, we would have to examine refugee cases decided without *Chevron* deference (the pre-1984 refugee cases) to see if these led to a materially greater number of foreign affairs problems than cases in which such deference was accorded the BIA. If we found that they did, the Court's argument would have some force. Without such evidence, it has little.

293. *See* Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 141 (adding that the Board's decision was also nonprecedential).

294. *In re* S-P-, 21 I. & N. Dec. 486, 492 (1996); *accord* Mousin, *supra* note 15, at 548 n.26. It should be noted that this position fully supports Professor Heyman's view that the Court should not deem BIA officials to be legitimate formulators of our foreign policy. *See* Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 142 ("The members of the Board . . . must not[] play any role in the formulation of foreign policy."). Relatedly, when the international community was considering the 1967 Refugee Protocol, the U.N. General Assembly made clear that "the grant of asylum by a State is a peaceful and humanitarian act

Thus, the very agency the Supreme Court insists is the expert to which the Court should defer in this area has denied that its asylum decisions should rest on this basis for inferring a lawmaking delegation to this agency.

Other factors inherent in refugee cases also contradict the Court's reasons for applying the *Chevron* framework: "In enacting the Refugee Act of 1980, for instance, Congress sought to bring the Act's definition of 'refugee' into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'"[295] Thus Congress's intent was "to afford a generous standard for protection in cases of doubt."[296] The Court's refugee cases have not adequately reflected this fact.

It is also ironic that although the Court in *Aguirre-Aguirre* expressed concern for the international implications of the interpretive task before it, it downplayed the significance of the United Nations High Commissioner for Refugees (UNHCR) Handbook in resolving a refugee status issue.[297] The Handbook's purpose is to promote uniform protection of refugee rights in international practice.[298] The General Counsel for INS stated, "[W]e assume that Congress was aware of the . . . Handbook when it passed the Refugee Act and that it is appropriate to consider the . . . Handbook as an aid to construction of the Act."[299] Indeed, not only is this common knowledge, but the Supreme Court also stated before *Aguirre-Aguirre* that,

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and . . . as such, it cannot be regarded as unfriendly by any other state." Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 277, 279 n.6 (2005) (quoting *Declaration on Territorial Asylum*, G.A. Res. 2312(II), 22 U.N. GAOR Supp. (No. 16), at 81, U.N. Doc. A/6716 (1967)). These observations belie a deeper undercurrent of philosophical debate regarding the political versus humanitarian nature of asylum that numerous authors have explored in some detail. *See, e.g.*, Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, *supra* note 14, at 774 ("Much has been written on the elevation of political over humanitarian concerns in the [Refugee] Act's application."); *id.* at 774 n.8 (citing Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243 (1984); David H. Laufman, Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMMIGR. L.J. 495 (1986)); Price, *supra*, at 279–82 & nn.6–21 (citing numerous authorities on both sides of the debate).

295. *In re* S-P-, 21 I. & N. Dec. at 492 (citing S. REP. NO. 96-256, at 1 (1979)).

296. *See id*.

297. The irony here is tempered by the case's procedural posture. The Court had concluded it should defer to the agency and, therefore, should not overturn the agency's decision merely because it contradicted the Handbook. INS v. Aguirre-Aguirre, 526 U.S. 428, 429–31 (1999).

298. *See* Giuseppe Fina, *The Misuse of Deference and International Standards in Narrowing Withholding of Deportation in Light of* INS v. Aguirre-Aguirre, 1 CHI.-KENT J. INT'L & COMP. L. 53, 77 n.132 (2001) (citing Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 13 (1997)).

299. *See id*. at 79 n.150.

although the Handbook was nonbinding, it "provides significant guidance in construing the Protocol [international treaty regarding refugees] to which Congress sought to conform [in the withholding provisions]. It has been widely considered useful in giving content to the obligations that the Protocol establishes."[300]

The Court should enforce Congress's clear intent to conform our refugee law to international law.[301] The Court's deference to a BIA interpretation that materially deviates from the accepted international standard on this issue is not the proper way to enforce Congress's intent regarding this foreign affairs issue.[302]

Finally, even if none of the foregoing critiques of the Court's foreign affairs rationale for *Chevron* deference in this context existed, equating the BIA with the Executive Branch to justify deference is not necessarily valid.[303] We should not assume BIA officials are appropriate exercisers of foreign affairs powers, because they generally have little to no legitimate expertise or accountability in this area. The BIA's job is to decide the cases before them, "not to formulate foreign policy in the guise of deciding cases."[304]

6. General Lawmaking Authority as an Indication of Implied Delegation

What has emerged as the most important rationale for *Chevron*'s inference of primary agency authority to fill legislative gaps is the notion that such a delegation is implied when Congress empowers an agency to make binding law through some formal procedure. This view has gained prominence under some of the Court's more recent decisions.

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300. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987) (citing McMullen v. INS, 658 F.2d 1312, 1319 (9th Cir. 1981)); *see also id*. at 436 ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . ."). Several commentators have decried *Aguirre-Aguirre*'s cavalier approach to this international issue. *See, e.g.*, Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 138–39, 145 (criticizing the Supreme Court's failure to rely on the U.N. Handbook to determine the scope of exclusion clauses in *Aguirre-Aguirre*).

301. *Aguirre-Aguirre*, 526 U.S. at 427; *Cardoza-Fonseca*, 480 U.S. at 437.

302. Yet another indication that the foreign affairs rationale is not so strong in this context as the *Aguirre-Aguirre* Court implied is the Court's inconsistency in applying it. In *Zadvydas v. Davis* for example, the Court held the Judiciary, not the agency, had primary interpretive authority. 533 U.S. 678, 700–01 (2001). Only in dissent did Justice Kennedy assert that the foreign affairs concern counseled deference to the agency. *Id.* at 705 (Kennedy, J., dissenting).

303. *See* Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 142 (stating that the BIA does not play any role in the formulation of foreign policy but rather is composed of administrative law judges whose function is to decide immigration appeals).

304. *Id*.

In *United States v. Mead Corp.*,[305] for example, the Court reviewed a tariff classification ruling by the United States Customs Service, and the Court held such rulings are not entitled to *Chevron* deference.[306] The Court stated that *Chevron* deference is appropriate only when it is "apparent from the agency's generally conferred authority and from other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[307] The Court held that express congressional delegation of rulemaking or adjudicative authority was "a very good indicator" of *Chevron* deference."[308] The *Mead* Court concluded the agency was entitled to no more than *Skidmore* deference, even though the ruling in question bound the parties and was some precedent for future agency decisions.[309]

Similarly, in *Christensen v. Harris County*,[310] the Court reviewed a decision by the Department of Labor contained in an "opinion letter."[311] The Court again stated that only agency interpretations having the "force of law," such as formal adjudications and notice-and-comment rulemaking, are eligible for *Chevron* deference, and "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law [and] do not warrant *Chevron*-style deference."[312]

If Congress has delegated general lawmaking power to an agency, and a regulation must be made because Congress did not specifically address a specific issue arising under the statute with sufficient clarity, then supposedly Congress intended the agency to fill that "gap." This is basically a sound theory, but it is no more than a theory; and like any theory, it has its limits.

The proposition that Congress's lack of intent regarding a specific policy

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305. 533 U.S. 218 (2001).
306. *Id*. at 234.
307. *Id*. at 229.
308. *Id*.
309. *Id*. at 234–35.
310. 529 U.S. 576 (2000).
311. *Id.* at 587.
312. *Id.*; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–26 (2000) (invalidating FDA regulations restricting the marketing and distribution of tobacco products to minors because Congress did not give the FDA authority to regulate tobacco products and concluding *Chevron* deference did not apply); United States v. Haggar Apparel Co., 526 U.S. 380, 383 (1999) (concluding that the Court of International Trade could defer to the agency and also conduct de novo review, and held that the Federal Circuit erred in failing to apply *Chevron* deference in this circumstance); Merrill & Hickman, *supra* note 29, at 875–76 ("Given *Chevron*'s foundation in the concept of delegation of powers, we believe *Christensen* correctly identified the power to bind persons outside the agency with the 'force of law' as the defining characteristic of agencies entitled to *Chevron* deference.").

issue indicates an intent to delegate authority to an agency is obviously somewhat self-negating: the failure to think of an issue is failure to think of the issue. That encompasses both the substantive and the procedural or jurisdictional aspects of that issue.

Nonetheless, *Chevron* posits that when Congress delegates authority to create binding law through some formal process, it intends that authority to extend to unforeseen circumstances, such as incurable ambiguities and outright gaps. Still, this fiction of implied congressional intent must be contrasted with the reality of expressed congressional intent embodied in the APA.[313]

One way to reconcile these competing claims is to read the APA as failing to actually address the issue at all. That is, the APA directs courts to review only the agency actions delineated in the Act, and gap-filling is not one of those actions. In other words, a gap exists in the APA regarding judicial review of agency policymaking. This too is a defensible theory that has its drawbacks.

As noted above, assuming Congress left a gap in the APA regarding the policy courts should follow when reviewing agency policymaking, courts should fill that gap because Congress has not delegated to any expert and politically accountable agency the general lawmaking authority to implement that Act. This "problem"[314] is inevitable if one posits a gap the court must fill—whether one sees the gap in the APA or in any given statutory context in which the court holds that *Chevron* applies. Apparently, however, it is not a show-stopper when the court believes *Chevron* should apply.

Moreover, the commentators citing the distinction between agency interpretation of statutes and agency policymaking have mentioned the problem that the two areas of activity are not always distinct.[315] Without recognizing it as such, the Court has acknowledged this flaw in the

313. *But see* Duffy, *supra* note 94, at 197–98 (discussing the "implicit deleg[ation]" view of *Chevron*, which avoids the problem with § 706 of the APA "because the court *does* interpret the statute de novo; the court just finds that the statute gives the agency the power to make the rule of decision").

314. This is, in short, the "problem" of judicial common law of agency review, which existed before the APA was passed (and which "problem" the APA presumably remedied), and has continued in part after the APA's passage. *See generally* Duffy, *supra* note 94, at 114–15 ("If anything, the growth of purely judge-made law accelerated.").

315. *See, e.g.*, Herz, *Deference Running Riot*, *supra* note 95, at 190, 232 (noting that "distinguishing legislation from interpretation is impossible"); *see also* Caust-Ellenbogen, *supra* note 277, at 762 ("The distinction between law interpretation and extrapolation is elusive at best, and does not form a sensible or stable line on which to demarcate judicial and agency roles."); Barron & Kagan, *supra* note 102, at 215 ("The functions of policymaking and legal interpretation in the context of statutory ambiguity (the only context in which *Chevron* operates) are so intertwined as to prevent any strict constitutional assignment of the one to agencies and the other to courts.").

Chevron framework's foundation.[316]

Even when they are distinguishable, however, the problem of what to make of an implied delegation in this context remains. Assuming there is a clear statutory gap that calls for policymaking and that the Court believes Congress implicitly delegated that task to the agency in question, the scope of that delegation—and the scope of judicial review of that delegation—remains an open question. This is so because a fundamental premise for the implicit delegation might be that a court will carefully review any agency action arising from it.[317]

Further, even when there is a call for *someone* to fill a statutory gap, the Court believes the call is directed to the agency in the first instance, rather than the courts, only if the agency is operating within the parameters of its general lawmaking authority. If an agency were empowered to make law only through rulemaking, for example, but did not use that forum to propound a given ruling, the inference of a delegation supporting *Chevron* deference on review of that ruling would be lacking.[318]

As noted above, this inference of an implied delegation is not necessarily lacking, but is lessened, when the agency exercises its lawmaking authority in a less formal process.[319] As the political accountability and uniformity

316. Printz v. United States, 521 U.S. 898, 927 (1997) (citations omitted). *But see* Cooley R. Howarth, Jr., United States v. Mead Corp.*: More Pieces for the* Chevron/Skidmore *Deference Puzzle*, 54 ADMIN. L. REV. 699, 705 (2002) ("[M]ost theorists concede that interpretation of statutes is possible and can be distinguished from lawmaking.").

317. *See, e.g.*, Herz, *Deference Running Riot*, *supra* note 95, at 230, 232 (emphasizing that reviewing courts must ensure that agencies operate within the boundaries of delegated congressional authority); Weaver, *Some Realism*, *supra* note 270, at 183; Caust-Ellenbogen, *supra* note 277, at 794 ("[I]ndependent judicial review does not vitiate the reason for delegating power to an agency."). A delegation of power to issue legislative rules says nothing about whether Congress intended the agency to interpret with the "force of law" in this format. Perhaps, in a given case, Congress really did intend to give a particular agency the power to interpret with the "force of law." But, it is just as possible that Congress intended for the agency to fill the interstices of the regulatory scheme but expected the federal courts to fulfill their role in the constitutional system by providing a meaningful check against administrative abuse.

> [T]his equation—of delegations to make binding substantive law through rulemakings or adjudications with delegations to make controlling interpretations of statutory terms—has little to support it. Contrary to the theory, Congress might wish for an agency, in implementing a statute, to issue binding rules and orders subject to an understanding that the courts, in the event of a legal challenge, will review fully any interpretation of ambiguous terms made in the course of these actions.

Barron & Kagan, *supra* note 102, at 218.

318. United States v. Mead Corp., 533 U.S. 218, 226–27 (2000) (an interpretation for which an agency claims *Chevron* deference must be "promulgated in the exercise of [delegated] authority").

319. *See* Anthony, *supra* note 165, at 30–36 (discussing the importance of the two-step *Chevron* analysis in determining whether there is a congressional delegation of power to authorize an agency's statutory interpretation).

discussions above explain, to say an agency may lawfully choose either a notice-and-comment rulemaking or formal adjudicative approach to lawmaking is not necessarily to say that either approach equally supports *Chevron*'s inference.[320] If two of the hallmarks of law are its legitimate foundation in a democratically accountable lawgiver and its predictability, the "force of law" is lessened when the lawgiver is less accountable and its decisions are inconsistent. That is essentially the *Chevron* argument against courts and in favor of agencies generally. But it also arguably applies among agency decisionmakers, showing that lesser deference should be given when the agency decisionmaker lacks some of the *Chevron* deference criteria. The relatively public forum of notice-and-comment rulemaking, which is the agencies' most legislative, is fit for policymaking, whereas the relatively private forum of individual dispute adjudication is not.[321]

Significantly, the Court's more recent decisions in *Mead* and *Christensen* highlight the fact that agencies' lawmaking power lies along a continuum of formality.[322] For example, *Mead* stated the following: "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[323] This signifies that the relative formality and deliberative nature of the agency's exercise of power can support or negate the inference of congressional intent. Indeed, in describing the "force of law" delegation that the *Mead* Court required to infer *Chevron* deference, *Mead* stated that a hallmark of this power is a "binding" ruling that "bespeak[s] the legislative type of activity that would naturally bind more than the parties to the ruling."[324] It also mentioned that

320. *Cf.* Krotoszynski, *supra* note 121, at 746 ("Although *Vermont Yankee* prohibits a reviewing court from demanding more process than Congress requires in the organic statute authorizing the agency to act, it would not be inconsistent with *Vermont Yankee* to make a reviewing court's deference to agency work product turn on the quality of process associated with the agency's decision.").

321. KOCH, *supra* note 32, § 11.10, at 71 ("[A]djudication is an individual dispute resolution process rather than a policymaking process even though interstitial policymaking necessarily takes place in many adjudications. A court might take a closer look at policy created in an adjudicative context than in others, such as rulemaking."). Indeed, Pierce notes that, prior to the year 2000, some lower courts refused to apply *Chevron* deference to adjudications at all. PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 23, at 152.

322. *See, e.g.*, *Mead*, 533 U.S. at 230 n.11 ("In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority.") (quoting Merrill & Hickman, *supra* note 29, at 872)).

323. *Id.* at 230.

324. *Id.* at 232; *see also id.* at 233 (noting that the letter at issue was not binding because its "binding character . . . stops short of third parties").

the sheer volume of such rulings can contradict an inference that Congress intended them to have binding effect.[325] Presumably, this latter finding relates to the lack of deliberative care and fairness mentioned above, although it has also been pegged to the uniformity factor.[326]

Thus, the Court believes the deliberative nature of an agency ruling and its precedential impact affect the deference it deserves.[327] Agency-made law that binds the general public is a more compelling indication of congressional intent to delegate primary gap-filling authority than a decision that binds only the parties. The *Chevron* framework inference based on "force of law" is therefore weaker in adjudications—where the force of any law that is made is undeniably weaker.

The BIA's adjudication of refugee claims is not only inherently distinguishable from the more formal procedures where *Chevron* most forcefully applies—it is often far closer to the informal-procedure side of the spectrum. As noted above,[328] the BIA's unpublished and AWO cases do not establish any precedent in the conventional understanding of that term. If some precedential value is insufficient to establish the force of law necessary for *Chevron* deference, the lack of precedential value should generally preclude it as a matter of logic.[329] Consequently, if a court reviews an unpublished BIA opinion or an AWO ruling, it should accord the BIA no *Chevron* deference.[330]

Even published BIA opinions regarding religious-refugee claims are not necessarily worthy of *Chevron* deference. Admittedly, *Mead* cited the power to adjudicate as generally indicative that *Chevron* deference is

325. *Id.* at 233–34.

326. Merrill, *The* Mead *Doctrine*, *supra* note 30, at 817 ("A regulatory system unconcerned with whether like cases are treated alike is an unlikely candidate for the appellation 'law.'").

327. The *Mead* Court also distinguished the agency classification ruling at issue there, however, by stating that "precedential value alone does not add up to *Chevron* entitlement." 533 U.S. at 232.

328. *See* discussion *supra* Part II.A.

329. *See, e.g.*, *Mead*, 533 U.S. at 232 (explaining that while interpretive rules sometimes functions as precedents, as a class, they are not entitled to *Chevron* deference) (citing Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1472–73 (1992) [hereinafter Strauss, Comment]).

330. *E.g.*, Yueqing Zhang v. Gonzales, 426 F.3d 540, 544 (2d Cir. 2005); Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 190–91 (2d Cir. 2005). Courts declining to extend *Chevron* deference to AWOs cite a lack of delegation of rulemaking authority to the IJs (e.g., *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 168 (2d Cir. 2006)), a lack of precedential power, or "force of law," for such decisions (e.g., *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 921–22 (9th Cir. 2006)), and the "sheer volume" rationale mentioned in *Mead* (e.g., *Miranda Alvarado*, 449 F.3d at 922). Relatedly, although the Supreme Court accorded *Chevron* deference to an unpublished (and, therefore, nonprecedential) BIA opinion in *Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999), it did so without discussing those decisions' lack of precedential power, which it later found important in *Mead*. 533 U.S. at 232.

due.[331] Yet *Mead* also implicitly recognized that finding an implied delegation in the adjudicative context is more tenuous,[332] and that various factors influence this inference.[333] To the extent those factors include the traditional *Chevron* factors, as discussed above, BIA adjudications are relatively less entitled to *Chevron* deference based on the foregoing analysis. Moreover, as the following Part discusses, congressional intent regarding judicial review of these decisions is informed by other considerations that generally do not affect other agency adjudications.[334]

III. PIECES THE COURT HAS NOT REALLY EXAMINED

A. Prudential Reasons for Eschewing Chevron *in Religious-Refugee Cases*

The *Chevron* doctrine is not just a fiction, as even the Court has admitted; it is a concatenation of fictions. The grounds on which it rests are revealed as shifting sands on closer inspection, and those grounds collapse almost entirely when the inquiry occurs in the realm of religious-refugee adjudication. Agencies usually have expertise in factfinding within their areas of operation, for example. But artificially endowing them with greater expertise in judging the legal scope or import of those facts than the federal appellate judges to whom they must explain their findings is a mistake—one made even more glaring by the apparent bias and lack of expertise in some BIA adjudications.

Whatever the merits of indulging these fictions may have been in *Chevron* and many of its progeny, they diminish to the vanishing point in the context of religious-refugee adjudications. Thus, the first argument against applying *Chevron* to religious-refugee claims is that *Chevron* is not only a rebuttable presumption, but a weaker one than the Court lets on—weaker still in the context of refugee claims. It is merely a prudential doctrine the Court created. Where it is imprudent to apply it, we should not. It is imprudent to rubber stamp BIA denials of refugee claims because the lives, health, and freedom of persecuted individuals are at stake, and Congress has expressed its intent to especially protect persons in this predicament. This counsels greater, not diminished, judicial review of these denials, whether by the Court's own initiative or by a new congressional directive.

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331. *Mead*, 533 U.S. at 229.

332. *See id*. at 232 (referencing "legislative activity" as generally indicating rulings with "the force of law" contemplated for *Chevron* deference).

333. *See id*. at 229, 230, 233.

334. Weaver, *The Emperor Has No Clothes*, *supra* note 88, at 188 (criticizing the concept on several legitimate grounds).

B. APA Revival

The *Chevron* Court said it did not want to usurp political power by deciding a policy question because it was not elected or politically accountable.[335] Yet when the Court drew on its own common law to decide *Chevron*, it arguably did just that: It neglected Congress's express directive in the APA regarding the scope of judicial review and substituted its own policy decision on that issue.[336] The APA is still the law. The fact that *Chevron* chose to ignore it is no reason for the Court to continue to do so. Especially where life and liberty are threatened on religious expression grounds, the Court should review agency adjudicative decisions at least as diligently as Congress can be understood to have mandated in the APA.[337]

C. Chevron*'s Inferred Delegation and Nondelegation Principles*

Chevron created an inference of congressional delegation of policymaking authority to agencies. Under the nondelegation doctrine, the Court examines whether and how Congress may delegate its lawmaking authority to agencies.[338] Under this doctrine, Congress cannot convey carte

335. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

336. *See, e.g.*, *Mead*, 533 U.S. at 241 (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the [APA], which it did not even bother to cite."). The APA arguably compels the Judicial Branch of government to resolve all statutory ambiguities. Under 5 U.S.C. § 706 (2006), in reviewing agency action, the court shall "decide all relevant questions of law." *But see* Duffy, *supra* note 94, at 197 (setting forth one argument that avoids a conflict between *Chevron* and § 706 of the APA); Foote, *supra* note 106, at 684 (arguing courts should narrowly construe that section to apply only to clearly legal questions).

337. Although the Bumpers Amendment failed to effectuate this approach, that failure is not necessarily dispositive of congressional intent from the Court's perspective, nor does it preclude such action in the future, and both of these factors are even more persuasive in the discrete context of refugee claims. Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1059 n.167 (2007).

338. Nowadays, this doctrine is most often honored in the breach. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (stating that the Court has invoked the nondelegation doctrine in only two cases and asserting that, in both cases, the statute at issue either "provided literally no guidance" or conferred broad authority "to regulate the entire economy" based on a vague "fair competition" standard); William N. Eskridge, Jr., *America's Statutory "Constitution"*, 41 U.C. DAVIS L. REV. 1, 11 n.51 (2007) ("Even scholars who support a vigorous nondelegation doctrine have not expressed confidence that it will actually be revived."). Yet it is not entirely moribund. *See, e.g.*, South Dakota v. Dep't of the Interior, 69 F.3d 878, 882–83 (8th Cir. 1995) (striking down the statute giving the Secretary of the Interior unqualified power to acquire land for Indians as a violation of nondelegation doctrine); *cf.* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 227 [hereinafter Manning, *The Nondelegation Doctrine*] ("Although the Court [in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000),] did not explicitly invoke the nondelegation doctrine as such, portions of its opinion clearly reflect significant nondelegation concerns."); *The Supreme Court, 2006 Term—Leading Cases: Federal Statutes and Regulations—Review of Administrative*

blanche authority to agencies to legislate, but rather must provide an "intelligible principle" to guide the agency's exercise of legislative power.[339] In deciding whether a particular delegation satisfies the concerns of this doctrine, the Court has examined not only the relevant statute's legislative history and purpose, but also the history and purpose of Congress's action in later statutes addressing the same area of concern.[340]

Although adjudication of refugee claims may not directly implicate the concerns that the nondelegation doctrine addresses, the decision whether to infer a congressional delegation of policymaking authority to DHS adjudicators arguably should be informed by similar considerations.[341] If these concerns are relevant to deciding whether Congress *may* delegate its lawmaking authority, they are also arguably relevant to deciding whether Congress *did* delegate that authority.

In the Religious Freedom Restoration Act (RFRA),[342] Congress clearly

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Action—Chevron Deference, 121 HARV. L. REV. 185, 189 (2007) [hereinafter *Leading Cases*].

339. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–31, 541–42 (1935) (invalidating under nondelegation doctrine a statutory provision that delegated broad authority to promulgate economic regulations); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring that an agency's legislative actions conform to an "intelligible principle" that Congress establishes to be valid).

340. *See, e.g.*, *Leading Cases*, *supra* note 338, at 397 (noting that in *Zuni Public School District No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534 (2007), the Court "took the unusual step of beginning [its] analysis by considering the Impact Aid statute's purpose and background, reversing the normal order of the *Chevron* analysis") (footnote omitted); Manning, *The Nondelegation Doctrine*, *supra* note 338, at 234 (noting that the Court in *Brown & Williamson* discerned legislative "intent" from legislative acts occurring decades after the relevant statute's enactment); *id.* at 236 (noting that the *Brown & Williamson* Court invoked the congressional purpose manifest in later statutes on the same topic to strike the agency's statutory interpretation); *id.* at 246 n.121 (contending that in *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 376 n.12 (D.C. Cir. 1982), the Court found "an intelligible principle to guide the tribunal in disbursing cable royalty fees in 'specific statements in the legislative history and in the general philosophy of the Act itself'").

341. *See, e.g.*, Andrés Snaider, Note, *The Politics and Tension in Delegating Plenary Power: The Need to Revive Nondelegation Principles in the Field of Immigration*, 6 GEO. IMMIGR. L.J. 107, 109 (1992) ("[T]he immigration field provides a natural arena for the revival of nondelegation principles.").

342. 42 U.S.C. § 2000bb (2000). In section (a) of that Act, Congress found that:

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

Id. § 2000bb(a). In section (b) Congress expressly stated the Act's purpose:

expressed its intent to subject any action of the Legislative or Executive Branches to the strictest judicial review when those government actions burden religious expression. RFRA, which applies to all federal statutes not specifically exempted,[343] provides in pertinent part:

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.[344]

It appears few courts have examined RFRA's application in refugee cases.[345] The Act applies to noncitizens under federal jurisdiction,[346] although it is not clear how it directly applies to refugee claims. What specific applications creative advocates of religious refugees may find in specific cases remains to be seen.[347] But when the Court considers whether it should defer to BIA denials of protection from religious persecution—i.e., whether or how *Chevron* applies—it should weigh this powerful and unequivocal expression of congressional intent in its calculations. Enacted against the backdrop of *Chevron*, Congress intended RFRA to protect all "persons" whose religious freedom rights are threatened by even facially

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> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. § 2000bb(b).

343. *Id.* § 2000bb-3.

344. *Id.* § 2000bb-1.

345. *See, e.g.*, Kwai Fun Wong v. United States, 373 F.3d 952 (9th Cir. 2004) (holding that a religious leader failed to state claims under RFRA); Jama v. INS, 343 F. Supp. 2d 338, 338 (D.N.J. 2004) (holding that with the exception of claims under RFRA, the statute of limitations barred claims against INS guards); Jama v. INS, 334 F. Supp. 2d 662 (D.N.J. 2004) (noting an alleged violation of RFRA); Jama v. INS, 22 F. Supp. 2d 353 (D.N.J. 1998) (denying INS motion to dismiss claims arising under RFRA without prejudice).

346. *See* Rasul v. Rumsfeld, 433 F. Supp. 2d 58, 64 (D.D.C. 2006), *rev'd on other grounds*, Rasul v. Myers, 512 F.3d 644 (D.C. Cir. 2008) (concluding that RFRA applies outside the United States). Although noncitizens on our soil are deemed not to have entered the United States and therefore not are afforded the protection of all constitutional rights, they are still protected under the Fifth Amendment's Equal Protection Clause. *Kwai Fun Wong*, 373 F.3d at 968 (finding that noncitizen plaintiffs can be entitled to relief for alleged violations of the equal protection component of the Due Process Clause of the Fifth Amendment).

347. It might be particularly interesting to explore RFRA's impact on cases such as *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), for example.

neutral government action.[348]

Therefore, RFRA—like IRFA—indicates that even if a court might otherwise accord the BIA *Chevron* deference, it should hesitate to do so in religious-refugee cases because any alleged inference of an implied congressional delegation of agency primacy over the courts is somewhat undercut here.[349] Broadly viewed, RFRA specifically reaffirms the courts' role as the primary protectors of religious freedom against infringing actions by the other branches of government.[350]

D. Congressional Intent to Comply with International Law as an Inferential Indicator

As noted above, Congress unquestionably intended to implement certain principles of international law into our domestic law. The Supreme Court has recognized that in enacting the Refugee Act of 1980, Congress sought to conform the Act's definition of "refugee" to the United Nations Convention and Protocol Relating to the Status of Refugees.[351] As the BIA explained, Congress intended to give "statutory meaning to our national commitment to human rights and humanitarian concerns."[352] Significantly, the BIA has concluded Congress thereby intended "to afford a generous standard for protection in cases of doubt."[353]

This evidence of congressional intent underlying the Refugee Act is also buttressed by the *Charming Betsy* doctrine, under which "an act of Congress ought never to be construed to violate the law of nations if any

348. RFRA specifically states that it applies to all federal law then extant and to future laws unless expressly exempted. 42 U.S.C. § 2000bb-3 (2000).

349. This issue is addressed in somewhat greater detail in Part III.C.1 (regarding agency expertise as a *Chevron* factor). IRFA points in the same direction, negating any inference that Congress intended to entrust primary policymaking authority to DHS adjudicators, because that Act expressly indicates that they require further training in this area. Of course, one also could cite IRFA to support an inference of delegation here, because it shows Congress wants these agency adjudicators trained so they can better make policy decisions in this area. This latter argument leaves open the contention that until they demonstrate improved competence in this area, Congress views them as inexpert.

350. Inferring a lack of congressional intent to delegate lawmaking authority to an agency does not always necessarily imply the negative, i.e., that Congress implicitly delegated that authority to the court, although that may be true in some instances. This is less problematic than the *Chevron* Court believed for various reasons. Congress—if not the Constitution itself—"delegates" policymaking authority to the Court, either directly or indirectly, in various ways. *Chevron* was itself federal common law—a policy decision that the Court inferred from a gap in the APA. Thus, if one objects to such policy decisions by the Court, one is left with following the APA without such a gap-filler, which could lead to the overturning of *Chevron*.

351. INS v. Cardoza-Fonseca, 480 U.S. 421, 432–33 (1986); *accord In re* S-P-, 21 I. & N. Dec. 486, 492 (1996).

352. *In re* S-P-, 21 I & N. Dec. at 492.

353. *Id*.

other possible construction remains."[354] Although it is a rule of construction, it offers some insight into congressional intent—and arguably more insight into that intent than the "silence" the Court found telling in *Chevron*. Admittedly, this factor is a stronger indication of whether a BIA interpretation is "reasonable" than it is an indication Congress did not intend to delegate primary policymaking authority to an agency. It is also evidence of the latter intent, which should be considered cumulatively with the other *Chevron* and anti-*Chevron* factors.

E. The Rule of Lenity in the Religious-Refugee Context

Another rule of construction that also reveals presumptive congressional intent regarding refugee protection is the "immigration rule of lenity."[355] This factor also may have a significant role in *Chevron*'s Step Two and even Step One. But it seems relevant even to a global analysis of "Step Zero"—i.e., whether *Chevron* applies to a decision at all—as well.

This rule is related to the criminal rule of lenity and, like that familiar canon of statutory construction, counsels leniency in favor of those subject to governmental power when statutory ambiguities exist. Although deportation is not punishment per se,[356] it "is a drastic measure and at times the equivalent of banishment or exile,"[357] with the attendant risks of

354. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (quoting *Charming Betsy*); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 719 n.85 (2008) (noting that in several recent and highly publicized cases, the Court inferred "that Congress intended to direct the Executive to comply with the laws of war"); Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780 (2006) (concluding that Congress has incorporated the law of war by reference in the Uniform Code of Military Justice); *id.* at 2794 (rejecting the court of appeals' contention that the Geneva conventions were not controlling); *id.* at 2799 (Kennedy, J., concurring in part) (noting that Congress requires military commissions to conform to the Geneva Conventions); Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (plurality opinion) (interpreting the grant of congressional authority to the President in response to the September 11, 2001 terrorist attacks); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) ("This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.").

355. *See, e.g.*, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (applying the "narrowest" of several possible interpretations of a statutory provision to give an alien facing deportation the benefit of the doubt); Bonetti v. Rogers, 356 U.S. 691, 699 (1958) ("It may fairly be said to be a presupposition of our law to resolve doubts . . . against the imposition of a harsher punishment.") (quoting Bell v. United States, 349 U.S. 81, 83 (1955)); *see also* Slocum, *supra* note 12, at 516–17 (discussing the rule of lenity in the context of immigration law, in which it "directs that statutory ambiguities in deportation provisions be resolved in favor of the noncitizen").

356. *See* Rubenstein, *supra* note 81, at 488 nn.48–49 (citing cases in which the Supreme Court states that it does not consider deportation to constitute a form of punishment).

357. INS v. Errico, 385 U.S. 214, 225 (1966) (quoting Delgadillo v. Carmichael, 332 U.S. 388, (1947)); *accord Fong Haw Tan*, 333 U.S. at 10.

separating families and destroying livelihoods. The noncitizen is "disadvantaged" in the fight to retain her freedom in this context,[358] with no political power or voice and often the object of prejudice.[359] Thus, under this rule, the Court infers that because deportation has harsh consequences on its subjects—not unlike penal statutes in certain respects—laws leading to deportation should be construed to favor the applicant where they are ambiguous.[360]

This rule of construction existed in our jurisprudence long before Congress passed the Refugee Act,[361] and Congress was presumably aware of it when it passed that Act. The rule embodies the assumption that Congress did not intend to provide for deportation absent a clear statement of that intent. It thus can be said to indirectly support an inference that Congress intends broad protection of refugee rights. If this is so, then—like the other anti-*Chevron* factors listed above—it may be invoked to offset an inference of congressional intent that courts defer more thoroughly to agency denials of refugee claims than the APA provides for.

Moreover, we should regard religious refugees as a special subclass of potential deportees and be even more assiduous in protecting them from harmful enforcement of ambiguous statutory provisions.[362] The legislative purpose and history of the Refugee Act, taken together with IRFA and RFRA, indicate that Congress intends the highest protection possible for the rights of religious refugees.[363] These individuals not only bear the risk

358. Rubenstein, *supra* note 81, at 480–81 n.6 ("[N]oncitizens [facing deportation] typically have no political voice or access to political power and its desire to counteract possible prejudice against them and ensure that the political process treats them fairly." (quoting Slocum, *supra* note 12, at 522)).

359. *Id.* (citing Slocum, *supra* note 12, at 522); *see also* Ramji-Nogales et al., *supra* note 223, at 389 ("[D]isparities are deeply ingrained in the U.S. asylum system . . . .").

360. *Fong Haw Tan*, 333 U.S. at 10. As Rubenstein notes: "Although the rule of lenity, as originally fashioned, was intended to apply to statutory provisions that render aliens deportable . . . it has since been applied to a wide variety of immigration provisions, including those that provide discretionary relief from deportation." Rubenstein, *supra* note 81, at 492 n.67.

361. The Court has also reaffirmed the vitality of this "immigration rule of lenity" in post-*Chevron* cases. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (permitting the Attorney General to consider granting asylum to anyone who falls within the statutory definition); INS v. St. Cyr, 533 U.S. 289 (2001) (permitting asylum to be given to an alien who committed a felony, absent clear proof that Congress intended to repeal the remedy retroactively).

362. *See supra* Part III.A; Slocum, *supra* note 12, at 523 n.38. Although the other characteristics Congress protected in the Refugee Act may share constitutionally protected status with religious expression (e.g., political opinion, like religious expression, is covered by the First Amendment), IRFA and RFRA evidence additional congressional concern for attacks on individuals because of their religious expression.

363. Though it would take more space than seems appropriate to develop the concept here, there may be an argument for reading the Refugee Act, IRFA, and RFRA in pari materia, at least in certain situations. There is no real dispute that

> [i]t is well established that "the interpretation of a doubtful statute may be influenced

of deportation but also the equivalent of criminal sanctions. Indeed, they face this risk for reasons we find particularly abhorrent—the criminalization of their religious beliefs.

Finally, we should regard the procedural posture in which federal courts receive refugee cases as significantly bearing on an inference regarding how closely courts should review these claims. Whenever a court reviews a religious-refugee claim, it is reviewing the denial of that claim. Thus, these cases are distinguishable from other appeals of agency rulings, such as *Chevron*—where deference to an agency interpretation benefited a private party, not just the agency. In religious-refugee cases appealed to federal court, deferring to the agency always means rejecting a person's plea for protection from religious persecution. We should view an inference that inevitably tends to deny religious freedom protection with heightened skepticism.[364]

> by language of other statutes which are not specifically related, but which apply to similar persons, things, or relationships." Employing this principle, the Court has previously compared nonanalogous statutes to aid its interpretation of them.

Nat'l Fed'n of Fed. Employees v. Dep't of the Interior, 526 U.S. 86, 105 (1999) (O'Connor, J., dissenting, joined by three other Justices) (citations omitted). Even though the doctrine might not apply here in its strictest sense, it is nonetheless desirable to interpret different statutes as harmonizing congressional purposes. *See, e.g.*, S. Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942) ("Frequently the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.").

364. The INA amendments that reduce judicial review of certain immigration cases, Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 117–20 (2006–2007), might constitute a potential counter-indication of congressional intent. Congress has eliminated judicial review of some BIA decisions, but not decisions denying religious refugee claims. *Id.* On one hand, this indicates that Congress did not want to deprive courts of authority to review denials. But on the other, one might argue that revisiting and revising some judicial review issues in the INA while passing over review of refugee claim denials implies satisfaction with the status quo as to those claims. There are two problems with that view. One is that one rarely really knows why Congress does or does not do certain things in these situations. *See, e.g.*, Sun Wen Chen v. Att'y Gen. of the U.S., 491 F.3d 100, 108 n.7 (3d Cir. 2007) (finding that Congress's decision not to reverse the BIA's construction of the INA was "flimsy evidence of congressional endorsement" of the agency's construction). The other problem is the related fact that the status quo that Congress is supposed to have approved in this context is quite unclear because courts have not been consistent in their approaches to these cases. *See, e.g.*, PIERCE, ADMINISTRATIVE LAW TREATISE, *supra* note 23, § 3.6, at 175 (suggesting that the Court has been inconsistent in applying *Chevron*); United States v. Mead, 533 U.S. 218, 237 n.18 (2000) ("[T]he limit of *Chevron* deference is not marked by a hard-edged rule.").

CONCLUSION—PUTTING THE PIECES TOGETHER

The *Chevron* framework arose in a context where it made relatively good sense for the Court to fashion a rule, albeit based on a fiction, to govern subsequent cases that resembled that case. How close the resemblance must be for *Chevron* to apply has confounded the Court, the circuit courts, and commentators alike.[365] But *Chevron* should be questioned on its own terms and interrogated more pointedly in the context of religious-refugee claims, where it seems particularly out of place.[366]

In general, the Court should view its *Chevron* framework more circumspectly and with at least one eye on APA § 706, particularly as to claims of religious refugees. It should pare away from its decisionmaking in this context the judicial entanglements that have overgrown the APA, the immigration rule of lenity, and Congress's clear intent to especially protect religious expression as evidenced by IRFA and RFRA. To date, it seems no court has done this. One cannot know the cost in suffering and perhaps even life that this neglect has incurred, but any such loss should not be allowed to continue.

The most salutary result would be for Congress to clarify that courts can review denials of refugee claims without any special deference to agency interpretations of the Refugee Act that arise in those adjudications.[367] Congress manifested concern with the BIA's ability to deal with these sensitive cases in a sufficiently professional manner when it passed IRFA. Circuit court judges report that those concerns remain valid, whether because of lack of training or resources.[368] The call for a political solution

365. These are largely theoretical objections to the *Chevron* framework, but then the *Chevron* framework is merely a theory. There remains the task of sorting through most of the practical implications of these theoretical observations, to the extent they might merit that effort.

366. As Professor Hickman recently observed:

> The courts should be open to deviating from legal norms where circumstances justify departure. Ernest Gellhorn and Glen Robinson notoriously decried "the tendency of administrative law to examine the process of judicial review without reference to the substantive content of the agency action being reviewed.

Hickman, *supra* note 37, at 1540–41 (quoting Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 783 (1975), but ultimately disagreeing with the premise of that article).

367. *Cf.* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1686 (2007) ("The third way to correct for the perceived failing of the immigration courts is to persuade Congress to overhaul the structure of immigration adjudication."); William R. Anderson, *Against* Chevron*—A Modest Proposal*, 56 ADMIN. L. REV. 957, 961 (2004) ("This article proposes a short amendment to § 706 of the Administrative Procedure Act (APA), which is intended to effectively abolish the *Chevron* doctrine.").

368. *See* Cox, *supra* note 367, at 1672 ("Today a growing number of federal judges review decisions by the immigration courts with apparent skepticism."); *see also supra* Part

involving activism within the legal community is certainly commendable,[369] but Congress need not wait for further public outcry. Amending the Refugee Act to expressly grant Article III courts greater judicial review would protect lives and freedom that need protecting now.[370] Such increased accountability—presumably leading to more remands—might finally prompt the Attorney General to upgrade, rather than continue to downgrade, DHS's religious-refugee decisionmaking processes.

Congressional action of this sort may be difficult, however, due to general turmoil in immigration policy. It may well fall to the Court, then, to recognize that *Chevron*'s inference is unfounded in this very limited context. This Article suggests a review of whether, in this specific context, Congress actually intended the type of delegation *Chevron* inferred. If it did not, then reviewing these claims more closely fulfills, rather than frustrates, congressional intent.

As several circuit courts have recognized, the BIA's AWO opinions do not inherently merit any deference because they fail under the current view of the *Chevron–Mead* tests.[371] And courts should treat unpublished BIA opinions, which also lack any extensive "force of law" on which *Mead* focused, in the same way.[372] But in light of the foregoing analysis, it is not

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III.C.1 (discussing judicial criticism of BIA decisionmaking).

369. *See* Alexander, *supra* note 16, at 45–58 (calling for concerted effort from the legal community in which "concerned organizations should lead a campaign to publicly identify the worst IJs and remove them from the bench"). I would suggest another useful activity in this regard would be for a concerned organization—perhaps with funding under IRFA or an amendment thereto—to track refugee applicants whose claims are denied after they return to their countries of origin to see whether they in fact suffer the persecution they feared but were told by the BIA they would not face. *See, e.g.*, Voss, *supra* note 19, at 235–36 (telling the story of an unsuccessful applicant for asylum deported to his country of origin and murdered by persecutors). Concerted investigation and reporting of such cases might stimulate the necessary change in our handling of those cases where other approaches have failed.

370. Offering greater protection to religious refugees would probably cause some increase in the number of cases appealed to the courts, where immigration case appeals are already a substantial burden. *See generally* John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006–2007) (discussing a number of factors that cause surges in immigration litigation); Alexander, *supra* note 16, at 3–11 (analyzing the reasons for an increase in immigration cases). But that is no excuse to deny refugees justice.

371. *See, e.g.*, Im v. Gonzales, 497 F.3d 990, 994–95 (9th Cir. 2007) (stating that a BIA decision that merely affirms an IJ decision without offering its own statutory analysis creates no legal precedent); Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 190–91 (2d Cir. 2005) (the BIA does not promulgate a "rule" with the force of law simply by summarily affirming an IJ decision).

372. *See* discussion *supra* Part III.C.6 (discussing the Court's presumption that statutory silence implies delegation of authority). As that discussion indicates, unpublished BIA opinions, like the letter ruling in *Mead*, bind only the affected party and do not establish precedent, which *Mead* emphasized as a necessary feature of a decision having the force of

a long step to take the same position regarding published BIA decisions of religious-refugee claims. The Court should simply review those issues not expressly committed to the agency's discretion in light of the statute's history and purpose, without being bound by them.[373]

In addition to concerns about the weakness of agency expertise, political accountability, and other *Chevron* framework factors, the refugee rule of lenity, IRFA, and RFRA counsel further caution before granting the BIA substantial deference in refugee cases.[374]

In the end, the *Chevron* framework is a policy decision by a Court that said it was unqualified to make policy decisions. Although it is generally a logical policy decision on balance, it should be taken with a grain of salt. To the extent that a court believes *Chevron* applies in a given context, the deference *Chevron* dictates is a rebuttable presumption. To the extent that presumption applies at all in the context of religious-refugee claims, it is particularly weak because the factors on which it rests are largely undermined; and it is rebutted by various expressions of Congress's intent to extend the utmost protection to religious freedom and to refugees. Congress should amend the Refugee Act to dictate a less deferential standard of judicial review for at least the nonfactual aspects of refugee claim decisions.

But rather than await that eventuality, the Supreme Court should reevaluate this unique situation. The Court might infer that Congress intends the Judiciary to approach denials of religious-refugee claims that might otherwise implicate *Chevron* under the *Skidmore* regime of judicial review. Or it might at least acknowledge that many of the factors it has

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law. United States v. Mead, 533 U.S. 218, 232 (2000).

373. Heyman, *The Flagging Spirit of the Law*, *supra* note 14, at 143 (stressing that "at times *Chevron* fits poorly in the modern administrative state," and adding that "[t]he same level of deference need not be afforded to all members of th[e] administrative community in all circumstances"); *see also id.* (criticizing the Court's decision to accord *Chevron* deference to the BIA's unpublished and poorly supported decision in *Aguirre-Aguirre*); Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, *supra* note 14, at 784 ("[C]ircumstances determine the amount of judicial deference to agency views on interpretive questions."); *id.* at 788 ("Perhaps more importantly, an asylum applicant's counsel can invoke the series of post-*Chevron* cases that demonstrate that the appropriateness of deference is still to some extent a function of the circumstances."). Others forcefully protest a return to such a standard in any context (without considering many of the factors discussed above), favoring the clearer rule *Chevron* supposedly provided. Yet, the Court itself may have obliquely suggested such a nuanced approach in contending agencies should receive less deference when they contradict themselves, and its cases discussing various factors that support *Chevron* deference, such as *Mead* and *Christensen* (and even *Chevron*), also open the door to a more standard-like approach than rule-like application of *Chevron*. Indeed, the notion that courts apply *Chevron* in a strict and uniform fashion is itself a fiction. Weaver, *Some Realism*, *supra* note 270, at 178–81.

374. At least, the Court could clarify the relationship between the traditional *Chevron* factors and the factors it now emphasizes under the *Mead* framework.

cited as supporting an especially deferential attitude toward these decisions are not actually so compelling. In any event, the dangerous mood of near-complete judicial acquiescence to the BIA must change. The religious refugees who today face the same type of persecution our founders suffered deserve nothing less.

* * *

REINCARNATING THE "MAJOR QUESTIONS" EXCEPTION TO *CHEVRON* DEFERENCE AS A DOCTRINE OF NONINTERFERENCE (OR WHY *MASSACHUSETTS V. EPA* GOT IT WRONG)

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TABLE OF CONTENTS

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INTRODUCTION

In *Massachusetts v. EPA*[1] (the Supreme Court's recent foray into the global warming debate), the Court dealt a fatal blow to a fledgling, though controversial, doctrine: the "major questions" exception to *Chevron*[2] deference.[3]

Admittedly, the Court's decision in *Massachusetts* is consistent with a simplistic view of the major questions rule. As it had done in the seminal major questions case, *FDA v. Brown & Williamson Tobacco Corp.*,[4] the Court in *Massachusetts* identified the central issue as a major one and refused deference to the Agency's handling of that issue. The Court thus seemed to hold, as it had in *Brown & Williamson*, that the *Chevron* framework was inapplicable in *Massachusetts* because the question at issue

1. 127 S. Ct. 1438 (2007).

2. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (creating a two-step inquiry for determining whether an agency's interpretation of its governing statute is entitled to deference). Under *Chevron* deference, the Court asks only two questions before accepting an agency's interpretation of its governing statute: whether the statute is silent or ambiguous on the question at issue (Step One) and, if so, whether the agency's interpretation of that statutory ambiguity is reasonable (Step Two). *Id*. at 842–43.

3. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–47 (2006) (identifying, explicating, and naming the "major questions" exception but concluding that it should not be enforced).

4. 529 U.S. 120 (2000).

was a major one. On that very basic level, the *Massachusetts* case is a datum in favor of the *Brown & Williamson* rule.

But, of course, that view is far too simplistic. The substantive logic in *Massachusetts* is, in the end, fundamentally incompatible with any substantive justification for a major questions exception.[5] Whereas the denial of deference in *Brown & Williamson* seemed to rest on a view that administrative agencies may not implement "major" policy changes,[6] the denial of deference in *Massachusetts* ultimately obligated one such agency to implement—or at least seriously to consider implementing—one such major change.[7]

The puzzle, therefore, is which case got it wrong. When an executive agency has an opportunity to address a major political issue and to implement a major policy reform, should it abstain, as *Brown & Williamson* suggests it should, or should it act, as *Massachusetts* suggests it must?[8]

Of course, there needn't be—and, I will argue, shouldn't be—a uniform answer to that question for every administrative agency or for every major issue. The appropriateness of executive intervention in a major policy battle might—and, I will argue, should—depend on relevant legal and political circumstances. That is, the *Brown & Williamson* rule need not and should not be a blanket exception for all executive treatments of major questions.

There is, however, no coherent story about the legal and political circumstances underlying *Massachusetts* and *Brown & Williamson* that would reconcile the two holdings. There is no reason that executive intervention should have been *inappropriate* in the context of *Brown & Williamson* but *necessary* in the context of *Massachusetts*.

The initial puzzle, thus, remains: which case got it wrong? But the

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5. Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise* (May 27, 2008) (unpublished manuscript on file with author) (arguing that the problem with EPA's decision not to regulate was, at least arguably, that the decision was based on crass political calculations rather than expert scientific judgments).

6. *See* Sunstein, *supra* note 3, at 243–45 (identifying *Brown & Williamson* as the clearest in a trilogy of cases that seemed to create a Step Zero exception for major questions).

7. *See* Freeman & Vermeule, *supra* note 5, at 18–19 (noting that *Massachusetts* and *Brown & Williamson* may be incompatible in this sense).

8. The question is slightly more complicated than I make it out to be here. The major questions exception comes into play only if Congress has not clearly bestowed authority in the agency. The rule, in its simplest form, is one of many "clear statement" rules, holding not that agencies are absolutely forbidden to make major decisions but rather that agencies may make such decisions only if Congress has clearly given them the authority to do so. This nuance, however, does not impact any of the analysis that follows, and I therefore set it aside for simplicity's sake.

puzzle has another layer, too. If *Brown & Williamson* got it wrong, then what were the legal and political circumstances that made agency intervention appropriate, or even *necessary*, in both cases? Or if *Massachusetts* got it wrong, then what were the legal and political circumstances that made agency intervention unnecessary, and even *inappropriate*, in both cases? Put another way: which one of the cases was right to deviate from *Chevron*?

As should be obvious from the title, this Article argues that *Massachusetts* got it wrong—and that *Brown & Williamson* had it right.

The thrust of the argument, however, is not that the major questions exception, as it has been understood, is a good rule or that *Massachusetts*, as it has been understood, is a bad case. The argument is instead that certain circumstances operating in the background of *Brown & Williamson*—circumstances that the Court and the academy have largely ignored—justified the Court's substantive intuition in that case that the agency's action was inappropriate. Because the same circumstances were operating in the background of *Massachusetts*, the Court ought to have reached the same substantive conclusion there, too: that executive action was inappropriate in the context of global warming.

The Article also argues that, whenever this particular background story is repeated, (1) the Executive ought to be restrained, (2) the Judiciary is the right institution to restrain it, and (3) a *Chevron* exception is an appropriate tool for accomplishing that restraint. The argument, therefore, is that the major questions exception should be reincarnated, yes, but also reconceptualized, with an emphasis on this background story rather than on the "majorness" of the relevant policy question.

So what is the background story? What justifies the *Chevron* deviation in *Brown & Williamson*? In short, it is a story of simultaneous efforts in the Executive and in Congress to effect changes in a single regulatory domain. In the background of both *Brown & Williamson* and *Massachusetts*—and in the background of a predecessor major questions case, *MCI Telecommunications Corp. v. AT&T Co.*[9]—Congress was actively negotiating amendments to the relevant regulatory regimes at the same time that the agencies considered and passed their regulations. And in the background of *MCI* and *Brown & Williamson*, the agencies' enactments perceptibly disrupted Congress's efforts.

The Court thus played a useful role in *MCI* and *Brown & Williamson* by vacating the agencies' enactments. It restored a substantive regulatory status quo ante, allowing congressional negotiations to pick up where they had left off. In other words, the agencies had shifted the targets around

9. 512 U.S. 218 (1994).

which Congress was negotiating, and the Court shifted them back.

The Court's role in *MCI* and *Brown & Williamson*, thus, was nothing more than that of referee, overseeing a complex game of political bargaining and preventing costly intermeddling between political institutions.

This refereeing role is not an unusual one for the Court. Indeed, the *Brown & Williamson* rule, if understood as a doctrine of noninterference, would be just one of many doctrines that the Court uses to prevent intermeddling among governmental institutions, such as preemption doctrines (preventing the states from interfering with federal policy) and abstention doctrines (preventing the federal Judiciary from interfering with state judicial or federal executive proceedings).

This refereeing role is also a necessary one for the Court. Our constitutional design permits jurisdictional overlap, permitting both cooperative and competitive divisions of labor between the political branches. Although the resulting interbranch competition can create efficiencies, it can also give rise to wasteful duplication and officious intermeddling. And when that harmful kind of competition occurs, the nonpolitical branch—the Judiciary—should step in to moderate the game.

So *Massachusetts* got it wrong because, rather than *preventing* this kind of meddlesome competition and costly target-shifting, the Court *encouraged* it—encouraged the Environmental Protection Agency (EPA) to implement status-quo-altering substantive regulations even while Congress was negotiating overlapping reforms.

This Article proceeds as follows. Part I describes the birth of the major questions exception in *MCI* and *Brown & Williamson* and the death of the exception in *Massachusetts*. Part II identifies the three forms of the major questions rule that the Court and the literature have proposed to date and rejects all three, concluding that the rule ought not to be reincarnated if it cannot also be reformed. Part III proposes the noninterference form of the *Chevron* exception, demonstrating its foundations in the history of the major questions cases and demonstrating its similarities to other noninterference rules. Part IV offers *Massachusetts* as a disanalogy to demonstrate the value and, indeed, the necessity of the noninterference rule. Part V proposes a doctrinal form for the reincarnated rule: a test for future application of the noninterference doctrine. Part V concludes.

I. THE MAJOR QUESTIONS EXCEPTION: A COMPLETE LIFE STORY

Under the original *Chevron* doctrine, the Court asked only two questions before deferring: whether the regulatory statute was silent or ambiguous on the question at issue (Step One) and, if so, whether the agency's interpretation of that statutory ambiguity was reasonable (Step Two). But

as Thomas Merrill, Kristin Hickman, Cass Sunstein, and others have noted, the Court has added a third, threshold step—a "Step Zero"—to the *Chevron* framework, asking whether an agency's decision is of a kind that deserves any deference at all.[10]

In two of those Step Zero cases, the Court gave birth to a discrete *Chevron* exception for agency interpretations that effect major changes, a rule that Sunstein termed the major questions exception to *Chevron* deference.[11] In both of those cases, *MCI*[12] and *Brown & Williamson*,[13] the Court denied deference to agencies' reasonable interpretations of statutory ambiguity, seeming to hold that the agencies deserved no deference because they had addressed issues of major "economic and political significance."[14]

But in *Massachusetts v. EPA*,[15] the Court unceremoniously killed this fledgling rule, issuing a decision that *required* an agency to address the (concededly major) question of global warming. Although the Court did not hold that EPA must regulate greenhouse gases, it did hold, contrary to the Agency's interpretation, that EPA has statutory authority to regulate, and it forbade the Agency from shirking that authority without more-compelling political or scientific justifications than those that the Agency had offered.

