AGENCY POLYMORPHISM

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> "The question is," said Alice, "whether you *can* make words mean so many different things."
> —Lewis Carroll, *Through the Looking Glass* (1897)

INTRODUCTION

Suppose a statute provides that noncitizens ordered removed from the United States "may be detained beyond the removal period" necessary to secure their deportation.[1] Does this statute authorize the indefinite detention of an inadmissible alien who has not lawfully entered the United States? Remarkably, the answer turns on whether a different type of noncitizen—a lawful permanent resident—happened to challenge the statute first.

1. 8 U.S.C. § 1231(a)(6) (2006).

Consider two scenarios. In the first, an inadmissible alien[2] challenges the constitutionality of the statute, arguing that his indefinite detention violates the Fifth Amendment. The Supreme Court would reject this claim because the Fifth Amendment does not extend to noncitizens who are, in the eyes of the law, outside of the United States.[3]

In the second scenario, a lawful permanent resident (LPR) raises the same claim. Since the Fifth Amendment does extend to LPRs,[4] the Supreme Court would recognize the serious constitutional question presented by the prospect of indefinite detention and impose a limiting construction on the statute.[5] For example, the Court might require that such detentions be limited to the time reasonably necessary to effect the removal—presumptively six months.[6] But what happens when, after this ruling, an inadmissible alien challenges his indefinite detention on the ground that he deserves the same interpretation of the statute, i.e., the presumptive six-month limitation? Is the inadmissible alien entitled to it? According to the Supreme Court in *Clark v. Martinez*, the answer is yes.[7]

This is peculiar. The constitutionality of the inadmissible alien's detention seems to turn on nothing more than the sequence of litigation. What could the *Clark* Court have done to avoid this outcome? Might it have read the same statutory phrase—"may be detained beyond the removal period"—two ways?

The *Clark* majority, in an opinion by Justice Scalia, maintained that because the statute's initial application to LPRs called for a limiting construction "[t]he lowest common denominator, as it were, must govern."[8] In other words, the six-month limitation that the Court read into the statute

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2. This Article uses the term *inadmissible alien* to mean a noncitizen who has not been lawfully admitted into the United States nor is currently admissible. Elsewhere, this Article refers to *aliens* (including lawful permanent residents (LPRs)) as noncitizens.

3. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990). According to the "entry fiction" of immigration law, inadmissible aliens who are physically present in the United States have not been legally admitted and are therefore deemed to be outside of the country for constitutional purposes. *See* Kaplan v. Tod, 267 U.S. 228, 230 (1925) (holding that an "excluded" noncitizen who had lived in the United States for nine years was nonetheless "still in theory of law at the boundary line").

4. This is true even if an LPR has been ordered removed. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896).

5. *See* Zadvydas v. Davis, 533 U.S. 678, 692 (2001) ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such [judicial process] is obvious.").

6. This is, in broad strokes, the limiting construction adopted by the Supreme Court in *Zadvydas*. *Id*. at 701.

7. *See* Clark v. Martinez, 543 U.S. 371, 380–81 (2005); *see also id.* at 397 (Thomas, J., dissenting) (protesting that "once narrowed in *Zadvydas*, [the statute] now limits the Executive's power to detain unadmitted aliens—even though indefinite detention of unadmitted aliens may be perfectly constitutional").

8. *Id.* at 380 (majority opinion).

must apply in every instance the statute is applied in the future. If the statute's meaning "depend[s] on the presence or absence of constitutional concerns in each individual case," Justice Scalia fretted, every statute would be "render[ed] . . . a chameleon."[9] In Justice Scalia's view, if there are two fairly possible constructions of a statute, "a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."[10] As Justice Breyer put it during oral argument in *Clark*, "[Our precedent] says you can't read words differently just because . . . they were interpreted in light of constitutional considerations, and now . . . those constitutional considerations aren't here . . . . You have to apply it the same."[11]

Under the *Clark* majority's "lowest common denominator" approach—also known as unitarianism[12]—the Court in the first scenario described above should not only have inquired whether the inadmissible alien before it could be detained indefinitely under the Constitution, but it also should have asked whether the indefinite detention of LPRs would be constitutional, even though no LPR was before the Court. Because the Court would have concluded that the indefinite detention of the (absent) LPR violates the Fifth Amendment, it should have imposed a similar temporal limitation in the inadmissible alien's case.

But this approach flouts the rules of standing. After all, courts do not normally "inquire whether either of the interpretations would be unconstitutional if applied to third parties not before the court, unless the challenge is facial or otherwise implicates third-party rights."[13] As the

9. *Id.* at 382.

10. *Id.* at 380–81.

11. Transcript of Oral Argument at 18, *Clark*, 543 U.S. 371 (No. 03-878) (Breyer, J.), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-878.pdf.

12. This Article uses the terms *lowest common denominator*, *strong unitary principle*, and *unitarianism* interchangeably.

13. *Clark*, 543 U.S. at 396 (Thomas, J., dissenting); *see also* United States v. Raines, 362 U.S. 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."). *But see* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 175–76 (5th ed. 2003) [hereinafter HART & WECHSLER'S THE FEDERAL COURTS] (explaining that following *Craig v. Boren*, the Court "purports to disfavor assertions of third-party rights, but in fact almost routinely permits them" if the litigant and third party whose rights are claimed have "some sort of relationship" and there is an obstacle to the third party's challenge); *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1361 n.202 (2000) [hereinafter Fallon, *As-Applied*] (arguing that the Supreme Court has almost invariably granted third-party standing when assertion of third-party rights "appeared likely to prevail on the merits").

Clark dissenters argued, the Court must interpret a statute so as to avoid constitutional concerns "only if the statute is constitutionally doubtful as applied to the litigant before the court."[14] Under this view, in the first scenario described above, the Court should only have asked whether the inadmissible alien before it could be detained indefinitely; later, when confronted with the LPR's challenge, the Court could always interpret the same statutory language differently.[15]

Yet the "chameleon" approach of the *Clark* dissenters—also known as polymorphism—raises its own set of legal and practical questions. Is it consistent with the rule of law for the very meaning of a statute to turn on the "pedigree of the petitioner"?[16] What if the characteristic triggering such a differential interpretation of a statute is a constitutionally protected characteristic like race or gender? And is this approach to statutory interpretation justifiable in the administrative agency context, where "courts and agencies play complementary roles in the project of statutory interpretation"?[17]

As this Article reveals, federal agencies often rely on canons of construction in adjudicating cases. And where there's canonical smoke, there's polymorphic fire.

This Article proceeds in five parts. Part I explores the interpretive dilemma posed by *Zadvydas v. Davis* and *Clark v. Martinez* and introduces the concepts of polymorphism and unitarianism. Part II reveals how courts, guided by canons of construction and influenced by policy concerns, often construe statutes polymorphically. It explains how polymorphism is perceived to be necessary in order to uphold prudential standing requirements and to prevent the sequence of litigation from being dispositive. Nevertheless, this Part shows that polymorphism raises equal protection, due process, and rule-of-law concerns. Part III then showcases the polymorphic principle at work in the administrative state, revealing the distinct benefits and drawbacks of this interpretive technique. Part IV analyzes issues raised by agency polymorphism and argues that within appropriate limits agency polymorphism is advantageous because it empowers politically accountable agencies to exercise their policymaking authority, to enforce constitutional norms, and to ensure that litigation sequence does not determine the outcome of cases.

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14. *Clark*, 543 U.S. at 396 (Thomas, J., dissenting).

15. *See id.* at 398 (arguing that statute's severability clause required courts to sever unconstitutional applications while leaving remainder of statute fully in force) (citing 8 U.S.C. § 1101 note (2000)).

16. Chmakov v. Blackman, 266 F.3d 210, 215 (3d Cir. 2001).

17. Negusie v. Holder, 129 S. Ct. 1159, 1171 (2009) (Stevens, J., concurring and dissenting).

In light of these considerations, Part V argues that courts and agencies should embrace a modified version of polymorphism in certain circumstances: hybrid polymorphism. Under hybrid polymorphism, where a canon of construction counsels one interpretation of a statute as applied to one category of individuals, the initial interpreter—whether court or agency—should signal to the subsequent interpreter how to resolve later challenges by other foreseeable and discrete categories of individuals. By synthesizing elements of polymorphism and unitarianism, hybrid polymorphism resolves many of the constitutional and rule-of-law issues raised by polymorphism and avoids major pitfalls of unitarianism. In addition, hybrid polymorphism answers a leading critique of the modern constitutional avoidance canon and is well suited to the administrative state.

In all, whatever one thinks about *judicial* polymorphism, there are strong reasons to be a hybrid pluralist when it comes to the administrative state, where courts and agencies make words mean so many different things.

I. JUDICIAL POLYMORPHISM AND UNITARIANISM

In *Clark v. Martinez*, the Supreme Court considered whether its interpretation of the detention statute in *Zadvydas v. Davis* should likewise apply to a challenge brought by an inadmissible alien, whose indefinite detention would not offend the Constitution under established precedent. Justice Scalia's opinion for the Court endorsed the "lowest common denominator" approach, the notion that a single statutory phrase ("may be detained beyond the removal period") must apply equally to all types of noncitizens, regardless of the presence or absence of constitutional concerns in any individual case.[18] Under this approach, the Supreme Court must first consider whether a given interpretation of the statute would create constitutional concerns as applied to any type of litigant, and then it must adopt a single construction which avoids those concerns, "whether or not those constitutional problems pertain to the particular litigant before the Court."[19] In other words, the inadmissible alien, like the LPR, is entitled to the same interpretation (which was arrived at via the canon of constitutional avoidance). By contrast, the dissent invoked the polymorphic principle, arguing that statutory language may mean different things when applied to different petitioners or when applied in different contexts.[20]

18. Clark v. Martinez, 543 U.S. 371, 380 (2005).

19. *Id.* at 380–81.

20. *Id.* at 391–92 (Thomas, J., dissenting) ("I grant that this understanding of *Zadvydas* could result in different detention periods for different classes of aliens—indefinite

This Part introduces polymorphism and the strong unitary principle in the judicial context. Part I.A summarizes Professor Siegel's concepts of the polymorphic and strong unitary principles.[21] Part I.B borrows insights from Professor Lawson's concept of "proving the law" to justify the polymorphic principle on the theoretical plane.[22] Part I.C then outlines the two basic sequences in which the polymorphic impulse may arise: (1) where the *Zadvydas*-like petitioner (i.e., the petitioner who triggers the relevant canon of construction) first challenges a statute; and (2) where the *Clark*-like petitioner (i.e., the petitioner who does not trigger the relevant canon of construction) first challenges a statute.

A. Unitarianism and Polymorphism

Professor Siegel explains the interpretive debate animating *Clark v. Martinez* in terms of two principles: the strong unitarianism of the majority and the polymorphism of the dissent.

1. Strong Unitary Principle

Professor Siegel defines this principle as follows: "a single term in a single statutory provision . . . must always have a single meaning, and that any suggestion to the contrary is 'novel' and 'dangerous' and an affront to the separation of powers."[23] Embracing this principle in *Clark*, Justice Scalia extended the *Zadvydas* Court's limiting construction of the statute[24] to inadmissible aliens as well, despite the absence of similar constitutional concerns in their case.[25]

This principle, Professor Siegel observes, saddles a court with a weighty burden when considering an initial challenge to a statute: it must consider not only the questions raised by the petitioner before it, but also all "necessary consequences of its choice," that is, the effect of its interpretation on parties not before the court.[26] Thus, in the *Zadvydas* scenario, a court seized with the inadmissible alien's challenge must also inquire whether other types of noncitizens, such as LPRs, would present a different constitutional case. If so, that court must decide the case as if an

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detention for some, limited detention for others.").

21. *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339 (2005).

22. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

23. Siegel, *supra* note 21, at 346.

24. *See supra* note 6 and accompanying text (describing *Zadvydas*'s limiting construction).

25. *Clark*, 543 U.S. at 380–81 (majority opinion).

26. *See supra* text accompanying note 10.

LPR were currently before it.[27] This seemingly speculative approach prompted Justice Thomas to protest that the Court would be forced to "limit the application of statutes wholesale by searching for hypothetical unconstitutional applications of them . . . despite the absence of any facial constitutional problem."[28] For Justice Thomas, such an approach fosters judicial creativity at the expense of Congress.[29]

It is therefore intriguing that Professor Siegel situates strong unitarianism squarely within Justice Scalia's campaign to rein in judges' "interpretive proclivities."[30] Siegel notes that Justice Scalia has consistently opposed the creativity and democratic unaccountability of the common law method of judging.[31] In its place, Justice Scalia advocates a statutory interpretation technique that he believes is consistent with a more limited judicial role: textualism.[32] In Professor Siegel's view, Justice Scalia embraced unitarianism in *Clark* because he distrusts unbounded judicial discretion:

> The strong unitary principle naturally fits into Justice Scalia's campaign. If courts can sometimes give a single statutory phrase multiple meanings, they must choose when to do so. To Justice Scalia, this amounts to 'invent[ing] a statute rather than interpret[ing] one.' That is, he regards the polymorphic principle as 'dangerous' because it involves judicial choice.[33]

Indeed, Justice Scalia views polymorphism as not only methodologically unsound but also as implicating separation-of-powers concerns. As Professor Siegel explains, Justice Scalia believes that "limiting judicial choice" is "a necessary aspect of the separation of powers . . . [and] the polymorphic principle represents . . . a violation of the limited judicial role

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27. *See Clark*, 543 U.S. at 393 (Thomas, J., dissenting) ("Under [the majority's] reading, *Zadvydas* would have come out the same way even if it had involved inadmissible aliens, for the 'lowest common denominator' of the statute remains the same regardless of the identity of the alien before the Court. . . . This understanding of *Zadvydas* is implausible.").

28. *Id.* at 400.

29. *See id.* at 397 (arguing that the constitutional avoidance principle is adopted to permit statutes to have "effect to the full extent the Constitution allows" but the majority's approach fails to extend the statute "to its full constitutional bound" (citation and quotation marks omitted)); *cf.* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 860–61 (1991) (suggesting this approach encourages adjudication of hypothetical disputes, rendering constitutional adjudication too abstract).