This Part describes and analyzes each of the three opinions, highlighting the substantive incompatibility between *MCI* and *Brown & Williamson* on the one hand and *Massachusetts* on the other.

A. MCI*: Whether "Major Modification" Is a Contradiction in Terms*

In 1994, the Court held that the Communications Act of 1934 (Act) did not give the Federal Communications Commission (FCC) the authority to exempt designated "nondominant" carriers from the Act's tariff-filing requirement.[16] Section 203 of the Act required communications common carriers to file rates with FCC and to charge only the filed rates,[17] a requirement originally intended to police AT&T's natural monopoly in

10. The term "Step Zero" is the creation of Thomas Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001), later adopted and schematized by Sunstein, *supra* note 3 (identifying two Step Zero inquiries that the Court has adopted).

11. Sunstein, *supra* note 3, at 236.

12. 512 U.S. 218 (1994).

13. 529 U.S. 120 (2000).

14. *Id.* at 160; *see also id.* at 133 ("In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

15. 127 S. Ct. 1438 (2007).

16. *MCI*, 512 U.S. at 231–32.

17. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. § 203 (1988 & Supp. IV 1993)).

telephone services.

Thanks to technological developments beginning in the 1950s, AT&T's monopoly began to dissolve as competition in long-distance services became feasible.[18] New competitors then argued that rising market forces sufficed to discipline their long-distance rates, rendering unnecessary the § 203 tariff-filing requirement. Agreeing that the requirement was more burdensome than beneficial, FCC enacted a series of rules exempting the new (nondominant) carriers from § 203 strictures.[19]

As the only "dominant" carrier remaining under the new regulations,[20] AT&T petitioned the D.C. Circuit Court of Appeals for review of the FCC orders. Among other things, AT&T argued that FCC lacked authority under the Communications Act to eliminate the tariff-filing requirement for any carriers. The D.C. Circuit agreed, and (eventually)[21] the Supreme Court affirmed.

FCC claimed regulatory authority under § 203(b)(2) of the Act,[22] which permitted the agency to "modify any requirement made by or under the authority of" § 203. The debate in the Supreme Court was whether elimination of the tariff-filing requirement for nondominant carriers constituted a mere "modification" of that requirement. The Court determined that it did not, reasoning that detariffing was too "major"[23] and "fundamental"[24] a change to constitute a modification since "'modify' . . . has a connotation of increment or limitation."[25]

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18. *Id.*

19. FCC originally eliminated the tariff-filing requirement altogether for nondominant carriers. When AT&T first challenged the mandatory detariffing rule, however, FCC responded by making the filing requirement permissive. The question before the Supreme Court, therefore, was whether FCC could make tariff filing *optional* for new competitors. *See infra* note 21.

20. Although FCC claimed to exempt only those carriers that had nondominant market power, the distinction between dominant and nondominant carriers in the long-distance market "amounted to a distinction between AT&T and everyone else." *MCI*, 512 U.S. at 221.

21. The D.C. Circuit first vacated the detariffing policy in 1992. AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992). The Supreme Court denied certiorari to the D.C. Circuit. MCI Telecomms. Corp. v. AT&T Co., 509 U.S. 913 (1993). FCC responded to the D.C. Circuit's opinion by instating a permissive (rather than mandatory) detariffing policy. *See MCI*, 512 U.S. at 223 ("The Commission . . . determined that its permissive detariffing policy was within its authority . . . ."); *In re* Tariff Filing Requirements for Interstate Common Carriers, 7 F.C.C.R. 8072, 8077–78 (1992) (outlining why FCC believed it acted within its statutory authority when it passed a permissive detariffing policy). The D.C. Circuit then granted summary reversal of the permissive policy, restating that a detariffing order exceeded FCC's authority. *See MCI*, 512 U.S. at 223. To this second case, the Supreme Court granted certiorari and affirmed the D.C. Circuit in 1994, two years after the first D.C. Circuit decision and more than a decade after the first FCC order. *Id.*

22. 47 U.S.C. § 203(b)(2) (1988 & Supp. IV 1993).

23. *MCI*, 512 U.S. at 227–29.

24. *Id.* at 231–32.

25. *Id.* at 225.

To support the claim that permissive detariffing constituted a "radical or fundamental change" to the Act, the Court considered, first, "the importance of the [tariff-filing requirement] to the [Act as a] whole" and, second, "the extent to which [a permissive detariffing policy] deviates from the filing requirement."[26] On the first point, the Court concluded that the relevant requirement was "the heart of the common-carrier section of the Communications Act" and that the elimination of that requirement for some carriers would be "tragic" for the regulatory regime.[27] On the second point, the Court determined that the permissive detariffing policy, which constituted "an elimination of the crucial provision of the statute for 40% of a major sector of the industry [was] much too extensive [a change] to be considered a 'modification.'"[28] The Court concluded that FCC's detariffing regulations were not entitled to *Chevron* deference because FCC's interpretation of its modification authority went "beyond the meaning that the statute [could] bear."[29]

Majorness thus played a central role in the Court's denial of deference. The Court relied on the significance of detariffing to both the statute's structure and the industry's operations in concluding that FCC had exceeded its authority to "modify" § 203 requirements. And this focus on the enactment's political and legal significance was unusual for the Court, particularly among holdings that are facially Step One holdings, denying deference based on a statute's plain meaning.

Of course, the case's necessary focus on the word "modify" arguably made the majorness distinction uniquely relevant in *MCI*; the only question in the case was the degree of change that the word "modify" could bear. But the Court did not merely decide that elimination of some requirement was too dramatic to constitute a "modification." Instead, the opinion focused on the rate-filing requirement in particular, concluding that tariff filing was "the essential characteristic of a rate-regulated industry" and that elimination of that single requirement was tantamount to total deregulation.[30]

At least one driving force behind the opinion, therefore, appears to be that the rate-filing requirement was too important as a matter of *policy* to be eliminated, not that elimination qua elimination was too dramatic to constitute "modification." *MCI* thus appears to rest in part on a *Chevron* Step Zero determination that telecommunications deregulation is a major

26. *Id.* at 229.
27. *Id.*
28. *Id.* at 231.
29. *Id.* at 229.
30. *See id.* at 231 (holding that Congress likely did not leave "the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion").

policy change that an agency should not be permitted to effect.[31]

Importantly, the Court nowhere implied that the majorness of telecommunications deregulation was enough in itself to justify judicial, rather than administrative, resolution of the debate. Rather, the implication of the Step Zero rule was that the agency should be prevented from implementing any major policy change, including telecommunications deregulation, and the Court's intrusion was necessary and appropriate only as a means of accomplishing that restraint.

B. Brown & Williamson*: Whether Nicotine Is a "Drug"*

Six years later, the Court gave a much stronger indication that *MCI* had created a Step Zero exception for major questions and that the purpose behind the Step Zero rule was to prevent agencies from implementing major policy changes.

In *FDA v. Brown & Williamson Tobacco Corp.*,[32] the Court held that the Food and Drug Administration (FDA) exceeded its authority when it determined that nicotine qualified as a "drug" under the Food, Drug, and Cosmetics Act (FDCA).[33] Section 321(g)(1)(C) of the FDCA defines drugs as "articles (other than food) intended to affect the structure or any function of the body."[34] Relying on nicotine's effects as a stimulant, tranquilizer, and appetite suppressor, FDA determined that nicotine fell within § 321(g)(1)(C) and, therefore, that the agency had authority to regulate tobacco products.[35] Having established its jurisdictional authority, FDA also passed a series of substantive regulations limiting the sale, distribution, and advertisement of cigarettes and smokeless tobacco.[36] Tobacco manufacturers, retailers, and advertisers challenged FDA's rulemaking,

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31. *See* Sunstein, *supra* note 3, at 236–42. Sunstein notes that *MCI* may be one of a trilogy of Step Zero cases denying deferential review to major policy changes. The other two cases in the trilogy, according to Sunstein, are *Brown & Williamson* and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Sunstein includes *Babbitt* in the trilogy primarily because the opinion cites the first scholarly article to have mentioned a major questions rule, an article that Justice Breyer wrote when sitting as a judge on the First Circuit. *Babbitt*, 515 U.S. at 703–04 (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986)). As Sunstein acknowledges, though, the Court's treatment of the major questions idea in *Babbitt* is limited and "cryptic." Furthermore, the *Babbitt* opinion does not affect my analysis here since my Dworkinian reconstruction of the "major questions" rule does not lose force even if it fails to fit and justify *Babbitt*. I will therefore exclude it from my analysis.

32. 529 U.S. 120 (2000).

33. 21 U.S.C. §§ 301–397 (2000).

34. *Id.* § 321(g)(1)(C).

35. *Brown & Williamson*, 529 U.S. at 127. The FDA claimed jurisdiction over cigarettes and tobacco as "combination devices," 21 U.S.C. § 353(g)(1) (2000), designed to deliver nicotine to the body. *Brown & Williamson*, 529 U.S. at 127.

36. *See id.* at 126 (describing the FDA rule).

arguing among other things that the agency lacked jurisdiction to regulate tobacco because nicotine is not properly a drug under § 321(g)(1)(C).[37]

By a 5–4 vote, the Supreme Court agreed with the tobacco industry, invalidating the FDA regulations on the ground that the agency lacked jurisdictional authority. The Court reasoned that the FDCA requires the prohibition of "dangerous" drugs and that tobacco, according to FDA's findings, could not be used safely. Pursuant to that logic, the Court claimed that FDA's designation of nicotine as a drug would require an all-out tobacco ban. The Court then concluded that Congress could not have intended the statutory definition of "drug" to encompass nicotine because Congress could not have intended to authorize FDA's criminalization of the entire tobacco industry.

Just as it had in *MCI*, the Court couched its disposition as a *Chevron* Step One holding; its primary conclusion was that FDA's broad interpretation of the term "drug" was not entitled to deference because it "contravene[d] the clear intent of Congress."[38] But in an unusual rhetorical move (especially for the Justices in the majority, all of whom belonged to the Court's conservative bloc), the Court justified its Step One conclusion by reference to postenactment legislative history.[39] The Court reasoned that a series of tobacco-specific bills passed between 1965 and 1992 demonstrated Congress's ratification of "FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products"[40] and demonstrated Congress's intent to preserve for itself exclusive regulatory authority over tobacco.[41]

The Court's reliance on postenactment legislative history seems puzzling not only because the Justices composing the majority ordinarily are disinclined to rely on legislative history but also because the Court as a whole typically disfavors "implied repeals."[42] The *Brown & Williamson* opinion focuses for thirty-three of its thirty-five pages on an implied repeal argument, concluding that later statutes implicitly subtracted tobacco from

37. *Id.* at 129, 131.

38. *Id.* at 132. Justice Scalia recently emphasized his belief that *Brown & Williamson* was a Step One holding. *See* Gonzales v. Oregon, 546 U.S. 243, 291 n.6 (2006) (Scalia, J., dissenting) ("[In *Brown & Williamson*] we relied on the first step of the *Chevron* analysis to determine that Congress had spoken to the precise issue in question . . . .").

39. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 226 (2000) (noting that the opinion's "heavy reliance on post enactment legislative history" was "puzzling" and seemed "out of character," especially given that the Justices composing the majority were Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Kennedy).

40. *Brown & Williamson*, 529 U.S. at 144.

41. *See id.* at 149 (arguing that subsequent statutes demonstrated Congress's intention to reserve for itself "exclusive control" over tobacco regulation).

42. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 154–55, 184 n.29 (1978) (outlining the Court's rejection of both the implied repeals doctrine and the use of legislative history).

the FDCA's otherwise-broad definition of "drug."[43] If the Court had relied exclusively on this disfavored reasoning, the *Brown & Williamson* opinion would seem easily impeachable.[44]

The last two pages of the opinion, however, suggest a surprising crutch to support an otherwise weak opinion. Relying exclusively on *MCI*, the Court wrote that it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency."[45] More broadly, the Court argued that "there may be reason" to deny deference in all "extraordinary cases"[46] that involve "major questions."[47]

The allusive Step Zero exclusion from *MCI* thus became explicit in the final salvo of *Brown & Williamson*. In a last-ditch effort to justify its denial of deference, the Court specifically referenced and adopted a "major questions" exception. And, as in *MCI*, the Court's justification for the Step Zero rule was that agencies should be forbidden to make such major changes.

C. Massachusetts*: Whether Carbon Dioxide Is an "Air Pollutant"*

Seven years later, the major questions exception died. In *Massachusetts v. EPA*,[48] the Supreme Court held that EPA contravened the Clean Air Act (CAA) when it *refused* to regulate vehicular emissions of greenhouse gases. The Court thus denied *Chevron* deference to an agency's stance on the major question of whether and how to respond to global warming, but it did so in a way that *encouraged*, rather than prohibited, the Agency's substantive intervention in the major policy debate.

The *Chevron* question in *Massachusetts* was whether EPA had statutory authority to regulate greenhouse gas emissions from new cars.[49] Under

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43. *See* Manning, *supra* note 39, at 274–75.

44. *See id.* at 260 ("The ratification arguments ultimately represent an unconvincing account of legislative intent, one that the Court almost surely would have rejected in the absence of nondelegation concerns."); *id.* at 274 ("[I]f the Court would otherwise have read the FDCA to include tobacco, its use of the specificity canon to narrow the FDA's authority might be characterized as a species of implied repeal.").

45. *Brown & Williamson*, 529 U.S. at 160; *see also id.* at 133 ("In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate *a policy decision of such economic and political magnitude* to an administrative agency.") (emphasis added).

46. *Id.* at 159.

47. *See id.* ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." (quoting Breyer, *supra* note 31, at 370) (internal quotation marks omitted)).

48. 127 S. Ct. 1438 (2007).

49. There were two other questions at issue in the case: whether the Commonwealth of Massachusetts had standing to challenge EPA's decision and whether EPA's refusal to

§ 202(a)(1) of the CAA, EPA is required to standardize vehicular emissions of any "air pollutant" that, in the Administrator's judgment, endangers public health or welfare.[50] The CAA defines an air pollutant as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air."[51]

Relying on these provisions, several private organizations filed a rulemaking petition with EPA, arguing that the Agency should use its § 202(a)(1) power to regulate four greenhouse gases: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. The Agency denied the petition, determining that those substances do not fall within the statutory definition of "air pollutant" and, on that basis, concluding that it lacked statutory authority to regulate greenhouse gases.[52]

In a 5–4 decision, the Supreme Court disagreed, refusing deference to EPA's interpretation of its statutory authority on the ground that greenhouse gases unambiguously fall within the statutory definition of "air pollutant." As in *MCI* and *Brown & Williamson*, the majority opinion in *Massachusetts* represented itself as a Step One holding. The Court reasoned that greenhouse gases must necessarily be air pollutants—and that EPA must necessarily have authority to regulate them—because all four gases are, unambiguously, "physical[or] chemical . . . substance[s that are] emitted into . . . the ambient air."[53]

In so holding, however, the majority opinion completely failed to address EPA's Step One argument. The Agency never disputed that greenhouse gases are physical or chemical substances, and it never disputed

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exercise its statutory authority was arbitrary and capricious. The Court's holdings on those two questions are not particularly relevant here, but the Court's analysis in both sections is interesting for the current discussion. To reach its conclusions on both points, the Court ended up emphasizing the majorness of global warming as an economic and political issue. EPA had argued that Massachusetts lacked standing in part because the Commonwealth could not show that EPA's decision *caused* any of the alleged injury (rising sea levels and loss of coastal lands). Its argument was that the refusal to regulate new car emissions was too small a decision to cause those harms. The Court responded: "[EPA's] argument rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve *massive problems* in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more-nuanced understanding of how best to proceed." *Massachusetts*, 127 S. Ct. at 1457 (emphasis added) (citations omitted). The Court thus characterized the Agency's decision as a first-step response to a massive regulatory problem.

50. 81 Stat. 499 (codified at 42 U.S.C. § 7521(a)(1) (2000)).
51. *Id.* § 7602(g).
52. *Massachusetts*, 127 S. Ct. at 1459.
53. 42 U.S.C. § 7602(g) (2000).

that those gases are emitted into the ambient air. It argued only that greenhouse gases are not "air pollution agents"[54] because the effect that they cause—global warming—is not "air pollution." EPA's textual argument was that anthropogenic greenhouse gas emissions do not, within the ordinary meaning of the word, "pollute" the air because those gases occur naturally in the atmosphere. The Agency also made a structural argument, asserting that global warming must not constitute air pollution under the CAA because the tools that the statute provides for responding to air pollution would be largely ineffective in responding to global climate change.[55]

In his dissenting opinion, Justice Scalia argued that EPA's position was at least a reasonable interpretation of statutory silence, which should have received deference under *Chevron*. That is, Justice Scalia pointed out that the CAA nowhere defines "air pollution" and argued that EPA presented a reasonable interpretation of that statutory silence in holding that global warming is *not* "air pollution." And, of course, Justice Scalia's dissent assumed that a reasonable interpretation of statutory silence is all that *Chevron* demands.

Although Justice Scalia's opinion presented a serious challenge to the majority's Step One reasoning, the majority did not expand its Step One analysis in response; instead, it stubbornly repeated its own incomplete argument.[56] As a Step One decision, therefore, the case is weak: weak on its own merits and weaker still for its failure to confront and rebut Justice Scalia's critique. There is simply no textual grounding for the holding that EPA had unambiguous authority to regulate greenhouse gases.

But, like the opinions in *MCI* and *Brown & Williamson*, the majority opinion in *Massachusetts* did not rest entirely on Step One analysis. The *Massachusetts* opinion also made a Step Zero argument, albeit an argument

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54. *See id.* (defining "air pollutant" as "any air pollution agent" that endangers public health or welfare, "*including* any physical[or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air") (emphasis added).

55. EPA argued that National Ambient Air Quality Standards (NAAQS) require the measurement of regional pollutants close to Earth but that greenhouse gases do not stay close to Earth or confined to regions. As a result, EPA argued that it would be incapable of using the CAA's statutory scheme to respond to global warming, even if it asserted jurisdiction over greenhouse gases. The Agency thus argued that Congress must not have intended for the CAA to cover greenhouse gases and global warming. If it had so intended, EPA argued, it would have provided some tool other than the NAAQS. *Massachusetts*, 127 S. Ct. at 1477 (Scalia, J., dissenting).

56. *See id.* at 1460 n.26 ("Justice Scalia does not (and cannot) explain why Congress would define 'air pollutant' so carefully and so broadly, yet confer on EPA the authority to narrow that definition whenever expedient by asserting that a particular substance is not an 'agent.' At any rate, no party to this dispute contests that greenhouse gases both 'ente[r] the ambient air' and tend to warm the atmosphere. They are therefore unquestionably 'agent[s]' of air pollution.").

that is directly opposed to the Step Zero analysis in *Brown & Williamson*. After emphasizing the majorness of global warming as a modern economic and political issue[57] (and thereby aligning *Massachusetts* with *MCI* and *Brown & Williamson* in terms of the Step Zero predicate), the *Massachusetts* majority argued that EPA should be *required* to confront this "most pressing environmental challenge of our time."[58] The opinion seemed to hold that EPA bore not only a statutory but also a social responsibility to confront the issue of global warming, and the Justices in the majority scolded the Agency for abdicating that social responsibility.[59] The majority thus held that EPA *must* express an opinion on the major issue of global warming (or at least give carefully considered reasons for refusing to do so).[60]

This holding is irreconcilable with the Step Zero holdings in *MCI* and *Brown & Williamson*. The first two major questions cases denied deference on the ground that the agencies must be restrained from making major decisions, whereas *Massachusetts* denied deference on the ground that the Agency must be forced to make a major decision.

D. Conclusion

In all three of the relevant cases, the Supreme Court highlighted the "economic and political significance" of the underlying regulatory questions, and in all three cases, the Court refused deference to the agencies' treatments of those major questions. All three cases, thus, deviate from *Chevron* for reasons that seem to relate to the majorness of the underlying issues. That is, in all three cases, the Justices rejected the agencies' interpretations in favor of their own, without making a compelling case of either statutory clarity (Step One) or executive unreasonableness (Step Two), justifying their interventions instead by reference to economic and political majorness (Step Zero).

But despite the cases' common departure from *Chevron*, they are incoherent when taken together. The Court's substantive justification for denying deference in *Massachusetts* is the opposite of the Court's substantive justification for denying deference in *MCI* and *Brown & Williamson*. The *Brown & Williamson* version of the major questions exception is, therefore, currently dead. Under *Massachusetts*, there is no

57. *Id.* at 1446–49, 1456–57.

58. *Id.* at 1446 (internal citation omitted) (quoting Petition for Writ of Certiorari, *Massachusetts*, 127 S. Ct. 1438, 1446 (No. 05-1120)).

59. *See* Freeman & Vermeule, *supra* note 5 (arguing that the problem with EPA's decision not to regulate was, at least arguably, that the decision was based on crass political calculations rather than expert scientific judgments).

60. *Massachusetts*, 127 S. Ct. at 1463.

longer a presumption against executive enactment of major policy changes, and, in fact, there might be a presumption in favor of executive enactment of such changes.

II. A RULE IN SEARCH OF A RATIONALE

The question now is whether we should celebrate or mourn the death of *Brown & Williamson*. Among today's scholars of administrative law and *Chevron* theory, there might be a strong temptation to celebrate—or at least blithely to accept—the case's demise. In the years since *Brown & Williamson* was decided, most scholars have concluded that the Court's opinion should be read narrowly or wholly rejected. Indeed, the existing literature has almost unanimously concluded that the *Brown & Williamson* rule lacks a coherent justification. And I largely agree. There is not, in the abstract, any reason to prevent agencies from making major decisions.

But, of course, there is more going on in *Brown & Williamson* than the majorness of tobacco regulation, as much of the literature has recognized. The scholarship has, therefore, imagined two alternative rationales for *Chevron* exceptionalism in *Brown & Williamson*, both of which center on deeper issues in the case: agency aggrandizement and nondelegation. In other words, some scholars have hypothesized that the Court's underlying concern in *Brown & Williamson* was the agency's expansion of its own jurisdiction (aggrandizement), while others have hypothesized that the Court's underlying concern was the statute's excessive delegation of lawmaking authority (nondelegation).

Despite having imagined and formulated these rationales, however, most scholars are skeptical of them. The trouble is that no conceptualization of the *Brown & Williamson* rule that has been proffered thus far—bare majorness, nonaggrandizement, or nondelegation—ultimately provides a justification for *Chevron* exceptionalism; all three of the underlying rationales are inconsistent with fundamental assumptions of *Chevron* theory. To support this conclusion, this Part begins with a brief description of *Chevron* theory, outlining two competing rationales for *Chevron* itself and identifying the basic assumptions and arguments that are common to both. This Part then elaborates the three proffered justifications for a major questions exception and concludes, in agreement with the near-unanimous literature, that those rationales are doctrinally and normatively unsatisfactory; all three would be difficult rules to enforce, and more importantly, all three fly in the face of the two assumptions underlying *Chevron*.

I therefore conclude that, in the absence of a compelling reformulation of the *Brown & Williamson* rule, we would be right to celebrate its death.

A. Chevron *Theory*

The competing camps of *Chevron* theorists can be divided by reference to their acceptance or rejection of the delegation metaphor. On the delegation account, deference rests on the (admittedly fictive) congressional choice to delegate law-interpreting power to administrative agencies, while on the competing account, deference is justified independently of congressional intent, resting instead on broad separation of powers principles that counsel against judicial second-guessing of agency interpretations.

Although scholars genuinely disagree on whether the fiction of delegation is useful, the two competing theories ultimately rest on the same intuitions about institutional competence: the reasons for inferring delegation are identical to the reasons for restricting judicial intervention.[61]

1. Congressional Intent

Under the more common view of *Chevron*, deference is mandated by a presumed congressional intent to delegate law-interpreting authority to agencies.[62] This "delegation" account holds that, when congressional instructions are either vague or absent, judges should assume that Congress delegated resolution of those statutory ambiguities to the Executive. In most such cases, of course, Congress did not speak to the question of interpretive authority, either explicitly or implicitly, so the delegation is purely fictional—a judicial presumption.[63]

Those who accept the delegation metaphor justify this presumption by reference to a kind of congressional meta-intention, arguing that a reasonable legislator in the modern administrative state would rather give law-interpreting power to agencies than to courts. The source of this meta-

61. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2596 (2006) (noting that the delegation fiction rests on "intensely pragmatic" considerations of institutional choice).

62. *See* Breyer, *supra* note 31, at 369 (discussing the reasons that courts presume that Congress intended for judges to defer to an agency's interpretation); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17 ("*Chevron*, however, if it is to be believed, [is] an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."); *see also* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) ("The touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used.") (emphasis added); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 623–27 (1996) (describing *Chevron* as a judicial presumption about Congress's intended delegate); Merrill & Hickman, *supra* note 10, at 872–73 (exploring the relationship between *Chevron* and congressional intent).

63. Scalia, *supra* note 62, at 517.

intention, then, is the perceived institutional superiority of the Executive relative to the Judiciary.[64] On this view, courts presume that Congress has delegated interpretive power to agencies because expert agencies are presumptively better than generalist judges at construing statutory ambiguities.[65]

2. Separation of Powers

The alternative view of *Chevron* simply jettisons the fiction of delegation and focuses squarely on the institutional competence justifications for judicial restraint.[66] On this version of *Chevron*, courts defer to executive-branch interpretations because they recognize that agencies are better than judges at making the kinds of technical and political decisions that are involved in the daily administration of regulatory statutes.

Some theorists who advocate this reading of *Chevron* believe that judicial restraint is constitutionally required under a forceful reading of the separation of powers,[67] while others advocate deference on purely pragmatic and consequentialist grounds, arguing that deference will lead to better policy results.[68] For present purposes, the constitutionality or

64. *See* Breyer, *supra* note 31, at 365, 397 (noting that the pre-*Chevron* body of administrative law represented a "skewed . . . view of institutional competence" and justifying deference on the ground that it plays to courts' and agencies' relative expertise).

65. *See generally* Sunstein, *supra* note 3, at 198–205 (summarizing the key arguments in support of the implied-intent reading, put forth by Justices Breyer and Scalia in the 1980s). As Sunstein describes, Justices Breyer and Scalia, though they disagreed as to the appropriate scope of mandatory deference, agreed that the implied-intent reading of *Chevron* was best. But, as Sunstein points out, both based their support of that reading on pragmatic considerations about relative institutional competence.

66. *See* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 689–90 (2006) (casting *Chevron* as an acknowledgement by the Justices of the limits of the Judiciary); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 357 (2000) (referring to *Chevron* deference as "a prudential doctrine that the courts have elected to apply independent of congressional or statutory mandates"); Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 270 (1988) ("[C]ourts owe deference to agency interpretation because the agency-court relationship is not supervisory . . . but more akin to one of respect or noninterference indicative of coequal branches."); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2229–30 (1997) (listing and explaining several practical benefits of placing policymaking power in the hands of agencies); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 309–10 (1986) (discussing agency expertise); Sunstein, *supra* note 61, at 2595–96 (arguing that *Chevron* deference arises from judicial recognition that policymaking properly rests in the Executive).

67. *See* Kmiec, *supra* note 66, at 269 (arguing that mandatory deference arises from "a coalescing of the separation of powers" and the courts' rejection of a constitutional nondelegation doctrine); Pierce, *supra* note 66, at 2229 (arguing that the *Chevron* opinion "anchored" the deference doctrine "securely in the Constitution").

68. *See* Gersen & Vermeule, *supra* note 66, at 687–88 (advocating *Chevron* as a voting

nonconstitutionality of this view is irrelevant; the basic idea does not depend on its constitutional foundations. Thus, the separation of powers account holds that judges should defer to agency interpretations because they should recognize, independently of any spectral congressional instructions, that agencies will do a better job of interpreting ambiguous statutes than courts will do.

3. Conclusion: Chevron*'s Two Assumptions*

From this rough sketch of *Chevron* theory, we can extract two assumptions that are common to all justifications of deference. First, all *Chevron* theorists make an "institutional choice assumption." *Chevron* assumes that at the time of the doctrine's application, the institutional choice is limited to the court and the agency. In other words, regardless of *Chevron*'s legal origins, a deference doctrine makes sense because, in the ordinary case, judges must choose between the agency's interpretation and their own.[69]

Second and subsequent, all theorists make an "institutional capacity assumption." *Chevron* theory holds that, as between the Judiciary and the Executive, agencies are frequently (or usually, or always) better interpreters of regulatory statutes than judges, thanks to their greater technocratic expertise and democratic accountability. All theorists therefore assume that we should, at least by default, prefer agencies to courts.

B. Chevron *Theory and Major Questions: The Problems with Majorness, Nonaggrandizement, and Nondelegation*

Any workable justification for a major questions exception should operate within the boundaries of *Chevron*'s two universally accepted intuitions. That is, the rationale for any *Chevron* exception must not be that judges are ordinarily better at interpreting regulatory statutes than agencies or that judges may allocate interpretive decisionmaking to a third body, such as Congress, rather than choosing between the agency's interpretation and their own. Such arguments would counsel in favor of rejecting *Chevron* wholesale; they cannot justify the mere creation of retail exceptions.

Nevertheless, as we shall see, all three of the proffered rationales for the major questions exception—majorness, nonaggrandizement, and

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rule in order to take better advantage of the doctrine's practical benefits); Sunstein, *supra* note 61, at 2596 ("The foundations of *Chevron* . . . are intensely pragmatic . . . .").

69. *See* Sunstein, *supra* note 3, at 232–33 (noting that "[b]y hypothesis," *Chevron* is in play only when "the only question is whether to accept an agency's resolution or instead to rely on the interpretation chosen by a federal court").

nondelegation—fight one or both of these fundamental assumptions of *Chevron* theory.

1. Bare Majorness

The most straightforward explanation for the major questions exception, of course, is the superficial view that agencies should be prevented from implementing major policies. Writing during his tenure as a First Circuit judge in 1986, Justice Stephen Breyer advanced this understanding of *Chevron* on the ground that Congress was unlikely to have delegated major questions to the Executive.[70] In his words, Justice Breyer's argument was that Congress was "more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[71] Since deference depends on a delegation and since Congress does not usually delegate major questions to the Executive, Justice Breyer argued, the Court should be less inclined to defer when an agency addresses a major question.[72]

But this bare majorness account raises both doctrinal and theoretical difficulties. As a blanket Step Zero exception, a bare majorness rule would be doctrinally problematic because it would be difficult to administer, and it would be theoretically unjustified because it fights both of the fundamental assumptions that underlie *Chevron* deference.

The first (more mundane) problem with the bare majorness view is an administrability problem. Consider *MCI*, the birthplace of the major questions exception. As Sunstein has pointed out,[73] it is difficult to determine what the relevant distinction is between that case and *Chevron* itself if we focus only on the majorness of the political issues. The tariff-filing requirement at issue in *MCI* was not clearly of greater political or economic significance than the bubble policy at issue in *Chevron*.[74] If anything, the bubble policy had greater economic significance than the tariff-filing requirement since the bubble policy affected all industrial manufactories, while the tariff-filing requirement affected only long-distance telephone carriers.

But even assuming that the policies at issue in *MCI* and *Brown &*

70. Breyer, *supra* note 31, at 370.

71. *Id*.

72. In later years, Justice Breyer has indicated that he intended "majorness" to be only one of many factors that judges should consider when determining whether Congress had, in fact, delegated the relevant question to the agency.

73. Sunstein, *supra* note 3, at 232–33.

74. The question in *Chevron* was whether EPA could interpret the term "stationary source" as used in the CAA's emissions restrictions to refer to an entire factory rather than an individual smokestack. This simple reinterpretation had enormous practical consequences.

Williamson were appreciably more major than the policy at issue in *Chevron*,[75] we still would need a mechanism for categorizing future major questions cases.[76] The Court never gave any indication, other than its somewhat vacuous reference to "economic and political significance," of how lower courts should determine whether agency enactments are more like *Brown & Williamson* or *Chevron*. Furthermore, the line between major and minor policies is easy to distort by reframing the predicate question. If the question in *MCI* had been whether deregulation of the telecommunications industry was a major policy change, then the Court's "yes" answer would have been clearly defensible. But as the *MCI* dissent pointed out, a narrower framing of the question might have been more accurate: whether a permissive detariffing policy for designated nondominant interexchange long distance carriers constituted a major policy change. So framed, the question's answer is much less clear.[77]

In the end, then, a bare majorness line does not provide an administrable rule of decision for future cases because there is no principled difference between a major question and a minor one. Thus, the *Brown & Williamson* rule might not be worthy of mourning or reincarnation in this form; if its only purpose were this prohibition of major executive enactments, the *Brown & Williamson* doctrine would seem excessively error-prone.

The second and more profound problem with the bare majorness understanding of the *Brown & Williamson* rule is that it offends *Chevron*'s assumptions about institutional choice and institutional capacity. Justice Breyer's argument, remember, is that judges should review major questions because reasonable legislators would not want to delegate those questions to agencies. But reasonable legislators surely would not want to delegate those questions to judges either. Within *Chevron*'s hypothesis that we must choose between the Executive's interpretation and the Judiciary's, it should be clear that agencies are better equipped than judges to answer *major* political questions just as they are better equipped to answer *minor* ones. In fact, the majorness of the policy makes the technocratic expertise and democratic accountability of the decisionmaker more relevant, not less. Justice Breyer, however, offers no reason for believing that judges are

75. *See* Sunstein, *supra* note 3, at 232 (arguing that the bare majorness line fails to distinguish the major questions cases from *Chevron* because the policy at issue in *Chevron* also had major economic and political consequences).

76. *See id.* at 233 (arguing that "the line between interstitial and major questions is thin").

77. The same can be said of *Brown & Williamson*. If the question had been whether criminalizing the tobacco industry is a major policy change, then the Court clearly was right that it is. But if the question had been whether an incremental increase in advertising and sales restrictions on cigarettes and smokeless tobacco constitutes a major policy change, then the Court's decision seems much more dubious.

systematically better than agencies at answering major questions. He merely ignores the institutional capacity assumption, making no effort to rebut it.

The only way to reconstruct a majorness exception to avoid this perverse perception of institutional capacity is, instead, to fight *Chevron*'s institutional choice assumption. One might believe—and maybe Justice Breyer believed—that Congress would be more likely to remain an active player in the institutional game when major questions are at issue. Maybe Justice Breyer was comfortable with a rule that requires judicial second-guessing of major administrative enactments because he believed that Congress retained working control over those questions and would answer them itself if the agency were forbidden to do so. If this assumption proved accurate in most major questions cases, then a majorness exception might well comport with *Chevron*'s institutional capacity assumption by allowing the Legislature, rather than either the Judiciary or the Executive, to make policy.

But the bare majorness rationale does not, in itself, justify skepticism towards *Chevron*'s institutional choice assumption. Even in cases of major significance, Congress might have checked out of the regulatory regime, leaving all further rulemaking to the experts in the Executive. A bare majorness exception, therefore, would not necessarily leave policymaking to legislators; it might, instead, allow judges to "make policy" by narrowing regulatory statutes and invalidating agency enactments even when Congress is extremely unlikely to correct the Judiciary's mistakes.

In the end, then, a majorness exception violates *Chevron*'s theory of institutional capacity, empowering judges relative to agencies in the interpretation of major questions. The only way to justify that outcome would be to make a counter-*Chevron* assumption that Congress is a viable institutional option when major questions are at issue. The bare majorness rule thus lacks both practical and theoretical virtue. As a judicial doctrine, the rule would be error-prone because the majorness line is too difficult to administer. And as a *Chevron* exception, the rule lacks normative justification because major questions, just like minor ones, trigger the theoretical underpinnings of the deference doctrine and therefore should trigger the doctrine itself.

So, in short, the *Brown & Williamson* rule should not be reincarnated in a bare majorness form.

2. Agency Aggrandizement

The first of the two alternative justifications for *Chevron* exceptionalism in the major questions cases is jurisdictional expansion or "agency

aggrandizement."[78] Scholars putting forward the nonaggrandizement rationale suggest that the intuition underlying the major questions exception is that courts should exercise greater scrutiny when an agency expands its own jurisdictional reach. Self-aggrandizing interpretations, the argument goes, might represent unscrupulous power-grabbing rather than responsible lawmaking, and the Judiciary should be wary of those interpretations.[79]

This nonaggrandizement justification for *Chevron* exceptionalism provides at least a plausible explanation for the disposition of *Brown & Williamson*. The Court may have denied deference in that case because FDA's interpretation of the term "drug" would have given the agency new power over an enormous sector of the American economy.[80] Perhaps, then, the background story that justified the denial of deference in *Brown & Williamson* was a story of presidential power-grabbing.[81]

But this justification for a Step Zero exception, even if descriptively plausible, runs into the same normative-theoretical difficulties as the bare majorness view. It too adopts a skewed perception of both institutional capacity and institutional choice. In its best light, a nonaggrandizement rule rests on a view that agencies engage in a kind of conflict of interest when they adjust their own mandates.[82] As it relates to *Chevron* theory, this argument is superficially convincing inasmuch as it centers on a *Chevron*-style question of institutional capacity. Perhaps we want an independent body, the Judiciary, to protect against presidential power

78. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 261 (2004) (defining "major questions" as those that implicate "the issue of the reach of [the agency's] own regulatory authority"); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1015–16 (1999) (casting the distinction between major and minor questions as a distinction between statutory constructions that involve a "detail in a statute whose general application is undisputed" (minor questions) and statutory constructions that involve a "fundamental issue of the limits of administrative jurisdiction" (major questions)); Merrill & Hickman, *supra* note 10, at 844–45 (defining major, or "extraordinary," questions as those in which "issues about the scope of the agency's jurisdiction are concerned").

79. *See* Sunstein, *supra* note 3, at 234–36 (considering the argument that agencies should not be allowed to determine "the scope of their own authority").

80. *See* Armstrong, *supra* note 78, at 261 (describing *Brown & Williamson* as a nonaggrandizement holding); Merrill & Hickman, *supra* note 10, at 844 (arguing that the majorness language in *Brown & Williamson* is best understood as indicating jurisdictional concerns).

81. Of course, this explanation does not fit *Massachusetts*, in which the Court encouraged EPA to expand its jurisdiction.

82. *See* Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting) ("[W]e cannot presume that Congress implicitly intended an agency to fill 'gaps' in a statute confining the agency's jurisdiction, since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power." (citations omitted)).

grabs.[83] But there is little reason to believe that executive agents will systematically abuse their right to adjust the scope of their jurisdiction. Indeed, there is no coherent theory of bureaucratic incentives that would validate such skepticism.[84] Instead, agencies' decisions to aggrandize or to abrogate their power seem to be core *Chevron*-style decisions, both technical and political in nature.

To use the two major questions cases as anecdotal examples: When FDA asserted jurisdiction over tobacco, it based its decision on painstaking analysis of nicotine's addictive properties and on careful consideration of the jurisdictional assertion's political consequences.[85] Similarly, FCC considered both the technical and political significance of telecommunications deregulation before it adjusted the Communications Act's tariff-filing requirements.[86] There was no reason, in either case, to believe that the agencies revised their jurisdictional reaches because the bureaucrats had personal or institutional preferences for either greater or lesser power.

Furthermore, even if executive agents held skewed preferences that would lead them to push systematically for superoptimal or suboptimal power, there are political checks on agencies' decisions to expand or contract their jurisdiction.[87] It therefore seems unlikely that agencies would be able to adjust their mandates arbitrarily. At the very least, political forces would require agencies to develop compelling technical and political reasons for their decisions, even if those reasons are not the bureaucrats' primary or genuine motivations.

Based on this analysis, a jurisdictional exception to *Chevron* deference seems to violate *Chevron*'s institutional capacity assumption. Because the decision to assert or deny jurisdiction is one that requires both technical expertise and political judgment, it is exactly the kind of decision that

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83. *See id.* (stating that the "Court has never deferred to an agency's interpretation of [its] jurisdiction").

84. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–34 (2005) (disputing the theory that executive bureaucrats' self-interest will lead them to push for larger budgets and larger jurisdiction by noting a host of plausible incentives that might lead bureaucrats to favor optimal or even suboptimal money and power). *But see* Armstrong, *supra* note 78, at 209–11 (asserting that agencies' jurisdictional expansions arise from agency "self-interest").

85. *See generally* DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2001) (describing FDA's decisionmaking process in concluding it could assert jurisdiction over cigarettes and tobacco).

86. *See generally* Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMM. L.J. 367, 370–73 (1997) (discussing FCC's considerations in whether to regulate telecommunications).

87. *See* Levinson, *supra* note 84, at 932–34 (recognizing that political figures and not "career bureaucrats" ultimately run an agency).

Chevron intended to prevent judges from making.[88]

The advocates of a jurisdictional exception, however, do not limit their argument to an alarmist account of agency incentives. They also argue that there is a relevant theoretical distinction between decisions of *how* to regulate, which are nonjurisdictional decisions that should be left to agencies, and decisions of *whether* to regulate, which are jurisdictional decisions that should be left to *Congress*.[89] On this view, the reason for denying deference to jurisdictional decisions is not that they are apolitical, such that judges can handle them, but rather that they are superpolitical, such that Congress must handle them. On the institutional hierarchy, these advocates argue, jurisdictional decisions must be left to the first-best actor: the Legislature.

Leaving aside the questionable assumption that jurisdictional decisions are genuinely and perceptibly different in kind from nonjurisdictional decisions,[90] this argument obviously falls into the same trap that the rehabilitation of majorness fell into: it assumes, without establishing, that Congress is still a viable institutional option. Under *Chevron*'s institutional choice hypothesis, congressional resolution of jurisdictional questions—like congressional resolution of nonjurisdictional questions—is not an option. The only relevant consideration is whether the Executive or the Judiciary is the better institutional decisionmaker. Within this framework, it seems clear that for both categories of questions—both whether and how to regulate—judges are less capable and less attractive decisionmakers than executive agencies.

The nonaggrandizement rationale for the *Brown & Williamson* rule, therefore, is equally as unattractive as the bare majorness rationale. Jurisdictional decisions, including self-aggrandizing ones, should get deference. Therefore, there would be little reason to mourn—and no reason to reincarnate—the Step Zero exception in a nonaggrandizement form.

3. Excessive Delegations

A second possible justification for the major questions rule is the much-

88. *Cf.* Sunstein, *supra* note 3, at 235 ("If an agency is asserting or denying jurisdiction over some area, it is either because democratic forces are leading it to do so or because its own specialized competence justifies its jurisdictional decision.").

89. *See generally* Armstrong, *supra* note 78, at 245–46 (exploring differences between determining how to regulate and determining when to regulate); Merrill & Hickman, *supra* note 10, at 909–14 (considering the kinds of jurisdictional issues to which *Chevron* applies).

90. *See* Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 381 (1988) (Scalia, J., concurring) (arguing that the distinction between jurisdictional and nonjurisdictional questions is fuzzy at best).

debated nondelegation principle[91]—which is described alternately as a constitutional doctrine,[92] an interpretive canon,[93] and a haunting distraction.[94]

Whatever status the nondelegation principle ought to hold in modern law, as a positive matter it might explain the major questions cases. That is, the intuition driving *Brown & Williamson* may be that the FDCA, if understood to authorize FDA's regulations, would represent an unconstitutionally broad delegation of policymaking authority. This understanding would explain the Court's tortured analysis in the case, which might just be the interpretive acrobatics necessary to avoid striking down the statute on constitutional grounds.[95]

This idea overlaps somewhat with the nonaggrandizement rationale. One problem with jurisdictional expansions is that they attempt to stretch statutory authority beyond the original delegation. But nondelegation is more ambitious than nonaggrandizement. It encompasses agency enactments that neither strengthen the agency's enforcement power nor extend the agency's jurisdictional reach. Nondelegation concerns arise whenever the agency claims broad interpretive or policymaking authority, which might be exercised either to narrow or to expand a statutory program.

This nondelegation rationale for a major questions exception is, at first blush, the least offensive to *Chevron*'s core assumptions. Ultimately, though, the nondelegation account's compliance with *Chevron* fundamentals exists only in theoretical space; once applied, nondelegation falls into the same traps as majorness and nonaggrandizement.

On the strongest version of nondelegation, courts deny deference to agency interpretations not because the judges are second-guessing the agency's decision but rather because they are invalidating Congress's

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91. Manning and Sunstein share this view, though both ultimately conclude that the nondelegation understanding is normatively troubling. *See* Manning, *supra* note 39, at 223–24 (representing the *Brown & Williamson* case as an example of the weakness of the nondelegation doctrine); Sunstein, *supra* note 3, at 245–46 (listing the problems with the nondelegation doctrine).

92. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528–30 (1935) (enforcing the nondelegation doctrine as a constitutional rule).

93. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (indicating that the Court enforces nondelegation by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) (arguing that the nondelegation doctrine is now enforced through "a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own").

94. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (claiming that the nondelegation doctrine is "undead").

95. *See* Manning, *supra* note 39, at 260 (suggesting that the weak arguments in *Brown & Williamson* are understandable in light of background nondelegation concerns).

decision.[96] The nondelegation doctrine is a constraint on the Legislature, not the Executive, which requires Congress to provide an "intelligible principle" to define the scope of its delegations.[97] Even when courts deny *Chevron* deference to promote nondelegation values, therefore, the invalidation of the agency's enactment is merely a means to the end of enforcing a constitutional limitation on Congress. This feature of nondelegation distinguishes it from both majorness and nonaggrandizement since both of those rationales focus on agency misbehavior, attempting to keep bureaucrats within legislatively "intended" boundaries.

The relevance of the nondelegation view's focus on legislation rather than on agency enactments is that the rule does not rely in the abstract on the faulty assumption of Congress's continuing presence in the regulatory regime. That is, it does not fight *Chevron*'s institutional choice assumption. When applying the nondelegation doctrine in its most ambitious and robust form, judges do not believe that they are "returning" questions to, or "reserving" questions for, Congress; in other words, they do not argue that the Legislature failed to delegate and thereby retained power over the relevant question. Instead, they emphatically believe that Congress *did* intend to delegate authority but that the delegation itself was unconstitutional. Judges enforcing nondelegation constraints, therefore, are not limiting agency power in favor of congressional power. They are limiting congressional power itself, by purging American law of unconstitutional statutory breadth.

The problem with this view is that it is impossible to apply in practice, whether attempted directly or through statutory interpretation. At the most basic level, the problem with nondelegation is that the line between excessive and appropriate delegations is notoriously difficult to draw.[98] Because no serious person in the modern administrative state believes that Congress must answer every quotidian policy question that arises, there must necessarily be some threshold—some magnitude of importance, or sensitivity, or majorness of policy questions—that triggers nondelegation concerns.[99] But no one actually knows where that threshold lies. As a

96. *See* Sunstein, *supra* note 93, at 329 ("[A] very strong version of the nondelegation doctrine would suggest that agencies can . . . do nothing [if Congress has not spoken clearly as to the scope of their authority] because the underlying grant of power is effectively void.").

97. *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (explaining that as long as Congress provides intelligible principles to guide agency action then there is no abuse of legislative power).

98. *See generally* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324–28 (1987) (addressing the problems in determining whether a given delegation is appropriate).

99. *See id.* at 325 (acknowledging the challenge of distinguishing between permissible and impermissible delegations); Sunstein, *supra* note 93, at 326 ("[T]he line between a

result, courts will make frequent errors, narrowing statutes that are constitutionally unproblematic and upholding interpretations that are constitutionally troublesome.

Of course, this line-drawing problem might not be a *Chevron* problem if the project of distinguishing constitutional from unconstitutional delegations is a legal project, falling within judges' core competency. In other words, if evaluating delegations were a legal project, then assigning nondelegation enforcement to the Judiciary would not violate *Chevron*'s institutional capacity assumption.

But the line-drawing project turns out to be far more political than legal. Ultimately, the simple account of the line-drawing problem—the absence of a threshold—is too simple: the nondelegation principle lacks not only a clear threshold but also, more significantly, a genuine theory. That is, on closer inspection, the "intelligible principle" requirement lacks substantive content. There simply are no criteria for determining whether or not a statute provides an intelligible principle.[100] As a result, judgments regarding which delegations to enforce or what limiting principles to impose will be inevitably arbitrary from a constitutional point of view.[101] In the end, those determinations will be based on value judgments and political preferences.[102]

This realist hypothesis is not radical. It is merely a restatement of *Chevron*'s institutional capacity assumption. One of *Chevron*'s most basic insights is that choices as to how and when to implement regulatory statutes, at least when the statutes are of ambiguous scope, are political rather than legal choices.[103] And those political choices should be left to the discretion of a democratically accountable institution. Of course, to the extent that any delegations are constitutionally problematic,[104] agencies will make the same errors as judges: they, too, lack any doctrinal means of

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permitted and a prohibited delegation is one of degree, and inevitably so.").

100. *See* Stewart, *supra* note 98, at 324 (noting the "absence of judicially manageable and defensible criteria to distinguish permissible from impermissible delegations").

101. *Cf.* Sunstein, *supra* note 93, at 333 (noting that certain categories of "clear statement" rules, such as the canon against extraterritorial application, constitute clear and easily administered constitutional constraints that can be enforced against Congress through *Chevron* exceptionalism).

102. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 792–93 (1999).

103. *See* Sunstein, *supra* note 61, at 2601–02 (rooting *Chevron* in a realist account of judicial decisionmaking); Sunstein, *supra* note 93, at 329 (calling *Chevron* a "prodelegation" doctrine); *see also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 880–81 (2006) (presenting empirical evidence of the political nature of judicial decisionmaking in *Chevron* decisions).

104. *See* Posner & Vermeule, *supra* note 94, at 1723 (questioning the constitutional foundation of the nondelegation doctrine).

deciding the extent to which they may constitutionally exercise a delegated authority. But their arbitrary decisions, at least, will benefit from greater technocratic and democratic legitimacy.

If one accepts that these justiciability problems exist and accepts *Chevron*'s realist story, then the only remaining argument to support a nondelegation restriction is to fight the central allegation of nondelegation skeptics: that judicial constructions will stick. That is, nondelegation enthusiasts might respond to concerns about judicial policymaking by arguing that Congress can and should intervene to supersede judge-made outcomes that it finds politically troublesome. In fact, some advocates of nondelegation make exactly this argument, expressing their hope for lasting congressional involvement in terms of the need to enforce legislative "responsibility" for relevant policy choices.[105]

In making this argument, of course, nondelegation enthusiasts wander into the same trap that catches the majorness and nonaggrandizement enthusiasts: they start to fight *Chevron*'s institutional choice assumption. Unless the nondelegation advocates assume that Congress remains a viable institutional option, their proposed exception to *Chevron* merely elevates judicial policymaking over administrative policymaking, which is to strike at the very heart of *Chevron* theory.[106]

Like the bare majorness and nonaggrandizement accounts of the *Brown & Williamson* rule, the nondelegation account lacks normative validity. Ultimately, the enforcement of a nondelegation principle through *Chevron* exceptionalism would deserve both *Chevron* and nondelegation.

Thus, the *Brown & Williamson* rule cannot be justified by reference to a nondelegation theory. The rule should be neither mourned nor reincarnated in that form.

4. A Brief Return to Chevron *Theory: A Second Theoretical Divide*

Based on the preceding discussion, we can identify a second, and more relevant, division among *Chevron* theorists: those who happily embrace and those who begrudgingly tolerate *Chevron*'s institutional choice assumption. Those who embrace the assumption, who hold a deep-seated skepticism towards Congress's interest and ability to engage in ordinary

105. *See, e.g.*, David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 731–32 (1999) (discussing the constitutionality of legislative responsibility); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 99 (1993) ("When the elected lawmakers delegate, the people lose . . . .").

106. *See* Sunstein, *supra* note 93, at 330 (noting that *Chevron* is in play only when Congress has necessarily delegated either to the Judiciary or to the Executive).

regulation, remain the strongest supporters of deference and the harshest critics of proposed limitations on *Chevron*'s scope.[107] On the other hand, those who worry about the institutional choice assumption, who harbor a quixotic conception of Congress's interest and ability to engage in daily regulation, are something like *Chevron* apologists; they gladly support proposals to constrain *Chevron*'s application.[108]

This debate, though, turns on an empirical question that neither side bothers to answer empirically. And the right answer is likely to be somewhere in the middle: Congress neither never nor always remains actively interested in monitoring established regulatory regimes.

C. Conclusion: A Rule Without a Rationale?

As it has been understood, the major questions rule lacks a workable rationale. When a major question or a jurisdictional question arises, we should prefer the Executive's answer to the Judiciary's; and when a statute confers broad authority, we should prefer to have the Executive, rather than the Judiciary, decide the extent to which that authority should be exercised. Absent some other justification for *Chevron* exceptionalism, therefore, the deference doctrine should apply in full force when an agency implements a major policy, aggrandizes its jurisdictional reach, or exercises a broad delegation.

Thus, the *Brown & Williamson* rule should be neither mourned nor reincarnated in any of the forms that the scholarship has proffered thus far.

III. A NEW RATIONALE: THE NONINTERFERENCE VIEW

So why reincarnate this pesky rule? Because there is another rationale for *Chevron* exceptionalism in *MCI*, *Brown & Williamson*, and *Massachusetts*, and that rationale *does* work, both theoretically and instrumentally.

The best justification for the *Brown & Williamson* rule is a practical idea orthogonal to majorness: when Congress has, in fact, remained actively interested in a regulatory regime, agencies should be forbidden from enacting regulations that would interfere with ongoing congressional bargaining. In the background of both *MCI* and *Brown & Williamson*, Congress was actively considering changes to the relevant regulatory

107. *See* Gersen & Vermeule, *supra* note 66, at 725 (suggesting the "voting rule" version of *Chevron* as a means of decreasing the "strain" that the *Chevron* doctrine has come under in the last two decades); Manning, *supra* note 39, at 227–28 (arguing that *Brown & Williamson* undermined *Chevron*'s laudable goals); Sunstein, *supra* note 61, at 2582 (defending "the law-interpreting authority of the Executive Branch").

108. *See* Breyer, *supra* note 31, at 371–72 (questioning why the courts should ever defer); Merrill & Hickman, *supra* note 10, at 836 (arguing for narrowing *Chevron*'s scope).

regimes. And in both cases, the Court prevented the agencies from distorting the regulatory status quo around which Congress was bargaining—or, more accurately, the Court restored a regulatory status quo ante so that congressional negotiations could pick up where they had left off.

The *Brown & Williamson* rule, then, was—and should be reincarnated as—a doctrine of noninterference, designed to prevent institutional intermeddling between the Executive and Legislative Branches. In this sense, the exception is similar to doctrines of preemption, which prevent state governments from interfering in federal regulatory domains; and it is similar to doctrines of abstention, which prevent the courts from interfering in the political branches' or the states' regulatory domains.

This Part describes the foundations of the noninterference understanding in the text of the *MCI* and *Brown & Williamson* opinions and in the background stories of those cases, and then it elaborates the noninterference rule by reference to analogous doctrines that similarly prevent institutional intermeddling and decisional simultaneity. In other words, this Part makes two crucial but modest contributions to the Article's thesis, demonstrating that the noninterference rationale is a plausible description of the cases and that a noninterference rationale is an ordinary judicial concern. The argument that the noninterference rule is instrumentally justified and is sufficiently important to be reincarnated is reserved for Part IV.