30. Siegel, *supra* note 21, at 371.

31. *See id.* at 370 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 13–14 (Amy Gutmann ed., 1997)) (decrying judges' "Mr. Fix-it mentality").

32. *See id.* at 371 (describing Justice Scalia's skepticism toward use of legislative history and canons of construction).

33. *Id.* (quoting Clark v. Martinez, 543 U.S. 371, 378, 386 (2005)).

in our system of government."[34] Of course, Justice Thomas's dissent accuses the *Clark* majority of *expanding* judicial discretion.[35] Nevertheless, in Siegel's view, Justice Scalia's broader methodological commitment best explains his categorical prohibition on polymorphism, that is, on judges giving "the same statutory text different meanings in different cases."[36]

Curiously, by relying on unitarianism Justice Scalia may have further "invented" (rather than interpreted) this statute. In *Zadvydas*, Justice Scalia agreed with the dissenters that the statute's plain language authorized the Attorney General to detain certain LPRs beyond the removal period.[37] In fact, he joined a dissent protesting that the *Zadvydas* majority "simply amends the statute"[38] by imposing the six-month time limit, a move that was wholly "invented by the Court."[39] Therefore, if Justice Scalia had embraced Justice Thomas's polymorphism in *Clark*, at the very least he could have cabined *Zadvydas*'s statutory "amend[ment]" by applying what he believed to be the statute's plain meaning to its full constitutional extent, i.e., to allow the indefinite detention of inadmissible aliens.[40] That Justice Scalia instead sided with the unitarians indicates that he prioritizes his

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34. *Id.* at 370.

35. *Clark*, 543 U.S. at 393 (Thomas, J., dissenting). Recall that Justice Thomas's quarrel with strong unitarianism relies on his observation that "[a] litigant ordinarily cannot attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances." *Id.* at 396. Ironically, this position is more consonant with Justice Scalia's own views on overbreadth than is Justice Scalia's unitarianism. *See* Janklow v. Planned Parenthood, 517 U.S. 1582, 1584–85 (1996) (Scalia, J., dissenting from the denial of the petition for certiorari) (invoking the "long established principle of our jurisprudence" that "[t]he fact that a legislative Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . [except in] the limited context of the First Amendment" (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

36. *Clark*, 543 U.S. at 386; *see also The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 28, 388 (2005) (praising Justice Scalia's understanding of the statute's single "detainment provision for three distinct categories of aliens" as a "commonsense maxim of indivisibility").

37. *See* Zadvydas v. Davis, 533 U.S. 678, 707–08 (2001) (Kennedy, J., dissenting) (criticizing the majority's rejection of a strict textual interpretation).

38. *Id.* at 707.

39. *Id.* at 708. *But see* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 140 (2005) (plurality opinion) (defending the outcome of *Zadvydas* as merely "one of textual interpretation"); *see also The Supreme Court, 2004 Term—Leading Cases*, *supra* note 36, at 391 (arguing that because Congress likely "prefers its statutes to have some effect rather than none," and because "[s]everance would likely have required the Court to exclude admitted aliens from the application of [the statute] entirely," the *Zadvydas* Court's use of avoidance rather than severance properly "kept admitted aliens within the purview of the statute, albeit with a reasonable time limit on their detention").

40. *See supra* note 29 (explaining how courts adopt certain interpretive presumptions such as constitutional avoidance to permit statutes to apply to their full constitutional extent).

interpretive commitments over substantive outcomes.[41]

Or so it would seem. Yet in the landmark decision of *Rasul v. Bush*[42]—decided only six months before *Clark v. Martinez*—Justice Scalia came out the other way. In *Rasul*, noncitizens who were captured during hostilities in Afghanistan and were detained at the U.S. naval base in Guantánamo Bay, Cuba, filed habeas corpus petitions challenging the legality of their detention.[43] The district court relied on *Johnson v. Eisentrager*[44] to conclude that noncitizens detained abroad may not petition for a writ of habeas corpus.[45] The U.S. Court of Appeals for the District of Columbia Circuit affirmed.[46] The Supreme Court reversed, holding that federal courts have jurisdiction under the federal habeas corpus statute to hear such challenges.[47] In an opinion for the majority, Justice Stevens noted that the government had conceded that an American citizen held abroad could invoke federal habeas corpus jurisdiction under the same statute.[48] As the text of the statute "draws no distinction between Americans and aliens held in federal custody," Justice Stevens reasoned, "there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."[49] Therefore, noncitizens should be equally entitled to invoke habeas jurisdiction to challenge the legality of their extraterritorial detention.[50]

Justice Scalia disagreed. He argued that *Eisentrager* "made an exception" to its rule for U.S. citizens, and that neither party in *Rasul* challenged this "atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts."[51] According to Justice Scalia, this "atextual" exception for citizens was either justified by constitutional avoidance or "(more honestly) a

41. *See* Siegel, *supra* note 21, at 378 ("Certainly one must credit [Justice Scalia] for sticking to his principles in cases such as [*Clark v.*] *Martinez*, where it seems clear that he personally disagreed with the result, which he had previously castigated in *Zadvydas*, yet voted for it all the same."). As described earlier, Justice Scalia may also have compromised his stance on overbreadth doctrine. *See supra* note 35.

42. 542 U.S. 466 (2004).

43. *Id.* at 470–72.

44. 339 U.S. 763 (1950).

45. Rasul v. Bush, 215 F. Supp. 2d 55, 72–73 (D.D.C. 2002).

46. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *aff'g Rasul*, 215 F. Supp. 2d 55 (D.D.C. 2002).

47. *See Rasul*, 542 U.S. at 484 (referring to 28 U.S.C. § 2241(a), (c)(3) (2000)).

48. *Id.* at 481 (citing Transcript of Oral Argument at 27).

49. *Id.*

50. *Id.* Justice Stevens observed that "Justice Scalia appears to agree that . . . the plain text of the statute . . . [does not] provide[] a basis for treating American citizens differently from aliens." *Id.* at 481 n.10.

51. *Id.* at 497 (Scalia, J., dissenting).

determination of [a citizen's] constitutional right to habeas."[52] However, he maintained, "the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt."[53]

This statement flatly contradicts the unitarianism Justice Scalia espoused in *Clark v. Martinez*. In fact, it succinctly restates the polymorphic principle. In Justice Scalia's own words, when there are two fairly possible constructions of a statute, a unitarian must "consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."[54] Had Justice Scalia relied on the strong unitary principle in *Rasul*, he would have concluded that the undifferentiated language of the habeas corpus statute applies consistently to citizens and noncitizens alike. If an "atextual" exception is required by the Constitution for citizens detained abroad, that same reading must always govern; otherwise the statute's meaning would vary "depending on the presence or absence of constitutional concerns in each . . . case."[55] But instead, the leading unitarian on the Supreme Court sought to render the federal habeas corpus statute a feared "chameleon" law.

2. Polymorphism

Contrary to Justice Scalia's claims, although consistent with his occasional practice, Professor Siegel maintains that courts often do adopt the polymorphic principle, that is, the view that "courts may, in appropriate cases, give a single [statutory] phrase multiple meanings"[56] in light of "special rule[s] of statutory interpretation" or for policy reasons.[57] Professor Siegel observes that "the polymorphic principle commonly comes into play when some special reason motivates a court to interpret a statute a particular way in one of its applications, and the reason does not apply to other applications."[58] Such reasons include the need to avoid constitutional questions, the need to interpret statutes "in the shadow of constitutional principles," and the need to serve certain policy goals and the

52. *Id.*
53. *Id.*
54. Clark v. Martinez, 543 U.S. 371, 380–81 (2005).
55. *Id.* at 382.
56. Siegel, *supra* note 21, at 352.
57. *Id.* at 359.
58. *Id.* at 352.

dictates of stare decisis.[59] Sometimes courts engage in "express polymorphism," in which courts expressly acknowledge that a statutory term's meaning varies depending on the circumstances. Other times, polymorphism is implied, such as when the inclination to engage in it may be inferred.[60] As discussed below, Professor Siegel lauds the polymorphic principle as consistent with the Constitution and the Judiciary's responsibility to engage in principled exercises of discretion.[61]

To be clear, polymorphism as described in this Article is limited to circumstances where a single instance of a statutory word or phrase is interpreted differently depending on its application. It does not refer to situations where a given word or phrase is repeated multiple times in a statute and the court ascribes different meanings to each (or some) iterations of the word. For example, the single statutory phrase "may be detained beyond the removal period" was at issue in *Zadvydas* and *Clark*.[62] If the Court had employed polymorphism, it would have determined that this single phrase was temporally unbounded as applied to inadmissible aliens, but bounded as applied to admitted aliens.[63] By contrast, if Congress passed a law providing that "any person may recover damages for defamation by any person without a showing of actual malice," the Court might read into the first reference to "any person" an exclusion of public figures seeking damages for acts relating to their official conduct in light of the actual malice rule of *New York Times Co. v. Sullivan*.[64] In this situation, the first "any person" would exclude such public figures, but the second "any person" would include them.[65] This example is not an instance of polymorphism because it does not purport to give a single statutory phrase multiple meanings. Rather, it implicates the "parallelism" canon of statutory interpretation, which holds that "there is a presumption that a given term is used to mean the same thing throughout a statute . . . [particularly] when a term is repeated within a given sentence."[66]

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59. *Id.* at 352–53. Professor Siegel discusses certain canons of construction, including constitutional avoidance, the rule of lenity, and other clear statement rules. *Id.* at 345–62.

60. *Id.* at 353.

61. *See infra* Part II.B.

62. 8 U.S.C. § 1231(a)(6) (2006).

63. *See* Clark v. Martinez, 543 U.S. 371, 380 (2005) (stating that absence of constitutional concerns in one case "cannot justify giving *the same detention provision* a different meaning when [unadmitted] aliens are involved") (emphasis added).

64. *See* 376 U.S. 254, 279–80 (1964) (establishing actual malice standard for libel action brought by public official against critics of official's conduct in office).

65. Of course, such suits against public officials would be subject to the defense of qualified immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

66. Brown v. Gardner, 513 U.S. 115, 118 (1994). It appears that Professor Richard Pierce erroneously conflates polymorphism with the parallelism canon. *See* Richard J.

B. Theorizing Polymorphism

Missing from the debate animating *Zadvydas* and *Clark* was a systematic attempt to justify the dueling interpretive philosophies on the level of theory. Amid the colorful accusations of an "end run around black-letter constitutional doctrine"[67] and statutory "chameleon[s],"[68] no Justice provided a satisfactory account of whether, and when, courts may give a single phrase multiple meanings.

Professor Lawson's concept of "proving the law" fills this analytic void. Professor Lawson's insight is that our legal system implicitly operates on the "best-available-alternative standard" as its quantum of proof for legal matters.[69] That is, "a legal interpretation is correct"—in some ill-defined objective sense—"if it is better than its available alternatives."[70] This means that "a litigant has a right to a decision in her favor if the principles that can be adduced in support of her claim are the tiniest bit more powerful than the principles against it."[71] As Professor Lawson points out, this does not always require a high threshold. In fact, when there are more than two possible interpretations—"which in the law is to say almost always"—the best interpretation may command a mere plurality.[72]

Because a given interpretation will often carry the day when it is only marginally more persuasive than an alternative interpretation, a minor difference in a petitioner's characteristics or circumstances may tip the balance in favor of another interpretation. For example, if the application of a statute to one person raises no constitutional concerns, one interpretation, *A*, might have a 55% chance of being "correct," while another interpretation, *B*, might have a 45% chance. So *A* wins. But if the application of the statute to another person raises, for example, constitutional concerns, interpretation *A* begins to look problematic and *B*'s likelihood of correctness rises by 10%. Now *B* has a 55% likelihood of being correct, and so *B* wins.

In this way, a change in a petitioner's characteristics or circumstances

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Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 598–99 n.232 (2006) (arguing that Siegel's position on polymorphism applies "with particular force to a situation in which a politically accountable agency gives different meanings to the same word when that word is used in two quite different contexts in the same statute").

67. *Clark*, 543 U.S. at 396 (Thomas, J., dissenting).

68. *Id.* at 382 (majority opinion).

69. Lawson, *supra* note 22, at 890.

70. *Id.*

71. *Id.* at 890 n.114 (quoting Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 335 (1989)).

72. *Id.* at 892 (positing a situation in which there are five plausible interpretations of a statute and noting that an interpretation that is 21% likely to be correct will win even though the four others are each 19.75% likely to be correct—and therefore the "net" likelihood of an incorrect outcome is 79%).

may dictate which interpretation satisfies our legal system's "best-available-alternative" quantum of proof for legal matters. While this low threshold raises important normative questions,[73] taken as a given this insight justifies the polymorphic principle on the level of theory.

C. What If Clark *Preceded* Zadvydas*?*

It was almost certainly happenstance that the Supreme Court decided *Zadvydas* before *Clark*. Where would unitarianism and polymorphism have led the Justices in the reverse sequence? As one author has pointed out, "it is difficult to imagine the Court in [*Clark v.*] *Martinez* reaching the same conclusion and using the same means to reach that conclusion."[74] This reflects a basic intuition that the Supreme Court would probably have withheld from Clark, an inadmissible alien, an interpretation informed by concerns over absent LPRs, such as Zadvydas.

But reaching that outcome requires a particular interpretive approach. If the *Clark*-like petitioner came first, the strong unitarian would say that because the indefinite detention of an (absent) LPR would raise constitutional concerns,[75] the single interpretation that best avoids "a multitude of constitutional problems"[76] in the future is an interpretation with a temporal limitation. And because a single statute cannot mean two things, that interpretation must also apply now to Clark, the inadmissible alien. Therefore, contrary to the expected outcome, the Court would accept the inadmissible alien's claim and impose a temporal limitation on his detention.

By contrast, a judge guided by polymorphism would anticipate the constitutional concerns presented by the absent LPR's case and engage in constitutional avoidance polymorphism. That is, the judge would recognize that under current doctrine, such constitutional concerns are

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73. *See id.* at 894 (asking whether there are "good reasons to permit armed government agents to order *A* to hand over property to *B* when *B* has shown merely that her view of the law is the best available alternative"); *id.* at 902 ("If one applies a best-available-alternative standard, highly ambiguous statutes that give rise to multiple interpretations are nonetheless given effect, often retroactively against parties who may have had no reliable way of predicting the finally effective interpretation.").