A. Origins of Noninterference

A noninterference understanding is not an obvious interpretation of *MCI* and *Brown & Williamson* given that the Court's central concern appeared to be majorness. Institutional intermeddling is, admittedly, orthogonal to majorness. Nevertheless, there is support for the noninterference understanding both in the text of the opinions and in the history of the cases. This Part, first, describes the Court's references to institutional intermeddling and, second, tells the story of interference that operated in the background of each case.

1. Noninterference in the Majority Opinions

In both *MCI* and *Brown & Williamson*, the majority opinions hinted that prevention of institutional intermeddling partly motivated the Court's dispositions. In *MCI*, the Court noted that questions of detariffing and deregulation should "address themselves to Congress, not the courts."[109]

109. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 234 (1994) (internal quotation

The decision to reserve a question for Congress, however, is an unusual one in a *Chevron* opinion. *Chevron* analysis typically assumes that Congress empowers agencies to make policy decisions in order to avoid the cost of doing so itself.[110] Significantly for the noninterference view, the explanation that the Court offered for this unusual argument was that, at the time the opinion was written, there was "considerable debate in other forums about the wisdom of the filed rate doctrine . . . and, more broadly, about the value of continued regulation of the telecommunications industry."[111] Although not explicit, the Court's argument seems to have been that the agency should allow Congress to address deregulation because the Legislature had already entered the debate.[112] In other words, the Court seemingly held that active congressional bargaining and deliberation should be allowed to continue, free of FCC interference.

In *Brown & Williamson*, the noninterference logic was different: the Court did not focus on ongoing debate, either in Congress or elsewhere. Instead, the Court concluded that Congress, because it had already reached a bargain regarding tobacco regulation, had implicitly instructed the agency not to interfere. The upshot of the Court's puzzling analysis of postenactment legislative history was that Congress had "adopted a regulatory approach to the problem of tobacco and health that contemplated no role for the FDA."[113] To support this conclusion, the Court quoted (among many other things) a Senate Report stating that "any further regulation in this sensitive and complex area must be reserved for specific [c]ongressional action,"[114] and a circuit court case holding that FDCA expansion "is the job of Congress," not of FDA.[115] The Court thus held, quite unusually, that Congress retained regulatory control over tobacco and that its retention of control necessarily precluded concurrent administrative action. This conclusion rests on a kind of dormant noninterference theory:

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marks omitted) (quoting Armour Packing Co. v. United States, 209 U.S. 56, 82 (1908)). Interestingly, *Armour Packing* predates *Chevron* by more than seven decades.

110. *See infra* Part IV (noting that one of *Chevron*'s fundamental assumptions is that Congress is no longer actively involved in the regulatory regime).

111. *MCI*, 512 U.S. at 234 (internal quotations and citations omitted).

112. Although the Court's language about "considerable debate in other forums" does not refer directly to *congressional* debate, the Legislature is the only alternative forum that should matter to *Chevron* analysis. A *Chevron* enthusiast (such as Justice Scalia, the author of the *MCI* majority) surely would be unimpressed by debate in, say, academic institutions or political think tanks. Furthermore, as I will describe fully in the next section, Congress certainly fits the description of an "other forum" that was debating deregulation at the time the Court decided *MCI*.

113. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 149 (2000).

114. *See id.* at 151 (quoting S. REP. NO. 94-251, at 43 (1975) (providing the additional views of Sens. Hartke, Hollings, Ford, Stevens, and Beall)).

115. *Id.* at 152–53 (quoting Action on Smoking & Health v. Harris, 655 F.2d 236, 243 (D.C. Cir. 1980)).

that the agency should be forbidden to intrude in a regulatory domain if the subject matter belongs exclusively to Congress.

2. Noninterference in the Background of Each Case

The Justices, however, did not directly discuss the most compelling evidence for the noninterference view of *MCI* and *Brown & Williamson*: the story of congressional deliberations proceeding in the background of each case. In both cases, members of Congress were debating the relevant regulatory regimes both before and during the agencies' deliberations. Furthermore, in both cases, the agencies' decisions to intervene apparently affected congressional negotiations. In the telecommunications case, agency intervention disrupted active congressional debate: deliberation paused after FCC completed its rulemaking, but negotiations quickly resumed and intensified after the Court vacated the agency's enactments. In the tobacco case, agency intervention disrupted reasoned congressional inertia: deliberation intensified dramatically after FDA completed its rulemaking, but debate quickly died after the Court vacated the agency's enactments. In both instances, the relevant agency's interference altered the stakes in Congress's game of public choice, potentially wasting time and resources by forcing stakeholders and legislators to adjust their negotiating positions to a new baseline.

a. Telecommunications Deregulation

Congress started considering new legislation in the area of telecommunications regulation in 1976, when AT&T began lobbying to diminish FCC's power over the industry.[116] The 1976 legislation, however, was not a serious proposal. Rather, it was a rent-seeking bill, derided as the "Bell Bill,"[117] which AT&T introduced in an attempt to curb FCC's earliest procompetitive policies.[118] Although the 1976 bill failed to emerge from committee, it sparked congressional interest in telecommunications reform, and that interest remained strong throughout the ensuing deregulatory process.

The first serious legislation proposing wholesale revision to telecommunications policy was introduced in late 1979,[119] which was the

116. *See* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 183–87 (The Brookings Institution 1985) (describing AT&T's involvement with FCC and describing Congress's reaction).

117. *Id.*

118. *Id.* at 179.

119. Another nonserious bill was introduced in 1978, *id.* at 187; H.R. 13015, 95th Cong. (1978), which sparked lengthy hearings, *Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the H. Comm. on Interstate and Foreign*

same year that FCC started considering and writing its First Report on long-distance detariffing.[120] Although neither the Communications Act of 1979[121] nor a later version, the Telecommunications Act of 1980,[122] passed either chamber of Congress, debate on those two bills paved the way for a more modest amendment to communications law and FCC jurisdiction. The Record Carrier Competition Act of 1981 passed shortly thereafter.[123]

Continuing throughout the first half of the 1980s—as FCC gradually fine-tuned its detariffing policy[124]—Congress debated both the general wisdom of telecommunications deregulation[125] and the specific benefits of proposed statutory overhauls.[126] Also during that time, Congress held many oversight hearings, specifically considering FCC's approach to competition policy and proposing changes to FCC's regulations.[127] Once

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Commerce, 95th Cong. (1978), but did not make it to a vote in either chamber. DERTHICK & QUIRK, *supra* note 116, at 187.

120. Competitive Carrier Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308, 308–09 (1979); Competitive Carrier First Report and Order, 85 F.C.C.2d 1, 3–5 (1980).

121. H.R. 3333, 96th Cong. (1979).

122. H.R. 6121, 96th Cong. (1980).

123. Pub. L. No. 97-130, 95 Stat. 1687 (repealed 1994).

124. FCC issued six reports implementing its detariffing policy, finalizing and releasing the last report in January of 1985. *See* Schoenwald, *supra* note 86, at 390–402 (providing a historical account of the evolution of the competitive carrier approach); Competitive Carrier Sixth Report and Order, 99 F.C.C.2d 1020 (1985) (noting the regulatory streamlining done between 1979 and 1984).

125. *See Status of Competition and Deregulation in the Telecommunications Industry: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce*, 97th Cong. (1981) (recording the views of industry leaders on deregulation); *AT&T Proposed Settlement: Hearings Before the S. Comm. on Commerce, Science, and Transportation*, 97th Cong. (1982) (considering AT&T divestiture pursuant to a Department of Justice consent decree); *The Economic Issues of a Changing Telecommunications Industry: Hearings Before the Subcomm. on Agriculture and Transportation of the J. Economic Comm.*, 98th Cong. (1983) (discussing the economic issues surrounding the deregulation of the telecommunications industry).

126. *E.g.*, Telecommunications Competition and Deregulation Act of 1981, S. 898, 97th Cong. (1981); Telecommunications Act of 1981, H.R. 5158, 97th Cong. (1981); Federal Telecommunications Policy Act of 1986, S. 2565, 99th Cong. (1986).

127. *See Monopolization and Competition in the Telecommunications Industry: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. (1981) (considering a provision of the Telecommunications Competition and Deregulation Act of 1981 that would have legislatively designated AT&T as a "dominant carrier" under FCC regulations); *FCC Authorization Legislation—Oversight: Hearing on H.R. 2755 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce*, 98th Cong. (1983) (discussing FCC's handling of major mass media and common carrier issues); Universal Telephone Service Preservation Act of 1983, S. 1660, 98th Cong. (1983) (proposing to amend the FCC regulations to ensure continued universal access to basic telephone services); *Impact of Recent FCC Decisions on Telephone Service: Hearing on H.R. 4102 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the H. Comm. on Energy and Commerce*, 98th Cong. (1983) (discussing the effect of deregulation on rural communities); *Federal Communications Commission Oversight: Hearing Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the H. Comm. on Energy and Commerce*, 98th Cong. (1984) (reviewing the

FCC finalized its detariffing policy, however, congressional consideration of telecommunications deregulation paused. Between 1985 (the year that FCC issued its final order) and 1993, Congress did not consider any serious legislation,[128] though it continued to hold hearings on deregulation and FCC oversight.

But in 1993—the year after the D.C. Circuit issued its final opinion vacating FCC's rules[129] and the same year that the Supreme Court granted certiorari[130]—serious debate began again.[131] That second round of deliberation then culminated in Congress's passage of the Telecommunications Act of 1996,[132] which, among other things, embraced FCC's detariffing policy.[133]

Admittedly, this chronology is a small part of a much bigger picture. The 1985 pause in congressional deliberation is, undoubtedly, also attributable to the passage of the final consent decree that broke up the Bells, which occurred at about the same time. And Congress certainly had a lot more in mind than long-distance regulation when it debated and passed the Telecommunications Act of 1996, which encompasses much more than long-distance rates. The point here, however, is only that congressional consideration of long-distance regulation—in both floor activity and committee activity—tracks FCC action on the same regulatory issues. Even though long-distance regulation was a small part of a big story, Congress was actively interested in long-distance regulation throughout the time that FCC acted, and Congress's ability and motivation to legislate apparently faltered after FCC finalized its rules.

In sum, the story of telecommunications deregulation is a story of simultaneous negotiations in Congress and the Executive. FCC's success at reforming long-distance regulation before Congress passed any significant legislation coincided with a temporary stop in congressional

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amount of contribution FCC required that long-distance carriers provide to local phone companies); *Reauthorization and Oversight of the FCC: Hearing Before the Subcomm. on Communications of the S. Comm. on Commerce, Science, and Transportation*, 99th Cong. (1985) (considering the efficacy of several FCC rulemakings).

128. The Federal Telecommunications Policy Act of 1986, S. 2565, 99th Cong. (1986), was the last bill introduced until the Telecommunications Policy Act of 1990, 101st Cong. (1990). Neither bill was serious enough to emerge from the initial committee process.

129. AT&T Co. v. FCC, 978 F.2d 727, 735–37 (D.C. Cir. 1992).

130. MCI Telecomms. Corp. v. AT&T Co., 510 U.S. 989 (1993).

131. The Telecommunications Policy Act of 1990 was not a significant proposal: serious bargaining began again with the introduction of the Telecommunications Infrastructure Act of 1993, S. 1086, 103d Cong. (1993). *See* JAMES K. SHAW, TELECOMMUNICATIONS DEREGULATION AND THE INFORMATION ECONOMY 27 (2d ed. 1998) (claiming that "Congress seriously debated a restructuring of the Communications Act of 1934 beginning in 1993").

132. Pub. L. No. 104-104, 110 Stat. 56 (1996).

133. *See* Schoenwald, *supra* note 86, at 449–52 (discussing Congress's intent in passing the Telecommunications Act of 1996).

deliberations, and then Congress restarted its negotiations in earnest as soon as the Judiciary struck down the agency's enactments. The Legislature was able to pass significant reforms just three years after resuming deliberation.

b. Tobacco Regulation

Congress's consideration and passage of tobacco legislation has a long history, as the Supreme Court acknowledged in *Brown & Williamson*.[134] In the three decades preceding FDA's 1994 announcement that it would consider asserting jurisdiction over tobacco, Congress had enacted six pieces of tobacco-specific legislation.[135] Additionally, the precise question of FDA jurisdiction over tobacco has an equally long congressional history, having been considered periodically since 1964.[136]

But the most interesting feature of the institutional story behind *Brown & Williamson* is the rash of congressional activity that began just *after* FDA launched its official rulemaking process. As noted, Congress had averaged one tobacco bill every five years in the three decades preceding FDA's announcement. In the short time between the beginning of FDA deliberations and the ruling of the Supreme Court, Congress averaged one tobacco bill *per year*, passing five tobacco-specific provisions in five years. By the time the Supreme Court vacated the agency's rulemaking, Congress had enacted limited versions of most of FDA's major initiatives, including programs to reduce teen smoking, prohibitions on vending machine sales, and higher excise taxes on all tobacco products and cigarette papers.[137]

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134. 529 U.S. 120, 137–39 (2000).

135. *See id.* at 137–38 (listing six pieces of tobacco-related legislation that Congress passed between 1965 and 1992).

136. *E.g.*, *Cigarette Labeling and Advertising: Hearings Before the H. Comm. on Interstate and Foreign Commerce*, 88th Cong. (1964); *Public Health Cigarette Amendments of 1971: Hearings Before the Consumer Subcomm. of the S. Comm. on Commerce*, 92d Cong. (1972); *Cigarettes: Advertising, Testing, and Liability: Hearings Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the H. Comm. on Energy and Commerce*, 100th Cong. (1988); *Health Consequences of Smoking: Nicotine Addiction: Hearings Before the Subcomm. on Health and the Environment of the H. Comm. on Energy and Commerce*, 100th Cong. (1988).

137. FDA launched its official investigation with a letter to the Coalition on Smoking or Health, which it sent on February 25, 1994. KESSLER, *supra* note 85, at 87–92. Immediately following the agency's announcement, Congress passed a bill that increased funding for public school programs designed to curb youth smoking, a key target of FDA's proposed regulations. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994). Just one year later, Congress banned the sale of cigarettes in vending machines in or around federal buildings, a limited version of another FDA proposal. Prohibition of Cigarette Sales to Minors in Federal Buildings and Lands Act, Pub. L. No. 104-52, § 636, 109 Stat. 507 (1995). In the next three years, Congress also increased excise taxes on tobacco and cigarette papers, Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), passed a second law funding school programs that target youth

The most extensive congressional debate, however, did not occur during the agency's deliberative process; it began after the agency published its jurisdictional statement and regulations. The agency finalized its rulemaking in August of 1996, at the close of the 104th Congress. In the next Congress, just one year after FDA published its enactments[138] and six months after the trial court upheld those regulations,[139] Senator John McCain introduced the first of an eventual six comprehensive tobacco bills that would be considered in the 105th Congress.[140] These comprehensive bills were legislative versions of the "global tobacco settlement," which had been proposed to end lawsuits brought by forty-one state attorneys general against the tobacco industry.[141] And the 105th Congress did not limit itself to comprehensive legislation; members also introduced more than fifty other bills that would have made incremental changes to tobacco regulation.[142]

On June 17, 1998, the comprehensive reform proposal died in a filibuster, and serious congressional debate came to an abrupt halt. Interestingly, though perhaps coincidentally, the filibuster occurred exactly one week and one day after oral arguments in the Fourth Circuit.[143] By that time, it had become fairly clear that the court of appeals would declare FDA's regulations unlawful.[144] After the Supreme Court affirmed the Fourth Circuit's decision, a few members of Congress once again attempted to give FDA jurisdiction,[145] but debate never again reached the level of seriousness that it reached in the two years following FDA's rulemaking.

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smoking, Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998), and passed two laws facilitating document requests in the mass tort suits pending against the tobacco industry, Tobacco Production and Marketing Information, Pub. L. No. 106-47, 113 Stat. 228 (1999); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 106-78, 113 Stat. 1135 (1999).

138. FDA published its jurisdictional statement and regulations on August 28, 1996.

139. Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374 (M.D.N.C. 1997) (decided on April 25, 1997).

140. Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997) (introduced Nov. 7, 1997). *See generally* C. Stephen Redhead & Joy Austin-Lane, *Tobacco Legislation in the 105th Congress: Side-by-Side Comparison of S. 1415, S. 1530, S. 1638, S. 1889, H.R. 3474, and H.R. 3868*, CRS Report for Congress (Aug. 19, 1998) (laying out the congressional events surrounding the Universal Tobacco Settlement Act).

141. Redhead & Austin-Lane, *supra* note 140, at 1.

142. *See id.* at 7–12 (listing the other tobacco bills introduced during the 105th Congress).

143. Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155 (4th Cir. 1998) (argued June 9, 1998).

144. *See* KESSLER, *supra* note 85, at 363–66 (describing the oral arguments).

145. *See* Adam Clymer, *Legislators Planning Response to Justices' Ruling on F.D.A.*, N.Y. TIMES, Mar. 24, 2000, at A19 (discussing Congress's reconsideration of a plan to give FDA a greater scope of power).

Like the story of telecommunications deregulation, the story of tobacco regulation is one of simultaneous activity in Congress and the Executive. During FDA's deliberations, Congress confronted many of the agency's core concerns and enacted limited versions of the agency's basic proposals. But FDA's successful assertion of jurisdiction sparked a congressional panic, which ended only after it became clear that the Fourth Circuit would vacate the agency's enactments. The interference story, then, is one of executive intermeddling with Congress's devotion to incrementalism.[146]

c. Conclusion

In both *MCI* and *Brown & Williamson*, Congress was, demonstrably, an active player in the relevant regulatory regimes. Although the interference stories are markedly different in the two cases, they both involve simultaneous deliberation throughout the early parts of the agencies' investigations, and they both involve manifest changes in Congress's bargaining after the agencies finalized their rulemaking processes. And in both cases, Congress returned to its deliberative status quo ante after the courts intervened. A noninterference intuition, then, would explain the Court's holdings in both cases.

Furthermore, we can imagine discrete harms that might have flowed from the agencies' interference in both cases and can therefore imagine concrete benefits that would result from the Court's fix. Taking the telecommunications case, imagine a proregulatory member of Congress who has developed a good relationship with AT&T on the tariff-filing issue and is therefore willing to oppose deregulatory overhauls by, for example, introducing amendments when deregulatory statutes reach the floor. Once FCC passed its deregulatory rules, that same member of Congress would need to figure out whether she would be willing to stick to her substantive position by supporting bills and amendments that would reverse the FCC regulations. Importantly, the answer might go either way, depending on political realities that are difficult to assess. We could easily imagine that overturning an FCC rulemaking would be politically riskier than proposing amendments to limit or even to kill deregulatory overhauls, but we could just as easily imagine that undoing the work of an adversary in the White

146. Of course, there is a sense in which the Court did not and could not restore the status quo ante. To recreate both the substantive and jurisdictional regulatory realities that existed before FDA intervened, the Court needed to issue a binding interpretation of the FDCA. It thereby created certainty where none had existed before as to the meaning of the FDCA and as to the authority of FDA. Thinking more concretely, though, the Court's holding accomplished two important returns to the status quo ante: it reversed FDA's jurisdictional assertion (reinstituting FDA's antecedent position that it lacked jurisdiction), and it vacated FDA's substantive rules (reinstituting the antecedent substantive regulatory reality).

House would be politically rewarding. The Congresswoman would therefore need to invest in polling data or other new information to determine what impact, if any, FCC's action should have on her voting preferences, and she would lose at least some of the value of her prior investments in similar information. As an additional cost to the process, AT&T would also need to invest in new information to figure out how valuable a reversal of the FCC ruling would be and how much it would cost to convince members of Congress to pass such a reversal.

This point might be even easier to see in the tobacco case. Imagine that the voters in a congressional district are generally opposed to the lobbying influence of tobacco companies but are also generally opposed to FDA regulation. The Congressman who represents that district might have invested in relationships with anti-tobacco advocates during the many years that Congress was devoted to an incremental approach. But once FDA acted, he might have needed to support legislation that would strip FDA's jurisdiction, thereby harming the relationships he had developed over the prior decades.

Thus, the agencies' interference might have imposed real informational and reputational costs on members of Congress who had already invested in the regulatory domain. By altering the regulatory status quo—by changing the substantive regulatory reality against which stakeholders and voters had formed their preferences—the agencies diminished the value of those prior investments and forced the legislators and lobbyists to make new investments in their new reality.

The question now remaining is whether this story of institutional intermeddling justifies a *Chevron* Step Zero exception—whether such an exception would be beneficial from legal and theoretical perspectives.

B. Analogous Doctrines

From a legal perspective, the concept of noninterference is neither new nor unusual. In fact, the noninterference rationale for the *Brown & Williamson* rule is an instantiation of a concern that arises regularly in both federalism and separation of powers jurisprudence—namely, the prevention of intermeddling and simultaneity among institutions exercising overlapping authority. This same goal motivates, for example, preemption and abstention doctrines.

The first example of an analogous rule is the doctrine of "obstacle" preemption, which invalidates any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress."[147] Unlike other versions of preemption, obstacle preemption requires neither explicit nor implicit federal instructions against state interference. Rather, the doctrine vacates any state action that intermeddles with the accomplishment of federal goals. Obstacle preemption, then, rests not on the supremacy of federal laws but rather on a general supremacy of congressional policy.[148] As a result, the instruction that the Court gives to states under obstacle preemption is the same instruction that it gave to the agencies in *MCI* and *Brown & Williamson*: "Step aside. Your action is interfering with congressional policymaking."

The second analogy is to federalism-inspired abstention doctrines—most famously *Pullman* abstention[149]—which limit federal courts' interference with state policymaking and with state court proceedings. Collectively, these doctrines rest on the same two policy concerns that motivate Step Zero noninterference: prevention of officious intermeddling and avoidance of wasteful duplication.

Very roughly, federal courts will abstain from exercising their jurisdiction in two scenarios:[150] (1) when they are asked to consider undecided questions of state law[151] and (2) when they are asked to interfere directly (as by injunction) with ongoing state court proceedings.[152] Abstention is justified in the first scenario by respect for the states' primacy in interpreting their own laws and in the second by respect for the state courts' concurrent and coequal jurisdiction over certain cases. The logic, then, is that federal courts should not intermeddle with a state's superior ability and equal right to decide questions of state law.

A converse abstention doctrine allows federal courts to enjoin state court proceedings (effectively forcing the state court to abstain) when state

147. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

148. *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 303–04 (2000) (arguing that obstacle preemption has no grounding in the Supremacy Clause).

149. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496, 497 (1941) (holding that federal courts should decline to exercise jurisdiction if (1) the case raises state law questions that should be decided by state courts and (2) the decision of the state law question might allow federal courts to avoid deciding a constitutional question).

150. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 12.1–13.4 (5th ed. 2003) (providing background information on the circumstances under which federal courts abstain).

151. *See, e.g.*, La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959) (applying *Pullman* abstention even in the absence of a significant constitutional question on the grounds that the state's interest in deciding the state law question was unusually strong); Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943) (holding that federal courts should abstain from reviewing state administrative agencies' orders because such federal review would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy").

152. *See* Younger v. Harris, 401 U.S. 37, 43 (1971) (holding that federal courts should not enjoin state court proceedings because there is a "longstanding public policy against federal court interference with state court proceedings").

jurisdiction is likely to result in harmful duplication of pending federal proceedings.[153] This exception to the anti-injunction rule avoids the waste of trying the same case in two forums, particularly when state court proceedings seem likely to interfere with the federal court's exercise of jurisdiction.

The two justifications, then, that are common to this body of abstention doctrines are closely analogous to the justifications that motivate Step Zero noninterference. In fact, we can state the intuition undergirding the *Brown & Williamson* rule in abstention terms: the Step Zero cases hold that administrative agencies—despite their concurrent authority to make certain policy decisions—should abstain from rulemaking when the exercise of their authority would interfere with or harmfully duplicate a congressional bargain.

The final analogy is to the two abstention-like doctrines that operate in administrative law, both of which prevent federal courts from interfering with executive policymaking: exhaustion and primary jurisdiction. These two doctrines rest on the same noninterference rationale as the federalism-inspired abstention doctrines and as Step Zero noninterference.

Exhaustion, which requires federal courts to stay proceedings until the litigants have exhausted all remedial processes available in administrative agencies,[154] "serves to avoid piecemeal interruption of administrative processes, to eliminate unnecessary judicial effort, and to secure the views of agency experts on questions within their competence."[155] In other words, the doctrine prevents federal courts from intermeddling with administrative decisionmaking and prevents litigation from proceeding simultaneously in judicial and administrative forums.

The second administrative law abstention doctrine, primary jurisdiction, is a similar rule with a different starting point: it prevents courts from entertaining suits that should be decided in administrative proceedings, even when administrative processes have not yet begun. The logic underlying primary jurisdiction is that courts should correctly "allocate initial decisionmaking responsibility between agencies and courts where [jurisdictional] overlaps exist."[156] Again, the motivation is the same

153. *See* Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 295 (1970) (interpreting the anti-injunction statute as allowing federal courts to enjoin state court proceedings when necessary "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case").

154. *See generally* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.7.2 (3d ed. 1999) (discussing various applications of the exhaustion doctrine in case law).

155. DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 179–80 (4th ed. 1999).

156. PIERCE, JR. ET AL., *supra* note 154, § 5.8.

as in the Step Zero noninterference cases: to avoid friction and overlap between two institutions that both have authority to act.

In sum, noninterference is a quotidian concern in both federalism and separation of powers jurisprudence. Although existing noninterference doctrines constrain state legislatures and state and federal courts rather than constrain federal agencies, the extension of the logic to the Step Zero context is not radical. The interaction between agencies and Congress is not different in kind from the interaction between state legislatures and Congress, between courts and agencies, or between federal courts and state courts. All noninterference doctrines concern the appropriate division of labor among governmental institutions, and it is coherent in all contexts of overlapping jurisdiction to limit one institution in favor of another in order to avoid needless friction and duplication. The noninterference understanding of *Brown & Williamson*, therefore, is at least ordinary.

IV. VIRTUES OF A NONINTERFERENCE RULE

Of course, the ordinariness of a noninterference rule would not be enough to argue in favor of reincarnating *Brown & Williamson*—and, by necessary extension, killing *Massachusetts*. But the noninterference rule is not merely ordinary. It serves important goals in the management of multibranch government.

This Part proceeds as follows. First, it briefly revisits *Chevron* theory to demonstrate that the noninterference understanding justifies *Chevron* exceptionalism—that is, that Step Zero noninterference complies with both of the core *Chevron* hypotheses. Second, it presents *Massachusetts* as a disanalogy, explaining the potential harms of the holding in that case and thereby explaining the usefulness of the noninterference principle.

A. Chevron *Theory and Noninterference*

The virtue of the noninterference understanding from a theoretical perspective is that it justifies an exception to deference without fighting either of the core *Chevron* hypotheses. It fully preserves the institutional capacity assumption of judicial inferiority, and it avoids making any counter-*Chevron* institutional choice assumptions about Congress's future involvement.

The most important feature of the noninterference rule from a theoretical perspective is that it is triggered only by case-specific evidence that Congress is interested in the precise question before the court. This feature has two payoffs. First, the noninterference view does not require judges to evaluate agencies' policy decisions. The trigger is an agency's perceptible

interference with a specific congressional bargain, not any particular characteristic (such as majorness or aggrandizingness) of the agency's policy. Thus, the noninterference rule does not assume that judges will be appropriate or capable evaluators of agencies' political decisions. That is, it does not violate the institutional capacity assumption. Instead, the judges' role is the humble role of referee, telling agencies to step aside while Congress plays.

Second, the necessity of congressional involvement eliminates the possibility that judicial policy will stick. This is not to say that the Legislature will inevitably alter the reality created by judicial decision. Congress might, as in the tobacco case, fail to pass the legislation it was considering, in which case the judicially created status quo will remain. But the concern underlying tales of judicial stickiness (and the concern motivating *Chevron*'s institutional choice assumption) is not simply that judge-made policy will last; it is that judge-made policy will remain unchecked, due to the sheer ignorance and inertia of the political branches. The virtue of the noninterference view, then, is that Congress's active interest in the precise question eliminates (or at least significantly mitigates) the concern that judge-made outcomes will go undetected and unconsidered.

In sum, the noninterference understanding of the major questions exception is superior to the proffered alternatives because it does not fight either the institutional choice assumption or the institutional capacity assumption underlying *Chevron* theory. It is an exception to *Chevron* rather than a challenge to *Chevron* because it relies on specific facts in the world that judges are capable of perceiving and that give rise to a discrete need for judicial intervention.

B Massachusetts *and Noninterference*

It is, however, still not enough to say that a noninterference rule is consistent with *Chevron*. Unless the rule is independently useful, there would be no reason to enforce a *Chevron* exception at all. But the Step Zero noninterference rule *is* useful. The easiest way to demonstrate this point is to present *Massachusetts* as a disanalogy, to point out the potential harms that could flow from the Court's failure to enforce a noninterference rule in that case. By this account, *Massachusetts* is error; it does not fit the noninterference principle and therefore cannot be justified.

The first step in this part of the argument is to tell the story of noninterference that operated in the background of *Massachusetts* and to demonstrate that the Court could have enforced a noninterference rule in that case. The second step is to acknowledge a worthy instinct that might

have underlain the Court's decision in *Massachusetts*—an instinct to promote, or even to require, executive expression of expert opinions.[157] The final step is to explain why the noninterference instinct should have trumped the "expertise-forcing"[158] instinct in *Massachusetts* and why the noninterference rule should trump the expertise-forcing rule in future cases.

1. Noninterference in the Background of Massachusetts

The noninterference story in *Massachusetts* has much in common with the one in *Brown & Williamson*. Congress's history of global warming regulation is almost as long—and almost as tortured—as its history of tobacco regulation. And in both cases, the postenactment legislative histories indicate that Congress may have preferred—and may have been actively working towards—a separate regulatory structure for the precise issues that the agencies confronted.

Congress became actively interested in global warming as an independent issue in the late 1970s, enacting its first global-warming-specific statute in 1978[159] and a second such statute in 1987.[160] Neither of those bills, however, implemented a regulatory scheme. The 1978 National Climate Program Act merely ordered the President to create a coordinated executive program to gather data on climate change and to ponder the diplomatic implications of global warming, and the 1987 Global Climate Protection Act simply ordered EPA to draft a report to Congress on the science and politics of global warming.

In 1990, the issue of climate change burst onto the international stage with the first report of the Intergovernmental Panel on Climate Change,[161] and the treaty model became a realistic supplement to domestic regulation as a means of addressing global warming. In 1992, President Bush signed and the Senate ratified the United Nations Framework Convention on Climate Change (UNFCCC), which was (like the domestic bills that had passed) simply a nonbinding declaration that global warming is probably a real problem.

After the ratification of that treaty, congressional interest in global warming faltered. Although the 101st and 102d Congresses had proposed a combined total of fifty-six bills related to greenhouse gas emissions, the 103d and 104th Congresses proposed a combined total of only one such

157. Freeman & Vermeule, *supra* note 5, at 1.
158. The term "expertise-forcing" is Freeman and Vermeule's. *Id.*
159. Massachusetts v. EPA, 127 S. Ct. 1438, 1448 (2007) (citing National Climate Program Act, Pub. L. No. 95-367, 92 Stat. 601 (1978)).
160. *Id.* (citing Global Climate Protection Act, Pub. L. No. 100-204, 101 Stat. 1407 (1987)).
161. *Id.*

bill.[162]

Then in 1997, the signatories to the UNFCCC wrote the Kyoto Protocol, which was the first attempt at a binding regulatory structure for reducing greenhouse gas emissions that Congress seriously considered. Although the Senate unanimously refused to ratify the Kyoto Protocol, Congress's interest in global warming picked up in the wake of the Kyoto debate.[163] In the 105th Congress, members introduced twenty-two bills related to greenhouse gas emissions.[164] In the middle of the 105th Congress and then again at the beginning of the 106th Congress, EPA took the position at congressional hearings that it had authority under the CAA to regulate greenhouse gases,[165] but the Agency did not act on that authority. The rulemaking petition that became the center of *Massachusetts* was presented to EPA in 1999, and at the same time the Legislature's interest in global warming grew perceptibly stronger. After considering only twenty-two bills in the 105th Congress and an average of only about fifteen per Congress in the prior four, the Legislature averaged over fifty proposals per Congress from 1999 to 2006, climbing to sixty-four proposals in the 109th Congress alone.[166] The Legislature also held oversight hearings throughout this time, specifically to discuss EPA's authority.[167] Interestingly, EPA's denial of the rulemaking petition in 2003 did not coincide with any significant change in congressional action; the 107th Congress introduced fifty-one proposals, and the 108th introduced fifty-seven.

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162. *See* Natural Gas Vehicle Incentives Act of 1996, H.R. 4288, 104th Cong. (1996). These numbers come from a search of THOMAS, the Library of Congress's internet search engine, http://thomas.loc.gov. A search of bills in each Congress from the 101st to the 110th, which are the ones that are searchable through THOMAS, using "greenhouse gas emissions" as the search term yielded 32, 24, 0, and 1 in the 101st, 102d, 103d, and 104th Congresses respectively. Using "global warming" produces slightly different results but a similar trend, showing 139, 60, 18, and 2 in the same Congresses. Using "climate change" shows 160, 99, 18, and 34 in the same Congresses. The drop-off is therefore clear regardless of which search terms one uses: the 103d Congress did very little work on the issue compared to its predecessors.

163. *See Massachusetts*, 127 S. Ct. at 1448–49 (citing S. Treaty Doc. No. 102-38, Art. 2, p. 5 (1992) (UNFCCC), and S. Res. 98, 105th Cong. (1997) (as passed) (Senate Resolution expressing the Senate's sense that the U.S. should not enter the Kyoto Protocol).

164. Fourteen of those proposals reached the floor, and one reached the President's desk. *See supra* note 162 (explaining the methodology used to obtain these numbers).

165. *Massachusetts*, 127 S. Ct. at 1449.

166. The numbers for the 106th, 107th, 108th, and 109th Congresses are 44, 51, 57, and 64 bills respectively, for an average of 54 proposals per session. Ninety-eight of those bills reached the floor, and 9 of them reached the President's desk. *See supra* note 162 (explaining the methodology used to obtain these numbers).

167. *E.g.*, *Is CO_2 a Pollutant and Does EPA Have the Power to Regulate It?: Hearing Before H. Comm. On Government Reform and H. Comm. On Science*, 106th Cong. (1999); *Clean Air Act: Risks from Greenhouse Gas Emissions: Hearing Before S. Comm. on Environment and Public Works*, 107th Cong. (2002); *Clean Air Act Oversight Issues: Hearing Before S. Comm. on Environment and Public Works*, 107th Cong. (2001).

Then, the Supreme Court issued its opinion, demanding action from EPA, and at the same moment, Congress went into an absolute fury.[168] So far in the 110th Congress, members have introduced 185 bills that include some provision related to greenhouse gas emissions,[169] and the Senate has begun serious floor debate on the Climate Security Act of 2008.[170] Several of those bills would implement the very regulations that the petitioners asked EPA to implement,[171] while others would implement President Bush's preferred market-based and voluntary approaches.[172]

Thus, the story of global warming regulation meets the predicates of Step Zero noninterference. Congress was actively aware of and negotiating in the regulatory domain prior to EPA's involvement and throughout the time that EPA deliberated. That is, negotiations occurred simultaneously in both institutions. Furthermore, the beginning of public deliberation at EPA coincided with increased deliberation in Congress, and the Court's incitement of serious deliberation at EPA has coincided with a dramatic increase of deliberation in Congress.

2. Massachusetts *and Expertise-Forcing*

Although there are many commonalities between the *Massachusetts* and *Brown & Williamson* background stories, there is also one important difference. Whereas Congress seemed to view FDA as a competitor in the project of tobacco regulation, it seems to view EPA as a partner in the project of global warming regulation.

Many of the congressional proposals and enactments related to global warming specifically invited executive participation in the debate, ordering scientists in the Executive to conduct the research and to provide the

168. A causal claim is harder to make here than in the tobacco case. The 110th Congress was also the first Congress since 1994 to be controlled by the Democratic Party, which may be a more compelling explanation for the significantly increased activity. There was no such regime-change in the tobacco case.

169. Remember, this number compares to an average of about 30 proposals per Congress in the preceding nine Congresses and a maximum of 64 proposals in any given Congress from 1989 to 2006. Also, the number of proposals in the 110th Congress increases to 223 if one uses "climate change" rather than "greenhouse gas emissions" as the search criterion. Of the 185 bills that include references to "greenhouse gas emissions," 77 have reached the floor of at least one chamber, and three have reached the President's desk.

170. *See* Lieberman-Warner Climate Security Act of 2008, S. 3036, 110th Cong. (2008); *see also Climate Action in the Senate; Sadly, Even Having a Debate Is Progress*, WASH. POST, June 2, 2008, at A12 (describing the bill's chances as "worse than 50-50").

171. *See, e.g.*, Clean Fuels and Vehicles Act of 2007, S. 1073, 110th Cong. (2007); Safe Climate Act of 2007, H.R. 1590, 110th Cong. (2007); National Low-Carbon Fuel Standard Act of 2007, S. 1324, 110th Cong. (2007).

172. *See, e.g.*, Climate Stewardship Act of 2007, H.R. 620, 110th Cong. (2007); Greenhouse Gas Accountability Act of 2007, H.R. 2651, 110th Cong. (2007); National Greenhouse Gas Registry Act of 2007, S. 1387, 110th Cong. (2007).

information that would be necessary to confront the challenge of global warming. Indeed, in its discussion of postenactment legislative history, the *Massachusetts* majority pointed out that all of Congress's global-warming-specific enactments were simply efforts "to promote interagency collaboration and research to better understand climate change";[173] The Court noted that Congress had not enacted any "binding emissions limitations to combat global warming."[174] For the *Massachusetts* majority, this point provided contrast with the tobacco-specific bills that comprised the postenactment history in *Brown & Williamson*, all of which were direct regulatory efforts and none of which requested FDA participation in identifying the harms of tobacco or the benefits of proposed regulations.

The Court thus reasoned that, because Congress's efforts in the realm of global warming were information-gathering efforts rather than direct regulatory efforts, those bills could not be viewed the same way that the tobacco bills were viewed: "as tantamount to a congressional command to refrain from regulating."[175]

This difference might matter a great deal for present purposes if it proves that executive action would have counted as helpful participation in—rather than officious intermeddling with—Congress's project. In holding that EPA had authority to regulate, maybe the Court was simply urging EPA to fulfill this congressionally assigned informational role.

Indeed, there has been at least one serious suggestion that this expertise-forcing account of *Massachusetts* is the best way to read the case. Jody Freeman and Adrian Vermeule argue that *Massachusetts* is best read as an attempt to reprimand the excessive politicization of EPA decisionmaking and to require expression of a scientific—rather than political—opinion on the issue of global warming.[176]

This view could be synergistic with the noninterference rationale. Like the noninterference view, the expertise-forcing view has much to say about the effect that executive regulation can and should have on a larger regulatory enterprise.[177] That is, executive regulations have the potential to be meddlesome, as the noninterference view assumes, but they also have the potential to be informative, as the expertise-forcing view reveals. By acting first, an agency might, as in the tobacco case, disrupt congressional activity, but it might additionally or alternatively convey useful information to Congress about the nature and the effectiveness of executive scientists'

173. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1448, 1460–61 & n.28 (2007).
174. *Id.* at 1460.
175. *Id.*
176. Freeman & Vermeule, *supra* note 5, at 1.
177. This point is not the primary focus of Freeman and Vermeule's article, however. They view the depoliticization of EPA decisionmaking as a good in itself without reference to EPA's ability to inform an ongoing congressional project.

preferred approach. Indeed, taking *Chevron*'s institutional capacity theory, the Executive's regulations should reflect both scientific expertise and political sensitivity, meaning that executive decisions should blend the considerations that are most relevant to responsible democratic rulemaking. Perhaps, then, generalist legislators will create better outcomes, from a perspective of democratic representation, if they legislate against a richer backdrop of executive enactments.

Pursuant to this view, the Court's role at Step Zero could be to measure Congress's preference for either executive participation or executive abstention and to require the agency to play the role that Congress prefers. When Congress has repeatedly invited executive participation, as in the global warming case, the Court should require executive regulation, and when Congress has repeatedly discouraged or precluded agency participation, as in the tobacco and telecommunications cases, the Court should prohibit executive regulation.

By this account, both *Massachusetts* and *Brown & Williamson* got it right.

3. Noninterference and Expertise-Forcing

The problem with the expertise-forcing account is that executive regulations are not merely informative. When an agency promulgates regulations, it is not just pontificating; it is affecting the real world, changing the status quo. And a midstream change in the status quo, unlike a mere informational update, will raise the cost of legislating, as mentioned in Part III.A.2.c, *supra*, in the stories of diminished investments and necessary reinvestments on the parts of lobbyists and legislators. That is, both lobbyists and legislators will be forced to reevaluate their positions in light of a new regulatory reality—to discard old investments and to create new ones.

All of this is to say the following: the bottom line justification for the noninterference view is that Congress's deliberative process is, by nature, a long and cumbersome one, which, to function as cheaply as possible, requires a fixed target, not a moving target, around which legislators can negotiate.

Some might object to this argument on the ground that congressional action always trumps administrative action. A noninterference rule might therefore be unnecessary since Congress can always undo administrative "interference" and therefore need not take serious account of midstream regulatory changes. It can instead simply treat midstream changes as though they were mere executive pontifications.

But such midstream regulatory changes, unlike, say, informative memoranda or policy statements, have real impacts on the interests of legislators and stakeholders. Remember the hypotheticals presented above: a proregulatory congresswoman who needs to decide whether to support a statutory reversal of the already-implemented FCC regulations and an anti-tobacco but also anti-FDA congressman who will necessarily ruin standing relationships with anti-tobacco advocates if he chooses to undo the already-implemented FDA regulations. These are plausible scenarios—and we could imagine many more—that indicate the increased costs associated with a change in the status quo. The costs that these scenarios indicate would not be incurred if the agencies had merely presented new information to the legislators. Thus, regulatory change is costly even though Congress can undo it through new legislation, and it is, importantly, far costlier than simple updates in scientific and political information.

There is also a doctrinal argument for the view that Congress's trumping power should be irrelevant to Step Zero noninterference: that view is fully consistent with the usual operation of noninterference doctrines. The point of a noninterference rule is not to prevent the first actor from setting the rule; it is to prevent simultaneous actors from disrupting each other's processes. In many of the situations that give rise to analogous noninterference rules,[178] the institution that was supposedly interfered with clearly had the power to trump the interfering institution through later enactments or decisions. Obstacle preemption, for example, restrains state legislatures even though a later-enacted national statute would trump any conflicting state statutes, and *Pullman* abstention prevents federal courts from deciding questions of state law even though later-acting state courts could trump federal interpretations. Furthermore, in both of those examples, the restrained institution could have provided information to its coequal by acting first. That is, by legislating in a field of obstacle preemption, the states could provide information to Congress about their individual preferences, and by addressing a question of state law, the federal courts could provide their insight on a tricky legal question. The noninterference doctrines recognize that simultaneous and meddlesome actions are too costly to be allowed even though they might be informative and even though they certainly can be undone.

Likewise, in the context of Step Zero noninterference, the point of the noninterference principle is not merely to prevent agencies from beating Congress in a race to regulate. The point is to prevent agencies from moving the target around which Congress is bargaining. The noninterference rule simply recognizes that lawmaking becomes more

178. *See supra* Part III.B.

costly if a regulatory regime changes independently of congressional action in the middle of the congressional bargaining process. The nightmare story is not that the agency's decision will prevent Congress from acting; it is that the agency's decision will fundamentally alter legislators' and stakeholders' incentives, requiring the public choice game to start afresh.

Of course, none of this is to deny that administrative regulations are informative. Even less is it to say that information is unimportant. But here is the critical point: agencies can present information to Congress without issuing status-quo-altering rules and regulations. There is, therefore, no need to incur the costs of such regulations in order to gain the benefit of information.

Let's now consider the case of global warming: The allegations of excessive politicization of EPA decisionmaking are troubling, particularly since they include allegations that the White House has been actively silencing executive scientists.[179] Because scientific information is a necessary component of responsible rulemaking in scientific domains, we *should* be bothered by allegations that political agents are altering and stifling technocratic information about global warming.

It does not follow, however, that the only remedy—or even one acceptable remedy—is to require the scientists to implement binding regulations. As the Court unwittingly pointed out in the *Massachusetts* opinion, Congress is perfectly capable of demanding information from executive scientists by legislatively demanding research and reports.[180] Furthermore, Congress has tools, such as hearings and concomitant subpoena powers, to oversee the Executive's research and reporting procedures.[181] We need not fear, therefore, that enforcement of a noninterference rule will prevent Congress from gathering information about the Executive Branch's views and preferences, and we should not defy the noninterference principle in order to enforce informational transfers.

Returning briefly to the telecommunications and tobacco cases: Congress could have ordered a report from FCC on the continuing necessity of tariff-filing as a means of rate regulation (or FCC could have provided such a report without a congressional mandate), and Congress could have ordered a report from FDA on the addictive properties of

179. *See* Freeman & Vermeule, *supra* note 5, at 3–10 (discussing the Executive Branch's influence on climate change policy); Juliet Eilperin, *Climate Findings Were Distorted, Probe Finds; Appointees in NASA Press Office Blamed*, WASH. POST, June 3, 2008, at A02.

180. *See supra* notes 173–75 and accompanying text.

181. *See Allegations of Political Interference with Government Climate Change Science: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. (2007).

nicotine and the need for greater tobacco regulation (or FDA could have provided such a report without a congressional mandate). It was not necessary in either case for the agencies to implement binding regulations to convey their scientific and political judgments to the Legislature.

The *Massachusetts* majority was undoubtedly right to conclude that "collaboration and research do not conflict with any thoughtful regulatory effort; they complement it."[182] But the Court was absolutely wrong to conflate "collaboration and research" with implementation of binding regulations. The Executive's regulatory effort, once enacted, will always be costly to an ongoing, parallel regulatory effort in Congress.

The noninterference rationale, therefore, should always trump the expertise-forcing rationale when the question is whether the Executive should enact new regulations in a domain that Congress is actively negotiating.

V. A DOCTRINE OF NONINTERFERENCE

Perhaps the greatest challenge for a reincarnated noninterference rule is to develop a standard for distinguishing serious congressional deliberation from strategic congressional posturing. If members of Congress knew that merely debating an issue would preclude executive authority, then they would have a perverse incentive to engage in meaningless debate whenever they wanted to prevent executive action in a particular regulatory regime. The purpose of the noninterference rule is not to give Congress a tool for blocking executive policymaking; it is to prevent the Executive from interfering with ongoing and serious congressional policymaking. In developing a test for future enforcement, then, the key is to identify the hallmarks of sincere deliberation and true interference. Four factors are apparent in the three major questions cases.

A. Pre-interference Activity

In the tobacco, telecommunications, and global warming cases, Congress had been active in the relevant debates before the Executive started its decisionmaking process. In the telecommunications case, Congress entertained revisions to FCC's organic statute three years before FCC started its detariffing process. In the tobacco case, Congress had passed several tobacco-specific bills before FDA considered asserting jurisdiction, and it had held hearings in the few years immediately preceding the agency's actions, specifically considering the possibility of granting the agency jurisdiction under the FDCA. In the global warming

182. Massachusetts v. EPA, 127 S. Ct. 1438, 1461 (2007).

case, Congress had passed at least five global-warming-specific statutes before the petitioners presented their rulemaking petition to EPA, and it had debated dozens more. The occurrence of debate and the passage of legislation before the Agency intervened constitute strong evidence that Congress's interest in the regulatory regimes existed independently of any desire to block executive policymaking.

B. Postannouncement Activity

In both the tobacco and the telecommunications case studies, Congress's committee and floor activities perceptibly increased immediately after the agencies began considering regulation. That is, immediately after the agencies started their investigations, members of Congress started holding more hearings and introducing more legislation than they had before the agencies' announcements. Such an immediate increase in activity might be evidence that Congress prefers to legislate before an agency has a chance to finish its rulemaking process. In the global warming case, congressional activity increased just before the Agency received its rulemaking petition, but it increased much more dramatically just after the Court issued its decision requiring EPA action.

C. Postenactment Activity

In both the tobacco and telecommunications cases, there was a perceptible change in Congress's activity immediately following the agencies' final rulemaking. In the tobacco case Congress dramatically *increased* its deliberations, while in the telecommunications case it dramatically *decreased* its deliberations. A shift in either direction indicates that the agency's action disrupted a preexisting process. Of course, as of this writing, we do not yet know whether and how EPA regulations, if implemented, would affect congressional deliberations.

D. Aggressive Oversight

During the debates over telecommunications deregulation, tobacco regulation, and greenhouse gas regulation, Congress aggressively monitored not only the agencies' specific decisionmaking processes but also the agencies' general activities. In the tobacco and telecommunications cases, however, oversight slackened significantly once the agencies completed their rulemaking processes. This trend might be evidence of an attempt to influence or to stall the agencies' rulemakings.

Taken together, these four factors probably suffice to identify cases in which an agency's actions truly disrupt a congressional bargaining process.

The test requires some evidence of congressional activity before the agency intervened, and it requires close temporal connections between steps in the agency's decisionmaking process and changes in Congress's bargaining process. Furthermore, the test incorporates magnitude requirements; increases or decreases in congressional activity must be fairly dramatic to trigger suspicions of interference. These factors should be enough to prevent strategic posturing since the introduction of a bill imposes at least some opportunity cost both on the member who introduces it and on the institution as a whole; that same member and then the institution must forego work on different—and potentially more important—issues in order to introduce, for example, a tobacco bill.

Of course, a doctrine of noninterference would not be error-proof. Judges might find connections between executive and legislative activity that are purely coincidental, and they might fail to perceive genuine congressional reactions to executive interference. Nevertheless, the difference between an interfering enactment and a noninterfering enactment, particularly given the four factors outlined above, is more discernible than the difference between a major enactment and a minor enactment, a jurisdictional decision and a nonjurisdictional decision, or an excessive delegation and a reasonable delegation. It is also at least as easy to perceive as the excessive politicization of executive decisionmaking that might justify the *Massachusetts* rule.

And, unlike its alternatives, the noninterference principle is theoretically and instrumentally valuable enough to justify even an imperfect judicial doctrine.

CONCLUSION

Although *Chevron* empowers the Executive to "say what the law is,"[183] it does not bestow exclusive policymaking authority in administrative agencies. Congress, of course, retains the power to legislate, even in those regulatory regimes that it has entrusted partially or fully to the Executive. Thus, *Chevron* enshrines a system of overlapping policymaking authority. In any such system, there is substantial risk that competing institutions will interfere with each other's work, and in any such system, there must be some rule for choosing between competing institutions.

In the *Chevron* context, courts should vacate interfering agency interpretations, not because they are unlawful, but simply because they raise overall lawmaking costs by forcing Congress to rethink and reformulate a regulatory strategy in which it has already invested substantial resources. Thus, judicial invalidation of meddlesome

183. Sunstein, *supra* note 61, at 2589.

administrative actions is necessary in individual cases to restore a status quo ante so that congressional bargaining can pick up where it left off, and a noninterference rule would be systemically beneficial if it created a disincentive for administrative agencies to enter regulatory domains in which Congress is already acting.

Overall, the noninterference understanding of the major questions cases is not just descriptively accurate; it creates a discrete exception to *Chevron* deference that is both theoretically and instrumentally justified. Although the bare majorness, nonaggrandizement, and nondelegation accounts fail to justify the major questions exception, the exception should nevertheless be reincarnated—and *Massachusetts* should nevertheless be killed. The major questions rule is necessary as a doctrine of noninterference.

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ADMINISTRATIVE ADJUDICATION AND THE RULE OF LAW

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TABLE OF CONTENTS

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INTRODUCTION

Administrative agencies have long played a substantial role in the development of American law. Although historically lawmaking responsibilities were the exclusive province of legislatures and courts, administrative agencies have regularly and substantially participated in the process for nearly a century. Statutory and judge-made rules of deference to administrative lawmaking have ensured that agency-made law is not relegated to junior-partner status, but instead may even control the decisions of ostensibly superior entities (such as the federal courts).[1] Thus, administrative agencies have come to be a major player in the creation of law in the American legal system, and often are responsible for creating the rules that govern important aspects of life and government.

In fulfilling these important lawmaking functions, agencies—unlike courts and legislatures—have typically been empowered to elect between proceeding legislatively (by issuing regulations), or adjudicatively (by creating a new legal rule in the context of an adjudication). Many agencies, particularly in recent decades, have opted to exercise their lawmaking authority primarily or exclusively legislatively through the issuance of regulations.[2] Despite this trend toward legislative lawmaking by administrative agencies, some agencies—most notably the National Labor Relations Board (NLRB) and the Board of Immigration Appeals (BIA or Board)—have continued to use adjudication as the exclusive or predominant means of establishing new legal principles.[3]

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1. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (establishing that agency-made law is entitled to deference from the federal courts, where the underlying statute is silent or ambiguous on the issue under consideration, and the agency's interpretation is reasonable).

2. *See* Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 255 (1986) (noting that over the last twenty years, agencies have shifted from using adjudicative lawmaking to legislative lawmaking).

3. *See, e.g.*, Michael J. Hayes, *After "Hiding the Ball" Is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523, 565 (2001); Peter H.

The use of administrative adjudication as a significant means of agency lawmaking has been the subject of sustained academic critique.[4] In a series of articles spanning more than a half century, academic commentators have argued that agency lawmaking through adjudication suffers from a number of significant drawbacks—including decreased public participation, a lack of prospectivity, lesser transparency or predictability for regulated entities, and a tendency to arise in fact-bound circumstances—which make it inferior to legislative lawmaking by administrative agencies.[5] As a result,

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Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1014 (indicating that the National Labor Relations Board (NLRB) and the Immigration and Naturalization Service (INS) almost exclusively use adjudication to make rules).

4. *See, e.g.*, Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 621–22 (1970); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 279, 281 (1991) (discussing a growing consensus that legislative lawmaking by administrative agencies is preferable to lawmaking through adjudication, and describing criticism of the NLRB for continuing to adhere to its practice of making law exclusively through adjudication); Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 259–61 (1936) (suggesting that it would be preferable for the Federal Trade Commission to make law through legislative lawmaking rather than through adjudication); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103 (noting that the "consensus" is that agency lawmaking via legislation is superior to adjudication); Carl McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 433–38 (1961) (criticizing agencies' use of adjudication instead of legislative lawmaking to develop policy); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308–09 (noting the "near-universal" consensus among judges and scholars that legislative lawmaking by administrative agencies is superior to adjudicative lawmaking, and discussing the reasons for this consensus); *see also* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 972 (1965) (arguing that the distinction between legislative and adjudicative lawmaking by administrative agencies has been overstated, but also noting that legislative lawmaking is superior in a number of contexts). *But cf.* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1491–92 (1992) (arguing that there are circumstances in which each form of agency policymaking is preferable); Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 550–53 (2005) (same); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 514–28 (1970) (critiquing the traditional reasons posited for favoring legislative lawmaking by agencies over adjudicative lawmaking).

5. *See* William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 372–75 (2000) (asserting the potential for unfair retroactivity that results where an agency relies on adjudicative lawmaking instead of legislative lawmaking); Bernstein, *supra* note 4, at 587–98 (discussing the limitations of adjudicative lawmaking in the context of the NLRB); Grunewald, *supra* note 4, at 278–81 (exploring the reasons why scholars consider legislative lawmaking to be superior to adjudicative lawmaking by administrative agencies); Handler, *supra* note 4, at 259–61 (discussing the reasons why it would be preferable for the Federal Trade Commission to make law through legislative lawmaking, rather than through adjudication); Mayton, *supra* note 4, at 103 (describing the reasons for preferring legislative lawmaking to adjudicative lawmaking); McFarland, *supra* note 4, at 433–38 (same); Pierce, *supra* note 4, at 308–09 (noting the "near-universal" consensus among judges and scholars that legislative lawmaking by administrative agencies is superior to adjudicative lawmaking, and discussing

many authors have contended that agency lawmaking through adjudication should be discouraged in all but very limited circumstances.[6]

In contrast to this rich critical literature, scholars have written very little regarding the potential benefits of agency lawmaking through adjudication.[7] In particular, essentially no scholarship has addressed the "absolute"—i.e., noncomparative—benefits of adjudicative lawmaking by administrative agencies. This tendency to ignore the absolute benefits of adjudicative lawmaking—benefits that might also be achieved through agency legislative lawmaking—is perhaps unsurprising given the literature's largely comparative focus. Nonetheless, it has had important effects, allowing the continuation of the widespread portrayal of adjudicative lawmaking as undesirable and to be avoided or discouraged if at all possible.

Of equal significance, very little of the existing literature has endeavored to empirically assess the comparative benefits and drawbacks of adjudicative lawmaking.[8] Thus, while authors have critiqued such lawmaking from a theoretical perspective, the true nature or extent of the theorized drawbacks remains largely speculative. Similarly, essentially no empirical data regarding potential benefits of adjudicative lawmaking has been gathered.

These limitations of the existing literature—and the corresponding negative view of adjudicative lawmaking they have fostered—have had a number of significant consequences. Most obviously, they have led certain

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the reasons for this consensus); *see also* Elliott, *supra* note 4, at 1491 (noting the general preference for legislative lawmaking among American academics).

6. *See, e.g.*, Bernstein, *supra* note 4, at 621–22; Handler, *supra* note 4, at 259–61; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308; *see also* Mayton, *supra* note 4, at 133–35 (arguing that Congress intended legislative lawmaking to be the sole means of lawmaking available to administrative agencies under the Administrative Procedure Act).

7. A few articles have critiqued the traditional view that legislative lawmaking by administrative agencies is superior to adjudicative lawmaking. These articles have tended to either criticize the assumptions underlying the claim that legislative lawmaking is superior to adjudicative lawmaking or argue that the distinction between legislative or adjudicative lawmaking is exaggerated and that other factors account for the observed deficiencies in agency lawmaking. *See, e.g.*, Elliott, *supra* note 4, at 1491–92; Robinson, *supra* note 4, at 514–26; *see also* William E. Kovacic, *Administrative Adjudication and the Use of New Economic Approaches in Antitrust Analysis*, 5 GEO. MASON L. REV. 313, 320 (1997) (concluding that the Federal Trade Commission could use administrative adjudication to integrate new theories and methods into the resolution of antitrust disputes).

8. *See, e.g.*, Araiza, *supra* note 5, at 372–75 (discussing the advantages of legislative lawmaking over adjudicative lawmaking, without the application of an empirical methodology); Grunewald, *supra* note 4, at 278–79, 281 (same); Handler, *supra* note 4, at 259–61 (same); Mayton, *supra* note 4, at 103 (same); McFarland, *supra* note 4, at 436–38 (same); Pierce, *supra* note 4, at 308 (same); *see also* Bernstein, *supra* note 4, at 620 (arguing in support of the conclusion that legislative lawmaking was preferable to adjudicative lawmaking in the NLRB context, but noting that this conclusion was "based primarily on supposition").

academic commentators to conclude prescriptively that the courts or Congress should restrain use of adjudicative lawmaking by administrative agencies through a variety of means.[9] Perhaps more importantly, they have caused academic commentators to be apathetic, or even appreciative, of real world declines in agencies' creation of legal rules via adjudication. Correspondingly, there is a dearth of critical academic commentary addressing the potential consequences of significant declines in the use of adjudicative lawmaking by administrative agencies.

In this Article, I posit that this apathetic (or sometimes hostile) attitude toward adjudicative lawmaking may not be as unambiguously appropriate as the current literature would seem to suggest. Specifically, I hypothesize that adjudicative lawmaking theoretically has the potential to further a number of important rule-of-law goals. For example, adjudicative lawmaking by administrative agencies theoretically has the capacity to increase consistency in the legal standards applied to individual cases, promote predictability through rule creation, and restrain otherwise arbitrary discretion. Using a case study of the Board of Immigration Appeals—the primary administrative body that has historically been responsible for creating new immigration rules—I examine whether these rule-of-law goals have, in fact, been promoted by administrative adjudication, or are simply theoretical benefits of adjudicative lawmaking.

I ultimately conclude that—judged by rule-of-law standards—there are significant benefits to adjudicative lawmaking by administrative agencies. While adjudicative lawmaking by the BIA has not uniformly succeeded in furthering hypothetical rule-of-law goals, it unquestionably has, in many circumstances, forwarded the hypothesized goals. For example, the BIA has played an important role in developing consistency in the standards applied across the immigration legal system, in furthering predictability in results for individual immigrants, and in restricting otherwise arbitrary exercises of government discretion. Thus, while the Board has not been a perfect actor in furthering rule-of-law goals within the immigration law system, its overall impact has been positive and substantial. While it is plausible that the Board might have achieved even greater benefits through a comparable program of legislative lawmaking, in the absence of that alternative, the elimination of adjudicative lawmaking would have prevented the furthering of important rule-of-law objectives.

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9. *See, e.g.*, Araiza, *supra* note 5, at 396 (arguing for a limited judicial role in policing the use of agency adjudication, where that adjudication would result in retroactivity concerns); Bernstein, *supra* note 4, at 620–21 (contending that the APA already requires the NLRB to engage in legislative lawmaking and that additional legislation may be appropriate to address the unique circumstance of legislative lawmaking by the NLRB); *see also* Mayton, *supra* note 4, at 133–35 (concluding that the APA requires that agencies make rules through legislative lawmaking and not through adjudication).

This conclusion, of course, has significant implications for the historically tepid academic view of adjudicative lawmaking by administrative agencies. At a minimum, it suggests that this view is unwarranted—and is, in fact, dangerous—in cases where a decline in adjudicative lawmaking is unlikely to be accompanied by the creation of a legislative lawmaking program of comparable scope and vigor. Where such comparable substitutes are unlikely to be forthcoming, a reduction in an agency's use of adjudicative lawmaking is likely to have substantial negative effects, which should be cause for concern among academics, the Legislature, and the Judiciary. This concern should, in turn, lead to exploration of how the decline in adjudicative lawmaking can be reversed or arrested. While "exchanges" of increased legislative lawmaking for less adjudication may be cause for lesser concern, they too should be viewed with a critical eye to ensure that the legislative lawmaking program accounts for the range of rule-of-law goals promoted by the eliminated body of adjudicative lawmaking. All of these conclusions differ dramatically from those that result from the traditionally negative academic view of adjudicative lawmaking by agencies.

In Part I of this Article, I discuss the rule-of-law goals that adjudicative lawmaking could theoretically promote and elaborate the specific contexts in which administrative agencies are confronted by opportunities for furthering those goals. Part II briefly introduces the BIA and discusses why the Board was selected as the case study for this Article. Part III discusses the history of adjudicative lawmaking by the BIA, and the extent to which adjudicative lawmaking by the BIA has in fact promoted the posited rule-of-law goals. Finally, I provide general conclusions and address specific prescriptive suggestions that can be made in light of the preceding sections.

Before proceeding, a brief note regarding terminology is in order. Throughout the Article, the term "adjudicative lawmaking" is used to refer to agency lawmaking through adjudication. "Legislative lawmaking" is used to refer to agency lawmaking through the issuance of regulations. (Note that "legislative lawmaking," instead of the traditional administrative law term "rulemaking" or "notice-and-comment rulemaking," has been used in order to avoid conflating the issues of whether a rule was created by the agency and how the rule was created). The term "rule" is used to refer to a legally enforceable standard set forth in either regulations or caselaw, and will not be used in its traditional administrative law sense (i.e., as a synonym for regulations). "Rule-of-law goals" (or "rule-of-law objectives") is used to describe features commonly associated with the "rule of law." Finally, the term "absolute benefits" is used to refer to benefits that might be achieved either through adjudicative lawmaking or

through legislative lawmaking.

I. DEVELOPING THE RULE-OF-LAW FRAMEWORK

Evaluating the absolute benefits of adjudicative lawmaking by agencies presents a significant challenge. The most obvious means of evaluating administrative adjudications—i.e., the substantive outcomes of such adjudications—provides an inherently contestable set of criteria. In virtually every case, different agency stakeholders will possess differing views of the merits of the adjudication's substantive outcomes. Because none of these views is inherently normatively "correct," selecting a neutral set of substantive outcome-based criteria for evaluation is difficult, if not impossible.

Fortunately, there are some relatively "neutral" means by which one can evaluate the goods afforded by agency adjudicative lawmaking. Most notably, rule-of-law goals can be used as a benchmark by which to assess whether adjudicative lawmaking by administrative agencies may have absolute benefits. Although the meaning of "rule of law" is often contested in academic and popular discourse, there is—as discussed at greater length below—a general consensus regarding desirability of a core set of rule-of-law goals. Because this general consensus exists, evaluation of these consensus rule-of-law goals provides a relatively straightforward and unbiased measure of the benefits of agency adjudicative lawmaking. This Article will accordingly focus on an examination of consensus rule-of-law goals as the evaluative measure for agency adjudicative lawmaking.

As set forth below, there are a significant number of rule-of-law goals that might theoretically be promoted by a robust agency program of adjudicative lawmaking. Among other things, agency adjudication should theoretically have the ability to (1) increase consistency in the legal standards that are applied across the legal system, (2) promote predictability for regulated entities through rule creation, and (3) restrict government discretion that might otherwise be entirely unchecked. The reasons why these specific goals are theoretically likely to be promoted by administrative adjudication—as well as the rule-of-law goals that administrative adjudication may not promote—are discussed in turn below.

Before turning to this more in-depth discussion, however, it is necessary to initially identify the consensus goals that will form the basis for the discussion. Because there is significant dissensus among scholars, judges, and members of the public as to what "rule of law" means, it is necessary to specify which rule-of-law criteria will be considered, and which are excluded from the evaluation.

A. The Meaning of "Rule of Law" in Academic and Popular Discourse

As many authors have noted, the rule of law is "an essentially contested concept."[10] No single consensus formulation of the rule of law exists, and indeed there is broad disagreement among scholars and popular users regarding the necessary components of a rule-of-law society.[11] Everything from the predictability of legal norms to the extent of liberalization of the economy and the existence of laws guaranteeing basic substantive human rights is designated by some (but not all) rule-of-law theorists as necessary components of the rule-of-law ideal.[12] This proliferation of rule-of-law understandings unsurprisingly can render meaningful use of the term "rule of law" difficult.

Fortunately, there are some basic components of the rule of law that are generally agreed upon and that can form the basis for a stripped-down "consensus understanding" of the rule of law. These basic components collectively comprise what some authors have referred to as "thin" theories of the rule of law, or what others have referred to as the "instrumental" or "formal" conception of the rule of law.[13] Among other things,[14] these

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10. Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 472 (2002); *see also* Mark Bennett, *"'The Rule of Law' Means Literally What It Says: The Rule of Law": Fuller and Raz on Formal Legality and the Concept of Law*, 32 AUSTL. J. LEGAL PHIL. 90, 92 (2007); Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

11. *See* JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210–11 (1979); Bennett, *supra* note 10, at 92–95; David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 308 (2003); Radin, *supra* note 10, at 781.

12. *See, e.g.*, RAZ, *supra* note 11, at 210–11; Bennett, *supra* note 10, at 92–95; Kairys, *supra* note 11, at 312–13.

13. *See, e.g.*, Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 533–35 (2005) (contrasting "formal" and "substantive" conceptions of the rule of law, and describing the elements of each); Peerenboom, *supra* note 10, at 472, 477–79 (characterizing the components of "thin" theories of the rule of law); Radin, *supra* note 10, at 783–85 (describing the components of the instrumental conception of the rule of law); *see also* Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes*, 26 NW. J. INT'L L. & BUS. 225, 246–48 (2006) (discussing Peerenboom's thin formulation of the rule of law).

14. There are a number of other consensus criteria which are generally considered to comprise part of thin or "instrumental" theories of rule of law, but which are not particularly helpful in evaluating the role of adjudicative lawmaking, and therefore are not discussed here. For example, agencies' faithfulness in the application of existing legal rules to specific individual cases is important from a rule-of-law perspective, but should not be affected (positively or negatively) by agency lawmaking. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1977) (identifying agency faithfulness in the application of existing legal rules as an important rule-of-law criteria). Similarly, the independence of adjudicative actors, while an important aspect of most formal conceptions of the rule of law, is not a value that is likely to be impacted by lawmaking by administrative agencies. *See, e.g.*, Ngugi, *supra* note 13, at 535 (identifying the independence of adjudicative actors as an important rule-of-law criteria). For an expanded discussion of these, and other criteria comprising thin or instrumental theories of the rule of law, see Peerenboom, *supra* note 10, at 478–80 and Radin, *supra* note 10, at 783–85.

shared consensus rule-of-law components include principles such as the following:

> (1) The Existence of Rules: Most basically, any system hoping to achieve the ideal of rule of law must have fixed general rules by which individual and government conduct can be judged.[15]
>
> (2) Consistency: The same rules should apply to everyone (including, *inter alia*, all similarly situated litigants and the government).[16]
>
> (3) Limitation of Discretion: Law should meaningfully restrain the discretion of government actors, particularly the discretion of government adjudicators.[17]
>
> (4) Prospectivity: The rules by which conduct is judged should exist prior to the application of those rules, so that the individuals governed by them have the opportunity to conform their conduct to them.[18]
>
> (5) Notice or Publicity: Rules should not be secret or hidden; those who are governed by them should have access to their content.[19]
>
> (6) Stability: The law should be relatively consistent and stable, so as to facilitate the ability of those governed by it to plan for the future.[20]
>
> (7) Predictability: Individuals should be able to know what the law proscribes and order their affairs in accordance with the law.[21]

As is evident from the above listing, these consensus rule-of-law components do not focus on the substantive content of the law, its initial method of creation (democratic versus nondemocratic), or its outcomes. They thus ignore any number of rule-of-law requirements that have been

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15. *See* FULLER, *supra* note 14, at 39; Kairys, *supra* note 11, at 312; Radin, *supra* note 10, at 785; *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 15–16 (1997) (discussing various authors' arguments for why fixed determinate rules are important in a rule-of-law context); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (arguing that judges should create definite and broad legal rules in rendering decisions, and discussing the rule-of-law values that are served by this approach).

16. *See* Kairys, *supra* note 11, at 312; *see also* Peerenboom, *supra* note 10, at 478 (noting the importance of having "generally applicable" rules that "treat similarly situated people equally").

17. *See* Kairys, *supra* note 11, at 313 (asserting the rules should limit government actors' conduct); John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 440, 444–45, 482 (2003) (noting the importance of limiting government discretion in promoting rule-of-law values); Scalia, *supra* note 15, at 1176–87 (arguing that judges should create rules that restrict the discretion of future adjudicators).

18. *See* Peerenboom, *supra* note 10, at 478; Reitz, *supra* note 17, at 440; *see also* FULLER, *supra* note 14, at 39 (identifying retroactive laws as one of the principal evils that can interfere with the rule of law); Ngugi, *supra* note 13, at 535 (same).

19. *See* FULLER, *supra* note 14, at 39; Kairys, *supra* note 11, at 312; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 785; Reitz, *supra* note 17, at 440.

20. *See* FULLER, *supra* note 14, at 39; Fallon, *supra* note 15, at 8; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 785; Reitz, *supra* note 17, at 440.

21. *See* Scalia, *supra* note 15, at 1179 (noting the importance of predictability to the rule of law); *see also* Radin, *supra* note 10, at 786 (noting the importance of the "knowability" of the law to conceptions of rule of law).

postulated by thick[22] rule-of-law theorists, including, *inter alia*, the following:

> (1) Democracy: Many thick rule-of-law theories postulate the need for rules to be formulated through some sort of democratic process.[23]
>
> (2) Protections for Human Rights or Other Individual Rights: Most thick rule-of-law theories also specify that societies must have laws that guarantee some collection of basic human and/or individual rights.[24]
>
> (3) Free Market Economic System: Particularly in popular usage, but also in scholarship, the existence of a free market economic system is sometimes postulated as a necessary component of rule of law.[25]

Unsurprisingly, there is no consensus even among thick rule-of-law theorists as to which of these thick components—and in what specific formulation—are necessary to achieve rule of law.[26] Because most thick rule-of-law components are undergirded by contestable value judgments about ideal legal outcomes—as well as ideal political and economic systems—it is difficult, if not impossible, to arrive at a universal thick formulation of rule of law.[27] Indeed, many rule-of-law theorists reject thick rule-of-law elements altogether, on the grounds that such elements preclude the formulation of a coherent and agreed-upon understanding of the rule of law.[28]

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22. "Thick" rule-of-law theories go beyond the instrumental criteria identified above, and postulate that various normative goals are also encompassed within appropriate conceptions of the rule of law; among other normative goals, thick rule-of-law theories often include as necessary components: liberal democratic norms, free market economics, and individual human rights. *See, e.g.*, Bennett, *supra* note 10, at 92–95; Peerenboom, *supra* note 10, at 472; Sheehy, *supra* note 13, at 246–48.

23. *See* Bennett, *supra* note 10, at 94–95 (observing that democracy constitutes a foundational component of certain thick conceptions of the rule of law); Kairys, *supra* note 11, at 312–13 (noting that rule-of-law formulations often include the need for the process to be democratic); Peerenboom, *supra* note 10, at 472 (noting that thick conceptions of the rule of law often include particular forms of government as a necessity for the existence of rule of law); Reitz, *supra* note 17, at 441–42 (same); Sheehy, *supra* note 13, at 246 (noting that certain Western commentators contend that rule of law by definition is limited to liberal democracies).

24. *See* Bennett, *supra* note 10, at 94; Kairys, *supra* note 11, at 313, 322; Ngugi, *supra* note 13, at 537; Peerenboom, *supra* note 10, at 472; Reitz, *supra* note 17, at 441; *see also* Sheehy, *supra* note 13, at 247 (noting that many Western commentators incorporate human rights within their conception of the rule of law).

25. *See* RAZ, *supra* note 11, at 227–28; Peerenboom, *supra* note 10, at 472; Sheehy, *supra* note 13, at 247.

26. *See, e.g.*, Bennett, *supra* note 10, at 92–95; Peerenboom, *supra* note 10, at 485.

27. *See* Ngugi, *supra* note 13, at 538; Peerenboom, *supra* note 10, at 485.

28. *See, e.g.*, RAZ, *supra* note 11, at 210–11; Kairys, *supra* note 11, at 317–19 (arguing that going beyond a minimalist definition of the rule of law makes the term undefinable and incoherent); Peerenboom, *supra* note 10, at 531–33 (noting that in order for rule of law to be a useful concept in evaluating Chinese development, it must be viewed in its thin formulation, without reference to contested thick rule-of-law conceptions); *see also* Reitz, *supra* note 17, at 481–82 (excluding from rule-of-law criteria political economy and democratic values).

For this reason, thick rule-of-law criteria must—at least at this time—be excluded from any consensus-based understanding of the rule of law. Without a common understanding of which thick rule-of-law criteria, if any, properly form the basis for the rule-of-law ideal, it is impossible to rely on such components as neutral criteria for assessment of legal institutions. As such, it is simpler—and preferable for current purposes—to limit consideration to thin or instrumental rule-of-law goals which have been the subject of general agreement among rule-of-law theorists.

For the remainder of this Article, use of the term "rule of law" will be accordingly restricted to consensus-based thin or instrumental rule-of-law goals and will exclude thick (and otherwise non-consensus-based) rule-of-law ideals. As described above, these consensus-based, rule-of-law goals include the importance of (1) the existence of rules, (2) consistency, (3) limitation of discretion, (4) prospectivity, (5) notice or publicity, (6) stability, and (7) predictability.

B. Application of Rule-of-Law Principles to Adjudicative Lawmaking by Administrative Agencies

The question remains: Does adjudicative lawmaking by administrative agencies promote rule-of-law goals? An evaluation of the seven identified consensus-based rule-of-law criteria suggests that adjudicative lawmaking by administrative agencies is indeed likely—at least as a theoretical matter—to promote many of the identified rule-of-law goals. While adjudicative lawmaking also has certain theoretical drawbacks from a rule-of-law perspective, these drawbacks are minor when compared with the likely benefits. Each of the seven consensus rule-of-law criteria is discussed separately below, and the potential benefits or drawbacks of agency adjudicative lawmaking from the perspective of each criterion are identified. These potential benefits and drawbacks form the basis for an empirical evaluation of the hypothesized benefits and drawbacks in Part III.

A note regarding how the inquiry in each category was defined is in order. A number of the identified rule-of-law objectives have multiple connotations, and may overlap for this reason. To the extent possible, each objective is defined discretely, so as to allow for a meaningful and nonrepetitive inquiry. Thus, for example, while stability obviously impacts the predictability of law, consideration of stability is largely omitted in the context of the discussion of predictability, since that rule-of-law goal is assessed as a distinct objective elsewhere.

1. The Existence of Rules

At its most basic, the rule of law requires that fixed legal rules exist, by which individual and governmental conduct can be judged. Several authors

identify this goal (i.e., the creation of legal rules) as perhaps *the* most important of all rule-of-law goals, as it provides the necessary foundation for the existence of many other rule-of-law objectives.[29] For example, Antonin Scalia has argued that the creation of general legal rules is a core component of the rule of law, as it allows for the furtherance of, *inter alia*, predictability in legal outcomes, consistency in the legal norm applied, and equality of treatment of similarly situated individuals.[30] Therefore, creation of legal rules can be seen as a highly important goal from a rule-of-law perspective.

Agency lawmaking through adjudication is, by definition, the process of creating legal rules. An agency does not engage in lawmaking—whether by adjudication or legislative lawmaking—unless it thereby creates a general, binding legal rule.[31] Thus, adjudicative lawmaking by administrative agencies will *by definition* further at least this primary rule-of-law goal. So, rule creation must be counted among the absolute goods which result from adjudicative lawmaking—whether or not it would be a comparative advantage of the adjudicative approach as compared to legislative lawmaking.

There are reasons to believe, however, that adjudicative lawmaking may also have a comparative advantage over legislative lawmaking in furthering the "rules creation" rule-of-law goal. Specifically, as numerous authors have noted, the process of legislative lawmaking is often quite cumbersome, requiring compliance with complex procedural requirements prior to formulating a final rule.[32] Extended litigation following the

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29. *See* FULLER, *supra* note 14, at 39; Kairys, *supra* note 11, at 312; Scalia, *supra* note 15, at 1187; *see also* Fallon, *supra* note 15, at 15–18 (describing the importance of the existence of rules in formalist conceptions of the rule of law).

30. *See* Scalia, *supra* note 15, at 1178–80.

31. *See* MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/law (defining "law" as "rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority"); *see also* Jin Yu Lin v. U.S. Dep't of Justice, 413 F.3d 188, 189–90 (2d Cir. 2005) (declining to afford *Chevron* deference to immigration judge decisions and noting that legal rules must, by definition, be binding outside of the context of their particular circumstance).

32. *See, e.g.*, Elliott, *supra* note 4, at 1493–94 (noting that the legislative lawmaking process has become "ossified" to the point where it is "cumbersome at best"); Grunewald, *supra* note 4, at 319 (noting in the NLRB context that the legislative lawmaking process required substantial investment of time and resources); Pierce, *supra* note 4, at 301–02 (describing the cumbersome procedures that any agency must follow in order to avoid having courts deem its legislative lawmaking "arbitrary and capricious"). These procedural requirements and their focus on public participation are, of course, part of the reason why academics generally favor legislative over adjudicative lawmaking. *See, e.g.*, Pierce, *supra* note 4, at 308; Shapiro, *supra* note 4, at 932. *But cf.* Elliott, *supra* note 4, at 1494 (arguing that the detailed procedural requirements that the courts have imposed on legislative lawmaking efforts make meaningful public participation difficult); Robinson, *supra* note 4, at 514–16 (noting that there may be less participation benefits to legislative lawmaking than other authors have suggested). However, these same rules also may impede rule-of-law goals, insofar as they may lead to the creation of fewer legal rules.

promulgation of a final rule is also not uncommon and often focuses not on the substance of the enacted rule, but instead on agency compliance with these complex procedural requirements.[33] In contrast, a rule an agency creates during the course of adjudication will ordinarily not be subject to rigid procedural requirements, and can typically be appealed only by the individual litigants involved in the proceeding, although it may be challengeable in future individual proceedings.[34] For this reason, it seems highly probable that an agency program of adjudicative lawmaking would result in a larger quantity of "rules" than a comparably resourced legislative lawmaking approach.[35]

Agency adjudication may also lead to increased rule creation by disrupting the inertia that would otherwise result in an agency's failing to promulgate new rules. For example, an agency that has an adjudicative process which may be initiated by third parties (such as the NLRB) or has an independent enforcement arm that prosecutes cases before the agency (such as the Executive Office for Immigration Review, whose cases are prosecuted by the Department of Homeland Security) will routinely find itself in the position of adjudicating cases on an essentially involuntary basis (i.e., being required by regulation or statute to decide cases). Adjudicating these cases will, of course, require the application of existing legal rules and is likely at times to highlight the need for the creation of new or more specific rules. Unlike an agency decision to proceed with legislative lawmaking, which ordinarily lies solely within the agency's discretion, the agency must issue *some* decision in an adjudicated case—

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33. *See, e.g.*, Grunewald, *supra* note 4, at 320 (discussing the extended litigation that followed the NLRB's promulgation of its first legislative rule); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 273–99 (1987) (describing the crippling litigation, focused on compliance with procedural norms, that the National Highway Traffic Safety Administration faced when it elected to proceed through the promulgation of legislative rules); Pierce, *supra* note 4, at 301 (describing the cumbersome procedures that an agency must follow in order to avoid having its legislative lawmaking be deemed "arbitrary and capricious" by the courts); Schuck & Elliott, *supra* note 3, at 1015 (noting that "between 1975 and 1985 reviewing courts increasingly constrained" legislative lawmaking by administrative agencies by imposing cumbersome procedures).

34. *See, e.g.*, Pierce, *supra* note 4, at 301 (explaining that courts apply less demanding standards to adjudicative lawmaking than to legislative lawmaking, and thus that agencies are increasingly turning to adjudication as a means of lawmaking). Agencies are, of course, required to comply with some procedural requirements in conducting adjudications. These procedural requirements, however, tend to be less onerous than those that are required in order to promulgate a legislative rule, and instead tend to be comparable to the procedural requirements that judicial bodies must follow. *See, e.g.*, 5 U.S.C. §§ 554, 556–558 (setting forth the procedural standards applicable to many administrative adjudications); *see generally* PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, ADMINISTRATIVE LAW 322–24 (10th ed. 2003) (describing the factors that determine what specific adjudicative procedures apply in any given administrative adjudication).

35. *See generally* Pierce, *supra* note 4, at 300–01 (attributing a decline in legislative lawmaking by administrative agencies to the comparative ease of adjudicative lawmaking).

whether or not it elects to create a new rule. Therefore, the agency is forced into some kind of action, which may—at least hypothetically—lead it to create a new legal rule, where the agency would otherwise be unlikely to do so.

Adjudicative lawmaking seems highly likely to promote the basic rule-of-law goal of the existence of legal rules. Indeed, as an absolute matter, it is certain that adjudicative lawmaking will further this important rule-of-law goal. Even as a comparative matter, there are a number of reasons for believing that adjudicative lawmaking will be more likely to promote the creation of general legal rules than legislative lawmaking.

2. Consistency

As numerous rule-of-law scholars have observed, consistency is also a critical component of the rule of law.[36] In order to fulfill the rule-of-law objective of consistency, the same rules must be applied to both governmental and nongovernmental actors, and, more generally, to all similarly situated litigants.[37] Consistency is important to achieving rule of law because its presence (or absence) may often critically affect the perceived fairness of a country's legal system—and hence its legitimacy.

Significantly, adjudicative lawmaking is theoretically capable of playing a very positive and important role in furthering the objective of consistency. Largely by virtue of judicially created rules of agency deference (such as *Chevron* deference), adjudicative lawmaking by agencies is—at least theoretically—capable of ensuring that all litigants nationwide are subject to the same legal rule.[38] Since adjudicative lawmaking is entitled to substantial deference under these doctrines, the agency's nationally applicable rules should ordinarily be binding on individual reviewing courts in local jurisdictions, whether or not those courts would agree with the agency's rule as a *de novo* matter.[39] Thus, the

36. *See supra* note 16 and accompanying text.

37. *See, e.g.*, Kairys, *supra* note 11, at 312.

38. Although the rules of deference applicable to administrative agencies have changed over time, the concept that courts should afford some form of deference to administrative lawmaking has long been a fixture of American law. *See* Schuck & Elliott, *supra* note 3, at 1023–24 (describing the history of administrative deference doctrines); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 955 (1992) (noting that canons of construction favoring the adoption of an agency's construction of a statute "as long as the statute is sufficiently ambiguous to admit of that construction" have existed at least since the New Deal); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (setting forth the modern standards for evaluating the appropriateness of deference to many forms of lawmaking by administrative agencies); INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (holding that *Chevron* deference must be afforded to the Board of Immigration Appeals' (BIA) adjudicative lawmaking).

39. *See Chevron*, 467 U.S. at 842–45; *Aguirre-Aguirre*, 526 U.S. at 425; *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and*

agency often should have the power to impose consistent nationwide rules in the area of law that it administers—a power no other judicial or executive entity, with the exception of the United States Supreme Court, possesses.[40]

Moreover, the power of an agency to impose this type of consistency is in some respects far more significant than the power the Supreme Court possesses. While the Supreme Court very rarely decides questions of substantive administrative law (and thus, very rarely has a consistency-promoting effect on the legal rules applied to those governed by administrative law statutes), administrative agencies typically promulgate multitudinous legal rules.[41] Because courts are supposed, under *Chevron* and other rules of judicial deference, to afford the agency deference wherever it promulgates a binding legal rule, any and all of these multitudinous legal rules should hypothetically have the power to impose nationwide consistency on legal standards.[42] In contrast, absent an agency or Supreme Court decision, the development of these multitudinous legal rules would be left to each United States district court or court of appeals, and could vary significantly across jurisdictions.[43]

Chevron and other agency deference rules are, of course, not perfect tools for the promotion of consistency in the United States legal system. While the federal courts are supposed to defer to agency-created legal rules, there are in all instances limitations to that deference.[44] Thus, one or more of the courts of appeals (or district courts, if applicable) may decline to follow an agency's interpretation if it is facially inconsistent with the applicable congressional statute, or if it is "unreasonable."[45] In addition, there is no guarantee that individual judicial bodies will act responsibly in applying *Chevron* and other doctrines of administrative deference where they disagree with an agency's chosen legal rule.[46] And in the event they

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Judicial Review, 78 TEX. L. REV. 1615, 1630 (2000) (noting that the "principle of judicial deference" helps to minimize the variance among the federal courts in addressing agency interpretations of questions of law).

40. Congress, of course, arguably has the greatest authority and ability of any entity in the United States government to impose rules that are consistent nationwide. However, the areas where administrative agencies have jurisdiction are typically very complex, and are often placed within the jurisdiction of the agency precisely because the legislature cannot properly address all of the relevant legal complexities.

41. Indeed, the Supreme Court hears very few cases of any kind, and thus rarely serves a unifying role in American law. *See, e.g.*, Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193, 1198–99 (1992).

42. *See Chevron*, 467 U.S. at 842–45; *Aguirre-Aguirre*, 526 U.S. at 425.

43. *See generally* Bruff, *supra* note 41 (discussing the problem of decentralized judicial review and the nationwide inconsistency that can result from such decentralization).

44. *See Chevron*, 467 U.S. at 842–45.

45. *See id*.

46. *See generally* Schuck & Elliott, *supra* note 3 (discussing the problem of court faithfulness to deference doctrines and conducting an empirical study of the extent to which

do not, the likelihood of Supreme Court review to rectify the situation is remote (as in the case of the substantive issue itself).[47]

Nonetheless, agency lawmaking—particularly adjudicative lawmaking—seems highly likely to promote the rule-of-law objective of consistency. Because agencies promulgate legal rules to be applied nationwide, and because those rules are entitled to deference, a far greater chance exists that all litigants will be subject to the same rule if the agency has acted than if it has not. While this does not necessarily suggest a comparative benefit of adjudicative lawmaking vis-à-vis legislative lawmaking (except insofar as adjudicative lawmaking may be more likely to lead to increased rule promulgation), it does suggest that adjudicative lawmaking may have a significant absolute rule-of-law benefit.

3. Limitation of Discretion

Among the other significant rule-of-law goals identified by rule-of-law theorists is the placing of meaningful restrictions on government discretion.[48] This rule-of-law goal—like many other rule-of-law goals—is critical to promoting a number of other important rule-of-law objectives. For example, consistency (discussed *supra*) and predictability (discussed *infra*) may be difficult, if not impossible, to achieve where limitless government discretion exists. Indeed, it would be difficult to characterize a legal system as even properly possessing legal rules (the first rule-of-law criteria discussed, *supra*) in the context of limitless government discretion.

Again, there are significant reasons for believing that adjudicative lawmaking by agencies is likely to promote this rule-of-law goal. Statutes often bestow enormous authority on agencies to engage in discretionary decisionmaking—authority which may not (depending on the terms of the statute) be reviewable by judicial authorities.[49] Even in the event that there

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deference doctrines are followed in the federal courts of appeals).

47. *See* Bruff, *supra* note 41, at 1198–99 (noting limitations on the Supreme Court's ability to review the courts of appeals' actions). *But cf.* Gonzales v. Thomas, 547 U.S. 183, 185 (2006) (per curiam) (reversing a circuit court decision that endeavored to decide an immigration legal issue in the first instance, without first remanding to the agency).

48. *See* Peerenboom, *supra* note 10, at 513–14; Reitz, *supra* note 17, at 435, 444–45, 482; *see also* Kairys, *supra* note 11, at 313 (stating rules should limit government, not merely individuals).

49. *See, e.g.*, 5 U.S.C. § 701(a)(2) (2000) (precluding review of agency action that is "committed to agency discretion by law"); *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1395–98 (1983) [hereinafter *Immigration Policy*] (discussing the limited ability of the courts to impose constraints on discretion in the immigration context); Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 862–63 (1994) (noting discretion frequently insulates agency decisions from review); *see generally* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997) (discussing immigration discretion and limitations on judicial review thereof); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983)

is some judicial review available for discretionary agency decisionmaking, such review is typically highly deferential, and may not place meaningful restraints on that decisionmaking.[50] Among other things, courts are rarely empowered to create substantive rules limiting clearly bestowed agency discretion, even where they are able to impose procedural requisites on the agency's discretionary decisionmaking process.[51]

In contrast, the agency itself is subject to no such restrictions. Thus, the agency is perfectly free to adopt (by adjudication or legislative lawmaking) binding standards for the exercise of its discretion. These standards, in turn, would be enforceable against the agency in court, creating meaningful limitations on the agency's discretion.[52] Thus, agencies are perhaps the best-suited governmental entities (aside from Congress) to impose meaningful limitations on discretionary government action.

Of course, this again is not a comparative benefit of adjudicative lawmaking by agencies. An agency could also elect to adopt discretion-constraining rules by legislative lawmaking, with a comparable effect. In addition, because there is no requirement that an agency use its lawmaking powers in this way, there may be some question whether an agency would, in fact, voluntarily elect to restrain its discretion. Nevertheless, constraining its own discretion is at least a theoretically absolute benefit of adjudicative lawmaking.

4. Prospectivity

Prospectivity—i.e., the existence of the rules by which conduct is judged prior to the judging—has similarly been identified by many rule-of-law scholars as an important component of the rule of law.[53] As such scholars have observed, the absence of prospectivity essentially renders it impossible for individuals to plan their conduct in a way that conforms to legal rules.[54] As such, prospectivity is desirable from a rule-of-law perspective because it allows for planning, as well as for consistency and predictability in legal outcomes.[55]

(discussing different forms of administrative discretion and judicial review thereof).

50. *See, e.g.*, 5 U.S.C. § 706 (2000) (setting out general limitations on review of administrative action under the APA); Heyman, *supra* note 49, at 862–64; *Immigration Policy*, *supra* note 49, at 1395–98; *see generally* Kanstroom, *supra* note 49 (discussing limitations on the review of discretionary decisions in the immigration context).

51. *See* Heyman, *supra* note 49, at 894, 908; *Immigration Policy*, *supra* note 49, at 1395–98.

52. *See, e.g.*, Johnson v. Ashcroft, 378 F.3d 164, 172–73 (2d Cir. 2004); Heyman, *supra* note 49, at 880.

53. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 17, at 440.

54. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480; Radin, *supra* note 10, at 784–86.

55. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480;

Unlike many other core rule-of-law objectives, prospectivity does not seem likely to be promoted by adjudicative agency lawmaking, in either an absolute or comparative sense. Indeed, one of the major academic critiques of adjudicative lawmaking by administrative agencies has been its lack of prospectivity—at least vis-à-vis the individual parties involved in the adjudication.[56] In contrast, authors have argued that legislative lawmaking generally results in only prospectively applicable rules.[57] Thus, many authors have posited that administrative adjudication's lack of prospectivity is a major drawback of adjudicative lawmaking.[58]

These critiques of adjudicative lawmaking from a prospectivity perspective, however, may be of less importance than many authors have previously suggested. Adjudicative lawmaking—also known in the judicial context as "common law" lawmaking—is in fact quite common in many systems thought to possess advanced rule-of-law attributes. This is perhaps because adjudicative lawmaking—while it does create some prospectivity concerns in the short term and, in particular, as applied to the individual parties involved in the dispute—does not create a major deviation from the prospectivity norm over the long term. Most individuals will be subject to preexisting rules, and even those parties subject to ostensibly "new" rules created through adjudication will rarely be without forewarning that the new rule was forthcoming.[59]

To the extent that prospectivity concerns do exist, moreover, the differences between agency adjudication and legislative lawmaking likely have been exaggerated. As Professor Glen Robinson observed in his 1970 article *The Making of Administrative Policy*, legislative lawmaking can also create prospectivity concerns, even though it is, in most circumstances, ostensibly applied only prospectively.[60] Because many past actions by

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Radin, *supra* note 10, at 784–86.

56. *See, e.g.*, Araiza, *supra* note 5, at 356, 372–78; Pierce, *supra* note 4, at 308–09; *see also* Shapiro, *supra* note 4, at 933 (discussing the prospectivity argument against adjudicative lawmaking).

57. *See, e.g.*, Araiza, *supra* note 5, at 374; McFarland, *supra* note 4, at 436; *see also* Robinson, *supra* note 4, at 517 (describing the prospectivity critique of adjudicative lawmaking); Shapiro, *supra* note 4, at 933 (analyzing the distinction between legislative lawmaking and adjudication with respect to retroactive application of policy).

58. *See, e.g.*, Araiza, *supra* note 5, at 356; McFarland, *supra* note 4, at 436; Pierce, *supra* note 4, at 308–09; *see also* Robinson, *supra* note 4, at 517 (describing the prospectivity critique of adjudicative lawmaking).

59. Agency "common law," however, is probably somewhat less predictable than judicial common law, since the legislation governing administrative agencies (and judicial constructions thereof) often empowers agencies to make decisions based on pure policy concerns. *See, e.g.*, Araiza, *supra* note 5, at 353.

60. *See* Robinson, *supra* note 4, at 518; *see also* Shapiro, *supra* note 4, at 933–35 (describing the retroactivity concerns that can be raised by legislative lawmaking, and noting that even in the context of agency adjudication, "an agency has the tools to shape its result" to prevent undue retroactivity concerns).

regulated entities may be relevant to—or indeed dispositive of—the entity's compliance with current regulations, the creation of legal rules via legislative lawmaking may also lead to a situation in which an entity's past conduct becomes the basis for a current penalty.[61] Thus, there is less reason for drawing a sharp distinction between legislative and adjudicative lawmaking than many academic scholars have suggested.

Therefore, while there certainly may be some prospectivity concerns that are raised by the use of adjudication as a means of agency lawmaking, these concerns seem relatively attenuated. In particular, it seems unlikely that adjudicative lawmaking by administrative agencies is significantly worse, from a prospectivity perspective, than agency legislative lawmaking.

5. Notice or Publicity

Notice or publicity of existing legal rules is another significant rule-of-law objective.[62] Because individuals can do little to conform their conduct to law without the means for identifying what legal rules exist, notice or publicity is a fundamental requisite for achieving many other rule-of-law goals.[63]

Adjudicative lawmaking likely has both benefits and drawbacks from the perspective of furthering access to the content of legal rules. On the one hand, agency lawmaking via adjudication is far preferable from a rule-of-law standpoint to agency application of unstated *de facto* legal rules. If an agency is, in fact, applying *de facto* legal rules to individual conduct without formally announcing them via adjudication or legislative lawmaking, it is dramatically undermining rule-of-law goals precisely because it does not allow for notice or publicity of its actual standards. Thus, from an absolute standpoint, agency adjudication—if made available in a published format—may well forward notice and publicity goals.

On the other hand, as some authors have noted, rules created via administrative adjudication are rarely as accessible as legislatively promulgated rules.[64] Because an agency typically publishes rules promulgated through adjudication in serial format (i.e., in the order each decision is issued), finding rules on a specific topic may be challenging.[65]

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61. *See supra* note 60.

62. *See, e.g.*, RAZ, *supra* note 11, at 214; Kairys, *supra* note 11, at 312; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 1717, at 440.

63. *See, e.g.*, RAZ, *supra* note 11, at 214; Radin, *supra* note 10, at 784–86.

64. *See, e.g.*, Bernstein, *supra* note 4, at 582–87; Mayton, *supra* note 4, at 103; Pierce, *supra* note 4, at 308; Reitz, *supra* note 17, at 440; Shapiro, *supra* note 4, at 941.

65. *See, e.g.*, Shapiro, *supra* note 4, at 941; *see generally* Administrative Decisions Under Immigration and Nationality Laws of the United States from 1940 to the Present [hereinafter I. & N. Dec.] (setting forth the BIA's and other administrative immigration bodies' precedential decisions in serial format).

In contrast, rules promulgated via legislative lawmaking are typically ordered by topic, and thus are easier to locate.[66] Similarly, parts of a current adjudicatively created rule may be scattered across multiple agency cases, whereas a legislative regulation is far more likely to consolidate all aspects of the rule.[67]

Thus—while there are likely absolute benefits of adjudicative lawmaking for the purposes of achieving notice and publicity rule-of-law goals—there are also comparative drawbacks of adjudicative lawmaking when viewed from a notice and publicity standpoint.

6. Stability

Numerous scholars identify stability—i.e., the level of change (or lack thereof) in defined legal standards—as an important rule-of-law goal.[68] As such scholars have observed, if legal rules are highly mutable, many of the planning benefits that otherwise flow from the rule of law can go unrealized.[69] Some level of legal stability is, therefore, an important prerequisite to a functional rule-of-law system.

Whether or not adjudicative lawmaking furthers or hinders stability will depend, in large part, on the behavior of the individual agency. An individual agency that issues stable rules via administrative adjudication will promote the objective of stability, whereas an agency that frequently uses adjudication to modify its position evidently will not. Thus, whether adjudicative lawmaking hinders or promotes stability will largely depend on the actions of the individual agency and its use of adjudicative lawmaking authority.

There are reasons to believe, however, that agencies may be more likely than not to make poor use of adjudicative lawmaking authority, insofar as stability values are concerned. For the same reason—i.e., procedural ease—that an administrative agency may be more likely to issue a greater number of rules *en toto* via adjudicative lawmaking, the agency may also be more likely to modify rules that it created via adjudication.[70] Because the costs

66. *See, e.g.*, Shapiro, *supra* note 4, at 941; *see generally Code of Federal Regulations* (organizing promulgated regulations topically).

67. *See, e.g.*, Bernstein, *supra* note 4, at 582–87; Shapiro, *supra* note 4, at 941.

68. *See, e.g.*, RAZ, *supra* note 11, at 214–15; Fallon, *supra* note 15, at 8; Peerenboom, *supra* note 10, at 478; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 17, at 435–36, 440.

69. *See, e.g.*, RAZ, *supra* note 11, at 214–15; Fallon, *supra* note 15, at 8; Peerenboom, *supra* note 10, at 480; Radin, *supra* note 10, at 784–86; Reitz, *supra* note 17, at 443.

70. *See* Bernstein, *supra* note 4, at 597; *see also* Grunewald, *supra* note 4, at 281 (noting that the NLRB's preference for adjudication creates potential stability concerns); Morrison, *supra* note 2, at 259–60 (noting that the NLRB's tendency to proceed through adjudication had allowed it, during the first five years of the Reagan Administration, to effectuate very substantial modifications of its policies very rapidly).

of modifying a rule are much lower where the rule is promulgated via adjudication, agencies may well be more likely to adopt different positions over time, where they exercise their adjudicative lawmaking authority.[71] For these reasons, adjudicative lawmaking by agencies may hinder the rule-of-law goal of stability.

7. Predictability

Predictability—the ability of regulated parties to know what the law proscribes—is another important component of the rule of law.[72] As with prospectivity and consistency, an absence of predictability can significantly hamper regulated entities' ability to order their affairs consistently with legal principles.[73] Predictability of the law, in the sense of the law's knowability and transparency, is therefore a highly important rule-of-law objective.

Adjudicative lawmaking by administrative agencies theoretically should play an important role in furthering predictability. The laws that agencies are charged with administering almost always include numerous interpretive ambiguities or outright omissions. Indeed, filling these statutory gaps is often one of the primary justifications for the creation of an administrative body. Therefore, until an agency has exercised its "gap-filling" function, the statutes it administers typically include significant areas of ambiguity, which critically limit the predictability of the law from the perspective of regulated entities.

Adjudicative lawmaking and legislative lawmaking are, of course, the two significant ways in which agencies can exercise their gap-filling function. Thus, adjudicative lawmaking theoretically should play an important role from the perspective of regulated entities in increasing predictability. Whenever the agency fills a gap in its organic law using its adjudicative lawmaking power, the ability of the regulated parties to know what the law proscribes is enhanced, thereby promoting predictability.

Indeed, even from a comparative perspective, adjudicative lawmaking seems likely to be superior to legislative lawmaking as a means of promoting predictability. For the many reasons discussed *supra*, administrative agencies may be more likely—at least theoretically—to issue a greater quantity of rules via adjudication than via legislative lawmaking. Since predictability depends critically on the extent to which

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71. *See, e.g.*, Morrison, *supra* note 2, at 259–60. *But cf.* Robinson, *supra* note 4, at 532 (noting that the Federal Communications Commission—which has focused almost exclusively on legislative lawmaking as its preferred mode of lawmaking—has been "accused . . . of vacillation in almost every major area") (internal quotation marks omitted).

72. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480.

73. *See, e.g.*, RAZ, *supra* note 11, at 214; Peerenboom, *supra* note 10, at 478, 480, 497; Reitz, *supra* note 17, at 443.

agencies elect to exercise their lawmaking authority, this increased lawmaking tendency, if accurate, may constitute a comparative advantage of adjudicative lawmaking.

Discrete subsets of regulated entities may also be more likely to receive the benefits of predictable legal rules where an agency engages in adjudicative lawmaking rather than legislative lawmaking. Unlike within the context of legislative lawmaking—which typically focuses on the most overarching common legal issues affecting regulated entities—legal issues that apply to a much smaller subset of regulated entities will organically arise within the context of adjudication.[74] Since the burden of issuing a new rule via adjudication is comparatively quite small, the likelihood that an agency will address these legal issues is almost certainly greater in the adjudicative context than it would be in a legislative lawmaking proceeding.

Therefore, there are significant reasons for thinking that adjudicative lawmaking is likely to promote the rule-of-law goal of predictability, both as an absolute and as a comparative matter.

II. INTRODUCTION TO THE BOARD OF IMMIGRATION APPEALS

A. History of the Board of Immigration Appeals

The Board of Immigration Appeals is the primary appellate entity responsible for reviewing immigration cases within the American legal system. Created by the Attorney General in 1940,[75] the BIA currently issues an astounding 46,000 immigration decisions a year[76]—a far greater number than any other appellate entity.[77] The Board's jurisdiction encompasses the vast majority of major immigration determinations, including appeals from removal determinations,[78] requests for discretionary

74. *See, e.g.*, Bernstein, *supra* note 4, at 588–89, 591 (observing, but also criticizing, the tendency of adjudicative lawmaking by agencies to deal with more discrete issues).

75. Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (now codified at 8 C.F.R. pt. 90).

76. U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2005 Statistical Yearbook*, at S2 (2006), *available at* http://www.usdoj.gov/eoir/statspub/fy05syb.pdf (last visited Jan. 17, 2007).

77. In contrast, the federal courts of appeals cumulatively hear approximately 12,000 immigration cases per year. U.S. Courts News Release, Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005 (Mar. 14, 2006), *available at* http://www.uscourts.gov/Press_Releases/judbus031406print.html (last visited Apr. 13, 2008). This figure reflects a recent surge in immigration appeals to the federal circuit courts, following the implementation of BIA streamlining procedures. *See generally* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005).

78. Prior to 1996, proceedings aimed at removing an alien from the United States were split into two categories—deportation and exclusion. Deportation and exclusion

relief, and asylum applications.[79]

The Attorney General created the Board by regulation, and it therefore has historically been without a statutory basis.[80] Its role in American immigration law, however, has been remarkably stable over the last six and a half decades. Since its creation, the Board has played two major roles within the immigration administrative regime: (1) serving as an appellate body for the review of individual immigration determinations made by lower level immigration officials (including, most notably, immigration judges (IJs));[81] and (2) issuing precedential decisions on issues of immigration law that are binding on other immigration officials within the administrative enforcement and adjudication structure.[82] This latter role—the creation of legal rules via adjudication—will be the primary focus of the analysis in this Article, and therefore merits further discussion.

Regulations promulgated by the Attorney General (AG) grant the BIA authority to issue binding precedential decisions. Under those regulations, which have remained remarkably similar over most of the course of the BIA's sixty-five year history, the AG has delegated immigration lawmaking authority to the Board to exercise when it acts as an appellate body.[83] The regulations do not set specific limits on the Board's ability to issue precedential decisions, leaving to the Board's discretion whether or

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proceedings were replaced with a single category of proceedings—removal—in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See* Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546. "Removal" thus incorporates both what was historically termed "deportation" and "exclusion." *See* Evangelista v. Ashcroft, 359 F.3d 145, 147 (2d Cir. 2004).

79. *See* 8 C.F.R. § 1003.1(b) (2007) (detailing the jurisdiction of the BIA). There are a few major types of immigration determinations that are not reviewable by the Board. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(C) (2000) (specifying that expedited removal determinations are generally not subject to administrative review by any entity).

80. *See* Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (now codified at 8 C.F.R. pt. 90); Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 30 (1977). The existence of the BIA has since been recognized in various statutory enactments, but has never been formally statutorily mandated. *See, e.g.*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440 (1996).

81. *See* Palmer, *supra* note 77, at 18; Roberts, *supra* note 80, at 34–35. During the very early years of its tenure, the BIA would also sometimes directly adjudicate cases that came with only a tentative decision from lower level officials. *See* Roberts, *supra* note 80, at 34–35.

82. *See* 8 C.F.R. § 1003.1(g) (2007) (setting forth the BIA's authority to make precedential law); *see also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002); Palmer, *supra* note 77, at 18.

83. The original regulation expressly delegating precedential decisionmaking authority to the BIA was promulgated in 1952. *See* Delegation of Attorney General's Authority in Certain Actions Under Immigration Laws, 17 Fed. Reg. 4737, 4737–38 (May 24, 1952). A very similar grant of precedential decisionmaking authority remains in effect today. *See* 8 C.F.R. § 1003.1(g) (2007).

not to designate a particular decision as precedential.[84] Precedential decisions of the Board are binding on all "officers and employees of the Department of Homeland Security" and on "immigration judges in the administration of the immigration laws of the United States."[85]

Although other administrative entities within the administrative immigration framework have also historically been empowered to issue precedential decisions in certain areas, the BIA has overwhelmingly been the entity responsible for the development of immigration law via administrative adjudication.[86] The BIA has, until recently, regularly exercised its authority to make law via administrative adjudication, issuing an average of forty-eight precedential decisions a year.[87]

In exercising both its lawmaking and individual review functions, the BIA has historically maintained relative independence from the enforcement wing of immigration administration (historically the Immigration and Naturalization Service (INS), and today the Department of Homeland Security, United States Immigration and Customs Enforcement (ICE)).[88] Unlike other adjudicative entities charged with administering immigration law, the BIA has never formally been a part of the enforcement wing of immigration administration.[89] While the Board's

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84. *See* 8 C.F.R. § 1003.1(g) (2007). All decisions of the BIA are subject to review by the Attorney General, and thus can be reversed if the Attorney General disagrees with the BIA's substantive determination or a decision to designate a decision as precedential. *See id.* § 1003.1(h) (2007). In practice, however, this authority is rarely exercised by the Attorney General, and is almost never exercised simply because of a disagreement regarding the appropriateness of designating a particular decision as precedential.

85. 8 C.F.R. § 1003.1(g) (2007). Prior to the enactment of the Homeland Security Act, INS was the agency responsible for immigration enforcement. INS, like its successor, the Department of Homeland Security (DHS), was bound by the decisions of the BIA. 8 C.F.R. § 3.1(g) (1981).

86. *See generally* I. & N. Dec., *supra* note 65 (reporting all precedential administrative adjudications by immigration bodies, the overwhelming majority of which have been issued by the Board of Immigration Appeals).

87. *See id.* (data on file with author).

88. *See, e.g.*, Catherine Yonsoo Kim, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 COLUM. L. REV. 1448, 1472–73 (2001); John A. Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Legislation*, 44 U. PITT. L. REV. 261, 283 n.99 (1983). *But cf. Immigration Policy*, *supra* note 49, at 1365 (arguing that the theoretical capability of the Attorney General to abolish the BIA "undermines the independence of the Board's judgment"); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1212 & n.287 (arguing that the BIA has a pro-enforcement bias); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1024 (1998) (noting that the Attorney General, then the chief enforcement officer for immigration laws, determines important features of the BIA, including its membership, size, and jurisdiction).

89. Most strikingly, until 1983, immigration judges—who are the first-level entities to hear many of the cases ultimately appealed to the BIA—were formally housed within the enforcement wing of the immigration bureaucracy. *See* The Committee on Communications and Media Law of the Association of the Bar of the City of New York, *"If It Walks, Talks and Squawks . . ." The First Amendment Right of Access to Administrative Adjudications: A*

decisions remain technically subject to the review and reversal of the AG—historically the head of both the enforcement and adjudicative wings of immigration administration—this authority has in fact been relatively rarely exercised.[90] In 2002, following the enactment of the Homeland Security Act, the AG was divested of responsibility for heading the enforcement wing of immigration administration, leading to a total division of the adjudicative and prosecutorial functions of immigration administration.[91]

While the BIA has maintained a relatively high level of independence from immigration enforcement efforts, it has remained subject to modification or eradication by the AG as a result of its nonstatutory nature. For most of the Board's history, this possibility remained more theoretical than real, as its structure and procedures remained relatively constant.[92] In 1999 and 2002, however, Attorneys General Reno and Ashcroft issued regulations implementing a series of significant reforms known as "streamlining."[93] As set forth below, these streamlining regulations—and in particular the 2002 streamlining regulations issued by Attorney General Ashcroft—mandated major changes in the BIA's method of processing cases. As a result, the 1999 and 2002 regulations have significantly reconfigured both the individual review and adjudicative lawmaking

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Position Paper, 23 CARDOZO ARTS & ENT. L.J. 21, 67 (2005); *see also* Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 658 (2006). In 1983, both the immigration judges, then-known as "special inquiry officers," and the BIA were moved to the newly constituted Executive Office for Immigration Review (EOIR), an entity that was independent of INS, reporting solely to the Attorney General. *See* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8040 (Feb. 28, 1983); Durham, *supra* note 89, at 674–75.