74. Phillip J. Riblett, Note, *Avoiding the Avoidance Canon: Subconstitutional Facial Challenge in* Clark v. Martinez, 19 GEO. IMMIGR. L.J. 409, 423 (2005).

75. In this respect, the approach requires the court to confront constitutional issues before they are ripe. *See The Supreme Court, 2004 Term—Leading Cases*, *supra* note 36, at 394–95 ("If *Martinez* had arisen before *Zadvydas*, for example, the rule would have demanded that the Court consider the difficult question of an admitted alien's due process rights, even if the government had independently decided not to detain admitted aliens indefinitely.").

76. Clark v. Martinez, 543 U.S. 371, 380–81 (2005).

absent in Clark's case,[77] and therefore, the judge would rule that the statutory phrase "may be detained beyond the removal period" requires no temporal limitation as applied to Clark. The judge would then interpret the same statutory phrase to permit the indefinite detention of inadmissible aliens but to prohibit the indefinite detention of LPRs.[78]

II. THE UBIQUITY AND LEGITIMACY OF JUDICIAL POLYMORPHISM

Some Justices have embraced polymorphism. But how common is polymorphism throughout the federal Judiciary? Part II.A agrees with Professor Siegel that, influenced by canons of construction, courts often do interpret statutes polymorphically.[79] Part II.B evaluates Professor Siegel's argument that courts should use polymorphism because, contrary to the view of Justice Scalia and other textualists, the Framers intended judges to exercise interpretive discretion, and because courts are "faithful agents"[80] of Congress when they refuse to "slavishly follow[] the text of [Congress's] written instructions."[81] Part II.B also contends that polymorphism upholds prudential standing requirements and prevents litigation sequence from becoming outcome determinative. However, as Part II.C explains, polymorphism raises serious constitutional and rule-of-law concerns.

A. Forms of Judicial Polymorphism

Professor Siegel contends that there is nothing "novel" about interpreting a single phrase in a statute as having multiple meanings, as

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77. The *Clark* dissent argued that this is precisely what the *Zadvydas* majority did when it said that inadmissible aliens "'would present a very different question'": it "explicitly reserved the question whether its statutory holding as to *admitted* aliens applied equally to *inadmissible* aliens." *Clark*, 543 U.S. at 388–89 (Thomas, J., dissenting) (quoting Zadvydas v. Davis, 533 U.S. 678, 682 (2001)).

78. Perhaps there was a third option: "If . . . the Court had read the provision as authorizing such indefinite detention [of inadmissible aliens] and severed its application in regard to admitted aliens, it might have remained open for the Court in *Clark* to uphold the availability of indefinite detention in regard to inadmissible aliens." Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 886 n.53 (2005). However, as Professor Metzger notes, "the Court would first have had to hold that this aspect of the provision's application to admitted aliens was severable," *id.*, a difficult prospect given the statute's failure to differentiate between categories of noncitizens. *See infra* notes 187–88 and accompanying text (describing undifferentiated statutory text).

79. *See* Siegel, *supra* note 21, at 341 (arguing that the Supreme Court often "applie[s] the contrary principle that a single term or phrase in a single statutory provision may have multiple meanings" in light of "special rule[s] of statutory interpretation" or as "a pure policy matter").

80. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) (stating that it is "widely assumed" that the Constitution requires federal judges to be "faithful agents" of Congress).

81. Siegel, *supra* note 21, at 372–77.

Justice Scalia claims.[82] In fact, Siegel argues, courts have embraced this principle in a veritable "parade of polymorphisms."[83]

1. Constitutional Avoidance Polymorphism

This type of polymorphism is triggered when one application of a statute raises constitutional concerns but others do not.[84] For example, the Supreme Court has held that challenges to Medicare regulations may or may not be "claim[s] arising under" the Medicare statute within the meaning of the statute's judicial review preclusion provision.[85] In *Bowen v. Michigan Academy of Family Physicians*, the Supreme Court held that if the claim is the petitioner's only opportunity to challenge the validity of a regulation, the claim does not "aris[e] under" the statute because precluding these challenges would raise serious constitutional concerns.[86] But in a subsequent decision, *Shalala v. Illinois Council on Long Term Care, Inc.*, the Court held that if a claimant had the opportunity to seek review within Medicare's designated procedures, the claim does "aris[e] under" the statute and is therefore precluded from judicial review.[87]

This sequence mirrors the progression from *Zadvydas* to *Clark*. In both situations, the Court first considered the constitutionally problematic application of the statute and interpreted it so as to avoid those concerns. However, in *Illinois Council on Long Term Care*, the Court interpreted the same statutory language differently as applied to the claimant who had already had the opportunity to seek review elsewhere.[88] By contrast, the *Clark* Court extended its initial reading into a context where constitutional

82. *Id.* at 341 (quoting *Clark*, 543 U.S. at 382 (majority opinion), 391 (Thomas, J., dissenting)).

83. *Id.* at 354. Siegel claims that

> the [polymorphic] principle seems most appropriate when some special rule of statutory interpretation, which deflects courts from the most natural interpretation of statutory text, applies to one application of a statutory phrase but not to others. Thus, it . . . commonly [appears] in cases involving constitutional avoidance or other, special, subconstitutional rules of interpretation.

Id. at 390–91.

84. *Id.* at 354–55.

85. *Id.* at 357–58 (quoting 42 U.S.C. § 405(h) (2000) ("[N]o action against the United States . . . shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.")).

86. *See id.* (discussing Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667 (1986)).

87. *See id.* (discussing Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000)).

88. In other words, "The Court chose to limit the application of the constitutional avoidance principle to cases in which the constitutional concern actually exists, even though doing so required treating the phrase 'claim arising under this subchapter' as a polymorphic operator." *Id.* at 358.

concerns were absent.

2. Subconstitutional Polymorphism

Another opportunity for polymorphism arises when an application of a statute "treads in an area where constitutional concerns have given rise to a special rule of statutory interpretation," even though the statute is actually constitutional under any possible interpretation.[89] The paradigmatic examples are "clear statement" rules. For example,

> In light of the subconstitutional principle that Congress must act clearly when it desires to "alter the usual constitutional balance between the States and the Federal Government," . . . a state official acting in an official capacity is not a "person" [under 42 U.S.C.] § 1983 when sued for damages. . . . [but is a] "person" when sued for injunctive relief.[90]

Additional clear statement rules include (1) the requirement of a clear statement before judicial review of agency action or habeas corpus jurisdiction is foreclosed,[91] (2) the requirement of a clear statement before statutes are interpreted as conflicting with international law,[92] (3) the criminal rule of lenity,[93] and (4) the immigration rule of lenity.[94] As courts increasingly rely on such canons of construction, the urge to employ subconstitutional polymorphism grows.

3. Policy Polymorphism

Courts sometimes engage in polymorphism without invoking any canon of construction, such as when they "construe statutory text in different ways as is necessary under different circumstances to achieve desirable results."[95] Presumably, this exemplifies the sort of judicial creativity against which Justice Scalia rails.[96] However, as discussed in Part IV.A, such policy polymorphism is defensible in the administrative context because agencies are expected to make policy via adjudication.

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89. *Id.* at 359.

90. *Id.* at 361–62 (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65, 71 n.10 (1989)).

91. *See* INS v. St. Cyr, 533 U.S. 289, 298 (2001) ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." (footnote omitted)).

92. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

93. *See* Siegel, *supra* note 21, at 345–46 (discussing rule of lenity as it relates to polymorphism).

94. *See generally* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515 (2003) (discussing the interaction of the immigration rule of lenity and the *Chevron* rule of deference).

95. *See* Siegel, *supra* note 21, at 362.

96. *See supra* text accompanying note 33.

4. Stare Decisis Polymorphism

Sometimes courts "avoid having a prior error control a statute's further applications [by c]onfining the effect of prior errors . . . through application of the polymorphic principle."[97] As discussed in Part IV.B, this form of polymorphism is indefensible in the administrative context because agencies are permitted, even expected, to change policies over time, obviating the need for such interpretive techniques.

B. Is Judicial Polymorphism Legitimate?

1. Faithful Agents

Professor Siegel argues that the polymorphic principle is anything but "dangerous," as Justice Scalia would have it.[98] In fact, he suggests, the Framers intended judges to exercise this type of interpretive discretion, and courts are even more "faithful agents"[99] of Congress when they judiciously adopt polymorphism.

To Justice Scalia's claim that courts should interpret statutes as faithful agents of Congress and refrain from policymaking, Professor Siegel responds that Article III's vesting of the "judicial Power" means that "the Framers and ratifiers would have understood that they were entrusting the courts with some degree of discretion."[100] Thus, Justice Scalia's position "rel[ies] on a textually and historically inappropriate understanding of the Constitution."[101] Moreover, Professor Siegel reminds us that "[t]he polymorphic principle does not involve departure from statutory text, but only giving statutory text meanings that it can bear."[102] Here Siegel may be on thinner ground, as the decision in *Zadvydas* reveals: it is difficult to disagree with Justice Kennedy's observation that the *Zadvydas* majority's interpretation—which imposed a temporal limitation—"bears no relation to the text" and was simply "invented by the Court."[103] Nevertheless, as discussed below, if a faithful *judicial* agent may choose between multiple interpretations that "lie[] within the ordinary realm of construction," *a fortiori* agencies may do so, given their acknowledged authority to choose

97. *See* Siegel, *supra* note 21, at 364.
98. *Id.* at 341.
99. *See* Manning, *supra* note 80, at 5 (discussing arguments that the Constitution requires federal judges to be "faithful agents" of Congress).
100. Siegel, *supra* note 21, at 373 (citing William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001)).
101. *Id.* at 374.
102. *Id.* at 376.
103. Zadvydas v. Davis, 533 U.S. 678, 707–08 (2001) (Kennedy, J., dissenting).

between reasonable constructions of ambiguous statutes.[104]

To Justice Scalia's charge that polymorphism inflates judicial discretion, Professor Siegel counters that unitarianism, while avoiding one judicial choice (the option to interpret the same phrase differently in the next case) nevertheless "yields [another] high-stakes judicial choice": the initial decision not to embrace polymorphism at all.[105] Justice Thomas would agree, as he believes that unitarianism encourages, rather than constrains, judicial creativity.[106] Furthermore, as mentioned above, unitarianism may frustrate congressional intent: it invalidates even those applications of a statute which would pose no constitutional (or other) concerns.[107] In all, there are good reasons to be skeptical of Justice Scalia's claim that only unitarianism is consistent with the proper judicial role.

2. Prudential Standing Requirements

Polymorphism also has the virtue of upholding prudential standing requirements. While constitutional standing requires that a party suffer a personal, distinct injury that is fairly traceable to the defendant's allegedly unlawful conduct and that would be redressable by a decision granting the requested relief,[108] the Court has also articulated prudential requirements, including the prohibition on third-party standing: "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."[109] As a prudential rather than constitutional limit on standing, this principle is subject to exceptions: Congress may override it by statute;[110] standing may be granted when enforcing the statute against the litigant would injure both the litigant himself and actually and simultaneously infringe upon the constitutional rights of a third party;[111]

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104. Siegel, *supra* note 21, at 376.

105. *Id.* at 377–78.

106. *See supra* note 29 and accompanying text.

107. *See* Siegel, *supra* note 21, at 382 ("Thus, the strong unitary principle had the effect of extending the violence that the [*Zadvydas*] Court had initially done to the statute into further applications where it might not have been necessary under the avoidance doctrine alone.").

108. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)).

109. United States v. Raines, 362 U.S. 17, 21 (1960).

110. *See* Warth v. Seldin, 422 U.S. 490, 509 (1975) (explaining that "this rule of judicial self-governance is subject to exceptions, the most prominent of which is that Congress may remove it by statute").

111. This is *jus tertii* standing. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 194–95 (1976) (granting standing to saloon owner financially harmed by application of law which prohibited eighteen- to twenty-one-year-old men from purchasing "near beer").

and, in the First Amendment context and occasionally elsewhere, courts grant standing to a claimant to whom a law is constitutionally applied if there is a possibility of its unconstitutional application to hypothetical third parties.[112]

Unitarianism is in considerable tension with prudential standing requirements. When a court is confronted with a petitioner for whom no constitutional concerns are raised (e.g., the inadmissible alien), the unitarian's consideration of other potential applications of the statute violates the prohibition of *United States v. Raines*.[113] As Justice Thomas protested in *Clark*, "A litigant ordinarily cannot attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances."[114]

Absent statutory override, such consideration would be justified only by *jus tertii* standing or the doctrine of overbreadth. The *jus tertii* exception would not apply because the inadmissible alien, unlike the saloon owner in *Craig v. Boren*, is not legally harmed by application of the statute to him: in the eyes of the law, his ongoing detention is a justifiable civil administrative detention resulting from adequate procedures.[115]

The inadmissible alien's position does resemble an overbreadth claim in that he contends that the statute is constitutionally applied to him but it is unconstitutionally applied to hypothetical third parties.[116] But this is not similar to the First Amendment context: there are no concerns about chilling constitutionally protected activity or invidious enforcement.[117] Similarly, even if Professor Fallon is correct that the Supreme Court tends to grant third-party standing when the third party's assertion of rights seems meritorious,[118] the Court would not grant an inadmissible alien—legally "outside" of the United States—Fifth Amendment protection.[119] True, the LPR and inadmissible alien have an identity of interests, i.e., not

112. This is the First Amendment overbreadth doctrine. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (requiring, in addition, that overbreadth be "real," aimed at expressive conduct, and "substantial . . . judged in relation to the statute's plainly legitimate sweep").

113. *See supra* note 109 and accompanying text.

114. Clark v. Martinez, 543 U.S. 371, 396 (2005) (Thomas, J., dissenting). Again, this view is consistent with Justice Scalia's own position on the doctrine of overbreadth. *See supra* note 35 and accompanying text.