90. *See, e.g.*, Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1308 (1986) [hereinafter Legomsky, *Forum Choices*]; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375 (2006) [hereinafter Legomsky, *War on Independence*]; Derek Smith, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 VA. L. REV. 681, 685 (1989) (noting that almost all BIA decisions are administratively final because the Attorney General rarely exercises oversight power). *See generally* I. & N. Dec., *supra* note 65 (reporting all precedential administrative immigration decisions, including all Attorney General decisions overruling the BIA).

91. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 401, 451, 456, 471 (2002) (codified as amended at 6 U.S.C. §§ 201, 271, 275 (2000)) (transferring the functions of INS from DOJ to the newly created Department of Homeland Security).

92. *See, e.g.*, Lory Diana Rosenberg, *Lacking Appeal: Mandatory Affirmance by the BIA*, 9-3 BENDER'S IMMIGR. BULL. 1, 2 (2004); *see also* Legomsky, *War on Independence*, *supra* note 90, at 378–79 (noting that before Attorney General Ashcroft, no Attorney General had ever removed a member of the BIA, despite having the authority to do so).

93. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,135–36 (Oct. 18, 1999); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880–81 (Aug. 26, 2002).

functions of the Board.

1. The 1999 Streamlining Regulations

In October 1999, Attorney General Reno promulgated streamlining regulations in response to a substantial backlog of cases awaiting review by the BIA.[94] Under these regulations, the BIA was authorized to handle a variety of cases in a more streamlined fashion, electing for single-member review of certain categories of cases, and issuing summary affirmances in certain specified circumstances. The most significant reforms delineated in the 1999 regulations included the following:[95]

> (1) Authorizing the Chairman of the BIA to designate categories of cases suitable for single-member (instead of three-member panel) review and to assign such cases to single members of the permanent Board;[96]
>
> (2) Authorizing the single member to which such cases were assigned to affirm the opinion of an IJ without opinion "if the Board [m]ember determines that the result reached in the decision under review was correct; that any errors in the decision were harmless or nonmaterial; and that (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-member review is not warranted."[97] A single member who determined that the decision was not appropriate for affirmance without opinion could refer the case to a three-member panel for review and decision;[98] and
>
> (3) Authorizing the exercise of the regulations' summary dismissal[99] power by a single member of the permanent Board (summary dismissals were previously allowed, but only by a panel of the Board).[100]

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94. Backlog problems have long plagued the BIA. *See, e.g.*, Roberts, *supra* note 80, at 39 (describing the history of backlogs, including a 1952 backlog in which there were 4,421 cases before the BIA). These problems escalated in the mid-to-late 1990s when the BIA saw a dramatic increase in the number of new appeals and motions filed. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,136; Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878–79.

95. In addition to the major reforms delineated below, the 1999 regulations added two grounds for summary dismissal of appeals and authorized individual Board members (instead of three-member panels) to deal with a variety of procedural or ministerial matters, such as ordering a remand because of a defective or missing transcript. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,135–36.

96. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,141 (Oct. 18, 1999).

97. *Id*.

98. *Id*.

99. A BIA case subject to "summary dismissal" is dismissed without review on the merits, generally because of a jurisdictional defect. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,137.

100. *Id*.

Thus, while the 1999 regulations created the possibility of substantial reforms in BIA procedures, they left discretion for determining the appropriateness of such reforms to the Board itself. The Board Chairman did, in fact, implement the 1999 streamlining regulations to a significant extent, following a "staged" process of implementation from 2000 to 2002.[101] Even following the implementation of the 1999 regulations by the Chairman, however, individual Board members retained—as per the regulations—the discretion to refer streamlined cases to a panel for full-Board review.

2. The 2002 Streamlining Regulations

The 2002 "streamlining" regulations promulgated by Attorney General Ashcroft considerably expanded the streamlining procedures created in 1999 and rendered their implementation mandatory in the vast majority of BIA cases. Among the major changes made by the 2002 streamlining regulations were the following:[102]

> (1) Mandatory assignment of all cases for single-member review, except in certain limited circumstances (such as, *inter alia*, where there is a "need to establish a precedent construing the meaning of laws, regulations, or procedures," or "[t]he need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents");[103]
>
> (2) Mandatory affirmance without opinion of IJ decisions where "the Board member determines that the result reached in the decision under review was correct; that any errors under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of a novel factual situation; or (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case;"[104]
>
> (3) Allowing for the issuance of short orders by single members where a case does not fit within the standards for panel review, but is not appropriate for affirmance without opinion;[105]
>
> (4) Implementation of strict timelines for the filing of briefs, for the record on appeal, and for the issuance of decisions by the Board

101. *See* Palmer, *supra* note 77, at 24–25, for a more comprehensive discussion of this staged implementation process.

102. In addition to the major reforms delineated below, a few more minor changes were also made by the 2002 streamlining regulations. *See generally* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

103. *Id.* at 54,903.

104. *Id*.

105. *Id.*

(generally, requiring the issuance of decisions within ninety days of the completion of the record on appeal, where a case is assigned to a single Board member, and within 180 days where assigned to a panel);[106]

(5) Eliminating *de novo* review of IJ factfinding and substituting it with clearly erroneous review;[107] and

(6) Reducing the number of Board members from twenty-three to eleven.[108]

Thus, the 2002 streamlining regulations dramatically expanded the use of single-member and summary "affirmance without opinion" (AWO) review, making both procedures mandatory in the vast majority of cases. The regulations also enacted a number of controversial reforms, such as more than halving the existing membership of the Board and implementing strict timelines for the issuance of BIA decisions.

3. Effects of the Streamlining Regulations

The 1999 and particularly the 2002 streamlining regulations mandated substantial changes in the Board's manner of handling its cases. Unsurprisingly, then, the 1999 and 2002 regulations led to major changes in the BIA's execution of both of its primary functions—i.e., the review of individual immigration cases and the issuance of precedential decisions. As set forth below, these changes failed to meet several of the articulated objectives of the Attorney General in issuing the regulations. However, they have allowed the Board to achieve the primary articulated objective of more efficiently disposing of cases.[109]

a. Individual Appeals

The effects of the streamlining regulations on the fair, considered disposition of individual appeals by the Board appear to have been disastrous. As numerous commentators have observed, the mandatory single-member, affirmance without opinion system, coupled with the rigid timelines imposed, has led to a markedly more pro-government regime in which egregious errors by IJs are often missed or ignored.[110] In addition,

106. *Id.* at 54,903–05.
107. *Id.* at 54,902.
108. *Id.* at 54,893.
109. In FY 1999, the year prior to the initial streamlining reforms, the BIA issued approximately 23,000 decisions, and had twenty-three permanent members (amounting to a rate of approximately 1,000 decisions per permanent member per year). In FY 2006, the most recent year for which complete data is available, the BIA issued approximately 41,500 decisions, while having only eleven permanent members, amounting to a rate of approximately 3,772 decisions per permanent member per year. Response to FOIA Request by Executive Office for Immigration Review (Sept. 13, 2006) (on file with author).
110. *See, e.g.*, Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 FORDHAM INT'L L.J. 1361, 1387 (2004); Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms*

the sheer volume of decisions issued by individual BIA members under the new regime—sometimes exceeding fifty appeals per day—must ensure that many individual appeals do not receive anything but the most cursory review.[111] This deterioration in the quality of individual review at the Board level has led to a striking surge in appeals of BIA decisions to the federal courts of appeals,[112] which has in turn led to a backlog of pending immigration cases at the court of appeals level.[113]

Despite these apparent defects from an individual "fairness" standpoint, the 1999 and 2002 streamlining procedures have uniformly withstood challenges to their validity.[114] In particular, despite numerous due-process- and administrative-law-based challenges to the single-member, affirmance without opinion procedure, the procedure has been upheld in every court of appeals to have addressed such a challenge.[115] Thus, although there is increasing impatience among the courts of appeals with the quality of individual case decisionmaking under the streamlining regulations, they have as a global matter refused to disrupt those regulations.[116]

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of Immigration Procedures, 19 GEO. IMMIGR. L.J. 35, 90–95 (2004); Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management* 7, 41–47 (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudy ABA_8mgPDF.pdf (last visited July 28, 2008) (noting substantial increase in affirmances that favored the government); Rosenberg, *supra* note 92, at 1.

111. *See* Burkhardt, *supra* note 110, at 94; Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1; *see also* Salameda v. INS, 70 F.3d 447, 458 (7th Cir. 1995) ("[D]eciding 14,000 cases a year, the Board [of Immigration Appeals] is bound to commit some howlers.").

112. During the relevant time period, most BIA determinations were reviewable in the first instance by federal courts of appeals.

113. *See, e.g.*, Dorsey & Whitney LLP, *supra* note 110, at 39; Durham, *supra* note 89, at 655–57; Aaron Holland, *New BIA Rules Lead to Skyrocketing Rate of Appeal*, 19 GEO. IMMIGR. L.J. 615, 615–17 (2005); Audrey Macklin, *Disappearing Refugees: Reflections on the Canada–U.S. Safe Third Country Agreement*, 36 COLUM. HUMAN RIGHTS L. REV. 365, 404 n.121 (2005); Palmer, *supra* note 77, at 3, 30–32, 88.

114. *See, e.g.*, Batalova v. Ashcroft, 355 F.3d 1246, 1253–54 (10th Cir. 2004); Yu Sheng Zhang v. Dep't of Justice, 362 F.3d 155, 160 (2d Cir. 2004); Albathani v. INS, 318 F.3d 365, 375–79 (1st Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 852 (9th Cir. 2003); Denko v. INS, 351 F.3d 717, 725–30 (6th Cir. 2003); Dia v. Ashcroft, 353 F.3d 228, 238–45 (3d Cir. 2003) (en banc); Georgis v. Ashcroft, 328 F.3d 962, 966–67 (7th Cir. 2003); Khattak v. Ashcroft, 332 F.3d 250, 252–53 (4th Cir. 2003); Mendoza v. U.S. Attorney General, 327 F.3d 1283, 1288–89 (11th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 832 (5th Cir. 2003).

115. *See, e.g.*, *Batalova*, 355 F.3d at 1253–54; *Zhang*, 362 F.3d at 160; *Albathani*, 318 F.3d at 375–79; *Falcon Carriche*, 350 F.3d at 852; *Denko*, 351 F.3d at 725–30; *Dia*, 353 F.3d at 238–45; *Georgis*, 328 F.3d at 966–67; *Khattak*, 332 F.3d at 252–53; *Mendoza*, 327 F.3d at 1288–89; *Soadjede*, 324 F.3d at 832.

116. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 828–30 (7th Cir. 2005) and Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004) (exemplifying the types of complaints that have been raised by the courts of appeals following the promulgation of the new streamlining regulations).

b. Precedential Decisions

The streamlining regulations also had a striking effect on the Board's other primary function—the issuance of binding decisions. Interestingly, both the 1999 and 2002 rules cited the need for the Board to focus to a greater degree on the issuance of precedential decisions as one of the major justifications for the promulgation of the rules.[117] Indeed, the need for the Board to be afforded greater time to focus on its role as an expositor of the immigration laws was one of the predominant justifications offered for the implementation of mandatory streamlining procedures in 2002.[118]

In marked contrast to these asserted goals, the number of precedential decisions issued by the Board actually *decreased* dramatically in the years following 1999.[119] In FY 1999, just prior to the issuance of the first set of streamlining regulations, the BIA issued forty-five precedential decisions, a number fairly consistent with its historical practice.[120] During the following three years, the number of precedential decisions issued each year fell to the mid-twenties.[121] In FY 2003, 2004, and 2005, following the issuance of the 2002 streamlining regulations, the number of precedential decisions fell even further, with an all-time low number of precedential decisions—five—being issued in 2004.[122]

These decreases are even more striking when they are considered as a proportion of the total number of cases decided by the BIA.[123] In 1996, shortly before the streamlining reforms were implemented by the Board, approximately 0.256% of BIA appeals resulted in published precedential decisions.[124] This figure—already a tiny fraction of the appeals decided by

117. *See* Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002); *see also* Philip G. Schrag, *The Summary Affirmance Proposal of the Board of Immigration Appeals*, 12 GEO. IMMIGR. L.J. 531, 534 (1998) (noting that the need for the Board to have greater time to focus on its lawmaking function was one of the predominant justifications for the initial streamlining proposal).

118. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,880.

119. *See* Figure 1, *infra.* Data on file with author. Data on the number of precedential decisions issued by the BIA per fiscal year were collected from Administrative Decisions Under Immigration and Nationality Laws of the United States, which reports all precedential administrative immigration decisions. *See generally* I. & N. Dec., *supra* note 65.

120. *See infra* Figure 1.

121. *Id.*

122. *Id.*

123. *See infra* Figure 2. The proportion of BIA cases raising novel issues of immigration law should not change as a result of the implementation of the streamlining regulations. While other factors (such as the passage of time from the date of major statutory amendments to the immigration laws) could certainly affect this proportion, it seems unlikely that these factors would result in such dramatic declines, or that they would so precisely coincide with the implementation of the streamlining regulations.

124. *See infra* Figure 2. Data on file with author. The proportion of precedential

the BIA—plummeted following the implementation of the 1999 and 2002 streamlining regulations, with 0.066% of BIA appeals resulting in published precedential decisions in 2001 and a mere 0.010% of appeals resulting in published precedential decisions in 2004.[125]

The most recent data available (FY 2006 and FY 2007) suggest that the BIA is again beginning to issue a more significant number of precedential decisions. Nonetheless, the proportion of precedential decisions (and in FY 2006, the number of precedential decisions) issued by the Board remains substantially lower than it was preceding the implementation of the streamlining regulations.[126] Thus, the streamlining reforms continue to adversely affect the BIA's second primary mission as an expositor of the immigration laws, albeit to a lesser extent than immediately following the implementation of those reforms.

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decisions issued by the BIA in a fiscal year was determined by dividing the number of precedential decisions issued by the total number of decisions issued. The total number of decisions issued per year by the BIA was obtained for the years 1996–2005 via a FOIA inquiry to the Executive Office for Immigration Review. *See* Response to FOIA Request by Executive Office for Immigration Review (Sept. 13, 2006) (on file with the author). The total number of decisions issued in 2006 by the BIA was obtained from the EOIR FY 2006 Statistical Yearbook. *See* U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2006 Statistical Yearbook*, at S2 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (last visited June 1, 2008). Since the EOIR had not, as of the time of the writing of this article, released the total number of BIA decisions decided in FY 2007, only an estimated proportion could be calculated. For the purposes of the estimate, the total number of decisions issued was estimated to be equal to the number issued in 2006.

125. *See infra* Figure 2.

126. *Id.*

Figure 1
Number of BIA Precedent Decisions
(FY 1996-FY 2007)

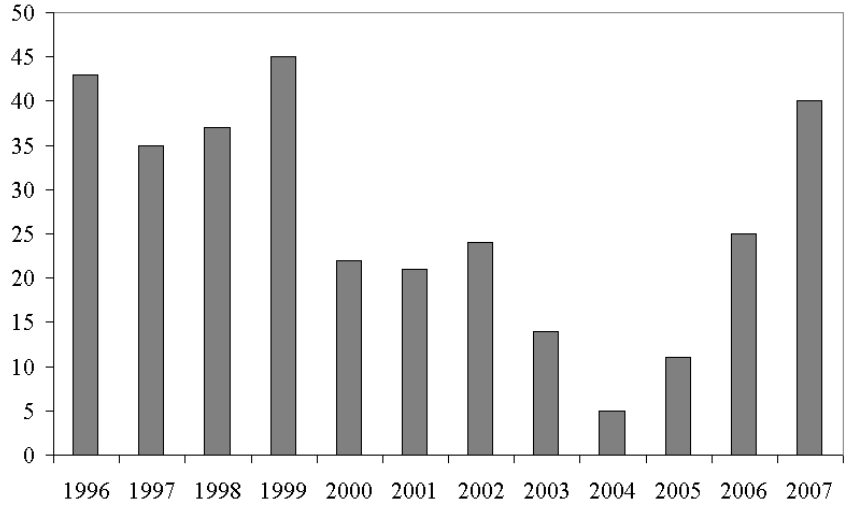
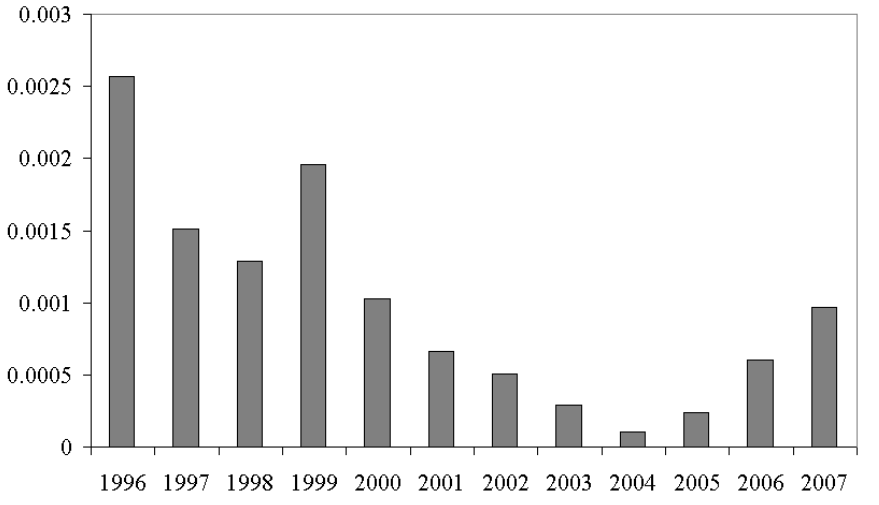


Figure 2
Proportion of BIA Decisions Issued as Precedential
(FY 1996-FY 2007)



The reasons for the BIA's return to a more robust program of adjudicative lawmaking during the two most recent fiscal years are not

fully apparent. However, one factor clearly has played a substantial role. Between FY 2005 and FY 2007, the number of precedential decisions issued by the BIA more than tripled.[127] Remands from the federal circuit courts account for approximately 38% of this increase.[128] Even more striking is that remands from the Second Circuit alone (only one of twelve circuit courts that hear immigration appeals) account for a full 28% of the increase in the numbers of precedential decisions.[129] Thus, increased remands have played a substantial role in reinvigorating the BIA's program of adjudicative lawmaking.[130]

A sampling of circuit court remand decisions reveals that a desire to further rule-of-law goals, like those identified in Part I, often is a motivating factor in such decisions. For example, the Second Circuit has repeatedly noted the importance of consistency in immigration rules—and the unique capability of the BIA to create such consistency across circuits—as a critical factor supporting remand.[131] The Second Circuit has also emphasized the critical role that the BIA can, and should, play as an expert agency in "filling gaps" in the immigration laws.[132] Therefore, it appears that circuit court dissatisfaction with the perceived rule-of-law drawbacks of the BIA's failure to maintain a robust program of adjudicative lawmaking has driven, at least in part, the increase in the number of remands from the circuit courts.

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127. Data on file with author. As noted, *supra* note 119, statistics on the number of precedential decisions issued by the BIA per fiscal year were collected from Administrative Decisions Under Immigration and Nationality Laws of the United States, which reports all precedential administrative immigration decisions.

128. *See infra* Figure 3. Data on file with author. The proportion of the increase in precedential decisions attributable to remands was calculated by dividing the increase in the number of remand-based precedential decisions by the overall increase in the number of precedential decisions issued. All BIA decisions during the relevant period were surveyed to determine whether or not they arose as a result of a remand by a circuit court of appeals.

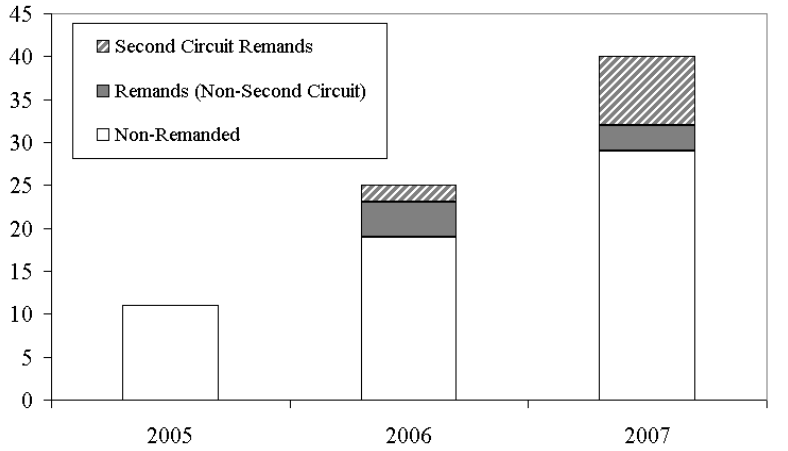
129. *Id.*

130. The reasons why the Second Circuit has been the predominant source of circuit court precedential remands to the BIA are not totally apparent. The Second Circuit does hear a comparatively greater number of immigration appeals than most of the other federal circuits. *See* Admin. Office of the U.S. Courts, *BIA Appeals Remain High in the 2nd and 9th Circuits*, The Third Branch, vol. 37, n.2 (Feb. 2005), *available at* http://www.uscourts.gov/ttb/feb05ttb/bia/index.html (last visited Oct. 9, 2007). However, it hears significantly fewer immigration appeals than the Ninth Circuit, which has nonetheless remanded very few cases to the BIA for rulings on questions of law. *Id.* A review of Second Circuit caselaw suggests that the most plausible explanation for this discrepancy is simply that a number of Second Circuit judges have grown impatient with the BIA's failure to fulfill its role as an expositor of the immigration laws, and have accordingly begun to attempt to force the issue by ordering law-based remands to the Board. *See infra* notes 130–31 and accompanying text.

131. *See, e.g.*, Yuanliang Liu v. U.S. Dep't of Justice, 455 F.3d 106, 116–17 (2d Cir. 2006); Jian Hui Shao v. Board of Immigration Appeals, 465 F.3d 497, 502 (2d Cir. 2006); *see also* Biao Yang v. Gonzales, 496 F.3d 268, 278 (2d Cir. 2007).

132. *See, e.g.*, *Yuanliang Liu*, 455 F.3d at 116–17; *Jian Hui Shao*, 465 F.3d at 502; *see also Biao Yang*, 496 F.3d at 278.

Figure 3
Number of Precedent Decisions By Remand Status
(FY 2005-FY 2007)



The rise in the number of remands from the circuit courts has clearly played a substantial role in increasing the number of BIA precedential decisions in FY 2006 and FY 2007. However, it leaves 62% of the BIA decision increase unaccounted for.[133] While no other contributing factors are as strikingly apparent, a number of other explanations seem like plausible contributors to the recent rise in precedential decisions.

Most notably, it seems likely that a review of Executive Office for Immigration Review adjudications ordered by Attorney General Gonzales in early 2006—and the modifications to BIA processes that resulted—accounts for at least some of the increase in the number of precedential decisions issued by the Board in FY 2006 and FY 2007.[134] For example, the directive issued by Gonzales upon conclusion of the review in August 2006 expressly indicated that the Board should publish more three-member panel decisions as precedential decisions.[135] Four months later, in December 2006, four additional Board members were added as a result of the review, providing critically needed additional staffing.[136]

133. *See* Figure 3.
134. *See* Board of Immigration Appeals: Composition of Board and Temporary Board Members, 71 Fed. Reg. 70,855 (Dec. 7, 2006).
135. *Id.*
136. *Id.*

Finally, it seems possible (although there is no clear evidence to support this conclusion) that the February 2005 departure of Attorney General Ashcroft—under whom the number of precedential decisions issued by the Board steadily decreased—played a role in the restoration of the Board's numbers of precedential decisions to more robust levels. Unfortunately, limitations of available data make it impossible to test these hypotheses, and their potential impact on the BIA's increase in adjudicative lawmaking therefore remains purely speculative.

B. Reasons for Selecting the Board of Immigration Appeals as an Adjudicative Lawmaking "Case Study"

The BIA is, in many respects, an ideal administrative entity to serve as a "case study" for the potential benefits and drawbacks of adjudicative lawmaking by administrative agencies. The Board has engaged, for most of its long history, in a robust program of adjudicative lawmaking, contributing substantially to the development of the field of immigration law through its issuance of precedential decisions. Thus, to the extent that there may be absolute benefits of adjudicative lawmaking by administrative agencies, they should be discernable upon examination of the Board's history. Similarly, to the extent that there are characteristic defects of predominantly adjudicative lawmaking bodies, they seem likely to be present in the case of the Board. In contrast, if the theorized benefits or drawbacks are not present in the case of the Board, it seems relatively unlikely that they would be observed elsewhere.

An examination of the Board's history of adjudicative lawmaking also provides an excellent opportunity to explore a relatively understudied area of administrative practice. Despite the BIA's robust history of adjudicative lawmaking, the BIA's role as a precedent-setting body has been the subject of comparatively little scholarship. While specific precedential decisions of the Board or topical areas of Board decisions have sometimes been the subject of scholarly notice, very little attention has been paid as a more global matter to the Board's role as an expositor of immigration law. Thus, this aspect of the Board's role is itself independently worthy of study—an opportunity provided by the instant exploration.

Finally, and most importantly, the BIA is an entity for which the results of the case study will have real meaning. The Board's issuance of precedential decisions—historically a frequent occurrence—recently underwent a dramatic decline. Although this trend has begun to reverse itself, it has only done so under compulsion by the federal circuit courts of appeals (predominantly the Second Circuit). And, there is little reason to believe that the return to higher levels of adjudicative lawmaking would be sustained in the absence of this external pressure. As such, the question of

whether a decline in adjudicative lawmaking matters is one which is clearly of relevance to the Board itself.

While there are many benefits to relying on the BIA as the selected case study for evaluating administrative adjudication, there is at least one theoretical drawback. While the BIA shares many characteristics with other agencies that engage in administrative adjudication, it is relatively unique in a few aspects. Most notably, the BIA—unlike many other administrative agencies that engage in adjudication—does not itself have the option of electing to proceed via legislative lawmaking. Insofar as the Board makes law, it is compelled to do so via administrative adjudication. Thus, the Board may not be entirely characteristic of agencies that engage in adjudicative lawmaking, as it is unable to elect to proceed differently.

This distinction, however, seems unlikely to be highly relevant in the specific context under review. Whether an agency's program of adjudicative lawmaking promotes or hinders the specific rule-of-law goals discussed in Part I is—for the most part—independent of whether the agency has the option of electing to proceed via legislative lawmaking. On the contrary, most of the hypothesized benefits or drawbacks should be unaffected by whether the agency has the option of electing to proceed via legislative lawmaking.

Furthermore, in the contexts where the availability of legislative lawmaking may be relevant—such as a comparative review of the relative benefits of adjudicative lawmaking vis-à-vis legislative lawmaking—the specific structure of the Board should not prove a substantial deterrent to it providing a representative body for review. For most of its long history, the BIA was a constituent component of the Department of Justice (DOJ), which issued immigration regulations via legislative lawmaking. Thus, a point of comparison is available—regulations issued by DOJ—which mirrors in many respects the adjudication/legislative lawmaking dichotomy that exists at other administrative agencies.

There are, therefore, substantial reasons for thinking that the BIA constitutes an excellent case study for this Article. The following section turns to a discussion of whether the BIA has historically hindered or promoted the rule-of-law goals identified in Part I.

III. ANALYSIS

As discussed in Part I, there are seven primary rule-of-law goals that form the foundation for a consensus-based understanding of the rule of law: (1) the existence of rules, (2) consistency, (3) limitation of discretion, (4) prospectivity, (5) notice or publicity, (6) stability, and (7) predictability. Agency lawmaking via adjudication should theoretically promote many of these rule-of-law goals. Therefore, the Board of Immigration Appeals—

with its robust history of adjudicative lawmaking—should, in theory, have historically promoted many of the consensus rule-of-law goals.

Whether these theoretical benefits have been realized requires an in-depth exploration of the content and effects of the BIA's adjudicative lawmaking history. An empirical analysis was therefore conducted of the BIA's precedential decisions, court of appeals level judicial immigration decisions, and immigration regulations.[137] Three years—1952, 1982, and 2002—were selected for consideration and were comprehensively reviewed.[138] Law review articles discussing the history of the BIA were also surveyed for additional pertinent information.

As set forth below, the results of this empirical analysis confirm many of the hypothesized benefits and drawbacks of the BIA's adjudicative lawmaking, but also refute some others. The findings of the analysis vis-à-vis each consensus rule-of-law objective are discussed in turn below.

1. The Existence of Rules

Adjudicative lawmaking by definition contributes to the primary rule-of-law goal of having fixed legal rules by which future cases can be judged. In the case of the BIA, published decisions issued by the Board are, by regulation, binding on all "officers and employees of the Department of Homeland Security" and on "immigration judges in the administration of the immigration laws of the United States."[139] They are also, as a result of judicial decisions, binding on both the BIA itself and, in many instances, the United States Judiciary.[140] Thus, the issuance of precedential decisions by the Board automatically contributes to the rule-of-law objective of "the existence of rules." The Board has historically issued a large number of precedential decisions (approximately forty-eight decisions per year over its sixty-plus year history) and thus has, by definition, contributed substantially to this rule-of-law goal.[141]

The above analysis, however, only addresses the BIA's absolute contribution to furthering the "existence of rules" rule-of-law goal. Certain factors (including most notably the heightened inertia that must be

137. *See* Appendix: Methodology.
138. *Id.*
139. 8 C.F.R. § 1003.1(g) (2007); *see also supra* note 85.
140. *See, e.g.*, Johnson v. Ashcroft, 378 F.3d 164, 173 (2d Cir. 2004) (holding that the BIA is bound by its own precedents); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (holding that the federal courts are bound by agency lawmaking under many circumstances).
141. Data on file with author. *See supra* note 119 and accompanying text; *see also* Peter Margulies, *Review: Asylum in a New Era*, 14 GEO. IMMIGR. L.J. 843, 844 (2000) (reviewing Deborah E. Anker, LAW OF ASYLUM IN THE UNITED STATES (1999)) (noting that "much of the law relied on daily by practitioners and immigration judges comes from the Board of Immigration Appeals").

overcome in order for an agency to legislatively promulgate a legal rule) suggest that even on a *comparative* level the Board's adjudicative lawmaking approach may be superior to the issuance of regulations in furthering the existence of rules goal.[142] In order to assess whether this hypothesized superiority is correct, a more nuanced analysis is required. As a result, all published Board decisions were surveyed, together with all final immigration regulations issued in the years 1952, 1982, and 2002.[143] The results of this survey are striking and suggest that at least in the promulgation of substantive legal rules, adjudication is generally more likely than legislative lawmaking to lead to increased rule creation.

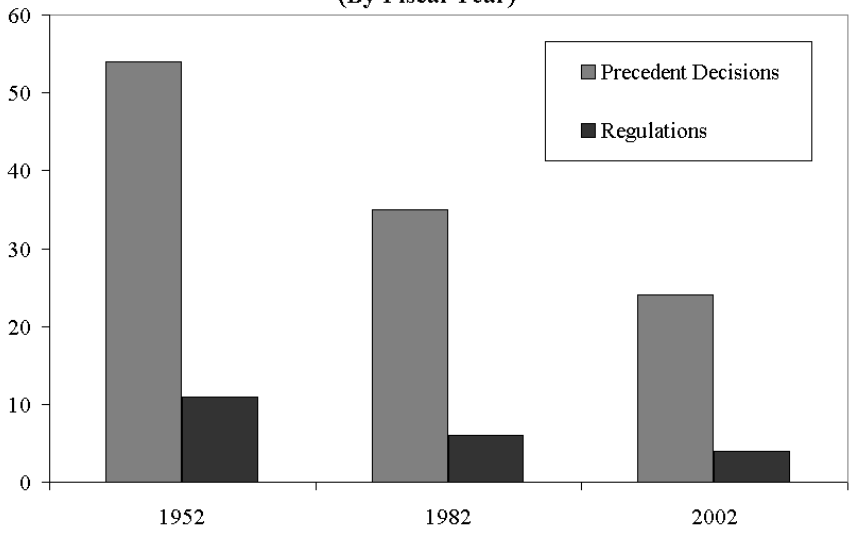
An initial rough measure of the comparative efficacy of adjudication versus legislative lawmaking as means of rules creation can be provided by comparing the total number of published Board decisions issued in any given year with the total number of immigration regulations issued. As set forth in Figure 4, this rough comparison strongly supports the hypothesis that adjudication is superior to legislative lawmaking as a means of rule creation, with a significantly higher number of adjudications than regulations being issued in each year surveyed.[144]

142. It should be noted that "superiority" in this context is intended only to refer to the volume of rules issued. Unfortunately, the comparative quality of the rules issued—also an important consideration—is extremely difficult to empirically test, and therefore has been omitted.

143. *See* Appendix: Methodology.

144. *See infra* Figure 4. For all three years, the disparity is statistically significant at the $p<.001$ level.

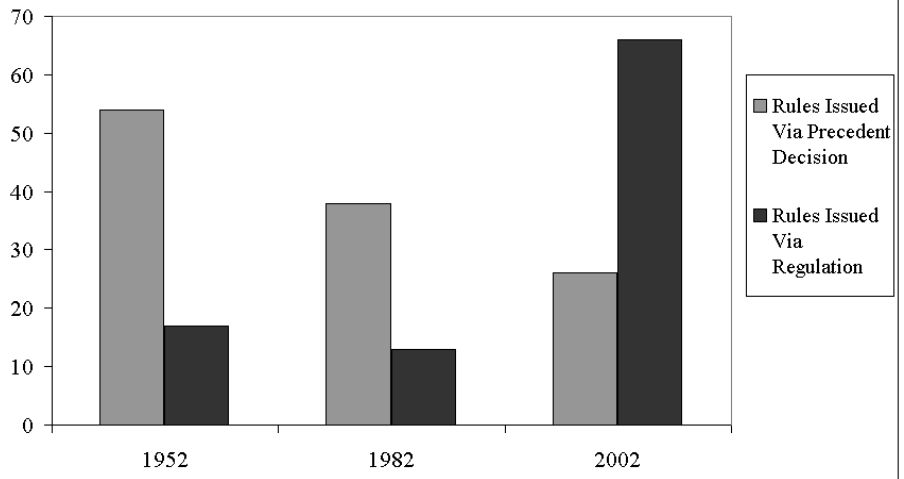
Figure 4
Precedent Decisions and Regulations Issued
(By Fiscal Year)



This rough measure, however, may be misleading, as both a regulation and a precedential decision can serve as the vehicle for creating multiple legal rules. Therefore, each precedential decision or regulation was analyzed in order to assess more specifically the total number of legal rules created by adjudication and by regulation during each year surveyed. For two of the years surveyed (1952 and 1982), the results again strongly suggest that adjudication is superior to legislative lawmaking as a means of rule creation.[145] Interestingly, however, the results are reversed for the final year surveyed (2002), with legislative lawmaking appearing to be the superior method.[146]

145. *See infra* Figure 5. For both years, the observed difference is statistically significant at the $p<.001$ level.
146. *Id*. The result is statistically significant at the $p<.001$ level.

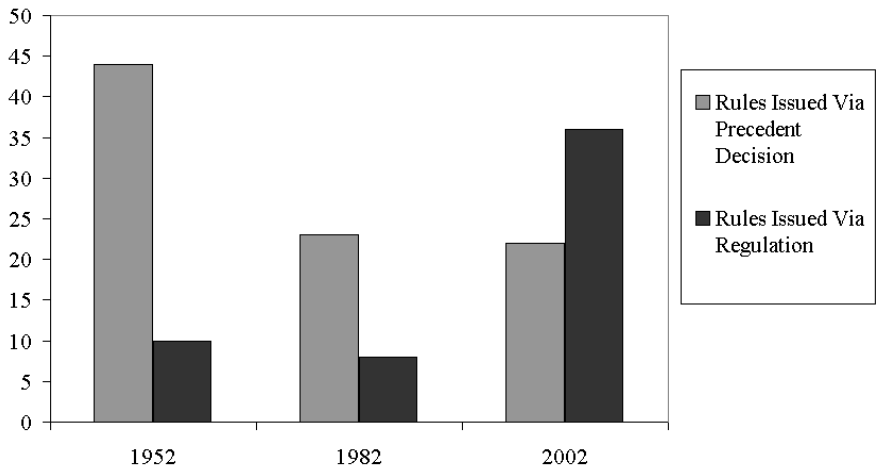
Figure 5
Total Number of Rules Issued
(By Fiscal Year)



When these results are further broken down to account for the different types of legal rules that can be created by an agency—substantive versus procedural—they suggest an even more nuanced picture. Although the number of substantive rules created by regulation in 2002 still exceed the number created by BIA decision, the difference is no longer statistically significant.[147] In contrast, for the years 1952 and 1982, the BIA issued many more substantive rules than were issued by regulation, at highly statistically significant levels.[148]

147. *See infra* Figure 6.
148. *Id*. For the year 1952, the observed difference is statistically significant at the $p<.001$ level. For the year 1982, the observed difference is statistically significant at the $p<.01$ level.

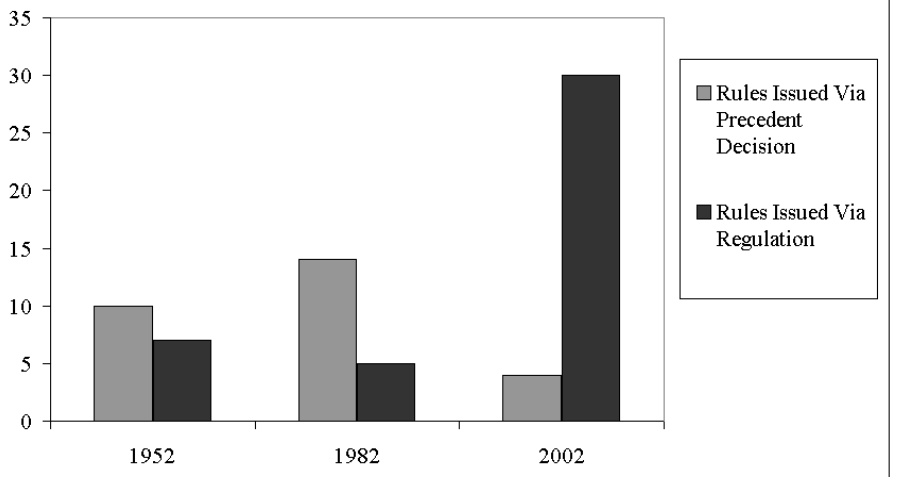
Figure 6
Number of Substantive Rules
(By Fiscal Year)



The opposite trend is observed for procedural rules—in 1952 the number of procedural rules created via BIA decision is higher than the number issued by regulation, but not at a statistically significant level.[149] The number of BIA-created rules is again higher for 1982, but at a level that barely reaches statistical significance.[150] In 2002, a much higher number of procedural rules were created by regulation than by BIA decision, at a highly statistically significant level.[151]

149. *See infra* Figure 7.
150. *Id.* The result is statistically significant at the $p<.05$ level.
151. *Id.* The result is statistically significant at the $p<.001$ level.

Figure 7
Number of Procedural Rules
(By Fiscal Year)



Thus, the data support the conclusion that adjudicative lawmaking is generally more likely than legislative lawmaking to promote the rule-of-law goal of rules creation. The data also reveal, however, that the superiority of adjudicative lawmaking as a form of rules creation may have decreased over time, a result which is consistent with—and is likely causally related to—the new burdens placed on adjudicative lawmaking by the streamlining regulations. Finally, it appears that the type of rule at issue, substantive or procedural, affects both of these observed phenomena. The bias in favor of adjudicative lawmaking appears to be particularly strong in the substantive rule context, perhaps because of the comparative difficulty of issuing substantive regulations. All of these results suggest that adjudicative lawmaking not only promotes an absolute good in the context of this rule-of-law goal, but may in fact be comparatively superior to legislative lawmaking.

2. Consistency

Adjudicative lawmaking by administrative agencies should, hypothetically, be likely to promote the rule-of-law goal of consistency. Supreme Court decisions have mandated that agency lawmaking be afforded deference nationwide. Therefore, such lawmaking theoretically

creates consistent nationwide rules.[152] Whether adjudicative lawmaking in fact creates such rules depends on two factors: (1) whether lawmaking rules are actually issued by the agency; and (2) whether such rules are followed by the federal courts. The BIA has regularly issued a significant number of lawmaking decisions throughout its sixty-year history.[153] Thus, whether or not it has had a positive impact on consistency depends on the extent to which its promulgated rules have been followed by the federal courts.

This issue has been addressed, at least in part, by prior studies of administrative and immigration law, including *To the* Chevron *Station: An Empirical Study of Federal Administrative Law* and *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*.[154] The results of these studies can provide a helpful starting point for examining the issue of the BIA's impact on nationwide rules consistency. What these results suggest is that reversal of the BIA's rules is fairly rare, and that the BIA thus likely has a significant impact on nationwide rules consistency in the immigration arena.[155] Specifically, the BIA's decisions during the studied time period were subject to only a 10%–12% reversal rate[156] on "substantive law grounds," a category which would include but may not be limited to reversal of BIA precedential rules.[157] Thus, the results of prior studies support the hypothesis that adjudicative lawmaking may often play a significant role in furthering nationwide consistency.[158]

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152. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984); INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); *see also supra* note 38 (noting that the rules of administrative deference have changed over time, but that deference has long been a fixture of American administrative law).

153. *See generally* I. & N. Dec., *supra* note 65 (setting forth BIA precedential decisions). Compiled data on file with author.

154. Schuck & Elliott, *supra* note 3; Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts 1979–1990*, 45 STAN. L. REV. 115 (1992) [hereinafter Schuck & Wang, *Continuity and Change*].

155. *See* Schuck & Wang, *Continuity and Change*, *supra* note 154, at 172 n.277; *see also* Schuck & Elliott, *supra* note 3, at 1043 n.138.

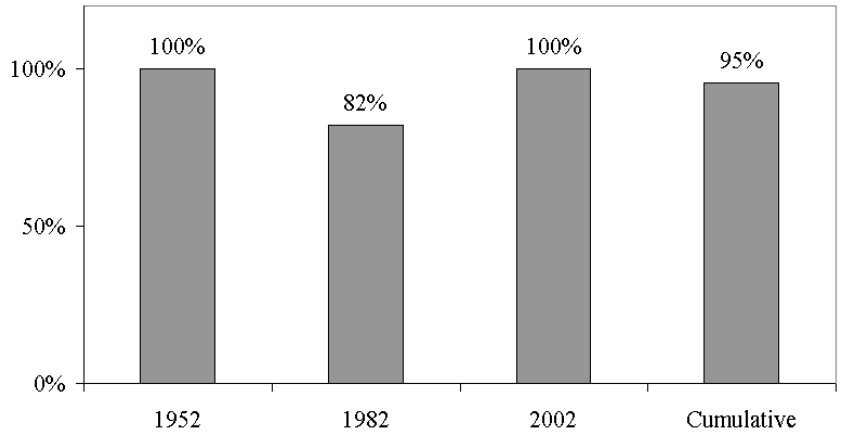
156. The 10%–12% reversal rate was based on a survey of decisions of the federal courts of appeals, where most immigration adjudications are directly appealed.

157. *See* Schuck & Wang, *Continuity and Change*, *supra* note 154, at 172 n.277 (setting forth the substantive law remand rate for all immigration cases studied in *To the Chevron Station*); *see also* Schuck & Elliott, *supra* note 3, at 1014–15 (indicating that there were no immigration regulations in the dataset analyzed). It appears that the substantive law remand category was intended to be a proxy for failure to afford *Chevron* deference. However, this category would also appear to incorporate reversals of nonprecedential substantive rulings by the BIA, which should not be afforded *Chevron* deference, even in theory.

158. *See also* Michael G. Daugherty, *The Ninth Circuit, the BIA and the INS: The Shifting State of the Particular Social Group Definition in the Ninth Circuit and Its Impact on Pending and Future Cases*, 41 BRANDEIS L.J. 631, 642–43 (2003) (noting that the BIA's decisions are important in shaping circuit court precedents in the immigration context since they are generally entitled to deference); Legomsky, *Forum Choices*, *supra* note 90, at 1393; Linda A. Malone, *Beyond Bosnia and* In re Kasinga*: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence*, 14 B.U. INT'L L.J. 319, 337 n.137 (1996) (noting the importance of BIA precedential decisions, given the deference

The independent data analysis conducted for this study also strongly supports the conclusion that adjudicative lawmaking plays a substantial role in promoting nationwide consistency. In each of the three years surveyed (1952, 1982, and 2002), BIA rules were rejected by the federal courts *at most* 18% of the time.[159] In two of the three years surveyed, an astounding 100% of BIA rules were left undisturbed.[160] Cumulatively, only approximately 5% of BIA rules were rejected during the three years examined.[161]

Figure 8
Percentage of BIA Rules Affirmed By the Courts of Appeals
(By Fiscal Year and Cumulative)



These results, moreover, may even underestimate the consistency-promoting effects that adjudicative rule creation is likely to have under the contemporary legal regime. The only year surveyed in which any BIA rules were rejected—1982—preceded the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a case that is

federal courts have generally afforded them); David L. McKinney, *Congressional Intent, the Supreme Court and Conflict Among the Circuits over Statutory Eligibility for Discretionary Relief Under Immigration and Nationalization Act § 212(c)*, 26 U. MIAMI INTER-AM. L. REV. 97, 107 (1995) ("A principal mission of the BIA is to '[e]nsure as uniform an interpretation and application of this country's immigration laws as is possible.'") (citations omitted).

159. *See* Figure 8.
160. *Id.*
161. *Id.*

widely viewed as increasing the level of deference afforded to administrative lawmaking by the federal courts. Moreover, none of the "rule rejecting" decisions examined in the study even mentioned the issue of deference, thus suggesting that the courts may not, in fact, have been applying a deferential standard of review.[162] Both of these factors suggest that the contemporary courts may be even *less* likely to reject adjudicative lawmaking than the study suggests.

Thus, it appears that adjudicative lawmaking may have a significant positive effect on the rule-of-law goal of consistency.[163]

3. Limitation of Discretion

Adjudicative lawmaking may also hypothetically promote the rule-of-law goal of limiting government discretion. Administrative agencies are often bestowed with substantial discretionary authority—authority which is often difficult or impossible for the federal courts to restrict.[164] As such, agencies themselves are uniquely situated to impose discretion-limiting rules on government action. Whether such agencies will in fact do so, however, will depend critically on their willingness to impose limitations on themselves or on a related enforcement agency.

Both a qualitative and a quantitative review of the BIA's caselaw suggest that the BIA has played a highly significant role in limiting otherwise unrestrained government action in the immigration context. Immigration is a notoriously discretionary field, with many statutes leaving critically important substantive determinations largely to the discretion of immigration officials.[165] The BIA has repeatedly created rules that limit the unfettered discretion afforded to immigration officials, thereby ensuring that claims of immigrants are, at a minimum, judged by reference to some objective standards.[166] From an absolute standpoint, it is clear that the

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162. Data on file with author.

163. The BIA itself also appears to believe that enhancing nationwide consistency in the interpretation of the immigration laws is one of its "principal mission[s]." *See In re* Cerna, 20 I. & N. Dec. 399 (BIA 1991) (Appendix) (indicating that "a principal mission of the Board of Immigration Appeals is to ensure as uniform an interpretation and application of this country's immigration laws as is possible," and noting the important role that *Chevron* deference plays in enabling the Board to fulfill this mission).

164. *See generally supra* Part I.

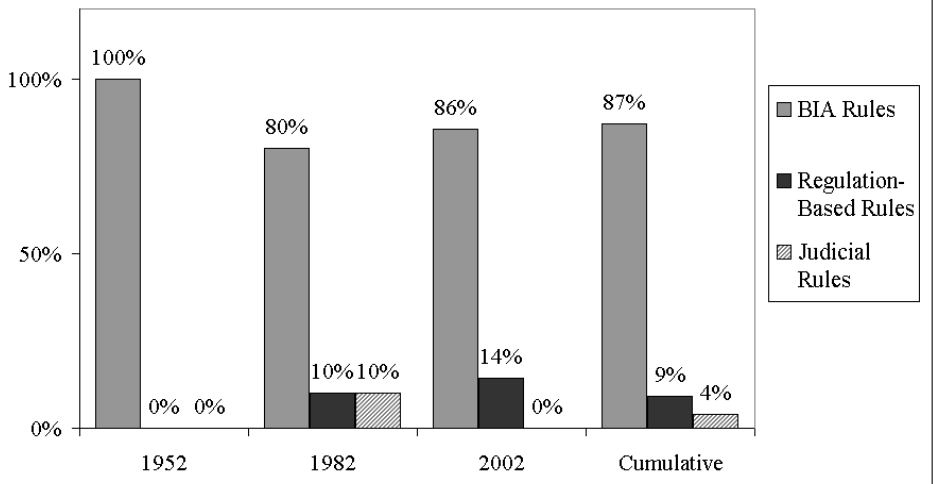
165. *See, e.g.*, Heyman, *supra* note 49, at 861; Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1205–06 (1984); *see generally* Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975) [hereinafter Roberts, *Administrative Discretion*].

166. *See, e.g.*, Roberts, *Administrative Discretion*, *supra* note 165, at 158, 160; Seth M. Haines, *Rounding Up the Usual Suspects: The Rights of Arab Detainees in a Post-September 11 World*, 57 ARK. L. REV. 105, 130 (2005); Kanstroom, *supra* note 49, at 771–72, 781–801; Roberts, *supra* note 80, at 36; *see also* Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 157 n.38 (2004) (noting that in accordance with BIA precedents, INS must provide some

BIA's adjudicative lawmaking has played an important role in promoting the rule-of-law goal of limiting government discretion.

Even from a comparative standpoint, the BIA's adjudicative lawmaking program has been highly significant. An examination of data for the years 1952, 1982, and 2002 demonstrates that BIA discretion-limiting rules formed the basis for discretion-limitation arguments in nearly 87% of cases in which such discretion-limiting arguments were raised.[167] In contrast, regulation-based discretion-limiting rules formed the basis for discretion limitation arguments in only 9% of cases, and judicially based discretion-limiting rules formed the basis for discretion limitation arguments in only 4% of cases.[168]

Figure 9
Discretion-Limiting Rules By Type
(By Fiscal Year and Cumulative)



Even more strikingly, 100% of the cases in which aliens prevailed on the basis of a discretion-limitation argument involved the application of a BIA discretion-limiting rule.[169] Thus, the BIA's adjudicative lawmaking

justification for detaining an individual without bond).

167. *See* Figure 9.

168. *Id.* Because of the relatively low number of rules at issue in each fiscal year, statistical significance was assessed for all fiscal years cumulatively. The results are statistically significant at the $p<.001$ level.

169. Because the number of cases in which aliens prevailed in each year was quite limited (N=3 for 1952, N=2 for 1982, N=3 for 2002), it is impossible to say with statistical significance whether aliens employing a BIA discretion-limiting argument were more or

program appears to have been comparatively far superior to either regulations or judicially imposed standards in truly limiting government discretion.

Finally, it should be noted that BIA-imposed limitations on government discretion may be particularly important in view of recent restrictions imposed on the ability of the federal judiciary to review the discretionary decisions of immigration entities. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the REAL ID Act, federal courts are precluded from reviewing virtually all discretionary determinations in the immigration context.[170] Thus, as to areas of immigration discretion that are unrestricted by statute or by constitution, the federal courts will, at best, be limited to enforcing the BIA's own self-created discretion-limiting rules (or discretion-limiting rules issued by regulation).[171] Such rules therefore are likely to assume even greater stature under the current jurisdictional regime than they have historically possessed.[172]

4. Prospectivity

Adjudicative lawmaking has been specifically criticized for its lack of prospectivity (i.e., the fact that it allows for the creation of legal rules in the context of the case in which they are to be applied).[173] Thus, one might

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less likely to win, as compared with a regulation or judicial-based argument. Because of the small sample sizes at issue, the statistical significance of the results was assessed using a Fisher's Exact test.

170. *See* 8 U.S.C. § 1252(a)(2)(B) (2000); *see also* Kanstroom, *supra* note 49, at 703 (remarking on the "seriously limited judicial review of discretionary immigration decisions" under the two Acts); *see generally* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 Boston College Law School Faculty Papers 161 (2007), *available at* http://lsr.nellco.org/bc/bclsfp/papers/191/ (last visited Sept. 14, 2007) (discussing judicial review of discretionary decisions post-IIRIRA) [hereinafter Kanstroom, *Better Part of Valor*]. The only substantial restriction on this jurisdictional limitation is imposed by the REAL ID Act, which provides that questions of law and constitutional claims remain reviewable by the federal courts. 8 U.S.C. § 1252(a)(2)(B).

171. There is a strong argument that the application of (or more properly the failure to apply) BIA precedential decisions and standards set forth in immigration regulations should be reviewable, regardless of whether those decisions or standards concern discretionary determinations. Nevertheless, some courts prior to the enactment of the REAL ID Act had taken the position that such standards were not, in fact, reviewable. *See generally* Kanstroom, *Better Part of Valor*, *supra* note 170, at 180–89. Following the enactment of the REAL ID Act, there should be little dispute that the application of (or failure to apply) such legal standards are reviewable as questions of law. *See, e.g.*, Johnson v. Ashcroft, 378 F.3d 164, 169 (2d Cir. 2004) (noting that the question of whether the BIA has followed mandatory requirements set forth in its caselaw is a question of law).

172. *See* Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 500 (2005) (noting the increased importance of the BIA in view of IIRIRA's restrictions on federal court reviewability of discretionary immigration decisionmaking).

173. *See, e.g.*, Araiza, *supra* note 5, at 356.

anticipate that an empirical evaluation would demonstrate that adjudicative lawmaking has a substantial—or at a minimum, noticeable—negative impact on the rule-of-law goal of prospectivity. However, it appears that litigants perceive adjudicative lawmaking as having a minimal impact on prospectivity. This conclusion is consistent with the theoretical observations made in Part I regarding the limitations of many of the prospectivity criticisms of adjudicative lawmaking.

An analysis of federal circuit court decisions issued in 1952, 1982, and 2002 reveals only one case—0.15% of the sample evaluated—that raised a prospectivity challenge to the application of a BIA rule.[174] In contrast, 9.02% of the sample involved prospectivity challenges to the application of federal legislation.[175] No prospectivity challenges were raised to the application of INS/DOJ regulations.[176] While the single challenge to a BIA rule's retroactivity was successful, a single successful challenge (out of all cases analyzed) hardly suggests that adjudicative lawmaking poses a serious threat to the rule-of-law objective of prospectivity.[177]

In addition, a survey of BIA caselaw reveals that the BIA is at least cognizant of the problem of retroactivity, and sometimes makes new rules applicable only prospectively.[178] The BIA is particularly likely to adopt such an approach where the new rule constitutes a true and unexpected departure from prior BIA precedent.[179] While this approach was by no means taken in all cases, it suggests that at least the more extreme cases of retroactivity may be eliminated through the BIA's own use of temporal limitations on newly created rules.[180]

Thus, while prospectivity goals seem unlikely to be promoted by adjudicative lawmaking, they also do not appear to be substantially hindered by such lawmaking.

5. Notice or Publicity

Notice or publicity norms—informing the public of the standards applicable to it—can theoretically be either promoted or hindered by adjudicative lawmaking. Unfortunately, there is no quantitative way of measuring the impact of the BIA's adjudicative lawmaking program on

174. Data on file with author.
175. Data on file with author.
176. Data on file with author.
177. Data on file with author.
178. *See, e.g.*, *In re* G-C-L-, 23 I. & N. Dec. 359, 361–62 (BIA 2002); *In re* S-H-, 23 I. & N. Dec. 462, 464 (BIA 2002).
179. *See, e.g.*, *In re* G-C-L-, 23 I. & N. Dec. at 361–62.
180. Note, however, that the legitimacy of designating rules developed during administrative adjudication as purely prospective is somewhat in doubt under the Supreme Court's fractured caselaw. *See generally* Araiza, *supra* note 5 (surveying the pertinent caselaw in this area).

notice and publicity. However, a qualitative evaluation suggests that the BIA's adjudicative lawmaking has had a positive impact.

The BIA has always, throughout its history, made its decisions available in a published, accessible format.[181] Thus, on an absolute level, it has promoted notice and publicity by ensuring that many of the legal rules applicable in the immigration context are available to interested constituents. This approach stands in contrast to immigration enforcement (previously INS and today ICE), which is often accused of applying *de facto* or "covert" policies, of which the public has no notice.[182]

On the other hand, it is clear—at least in theory—that notice and publicity norms would be better promoted by a comparable regulation scheme. It is difficult to accurately and precisely cull specific legal rules from over sixty years of BIA caselaw. Moreover, the format in which BIA decisions are issued—by date of issuance—does little to assist in finding all decisions related to a specific topic. A number of tools provided by private entities—including searchable electronic databases and topical summaries of BIA decisions—lessen, but do not eliminate, these difficulties. In contrast, a comparable regulation-based program would be organized topically, allowing for greater ease in determining the applicable legal rule.

In the absence of any such regulations, however, it is clear that the BIA's adjudicative lawmaking serves an important notice and publicity function. Without such adjudicative lawmaking, it is likely that many immigration-related rules would be totally hidden from public view, critically undermining the rule-of-law goals of notice and publicity.

6. Stability

Stability, in theory, could be either promoted *or* hindered by adjudicative lawmaking. However, the comparative ease of adjudicative lawmaking (as compared to legislative lawmaking) suggests that adjudicative lawmaking may be particularly susceptible to reversals of position, thus leading to lesser stability.[183] An examination of legal literature and of BIA caselaw tends to bear out this hypothesis. However, it also suggests that there are often good reasons—reasons that further other rule-of-law goals—for BIA changes of position.

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181. *See generally* Administrative Decisions Under Immigration and Nationality Laws of the United States (setting forth the BIA's precedential decisions). Compiled data on file with author.

182. *See, e.g.*, Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 230–31 (1999) (noting that INS has a *de facto* policy of basing its rate of release of detainees on the availability of detention beds); Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1505 (C.D. Cal. 1988) (finding that INS had a de facto policy of pressuring Salvadorans to accept voluntary departure).

183. *See generally supra* Part I.

Legal literature is replete with criticisms of the BIA for its inconsistency with respect to important issues of immigration policy.[184] As numerous authors have observed, there are several high profile immigration law issues on which the BIA has reversed direction or failed to articulate a clear, consistent policy.[185] Thus, it appears that the BIA may undermine the rule-of-law objective of stability by failing to consistently articulate and apply its own legal policies.

An evaluation of BIA caselaw supports this conclusion, at least with respect to the contemporary BIA.[186] In the cases surveyed, fourteen (or 12%) of the decisions reversed a prior decision of the BIA—facially, a very high proportion of cases.[187] Although it is not possible to compare this figure to reversals of position in immigration regulations (due to difficulties in assessing whether a new regulation reversed prior agency position), it seems likely that this proportion of reversals of position is high, not only as an absolute matter, but as compared to legislative lawmaking.

A closer examination of the reasons for these BIA reversals reveals, however, that they are often motivated or compelled by a desire to promote other rule-of-law goals. For example, 29% of the BIA reversals reviewed were compelled by a change in statutory, regulatory, or foreign law.[188] An additional 21% of the reversals were motivated by a desire for consistency with federal court of appeals precedents.[189] Thus, a full 50% of BIA reversals were motivated by a need or desire to promote consistency—another critical rule-of-law objective.[190]

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184. *See, e.g.*, Roberts, *Administrative Discretion*, *supra* note 165, at 160; Rex D. Kahn, *Why Refugee Status Should Be Beyond Judicial Review*, 35 U.S.F. L. REV. 57, 66 & n.82 (2001); Margulies, *supra* note 141, at 844.

185. *See, e.g.*, Kahn, *supra* note 184, at 66 n.82; Margulies, *supra* note 141, at 844.

186. In contrast to the relatively high numbers of reversals of position observed in later years, in the 1952 sample no reversals were observed. Data on file with author.

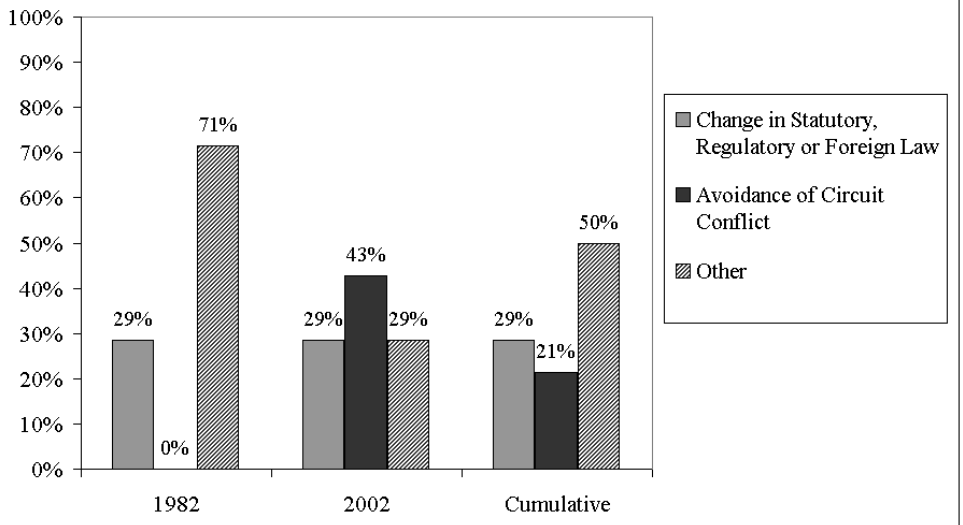
187. Data on file with author.

188. *See infra* Figure 10. There were no reversals of BIA position in FY 1952. Therefore, FY 1952 is omitted from the data represented in Figure 10.

189. *Id*.

190. *Id.*

Figure 10
Reasons for BIA Reversals of Position
(By Fiscal Year and Cumulative)



Thus, an analysis of BIA caselaw does support the conclusion that the BIA reverses its position frequently, thereby undermining the rule-of-law goal of stability. An examination of the reasons for these changes of position, however, suggests that they are often made in furtherance of another rule-of-law objective: consistency. Therefore, an assessment of the BIA's consistency leads to mixed conclusions with respect to the BIA's promotion of rule-of-law objectives.

7. Predictability

Predictability, in the sense of the ability of regulated parties to know what the law proscribes, should clearly be promoted by adjudicative lawmaking. Any time that an agency exercises its legal "gap filling" role, whether through adjudicative lawmaking or legislative lawmaking, this assists parties in understanding the law and thus enhances predictability. Moreover, as noted in Part I, adjudicative lawmaking seems—even from a comparative standpoint—likely to be superior to legislative lawmaking in promoting predictability. This is because adjudicative lawmaking seems likely to lead to overall greater rules creation than legislative lawmaking, given the lesser obstacles to new rules creation in the adjudication context. Adjudicative lawmaking also seems more likely than legislative lawmaking to address the specific predictability concerns of discrete groups of regulated entities, given that adjudication—unlike legislative lawmaking—

is often directed at special individual circumstances.

An examination of BIA caselaw and legal literature tends to bear out the hypothesis that adjudicative lawmaking plays an important role in enhancing predictability. As noted at the outset of this section, the BIA has regularly exercised its lawmaking authority throughout its sixty-plus-year history, issuing precedential decisions at a rate of approximately forty-eight per year.[191] Many of these decisions have resulted in the creation of multiple legal rules, all of which promote predictability of the law for regulated entities.[192] From a comparative standpoint, moreover, adjudicative immigration lawmaking has arguably been superior to legislative immigration lawmaking—the BIA has historically tended to issue a greater number of rules than have been issued via immigration regulations, particularly in the context of substantive (as opposed to procedural) lawmaking.[193]

BIA caselaw and legal literature also tend to support the conclusion that adjudicative lawmaking can play a unique, critical role in promoting predictability for discrete groups of regulated entities. Interpretation of the Immigration and Nationality Act (INA) regularly involves the application of vague general terms to a wide variety of discrete individual circumstances.[194] Moreover, interpretation of the terms of the Act often requires the assessment of other (non-INA) laws that are both topically and jurisdictionally diverse.[195] Thus, there are an enormous number of discrete legal assessments that need to be carried out in order to interpret certain parts of the INA, assessments which are often uniquely poorly suited to legislative lawmaking given their contingency on potentially changeable non-INA law.

In several of these areas, the BIA has played a predominant or exclusive role in filling statutory gaps, and thus in enhancing predictability for regulated entities. For example, the BIA is acknowledged to be the primary entity responsible for defining what constitutes a crime of moral turpitude (a category of deportable offenses) under the INA, and has also played a major role in defining what constitutes an aggravated felony

191. *See supra* note 87 and accompanying text.
192. *See supra* notes 138–50 and accompanying text.
193. *Id.*
194. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (2000) (providing for the deportation, under certain circumstances, of an alien upon conviction of a "crime involving moral turpitude").
195. For example, whether a particular crime is a crime involving moral turpitude and whether it is an "aggravated felony" for the purposes of the immigration laws depends on a case-by-case assessment of the underlying state, federal, or foreign criminal law. Similarly, determining whether an individual qualifies as a "sister," "brother," "mother," or "father" for visa purposes may also require reference to the terms of the family law of other countries.

(another category of deportable offenses).[196] The BIA has also played a predominant role in developing the law surrounding what factual and legal circumstances must be met in order to demonstrate a visa-qualifying familial relationship (e.g., what constitutes an INA-qualifying marriage, parent/child relationship, etc.).[197] Similarly, the BIA has also played a substantial role in clarifying what forms of state and federal post-conviction relief serve to eliminate the immigration consequences of a conviction.[198] Each of these areas may literally determine an alien's ability to enter or remain in the United States, but has been addressed minimally, if at all, through legislative lawmaking. Thus, the BIA's exercise of its adjudicative lawmaking function has played a critical role in enhancing predictability for numerous discrete categories of immigrants.

CONCLUSIONS

This Article represented an effort to empirically assess the potential benefits of adjudicative lawmaking by administrative agencies. The results of the study are striking—by numerous rule-of-law measures, adjudicative lawmaking promotes desirable outcomes. Although adjudicative lawmaking also displays certain drawbacks from a rule-of-law perspective, these drawbacks are—with limited exceptions—quite minor.

These results directly contradict the traditional wisdom, which has generally viewed adjudicative lawmaking by administrative agencies as undesirable.[199] Specifically, numerous prior authors have hypothesized that adjudicative lawmaking should be discouraged because it is comparatively disadvantageous vis-à-vis legislative lawmaking.[200] Such authors have focused on a number of theoretical disadvantages of adjudicative

196. *See* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 311–15 (1997); *see also* Alexandra E. Chopin, *Disappearing Due Process: The Case for Indefinitely Detained Permanent Residents' Retention of Their Constitutional Entitlement Following a Deportation Order*, 49 EMORY L.J. 1261, 1278 n.102 (2000) (noting that "crimes of moral turpitude" are "a class of offenses defined by Board of Immigration Appeals case law"). An astounding 13% (15 of 113) of all BIA precedential decisions surveyed were concerned with the issue of what constitutes a crime of moral turpitude or what constitutes an aggravated felony.

197. Eight percent (9 of 113) of the decisions surveyed addressed the issue of what constitutes a visa-qualifying familial relationship.

198. Five percent (6 of 113) of the decisions surveyed addressed the issue of what forms of postconviction relief may serve to eliminate the immigration consequences of a criminal conviction.

199. *See, e.g.*, Araiza, *supra* note 5, at 356; Bernstein, *supra* note 4, at 621–22; Grunewald, *supra* note 4, at 278–79, 281; Handler, *supra* note 4, at 259–61; Mayton, *supra* note 4, at 103; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308–09; *see also* Elliott, *supra* note 4, at 1491 (noting that most American academic students are overly enamored with the legislative lawmaking process).

200. *See* Bernstein, *supra* note 4, at 621–22; Grunewald, *supra* note 4, at 278–79, 281; Handler, *supra* note 4, at 259–61; Mayton, *supra* note 4, at 103; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308–09; *see also* Elliott, *supra* note 4, at 1491.

lawmaking, including: (1) its lack of prospectivity, (2) its tendency to arise in fact-bound circumstances, (3) its limited predictability or transparency (as compared to legislative lawmaking), and (4) its limited opportunities for public participation (as compared to legislative lawmaking).[201]

In striking contrast to this traditional perspective, the instant empirical analysis indicates that adjudicative lawmaking in fact has a number of significant benefits. Among other things, the analysis demonstrates that adjudicative lawmaking is superior to legislative lawmaking in the areas of: (1) creating significant numbers of legal rules, (2) limiting government discretion, and (3) enhancing predictability for regulated entities through legal gap filling. The analysis further establishes that there are—in addition to the above-noted comparative benefits—significant absolute benefits of adjudicative lawmaking, including: (1) promoting consistency in the development of immigration law and (2) assisting in the notice or publicity of such law. Finally, the empirical analysis conducted for this Article suggests that several of the previously identified theoretical drawbacks to adjudicative lawmaking, including its lack of prospectivity, are of lesser significance than previously hypothesized.

The reasons for the discrepancies between the conclusions of most prior authors and the instant analysis appear to be threefold.[202] First, prior academic treatments of adjudicative lawmaking have ignored absolute goods that may be furthered by such lawmaking—i.e., goods that may also be furthered by legislative lawmaking. Second, no prior analysis has endeavored to empirically assess the drawbacks and benefits of adjudicative lawmaking in any sort of a systematic fashion. Finally, the rule-of-law criteria evaluated by this study included several factors that have not traditionally been evaluated by other scholars—factors by which adjudicative lawmaking appears to be comparatively superior to legislative lawmaking.

This Article's differing substantive conclusions necessarily lead to differing prescriptive conclusions from those expressed in the prior literature. Specifically, in contrast to prior literature—which has generally suggested that we should take steps to limit adjudicative lawmaking by administrative agencies—the results of this Article suggest that adjudicative lawmaking should generally be encouraged. At a minimum, the results of this Article suggest that we should be concerned by

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201. *See, e.g.*, Araiza, *supra* note 5, at 356–57; Bernstein, *supra* note 4, at 587–98; Grunewald, *supra* note 4, at 278–79, 281; Mayton, *supra* note 4, at 103; McFarland, *supra* note 4, at 433–38; Pierce, *supra* note 4, at 308–09; *see also* Elliott, *supra* note 4, at 1491.

202. As noted, *supra*, a few prior articles have argued that the traditional critiques of adjudicative lawmaking are exaggerated. *See* Elliott, *supra* note 4, at 1491–92; Robinson, *supra* note 4, at 514–28; Kovacic, *supra* note 7, at 320.

significant decreases in adjudicative lawmaking by administrative agencies and should take steps to arrest or reverse such decreases.

The question then becomes: What steps can be taken? It is not immediately apparent how external actors can affect the quantity of law made by administrative agencies via adjudication. However, the experiences of the agency under review in our study—the Board of Immigration Appeals—provides some initial insights into the factors that may impact decreases in adjudicative lawmaking.

Most strikingly, as discussed in Part II, the experience of the BIA demonstrates that the federal courts can play a substantial role in reversing declines in adjudicative lawmaking by administrative agencies. Indeed, a single federal court—the Second Circuit Court of Appeals—has accounted for a full 28% of the increased numbers of precedential decisions issued by the BIA in the two most recent fiscal years.[203] Cumulatively, remands from the federal circuit courts have accounted for 38% of the increase in the number of precedential decisions issued by the BIA. These experiences highlight the fact that the federal Judiciary is uniquely situated to ensure that administrative agencies continue to fulfill their adjudicative lawmaking function and do not abdicate their responsibilities to properly develop the law.

There are, therefore, important conclusions that can be drawn, both substantively and prescriptively, from the case study of the BIA—conclusions that differ significantly from those drawn in the prior literature. Adjudicative lawmaking by administrative agencies matters, and it furthers important rule-of-law goals. Such lawmaking can and should be encouraged by external actors, including, most notably, the federal Judiciary. It is my hope that this study can serve as a starting point for more extended discussions of these conclusions and their implications for the role of administrative adjudication in the development of American law.

203. Indeed, the Second Circuit not only has begun ordering the BIA to consider important issues of law, but also has set time limits for the Board to do so. *See, e.g.*, Ucelo-Gomez v. Gonzales, 448 F.3d 180, 188 (2d Cir. 2006).

APPENDIX: METHODOLOGY

In order to assess the hypothesized benefits and drawbacks of the BIA's history of adjudicative lawmaking, three years were selected for review of (1) published BIA decisions, (2) judicial immigration decisions issued by the courts of appeals, and (3) immigration regulations issued by the Department of Justice and/or Department of Homeland Security. An explanation is provided below of the methodology for selecting the years to be reviewed, the cases surveyed, and exclusions from the data analyzed.

I. SELECTION OF YEARS FOR REVIEW

In order to obtain results that would not be specific to only a discrete timeframe, years spanning the spread of the BIA's history were selected for review. Because of the difficulty of surveying regulations prior to the availability of the Federal Register in an easily accessible format online, the year 1982 (the first full fiscal year that the Federal Register is available on LEXIS or Westlaw) was selected as the midpoint year for the survey. The "early" survey year was set at thirty years prior to this (1952), and the "late" survey year was set twenty years subsequent to this (2002), in order to obtain a spread of years. The early and late years selected were not equidistant from the midpoint, because of a desire to obtain a spread that covered more of the early history of the BIA. In all cases, years were surveyed on a federal government fiscal year basis (October 1 of Year X–September 30 of Year Y) because that is the format in which data on the volume of BIA published and unpublished decisions is available from the EOIR.

II. SURVEY METHODOLOGY

A. Board of Immigration Appeals Decisions

The following searches were performed in the "Immigration Precedent Decisions" LEXIS database in order to obtain BIA decisions for the analysis:

date(geq (10/01/01) and leq (9/30/02))
date(geq (10/01/81) and leq (9/30/82))
date(geq (10/01/51) and leq (9/30/51))

All non-BIA decisions were removed from the results, as were all nonprecedential decisions that nonetheless appeared in the precedential database. Upon substantive review of the cases, any cases addressing

purely individual issues, which did not appear to have any precedential value, were also excluded from the analysis.

All of the remaining cases were assessed (N=54 for FY 1952, N=35 for FY 1982, and N=24 for FY 2002). The following categories/questions were addressed:

Number of Precedential Decisions Issued
(Calculated Cumulatively by Year)

Number of Rules
Number of Rules Created
Number of Substantive Rules Created
Number of Procedural Rules Created

Discretion-Limiting Rules
Discretion-Limiting Rules at Issue
If Discretion-Limiting Rule at Issue, What Type(s)? (BIA/Judicial/Regulation-Based)
If Discretion-Limiting Rule at Issue, Did Alien Prevail?

Reversals of Prior BIA Decisions
Decision Overruled Prior BIA Position?
What Was the Reason for Reversal? (Policy Change/Change in Statutory or Foreign Law/Change in Regulation/Intervening Supreme Court Case Law/Circuit Court Case Law/Other)

Development of the Law
A short substantive summary of the area of law that the decision developed was also completed.

Cases were coded UNC if the response to any of the above categories was unclear or unknown. UNC designations were counted as nos/zeros for the purposes of the analysis.

B. Federal Circuit Court Decisions

The following searches were performed in the "US Courts of Appeals Cases, Combined" LEXIS database order to obtain federal circuit court cases for the analysis:

("board of immigration") and date(geq (10/01/01) and leq (9/30/02))

("board of immigration") and date(geq (10/01/81) and leq (9/30/82))
("board of immigration") and date(geq (10/01/51) and leq (9/30/51))
name("immigration and naturalization" or "attorney general" or justice) and (regulation! or rule or "8 c.f.r." or "8 c. f. r.") and immigration and not "board of immigration") and date(geq (10/01/01) and leq (9/30/02))
name("immigration and naturalization" or "attorney general" or justice) and (regulation! or rule or "8 c.f.r." or "8 c. f. r.") and immigration and not "board of immigration") and date(geq (10/01/81) and leq (9/30/82))
name("immigration and naturalization" or "attorney general" or justice) and (regulation! or rule or "8 c.f.r." or "8 c. f. r.") and immigration and not "board of immigration") and date(geq (10/01/51) and leq (9/30/51))

Because of the extremely high number of appeals during the FY 2002 timeframe, every tenth case was selected for review (resulting in a total of sixty cases reviewed). Results for FY 2002 were then extrapolated from this sample.

Appeals that did not pertain to immigration law, or that pertained to immigration law only indirectly (such as criminal appeals), were excluded from the analysis for all years. In addition, cases where no information regarding the case was provided (such as unpublished table decisions that are not available on LEXIS) were also excluded from the analysis.

All of the remaining cases were assessed (N=6 for FY 1952, N=59 for FY 1982, and N=60 for FY 2002).[204] The following categories/questions were addressed:

Deference
Number of BIA Rules at Issue
Number of BIA Rules Affirmed/Adopted (Deferred to/Adopted/Not Disturbed (Not Otherwise Specified))
Number of BIA Rules Reversed (Deference Applied/Refused to Apply Deference/Deference Not Mentioned)

Prospectivity
Prospectivity Challenge Raised?
If So, Number of Challenges Raised?
Number of Challenges to BIA Rule
Number of Challenges to Immigration Regulation
Number of Challenges to Statute/Interpretation of Statute

204. As discussed *supra*, the sixty cases evaluated for FY 2002 constituted a sampling of all immigration cases heard by the federal courts of appeals during that year and results were extrapolated from that sample.

Did Challenge(s) Prevail?

Cases were coded UNC if the response to any of the above categories was unclear or unknown. UNC designations were counted as nos/zeros for the purposes of the analysis.

C. Immigration Regulations

The following searches were performed in the "FR–Federal Register" LEXIS database order to obtain immigration regulations for the analysis:

> action(final rule) and agency(justice or "homeland security") and (immigr! or asylum! or deportat! or exclus! or removal) and date(geq (10/01/01) and leq (9/30/02))
>
> action(final rule) and agency(justice or "homeland security") and (immigr! or asylum! or deportat! or exclus!) and date(geq (10/01/81) and leq (9/30/82))

As the Federal Register is not available prior to FY 1982 on LEXIS or Westlaw, HeinOnline was searched in order to obtain data for FY 1952. Because of the lesser search capabilities of HeinOnline, a broad search was executed for the following terms during the years 1951 and 1952: immigration, immigrant, asylum, deportation, exclusion. The results were then manually sorted to exclude:

> (1) Regulations from outside of the FY 1952 time period (regulations issued prior to 10/01/51 or after 9/30/52);
>
> (2) Regulations that were not issued by the Department of Justice; and
>
> (3) Federal Register notices that are not final rules.

For all three years, all regulations not pertaining to immigration were excluded. Upon substantive review of regulations, any regulations addressing purely individual and/or administrative issues, which did not appear to have any precedential value, were also excluded from the analysis.

All of the remaining regulations were assessed (N=11 for FY 1952, N=6 for FY 1982, and N=4 for FY 2002). The following categories/questions were addressed:

> Number of Immigration Regulations Issued
>
> (Calculated Cumulatively by Year)

Number of Rules
Number of Rules Created
Number of Substantive Rules Created[205]
Number of Procedural Rules Created

III. ANALYSIS METHODOLOGY

All analysis was conducted relying on the above categories of data collected. Where statistical testing was utilized in order to verify the statistical significance of a result, a chi-square test was used, except where the expected value was too low to permit the use of a chi-square test. A Fisher's Exact test was used in the few cases where the expected value was too low to permit the use of a chi-square test.

The statistical significance of results was generally assessed for each fiscal year, with the significance of the results listed for each year. Where small sample sizes did not permit a "by year" assessment of statistical significance, the significance of the results was assessed cumulatively.

205. Rules were coded as "substantive" if they could arguably be considered substantive.

RECENT DEVELOPMENT

FIRING U.S. ATTORNEYS: AN ESSAY

DAVID M. DRIESEN*

TABLE OF CONTENTS

INTRODUCTION

Article II of the Constitution grants the President "the Executive Power" and admonishes him to "take Care that the Laws be faithfully executed[.]"[1] Does Article II create a presidential duty, or a broad presidential right to fully control all executive branch officials? This Essay explores this issue and explains why the controversial firing of several U.S. Attorneys that came to light in 2007 should prompt a fresh critical look at the unitary executive theory, which treats the President's executive power as a right to complete control over all executive branch officials.[2]

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1. U.S. CONST. art. II, §§ 1, 3.

2. *See* Steven G. Calabresi & Gary Lawson, Essay, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1022 (2007) (stating that the President can supervise and control principal officers and veto any decision by an inferior officer); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593–99 (1994) (describing the unitary executive theory as requiring complete presidential control over all executive branch officials and discussing required control mechanisms);

The decision to fire these prosecutors strikes many legal professionals, including many legal scholars, as wrong—an unfortunate break from a proud tradition of prosecutorial independence.[3] The decision's many critics, however, have not explained why the firings are wrong on constitutional grounds. The firings seem consistent with the unitary executive theory, which some of the firings' critics have promoted. This theory maintains that the President's Article II power to execute the law gives him the right to control all other officers who have law enforcement responsibilities.[4] The Administration's defense of the firings relied upon this theory. Many officials, in addressing complaints of political interference with the U.S. Attorneys' work,[5] explained the dismissals as an effort to conform the attorneys' work to the President's priorities.[6] This suggests that the administration viewed the President's power to execute

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Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992) (arguing that many arguments made about Article III support the unitary executive theory of Article II); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1348 (1994) (stating that "unitarians" believe that the Constitution requires that the President have the power to countermand and fire all executive branch officials); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 73 (1990) (stating that the Supreme Court has recognized presidential removal authority in order to "preserve a unitary executive"); *cf.* Robert V. Percival, Essay, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 965–66 (2001) (arguing against application of the unitary executive theory to officials that have received delegated authority from Congress).

3. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 16–17 (1994) (explaining that district attorneys reported to no one between 1789 to 1820 and did not report to the Attorney General until after 1861); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 126 (1988) (discussing the traditional independence of U.S. Attorneys); *cf.* Calabresi & Prakash, *supra* note 2, at 659 (discussing early instances of the President's issuing directives to U.S. Attorneys).

4. *See* Calabresi & Prakash, *supra* note 2, at 593–99 (justifying this control and discussing required control mechanisms).

5. *See* David Johnston & Eric Lipton, *Doubt Is Raised About Honesty and Judgment*, N.Y. TIMES, Apr. 20, 2007, at A19 (noting that "Democrats continued to question whether the dismissals were politically motivated, and therefore, improper[.]").

6. *See* David Johnston & Eric Lipton, *Ex-Aide Disputes Gonzales's Stand Over Dismissals*, N.Y. TIMES, Mar. 30, 2007, at A1 (reporting that D. Kyle Sampson, Gonzales's former chief of staff, claims that dismissals were motivated by a desire to ensure that U.S. Attorneys were loyal to the President's and Attorney General's priorities); David Johnston & Neil A. Lewis, *U.S. Prosecutors Assail Gonzales in Closed Session*, N.Y. TIMES, Mar. 29, 2007, at A1 (according to the prepared testimony of D. Kyle Sampson, Gonzales's former chief of staff); Carl Hulse, *Prosecutors in a Past Life, Sleuths of the Senate Now,* N.Y. TIMES, Mar. 23, 2007, at A19 (referring to the Administration's position that the Justice Department and the White House "wanted prosecutors who were more committed to the Administration's priorities than those being pushed out."); David Johnston, *Dismissed U.S. Attorneys Received Strong Evaluations*, N.Y. TIMES, Feb. 25, 2007, at 19 (reporting that a Senior Attorney from the Department of Justice (DOJ or Justice Department) suggested that the dismissals reflected an effort to have U.S. Attorneys conform to administration priorities).

the laws as implying a right to choose law enforcement priorities and to fire officials who do not implement the President's priorities.[7]

But little difference exists between a Department of Justice (DOJ or Justice Department) reflecting an elected President's priorities and a politicized Department.[8] A President's politics consist, in large part, of a set of priorities he has chosen. The ideal of Justice Department independence only makes sense if we accept Article II as embodying a duty, not an unlimited right to control all officials executing the law. In short, the ideal of DOJ independence does not easily coexist with the unitary executive theory.

This tension does not prove that a duty-based theory is correct or that the unitary executive theory is necessarily wrong. Scholars have devoted numerous articles to the unitary executive theory, and a short essay cannot thoroughly assess the theory's merits.[9] The conflict between the widely held belief that the Justice Department should be both apolitical and substantially independent and the unitary executive theory does suggest, however, that the question of whether Article II primarily creates a right or imposes a duty merits a fresh look. This essay suggests a basis for a duty-based theory and explains how such a theory might justify Justice Department independence.

I can only outline such a duty-based theory here. I will not seek to prove that this conception is the correct theory of Article II, nor thoroughly explore its precise contours. I only wish to show that such a theory is plausible as a literal construction of the Constitution's language and that it would justify DOJ independence. The duty-based theory's reliance upon the Constitution's text is important, because the competing unitary executive theory's influence stems mostly from its claim that the text's plain meaning requires that theory's adoption.[10]

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7. *See* Sheryl Gay Stolberg, *Bush Criticizes How Dismissals of U.S. Attorneys Were Handled*, N.Y. TIMES, Mar. 15, 2007, at A1 (quoting President Bush's statement that "[p]ast administrations have removed U.S. attorneys[, and] they're right to do so") (internal quotation marks omitted); *accord* Calabresi & Prakash, *supra* note 2, at 597 (arguing that the Constitution allows the President to "remove federal officers who he feels are not executing federal law in a manner consistent with his administrative agenda").

8. *Cf.* Johnston & Lipton, *supra* note 6 (discussing Republican Senators' revolt against the placement of "loyalists" in the DOJ).

9. *See* Calabresi & Prakash, *supra* note 2, at 579 (noting Scalia's proposition "that a thorough scholarly treatment" of unitary executive theory would require 7,000 pages); *see, e.g.*, Calabresi & Rhodes, *supra* note 2, at 1158 (claiming that many arguments made about Article III support the unitary executive theory of Article II); *see also* Lessig & Sunstein, *supra* note 3, at 2 (characterizing the claim that the Constitution requires that the "President must have the authority to control all government officials who implement the laws" as "just plain myth").

10. *See* Calabresi & Prakash, *supra* note 2, at 550–56 (claiming that constitutional text shows the correctness of the unitary executive theory and emphasizing the primacy of constitutional text).

I. THE FIRINGS

A DOJ request that several U.S. Attorneys resign created a public furor in 2007, ultimately leading Attorney General Alberto Gonzales to resign under pressure.[11] U.S. Attorneys are the top regional officials for the Justice Department. They have traditionally been selected through presidential nomination and Senate confirmation to four year terms, coinciding with a President's term in office.[12] Thus, they are political appointees.

A President may remove a U.S. Attorney, but in the past, Presidents have rarely used this power to replace attorneys retained or appointed during their administration.[13] In the event of a vacancy (whether through removal or resignation), the Attorney General can appoint a replacement until the President nominates and the Senate confirms a successor to the vacated office.[14] Prior to 2005, these unilateral executive branch appointments were temporary, because they expired after 120 days.[15] If the President failed to nominate and obtain Senate confirmation of a permanent successor within 120 days, the relevant statute provided for judicial appointment of a second temporary successor.[16] This arrangement ensured that the executive branch could only appoint a permanent U.S. Attorney with Senate consent.

Section 502 of the PATRIOT Improvement and Reauthorization Act of 2005 (Patriot Act Amendments),[17] however, made firing U.S. Attorneys a

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11. It is not entirely clear from news reports precisely how many resignations reflect dismissals. *See* David Johnston, *Justice Dept. Names New Prosecutors, Forcing Some Out*, N.Y. TIMES, Jan. 17, 2007, at A17 (explaining that the Justice Department would not provide a specific number of prosecutors fired, but reporting Senator Dianne Feinstein's estimate of five to ten firings); *see, e.g.*, David Johnston & John M. Broder, *New E-Mail Gives Dismissal Detail*, N.Y. TIMES, Mar. 20, 2007, at A1 (reporting eight dismissals); David Johnston & Eric Lipton, *White House Said to Prompt Firing of Prosecutors*, N.Y. TIMES, Mar. 13, 2007, at A1 [hereinafter Johnston & Lipton, *Prompt Firing*] (reporting seven prosecutors fired); David Johnston & Eric Lipton, *'Loyalty' to Bush and Gonzales was Factor in Prosecutors' Firing, E-Mail Shows*, N.Y. TIMES, Mar. 14, 2007, at A18 [hereinafter Johnston & Lipton, *Loyalty*] (reporting seven prosecutors fired and an eighth forced out of office); Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES, Aug. 27, 2007, at A1 (reporting nine dismissed prosecutors).

12. 28 U.S.C. § 541(a) (2000).

13. *See id.* § 541(c) (2000); Parsons v. United States, 167 U.S. 324, 343 (1897) (finding presidential power to remove a U.S. Attorney without explicit statutory authority); Stolberg, *supra* note 7, at A1 (pointing out that dismissals after the onset of a new administration are unusual and stating that neither Clinton nor Reagan replaced U.S. Attorneys in their second terms).

14. 28 U.S.C. § 546(a) (2000).

15. *Id.* § 546(c). If a temporary appointment expired, the District Court could appoint a new U.S. Attorney for the District with a vacant seat until the vacancy is filled.

16. *Id.* § 546(d).

17. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 502, 120 Stat. 192, 246 (2006) (to be codified at 28 U.S.C. § 546 (c)) (allowing

viable means of shaping prosecutorial activity by allowing the President's administration to unilaterally choose successors. It repealed the provision limiting the terms of unilaterally appointed replacement U.S. Attorneys.[18] Under § 502, a replacement U.S. Attorney could serve until the President nominated a successor.[19] Of course, this means that a President can make a replacement appointee (chosen solely by the Executive Branch) permanent during his time in office by simply declining to nominate a new U.S. Attorney for Senate approval.

Limitations on unilateral executive branch control over prosecution through appointments and removal, like those prevailing in the legal practice prior to the Patriot Act Amendments, can limit political interference with prosecution. A custom of not removing U.S. Attorneys during a President's term makes it harder to fire a U.S. Attorney because of political disagreement with decisions to prosecute the President's enemies or not to prosecute his friends. The limitations on unilateral replacement of removed U.S. Attorneys found in the law prior to the 2005 Patriot Act Amendments create a further hindrance to political interference with prosecution decisions. They prevent a President from securing his politically preferred outcome to a particular criminal case by simply firing the attorney making a prosecution decision with which he disagrees, because his unilaterally chosen replacement will not remain in office long enough to protect the President's friends or see through a prosecution of his enemies.

Political influence upon prosecution raises serious individual liberty concerns, which can justify structural constraints discouraging political interference with prosecutorial discretion. The power to prosecute constitutes an enormous threat to personal liberty.[20] An official accusation of a crime, even if ill-founded, can ruin a person's reputation. The need to defend oneself against criminal charges can bankrupt and exhaust defendants. And prosecutors sometimes succeed in convicting the wrong person, thereby sending an innocent person to jail. On the other hand, failure to prosecute serious wrongdoing when the evidence is strong also raises serious concerns. Such a failure may allow perpetrators of serious crimes remaining at large to prey upon society. Both of these concerns justify restraints on political influence.

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an interim U.S. Attorney to serve until another is appointed by the President and confirmed by the Senate).

18. *Id*.

19. *Id*.

20. *See* Morrison v. Olson, 487 U.S. 654, 728 (1987) (Scalia, J., dissenting) (characterizing the prosecutor's power to choose cases as "dangerous" (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940))).

Prosecutors should make judgments about who to prosecute based on evidence. If a higher ranking official could remove prosecutors from office for failing to prosecute some enemy of a powerful politician, like a President or congressman, prosecutors might persecute the innocent in order to stay in office.[21] Conversely, if prosecutors could be removed from office for prosecuting powerful politicians' friends or benefactors, government corruption might remain unchecked.[22] Hence, the tradition of prosecutorial independence has some logic to it.

When the story of the request for resignations first surfaced, the White House asserted that the decisions were made on the merits, not on political grounds.[23] Any suggestion that this merits judgment involved a decision that these prosecutors were incompetent conflicted with evidence that they had strong records, so the Administration did not squarely and consistently allege incompetence.[24] The Administration cited varying reasons for these dismissals. At one point, the Administration suggested that these prosecutors had been insufficiently vigorous in challenging voter fraud and in prosecuting immigration violations.[25] Reports surfaced of pressure from Senator Domenici to prosecute voting fraud in a case where David C. Iglesias, the U.S. Attorney for New Mexico, had found insufficient

21. *Cf. id*. at 728–29 (Scalia, J., dissenting) (describing the danger of prosecuting someone because he is "unpopular with the predominant or governing group" (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940))).

22. *Cf.* Neil A. Lewis & Eric Lipton, *Flexing Majority Muscles, Democrats Issue 3 Subpoenas*, N.Y. TIMES, Apr. 26, 2007, at A18 (discussing a possible link between the firings and pressure to dismiss corruption investigations that could damage Republicans).

23. *See* Stolberg, *supra* note 7, at A1 (citing President Bush's denial of accusations that the firings reflected "political decisionmaking"); Jess Bravin, *Still Vague: Why Were Prosecutors Fired?*, WALL ST. J., Mar. 15, 2007, at A5 ("The administration has said its initial explanation—that the prosecutors were fired for poor performance—wasn't fully accurate."); David Johnston, *A U.S. Attorney Was Removed Without Cause, Official Says*, N.Y. TIMES, Feb. 7, 2007, at A14 (reporting that Deputy Attorney General Paul J. McNulty had testified to the Senate Judiciary Committee that most of the prosecutors were dismissed because of "poor performance"); Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, WASH. POST, Jan. 19, 2007, at A2 (reporting that Attorney General Gonzales attributed firings to "performance issues"); Johnston, *supra* note 11, at A1 (reporting that Justice Department officials fired prosecutors "based on a review of their performance in carrying out Mr. Gonzales's violent crime priorities").

24. *See* Dan Eggen, *6 of 7 Dismissed U.S. Attorneys Had Positive Job Evaluations*, WASH. POST, Feb. 18, 2007, at A11 (reporting that six out of seven prosecutors had positive evaluations before they were fired); Johnston, *supra* note 6 (stating that six of eight fired U.S. Attorneys were routinely praised in their Justice Department evaluations).

25. *See* Johnston & Lipton, *Prompt Firing*, *supra* note 11, at A1 (stating that both Karl Rove and President Bush relayed the concern that prosecutors failed to aggressively move on voter fraud cases); Richard A. Serrano, *Border Policing Was a Trial for 3 U.S. Attorneys*, L.A. TIMES, Apr. 15, 2007, at A29 (reporting that three of the eight prosecutors were singled out for failure to aggressively prosecute immigration cases).

evidence of serious wrongdoing to justify prosecution.[26] Attorney General Gonzales, in statements to the Senate Judiciary Committee, cited insufficient gun crime prosecution, resistance to taking up a death penalty case, and "management problems" as justifications for the firings.[27]

The White House's statement that the Department fired prosecutors who did not implement the President's priorities implicitly distinguishes conformity of prosecutorial priorities to White House policy from political interference with the Justice Department.[28] This emphasis on setting priorities suggested some disagreement about what sorts of violations were sufficiently important to merit prosecution, rather than demonstrating an attempt to force a prosecution where no evidence of any crime existed.[29] This invocation of the unitary executive theory suggests that the theory may have played a role in securing support for these firings within the Administration.[30] Conversely, acceptance of a more modest background conception of executive power would make it harder to carry out this sort of action, making it unlikely that a U.S. Attorney General or other relevant actors in the DOJ would accept such an action absent strong evidence of malfeasance.[31]

Much of the media and congressional attention has focused on questions about Attorney General Gonzales's conduct.[32] At first, he denied playing an active role in seeking the resignations of prosecutors, but evidence soon emerged suggesting that he had played a substantial role.[33] Ultimately, this

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26. *See* Johnston & Lipton, *supra* note 5, at A1 (discussing Attorney General Gonzales's claim that he fired Mr. Iglesias because he had lost Senator Domenici's confidence).

27. *Id*.

28. *See* Stolberg, *supra* note 7 (quoting President Bush as denying that the firings were politically motivated, but asserting a right to fire prosecutors at will).

29. *See id*. (reporting President Bush's statement that he did relay complaints about federal prosecutors to Gonzales, but did not give him "specific instructions").

30. *See id*. (paraphrasing President Bush as stating that the U.S. Attorneys serve at the pleasure of the President).

31. The Justice Department played a large role in the dismissals, so the beliefs of DOJ officials about the legitimacy of White House actions controlling prosecutors is significant. *See* Johnston & Lipton, *Loyalty*, *supra* note 11 (characterizing D. Kyle Sampson, Mr. Gonzales's former top aide, as "the Justice Department's point man" for the firing plan and characterizing his e-mail communications with the White House as "extensive consultation"); *Prompt Firing*, *supra* note 11 (explaining that Harriet Miers, then White House legal counsel, asked Mr. Sampson whether all the U.S. Attorneys could be replaced at one time, in response to which he advised firing only a few).

32. *See, e.g.*, *Prompt Firing*, *supra* note 11 (discussing Senators' doubts about Attorney General Gonzales's honesty and judgment and calls for his resignation); *see also* David Johnston, *Ex-Aide Says Gonzales Discussed Firings*, N.Y. TIMES, Apr. 17, 2007, at A17 [hereinafter *Ex-Aide*].

33. *See Ex-Aide*, *supra* note 32 (reporting that a top aide had characterized Gonzales's assertion that he had no role in deliberations about firing the U.S. Attorneys as "inaccurate").

evidence and his failure to adequately explain the firings so undermined his credibility that he resigned. The focus on who is to blame for the departure of the U.S. Attorneys and the Attorney General's honesty and management capabilities has diverted attention from the background constitutional issue: Is the tradition of Justice Department independence consistent with the Constitution?

II. ARTICLE II: DUTY OR RIGHT?

Article II, Section 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America."[34] This Vesting Clause seems to suggest that the President has the right to control all law enforcement officials. Yet, some intertextual and historical considerations cut the other way. Article I grants "all" legislative power to Congress,[35] but the Article II grant of executive authority to the President does not contain the word "all."[36] This juxtaposition might suggest that Congress may lodge some executive power outside the President's control, even if the phrase "the executive Power" might be read in isolation to encompass all executive power. Historically, the first Congress relied heavily upon state officials to execute federal law.[37] This suggests that "the executive Power" granted in Article II does not necessarily mean the power to completely control the execution of each and every aspect of federal law, at least not directly.[38]

Yet, several prominent scholars have vigorously argued that this clause makes complete control over every official executing federal law a presidential right.[39] Justice Scalia's dissent from the Court's decision upholding the independent counsel provisions of the Ethics in Government

34. U.S. CONST. art. II, § 1.

35. U.S. CONST. art. I, § 1.

36. U.S. CONST. art. II, § 1.

37. *See* Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1666 (2007) (discussing President Jefferson's effort to enlist governors in the enforcement of a federal embargo); Lessig & Sunstein, *supra* note 3, at 18 (describing how the founding state officials conducted federal prosecutions); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2037 (1993) (explaining that the United States relied heavily on state officials to execute federal law); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303–10 (1989) (discussing the extent of state authority to conduct federal prosecutions).

38. *See* Lessig & Sunstein, *supra* note 3, at 31 (noting that the President has no power to remove state officials enforcing federal law); Krent, *supra* note 2, at 67 (claiming that state officials cannot be controlled by the President because he can neither appoint nor remove them); *see, e.g.*, Mashaw, *supra* note 37, at 1666 (discussing the Connecticut governor's refusal to enforce a federal embargo law). *Cf.* Calabresi & Prakash, *supra* note 2, at 639 (claiming that the President may deprive state officials of their authority to carry out federal law).

39. *See, e.g.*, Calabresi & Prakash, *supra* note 2, at 593.

Act of 1978 in *Morrison v. Olson*[40] gave forceful support to this rights-based view.

On the other hand, Article II, Section 3 states that the President "shall take Care that the Laws be faithfully executed."[41] The word "shall" suggests that the President has a duty to faithfully execute law,[42] not necessarily a right to control each discretionary decision an official might make.[43] Proponents of a unitary executive theory seek to harmonize the duty- and right-based visions of Article II by arguing that the President cannot ensure the law's faithful execution unless he controls all aspects of the law's execution.[44] This argument construes the Take Care Clause as more than a requirement to *seek* the law's faithful execution. It construes Article II as creating power adequate to enable the President by himself to *ensure* the proper execution of every law.[45]

The Constitution contains some other clauses germane to the status of U.S. Attorneys that address the idea that the President alone is responsible for faithful law execution. The Constitution bolsters unitary executive theory by giving the President the authority to nominate "Officers of the United States."[46] Yet the same clause gives the Senate the power to deny the President complete control over these officials' appointments by preventing his chosen nominees from assuming office absent Senate consent.[47] Since the Senate has an interest in ensuring that laws it has helped enact are properly carried out, this provision relies on the Senate power to withhold consent as a check on appointment of officers disinclined to faithfully execute laws.[48] This construction would suggest that the President's executive authority is to be subordinate to his duty to

40. 487 U.S. 654, 728–34 (1988).

41. U.S. CONST. art. II, § 3.

42. *See* Lessig & Sunstein, *supra* note 3, at 10 (finding that the Take Care Clause establishes a duty); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1793 (1996) (stating that a number of contemporaries understood the Take Care Clause as imposing "some duty or limit" on the President).

43. *See* A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 801 (1987) (denying that the Take Care Clause entitles the President to set administrative agencies' political agendas).

44. *See* Calabresi & Rhodes, *supra* note 2, at 1198 n.221 (claiming that the President cannot faithfully execute the law unless the Vesting Clause grants him all executive power); Calabresi & Prakash, *supra* note 2, at 583 (suggesting the same); *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 36–37 (1995) (postulating that the growth in the federal "pie" combined with the lack of change in methods of election creates a need for a strong unitary President).

45. *See* Calabresi & Rhodes, *supra* note 2, at 1165 (stating that the "President alone possesses *all* of the executive power and . . . therefore can . . . control . . . inferior officers").

46. U.S. CONST. art. II, § 2, cl. 2.

47. *Id*.

48. *See* Percival, *supra* note 2, at 968 (arguing that the Senate's role in appointments suggests an intention to give cabinet officers "some degree of independence").

execute the laws and can be negated when his nomination power is used for inappropriate ends.[49]

The Appointments Clause also allows the Congress to take the appointment of "inferior Officers" away from the President entirely by expressly authorizing Congress to vest the appointments power in Article III judges,[50] who have life tenure and may have been appointed by a political opponent of a sitting President. This congressional authority to vest judges with an appointment power figured prominently in *Morrison*, which adjudicated, among other things, the constitutionality of an Ethics in Government Act provision that vested the power to appoint an independent counsel in a panel of Article III judges.[51] The Court upheld this provision, relying on the language authorizing Congress to delegate appointment authority to judges.[52] The Appointments Clause also authorizes the vesting of the authority to appoint inferior officers in the President or heads of departments, but it leaves Congress with the choice of whether to allow for direct presidential control, the possibility of presidential influence (heads of departments), or no presidential control at all (the Judiciary).[53] The provision authorizing Congress to control who gets to appoint inferior officers allows Congress to lodge the appointment power in the person most likely to hire inferior officers who will faithfully execute law.[54] This clause shows that the Constitution does not give the President complete control over the Executive Branch of government, thereby undermining the duty-based theory.[55]

Not only does the Constitution deny the President sole control over appointments, it grants him no express authority to remove officers under any circumstances. The Constitution provides only one means of removing "civil Officers of the United States" from office: impeachment.[56] Accordingly, the impeachment provision suggests that the Constitution, far

49. *Cf. id*. (asserting that the President may not displace the decisions of agency heads with delegated authority).

50. U.S. CONST. art. II, § 2, cl. 2.

51. *See* Morrison v. Olson, 487 U.S. 654, 671–76 (1988) (explaining why 28 U.S.C. § 594(a) does not violate the Appointments Clause when it provides for judicial appointment of an independent counsel).

52. *See id*. at 673–77 (rejecting an argument against interbranch appointments, primarily because the Appointments Clause expressly authorizes vesting the appointment of "inferior officers" in the courts).

53. *See* U.S. CONST. art. II, § 2, cl. 2; *see also Morrison*, 487 U.S. at 673 (stating that the Appointments Clause gives Congress "significant discretion" in choosing where it wants to vest the authority to appoint inferior officers).

54. *Cf. Ex parte Siebold*, 100 U.S. 371, 398 (1879) (affirming Congress's discretionary authority to choose the locus of the appointment power, but suggesting that Congress should favor the department of government in which the official is to be located).

55. *Cf. Morrison*, 487 U.S. at 674–75 (noting that the framers rejected attempts to transfer the authority to appoint inferior officers to the President).

56. U.S. CONST. art. II, § 4.

from envisioning complete presidential control of officers, envisions a system of checks and balances where Congress exercises significant control over civil officers.[57] Indeed, this clause, the only clause in the Constitution that addresses removal of officers, provides for congressional, rather than presidential removal.[58] This impeachment provision seems at odds with the notion that the Constitution demands a presidential removal power to secure faithful execution of the law. A literal construction of the Constitution might treat this impeachment provision as an exclusive "finely wrought" procedure for removing civil officers of the United States, which would imply no presidential authority to remove these officers.[59]

The Supreme Court, however, has never treated this impeachment power as exclusive.[60] It has allowed varying degrees of presidential control over removal, often depending upon the type of office involved.[61] This tradition, however, is in some tension with the constitutional text.

Treating impeachment as the exclusive means of removing officers would imply a substantial reliance on the independence and integrity of officers as a means of securing the rule of law. Because the impeachment clause only authorizes removal of civil officers for "high crimes and misdemeanors," it provides a very limited mechanism for controlling

57. *See* Froomkin, *supra* note 2, at 1372 (claiming that the Impeachment Clause shows that Congress has "some say in the conditions of" an executive officer's "tenure"); *see also* Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 303 (1999) (suggesting that the text authorizes impeachment of both inferior officers and officers of the United States); JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 792, at 550 (C.C. Little & J. Brown eds., 2d ed. 1851); Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENT. 479, 491 n.61 (1998) (discussing arguments as to whether inferior officers are subject to impeachment); Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1510–11 (1970) (reviewing evidence that the Constitution's adopters did not mean to authorize impeachment of inferior officers).

58. Berger, *supra* note 57, at 1510.

59. *See* Calabresi & Prakash, *supra* note 2, at 642–43 (noting that some in the First Congress supported the idea that impeachment was the sole constitutionally permissible method of removing an officer); *cf.* INS v. Chadha, 462 U.S. 919, 951 (1983) (treating the "finely wrought" procedure of bicameralism and presentment explicitly set out in the Constitution as the exclusive means of passing legislation).

60. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 685, 691 (1988) (upholding a provision authorizing the Attorney General to remove an independent counsel for "good cause"); Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935) (upholding a provision allowing the President to remove a member of the Federal Trade Commission for cause); Myers v. United States, 272 U.S. 52 (1926).

61. *See Morrison*, 487 U.S. at 691–93 (finding the independent counsel's function insufficiently important to require that the President have authority to remove him at will); Wiener v. United States, 357 U.S. 349, 356 (1958) (forbidding the President from removing a War Claims Commissioner in order to name his own appointee when Congress had not authorized removal); *Humphrey's Ex'r*, 295 U.S. at 629 (finding that Congress can forbid removal of "quasi-legislative" and "quasi-judicial" officials except for cause); *cf. Myers*, 272 U.S. at 117 (finding an implied presidential power to remove officers "in the absence of any express limitation").

official misconduct.[62] Whether or not the Constitution makes impeachment the exclusive means of removing officers, the Constitution clearly does rely on the individual integrity of executive branch officials as a means of securing faithful execution of the law. The constitutional requirement that all executive officers swear an oath of allegiance to the Constitution and laws of the United States shows this.[63] Furthermore, the Federalist Papers suggest that the Constitution relies on an official's individual sense of duty, not complete presidential control, as a means of assuring a rule of law. In explaining why the Constitution requires Senate approval of presidential nominees, Federalist No. 76 states that this provision discourages the nomination of pliant officials "personally allied" with the President.[64] The Federalist Papers, together with the Appointments Clause, suggest that the framers may have expected appointees to stand up to the President on occasion.[65] The Constitution, of course, erects a system of checks and balances in order to, among other things, create a rule of law. The lack of express authority for presidential removal of officers, the Oath Clause, and the congressional appointments role all suggest that the framers relied on executive branch officials' having a degree of independence as one of the means of securing that goal.

Thus, the Constitution's literal language provides some support for advocates of Justice Department independence. Part IV will show that constitutional reliance on the integrity of individual employees is an important means of securing faithful execution of the law and comports with a duty-based reading of the Constitution.

III. DUTY AND RIGHT COLLIDE AT THE DOJ

The Justice Department's tradition of independence stands in some tension with the view of executive power as an exclusive presidential right. A view of executive power as a presidential right implies a presidential power to control prosecution. If this implication is granted, then the President is within his rights to tell U.S. Attorneys to prosecute cases he wishes to pursue or decline cases he does not, and to fire those who do not conform to his directions. The President could then remove prosecutors who fail to conform to his decisions. The theory of presidential right

62. *See* Amar, *supra* note 57, at 301–02 (rejecting the idea that impeachment would be appropriate for noncriminal "maladministration"); *cf.* Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 ST. LOUIS U. L.J. 905, 914–19 (1999) (arguing that impeachment would be appropriate for some types of noncriminal official misconduct).

63. U.S. CONST. art. VI, cl. 3.

64. THE FEDERALIST PAPERS, NO. 76: ALEXANDER HAMILTON 458 (Clinton Rositer ed., 1961).

65. *See id*. (stating that the Senate's advise and consent function would discourage nomination of pliant "obsequious instruments" of presidential "pleasure").

suggests the legitimacy of a presidential decision to remove prosecutors who do not implement the President's enforcement priorities.

The White House's defense of the firings echoes Justice Scalia's articulation of a unitary executive theory based on presidential right. In *Morrison*, Justice Scalia's dissent characterizes prosecution as a "quintessentially executive activity[.]"[66] He describes Article II as commanding "complete" presidential "control" over prosecution.[67] He then endorses a presidential power to fire prosecutors as the "primary check against prosecutorial abuse."[68] Yet, Justice Scalia's conception of the President's rights under Article II, like that of the White House, goes beyond the checking of outright abuse.[69] In cases adjudicating the standing of private citizens to bring suit, Justice Scalia has suggested that the duty to "take Care that the Laws be faithfully executed" includes a right to determine prosecutorial priorities, including the right to refrain from prosecuting violations enjoying sufficient evidentiary support.[70] Hence, Justice Scalia seems to endorse the idea that the President has a right to direct prosecution according to his priorities, and not just a duty to check prosecutorial abuse to ensure faithful execution of the law.

On the other hand, the view of executive power as primarily a duty underlies the criticism of the firings. On this view, a prosecutor who honestly chooses cases based on evidence has faithfully executed the law, whether or not the cases he prosecutes reflect presidential priorities. This view of law as a duty influenced the media coverage of this flap, as evidenced by reports of high conviction rates by discharged prosecutors.[71]

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66. *Morrison*, 487 U.S. at 706.

67. *Id*. at 710.

68. *Id.* at 728 (describing "the primary check against prosecutorial abuse" as "political" and then describing this political check as the President's power to remove and appoint prosecutors).