115. *See* Zadvydas v. Davis, 533 U.S. 678, 718–19 (2001) (Kennedy, J., dissenting) ("No party to this proceeding contests the initial premise that the aliens have been determined to be removable after a fair hearing under lawful and proper procedures. . . . [A]liens like Zadvydas and Ma do not arrive at their removable status without thorough, substantial procedural safeguards.").

116. *See supra* note 112 and accompanying text.

117. HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 13, at 188.

118. *See id.* at 176 (discussing Fallon's argument).

119. *See supra* note 3 and accompanying text.

being deported except pursuant to a constitutional law,[120] and this sometimes persuades the Court to grant third-party standing.[121] But given the absence of any structural impediment to the LPR's assertion of his own rights,[122] and the unlikelihood of the inadmissible alien's success on the merits, the Court would almost surely reject the inadmissible alien's bid for third-party standing.

Nevertheless, there may be other bases for determining that the inadmissible alien has standing. Observing that the characterization of a claim as first- or third-party depends on the definition of the substantive right at issue, Professor Monaghan has attempted to redefine third-party claims as first-party claims that certain restrictions "directly impair [a claimant's] freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction."[123] For example, a white resident of a racially homogenous housing complex may have standing to sue the landlord for race discrimination due to his "embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as [a] resident[] of a 'white ghetto.'"[124] But this effort does not translate to the typical polymorphic context. What distinct, legally cognizable interest does the inadmissible alien have in interacting with the LPR?

More promising is Professor Fallon's challenge to prudential standing requirements, which builds on Professor Monaghan's work.[125] Fallon argues that every person has a personal constitutional right to be sanctioned pursuant to a constitutionally valid rule of law.[126] Under this theory, the inadmissible alien could claim that the statute at issue in *Zadvydas* and *Clark* would be unconstitutional if it authorized the indefinite detention of

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120. This theory is described in greater detail below.

121. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 192–97 (1976); Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

122. *See* Barrows v. Jackson, 346 U.S. 249, 257–60 (1953) (granting standing to white vendor of land in violation of racially restrictive covenant to assert third-party prospective buyers' constitutional rights in part because it would be difficult or impossible for such buyers to raise the challenge).

123. *See* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 299 (1984).

124. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972).

125. *See* Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3 (arguing that the First Amendment overbreadth doctrine reflects the general notion that all petitioners have the right to be adjudicated under a valid rule of law).

126. Fallon, *As-Applied*, *supra* note 13, at 1331–32 (arguing that under *Marbury v. Madison* citizens have a personal constitutional right to be prosecuted by constitutionally valid laws); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 243 & n.31 (1994) (agreeing with Monaghan and Fallon that the Constitution "permits only the application of constitutional rules," but arguing that "this conclusion is by no means self-evident" and, in fact, "none of the cases Monaghan cites stands for the proposition that there is a right to be judged by a valid rule").

an LPR. Therefore, the statute is an invalid rule of law which may not be applied to him.[127] However, polymorphism defeats this objection, thereby upholding the prudential restriction on third-party standing. If a statute's meaning may change as applied to different people, the statute—read polymorphically—would not authorize the indefinite detention of an LPR. Therefore, it is a valid rule of law.

Because the prohibition on third-party standing is prudential, it cannot be said that the Constitution mandates polymorphism. But an interpretive technique that is consistent with existing and long-standing prudential rules of standing is certainly preferable to an approach that necessitates yet another ill-defined exception. Of course, as discussed below,[128] constitutional and prudential standing requirements do not apply in the administrative agency context and so this argument in favor of polymorphism is limited to the purely judicial context.

3. Litigation Sequence

Perhaps most importantly, polymorphism ensures that the sequence of litigation is not dispositive. As the Introduction to this Article shows, it would be strange indeed if the constitutionality of an inadmissible alien's detention depended solely on the sequence of litigation.[129] Had the inadmissible alien first challenged the constitutionality of the detention statute on Fifth Amendment grounds, the Supreme Court would have rejected the claim.[130] Yet, when the LPR first challenges the statute and the Court reads in the temporal limitation (as in *Zadvydas*), a unitarian would then be forced to grant the inadmissible alien the same reading. But polymorphism avoids this problem: if the inadmissible alien came first, the court could reject his claim and only later read in the temporal limitation in response to the LPR's challenge. If the LPR's challenge came first, the court would read in the temporal limitation and then reject the inadmissible alien's later bid for the same interpretation.

C. Further Challenges to Judicial Polymorphism

Despite these benefits, there are still significant drawbacks to

127. *Cf.* Metzger, *supra* note 78, at 893 n.91 (arguing that "nothing . . . precludes a litigant from using the constitutionality of a statute's application to others as a basis for arguing that the statute be given a particular construction *as it applies to her*" because "[i]n so doing, she is simply asserting her own rights to be judged by a valid rule of law").

128. *See infra* notes 314–316 and accompanying text (discussing agency standing rules).

129. *Cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.").

130. *See supra* notes 1–3 and accompanying text.

polymorphism. Although Professor Siegel responds to Justice Scalia's arguments concerning the proper role of the federal Judiciary, he neglects additional challenges to polymorphism, including the possibility that polymorphism is contrary to the rule of law and raises equal protection and due process concerns.

1. Rule of Law

At the highest level of generality, the rule of law requires the "supremacy of regular as opposed to arbitrary power."[131] While more specific definitions are contestable, Professor Fallon lists the "traditional desiderata" of the rule of law as including comprehensible legal rules or standards, doctrinal stability, the binding of governors as well as the governed, and judicial enforcement of the law through fair procedures.[132]

Polymorphism seems to conflict with this emphasis on guidance, stability over time, and predictability. After all, as *Zadvydas* and *Clark* exemplify, the meaning of a statute turns on the "pedigree of the petitioner":[133] the phrase "may be detained" is unbounded if the petitioner is an inadmissible alien but bounded if applied to an LPR. This is in tension with the "historicist" conception of the rule of law, which requires the promulgation of clear rules prior to their application to individual cases.[134] It also runs afoul of the "formalist" notion of the rule of law, which demands clear rules capable of guiding the conduct of rational actors.[135] After all, it is difficult for citizens to know in advance whether they possess a salient characteristic that might trigger a differential reading.[136] Polymorphism, it seems, "render[s] the meaning of any statute as changeable as the currents of the sea, and potentially as cruel and capricious."[137]

Polymorphism raises these issues because it empowers courts to self-consciously change the meaning of a statute through its application. However, there may be less of a problem here than meets the eye. In some

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131. BLACK'S LAW DICTIONARY 1359 (8th ed. 2004).

132. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8–9, 55 (1997); *see also id.* at 1 (cautioning that the meaning of the rule of law is "less clear today than ever before," and concluding that "the Rule of Law needs to be understood as a concept of multiple, complexly interwoven strands").

133. Chmakov v. Blackman, 266 F.3d 210, 215 (3d Cir. 2001).

134. Fallon, *supra* note 132, at 11.

135. *Id.* at 15–16 (discussing, among other authorities, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989)).

136. Of course, with respect to constitutional avoidance, this is as much a complaint about the ambiguity of constitutional law as it is a complaint about statutory ambiguity and polymorphism.

137. *Chmakov*, 266 F.3d at 215.

situations, it may not be so difficult for regulated individuals to know whether they possess a salient characteristic. For example, regardless of whether his case arose before or after the LPR's case, it would not have surprised Clark's lawyer that his client's immigration status was relevant to the constitutionality of the immigration detention.

Moreover, polymorphism is consistent with a competing notion of the rule of law, the legal process version. This view emphasizes procedural fairness in the creation and application of legal norms, "reasoned elaboration of the connection between recognized, pre-existing sources of legal authority and the determination of rights and responsibilities in particular cases," and judicial review to ensure procedural fairness.[138] Importantly, legal process theory does not require "rules that pre-exist the occasions of their application," and so on this account, a central criticism of polymorphism subsides.[139]

2. Equal Protection

Equal protection issues may arise when the meaning of a statute changes based on constitutionally protected characteristics. For example, suppose a peremptory norm of international law requires nations to permit women to purchase drug X for use as birth control. In the United States, drug X is also used to produce a popular yet medically untested dietary supplement. Suppose Congress passes a federal law that bans the sale of all products containing drug X based on the perceived health risk of the dietary supplement. If a woman challenges this law because it prevents her from purchasing contraceptives made with drug X, a court might rule that because Congress is presumed to not pass laws which violate international law,[140] an exception should be implied in the statute for sales of contraceptives made with drug X. What then of a man's claim for access to dietary supplements containing drug X? If the court rejects his claim, the statute's meaning now turns on the gender of the petitioner. Would this survive intermediate scrutiny?[141] What if the distinction turned on the petitioner's race? Would it survive strict scrutiny?[142]

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138. Fallon, *supra* note 132, at 18.

139. *Id.* at 19.

140. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

141. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (requiring statutes discriminating on the basis of gender to serve "important governmental objectives and . . . substantially relate[] to achievement of those objectives") (citing Reed v. Reed, 404 U.S. 71, 75–77 (1971)).

142. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (requiring statutes discriminating on basis of race to be "narrowly tailored" to "compelling" governmental interests). It is possible that the interests served by judicial polymorphism—making courts more faithful agents, upholding prudential standing requirements, and

Situations like this may be rare, but they do suggest that in some instances polymorphism is inappropriate.

3. Due Process

Polymorphism also raises due process concerns. Imagine that the initial petitioner is like Clark, someone for whom no constitutional issues are presented. If Clark correctly assumes that the court will proceed polymorphically, he has no incentive to raise Zadvydas's constitutional claim because it does him little good to persuade the court that the statute would be unconstitutional as applied to Zadvydas. Therefore, Clark would refrain from raising that argument and instead would argue—unsuccessfully—that the statute is unconstitutional as applied to him.

But what about Zadvydas's interests? Suppose that the court ruled that the statute is constitutional as applied to Clark, but also ruled that it is constitutional as applied to the absent Zadvydas.[143] The court might not have reached this result had it ever heard from Zadvydas. In other words, it hardly seems fair to Zadvydas that the polymorphic court construed the statute as applied to him differently than it would have had Zadvydas challenged the statute first. Because Clark rightly assumed that the court would proceed polymorphically, he had no reason to raise Zadvydas's best arguments except to the extent that they overlapped with his own. Thus, polymorphism enables the court to effectively decide Zadvydas's case without hearing his best arguments.[144]

This raises due process concerns. Because a judicial decision is always made "in light of the proofs offered by the parties and the evidence noticed by the judge," it "may have been made in light of a deficient evidence

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preventing litigation sequence from being outcome determinative—are compelling state interests to which polymorphism is narrowly tailored. But given the Court's stringent definition of compelling state interests, and its usual conception of a compelling interest as a policy objective rather than an interpretive ideal, this is unlikely.

143. A polymorphic court could refrain from interpreting the statute as applied to the absent Zadvydas so long as it explained that its interpretation with respect to Clark does not require the same interpretation in the future with respect to Zadvydas.

144. Of course, most would agree that the *Clark* Court's statements regarding the absent *Zadvydas* would be dicta, as they were unnecessary to the holding of the *Clark* case. *See* BLACK'S LAW DICTIONARY 1102 (8th ed. 2004) (defining *obiter dictum* as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)"). *But see* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 959 (2005) (arguing that "a core element in the definition of holding, necessity is itself not necessary and might not even be sufficient to ensure holding status to a given proposition" (citations omitted)). *See generally* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994). However, insofar as dicta is considered for its persuasive value, this would at least mean that Zadvydas would have to persuade the court to change its mind.

set."[145] For this reason, "[a] subsequent party must be free to argue that the previous evidence set was deficient," otherwise there may be "the injustice of punishing parties for the bad lawyering (or bad luck) of previous parties."[146] The risk of this injustice is particularly acute where the initial decision commanded a mere "plurality" because, as this Article has shown, even minor variations in the "evidence set" could make all the difference.[147]

By contrast, there are fewer due process concerns for Zadvydas where Clark correctly assumes that the court is unitarian. In that situation, Clark has the incentive to argue that the statute is unconstitutional as applied to Zadvydas because if he is right, he is entitled to the same construction. But suppose that Clark is mistaken about the court's methodology. If Clark believes that the court is polymorphic, he has no incentive to raise Zadvydas's constitutional arguments. But if the court actually is unitarian, absent briefing on the constitutional concerns raised in Zadvydas's case the court may rule that there are no constitutional infirmities with the statute at all. When Zadvydas challenges the statute in the future, it would be difficult to persuade the court to reconsider its prior ruling. This raises similar due process concerns.[148]

Still, most would agree that "an interpretation is legally 'true' to the extent that it accurately predicts or describes the behavior of official agents . . . ."[149] Therefore, to the extent that the Judiciary publicly embraces polymorphism, such due process qualms subside.[150]

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145. Lawson, *supra* note 22, at 903.

146. *Id.* at 903–04.

147. *See supra* notes 69–73 and accompanying text (explaining how a minor change in a party's circumstances can alter the interpretation of a statute fundamentally). As mentioned, these concerns would not arise if the court simply dismissed Clark's claim while reserving the question of the statute's meaning in Zadvydas's case. *See supra* note 143. For a discussion of this technique and its implications for hybrid polymorphism, *see infra* Part V.

148. In the reverse scenario—where Clark incorrectly assumes that the court is unitarian—he would raise Zadvydas's constitutional claims and the court would rule that the statute was constitutional as applied to Clark but unconstitutional as applied to Zadvydas.

149. Lawson, *supra* note 22, at 879 (emphasis omitted); *see* Oliver Wendell Holmes, *The Common Law*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES 109, 149 (Sheldon M. Novick ed., Univ. of Chicago Press 1995) (1881) (suggesting the "bad man" needs only to concern himself with likelihood of detection and the predicted penalty, in other words, official behavior).

150. *Cf.* Dorf, *supra* note 144, at 2028 ("[T]he reliance argument . . . is circular. If it were definitively established that courts would treat only the facts and outcomes of cases as establishing precedents, then no one could reasonably rely on judicial rationales." (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 608 (2d ed. 1988)).

There are strong arguments for judicial polymorphism, including faithfulness to the proper judicial role, the preservation of standing requirements, and ensuring that litigation sequence does not affect the outcomes of cases. However, polymorphism does raise potential, albeit not overwhelming, constitutional and rule-of-law concerns. Still, "[i]n appropriate cases, the Supreme Court, lower courts, and individual judges and Justices have all applied the polymorphic principle, expressly, impliedly, and tacitly."[151]

But is polymorphism similarly ubiquitous in the administrative state, where courts share their interpretive tasks with agencies?

III. AGENCY POLYMORPHISM

Professor Siegel considers only judicial polymorphism, that is, situations where the first and second interpreters are courts.[152] But in the administrative state, agencies and courts flesh out statutes in partnership. Part III explores agency polymorphism, providing examples of the phenomenon and presenting a two-by-two matrix to assist analysis. As shall be seen, polymorphism has made inroads in the administrative state and has generated complex questions concerning adjudicative methodology and the separation of powers.

A. Polymorphism in the Administrative State

Professor Trevor Morrison has reported that "the avoidance canon appears fairly often in the work of at least some executive [agencies]," such as the Federal Communications Commission, the Federal Energy Regulatory Commission, the Office of Personnel Management, and the Office of Legal Counsel.[153] And as for the Judiciary,

> from the jurisprudential inception of the modern, federal administrative state in the New Deal, the doctrine [of constitutional avoidance] has served as a mechanism by which the Court invalidates agency rules, orders or actions on constitutional grounds, while leaving open the possibility that statutes with the same or similar content might be upheld.[154]

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151. Siegel, *supra* note 21, at 365.

152. *See id.* at 341 ("[*C*]*ourts*, including the Supreme Court, have applied the . . . principle that a single term or phrase in a single statutory provision may have multiple meanings.") (emphasis added).

153. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1218 (2006).

154. Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 863 & nn.281–82 (1997) (recounting instances where the Court invokes the constitutional avoidance doctrine in limiting federal agency action involving civil liberties).

Perhaps encouraged by the increased importance of canons of construction to the Supreme Court's own jurisprudence,[155] federal agencies often rely on similar interpretive tools in making rules and adjudicating cases. And where there's canonical smoke, there's polymorphic fire.[156]

1. Nadarajah v. Gonzales

An example of agency polymorphism and an unreceptive judicial response is the Ninth Circuit's decision in *Nadarajah v. Gonzales*.[157] Fleeing torture in Sri Lanka, Ahilan Nadarajah arrived in the United States and was granted asylum, withholding of removal, and relief under the Convention Against Torture by an immigration judge (IJ).[158] The Board of Immigration Appeals (BIA)[159] granted the government's motion to reopen Nadarajah's case based on new evidence.[160] During the second round of proceedings, an immigration agent testified that on the basis of reliable information, it "would have been impossible for [Nadarajah] to exit the area" of Sri Lanka where he had previously lived "without the approval and assistance of [a terrorist group]."[161] The agent therefore concluded that at minimum "Nadarajah must have been at least affiliated with the

155. *See* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 29–31 (1998) (stating that the Supreme Court in the October 1996 term cited at least one canon of construction in fifty-six percent of all majority opinions, and concluding that "the canons used in several opinions offer support for the claim that these rules afford judges considerable policymaking discretion"); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596–97 (1992).

> One theme is that as the Supreme Court grew less activist in constitutional interpretation during the 1980s, it grew correspondingly more activist in statutory interpretation. That is, the Court in the 1980s became somewhat more reluctant to apply constitutional rules to prohibit state and federal legislative action, but somewhat more stingy about interpreting federal statutes, often basing its analysis upon constitutional concerns. Like the Court in the 1970s, the current Court expresses its constitutional concerns through "presumptions" that can be rebutted by statutory language, legislative history, and overall purpose, as well as through "clear statement rules" that can only be rebutted by clear statutory text.

Id. (internal citation omitted).

156. *See supra* note 83 (noting appeal of polymorphism when constitutional avoidance or other interpretive canons are implicated).

157. 443 F.3d 1069 (9th Cir. 2006).

158. *Id.* at 1071–73.

159. The Board of Immigration Appeals (BIA) is the appellate body within the Department of Justice that reviews decisions of the Executive Office for Immigration Review, the administrative court of first instance in removal proceedings. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication" (internal quotation marks and citation omitted)).

160. *Nadarajah*, 443 F.3d at 1073.

161. *Id.* at 1073–74.

[group]."[162] The agent also testified that he learned from an informant that Nadarajah made a phone call from a U.S. detention facility to order the execution of someone in Canada.[163] Despite this new evidence, the IJ upheld its prior grant of asylum.[164] On administrative appeal, the BIA initially upheld the IJ's decision. But "in an unusual move," the Chairperson of the BIA referred the case to the Attorney General, "'seek[ing] guidance from the Attorney General on whether he wishes to exercise his discretion and de novo review authority in this case of national interest . . . .'"[165] The stated "national interest" was the possibility that Nadarajah was a terrorist affiliated with the group.

Meanwhile, Nadarajah petitioned for a writ of habeas corpus, seeking release on parole. The district court denied his petition.[166] On appeal, the government argued that two immigration detention statutes authorized his ongoing detention.[167] One statute provides, "If the [asylum] officer determines at the time of the interview [upon arrival in the United States] that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum."[168] The second provides, "[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained [for further statutory proceedings]."[169] Similar to the statute at issue in *Zadvydas* and *Clark*,[170] these statutes both state that the alien "shall be detained" in terms qualified only by the requirements of "further consideration" and further statutory proceedings, respectively.

As the government argued in *Clark*, under current precedent the indefinite detention of some categories of aliens would not raise constitutional concerns. In fact, in *Zadvydas* the Supreme Court had suggested in passing that the ongoing detention of suspected terrorists might not raise the same (or any) constitutional concerns as those raised by the indefinite detention of LPRs.[171] Therefore, the polymorphic argument

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162. *Id.* at 1074.

163. *Id.* Note that because the Federal Rules of Evidence do not apply in immigration court, the agent's testimony raised no issue of hearsay.

164. *Id.* at 1074–75.

165. *Id.* at 1075 (quoting BIA Chairperson referral) (alteration in original).

166. *Id.*

167. *Id.* at 1076.

168. 8 U.S.C. § 1225(b)(1)(B)(ii) (2006).

169. *Id.* § 1225(b)(2)(A).

170. *See id.* § 1231(a)(6) (providing that aliens "may be detained beyond the removal period").

171. *See* Zadvydas v. Davis, 533 U.S. 678, 691 (2001) ("The provision authorizing detention does not apply narrowly to 'a small segment of particularly dangerous individuals,' say, suspected terrorists, but broadly to aliens ordered removed . . . .") (citation

might go, these immigration detention statutes may be seen as authorizing the indefinite detention of aliens who are suspected of terrorist activity, such as Nadarajah, even though the same statutory language could be read differently as applied to LPRs, whose indefinite detention would raise serious constitutional concerns.

The Ninth Circuit began its discussion by explicitly endorsing the relevance of the canon of constitutional avoidance to Nadarajah's case,[172] perhaps signaling that it was prepared to proceed polymorphically. After all, the panel might have decided that it could uphold the denial of habeas corpus on the ground that Nadarajah was a suspected terrorist (and thereby comply with the dictum in *Zadvydas*), relying on the canon of constitutional avoidance to narrow the statute in the future as applied to aliens without suspected terrorist links.

Instead, the panel followed the Supreme Court's approach in *Clark*, ruling that "the holding and reasoning in *Clark*" required it to treat all detentions authorized by the same statute similarly.[173] In embracing unitarianism, the Ninth Circuit rejected the government's argument that such provisions could be read literally with respect to suspected terrorists and differently in all other situations. Instead, the panel found that the statutory language did not admit of a distinction between different types of noncitizens.[174] Therefore, the panel imported *Zadvydas*'s temporal limitation and ruled that the limitation applies to all noncitizens detained under the statute.[175]

2. In re Orrett Clinton Lindo

Perhaps responding to *Nadarajah*, the BIA appears to have embraced *Clark*'s unitarianism in a series of decisions. *In re Orrett Clinton Lindo* raised the question of whether a removable alien was statutorily barred from relief from removal because of a state law conviction for illegal

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omitted); *id.* at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.").

172. *See* Nadarajah v. Gonzales, 443 F.3d 1069, 1076 (9th Cir. 2006) (noting that the governing canon required that "a statute . . . be construed so as to avoid serious doubts as to the constitutionality of an alternate construction").

173. *Id.* at 1077–78.

174. *Id.* ("[B]ecause these statutes are not limited to such applications, they cannot be read to authorize the indefinite detention of supposed terrorists but only the brief detention of all others.").

175. *Id.* at 1078. Note that because Congress empowered the Attorney General to detain certain noncitizens of national security interest for longer periods of time provided that additional procedural safeguards are met, the panel's decision did not strip the government of the power to continue to detain aliens suspected of terrorism. *Id.* at 1078–79.

possession of narcotics.[176] Under the immigration laws, if Lindo was convicted of an *aggravated felony* he would be precluded from most forms of relief from removal. Under BIA precedent, the status of a state law offense as a drug trafficking crime, which is one type of an aggravated felony, is determined by the case law of the controlling U.S. court of appeals.[177] In the Second Circuit—the controlling circuit court—state law felonies involving only the simple possession of controlled substances qualify as aggravated felonies for sentencing purposes but not for immigration purposes.[178] This bifurcated[179] approach bears clear traces of polymorphism. This is especially true because the immigration law definition of "aggravated felony" itself refers directly to "illicit trafficking in a controlled substance (as defined in section [102 of the Controlled Substance Act])," the analogous federal statute.[180]

Notwithstanding the Second Circuit's polymorphic impulses, the BIA relied on *Clark* to conclude that unitarianism was required:

> [E]ven if we assume that the Second Circuit continues to interpret the language of section 101(a)(43)(B) differently in the criminal and immigration contexts, the validity of that approach is in serious question in light of intervening Supreme Court precedent indicating that provisions of the Immigration and Nationality Act are not subject to varying interpretations depending on context. *Clark v. Martinez*, 543 U.S. 371, 378, 386 (2005) (refusing to countenance varying interpretations of the indefinite detention provision . . . based on the admissibility of the alien because such variability "would be to invent a statute rather than interpret one" and "would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases") . . . .[181]

Here we find an example of an administrative agency purporting to override governing circuit case law in the name of a strong unitarian approach it believes the Supreme Court has mandated.[182] The implications

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176. *In re* Orrett Clinton Lindo, 2006 WL 2427912 (B.I.A. July 21, 2006) (unpublished decision).

177. *See In re* Ismael Yanez-Garcia, 23 I. & N. Dec. 390, 397 (B.I.A. May 13, 2002), http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3473.pdf (holding that "in those circuits that have spoken, the determination whether a state drug conviction constitutes a 'drug trafficking crime' . . . and therefore an aggravated felony . . . shall be made by reference to applicable circuit law . . . .").

178. *See* Aguirre v. INS, 79 F.3d 315 (2d Cir. 1996).

179. *Lindo*, 2006 WL 2427912.

180. 8 U.S.C. § 1101(a)(43)(B) (2006).

181. *Lindo*, 2006 WL 2427912 (quoting Clark v. Martinez, 543 U.S. 371, 378, 386 (2005)).

182. And *Lindo* is but one of many. *See, e.g.*, *In re* Donald Overton Powell, 2006 WL 3485636 (B.I.A. Oct. 20, 2006) (unpublished decision) (deciding that Powell's "second conviction for possession of a controlled substance qualifies as a conviction for drug trafficking crime" and therefore constitutes an "aggravated felony" in light of *Clark*).

of this divergence will be explored below.

B. Systematizing Agency Polymorphism

As the above discussion suggests, polymorphism has seeped into administrative law. In an effort to capture this phenomenon systematically, the matrix below portrays four scenarios in which agency polymorphism might arise. The top row describes situations where a court interprets a statute first, and the bottom row describes situations where an agency does so first. The left column describes situations where a *Zadvydas*-like petitioner's case arises first (Z)—that is, a case brought by a petitioner triggering the concerns of the relevant canon of construction. The right column describes situations where the *Clark*-like petitioner (C) comes first—the petitioner who does not trigger the canon. The purpose of this scheme is not to exhaust every possible issue that might arise within each segment. Rather, the matrix highlights some complex questions concerning agency polymorphism.

I. Z (court) then C (agency)	**II.** C (court) then Z (agency)
III. Z (agency) then C (court)	**IV.** C (agency) then Z (court)

1. Quadrant I

In this scenario, the LPR argues before a court that his indefinite detention would violate the Constitution, and so the court must strike down or limit the statute. Because "[a] court has no choice but to adopt its own preferred construction of an ambiguous provision in an agency-administered statute when the agency has not announced an interpretation to which the court can defer,"[183] the court decides this question de novo.

Subsequently, the inadmissible alien would argue that he deserves the same interpretation. A decision like *Zadvydas* would likely not satisfy the *Brand X* criterion for a judicial decision that will trump a subsequent, conflicting agency interpretation—"a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill . . . ."[184] Given the *Zadvydas*

183. Pierce, *supra* note 66, at 601 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005)).

184. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005). In *Brand X* the Court ruled, "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior

majority's assurance that it would be "a very different case" were the petitioner not an LPR, it would be hard to conclude that the Supreme Court held that the statute could *only* mean that a temporal limitation was always required. Therefore, there would be a gap for the agency to fill, and the agency could reasonably refuse to extend *Zadvydas*'s interpretation to the inadmissible alien.

In fact, this will always be the dynamic when the relevant canon of construction deployed by the court requires statutory ambiguity. For example, before invoking the constitutional avoidance canon, a court must first determine that the statute is ambiguous.[185] (After all, without statutory ambiguity, such a purported "exercise in judicial restraint[] would trench upon the legislative powers vested in Congress.")[186] Therefore, in this scenario the agency could always claim that the fact that the court invoked the canon of constitutional avoidance in its decision necessarily means that the statute was ambiguous—at least in the court's eyes—and therefore, within the purview of the agency's authority to interpret.