69. *See id*. at 728–29 (pointing out that prosecutors may misuse their discretion and not prosecute, thereby causing the President political harm); *see also* Carter, *supra* note 3, at 115 (describing a system that limits the President's discretion to refrain from enforcing the law as wreaking "havoc upon the system of checks and balances inherent in the separation of powers").

70. In *Friends of the Earth v. Laidlaw Environmental Services*, Justice Scalia criticizes the majority's grant of standing to enforce the Clean Water Act because it deprived "elected officials" of the right "to decide that a given violation should not be the object of suit at all[.]" 528 U.S. 167, 210 (2000) (Scalia, J., dissenting). He finds this loss of discretion "constitutionally bizarre." *Id*. Justice Scalia begins the section containing this statement by quoting Article II's creation of a duty to faithfully execute law, thereby suggesting that the bizarreness involves a conflict with Article II. *Id*. at 209. I have stated only that Scalia "suggests" that Article II embodies a presidential right to refrain from prosecuting violations with sufficient evidentiary support, because Scalia claims not to reach the question of whether Article II limits standing in this same passage. *Id*.

71. *See* David C. Iglesias, Op-Ed., *Why I Was Fired*, N.Y. TIMES, Mar. 21, 2007, at A21 (reporting his own conviction rate as ninety-five percent); Eric Lipton, *U.S. Attorney in Michigan Disputes Reason for Removal*, N.Y. TIMES, Mar. 23, 2007, at A19 (stating that

High conviction rates suggest that the prosecutors have chosen cases where the underlying evidence supports conviction and have eschewed the pursuit of cases where the prosecutor cannot prove a criminal violation beyond a reasonable doubt. If a duty to faithfully execute the law defines the Presidency, there is no constitutionally valid justification for firing prosecutors who are already faithfully executing the law. Rather, the President's energy should be devoted to remedying failures to execute the law properly, which are, of course, fairly common in an enterprise as vast as the federal government. If the President fires prosecutors when they are already faithfully executing law, the President is merely engaged in "politics." On this view, the President should only interfere with prosecutors if his duty to faithfully execute law requires such interference, as in a case of prosecutorial abuse.

I do not mean to suggest Article II of the Constitution prohibits the President from interfering with prosecutorial discretion for political reasons. I do mean to suggest that a duty-based theory only makes proper execution of the law a constitutional concern. In other words, the Constitution does not give him a right to interfere with prosecutorial decisions for political purposes; Congress was within its rights to interfere with the firings, even if the President turned out to have directed them. Any invocation of the Constitution's symbolic authority to justify the firings would be inconsistent with a duty-based theory, unless the President could show prosecutorial malfeasance.

The juxtaposition of "politics" and priority setting in the debate over the firings suggests that these are two separate things. But politics consist, in part, of priority setting. If the President has decided that voting fraud cases merit more prosecutorial attention than, say, securities law violations, that represents a political decision that voting rights cases are more important. Perhaps the Bush Administration's critics' framing of the firings as "political" suggests low political motives instead of high ones. A President might prioritize voting rights decisions in order to attack political opponents, a low political motive.[72] Conversely, the Administration's characterization of the firings as reflecting priority setting might suggest what we may call a high political motive, such as a decision that voting

former U.S. Attorney Margaret Chiara increased felony convictions by fifteen percent in her Michigan office); Kevin McCoy & Kevin Johnson, *3 Fired Prosecutors Were in Top 10 for Convictions, Federal Data Show*, USA TODAY, Mar. 22, 2007, at 1A (listing the conviction rate rankings of the eight fired prosecutors); Paul Shukovsky, *Ex-U.S. Attorney McKay Was Forced to Resign*, SEATTLE POST-INTELLIGENCER, Feb. 8, 2007, at B1 (reporting that John McKay had increased the Seattle office's conviction rate from eighty-one percent to eighty-seven percent in five years).

72. *See* Editorial, *Gonzales v. Gonzales*, N.Y. TIMES, Apr. 20, 2007, at A22 (claiming that it is "obvious" that the firing was a "partisan purge").

rights cases are especially important because voting fraud can prevent elections from reflecting the true will of the people.[73] But in both cases, a unitary executive theory would support politicization of the Justice Department, allowing an elected President's political choices to determine who gets prosecuted for what.

This politicization seems troubling. For one thing, once politicization is accepted, Presidents can control prosecution for both high and low political reasons. Use of prosecution to defeat political opponents can constitute a serious threat to democracy. And the public will have difficulty discovering whether high or low politics motivated particular decisions.[74]

Even presidential reliance on high political motives as the basis for removal may have troubling implications. Such reliance means that general policy priorities, rather than the merits of individual cases, determine prosecution decisions. This sort of approach seems at odds with the ideal of legal neutrality that, in spite of its problematic nature, lies at the heart of the concept of rule of law and legitimate government. Prosecutors might refrain from prosecuting cases thought worthy of legal action by the White House for two related reasons. First, prosecutors might find the evidence of a crime too weak to justify prosecution. Second, they might find violations that have sufficient evidentiary support insufficiently egregious to merit prosecution in light of other criminal activity vying for their offices' prosecutorial resources. Thus, a prosecutor may suspect that a voter deliberately lied in order to cast an illegal vote, but the evidence may only prove beyond a shadow of a doubt that the voter made a false statement, which could be the result of error. The decision to prosecute or not to prosecute such a case may involve a mixture of evidentiary and priority setting judgments.[75] If presidential politics control voting rights cases, then the President (or the Attorney General, or a White House employee) might issue directives to prosecute such cases. But a prosecutor

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73. *Cf.* Lewis & Lipton, *supra* note 22 (quoting a DOJ spokesman as denying that Attorney General Gonzales ever interfered with a prosecution for "partisan political reasons").

74. *See* Eric Lipton, *Some Ask If U.S. Attorney Dismissals Point to Pattern of Investigating Democrats*, N.Y. TIMES, May 1, 2007, at A20 (discussing the lack of data available to check suspicions that Justice Department prosecutions of corruption reflect partisan political motivations).

75. *Cf.* Matthew Gertz, *Kondracke Assumed Voter Fraud as Fact in Claiming Prosecutor Firings Were About "The Failure to Prosecute" It*, MEDIA MATTERS FOR AM., July 12, 2007, http://mediamatters.org/items/200707120008 [hereinafter McKay] (reporting that former prosecutor John McKay, who was accused of failure to pursue voter fraud, did not convene a grand jury on the issue because he thought "there was no evidence of voter fraud"). *See generally* Interview by PBS with David Iglesias, U.S. Attorney of New Mexico (June 27, 2007), *available at* http://www.pbs.org/now/shows/330/david-iglesias.html [hereinafter Iglesias Interview] (explaining that David Iglesias's voter fraud taskforce reviewed the evidence in over 100 files and found no prosecutable cases).

committed to weighing the evidence, rather than execution of individual policy preferences (even if the individual is the President) might eschew such a prosecution. If general policy preferences wholly control prosecution decisions, individualized justice may suffer.

A desire to have individualized justice trump politics constitutes a perfectly good policy reason to like prosecutorial independence, but it does not provide a constitutional theory adequate to show that Article II supports such independence for U.S. Attorneys in the face of a fairly powerful unitary executive theory suggesting that it does not. If the President has the right to control prosecution, then prosecutorial independence constitutes a constitutionally suspect contemporary policy preference.[76] A duty-based conception of the executive power, however, may constitutionally justify prosecutorial independence. In Part IV, I proceed to outline the basis for such a conception.

IV. DUTY AND DOJ INDEPENDENCE

The purpose of Article II is to ensure faithful execution of the law. The arrangement of power within Article II should be seen as a means toward this end. And the Constitution does not rely on presidential power as the sole means of achieving the desired fidelity to the law.

Even at the time of the founding, and certainly today, the President cannot possibly exercise all executive power.[77] The omission of the word "all" from Article II must be deliberate. The corpus of law, even in George Washington's time, was too vast for one person to execute all of it.[78] That is why the Constitution contemplates civil officers in the government.[79]

The impossibility of a presidential monopoly on executive action also explains why the Constitution commands that the President "take Care that the Laws be faithfully executed,"[80] instead of simply telling him to execute the law faithfully. He cannot possibly execute all of the laws faithfully

76. *See* Carter, *supra* note 3, at 109–10 (noting that the modern Court generally finds claims of efficiency, good policy, and necessity insufficient as justifications in separation of powers cases); *cf.* Calabresi & Prakash, *supra* note 2, at 664 (stating that a preference for "depoliticized" administration has no "grounding in the Constitution").

77. *See* Calabresi & Prakash, *supra* note 2, at 595 n.205 (acknowledging that the President requires the assistance of "other officers" to execute the law).

78. *See* Lessig & Sunstein, *supra* note 3, at 23–30 (discussing departments established by the first Congress); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 233–42 (1980) (same); *cf.* Mashaw, *supra* note 37, at 1667 (explaining that even though the statutes enforcing the embargo acts under Jefferson gave him the power to enforce these laws, "much of the content of the enforcement policies came from the Treasury Department").

79. *See* Calabresi & Prakash, *supra* note 2, at 593–94 (affirming that the Constitution contemplates executive officers other than the President).

80. U.S. CONST. art. II, § 3.

himself, because he cannot execute most of the laws at all. Somebody else, such as U.S. Attorneys, must execute an awful lot of the law.[81] This reliance on nonpresidential executive action explains the use of the passive voice in the constitutional text—a call that the law "be faithfully executed."[82]

Because the President cannot control all decisions in executing the law, the Constitution places a great deal of reliance on the integrity of individual officers. That is why Article VI requires "all executive and judicial Officers" to swear an oath to "support this Constitution[.]"[83] The Take Care Clause directs the President to influence other officials, so that they might faithfully execute law.[84]

But a duty-based theory denies that the Constitution grants the President complete control over executive officers, and therefore reads the Constitution as not relying on complete presidential control of officers as the only means of obtaining faithful execution of the law.[85] It recognizes that the President has limited control over appointments, since the Constitution only guarantees the President the right to nominate "Officers of the United States." Congress may give him more power by approving his appointees or vesting the authority to appoint inferior officers in the President, but it need not do so.

Nor does the Constitution expressly confer any removal authority upon the President. Since the only removal mechanism specified in the Constitution is impeachment, a duty-based theory might maintain that the Constitution forbids presidential removal of officers.[86] Or it might maintain that Congress may specify whatever removal provisions it thinks appropriate to ensure faithful execution of the law, subject of course to a presidential veto that would generally create pressure to negotiate the locus of removal power. A third approach, the one the Court has adopted, allows for congressional control over removal provisions subject to ad hoc judicial intervention.[87] Any of these approaches would raise an issue of how the

81. *See* Myers v. United States, 272 U.S. 52, 117 (1926) (noting that the President cannot execute the laws unaided).

82. U.S. CONST. art. II, § 3.

83. U.S. CONST. art. VI, cl. 3.

84. U.S. CONST. art. II, § 3.

85. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 610 (1838) (denying that "every" executive "officer" is "under the exclusive direction of the President").

86. *See* Calabresi & Prakash, *supra* note 2, at 596–97 (acknowledging that at first glance "the Constitution would seem to provide only one means of removing inferior executive officers: impeachment," but rejecting this "cramped" reading based on prior practice and functional considerations).

87. *See* Froomkin, *supra* note 2, at 1366 (citing "general agreement that the Supreme Court's separation of powers decisions are hopelessly contradictory"); *see also* Morrison v. Olson, 487 U.S. 654, 688–91 (1988) (acknowledging that the Court had disapproved of "good cause" removal provisions in statutes governing removal of "purely executive"

President would exercise executive power when he does not possess unlimited authority to remove an officer.

The firing cases suggest an answer. Because the Constitution lodges executive power in the President, executive officers, who swear an oath to uphold the Constitution, will normally pay attention to presidential requests. Since they owe their office to the President who nominated them (at least in part), some notion of loyalty will usually augment their sense of duty, making them responsive to presidential requests. This sense of duty to the President explains why the fired U.S. Attorneys reviewed the cases that the White House thought should receive priority.[88] In other words, it is not clear that proper exercise of executive power requires an executive removal authority, especially when an effort to direct prosecution is exercised to ensure faithful execution of law, a motive that will enhance the legitimacy of presidential requests and will usually suffice to ensure secure adoption of presidential instructions.[89]

On the other hand, a duty-based theory of executive power does not demand that DOJ officials grant all White House requests for prosecutions. As long as prosecutors are faithfully executing the law, a duty-based theory is satisfied whether or not they obey presidential requests to prosecute a particular case or a class of cases.[90]

One can, however, reconcile a weak duty-based theory with a weak version of the unitary executive theory. A weak unitary executive theory would insist that the President have nearly complete control over the Executive Branch, but demand that this power be used only to ensure faithful execution of the law, not to substitute presidential priorities for those of officials who are faithfully executing the law.

The strong unitary executive theory, however, accepts politicization of the civil service. Its emphasis on presidential control over appointments

officials, but adopting a "present considered view" that this approach is too rigid); Lessig & Sunstein, *supra* note 3, at 5–6 (discussing the wavering lines in the Court's jurisprudence on presidential control of officials).

88. *See* Iglesias Interview, *supra* note 75 (explaining that David Iglesias's voter fraud taskforce, including members from the Washington D.C. Department of Justice and the local FBI, reviewed one hundred files and found no prosecutable cases); McKay, *supra* note 75 (reporting that former prosecutor John McKay found "no evidence of voter fraud," which suggests that he did review cases); *see also* Lara Jakes Jordan, *Fired U.S. Attorneys Ranked Above Peers in Prosecution Rates*, STARNEWSONLINE.COM, Mar. 21, 2007, http://www.wilmingtonstar.com/apps/pbcs.dll/article?AID=/20070321/NEWS/703210457/-1/State&template=printart (suggesting that three fired prosecutors had pursued administration priorities, because their offices were among the top five rated offices for the number of immigration cases prosecuted).

89. *See* Froomkin, *supra* note 43, at 801 (describing the President's role as "one of general leadership and persuasion").

90. *See* Percival, *supra* note 2, at 966 (claiming presidential removal authority may influence an official's decisions, but that the President may not simply countermand an official's decision on matters entrusted to him by Congress).

and removal might be called the theory of the patronage state, because the theory embraces presidential control over hiring and firing as a right, which would inevitably be used for political purposes.

Analysis of the statutory regime governing the appointment and removal of U.S. Attorneys shows why the strong unitary executive theory may be inconsistent with express clauses in the Constitution giving Congress substantial control over appointments. Complete presidential power over removal has the potential to nullify the effect of the congressional participation in appointments that the Constitution explicitly commands. The regime that the Patriot Act Amendments establish illustrates the problem. Under 28 U.S.C. § 546, as revised by the Patriot Act Amendments, the President may remove U.S. Attorneys and replace them with appointees that the Attorney General chooses.[91] The President can keep hand-picked replacement U.S. Attorneys in office by simply declining to nominate a "permanent" U.S. Attorney for Senate approval. In principle, he could do this the day after the Senate confirms his nominee, making the Senate's advice and consent function a complete charade. Recognizing this, Congress promptly passed the Preserving United States Attorney Independence Act of 2007,[92] amending 28 U.S.C. § 546 to nullify the Patriot Act Amendments' effect once the firings' story came to light.[93]

This inconsistency of presidential removal with effective congressional participation in appointments, which the Constitution specifically requires in various ways, may appear to depend upon the nature of the regime governing replacements for removed officials. After all, Congress fought perceived politicization of the Justice Department not by targeting the presidential removal authority, but rather by repealing the grant of authority conferred by § 502 of the Patriot Act Amendments to name permanent, rather than just temporary, replacements.[94]

The inconsistency between presidential removal authority and the Senate's appointments power, however, only depends upon the nature of the replacement regime to a limited degree. If the President can immediately fire the person the Senate approves for any reason or no reason at all, the President frustrates giving effect to the Senate judgment that the approved nominee is the right person for the job, no matter what happens with replacements. Furthermore, even in the absence of a regime

91. *See* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-77, § 502, 120 Stat. 192, 246 (2006) (to be codified at 28 U.S.C. § 546) (allowing an interim U.S. Attorney to serve until another is appointed by the President and confirmed by the Senate).

92. Pub. L. No. 110-34, § 2, 121 Stat. 224 (2007) (to be codified at 28 U.S.C. § 546) (restricting the time Attorney General-appointed U.S. Attorneys can stay in office).

93. *Id*.

94. *Id*.

giving the President formal authority to name permanent replacements, the President can exercise substantial control over replacements, thus thwarting the objective of having only "officers of the United States" who command sufficient respect across the political spectrum to gain Senate confirmation. To see this, imagine that the statute simply prohibited the President from naming replacements. Even if the President named no replacement, somebody would have to do an ousted U.S. Attorney's work. And absent an express provision to the contrary, a right-based theory would assume that the President can assign this work to officers he selects from those already employed in the Department. That is why 28 U.S.C. § 546 provided for *judicial* appointment of a successor U.S. Attorney once the term of a temporary replacement lapsed without Senate approval of a permanent successor.[95] Absent some explicit check on abuse of the removal authority through congressional or judicial control of replacements even absent presidential action, presidential removal authority thwarts meaningful congressional participation in appointments decisions, allowing the President to nullify an appointment's effects by removing the appointee and declining to nominate a successor for Senate approval.

The Constitution's reliance on individual integrity, on impeachment as the only explicitly sanctioned removal mechanism, and on a very substantial congressional role in appointments suggest that the Constitution does not require that the President have the freedom to fire prosecutors who fail to implement the President's priorities. In other words, the Constitution may not grant the President the complete control over execution of the law that the right-based theory envisions. A duty-based theory—that the President enjoys limited power over the Executive Branch as part of a system of checks and balances to ensure faithful execution of the law—fits many constitutional provisions better than a right-based theory.[96] From this perspective, the firing of prosecutors only enjoys a constitutional justification if it corrects a failure to faithfully implement law. If the Administration used the removal power just to implement presidential priorities—rather than to correct prosecutorial abuse—Article II does not require any particular respect for the President's decision.

The duty-based theory takes into account clauses of the Constitution and some evidence of original intent that unitary executive scholars often gloss over.[97] And it shows that a proper duty-based theory of the Constitution

95. *See* 28 U.S.C. § 546(d) (2000) (stating that the district court will appoint a U.S. Attorney if a temporary appointment expires without Senate approval).

96. *See* Froomkin, *supra* note 43, at 804 (describing the separation of powers in the Constitution as seeking to avoid concentrating power in the President or any other person or body).

97. *See, e.g.*, Calabresi & Rhodes, *supra* note 2, at 1168 (stating that unitary executive theorists treat the congressional power to vest the appointment of inferior officers in

would support DOJ independence. Without such a theory, that independence must remain threatened.

CONCLUSION

I have sketched here a basic argument for a duty-based conception of executive power. A right-based conception, however, can support the politicization of the Justice Department. This troubling feature of a right-based theory should invite a more vigorous debate about the relative merits of a right-based unitary executive theory and a duty-based theory. A duty-based theory maintains that the Constitution sets up Congress and, to some degree, executive branch officials and the Judiciary, as checks on presidential control over the Executive Branch to ensure that the "Laws be faithfully executed." Such a theory would provide constitutional grounding for a measure of DOJ independence.

department heads as an "insignificant housekeeping provision added at the last minute").

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COMMENTS

IMMIGRATION DETENTION: THE INACTION OF THE BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

STEVEN NEELEY*

TABLE OF CONTENTS

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INTRODUCTION

In 2000, following numerous complaints and lawsuits, the Immigration and Naturalization Service (INS) issued the National Detention Standards (NDS) to govern the treatment of immigration detainees.[1] The standards were designed to provide humane conditions of confinement for immigration detainees[2] and resulted from negotiations between INS, the Department of Justice (DOJ), and various advocacy groups.[3] In total, INS created thirty-eight standards,[4] all of which were compiled in a Detention Operations Manual (DOM).[5] Following the passage of the Homeland Security Act of 2002,[6] the newly created Department of Homeland Security (DHS) assumed the responsibilities of the former INS, while the Bureau of Immigration and Customs Enforcement (ICE) became responsible for detention and removal operations.[7] ICE adopted the NDS and continues to use these standards to govern its detention practices.[8] However, despite the purpose behind the NDS, neither INS nor DHS promulgated the detention standards as binding regulations.

The NDS apply to any facility that houses immigration detainees, including federal detention centers, privately owned and operated facilities, and state or local jails.[9] However, while the NDS theoretically apply to all

1. BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL (2000) [hereinafter DETENTION OPERATIONS MANUAL], *available at* http://www.ice.gov/partners/dro/opsmanual; *see also* Chris Hedges, *Policy to Protect Jailed Immigrants Is Adopted by U.S.*, N.Y. TIMES, Jan. 2, 2001, at A1 (describing the contextual background of the National Detention Standards (NDS) and outlining goals of improving conditions and ensuring fair and equal treatment for all those detained).

2. Hedges, *supra* note 1, at A1.

3. *See* OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 2 (2006) (explaining that the standards were a collaborative effort between the American Bar Association, the Department of Justice (DOJ), the former Immigration and Naturalization Service (INS), and other advocacy groups that engage in pro bono representation of immigration detainees).

4. *See id*. (stating that INS initially created thirty-six detention standards in 2000 and later added two additional standards).

5. DETENTION OPERATIONS MANUAL, *supra* note 1.

6. Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 111 (2006)).

7. *See generally* 6 U.S.C. § 252 (2006) (establishing the Bureau of Immigration and Customs Enforcement (ICE)); *see also* 6 U.S.C. § 251(2) (2006) (transferring authority for the detention and removal program from the Commissioner of the former INS to the Under Secretary of ICE).

8. *See* DETENTION OPERATIONS MANUAL, *supra* note 1 (listing all of the former INS detention standards as ICE detention standards).

9. Specifically, the NDS are applicable to Service Processing Centers (SPCs), Contract Detention Facilities (CDFs), and state or local jails that are used by the Department of Homeland Security (DHS) via Intergovernmental Service Agreements (IGSAs) to hold detainees for longer than seventy-two hours. BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS

of these facilities, that is not always the case in practice. While each individual standard within the DOM contains a general policy statement, there are also more specific implementing procedures outlined throughout the standard, which are not applicable to state or local jails operating under an intergovernmental service agreement (IGSA).[10] Afraid of imposing additional burdens on IGSA facilities, INS decided that the implementing procedures should be mere guidelines for IGSA facilities,[11] and that such facilities should have the flexibility to determine how best to satisfy the policy objectives of the NDS.[12] Thus, alarmingly, the standards that supposedly govern immigration detention are not applicable to the most heavily used detention facilities, which are IGSA facilities.[13] Moreover, as the number of immigration detainees rises,[14] ICE is increasingly relying on IGSA facilities for detention because of the availability and flexibility that such facilities provide.[15]

Recently, government investigations showed that conditions at detention centers, particularly IGSA facilities, are much worse than those envisioned under the NDS. Investigations by both the DHS Office of Inspector General (OIG) and the Government Accountability Office (GAO) found

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DETENTION STANDARD: HOLD ROOMS IN DETENTION FACILITIES 1 (2000) [hereinafter HOLD ROOMS], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/holdrm.pdf.

10. *See id.* ("Within the [standard] additional implementing procedures are identified for SPCs and CDFs. . . . IGSA facilities may find such procedures useful as guidelines."). Thus, implementing procedures are specifications that SPCs and CDFs must follow in order to satisfy the goal of the broader standard in the NDS. For example, while the broad standard for hold rooms provides simply that "[h]old rooms will be used for the temporary detention of individuals awaiting removal," the more meaningful implementing procedures have specifications, such as "[s]ingle-occupant hold rooms shall contain a minimum of 37 square feet." *Id.* Accordingly, because IGSA facilities are not bound by the specific procedures, single-occupant hold rooms at such facilities can be smaller than thirty-seven square feet.

11. *See* Brian L. Aust, Comment, *Fifty Years Later: Examining Expedited Removal and the Detention of Asylum Seekers Through the Lens of the Universal Declaration of Human Rights*, 20 HAMLINE J. PUB. L. & POL'Y 107, 124–25 (1998) (explaining that the NDS do not apply to IGSAs because INS worried about antagonizing local jail officials and government entities which could have potentially resulted in losing needed bed space for detainees).

12. *See* HOLD ROOMS, *supra* note 9, at 1 ("IGSAs may adopt, adapt or establish alternatives to, the procedures specified for SPCs/CDFs, provided they meet or exceed the objective represented by each standard.").

13. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT SHOW A PATTERN OF NONCOMPLIANCE 7–8 (2007) (reporting that ICE uses eight SPCs, six CDFs, and over 300 IGSAs).

14. *See id.* at 1 (stating that the number of immigration detainees has increased from 95,214 in 2001 to 283,115 in 2006).

15. *See* Aust, *supra* note 11, at 123–24 (noting that IGSAs are used when ICE does not have a detention facility in an area, when its facilities are full, or as a means of increasing detention capacity). Indeed, ICE is statutorily required to consider existing prisons and jails for use as detention facilities prior to authorizing the construction of a new detention facility. 8 U.S.C. § 1231(g)(2) (2006).

that detainees are denied access to medical treatment, telephones, and legal materials.[16] Additionally, these investigations revealed that ICE's internal compliance review procedures are inadequate for ensuring compliance with the NDS.[17] Both OIG and GAO offered several recommendations to bring detention conditions in line with the NDS, only some of which ICE implemented.[18] Moreover, ICE was unwilling to address certain key recommendations, alleging that the OIG report used a flawed methodology.[19]

Largely in response to these reports, in January 2007, the National Immigration Project of the National Lawyers Guild and eighty-four immigration detainees petitioned DHS and ICE to engage in notice-and-comment rulemaking to promulgate its detention standards as regulations.[20] As of the time of this writing, ICE has not officially responded to that petition.

This Comment argues that ICE's failure to enforce the NDS at IGSA facilities, while simultaneously relying predominantly on those facilities to house the majority of immigration detainees, constitutes "agency action

16. OFFICE OF INSPECTOR GEN., *supra* note 3, at 1–3; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 10.

17. *See* OFFICE OF INSPECTOR GENERAL, *supra* note 3, at 1 (stating that ICE procedures do not provide a process for allowing detainees to report civil rights violations); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 5–6 (finding that a "[l]ack of internal controls and weaknesses in ICE's compliance review process" prevented ICE from recognizing systemic problems with telephones at detention facilities).

18. *See generally* OFFICE OF INSPECTOR GEN., *supra* note 3, at 44–52 (containing ICE's letter response to the OIG recommendations which states that ICE concurs only in part with some recommendations and does not concur with others). For example, ICE refused to implement the OIG report's recommendation that facilities using double and triple bunk beds provide ladder access and a safety rail because the recommendation "will be extremely expensive" and "will significantly reduce the amount of available bedspace (particularly in areas of the country where IGSA bedspace is heavily relied upon)." *Id.* at 47.

19. One critical recommendation from the OIG report suggested that ICE ascertain why the level of noncompliance noted by ICE inspections was "significantly less" than the noncompliance issues identified by the OIG report. *Id.* at 51. ICE did not concur with this recommendation, arguing instead that the OIG's use of "'exception reporting' inherently leads to different outcomes" than ICE's use of random sampling investigations. *Id.* Additionally, ICE noted that the OIG spent a considerable amount of time on its investigation and that ICE's review process, which is shorter, allows a "reasonable assessment within a reasonable period of time" that is "minimally invasive to day-to-day operations of a facility." *Id.*

20. Press Release, Nat'l Immigration Project, Immigration Detainees Petition Homeland Security to Issue Enforceable, Comprehensive Immigration Detention Standards (Jan. 25, 2007), *available at* http://www.nationalimmigrationproject.org/press_releases/petition_PR_final.pdf (announcing the National Immigration Project's plan to file a petition for rulemaking with DHS); MICHAEL J. WISHNIE, PETITION FOR RULE-MAKING TO PROMULGATE REGULATIONS GOVERNING DETENTION STANDARDS FOR IMMIGRATION DETAINEES 1 (Jan. 25, 2007), *available at* http://www.nationalimmigrationproject.org/detention_petition_final.pdf (containing the text of the petition for rulemaking filed with DHS).

unlawfully withheld"[21] under the Administrative Procedure Act (APA). Part I explores the current situation of immigration detention with a particular focus on the conditions at IGSA facilities. Part II addresses the lack of enforcement mechanisms in the NDS and examines ICE's inadequate treatment of detainees. Part III argues that ICE's failure to enforce the NDS is an abdication of its statutory responsibility and outlines how detainees may persuade a court to compel ICE to promulgate the NDS as regulations. Finally, Part IV concludes that promulgation of the NDS as regulations is necessary to create greater accountability and transparency in immigration detention.

I. CURRENT CONDITIONS OF IMMIGRATION DETENTION

Immigration detention is an expanding form of incarceration that a conglomeration of federal facilities, private prisons, and state and local jails administer.[22] Within ICE, the Detention and Removal Office (DRO) has primary responsibility for the custody and management of immigration detainees while they await a decision regarding their removal.[23] To that end, DRO adopted the NDS (created by the former INS) and is responsible for inspecting ICE detention facilities annually to ensure compliance with those standards.[24]

A. Ideal Conditions Under the National Detention Standards

In total, thirty-eight detention standards govern conditions of immigration detention.[25] These standards prescribe, among other things, the conditions under which detainees receive medical care,[26] access to telephones[27] and legal materials,[28] procedures for reporting and

21. 5 U.S.C. § 706(1) (2006).

22. *See* Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. TIMES, June 26, 2007, at A1 (describing immigration detention as the "fastest-growing form of incarceration" and as "a patchwork of county jails, privately run prisons and federal facilities").

23. OFFICE OF INSPECTOR GEN., *supra* note 3, at 2 (describing the responsibilities of ICE's Detention and Removal Office (DRO)).

24. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 2 (stating DRO's annual responsibility to inspect detention facilities for standards compliance).

25. *See* DETENTION OPERATIONS MANUAL, *supra* note 1.

26. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: MEDICAL CARE 1 (2000) [hereinafter MEDICAL CARE], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/medical.pdf ("All detainees shall have access to medical services that promote detainee health and general well-being.").

27. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: TELEPHONE ACCESS 1 (2000) [hereinafter TELEPHONE ACCESS], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/teleacc.pdf ("Facilities holding INS

documenting detainee grievances,[29] and the capacity and time requirements for using holding rooms.[30]

Ideally, a trained healthcare provider should administer an initial medical screening for all immigration detainees immediately upon arrival at a detention facility.[31] These screenings are crucial for identifying the "immediate medical, emotional, and dental needs of the detainees."[32] Moreover, facilities should have a "sick call" mechanism consisting of regularly scheduled times when detainees may request nonemergency health care from a physician or qualified medical officer.[33]

Additionally, facilities should maintain at least one properly functioning telephone for every twenty-five detainees.[34] Facilities should grant access to those telephones within eight waking hours of, and no later than twenty-four hours after, a detainee's request.[35] Detainees should also have the opportunity to make private phone calls to discuss legal matters[36] and free local calls to federal or state courts, local immigration courts, consular officials, government offices, and legal service providers.[37]

Immigration detainees should also have access to a well-lit, reasonably quiet law library, containing a sufficient number of typewriters, computers, and writing implements[38] for a minimum of five hours per week.[39] A designated employee at the facility should update legal materials when

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detainees shall permit them to have reasonable and equitable access to telephones.").

28. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: ACCESS TO LEGAL MATERIALS 1 (2000) [hereinafter LEGAL MATERIALS], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/legal.pdf ("Facilities holding INS detainees shall permit detainees access to a law library, and provide legal materials, facilities, equipment and document copying privileges, and the opportunity to prepare legal documents.").

29. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, INS DETENTION STANDARD: DETAINEE GRIEVANCE PROCEDURES (2000) [hereinafter GRIEVANCE PROCEDURES], *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/griev.pdf (mandating that every detention facility develop standard operating procedures to establish reasonable timetables for addressing detainee grievances).

30. *See* HOLD ROOMS, *supra* note 9, at 1 (providing that hold rooms should be used for temporary detention related to processing of detainees).

31. MEDICAL CARE, *supra* note 26, at 3.

32. OFFICE OF INSPECTOR GEN., *supra* note 3, at 6.

33. MEDICAL CARE, *supra* note 26, at 5 (prescribing the minimum sick call times as one day per week for facilities with fewer than fifty detainees, three days per week for facilities with fifty to 200 detainees, and five days per week for facilities with over 200 detainees).

34. TELEPHONE ACCESS, *supra* note 27, at 1.

35. *Id*. at 2.

36. *Id*. at 4–5.

37. *Id*. at 2.

38. LEGAL MATERIALS, *supra* note 28, at 1.

39. *Id*. at 3.

necessary.[40]

In order to minimize conflicts and disruptions, facilities should establish policies for detainees to submit oral or written grievances[41] and document these grievances in a Detainee Grievance Log.[42] Copies of grievances should remain in a detainee's file for no less than three years.[43]

Finally, a detainee should not be confined in a hold room for longer than twelve hours,[44] and the hold room should possess enough seating to accommodate the room's maximum capacity.[45] These provisions constitute the ideal immigration detention conditions that would result from compliance with the NDS.

B. Actual Conditions in ICE Detention Facilities

Unfortunately, the actual conditions in ICE detention facilities are often a substantial departure from the ideal conditions contemplated by the NDS. For example, the system of medical care available to immigrant detainees is fundamentally flawed. Although ICE spends significant sums of money on medical care,[46] as many as sixty-two immigrants have died in immigration custody since 2004, largely due to inadequate or untimely medical care.[47] Often, newly admitted detainees never receive either the medical screening or physical examination that the NDS require.[48] Moreover, while the NDS require regular responses to sick call requests, the actual sick call policies vary among detention facilities and often are

40. *Id*.
41. GRIEVANCE PROCEDURES, *supra* note 29, at 1–3.
42. *Id*. at 5.
43. *Id*.
44. HOLD ROOMS, *supra* note 9, at 3.
45. *Id*. at 2.
46. *See* Darryl Fears, *3 Jailed Immigrants Die in a Month: Medical Mistreatment Alleged; Federal Agency Denies Claims*, WASH. POST, Aug. 15, 2007, at A2 (quoting Marc Raimondi, an ICE spokesman, as saying that ICE spends more than $98 million per year to provide "humane and safe detention environments" to detainees).
47. *See, e.g.*, Bernstein, *supra* note 22 (chronicling the death of Sandra M. Kenley, who suffered from uterine bleeding, a fibroid tumor, and high blood pressure and was denied her medication while being detained at Hampton Roads Jail in Portsmouth, Virginia; eventually, she fell off of the top bunk of her bed and a cellmate had to pound on the door for twenty minutes before guards responded); *see also* Sandra Hernandez, *Denied Medication, AIDS Patient Dies in Custody*, DAILY JOURNAL, http://www.culturekitchen.com/shreya_mandal/forum/denied_medication_aids_patient_dies_in_0, Aug. 9, 2007 (describing how Victor Arellano, a transgender Mexican immigrant and AIDS patient, was denied vital AIDS medication while detained at San Pedro detention center, and that fellow detainees had to care for him by soaking bath towels in water to cool his fever and using a cardboard box as makeshift trashcan to collect his vomit).
48. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 3 (finding, in a study of four detention facilities, that at least eight detainees did not receive a medical screening, while a minimum of fifteen detainees did not receive a physical examination during processing).

not enforced.[49] As a result, some detainees wait more than three days to receive medical attention.[50]

In addition to their substandard medical care, several facilities have systemic telephone problems, resulting in substantial impediments to detainees' access to pro bono services and legal counsel.[51] In several detention facilities, many telephones are not operational[52] and evidence of telephone maintenance or repairs is lacking.[53] Facilities have also failed to grant detainees access to telephones within twenty-four hours of their requests as required by the NDS, forcing some detainees to wait several days or file formal grievances in order to contact family members or attorneys.[54] Moreover, when detainees place calls to discuss legal matters, they are not afforded the privacy that the NDS require, either because telephones are located in heavily populated rooms or because a detention officer remains in the room during the private call.[55]

Detainee access to legal materials is also severely restricted because of reduced library time or lack of legal resources.[56] While the NDS require

49. *See id.* at 4 (noting that in three surveyed facilities employing varying policies for responding to nonemergency health care treatment, 196 of 481 immigration detainee nonemergency medical requests were not attended to within the time established by the facility).

50. *See id.* (observing that the Berks County Prison, an IGSA facility in Pennsylvania, failed to timely respond to 179 of 447 detainee sick call requests).

51. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 10 (finding that, of seventeen detention facilities that use a pro bono telephone system, test calls at sixteen of those facilities failed to complete because of inaccurate or incomplete phone number postings or various technical failures; observing further that the number to the OIG, where complaints about detention conditions are reported, was often blocked or restricted); *see also* OFFICE OF INSPECTOR GEN., *supra* note 3, at 24–25 (discovering that detainees were unable to reach representatives at fifty of sixty-three consulate numbers tested, and were unable to reach any of the twelve pro bono legal services numbers listed because the numbers either required a fee or failed to connect).

52. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 24 (reporting that four of eleven telephones at the Passaic County Jail, an IGSA facility in Patterson, New Jersey, were not operational, and that thirteen of sixty telephones were not operational at a Corrections Corporation of America (CCA) CDF in San Diego, California).

53. *See id.* at 25 (documenting that the Passaic County Jail staff responsible for telephone maintenance did not keep records of maintenance or repairs prior to June 2005).

54. *See id.* at 24 (noting six instances at one IGSA when detainees had to file formal grievances for an emergency phone call to notify their families that they were detained, and one instance when a detainee had to wait sixteen business days before being granted access to a phone to contact an attorney).

55. *See id.* (finding that detainees at Berks County Prison, an IGSA facility, were required to make private calls in a day room where they could be overheard by other detainees or detention officers, and that at the CCA detention facility, detainees were allowed access to the manager's office for legal calls provided that a detention officer remain in the room with the detainee).

56. *See id.* at 16 (documenting that detainees at Berks County Prison, Passaic County Jail, and Hudson County Correctional Center did not have access to legal software for at least a month because detention officials had failed to install software or had allowed the software licenses to expire).

that facilities allow detainees a minimum of five hours per week in the law library,[57] several facilities allow detainees far less time.[58] Such limited library access drastically reduces detainees' efforts to understand and participate in their immigration cases.

Facilities have also failed to appropriately document detainee grievances.[59] Some facilities do not maintain grievance logs,[60] while others fail to maintain complete detainee files.[61] In addition to their failure to document grievances, numerous facilities do not respond to detainee grievances within the five-day time frame required by the NDS.[62] These longer response times may be due in part to detention officers' ignorance of the five-day response window.[63]

Also troubling is the fact that detainees are often in holding rooms longer than the maximum twelve hours permitted by the NDS.[64] This excess time is often due to staff shortages or low prioritization of the processing of new detainees.[65] Moreover, holding rooms are often not compliant with the NDS in that they do not provide sufficient seating or floor drains.[66]

Thus, despite the broad purpose of the NDS, actual conditions of immigration detention facilities oftentimes remain unsafe, insecure, and

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57. LEGAL MATERIALS, *supra* note 28, at 3.

58. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 17 (stating that Hudson County Correction Center allowed detainees only one-and-a-half hours per week in the law library and that Passaic County Jail allowed detainees only four hours per week).

59. *See* GRIEVANCE PROCEDURES, *supra* note 29, at 5 (requiring that all detention facilities maintain, at a minimum, a Detainee Grievance Log and a copy of all detainee grievances in a detainee's file for three years).

60. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 20 (observing that Passaic County Jail did not maintain a Detainee Grievance Log and that ICE detention staff at the Detention and Removal Field Office did not maintain one before June 2005, even though the NDS grievance standard became effective in September 2000).

61. *See id.* at 13 (documenting that of fifteen detainee files requested at the Krome Service Processing Center (SPC) in Miami, Florida, four files were missing altogether, and seven others were missing documents such as grievances).

62. *See id.* at 20–21 (finding that grievance response time at Berks County Prison ranged from seven to twenty-two days, with an average of nine days, and that in one instance, ICE itself waited twenty-five days before responding to a detainee grievance that was faxed directly).

63. *See id.* at 20 (observing that officials at the Hudson County Correctional Center were not aware of the five-day requirement for responding to detainee grievances).

64. *See id.* at 15 (discovering that forty detainees at the Krome SPC were held from thirteen to twenty hours in noncompliant holding rooms).

65. *See id.* (interviewing a Supervisory Immigration Enforcement agent who stated that detainees are held longer than twelve hours because there are not enough processing officers to handle a large group of newly admitted detainees, or the officer in charge orders a priority task to be completed and processing duties to be postponed).

66. *See id.* (noting that hold rooms at the Krome SPC did not provide an adequate number of benches to accommodate the number of detainees held, and that several of the rooms lacked floor drains).

considerably inhumane.[67]

II. INADEQUACIES OF ICE DETENTION STANDARDS

The inadequacies of the NDS stem in large part from their status as guidelines and not binding regulations. This status creates two problems. First, as previously mentioned, the specific implementing procedures detailed in the NDS are not applicable to the most widely used detention centers—the IGSA facilities—creating a substantial void of accountability and lack of oversight in a great number of detention facilities.[68] Second, because the NDS serve only as guidelines—not binding regulations—they are not judicially enforceable.[69]

A. Lack of Internal Controls to Ensure Compliance

The widespread use of IGSA facilities creates significant accountability problems, as ICE has less control over these facilities[70] and is unwilling to force them to comply with the specific implementing procedures of the NDS.[71]

When drafting the NDS, INS was particularly reluctant to force compliance at IGSA facilities out of fear that local jails would refuse to accept detainees—a result that would have left INS in a difficult situation.[72]

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67. *See* Hedges, *supra* note 1 (quoting a previous immigration commissioner describing the purpose of the NDS as providing "safe, secure and humane conditions of detention" for immigration detainees).

68. *See* BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012, DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND 2–11 (2003) [hereinafter ENDGAME] (explaining that during the early 1990s, the majority of immigration detainees were held in SPCs, CDFs, or Bureau of Prison Facilities, but that now "the majority of detainees are housed in county and local institutions through inter-governmental service agreements"); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 7 (stating that "[t]he majority of ICE's alien detainee population is housed with general population inmates in about 300 state and local jails that have intergovernmental service agreements with ICE"); OFFICE OF INSPECTOR GEN., *supra* note 3, at 2 (explaining that "the need to modify contractual agreements" with IGSA facilities prevented ICE from requiring compliance with those procedures).

69. *See* AM. CIVIL LIBERTIES UNION, U.S. IMMIGRATION DETENTION SYSTEM: SUBSTANDARD CONDITIONS OF CONFINEMENT AND INEFFECTIVE OVERSIGHT 1 (May 3, 2007) [hereinafter DETENTION SYSTEM] (stating that the NDS are "nonbinding and not judicially enforceable").

70. *See* ENDGAME, *supra* note 68, at 2–11 (admitting that "[b]ecause DRO does not own [IGSA] facilities, they have less control over mixing criminal vs. noncriminal populations and ensuring compliance with other jail standards that affect detention").

71. *See, e.g.*, HOLD ROOMS, *supra* note 9, at 1–3 (containing more than an entire page of specifications for hold room construction and permissible time limits for detention in hold rooms that are applicable only to SPCs and CDFs; IGSA facilities "may find such procedures useful as guidelines," but remain free to use their existing hold rooms).

72. *See* Aust, *supra* note 11, at 124 (explaining INS's fear that if the NDS were

Accordingly, INS adopted a standard detention contract for state and local jails that does not even mention the NDS.[73] Rather, the standard contract contains vague language that gives IGSA facilities substantial discretion to determine what constitutes appropriate conditions of detention.[74] When IGSA facilities fail to comply with these vague contractual standards, there are limited means of recourse, which ICE is reluctant to employ.[75] Moreover, while ICE could presumably strengthen its contractual requirements and demand that IGSA facilities comply with the specific implementing procedures of the NDS, the increased costs that would result could reverse the facilities' financial incentives to house immigration detainees[76] and put ICE in the precarious position of having vastly more detainees than detention facilities vacancies.

Also exacerbating the accountability problem is ICE's ineffective oversight of conditions at IGSA facilities. ICE's internal compliance procedures for IGSA facilities consist primarily of the Detention Standards Compliance Unit (DSCU), which conducts annual inspections of detention facilities.[77] However, the ICE reviewers conducting these inspections apply the standards inconsistently, resulting in a substantial risk of underreporting the lack of compliance.[78] Additionally, while ICE theoretically informs IGSA detention officers about the NDS, several IGSA facility officers admitted to having no knowledge of the detention standards and, as a result, treating immigration detainees the same as criminal

applicable to IGSA facilities, local jails would refuse to house immigration detainees altogether).

73. *See, e.g.*, IMMIGRATION AND NATURALIZATION SERV., DETENTION AND DEPORTATION OFFICERS' FIELD MANUAL Appendix 21-7 (Oct. 9, 1998) (containing a standard intergovernmental service agreement for detention of immigration detainees by state and local jails).

74. *See, e.g.*, *id.* (requiring merely that IGSA facilities provide "reasonable access" to public telephones, legal rights groups, and legal materials, and "reasonable visitation" with legal counsel).

75. *See id.* (providing that if the IGSA facility fails to remedy compliance deficiencies, then the detention contract *may* be terminated) (emphasis added); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 9 (stating that while ICE may discontinue use of a facility, remove detainees, or withhold payment for noncompliance, "ICE has never technically terminated an agreement for noncompliance with its detention standards").

76. *See* Christopher Nugent, *Towards Balancing a New Immigration and Nationality Act: Enhanced Immigration Enforcement and Fair, Humane and Cost-Effective Treatment of Aliens*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 243, 254–55 (2005) (explaining that the per diem rate that ICE pays to IGSA facilities under the standard detention contract is often higher than the actual operating costs that IGSA facilities spend on detaining an individual).

77. *See* Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d 825, 863–64 (C.D. Cal. 2007) (specifying the standards prescribed, number of detention centers, and other measures taken to ensure that each center complies with appropriate regulations).

78. *See id.* at 865 (finding that the testimony of ICE reviewers shows inconsistent application of the NDS and that reviewers "may severely under-report non-compliance with the detention standards") (internal quotation marks omitted).

inmates.[79] Moreover, GAO found that the systemic telephone problems at various detention facilities were largely attributable to ICE's admittedly ineffective oversight[80] and lack of internal control mechanisms to ensure proper functioning.[81] These are significant findings given that ICE's failure to provide meaningful internal recourse prevents immigration detainees from appealing to ICE for remedies to substandard detention conditions at IGSA facilities.

B. Absence of Judicial Oversight

In addition to ineffective internal recourse, detainees cannot obtain independent oversight of their detention conditions because the NDS are nonbinding standards rather than regulations,[82] and therefore judicial review is difficult or altogether unavailable.[83] While this is not to say that detainees are completely incapable of challenging their conditions in court,[84] such recourse is rare and requires individual detainees to bear the burden of constant challenges. Thus, deprived of their normal recourse through ICE's compliance review processes, detainees essentially find themselves without adequate means to assert their rights and combat inadequate detention conditions.

79. *See* OFFICE OF INSPECTOR GEN., *supra* note 3, at 31 (finding that five Berks County Prison officials claimed that they were unaware of specific standards for immigration detainees and that correctional officers were therefore trained to treat detainees similarly to inmates). This is alarming considering the Ninth Circuit's holding in *Jones v. Blanas* that civil detainees' treatment must be better than that of convicted prisoners and pretrial criminal detainees, and that if a civil detainee's treatment is similar, such treatment is presumptively punitive and unconstitutional. 393 F.3d 918, 933–34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005).

80. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at Highlights (quoting ICE officials as admitting that "there was little oversight of the telephone contract" that allowed detainees free calls to courts, government agencies, and legal representation).

81. *See id.* (finding that "insufficient internal controls and weaknesses in ICE's compliance review process resulted in ICE's failure to identify telephone system problems at most facilities GAO visited").

82. *See id.* at 9 (explaining that ICE's detention standards are "not codified in law and thus represent guidelines rather than binding regulations").

83. *See* DETENTION SYSTEM, *supra* note 69 (stating that the NDS are "nonbinding and not judicially enforceable").

84. *See generally* Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988) (granting, before the adoption of the NDS, a permanent injunction that required INS to inform detainees of their right to apply for asylum, obtain counsel at their own expense, and to be allowed adequate access to telephones, law libraries, and medical care).

III. ICE'S INACTION

A. Evasive Response to Petition for Rulemaking

In response to the current detention conditions, several immigration detainees have petitioned DHS for relief.[85] After observing the detainees' inadequate detention conditions through its Keeping Hope Alive program,[86] that National Immigration Project (NIP) petitioned DHS to initiate a notice-and-comment rulemaking.[87] Numerous organizations, including the American Bar Association, filed letters in support of NIP's petition.[88] While ICE has not yet made a formal decision,[89] it has agreed to consider the petition.[90] Nevertheless, ICE did express significant reservations, believing that regulations would reduce flexibility and consume valuable resources.[91] Accordingly, ICE has delayed the promulgation of the NDS regulations for over a year, and the future prospects are uncertain.

B. ICE's Authority to Promulgate Rules

Pursuant to Title 8 of the *United States Code*, the Secretary of Homeland Security possesses the authority and obligation to promulgate regulations governing immigration detention, and this obligation is equally forceful in the IGSA context.[92] When Congress authorized the Secretary of Homeland

85. *See* WISHNIE, *supra* note 20, at 7–8 (arguing that DHS has the experience and expertise to promulgate regulations that will allow for meaningful enforcement).

86. The Keeping Hope Alive program provides legal assistance to immigration detainees by, *inter alia*, bringing class action lawsuits in cases of abused detainees. *Id*. at 1.

87. *See id.* (requesting that DHS "initiate a rulemaking proceeding pursuant to the Administrative Procedures [sic] Act, 5 U.S.C. § 553, to promulgate regulations governing detention standards for immigration detainees").

88. *See, e.g.*, Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Michael Chertoff, Sec'y, Dep't of Homeland Sec., 1 (Jan. 31, 2007), *available at* http://www.abanet.org/poladv/letters/immigration/2007jan31_detenstandards_l.pdf (supporting the NIP petition for rulemaking because "it has become clear that the lack of a legal enforcement mechanism for the detention standards has seriously undermined their effectiveness").

89. Julie Myers, Responses to S. Comm. on Homeland Security and Government Affairs Pre-hearing Questionnaire for the Nomination of Julie Myers to be Assistant Secretary, Department of Homeland Security 62,109 (July 26, 2007) (on file with author).

90. *See* Letter from Michael Chertoff, Sec'y, Dep't of Homeland Sec., to Karen J. Mathis, President, Am. Bar Ass'n (Mar. 19, 2007) (on file with author) (responding that DHS regards full NDS compliance to be an important priority and that DHS will "consider the request that the NDS be formally codified").

91. *See id.* ("[A]n NDS-related rulemaking would be a lengthy and resource-intensive process. Moreover, once implemented, updating the regulation would be equally laborious and protracted, thereby undermining agency flexibility to respond to changed circumstances or crises."); *see also* Myers, *supra* note 89, at 62 (stating that ICE has taken several steps to improve oversight, training, and compliance that would have been more difficult to implement with regulations in place).

92. *See* 8 U.S.C. § 1103(a)(1) (2006) (charging the Secretary with the administration

Security to enter into IGSAs with local jails,[93] it also authorized the Secretary to expend funds necessary to cover the costs of immigration detention at IGSA facilities.[94] Thus, DHS does not relinquish authority to issue regulations governing IGSA facilities simply because local jails exercise immediate control over detainees.[95]

Despite this obligation, the Secretary has promulgated regulations that provide relatively few guarantees concerning detention conditions.[96]

C. Case for Compelling ICE to Promulgate Rules

While it is not possible to bring a claim against ICE for noncompliance with the NDS, detainees have a potential case against ICE for agency inaction with regard to the NIP rulemaking petition. Under the APA, immigration detainees could reasonably argue that ICE has failed to act by not promulgating binding regulations for IGSA facilities.[97] Under this argument, a reasonable remedy would be for the court to compel ICE to

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and enforcement of all "laws relating to the immigration and naturalization of aliens"); *see also* 8 U.S.C. § 1103(a)(3) (2006) (requiring that the Secretary "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions" of the Immigration and Nationality Act (INA)).

93. *See* 8 U.S.C. § 1231(g) (2006) (requiring the Attorney General to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal" and to consider, prior to constructing a new detention facility, "the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use"); *see also* 6 U.S.C. § 251(2) (2006) (transferring the detention functions from the Attorney General and INS to DHS and the Secretary of Homeland Security).

94. *See* 8 U.S.C. § 1103(a)(11)(A) (2006) (authorizing the expenditure of funds for "necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained . . . pursuant to Federal law under an agreement with a State or political subdivision of a State").

95. *See* Roman v. Ashcroft, 340 F.3d 314, 320 (6th Cir. 2003). *Roman* held the following:

> [I]t is clear that INS does not vest the power over detained aliens in the wardens of detention facilities because the INS relies on state and local governments to house federal INS detainees. Whatever daily control state and local governments have over federal INS detainees, they have that control solely pursuant to the direction of the INS.

Id. *See also* ACLU of N.J., Inc. v. County of Hudson, 799 A.2d 629, 654 (N.J. Super. Ct. App. Div. 2002) (finding that "while the State possesses sovereign authority over the operation of its jails, it may not operate them, in respect of INS detainees, in any way that derogates the federal government's exclusive and expressed interest in regulating aliens").

96. *See, e.g.*, 8 C.F.R. § 235.3(e) (2007) (providing that an alien may be detained only in facilities that meet four mandatory criteria: twenty-four hour supervision, compliance with safety and emergency codes, food service, and availability of emergency medical care); *see also* 8 C.F.R. § 215.4(a)–(b) (2007) (providing a detainee a "right to be represented, at no expense to the government, by counsel of his own choosing").

97. *See* 8 U.S.C. § 1103(a)(3) (2000) (directing the Secretary of Homeland Security to establish regulations carrying out his authority under the INA); *see also* 5 U.S.C. § 702 (2000) (granting a right of judicial review to any person suffering a legal wrong because of, among other things, an agency's failure to act).

promulgate regulations on the ground that ICE has unlawfully withheld the regulations or that ICE's failure to promulgate is an abuse of discretion.[98] While ICE has substantial discretion to allocate its resources,[99] it is likely an abuse of that discretion not to enforce its standards at IGSA facilities while simultaneously relying predominantly on those facilities to house the majority of immigration detainees.

1. Availability of Judicial Review

To successfully bring a claim against ICE for its inaction regarding IGSA facilities, the first step is for detainees to establish that judicial review of ICE's inaction is available.[100] To do so, detainees must show, pursuant to § 701(a) of the APA, that the Immigration and Nationality Act (INA) does not preclude judicial review and that ICE's failure to promulgate the NDS as regulations is not committed to ICE's discretion by law.[101]

Detainees may reasonably argue that the INA does not preclude judicial review of ICE's inaction. While the INA does contain a broad jurisdiction-stripping provision for discretionary decisions,[102] ICE's obligation to promulgate regulations is not contained within the subchapters to which the provision applies.[103] ICE also cannot assert its general discretion to interpret the INA, as such discretion is not specifically delineated in the INA itself.[104] Moreover, a court must interpret the provision in light of

98. *See* 5 U.S.C. § 706(1)–(2) (2000) (allowing courts to compel agency action that is unlawfully withheld or unreasonably delayed and to set aside agency actions that are arbitrary, capricious, or an abuse of discretion). *But see In re* Bluewater Network, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (stating that a writ of mandamus under § 706 is an extraordinary remedy that is used for only the most blatant violations of a clear duty).

99. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (stating that "an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities").

100. *See* Heckler v. Chaney, 470 U.S. 821, 828 (1985) (holding that while the APA does provide judicial review for agency inaction, a party must first show that judicial review is available under § 701(a) of the APA).