It may be argued that although the *Zadvydas* Court determined that the statute was ambiguous *with respect to LPRs*, the holding does not mean that the statute is ambiguous with respect to inadmissible aliens. But this reading is hard to square with the undifferentiated statutory text;[187] textual ambiguity with respect to one group necessarily carries over to the other.[188] Nevertheless, in other situations, where the statute distinguishes between relevant categories of individuals, it may be that the statute is ambiguous as applied to one group but not the other.

In addition, statutory ambiguity may be in the eye of the beholder. Professor Morrison has persuasively argued that agencies act in "information-rich" environments—they "draw on sources of statutory

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court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982.

185. *See* Morrison, *supra* note 153, at 1194 ("As described by the courts, the avoidance canon applies only in circumstances of statutory ambiguity.").

186. United States v. Albertini, 472 U.S. 675, 680 (1985); *see also* Zadvydas v. Davis, 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting) (criticizing the majority's constitutional avoidance approach as "interpreting a statute in obvious disregard of congressional intent; curing the resulting gap by writing a statutory amendment of its own; . . . [and] caus[ing] systemic dislocation in the balance of powers").

187. It is also hard to square with the undifferentiated statutory text in *Nadarajah*. *See supra* note 174 and accompanying text.

188. *See Zadvydas*, 533 U.S. at 710 ("[I]t is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility."); *see also* Transcript of Oral Argument at 17–18, Clark v. Martinez, 543 U.S. 371 (2005) (No. 03-878) (Breyer, J.), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-878.pdf ("I don't see how to read the statute one way for one group of people and another way for another. . . . I haven't found a single case of this Court where you interpret these complicated words one way for one and another way for another.").

meaning not readily accessible to courts" because of their ongoing contact with Congress and the President—and therefore, agencies often decline to find statutory ambiguity and refrain from invoking constitutional avoidance.[189] For this reason, where a court found ambiguity, an agency might find clarity.[190]

This complicates the claim that because a prior court employed a canon of construction that requires ambiguity its decision necessarily fails the *Brand X* test. Ironically, if an agency's information-rich environment enables it to find clarity where a court found ambiguity, the agency would thereby disqualify itself for *Chevron* deference by failing *Chevron* step 1—as far as the agency is concerned, Congress *has* directly spoken to the precise question at issue. Of course, the reviewing court—perhaps due to its information-poor environment—might disagree, and instead conclude that the statute is, in fact, ambiguous. But having satisfied *Chevron* step 1 (because the court found statutory ambiguity), the court would then only inquire whether the agency's construction (which found no ambiguity) is reasonable (*Chevron* step 2). Oddly, the court could uphold the agency's conclusion, albeit for a different reason: the agency's construction of the statute as *unambiguous* was faulty, but nevertheless, the agency's interpretation was reasonable.[191]

If the agency reached this conclusion in the Quadrant I scenario, its most

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189. *See* Morrison, *supra* note 153, at 1241 ("This informational superiority may, in turn, bring clarity to otherwise ambiguous statutory language. When that occurs, there is no need for the avoidance canon."); *see also* Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 517 (2005) (observing how agencies that have been "heavily involved in the negotiation of statutory language" and "privy both to formal and informal legislative debates and . . . multiple motives that have prompted particular legislative utterances" will be able to more effectively interpret legislative history than courts); *id.* at 518 (describing how "the prudent American administrative agency may also seek political capital by constant attention to the preferences of the [political branches]").

190. *See* Morrison, *supra* note 153, at 1241 ("[A]n agency's access to, and familiarity with, extratextual sources of statutory meaning may often leave little or no room for constitutional avoidance."); *cf.* Adler, *supra* note 154, at 770 ("[A]gencies might have an *epistemic* advantage over courts on certain constitutional issues by virtue of the epistemic constraints that the very process of adjudication brings. . . . [A]rguments for [judicial] restraint . . . might be epistemic rather than democratic[:] . . . courts are epistemically imperfect in determining what [some constitutional criterion] requires" due to their focus on "particular parties and cases . . . .").

191. However, if the agency had deemed its interpretation to be mandated by federal case law—as opposed to the text of the statute—and a reviewing court disagreed with the agency on that point, the "ordinary remand rule" would require that the court declare that the agency's "error prevented it from a full consideration of the statutory question here presented," find that the agency "has not yet exercised its *Chevron* discretion to interpret the statute in question," and remand the case "for [the agency's] initial determination of the statutory interpretation question and its application to this case." Negusie v. Holder, 129 S. Ct. 1159, 1166–68 (2009).

extreme reaction would be to attempt to "overrule" the prior judicial determination with respect to *Zadvydas*-like petitioners. That is, because of its information-rich setting, the agency might well decide that the court simply got the initial statutory construction question wrong—that the statute unambiguously indicates that Congress *did* intend to permit the indefinite detention of LPRs, as well as inadmissible aliens. The agency here would be repudiating *Zadvydas*'s statutory holding, ruling instead that the statute is best interpreted to authorize such ongoing detention.[192]

Importantly, given its statutory ruling, the agency would then have to decide the constitutional question that *Zadvydas* avoided: is the indefinite detention of LPRs constitutional? If the agency answers yes, the following difficult question would be raised upon the alien's subsequent petition for a writ of habeas corpus in district court: under *Brand X*, where the Supreme Court construed a statute one way in order to avoid constitutional concerns, does the Court's finding of statutory ambiguity authorize an agency to subsequently interpret the same statute differently, albeit reasonably, even when applied to an identical petitioner? If the answer to that question is yes, then the agency could uphold the indefinite detention of *both* LPRs and inadmissible aliens.

Short of "overruling" the Court's holding that the statute, read to avoid constitutional concerns, does not authorize the unlawful detention of LPRs, the agency could conclude that the statute does authorize the indefinite detention of inadmissible aliens. To reach this conclusion, the agency would embrace polymorphism: the same statutory language would mean one thing as applied to LPRs and another as applied to inadmissible aliens. This is an approach agencies may be willing to take. For example, in *Nadarajah v. Gonzales*, the government suggested that aliens suspected of terrorism could be detained indefinitely under general detention statutes even though most other aliens could not.[193] However, as *Nadarajah* also indicates, polymorphism may find a chilly reception in federal court.[194] Indeed, it may be similarly unwelcome within the agency itself.[195]

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192. Recall that constitutional avoidance is often defended as a presumption about congressional intent. *See* HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 13, at 89 (explaining the underlying basis of avoidance canon as an assumption that Congress would not have wanted to legislate in constitutionally suspect ways). Therefore, if an agency were to conclude that Congress *did* intend to pass the constitutionally suspect version of the statute, the agency would be justified in interpreting the statute in light of Congress's manifest intent.

193. *See supra* note 171 and accompanying text (describing the polymorphic approach urged by the government in *Nadarajah*).

194. *See supra* notes 173–75 and accompanying text (discussing the Ninth Circuit's rejection of polymorphism and endorsement of *Clark*'s unitarian approach).

195. *See supra* notes 181–82 and accompanying text (identifying BIA's subsequent unitary approach).

2. Quadrant II

In the second quadrant, the petitioner who does not trigger the relevant canon of construction (Clark) challenges the statute in court, and subsequently the agency is faced with a claim by one for whom the canon is triggered (Zadvydas). There are many possible outcomes in this situation. If the court adopts the strong unitary principle urged by Justice Scalia, it would conclude that the "lowest common denominator" of the statute must govern and therefore Clark is entitled to a temporal limitation on his detention.

It would be reasonable to think that in the post-*Brand X* era, in order to bind the agency when faced with Zadvydas's subsequent challenge, the court would have to explicitly hold that the *only* meaning of the statute (not just its best meaning) is that there is a temporal limit for both inadmissible aliens and LPRs. However, this degree of judicial specificity is likely unnecessary. Suppose the court grants Clark's request for a temporal limitation on the statute in light of the constitutional concerns raised by its application to the absent Zadvydas. The agency could reasonably argue that this lowest-common-denominator approach does not pass muster under *Brand X* because the court effectively said that the best, but not the only, meaning of the statute was the reading resulting from the lowest-common-denominator approach. However, to prevent this decision from applying to Zadvydas, the agency would have to determine that there are no constitutional infirmities with the indefinite detention of an LPR, notwithstanding clear Supreme Court precedent to the contrary. In addition, the agency would surely perceive the absurd outcome of such a decision: LPRs, but not inadmissible aliens, could be detained indefinitely. Even if agencies are less adept at applying the avoidance canon than courts,[196] surely the immigration service would not reach such a conclusion. And even if it did, a reviewing court (that is, the *third* interpreter in this scheme) could summarily reverse the agency—not on precedential grounds, i.e., that the agency diverged from the initial court's interpretation, or on constitutional grounds, i.e., that LPRs may not be detained indefinitely, but simply for reaching an arbitrary and capricious decision.

But what if the court instead embraces polymorphism, expressly stating that (1) Clark could be detained indefinitely but (2) a future Zadvydas could not be given the relevant constitutional concerns? To what extent

196. Morrison, *supra* note 153, at 1218–19 (noting that while agencies often invoke the constitutional avoidance canon by claiming Supreme Court precedent requires its application, often "these pronouncements contain no discussion of the basis for the canon," are invoked in "summary fashion," and are ultimately "inadequate").

does the court's second statement bind the agency when Zadvydas challenges his indefinite detention? Here, polymorphism raises interesting questions about what it means to say that a statute has a single permissible meaning—rather than merely a "best" meaning—in the *Brand X* regime. For if the court's second statement is understood as a "judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill," then it is conclusive upon the agency.[197] In other words, in this case one could argue that the statute has two "single" meanings: a single meaning as applied to one group (inadmissible aliens) and a single meaning as applied to another (LPRs). If that formulation is tough to swallow, it is fair to say that when the agency considers the application of the statute to Zadvydas, if it is inclined to uphold his indefinite detention, the polymorphic court has already held "that the statute unambiguously forecloses the agency's interpretation" under *Brand X*.[198]

A better challenge to the court's second statement is that the court erred in reaching that question at all because it was not ripe. Under the Administrative Procedure Act, the ripeness inquiry involves two steps: (1) is the issue fit for judicial decision?; and (2) does the balance of hardships to the parties of withholding consideration counsel immediate resolution?[199] On the first prong, although the dispositive issue here is a pure legal question,[200] the adjudicator would surely benefit from additional fact finding,[201] which cuts in favor of judicial postponement.[202] On the second prong, the court's finding with respect to LPRs would adversely affect the agency because it would foreclose the agency from reaching its own conclusions as to the advisability and constitutionality of detaining LPRs. Furthermore, an LPR who is subsequently detained could then

197. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

198. *Id.* This raises the issue of whether dicta—in this example, the court's statement that the absent Zadvydas may not be detained indefinitely—can ever be considered a holding, as *Brand X* requires the court to have "[*held*] that the statute unambiguously forecloses the agency's interpretation." *Id.* For a discussion of the stare decisis effect of "considered dicta," see *supra* Part V.A.1.

199. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 153 (1967).

200. That is, whether the indefinite detention of an LPR is constitutional.

201. For example, relevant facts would include information regarding the likelihood of eventual release and the reasons for and the strength of the government's interest in detaining a particular LPR as opposed to all LPRs. Yet none of these factual dimensions could be developed in the scenario described here, where the court adjudicates the inadmissible alien's claim but also issues dicta regarding absent LPRs.

202. *Cf.* Lujan v. Nat'l Wildlife Fed'n., 497 U.S. 871, 891 (1990) ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out . . . .").

challenge his or her detention.[203] Therefore, the agency is most likely unconstrained by the court's gratuitous statement that future LPRs may not be detained indefinitely.

3. Quadrant III

In this scenario, the agency is presented with a *Zadvydas*-like petitioner for whom a given canon of construction would be triggered. But, assuming that the agency concludes the statute interpreted in light of the relevant canon requires one thing, what deference, if any, should a subsequent court pay to the agency's additional statements that the statute should mean something else as applied to someone else? For example, had the agency construed the statute in *Zadvydas* as not permitting the indefinite detention of LPRs, must a court defer to the agency's further statement that future inadmissible aliens should not benefit from that reading? This would amount to agency-mandated polymorphism, in that the agency would purport to impose its interpretive technique on the court.

Of course, the agency might instead embrace unitarianism, simultaneously deciding that the statute must be read the same way for future inadmissible aliens.[204] This raises an interesting question: Must a reviewing court that is itself inclined toward polymorphism defer to the agency's unitarianism? This situation creates a tension over methodology—the agency is purporting to tell the court how to interpret statutes—and a tension over policy, as the court may believe that the agency's unitarianism grants inadmissible aliens a windfall. Should courts stick to their polymorphic guns or must they defer?

The answer lies in recognizing that in this situation the agency reached its interpretation in light of its understanding of what Supreme Court precedent requires, and courts need not defer to such administrative determinations. That is, when the agency goes beyond the LPR's claims and attempts to dictate how the statute applies to inadmissible aliens, it does so either via the doctrine of constitutional avoidance or the unitary approach. In effect, the agency purports to tell the subsequent court either (1) constitutional avoidance does not require limits to the detention of inadmissible aliens or (2) unitarianism requires that inadmissible aliens benefit from the same construction. Although these are different outcomes,

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203. For this reason, this is not a situation in which future review is unlikely.

204. It is unlikely that an agency charged with effectuating removals under the Immigration and Nationality Act would ever reach such a liberal interpretation. Indeed, the Service's post-*Clark* litigation posture bears out this intuition. *See supra* notes 171–72 and accompanying text (describing the government's efforts in *Nadarajah* to use polymorphism to justify indefinite detention of alien suspected of terrorism).

in both scenarios the agency would invoke judicial precedent to support its position. But courts do not grant *Chevron* deference to an agency's statutory interpretation if it is based on the agency's understanding of judicial precedent.[205] Therefore, in either scenario, the court should decide for itself—de novo—what governing case law requires.[206] Even in the post-*Brand X* era, then, there are limits on agencies' ability to play such interpretive hardball.