101. *See* 5 U.S.C. § 701(a) (2000) (providing that judicial review of agency action is available "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law").

102. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (2006) (removing jurisdiction for any decision or action of the Attorney General "the authority for which is specified under this subchapter [8 U.S.C. §§ 1151–1378] to be in the discretion of the Attorney General").

103. *See* Khan v. Att'y Gen. of the U.S., 448 F.3d 226, 230 (3d Cir. 2006) (explaining that § 1252(a)(2)(B)(ii) removes jurisdiction only for decisions that are specified as discretionary within the appropriate subchapter, namely §§ 1151–1378). The provision which requires the Secretary of Homeland Security to promulgate regulations, § 1103(a)(3), does not fall within that subchapter.

104. *See* Soltane v. U.S. Dep't of Justice, 381 F.3d 143, 146–48 (3d Cir. 2004) (explaining that statutory language must specifically provide discretionary authority for the particular action before the jurisdictional bar applies and that Congress did not intend for

"the strong presumption in favor of judicial review of administrative action"[105] and the tendency to construe ambiguities in favor of immigrants.[106]

Detainees can also demonstrate that ICE's decision to promulgate the NDS regulations is not committed to agency discretion by law.[107] Although courts are reluctant to interfere with an agency's decisions regarding how to best allocate its limited resources,[108] when a court has manageable standards to apply to the agency's actions, the action is not committed to agency discretion.[109]

Applying this analysis in *Heckler v. Chaney*,[110] the Supreme Court found that an agency's refusal to bring an enforcement action is generally unsuitable for judicial review.[111] The Court upheld the Food and Drug Administration's (FDA) refusal of inmates' petitions to prevent the use of lethal injection drugs on the ground that the drugs were not approved for such use.[112] In reaching this conclusion, the Court relied on a variety of factors, including the agency's allocation of resources and ordering of priorities.[113]

Significantly, application of the *Heckler* factors to ICE's inaction regarding the NIP rulemaking petition demonstrates that the decision to promulgate NDS regulations is not committed to ICE's discretion by law. First, while ICE does exercise substantial discretion over its resources, it is not likely that Congress intended such discretion to permit ICE to avoid the

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§ 1252(a)(2)(B)(ii) to allow agencies to avoid judicial review by relying on broad incumbent discretion to interpret statutory language).

105. Arar v. Ashcroft, 414 F. Supp. 2d 250, 267 (E.D.N.Y. 2006) (citing INS v. St. Cyr, 533 U.S. 289, 298 (2001)) (internal quotation marks omitted).

106. *See id.* (citing to the immigration rule of lenity caseline, which stands for the proposition that ambiguities in deportation statutes should be construed in favor of aliens).

107. *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985) (stating that action is committed to an agency's discretion by law "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion").

108. *See id.* at 831 (expressing concern over the "complicated balancing" involved in an agency's decision not to enforce and the incumbent difficulties an agency faces in determining how best to spend its resources).

109. *See id.* at 830 (explaining that "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion'").

110. 470 U.S. 821 (1985).

111. *See id.* at 831 ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion.").

112. *See id.* at 823 (holding that FDA's decision not to take enforcement action was not subject to review).

113. *See id.* at 831–32 (stating that an agency's decision not to enforce involves decisions concerning allotment and prioritization of resources, and noting the fact that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights").

statutory mandate of promulgating regulations governing detention conditions.[114] Second, whereas an agency generally does not infringe upon a person's liberty or property rights when it refuses to act, that is not the case here.[115] Given the actual conditions that detainees face at IGSA facilities, ICE's failure to enforce the NDS is a real and substantial infringement of detainees' liberty and property rights. Third, while agency enforcement decisions may be akin to prosecutorial discretion,[116] ICE's refusal to enforce the NDS in IGSA facilities, given ICE's prevalent use of those facilities, is extreme enough to conclude that ICE has abdicated its responsibilities.[117]

Additionally, it is important to note that if ICE had refused or denied the NIP petition for rulemaking, ICE's refusal, and its reasoning, undoubtedly would be reviewable.[118] It would be difficult to suggest that ICE has complete discretion in responding to a petition for rulemaking until it actually responds.

2. Merits of the Case

Having established that judicial review is available, detainees then have the difficult task of persuading a court to compel ICE to act under § 706 of the APA.

In *Norton v. Southern Utah Wilderness Alliance*,[119] the Supreme Court established a high burden of persuasion for compelling agency action.[120] At issue in that case was whether the Secretary of the Interior and the Bureau of Land Management (BLM) failed to act by not preventing the use

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114. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 675 (1985) (arguing that "the problem of limited resources does not justify a broad rule immunizing inaction from judicial review").

115. *See* Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL'Y 9, 20 (2006) (finding that many detainees are unable to deal with the stress of lengthy imprisonment and therefore give up the right to a deportation hearing, that detained immigrants have less access to legal representation because of reduced economic resources from detention and remote locations, and that prolonged detention negatively affects a detainee's chances of winning a deportation case).

116. *See Heckler*, 470 U.S. at 832 (recognizing the similarities between an agency's refusal to institute proceedings and the decision by a prosecutor of the Executive Branch not to indict, and finding that both decisions are the special province of the Executive).

117. *See id.* at 833 n.4 (expressing a willingness to find that judicial review is available when an agency has knowingly adopted such an extreme policy that it amounts to an "abdication of its statutory responsibilities").

118. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (holding that "[r]efusals to promulgate rules are thus susceptible to judicial review, though such review is extremely limited and highly deferential") (internal quotation marks omitted).

119. 542 U.S. 55 (2004).

120. *See id.* at 64 (explaining that § 706(1) claims to compel agency action will only succeed where a plaintiff can show that "an agency failed to take a *discrete* agency action that it is *required to take*").

of off-road vehicles on Utah public lands.[121] Finding that BLM did not fail to act,[122] the Court held that when seeking to compel agency action, the action sought must be both discrete and legally required.[123] In other words, the aggrieved individual "must direct [his] attack against some particular agency action that causes [him] harm."[124] Accordingly, general compliance problems typically are not sufficiently discrete for a court to compel agency action.[125]

Contrary to the result in *Norton v. Southern Utah Wilderness Alliance*, which involved a broad land management directive,[126] the action that immigration detainees seek—namely a response to the rulemaking petition—is both sufficiently discrete and legally required. Accordingly, a court would be well within its discretion to compel ICE to promulgate the NDS. First, the NDS regulations are legally required because the Secretary of Homeland Security has the clear duty to promulgate regulations that carry out the purposes and intentions of the various immigration laws.[127] The obligation to provide adequate detention conditions is thus statutorily required,[128] and cannot reasonably be considered as discretionary.[129] Additionally, ICE's response to the rulemaking petition is legally required and therefore cannot be withheld unreasonably.[130]

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121. *See id.* at 60 (discussing the alliance's requested relief in light of BLM's inaction).

122. *See id.* at 67 (holding that BLM did not fail to act by allowing off-road vehicles because BLM enjoyed significant discretion in implementing the Wilderness Act, and because "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance . . . is not contemplated by the APA").

123. *See id.* at 63 (describing an exemplary discrete failure to act as a failure to promulgate a rule, and a legally required action as an unequivocal command); *see also id.* at 66 (explaining that the purposes of the limitations to compelling agency action are "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve").

124. *Id.* at 64 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)) (internal quotation marks omitted).

125. *Id.* at 66–67 (explaining that if general deficiencies in compliance were sufficient, then courts would necessarily entangle themselves in an agency's functions); *see also* Sunstein, *supra* note 114, at 682–83 (asserting that an argument that an agency acted arbitrarily simply because it failed to act against a particular violation of the relevant statute presents the weakest claim for reviewability).

126. *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. at 58 (describing BLM's task of "multiple use management" as an "enormously complicated task of striking a balance among the many competing uses to which land can be put").

127. *See* 8 U.S.C. § 1103(a)(3) (2006) (stating that the Secretary of Homeland Security "shall establish such regulations" and "issue such instructions" necessary to execute his duties of enforcing the immigration laws).

128. *See* 8 U.S.C. § 1231(g)(1) (2006) (requiring the Secretary of Homeland Security to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal").

129. *See S. Utah Wilderness Alliance*, 542 U.S. at 64 (explaining that a court can only compel "a ministerial or non-discretionary act") (internal quotation marks omitted).

130. *See* 5 U.S.C. § 553(e) (2006) ("Each agency shall give an interested person the

Second, because detainees likely would seek a writ of mandamus to compell ICE to promulgate the NDS as regulations or to at least respond to the NIP rulemaking petition, the action sought would be discrete and would not be an attack based on general noncompliance.[131]

Third, ICE's action is truly a failure to act because, for seven years,[132] ICE has neither enforced its own standards nor promulgated binding regulations that could be enforced by the courts.[133]

Fourth, a court can compel ICE to act without mandating how ICE must act.[134] The problem with IGSA facilities is not the manner of enforcement at the facility, but rather the complete lack of enforcement. Thus, a court can compel ICE to promulgate the NDS as binding regulations for IGSA facilities while leaving ICE free to determine the best manner of enforcement.

CONCLUSION

Detainees should utilize their potential APA claim for compelling ICE to promulgate the NDS as binding regulations. NDS regulations are the most viable option for providing meaningful relief to detainees suffering from inadequate detention conditions. While ICE could strengthen the IGSA contractual requirements relating to conditions of detention, this likely would have little effect, as ICE is reluctant to actually terminate an IGSA for noncompliance because of its dependence on such facilities. It is also unlikely that Congress could, or would, authorize the construction of additional federal detention facilities given the immediate demand for detention bed space and Congress's stated preference for utilizing IGSA facilities.[135] ICE almost certainly will continue to use IGSA facilities; if anything, it may increase the number of such facilities as the number of detainees rises.

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right to petition for the issuance, amendment, or repeal of a rule."); *see also* Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (explaining that an agency's refusal to promulgate is "subject to special formalities, including a public explanation").

131. *See S. Utah Wilderness Alliance*, 542 U.S. at 66 (finding that the action sought from BLM was not discrete where the plaintiff complained primarily of noncompliance and was not seeking a concrete action).

132. The NDS were applied to detention facilities in 2000. DETENTION OPERATIONS MANUAL, *supra* note 1.

133. *See S. Utah Wilderness Alliance*, 542 U.S. at 63 (describing a failure to act as "simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline").

134. *See id.* at 64 (explaining that § 706(1) of the APA only allows a court to compel agency action "without directing *how* it shall act") (citation omitted).

135. *See* 8 U.S.C. § 1231(g)(2) (2000) ("Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.").

Once promulgated, regulations will provide substantial benefits to immigration detainees and will help ensure compliance with the standards at all facilities, including the numerous IGSA facilities.[136] Regulations will increase transparency and confidence in the immigration system and prevent ICE from engaging in ad hoc departures from its detention standards.[137] While binding regulations will likely increase costs for both ICE and IGSA facilities, the benefits to immigration detainees, and the immigration system as a whole, outweigh the potential costs. Regulations are necessary if immigration detainees who suffer deplorable detention conditions are to have meaningful recourse to remedy their situations.

If the APA claim is unsuccessful and regulations do not issue, at the very least, the filing of a lawsuit may motivate ICE to make a final decision regarding the rulemaking petition. Then, even if the petition is denied, the mere denial may open up new avenues for further action.[138]

136. *See* Sunstein, *supra* note 114, at 656 (arguing that when regulatory agencies are aware of the availability of judicial review, such knowledge can help combat unduly lax enforcement of the agency's obligations).

137. *See* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1690–91 (2004) (arguing that when agencies are subject to judicial review, they have incentives to discipline themselves by providing reasons for their decisions and setting clear standards for their actions, which increases transparency and reduces the potential for corruption and irrational decisions).

138. On April 30, 2008, as this piece was being edited for publication, several immigration detainees and immigrants' rights groups, represented by Michael Wishnie and the Jerome N. Frank Legal Services Organization at Yale Law School, filed a complaint in United States District Court for the Southern District of New York against Michael Chertoff, the Secretary of Homeland Security. *See* Families for Freedom v. Chertoff, No. 08-40567 (S.D.N.Y. filed Apr. 30, 2008), *available at* http://www.nationalimmigrationproject.org/Detention_Standards_%20Complaint_final.pdf. Among other things, the lawsuit seeks a court order directing Secretary Chertoff "to initiate a rulemaking procedure and to enact regulations covering conditions of confinement for detained immigrants within a reasonable period of time" or, alternatively, "to respond to [the NIP Petition for Rulemaking], including an explanation of his decision and the reasons supporting it within thirty (30) days of the Court's order." *Id.* at 15–16. While the case is still in the early stages, it could have important ramifications for detainees and the conditions they face in the future.

iTAX: AN ANALYSIS OF THE LAWS AND POLICIES BEHIND THE TAXATION OF PROPERTY TRANSACTIONS IN A VIRTUAL WORLD

DAVID J. MACK*

TABLE OF CONTENTS

INTRODUCTION

Since the turn of the century, there has been a proliferation of people around the world engaging in virtual communities, where they live out their fantasy lives over the Internet. Through these online communities, some virtual participants create and sell products, while others build and auction property. These transactions—with a total estimated value of $2.09 billion

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per year[1]—would be subject to taxes in the nonvirtual world, but escape taxation due to their virtual nature.

While these virtually created products, land, and services amount to little more than information archived in an Internet database,[2] there are many reasons to characterize virtual property as a functional equivalent of nonvirtual property—a status that could require taxation when such property is bought or sold.[3] *Second Life*, one of the most popular virtual environments[4] and the focus of this Comment, has recognized participants' rights to retain full intellectual property protection for the digital content they create, including "characters, clothing, scripts, textures, objects and designs."[5] While the tax code has not specifically declared virtual items to be property, there is a growing trend among scholars and courts to treat virtual items as such.[6] This Comment supports the position of these

1. *See generally* Posting of Tuukka Lehtiniemi to Virtual Economy Research Network, *How Big Is the RMT Market Anyway?*, http://virtual-economy.org/blog/how_big_is_the_rmt_market_anyw (Mar. 2, 2007, 12:50) (analyzing the sizes and sources of virtual markets and extrapolating the total value of the "Real-Money Trade" virtual market).

2. *See generally* Daniel Terdiman, Second Life*: Don't Worry, We Can Scale*, CNET NEWS.COM, June 6, 2006, http://www.news.com/Second-Life-Dont-worry,-we-can-scale/2100-1043_3-6080186.html?tag=nefd.lede (last visited Mar. 20, 2008) (recognizing *Second Life*'s 2,579 computer servers housed in San Francisco, each server holding about sixteen acres of virtual *Second Life* land and objects).

3. *See* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1048–50 (2005) (detailing the three main reasons why computer code in virtual worlds should be treated as virtual property rather than intellectual property, namely because it is rivalrous, persistent, and interconnected). *See generally* Charles Blazer, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137, 161 (2006) (concluding that virtual property rights must be preserved and recognized by courts, especially in light of their individualized characteristics).

4. *Compare* Second Life, *Economic Statistics*, http://secondlife.com/whatis/economy_stats.php (last visited Apr. 16, 2008) (placing the number of *Second Life* residents at 13,286,548), *with* Siam Choudhury, *MindArk: Marketing and Brand Awareness to Attract 150 Million Users to* Entropia, MMO GAMER, June 11, 2007, http://www.mmogamer.com/06/11/2007/mindark-marketing-and-brand-awareness-to-attract-150-million-users-to-entropia (interviewing the CIO of *Entropia Universe*, one of *Second Life*'s competitors, who seeks to raise the current total of registered users from approximately 600,000 individuals to 150 million).

5. Second Life, *IP Rights*, http://secondlife.com/whatis/ip_rights.php (last visited June 13, 2008); *see also* Second Life, *Terms of Service*, http://secondlife.com/corporate/tos.php (last visited June 13, 2008) (acknowledging that users have intellectual property rights in their creations to the extent that applicable law permits, but that such rights come at the cost of certain license rights, forbearances, and indemnifications to Linden Lab—*Second Life*'s owner—and other users).

6. The question of determining which virtual items are legal property is beyond the scope of this Comment. *See generally* Leandra Lederman *"Stranger Than Fiction": Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620, 1631–39 (2007) (addressing various factors that affect the treatment of virtual property with regard to legal entitlements, including end user license agreements, as well as the differences between game worlds and unscripted worlds); *see also* Theodore J. Westbrook, Comment, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779, 781 (2006) ("[T]here is ample room to argue for such rights within established property theories ranging from Lockean natural law labor

commentators that virtual items do indeed constitute property and further argues that virtual item transactions should be subject to taxation under U.S. law.

Even without any conclusive recognition of such property rights, or perhaps because of it, virtual commerce has been growing at an unprecedented pace.[7] Currently, even conservative estimates place the value of virtual transactions at over $880 million.[8] Virtual economies are therefore comparable to, and in some cases surpass, economies of real-world industrialized nations.[9] If economic growth increases at the current rate, virtual commerce could achieve a value of $250 billion by 2010.[10]

Tax law in the United States does not currently cover virtual transactions—either virtual-to-real transactions or virtual-to-virtual transactions.[11] It is debatable whether these transactions represent taxable events,[12] and even under which theory governments could or should tax

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theory to Hegelian personality theory."). *But see* Allen Chein, *A Practical Look at Virtual Property*, 80 ST. JOHN'S L. REV. 1059, 1088 (2006) ("Despite the fact that virtual world residents think of virtual goods in the same way as tangible properties and that the relative equities favor these residents, reasons abound why a court would not treat virtual items as property.") (footnote omitted).

7. *See* The Secondlife Newspaper, *U.S. Congress Ponders Taxing Virtual Commerce*, July 4, 2007, http://sl-newspaper-bnc.blogspot.com/2007/07/us-congress-ponders-taxing-virtual.html (citing industry growth predictions of around 10%–15% a month, while Linden Lab reports figures at approximately 140% since November 2006). For further predictions, see Daniel Terdiman, *IRS Taxation of Online Game Virtual Assets Inevitable*, CNET NEWS.COM, Dec. 3, 2006, http://www.news.com/IRS-taxation-of-online-game-virtual-assets-inevitable/2100-1043_3-6140298.html?tag=item (last visited Mar. 20, 2008) (citing a senior economist with the Joint Economic Committee of Congress). For growth statistics, see Second Life, *Economic Statistics: Graphs*, http://secondlife.com/whatis/economy-graphs.php (last visited June 13, 2008) (providing graphical evidence of tremendous growth between the middle of 2006 and the middle of 2007).

8. *See* The Secondlife Newspaper, *supra* note 7 (estimating a value based upon virtual sales and transaction values occurring in a virtual world alone).

9. *See* Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 33 (CESifo, Working Paper No. 618, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294828 (explaining that the GNP of Norrath, a virtual nation in the game *Everquest*, is comparable to that of Russia or Bulgaria, and higher than that of China or India).

10. *See* The Secondlife Newspaper, *supra* note 7 (using growth predictions from Dan Miller, a senior economist with the Joint Economic Committee and expert on virtual economies). While it is unrealistic to contend that the growth rates will continue in perpetuity, substantial amounts of capital would elude taxation even under significantly lower rates of growth.

11. Virtual-to-real transactions are those involving real money or property exchanged for virtual money or items. Virtual-to-virtual transactions involve only the sale or exchange of virtual property and virtual money. These two types of transactions can be treated the same in assessing tax liability, as the issue turns on whether virtual activity is taxable and not how virtual activity intersects with the real world.

12. *See* Lederman, *supra* note 6, at 1651–52 (recognizing that although the Supreme Court does seem to include virtual transactions in the scope of taxable transactions, the issue has not been definitively decided); *cf.* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 566 (1991) ("[A]n exchange of property gives rise to a realization event so long as the

them. Due to potentially significant amounts of lost tax revenue associated with virtual transactions, the Joint Economic Committee of Congress has launched an investigation into the public policy considerations that virtual economies raise.[13] Interestingly, at the outset of the study, the majority of the committee expressed the opinion that the government should not tax the receipts and profits of virtual worlds.[14]

This Comment discusses the reasons for and against the Internal Revenue Service's (IRS) controlling, regulating, and taxing online exchanges of virtual currency and property. Part II describes the experiences users encounter while participating in the virtual world. Although there are several such worlds, this Comment focuses on *Second Life*—an unscripted virtual environment with no set storyline or specific goals.[15] The world allows individuals to create online personae, live out whatever dreams they wish, and interact with the millions of others in the environment. Part II also lays out the context for virtual transactions and the reasons for their development. Part III discusses the current state of U.S. tax law as it relates to online transactions and property regulation, while comparing it with similar laws governing real property. Part IV explores both the needs and benefits of imposing tax regulations on virtual environments. Additionally, this Part examines the drawbacks and complications that would result from IRS application of such regulations. Part V proposes two methods the IRS could use to regulate and tax virtual transactions: the imposition of either a capital gains tax or a sales tax. This Comment concludes by arguing that there is a need for new regulations of both virtual-to-real and virtual-to-virtual transactions. It further concludes that the IRS should employ a modified form of a sales-and-use tax by which the agency could best achieve its revenue-collecting purpose while

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exchanged properties are 'materially different'—that is, so long as they embody *legally distinct entitlements*.") (emphasis added). By leaving the definition of legal entitlements vague, the Supreme Court has allowed ambiguity as to whether virtual property represents a legal entitlement subject to tax when exchanged.

13. *See, e.g.*, Stephen Foley, *U.S. Taxman Targets Virtual World Booming on the Internet*, INDEPENDENT (UK), Oct. 20, 2006, *available at* http://www.independent.co.uk/news/business/news/us-taxman-targets-virtual-world-booming-on-the-internet-420891.html (noting the current congressional probe into virtual environments). At the time of this writing, the investigation is still ongoing and the final report has yet to be released.

14. *See* Press Release, Joint Econ. Comm., Virtual Economies Need Clarification, Not More Taxes (Oct. 17, 2006), *available at* http:// www.house.gov/jec/news/news2006/pr109-98.pdf ("'There is a concern that the IRS might step forward with regulations that start taxing transactions that occur within virtual economies. This, I believe, would be a mistake,' Chairman Jim Saxton said today.").

15. *See* Daniel C. Miller, Note, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435, 436–37 (2003) ("In this [type of world], users create virtual lives by building houses, publishing newsletters, and creating alter egos. They spend hours upon hours creating their existence.") (footnotes omitted).

avoiding many of the pitfalls of virtual regulation—including enforcement, evaluation, and liquidity problems.

I. A NEW ECONOMIC WORLD

For ease of understanding, this Comment will focus on *Second Life*—one of several virtual worlds—as an exemplar of virtual environments and economies.[16] *Second Life* is an ideal model for evaluating new regulations because it represents a good cross section of the other environments, incorporating many of the same elements and principles, such as a fixed currency and property rights.[17]

Linden Research, Inc. (Linden Lab), the creator of *Second Life*, declares that its product is a "3-D virtual world entirely built and owned by its Residents."[18] To access the environment, a user registers on the *Second Life* homepage by creating a character and downloading the application,[19] which under the basic membership plan is free of charge.[20] The user may then access the virtual world, which possesses many real-world qualities, such as weather, natural topography, cities, and town squares where people congregate and interact.[21] Individual users have created nearly all the objects in *Second Life*, from the clothing to the gardens and even the buildings themselves.[22] Because, at least according to Linden Lab, users

16. This Comment does not purport to declare *Second Life* as better or worse than other virtual worlds. Rather, it focuses on *Second Life* because its economy has been thoroughly studied, and enough data exists to apply findings on tax liabilities and solutions to other virtual worlds. *See, e.g.*, Mark Methenitis, *A Tale of Two Worlds: New U.S. Gambling Laws and the MMORPG*, 11 GAMING L. REV. 436, 437–38 (2007) (noting that by its nature, *Second Life* lends itself to use as a virtual world model for developing future regulations).

17. *See* Viktor Mayer-Schonberger & John Crowley, *Napster's Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 NW. U. L. REV. 1775, 1804–10 (2006) (recognizing Second Life as one of the premier virtual economies due to its policy of granting intellectual property rights—one of the many features that competitors seek to emulate).

18. Second Life, *What Is* Second Life*?*, http://secondlife.com/whatis (last visited June 13, 2008); *see also* Bettina M. Chin, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 BROOK. L. REV. 1303, 1303 (2007) (describing the visual setting and personalized feel of *Second Life*).

19. *See* Second Life, *FAQ*, http://secondlife.com/whatis/faq.php (last visited June 13, 2008) (describing the subscription process and noting its simplicity). The process requires very little time and effort: the author registered, created an avatar (a 3-D computer model that represents an individual user), and was exploring the world in less than fifteen minutes.

20. *See* Second Life, *Memberships, Land, and Pricing*, http://secondlife.com/whatis/pricing.php (last visited June 13, 2008) (describing the two membership plans: a free basic membership and a premium membership which costs $9.95 per month and allows the user to own land and receive extensive support).

21. *See generally* Second Life, *What Is* Second Life*?*, *supra* note 18 (advertising a free-reign world teeming with people, entertainment, experiences, and opportunity).

22. *See* Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 87 (2004) (noting that individual users, and not Linden Lab (the site owner and administrator), have created nearly all of the objects in the

maintain property rights in the objects they create, they are free to sell these objects to others.[23] In the virtual economy of *Second Life*, users buy and sell objects with a virtual monetary unit—the Linden dollar.[24]

A. The Linden Dollar

The Linden dollar (named after the environment's creator, Linden Lab) is the digital currency that forms the backbone of *Second Life*'s virtual economy.[25] An actual currency exchange, the Linden Dollar Exchange (LindeX), allows users to fund their characters and increases flexibility for world markets.[26] The creators have made the Linden dollar a floating currency.[27] Because the Linden dollar has an exchangeable real currency value, each sale by a user can potentially reap a profit, leading some users to turn to *Second Life* as their entire source of income.[28] As an extreme example, Ailin Graef, better known in *Second Life* as Anshe Chung, has become a virtual world icon by declaring a net worth of over one million U.S. dollars, all earned from her *Second Life* business.[29] This represents a

environment).

23. *See* Second Life, *IP Rights*, *supra* note 5 (recognizing a resident's right to "retain intellectual property rights in the original content they create in the *Second Life* world, including avatars, clothing, scripts, textures, objects and designs"). This right is enforceable and applicable both in-world and offline. The implications of this right are unknown, as there has yet to be a challenge to it. However, regardless of the rights that the virtual world provides, the courts and legislature have not yet followed suit.

24. *See* Second Life, *What Is* Second Life*?*, *supra* note 18 ("The Marketplace currently supports millions of [U.S.] dollars in monthly transactions. This commerce is handled with the in-world unit of trade, the Linden dollar, which can be converted to [U.S.] dollars at several thriving online Linden dollar exchanges.").

25. *See id.* (declaring the Linden dollar the only permitted currency in *Second Life*).

26. *See generally* Second Life, *LindeX Market Data*, http://secondlife.com/whatis/economy-market.php (last visited June 13, 2008) (listing the LindeX's past exchange rates for the Linden dollar against the U.S. dollar and providing graphs of past usage and exchange rates).

27. A floating currency has a flexible exchange rate that is allowed to fluctuate according to the foreign exchange market. *See* CNNMONEY.COM, *How Real Money Works in* Second Life, http://money.cnn.com/2006/12/08/technology/sl_lindex/index.htm (last visited June 13, 2008) (interviewing the CFO of Linden Lab to analyze how virtual currency works, including his opinions on why it is important to leave the Linden dollar as a floating currency); *see also* Second Life, *LindeX Market Data*, *supra* note 26 (providing daily market history, including the current exchange rate of 264 Linden dollars to one U.S. dollar).

28. *See generally* JULIAN DIBBELL, PLAY MONEY: OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT (2006) (relaying the author's experiment in becoming a virtual currency trader and earning the equivalent of a $47,000 annual salary).

29. *See* Rob Hof, Second Life*'s First Millionaire*, BUSINESS WEEK, Nov. 26, 2006, *available at* http://www.businessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html (relating the career successes of Ailin Graef, who, from an initial investment of $9.95, arranged a business whereby she would buy virtual land, subdivide it, and either rent or resell it for a profit).

milestone in the business world—a company has derived the entirety of its real-world profits and revenue solely through virtual transactions.[30]

At any time they choose, users are free to utilize the LindeX or various other methods to exchange their real currency for Linden dollars, and vice-versa.[31] With a little start-up capital and the right investments, or just an industrious business sense, it is quick and easy to earn a sizable amount of Linden dollars.[32] Users can exchange Linden dollars for real currency, effectively turning each profitable virtual transaction into a potential real-world gain.[33]

B. A Virtual Future

Second Life is an exemplary representation of an entire industry that is quickly expanding at an increasing rate.[34] While *Second Life* has nearly ten million registered users, there are as many as thirty million people participating in virtual environments.[35] Data indicate that virtual environments of all types, not just *Second Life*, will continue to play an

30. While sales of nontangibles occur quite frequently in the real world, as in the sale of a copyright, patent, or trademark, these are equivalent to thoughts and ideas, which are intangible by their nature. While the land and goods in *Second Life* may be more analogous to real property—the most tangible of commodities—*Second Life* land is not tangible at all. For more information, see *supra* note 3 and accompanying text.

31. *See* Second Life, *FAQ*, *supra* note 19 (explaining that in addition to the LindeX, there are many ways to exchange U.S. dollars and Linden dollars, including third party websites and virtual ATMs).

32. *See* Second Life, *Business Opportunities*, http://secondlife.com/whatis/businesses.php (last visited June 13, 2008) (discussing the potential opportunities for both innovation and profit, such as creation and sale of items, conducting land transfers, and performing various services for other users—including party and wedding planners, theme park developers, vacation resort owners, custom animation creators, and automotive manufacturers).

33. *See* Edward Castronova, *A Cost-Benefit Analysis of Real-Money Trade in the Products of Synthetic Economies*, 8 INFO 51, 52 (2006) (recognizing in-game items and currency as having real-world value even if never removed from the virtual environment, and using the example of a hypothetical dungeon key, which has both a supply curve and a demand curve, and hence an implicit economic value).

34. Many other environments exist as part of the virtual industry, which has flourished in recent years. Not only are there unscripted worlds such as *Second Life*, *Sims Online*, and *There*, but game worlds as well, such as *World of Warcraft*, *City of Heroes*, and *Everquest*, where there are specific objectives for each user to complete. Tax questions apply differently to game worlds, which were created purely for entertainment and without market forces and economic situations in mind. Although game worlds fall outside the scope of this Comment, it is important to note that *Second Life* is merely one of many similar environments. *See supra* note 7 and accompanying text.

35. *See* Second Life, *Economic Statistics*, *supra* note 4 (noting population and usage, land sale figures, and a variety of statistics concerning the Linden dollar, such as average monthly spending, number of business owners with positive cash flow, and the primary sources of the Linden dollar). *See generally* Castronova, *supra* note 33, at 52 (reporting approximately twenty million users over a year ago, leading to the possibility of nearly forty million users today, given current rates of expansion).

increasing role in modern society as more and more users join and bring increasing amounts of capital into the online world.[36] There has already been a dramatic move to virtual worlds by banking, retail, telecommunications, and general business industries.[37]

II. THE CURRENT STATE OF VIRTUAL TAXATION

Assuming that users maintain a legitimate real property interest in their virtual items, it is easy to discern the real-world value of such items. According to current federal income tax laws, the gross income from any source is taxable.[38] However, ambiguity exists about whether a virtual property transaction is equivalent to a real-world acquisition or sale.[39]

In the real world, when people exchange property for a value different from their basis in that property, tax liability may arise.[40] Determining basis depends on how the owner acquired the property in question; for property acquired by purchase or contract, the basis is the original cost.[41] The difference between the amount realized from the sale or other disposition and the basis constitutes gain or loss.[42] This value, taken in conjunction with the associated deductions, is the adjusted gross income, and ultimately becomes taxable.[43]

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36. *See* Castronova, *supra* note 9, at 39 (stating that the impact of virtual worlds is difficult to overestimate, and even predicting that most, if not all, real-world communication, family interaction, and commerce will be replaced by virtual-world analogues). *See generally* Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2044–45 (2004) (concluding that virtual worlds are very likely to become important spaces for innovation and free expression, and proper legislation should reinforce and protect these important values).

37. *See, e.g.*, Alan Rappeport, *When Virtual Crises Turn Real*, CFO.COM, Aug. 16, 2007, http://www.cfo.com/article.cfm/9670900/1/c_9644880?f=home_todayinfinance (examining a real banking crisis that occurred in one of *Second Life*'s virtual banks, and noting that what draws banks into Second Life also draws others companies, including IBM, Coca-Cola, and Best Buy).

38. *See* 26 U.S.C. § 61(a) (2000) (stating that taxable income includes, but is not limited to, the purchase or sale of any property with a discernable value, gross income derived from businesses, compensation for services, and gains derived from dealings in property).

39. *See supra* note 12 and accompanying text.

40. *See generally* 26 U.S.C. § 1001 (2000) (explaining both how to recognize a gain or loss and the proper method of determining that amount). Liability may arise in a myriad of other circumstances, but this Comment only deals with this type of exchange.

41. *See* 26 U.S.C. § 1012 (2000) ("The basis of property shall be the cost of such property, except as otherwise provided . . . .").

42. *See* 26 U.S.C. § 1001(a) (2000) ("The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis . . . and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.").

43. *See* 26 U.S.C. § 1001(c) (2000) ("[T]he entire amount of the gain or loss, determined under this section, on the sale or exchange of property shall be recognized.").

A simple change in basis will not immediately incur tax liability.[44] There must be a taxable event, currently characterized as "the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent," which "is treated as income or as loss sustained."[45]

Whether virtual property is taxable thus turns on whether it falls under this second depiction of property. The fact that an item is not tangible does not defeat this characterization; for tax purposes, the exchange of intellectual property can constitute a taxable event.[46] As users retain intellectual property rights in their unique creations, a virtual sale could be viewed as exchanging two distinct and dissimilar intellectual property rights, which is a taxable transaction.[47] From this view, there is a strong argument that an exchange of a virtual car for a virtual house would constitute a taxable event, as each item possesses a distinct and dissimilar market value.[48]

If a transaction of real-world goods or services occurs online, it could be taxable under current law.[49] However, the IRS is silent about how it intends to handle virtual transactions.[50]

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44. *See* 26 U.S.C. § 1031 (2000) (excluding like-kind exchanges from tax recognition, as in the case of a taxpayer selling and receiving items used for business purposes who will not be taxed on any gains up to the amount of non-like-kind property received).

45. 26 C.F.R. § 1.1001-1(a) (2007).

46. *See generally* Xuan-Thao N. Nguyen & Jeffrey A. Maine, *Taxing the New Intellectual Property Right*, 56 HASTINGS L.J. 1, 35 (2004) (analogizing the tax treatment of intellectual property transactions, such as an exchange of copyrights and patent rights, to those of real property transactions).

47. *See generally id.* (providing background information on the taxability of intellectual property rights). For a discussion on the treatment of virtual property, as well as *Second Life*'s observance of creators' rights, see *supra* notes 3, 5–6 and accompanying text.

48. *See* Castronova, *supra* note 33, at 52 ("Economics sees value wherever humans decide that some construct of theirs has utility but is scarce. Synthetic world goods have utility and are scarce; thus they have value that can be measured in terms of real dollars.").

49. *See generally* 26 U.S.C. § 61(a) (2006) (providing the legal basis to tax online retailers, such as eBay, by defining gross income as income through any source derived, not limited to real-world activity). This definition is incredibly broad and can be interpreted to include nearly anything as income. However, most of the tax code constitutes exceptions to the general rule represented in this section.

50. While there has been no attempt to require tax payments resulting from virtual activity, such regulation does not appear to be outside the scope of the IRS's authority under its enabling legislation. Because the tax code defines income broadly enough to encompass any source of income, the IRS would not exceed its rulemaking authority by promulgating additional regulations specifically governing virtual economies. *See infra* note 54 and accompanying text. The IRS could impose reporting requirements so long as the IRS interprets the existing statutory provisions to be broad enough to encompass virtual transactions. If not, Congress would need to issue an amendment to force third parties to report their income and costs, as is currently required of banks, mutual funds, other financial institutions, and many employers, through the W-2 form. *Cf.* Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 697 (2007) ("As is well known, in a variety of situations, the federal government requires third

III. NEW TAX REGULATIONS FOR VIRTUAL ECONOMIES

While the current U.S. tax code does not provide the IRS with a vehicle to tax transactions that occur entirely in a virtual environment, there are several reasons why regulation is not only desirable, but also necessary. However, the IRS must exercise extreme care in forming new regulations, as there are numerous pitfalls in attempting to regulate such new and fragile worlds, each having the potential to kill virtual economies in their infancy.

A. The Need for Regulation

Because the current enabling legislation is arguably broad enough to tax virtual transactions, the IRS need only announce a new interpretation and provide guidelines. There are many reasons for the IRS to promulgate rules governing virtual transactions, including (1) elimination of the potential for tax evasion; (2) prevention of legal ambiguities that would result in unintentional noncompliance; and (3) fleeting opportunity to incorporate regulations into a fledgling economy while it is still both feasible and practical.

The first reason to regulate virtual transactions is that if virtual economies remain untaxed, a real-world vendor could sell goods or services through *Second Life*, taking in untaxed virtual money in exchange for items in the real world.[51] By avoiding taxes, the vendor could lower prices, thereby gaining a market advantage over vendors selling only in real-world markets.[52] This would result in negative economic effects whereby vendors operating in good faith would lose business as a direct result of their good faith, eventually forcing a significant portion of vendors to operate in the underground economy solely to stay competitive. The consequences would be not only a significant loss of revenue to the government, but a major blow to the economy as a whole.

The second reason to impose new regulations is to avoid creating ambiguity or uncertainty regarding the treatment of taxable, real-world income vendors earn along with untaxed, virtual income. By exchanging virtual money for real goods and vice versa,[53] businesses and individuals

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parties to report to the government, with a copy to the taxpayer, amounts the payor transferred to the taxpayer.").

51. While this market advantage is primarily a theoretical harm, the situations in which it could materialize are already occurring. *See infra* note 53 and accompanying text (detailing one instance of a business accepting virtual money for real goods).

52. *See* Lederman, *supra* note 6, at 1666–69 (advancing the theory that the intentional tax avoidance resulting from an untaxed sector is a reason to tax the sale of virtual items).

53. Such trade between virtual and real economies has already occurred. A few sites have begun to allow visitors to purchase goods using Linden dollars. *See, e.g.*, Press

may easily become confused about their tax liabilities. A vendor might believe that by accepting virtual currency for its real-world services, its income would not be taxed, despite current laws to the contrary.[54] This could have the unfortunate consequence of leading the government to create a society of unintentional tax cheats.[55]

The third reason for a new regulation is the extreme growth potential of virtual economies.[56] Already, more than fifty major real-world companies have created official virtual presences within the *Second Life* environment.[57] With the current rate of expansion, a measurable percentage of the U.S. economy will soon be engaged in virtual transactions, with many occurring entirely within such environments.[58] The IRS has a unique opportunity to promulgate regulations and observe their effects before so much of the real economy becomes invested in the virtual world that it is difficult to make a significant change.[59] However, as important as these regulations are in a virtual world, there may also be

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Release, *Pizza Enters the Virtual World of* Second Life, FASTPITCH (Apr. 21, 2007), *available at* http://www.fastpitchnetworking.com/pressrelease_pdf.cfm?PRID=8734 (recognizing that *Second Life* users are now able to order real pizzas with Linden dollars from virtual-world locations, to be delivered to real-world locations).

54. *See* 26 C.F.R. § 1.61-1(a) (2007) ("Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash."). While virtual currency is not specifically mentioned, it could be included in the list of potential income sources based on even the most conservative interpretation of the regulation.

55. *See* Lederman, *supra* note 6, at 1667–68 (speculating that if the government declared its intent not to tax virtual currency, the confusion it would likely cause would result in unintentional noncompliance).

56. *See supra* note 7 and accompanying text (presupposing that greater than expected growth rates will eventually lead to a high value economy).

57. *See* Frank Rose, *How Madison Avenue Is Wasting Millions on a Deserted* Second Life, WIRED, July 24, 2007, http://www.wired.com/techbiz/media/magazine/15-08/ff_sheep?currentPage=all (evaluating the efficacy of major companies opening official virtual offices in *Second Life* and concluding that it would be a poor business decision). Nevertheless, Coca-Cola, IBM, Coldwell Banker, Adidas, H&R Block, Sears, Nissan, Pontiac, CNET, Reuters, the MLB and NBA, and AOL have all begun conducting virtual business in *Second Life*. *Id*.

58. *See* Second Life, *Economic Statistics: Graphs*, *supra* note 7 (showing that while around seven million dollars were exchanged on the LindeX in each month of 2007, the virtual economy has a value approximately five times as high, leading to the inference that the majority of the money involved in *Second Life* remains in the virtual world).

59. While reporting regulations have their difficulties now, in a few years it will be immeasurably more difficult to impose a new tax structure, as virtual environments will not be able to accommodate such changes without severe detriment to their nature. It is difficult to accurately predict the point at which such regulations will no longer be feasible, as this is uncharted legal territory. Most, if not all, methods of taxing such transactions will require significant infrastructure changes on the part of the virtual-environment provider. To reduce the resistance from providers, the government should impose requirements early, which will require the least retrofitting of code and allow start-up companies to consider reporting requirements from the start.

downsides to establishing regulations in a nascent economy—an issue to which this Comment now turns.[60]

B. Difficulties in Regulation

There are several disadvantages to the taxation of virtual transactions, including compliance difficulties, liquidity problems, and the danger of overregulation. It would be difficult and unrealistic to require all individual users to manually keep track of each transaction in which they participate.[61] Given these administrative difficulties, it would be advantageous for the IRS to require virtual-world owners[62] to report transaction data to the government, essentially grafting the third-party reporting regime onto the virtual world.[63] These requirements would be fundamentally the same as those currently imposed on the mutual fund and investment industries.[64] Fortunately, reporting requirements would not require the data servers to record any more information than they already do.[65] A virtual transaction, in essence, is merely moving a segment of data containing the asset from one location on an Internet server to another, and that process is already naturally recorded by virtue of its taking place.[66]

A policy of imposing taxes after the receipt of virtual goods would be unworkable, considering the nature of such items. An item that has great value to a single user may have little or no value to other users, thus

60. *See infra* notes 69–71 and accompanying text (acknowledging potential downsides such as overregulation and destroying user incentives).

61. This is especially evident since many of the transactions are valued at one Linden dollar, for which the current real-world equivalent is about $0.003. For a hypothetical sales situation, such manual requirements would make a user record the basis, the purchase price of the item, the exchange rate at the time, and the parties to the trade. For any user engaging in multiple trades per day, with some engaging in hundreds of daily transactions, this is an unworkable requirement. The only way for reporting requirements to succeed is through automatic reports by owners.

62. Virtual-environment owners are those who provide the virtual framework and maintain the online servers. While item and property ownership rights rest with individual users, rights to the environment as a whole do not. For example, *Second Life* is owned by Linden Lab, a California-based corporation. *Entropia Universe* is owned by MindArk, a Swedish company.

63. *See* Charles P. Rettig, *Nonfilers Beware: Who's That Knocking at Your Door?*, 8 J. TAX PRAC. & PROC. 9, 9–10 (2006) (comparing amounts subject to third party reporting with similar amounts not subject to reporting, and finding that those without reporting requirements have a significantly lower rate of proper tax reporting and compliance, averaging around 46.1%).

64. *See* IRS Instruction Mem., *2008 Instructions for 1099-B* (instructing brokers on how to correctly file the 1099-B form, which reports any gains or losses that a taxpayer makes).

65. *See* Rappeport, *supra* note 37 (noting that every transaction within Second Life may be observed and tracked, with large transactions flagged automatically).

66. *See id.* (quoting CFO John Zdanowski, who says that "unlike [monitoring in] the real world, in [*Second Life*] it just so happens that we know everything that happens").

eliminating the potential for resale.[67] However, taxing a user upon receipt or through continuing possession of such an item, such as via a property or use tax, would present difficulties. If the would-be taxpayers have no liquid funds with which to pay the tax and no way to rid themselves of the item, they would be forced into the unfortunate situation of indebting themselves to meet their tax obligations.[68]

Notwithstanding the many reasons to act, the IRS must use extreme care in promulgating rules designed to govern virtual economies. There is a very fine line between effective regulation and overregulation: the more liability imposed upon participants for their actions in the virtual economy, the less attractive such actions become.[69] Overregulation would likely result in the immediate decline of the virtual economy, lowering its total economic value, and therefore lowering the total federal revenue expected from the regulations.[70] The government can create the proper balance by promulgating regulations that do not burden the user in terms of filing or recording transactions, but that still generate enough tax income to make the regulations worthwhile.[71]

IV. POTENTIAL SOLUTIONS

In creating a new tax system, it is crucial to account for major taxation policy considerations. The "provision[s] should be equitable, give rise to minimal deadweight loss, and be possible for the government to implement and enforce."[72] In light of such policy dictates, this Comment analyzes two

67. Hypothetically, User A could conscript User B to design and create a particular item, one which only User A would desire to own. *See, e.g.*, RESTATEMENT OF CONTRACTS § 346 illus. 4 (1979) (contemplating a fountain so ugly that the property value decreases and fewer buyers are interested in the land). If such an object were delivered and taxed upon receipt, the user, if presumed to have no liquid capital, would be forced to sell the object just to pay the taxes. However, since the object would be unsalable, the user would become an unintentional tax evader.

68. *See generally* Dustin Stamper, *Taxing Ones and Zeros: Can the IRS Ignore Virtual Economies?*, 114 TAX NOTES 149, 151 (2007) (noting the similar problems that arise in the case of some virtual goods and valuable home run baseballs when taxes are imposed on these items after receipt but before sale).

69. *See* Mayer-Schonberger & Crowley, *supra* note 17, at 1819–21 (2006) (elaborating on the idea that with increasing regulation on virtual worlds and providers, the attractiveness of such worlds decreases, and with such drawbacks, the virtual environment will change significantly in membership and policy—potentially dooming the world to failure).

70. *See id.* (implying that once users cease to participate in the virtual economy, the value will drop such that it would no longer be beneficial for the IRS to regulate).

71. While this task would be difficult to accomplish, an appropriate balance is essential. Too little regulation would not be cost-effective, as the costs to users and providers in reporting transactions and to the agency in policy changes would not be met by an equivalent amount of tax revenue. Overregulation will bring in more tax revenue, but may deter users from virtual economies, eventually negating the need for regulations altogether.

72. Lederman, *supra* note 6, at 1658 (citing Milka Casanegra de Jantscher,

practical solutions: a capital gains tax and a sales tax for the virtual economy.

A. Capital Gains Tax

The most obvious method of taxing virtual land and property transactions is through a capital gains tax, which is the scheme the IRS uses to tax real-world property sales. While using current capital gains formulas would effectively allow the IRS to tax virtual profits, it would also create a slew of evaluation issues that do not exist in the real world.

A capital gains tax is a tax on gains after accounting for costs and expenses.[73] Before computing capital gains, the final basis must be determined to allow for a calculation of net gain or loss.[74] When a user creates an item in the online world with no costs associated with the creation, the basis is zero.[75] The service fees paid for use of the environment do not enter into the equation.[76]

The IRS could introduce a regulation requiring individuals to declare any income earned in virtual environments on their tax returns, similar to the way that investment profits are currently declared. To aid enforcement, reporting regulations would be a necessary accompaniment to the new law, forcing virtual-environment owners to send details of all transactions to the IRS, which would allow the IRS to compare the figures to an individual's tax returns.[77]

This method would likely result in an extraordinary amount of work for both the IRS and the providers, requiring them to spend a great deal of time documenting transactions that amount to little more than one or two dollars. While this method is extremely accurate for collecting the taxes

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Administrating the VAT, in VALUE ADDED TAXATION IN DEVELOPING COUNTRIES 179 (Malcolm Gillis, Carl S. Shoup & Gerardo P. Sicat eds., 1990)).

73. *See* BLACK'S LAW DICTIONARY 1496 (8th ed. 2004) (defining capital gains tax as "[a] tax on income derived from the sale of a capital asset" and stating that "[t]he federal income tax on capital gains typically has a more favorable tax rate"). For example, the current rates are 5% for taxpayers in the 10 or 15% bracket and 15% for taxpayers in the 25, 28, 33, or 35% tax brackets.

74. For a discussion on the determination of basis, see *supra* notes 40–42 and accompanying text (describing the formula used in basis determination, including with regard to gross income).

75. *See* 26 U.S.C. §§ 212–224 (2000) (discussing potential deductible expenses). Because nothing on the list pertains to the creation of a virtual item, the basis must be set at zero.

76. *See* Lederman, *supra* note 6, at 1649–50 (concluding that monthly and licensing fees must not be used in establishing basis because it would require a constant reevaluation of expenses, and would not reflect the particularized worth of each individual asset).

77. The industry as a whole is likely to resist the establishment of reporting requirements. However, such requirements would not be impossible to administer, nor would they be beyond the scope of the IRS's current enabling legislation. For a more detailed discussion on this issue, see *supra* notes 61–65 and accompanying text.

due, it is unlikely to be the most cost-effective. This Comment proposes it only because it is the technically correct way to tax such transactions, since the IRS analyzes and taxes property exchanges through a capital gains analysis. However, for the purposes of taxing virtual property exchanges, while a capital gains analysis is workable and manageable, it is not nearly as viable a solution as a sales tax.

B. Sales-and-Use Tax

A system in which the virtual environment automatically deducts a percentage of each transaction and routes the money directly to the IRS would be an efficient and effective solution to the ambiguity in current tax law. A sales tax is one "imposed on the sale of goods and services, usually measured as a percentage of their price."[78] Traditionally, the buyer pays the tax at the time of sale and the seller remits the tax to the appropriate authorities.[79] Most jurisdictions also impose a "use" tax which functions to capture lost sales tax revenue when transactions occur in a different jurisdiction than that of the collecting agency.[80] An example of this imposition is when a resident of State A buys an item in State B: he incurs use tax liability whether he brings the item into State A himself or has it shipped. Generally, the use tax is self-assessed by the buyer, unless the seller also operates in the taxing jurisdiction, in which case the state will again impose a collection duty upon the seller.[81]

The IRS could seek to change its enabling legislation to allow for a federal sales-and-use tax when there is no other jurisdictional nexus. In essence, the IRS could require that for each transaction where Linden dollars change hands, the computer framework will withhold a certain

78. BLACK'S LAW DICTIONARY 1498 (8th ed. 2004). *See also* 68 AM. JUR. 2D SALES-AND-USE TAX § 1, at 13 (1993) ("While . . . the economic burden of [a retail] sales tax falls upon the consumer, the seller has the statutory duty to collect the tax for the taxing jurisdiction.").

79. *See* Hal R. Varian, *Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 639, 640 (2000) (noting that sales taxes apply only to purchases in which the seller and buyer are located in the same jurisdiction).

80. *See* Sales Tax Institute, *Sales Tax Concepts Made Easy for You*, http://salestaxinstitute.com/sales_tax_rates.php (last visited June 13, 2008) (listing each state and accompanying sales tax percentage, as well as whether a use tax exists). Forty-five of the fifty states, plus the District of Columbia, impose a sales tax. Only Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose sales or use taxes. *Id.*

81. *See* Sidney S. Silhan, *If It Ain't Broke Don't Fix It: An Argument for the Codification of the* Quill *Standard for Taxing Internet Commerce*, 76 CHI.-KENT L. REV. 671, 674–76 (2000) (outlining the basic elements of both sales and use taxes, particularly with regard to the methods employed to collect the use tax); *see also* Varian, *supra* note 79 (reviewing the process by which states collect use taxes from firms and consumers, as well as the difficulties they face in doing so).

percentage during the transfer for remittance to the government.[82] This method fulfills major policy considerations underlying taxation: fairness, minimization of deadweight loss, and ease of implementation and enforcement.[83] It would be just as fair as any state or local version of a sales-and-use tax, as it would be passive and automatic, and would minimize loss. In addition, because the virtual environment would apply the tax automatically to every transaction, compliance theoretically would be one hundred percent.

The sales-and-use tax method would require eliminating any requirements of reporting and taxing cash-out amounts,[84] as this practice would result in double taxation in most instances.[85] While a "cash-out" policy would serve to collect revenues both easily and efficiently, it would not capitalize on the significant amount of transactions whose value will never leave the virtual world, rendering such a system less effective than a sales-and-use tax applied throughout the virtual economy.

CONCLUSION

By all indications, virtual worlds are here to stay and will in all likelihood continue to grow in both usage and influence. It is up to Congress to analyze the law and public policy to determine whether transactions occurring in such environments—both virtual-to-real and virtual-to-virtual—should remain untaxed. There are many reasons to change the current policy and begin taxing such economic activities, but there are also significant difficulties in doing so. Nonetheless, by applying sales-and-use taxes to virtual transactions, the IRS would meet the major requirements for an equitable and efficient tax policy while avoiding most of the pitfalls associated with virtual regulation. There is a demonstrable need for regulation, as evidenced by the increasingly significant value of virtual economies, and a sales-and-use tax—properly applied—will meet this need.

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82. The remittance process would take the form of any other sales-and-use tax application, with the added ease of automatic collections. *But see* Silhan, *supra* note 81, at 701 (concluding that Congress should adopt stricter standards for determining what constitutes a nexus for tax purposes). If Congress adopted stricter standards, it would have to include an exception for virtual economies to enable the taxation of such environments, since by their nature they have no physical nexus in any real-world location.

83. *See supra* notes 6, 72 and accompanying text.

84. A "cash-out" policy would apply a tax liability to any money taken out of the virtual environment over the amount put in, regardless of the amount gained or lost while invested in the virtual world.

85. Double taxation in the virtual world—similar to the double taxation of corporate profits (once at the corporate level and again at the shareholder level)—would result if a sales tax were imposed on virtual-to-virtual transactions, in addition to a tax applied to income from virtual-to-real transactions. This result is undesirable and should be avoided.

The three primary reasons to tax virtual transactions stem from the same source: the importance of certainty in the law.[86] First, without proper regulations, the virtual environments could create a significant legal ambiguity, with some taxpayers using them to fraudulently avoid taxes. Second, other taxpayers may be incurring liabilities they never meant to assume. Third, this is an opportunity for the IRS to incorporate structure and regulation into the growing virtual economy before it would be unfeasible to retrofit the new regulations to the virtual world.

The drawbacks to regulation are also significant.[87] Like many taxation fields, there are a great number of valuation, liquidity, and enforcement concerns. Because of the very nature of virtual money and items, they are difficult to price, and oftentimes just as difficult to resell. There is also a chance that overregulation will prove to be a bigger detriment than the economies are willing, or even able, to handle. Whichever regulations the government may choose to institute, its principal concern must be to avoid overburdening both the owners of the virtual environments and the individual users who populate them.

While a capital gains approach to the taxation of virtual transactions may result in higher tax revenue, it would also create several problems that could lead to the demise of the entire system. The sales-and-use tax application would allow for an equally efficient and equitable policy with few, if any, of the drawbacks of a capital gains tax. Reporting requirements would not be necessary, which would render the integration of the sales-and-use tax into the current tax system far easier. The only major change required to implement such a system would be to create and launch a computer program that automatically deducts a negligible percentage of virtual currency from each transaction and holds it for government collection.[88] The end result of implementing such a system would be a proper application of existing tax law and its underlying concepts, while avoiding a majority of its inherent disadvantages.

86. For a discussion on the need to institute regulations, see *supra* notes 51–59 and accompanying text.

87. For a discussion on the drawbacks to regulation, see *supra* notes 60–71 and accompanying text.

88. Such a program would be a simple adjustment to the infrastructure of the virtual environment. Each time the computer transferred Linden dollars from one user's account to another, the program would siphon a set percentage of that amount to another location in escrow for the government.

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