4. Quadrant IV

In the fourth quadrant, an individual who triggers no canon-relevant concerns nevertheless argues to the agency that such concerns would arise in a different person's case. In all likelihood, the agency would reject this claim due to its mandate to enforce the statute to its permissible extent.[207] However, there could be exceptions. For example, suppose that an agency-administered statute provides for stiff civil penalties for its violation, such as a fine of $50,000. Recognizing the importance of ensuring that the regulated public receives clear notice as to what conduct is prohibited by such a quasi-punitive statute, the agency may conclude that it would be simpler and more fair to interpret the statute in a single way as applied to all, rather than attempting to overcome as-applied challenges on notice grounds at a later date.[208] Alternatively, if the agency proceeds polymorphically, it would declare—using *Zadvydas* as an example—that Clark could be detained indefinitely but a future Zadvydas could not. When the court then confronts Zadvydas's challenge, it would likely agree with the agency, whether out of deference or, more likely, its own independent reasoning.

* * *

Polymorphism has made inroads in the administrative state and, as the matrix shows, leads to complex questions concerning adjudicative methodology and the separation of powers.

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205. *See* Pierce, *supra* note 66, at 570 (citing Akins v. Fed. Election Comm'n, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998)).

206. In Part IV this is discussed as a benefit of agency polymorphism.

207. *See supra* note 204.

208. *Cf.* Negusie v. Holder, 129 S. Ct. 1159, 1168 (2009) (explaining that agency's interpretation of a statutory term on remand "may be influenced by how practical, or impractical, the standard would be in terms of its application to specific cases," a consideration that "may have relevance in determining whether its statutory interpretation is a permissible one").

IV. EVALUATING AGENCY POLYMORPHISM

Part II explored justifications for judicial polymorphism, including conceptions of the proper judicial role, standing, and litigation sequence. It also raised some constitutional questions about polymorphism. Part III then analyzed instances of agency polymorphism and reviewed four scenarios in which agency polymorphism may occur. This Part assesses agency polymorphism, revealing some of its distinct benefits and drawbacks.

A. Benefits of Agency Polymorphism

1. Faithful Agents and Agency Policymaking

Even those who agree with Justice Scalia that courts must be "faithful agents" of Congress,[209] which in turn requires unitarianism,[210] should feel differently about agency polymorphism. For Justice Scalia, the faithful agent ideal means that a court may not "make policy choices of its own."[211] On this account, polymorphism amounts to inappropriately "invent[ing] a statute rather than interpret[ing] one."[212] But agencies are empowered by Congress to select among many permissible interpretations of statutes.[213] Indeed, the entire premise of *Chevron* deference is that Congress expects agencies to fill in statutory gaps through policymaking.[214] And, as Professor Siegel rightly points out, "Justice Scalia is typically the Court's strongest vote to support the *Chevron* principle that an ambiguous provision in an administrative agency's organic statute constitutes a delegation of power to the agency to resolve the ambiguity . . . ."[215] Justice Scalia may well disagree with Siegel's claim that the "Framers and ratifiers would have understood that they were entrusting the *courts* with some degree of discretion,"[216] but surely he agrees that Congress grants such

209. *See supra* Part II.B.1.
210. *See supra* note 33 and accompanying text.
211. Siegel, *supra* note 21, at 371.
212. Clark v. Martinez, 543 U.S. 371, 378 (2005).
213. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
214. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.").
215. *See* Siegel, *supra* note 21, at 388 & n.245 (listing examples of Justice Scalia's embrace of *Chevron* deference); *see also* Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1726 (2006) (explaining that Justice Scalia "endorses a broad reading of *Chevron*, one that would generally defer to agency interpretations of law").
216. Siegel, *supra* note 21, at 373 (emphasis added).

discretion to agencies. And, as Professor Morrison has shown, if agencies sometimes engage in polymorphism to "sincerely attempt[] to reach the correct result under the applicable statute," then that exercise of discretion should be permitted.[217] Furthermore, although courts are unrepresentative,[218] agencies are politically accountable through the President.[219] Therefore, politically accountable agencies in the world of *Chevron* are immune from many of the charges lodged by the "faithful agent" camp.

A comparison of two examples from the matrix bears this out. Recall that in Quadrant I, a court first reads in a limitation of the statute as applied to a petitioner triggering the relevant canon of construction, and then the agency decides (polymorphically) that the limiting construction does not apply to a petitioner who does not trigger the canon.[220] For example, in *Nadarajah v. Gonzales*, the government suggested that aliens suspected of terrorism could be detained indefinitely under general detention statutes even though under settled judicial precedent other aliens could not.[221] Here, if the agency is "sincerely attempt[ing] to reach the correct result under the applicable statute" in light of its unique knowledge as to Congress's stance on detaining terrorists,[222] then its exercise in polymorphism would be legitimate. This is true even if a *judge* who reached that construction could be fairly described as "invent[ing] a statute rather than interpret[ing] one."[223] Furthermore, if this outcome—authorizing the indefinite detention of a suspected terrorist—was deeply unpopular with the public, the agency would be made to respond via the President.[224]

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217. Therefore, the phenomenon of "policy polymorphism" that Professor Siegel identifies—where courts interpret statutes differently in different situations in order to reach "desirable results," *see supra* note 95 and accompanying text—while objectionable to adherents of the *judicial* "faithful agent" model, is defensible where an agency charged with implementing a statute makes such policy judgments.

218. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

219. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) (arguing that presidential administration of agencies promotes accountability by enhancing transparency and increasing bureaucracy's responsiveness to the public); *see also* Morrison, *supra* note 153, at 1221 & n.138 ("The executive branch does not present the same countermajoritarian concerns as the federal judiciary . . . .") (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 864–66 (1984)); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1675–78 (2004) (discussing how the Executive Branch is held accountable under the accountability theory and presidential-control model).

220. *See supra* Part III.B.I.

221. *See supra* notes 167–72 and accompanying text.

222. *See supra* note 217 and accompanying text.

223. Clark v. Martinez, 543 U.S. 371, 378 (2005).

224. *See supra* note 219 and accompanying text.

By contrast, take Quadrant III, where the agency is presented with a petitioner that triggers the relevant canon of construction and the agency concludes that (1) in light of the relevant canon, the petitioner may not be detained indefinitely, and (2) inadmissible aliens may be detained indefinitely. As discussed, courts might resist such agency-mandated polymorphism because the agency would have reached conclusion (2) in light of its understanding of what the judicial doctrine of constitutional avoidance requires. But because courts do not grant *Chevron* deference to an agency's statutory interpretation based on judicial precedent, the court would determine for itself whether inadmissible aliens could be detained indefinitely. This is beneficial because the agency would bring no expertise to bear on the question of what judicial precedent requires. No amount of information richness makes an administrative agency more qualified than a federal judge to interpret Supreme Court case law. As the D.C. Circuit has observed,

> [A]gencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where . . . the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence.[225]

In addition, judicial rejection of agency-imposed polymorphism is consistent with the notion that agency polymorphism is justified when the twin deference rationales of *Chevron*—implicit delegation for policy-based gap filling and democratic accountability via the President—are in play.

2. Litigation Sequence

On a practical level, agency polymorphism is consistent with *Brand X*'s concern that litigation timing should not be dispositive:[226] it ensures that the length of an inadmissible alien's detention does not depend on whether an LPR happened to challenge the statute first. For example, in Quadrant I, once the court concludes that the first petitioner may not be detained indefinitely, the agency may still determine that the second petitioner could be detained indefinitely based on the absence of constitutional concerns. The agency would conclude polymorphically that the same statutory language means one thing as applied to LPRs and another as applied to

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225. Akins v. Fed. Election Comm'n, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998).

226. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.").

inadmissible aliens. The result: inadmissible aliens may be detained indefinitely, regardless of litigation sequence.

In Quadrant III, where the agency is presented with the LPR's claim, the agency's statement that the statute should mean something different as applied to inadmissible aliens (i.e., agency-mandated polymorphism) also ensures that the inadmissible alien does not receive a windfall. To the extent that a later court defers to this statement by the agency when adjudicating the inadmissible alien's case, the court will have interpreted the statute just as it would have had it adjudicated the inadmissible alien's challenge before the agency's decision. And if the agency reached the unitarian conclusion that future inadmissible aliens merit the same statutory interpretation as does the current LPR, the court could reject that determination because courts review agency interpretations of judicial precedents de novo.[227] Therefore, consistent with how it would have come out as an initial matter, the court could reach the polymorphic conclusion that the inadmissible alien may be detained indefinitely, despite the LPR's prior, successful challenge. Here again, agency polymorphism ensures that the sequence of litigation plays no role.

3. Departmentalism

Professor Morrison contends that executive branch avoidance is appropriate if one adopts a "constitutional enforcement" theory of the canon. In contrast to the traditional "judicial restraint" account of avoidance—according to which courts presume Congress intended to legislate within constitutional bounds and courts avoid making unnecessary constitutional decisions[228]—the enforcement approach does not purport to capture Congress's intent.[229] Rather, it views the avoidance canon as protecting constitutional values by making it more difficult for Congress to approach constitutional boundaries by imposing quasi-clear statement rules: Congress must consider constitutional concerns raised by proposed legislation and then clearly state that it intends to legislate in constitutionally suspect ways.[230]

Unlike the judicial-restraint account, the constitutional-enforcement

227. *See supra* notes 205–06 and accompanying text.

228. *See* Morrison, *supra* note 153, at 1206–07.

229. *See id.* at 1212–13 ("[I]f the aim of avoidance is to protect constitutional values . . . its failure to track constitutional intent is largely irrelevant.").

230. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262 (1991) (Marshall, J., dissenting) ("Clear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them."); Morrison, *supra* note 153, at 1226–27 (arguing that the enforcement theory of constitutional avoidance raises political costs for Congress to clearly state its intent to enact constitutionally suspect legislation).

view of avoidance has a role beyond the Judiciary. Due to the President's independent duty to abide by and protect the Constitution and federal law,[231] and the President's "independent responsibility to interpret . . . the Constitution,"[232] the Executive Branch may also invoke constitutional avoidance in interpreting statutes so as to enforce underlying constitutional norms. As a practical matter, Morrison points out, if the purpose of the enforcement version of avoidance is to force Congress to be clear about its intention, then "it is more likely to be effective if it is consistently applied by the executive as well as the courts."[233] As a normative matter, because the constitutional avoidance canon "is understood as a statutory means of enforcing constitutional values," "the executive branch's independent obligation to enforce the Constitution entails an *obligation* to use the avoidance canon."[234]

This independent obligation may mean that the Executive Branch should enforce underlying constitutional norms more robustly than courts. Indeed, Morrison claims that the President may conclude that a statute is unconstitutional even though the courts themselves have not and would not reach that conclusion.[235] For example, where a particular issue is nonjusticiable or implicates a judicially underenforced constitutional norm,[236] in Morrison's view, executive branch officials "have a duty to abide by their own best understanding of the provisions."[237] On this account, an agency might interpret a statute one way to avoid constitutional concerns which a court—limited by justiciability doctrine, for example—might never confront.

Agency polymorphism motivated by the canon of constitutional

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231. *See* U.S. CONST. art. II, § 1, cl. 8 (requiring the President to take an oath to "preserve, protect and defend the Constitution of the United States"); U.S. CONST. art II, § 3 (requiring the President to "take Care that the Laws be faithfully executed").

232. Morrison, *supra* note 153, at 1226. The notion that the President may diverge from Supreme Court precedent as to the meaning of the Constitution is, of course, controversial. *Cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."); Adler, *supra* note 154, at 875–76 (listing many logical steps that theorists of a "Plebiscitary Presidency"—one "responsive to the judgments, preferences, beliefs or other attitudes of a majority of the citizenry"—must make out in order to justify executive departmentalism).

233. Morrison, *supra* note 153, at 1222.

234. *Id.* at 1226 (internal citation omitted) (emphasis added).

235. *Id.* at 1224.

236. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

237. Morrison, *supra* note 153, at 1224 (citing Trevor W. Morrison, Hamdi*'s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 436–37 (2006); Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 690 (2005)).

avoidance is consistent with the enforcement approach to avoidance because it enables executive branch agencies to assume their role as co-expositors and enforcers of constitutional norms. Agencies may look to judicial precedents to discern the underlying constitutional values at stake in a given case, but "it is ultimately the values themselves . . . that an executive actor should consider when deciding whether to employ avoidance."[238] This account of avoidance grants agencies a measure of decisional independence: they need not apply the avoidance canon in the same way that courts do.[239] Moreover, and particularly relevant to agency polymorphism, where the Judiciary recognizes its obligation to defer to Congress or the Executive Branch, such as where an issue is nonjusticiable or implicates an underenforced constitutional norm, the Executive Branch should strive even more vigorously to ensure its own compliance with the Constitution. As a President Clinton-era Office of Legal Counsel memorandum explained, where the Judiciary is restrained in its ability to enforce the Constitution by its obligation "to defer to the political branches[,] . . . the executive branch's regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements."[240]

One example of such reduced judicial scrutiny is the "plenary power" doctrine of immigration law, which dictates that "Congress and the executive branch have broad and often exclusive authority over immigration decisions [such that] courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled."[241] In this area, and others in which the Judiciary defers to the political branches, executive branch agencies should assume a more active role in policing their own adherence to the Constitution. Agency polymorphism, in which agencies have their own say on constitutional questions even once the Judiciary has spoken on a related constitutional question, enables agencies to do so.

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238. *Id.* at 1219.

239. *See id.* (criticizing executive agencies for summarily stating without deeper analysis that the avoidance canon is a "'cardinal principle' of judicial statutory interpretation" which agencies should also apply) (citing Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. Off. Legal Counsel 350 (1995)); *see also supra* notes 189–90 and accompanying text (describing how agency's "information-rich" environment enables them to avoid invoking avoidance because statutes are clearer to them than they are to courts).

240. *See* Morrison, *supra* note 153, at 1225 & n.161 (quoting The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 180 (1996)).

241. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

B. Limitations of Agency Polymorphism

1. Stare Decisis Polymorphism

As Professor Siegel explains, courts sometimes "avoid having a prior error control a statute's further applications" by "[c]onfining the effect of prior errors . . . through application of the polymorphic principle."[242] But this approach is indefensible in the administrative agency context: agencies are permitted, even expected, to change regulatory policies, obviating the need for such interpretive gymnastics.[243] As Professor Pierce puts it, "*Chevron* deference applies with as much strength to an agency decision to change its interpretation of an ambiguous agency-administered statute as to an agency decision to adhere to a previously announced interpretation."[244]

To illustrate, recall Quadrant IV, where the individual who triggers no constitutional concerns nonetheless argues to the agency that such concerns would arise with respect to someone else. Initially, the agency would likely reject this argument and conclude that the statute authorizes the indefinite detention of the petitioning individual. But perhaps over time this new polymorphic rule of differential treatment may prove difficult for the agency to administer, perhaps because of the litigation it encourages, notice issues it raises, or simply due to the unnecessary complexity of a two-tier regime.[245] In light of this, the agency may later decide to interpret the statute in a unitary way.[246] In that situation, it would be inappropriate for the agency to engage in stare decisis polymorphism. That is, the agency should not attempt to cabin its initial decision by pointing to extrinsic factors, such as changes in immigration policy, which render its initial determination obsolete. Rather, because *Chevron* accommodates changes in administrative policies, the agency should announce its new unitarian position that *all* petitioners—LPRs and inadmissible aliens—are entitled to

242. Siegel, *supra* note 21, at 364.

243. *See* Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (recognizing that the National Highway Traffic Safety Administration's change in seatbelt regulation policy was "related to the election of a new President of a different political party" but such policy changes are "perfectly reasonable" as long as the agency remains within statutory bounds.); *see also* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 710 (2007) ("[F]reeing up agencies to change policies, as *Chevron* does . . . works to prevent regulatory policy from becoming obsolete. Under either version of *Chevron*, it is entirely legitimate for agencies to update policies in light of changing circumstances or changing democratic preferences.").

244. Pierce, *supra* note 66, at 570 (citing Smiley v. Citibank, 517 U.S. 735, 742 (1996)); *see* United States v. Eurodif S.A., 129 S. Ct. 878, 886–87 (2009) (reaffirming the principle that *Chevron* deference applies "even after a change in regulatory treatment").

245. *See supra* Part III.B.4 (discussing practical reasons for agency dissatisfaction).

246. *Id.*

the same statutory construction. Stare decisis polymorphism is unnecessary and inappropriate for agencies because agency-generated "precedent" does not bind with the force of judicial stare decisis.[247]

2. Strong Unitarianism in the Administrative Context

Suppose the agency announces its unitarian position that no petitioner may be indefinitely detained. Recall that Justice Thomas criticized unitarianism as encouraging, rather than restraining, judicial creativity.[248] Likewise, Professor Siegel argues that unitarianism "yields one high-stakes judicial choice": the initial decision *not* to embrace polymorphism and instead impose a single interpretation on the statute in every application.[249] But agency unitarianism is largely immune from these critiques because an agency's initial decision to reject polymorphism is only provisional—it could always embrace polymorphism later. For example, in Quadrant III, when presented with an LPR the agency may first reach the unitary position that the statute must be read the same way for future inadmissible aliens.[250] But for many reasons—including judicial rejection of that conclusion, as discussed in Part III.B.3—the agency may later decide to proceed polymorphically, deciding that inadmissible aliens no longer should benefit from the construction of the statute as applied to LPRs. Nothing in *Chevron* or administrative law doctrine in general prohibits the agency from shifting interpretive techniques.[251] This diminishes the affirmative case for agency polymorphism because it weakens a central critique of unitarianism.

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247. *See supra* notes 243–44 and accompanying text. Of course there are limits. *See State Farm*, 463 U.S. at 58–59 (requiring the new agency decision to not be arbitrary and capricious, remain within the boundaries set forth by Congress, and "articulate a 'rational connection between the facts found and the choice made'" (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962))); *see also Eurodif S.A.*, 129 S. Ct. at 887 n.7 ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act" (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005))).

248. *See supra* note 29 and accompanying text.

249. *See supra* note 105 and accompanying text.

250. *But see supra* note 204 and accompanying text (doubting whether the agency would make this decision). As discussed above, this decision may not bind the court because a later court faced with the inadmissible alien's claim would review de novo whether constitutional avoidance or unitarianism require the agency's initial construction. *See supra* notes 205–06 and accompanying text.

251. *See supra* note 243 and accompanying text; *see also* Mashaw, *supra* note 189, at 525 (pointing to numerous factors that influence agency interpretive techniques and concluding that "[w]hen speaking interpretively . . . administrators often have less need to explain themselves, and no need to formalize, preserve or make available sources from which we might glean their methodological commitments").

3. Agency Nonacquiescence

Agency nonacquiescence is the "selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals . . . ."[252] Because a federal court's jurisdiction is limited territorially, while federal agencies administer statutes nationally, agencies must often proceed in the face of conflicting judicial constructions of a statute.[253] "[*I*]*nter*circuit nonacquiescence" occurs when an agency "refuses to follow, in its administrative proceedings, the case law of a court of appeals other than the one that will review the agency's decision."[254] More controversially, "an agency engages in *intra*circuit nonacquiescence when the relevant venue provisions establish that review will be to a particular court of appeals and the agency nonetheless refuses to follow, in its administrative proceedings, the case law of that court."[255]

For federal agencies, opportunities for intercircuit nonacquiescence abound. For example, following the Ninth Circuit's decision in *Nadarajah* that all detentions authorized by the same statute must be treated similarly,[256] the immigration service may still have contended in a Second Circuit case (or a proceeding before the agency that would be reviewed by the Second Circuit) that the statute authorized the indefinite detention of suspected terrorists. (If the agency adopted a stance of intracircuit nonacquiescence, it would have refused to apply *Nadarajah* to future cases *within* the Ninth Circuit.)

Agency polymorphism would seem to increase the likelihood of agency nonacquiescence. For instance, recall Quadrant III, where the agency construes the statute at issue in *Zadvydas* polymorphically, prohibiting the indefinite detention of the LPR but permitting the indefinite detention of inadmissible aliens.[257] Earlier, this Article demonstrated how courts could rebuke this attempt at agency-mandated polymorphism by reviewing the agency's conclusion regarding inadmissible aliens de novo, deciding for itself whether the agency is correct or whether unitarianism is required.[258] It therefore seemed as though courts could repel agency-mandated polymorphism, even in the era of *Brand X*. But what if the agency then

252. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

253. *See* Mashaw, *supra* note 189, at 513–14.

254. Estreicher & Revesz, *supra* note 252, at 687.

255. *Id.* The many asserted challenges to and justifications for both forms of agency nonacquiescence are beyond the scope of this Article.

256. *See supra* notes 172–75 and accompanying text.

257. *See supra* Part III.B.3.

258. *Id.*

decided not to acquiesce in such *judicially* mandated unitarianism? When faced with another inadmissible alien's argument for a unitary approach to the statute—even in a jurisdiction appealable to the very same circuit—the agency may well decide to engage in polymorphism, denying the inadmissible alien's claim.

This is possible, but such nonacquiescence is just as likely in a unitarian regime. This is because nonacquiescence is agnostic about methodology: it may transpire whenever a judicial decision contravenes an agency's interpretive preferences. To illustrate, recall a different scenario within Quadrant III: the agency is confronted with the LPR's claim and proceeds according to the unitary principle, deciding that the statute must be read the same way for inadmissible aliens as well. Upon its de novo review of the subsequent inadmissible alien's appeal, a court inclined toward polymorphism might reject the agency's initial decision and uphold the inadmissible alien's indefinite detention.[259] But once again, following this decision, the agency has an equally strong incentive to engage in nonacquiescence, declining to indefinitely detain future inadmissible aliens.

Therefore, a regime oriented towards agency polymorphism does not actually increase the likelihood of agency nonacquiescence. In fact, in at least some of the scenarios described in Part III, agency polymorphism provides an intermediate option for dissatisfied agencies, an option short of full-fledged nonacquiescence. Agencies may engage in polymorphism to say that while an antecedent judicial holding affects one category of petitioners, the statute should be read differently as applied to others. For example, in Quadrant I, the agency might respond to a judicial decision that the statute does not authorize the indefinite detention of LPRs by reaching the polymorphic conclusion that it does authorize the indefinite detention of inadmissible aliens; wholesale nonacquiescence may be unnecessary.

V. HYBRID POLYMORPHISM

In light of the concerns identified in Part IV, this Article does not propose that courts and agencies rely exclusively on polymorphism. After all, agencies are permitted to change policies over time, so certain kinds of polymorphism are inappropriate in the administrative context.[260] For this same reason, the significance of an agency's initial methodological choice is lessened, as the agency could always decide to take a different approach later.[261] Nevertheless, politically accountable agencies in the world of *Chevron* are immune to many of Justice Scalia's charges that *judicial*

259. *See supra* Part III.B.3.
260. *See supra* Part IV.B.1.
261. *See supra* Part IV.B.2.

polymorphism undermines the courts' role as faithful agents: agencies legitimately fill gaps through policymaking, taking advantage of their information-rich context.[262] Also, agency polymorphism prevents litigation sequence from affecting the outcome of cases.[263] And agency polymorphism—motivated by the canon of constitutional avoidance—empowers agencies to assume their role as co-expositors and enforcers of constitutional norms.[264]

In light of these countervailing considerations, Part V advocates hybrid polymorphism. Specifically, where a canon of construction counsels one interpretation of a statute as applied to one category of petitioners but not another category, the first adjudicator—whether court or agency—should issue quasi-advisory rulings encompassing other foreseeable and discrete categories of petitioners not yet before the other adjudicator. If a court goes first, this means that it should issue "considered dicta": statements taking into account all of the relevant considerations and intimating a clear conclusion with respect to the absent petitioner. If an agency goes first, it should issue an analogous statement which explicitly interprets the statute as applied to such foreseeable categories of petitioners. Hybrid polymorphism accounts for concerns raised by polymorphism but also sidesteps the pitfalls of unitarianism.

A. A Hybrid Approach

In light of the constitutional and rule-of-law concerns identified in Part II with polymorphism in general,[265] and the agency-specific concerns identified in Part IV,[266] this Article proposes that when there are a small number of discrete, foreseeable classes of potential challengers, courts and agencies should issue considered dicta or similar statements that acknowledge the possibility of differential meanings and decide the meaning of the statute as applied to the future classes of individuals.

This hybrid approach is similar to unitarianism in one respect: it requires the first interpreter to consider the possible future applications of the statute and construe the statute as applied to foreseeable parties not currently before it.[267] Still, it is polymorphic in that the resulting interpretation need not be a single reading; rather, it specifically provides for multiple

262. *See supra* Part IV.A.1.
263. *See supra* Part IV.A.2.
264. *See supra* Part IV.A.3.
265. *See supra* Part II.C.
266. *See supra* Part IV.B.
267. *See supra* text accompanying note 26 (describing requirement of unitarianism that court (or agency) consider the "necessary consequences of its choice" *ex ante*).

meanings of a single statute as applied to different types of people.[268] In order to most clearly guide the second interpreter, this hybrid approach should be express: the first decisionmaker must state that "[the] particular statutory text has different meanings under different circumstances"[269] and then say what those meanings are.

1. Considered Dicta

When the first interpreter is a court and the situation calls for polymorphism, the court should issue considered dicta to guide the agency. Considered dicta are "recent dict[a] that consider[] all the relevant considerations and adumbrate[] an unmistakable conclusion."[270] When issued by the Supreme Court, such dicta "generally must be treated as authoritative" by the inferior courts.[271]

Recall that the *Zadvydas* Court said that the situation would be "very different" if the petitioner were an arriving alien rather than an LPR,[272] and it discussed at length the central "distinction between an alien who has effected an entry into the United States and one who has never entered . . . ."[273] As Justice Thomas would later protest in *Clark*, this distinction "'made all the difference' to the *Zadvydas* Court"[274] and therefore the Court signaled—if only implicitly—that the statute should *not* be similarly interpreted as applied to inadmissible aliens. But the *Zadvydas* majority's stray comments are not expressly polymorphic because they never actually declare that the statute should mean something different with respect to inadmissible aliens. Instead, the *Zadvydas* majority engaged in "implied polymorphism" by "reserv[ing] an issue for future decision in a

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268. *See* Part I.A.2 (defining *polymorphism*).

269. Siegel, *supra* note 21, at 353 n.66 (defining *express polymorphism*).

270. Reich v. Continental Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994).

271. United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997) (quoting Doughty v. Underwriters at Lloyd's, London, 6 F.3d 856, 861 n.3 (1st Cir. 1993)); *see also* Christopher R. Green, *Originalism and the Sense–Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 589 & n.93 (2006) ("'Considered dicta' are properly given substantial, even controlling weight.") (citing cases discussing weight to be accorded considered dicta of the Supreme Court and state supreme courts). Professor Dorf has noted that "[s]ome lower courts do not view themselves as bound by a higher court's dicta, while others take the position that all considered statements of a higher court are binding," and argued that "[e]ach view has some merit": on the one hand, "[s]ince the higher court itself would not be bound to follow its own dicta, the lower court may reasonably assume that it has no greater obligation"; on the other hand, "the prudent lower court may choose to follow dicta" because "the higher court's dicta [is] a fairly reliable prediction of what the higher court would do . . . ." Dorf, *supra* note 144144, at 2026 (internal footnotes omitted).

272. Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

273. *Id.* at 693.

274. Clark v. Martinez, 543 U.S. 371, 388 (2005) (Thomas, J., dissenting) (quoting *Zadvydas*, 533 U.S. at 693).

way that would make no sense under the strong unitary principle."[275] In fact, the *Clark* majority claimed that this is precisely what the *Zadvydas* majority did: it made a "reservation of a question . . . . refus[ing] to decide that question."[276] But by ultimately concluding that because the statute's text was undifferentiated it should be read unitarily, the Court abandoned its initial polymorphic impulse.

Under this Article's proposal, it is not enough for the court to expressly declare that a statute *could* mean something different as applied to different people. Rather, it must acknowledge the possibility of a different meaning and then actually decide what that other meaning is, i.e., it must "adumbrate an *unmistakable* conclusion."[277] Merely flagging the possibility that the statute might mean something different in a different situation would not suffice.

2. Discrete and Foreseeable Classes

To limit potentially unruly judicial polymorphism—in which a statute's meaning would vary based on minor factual particularities of individual petitioners—Professor Siegel suggests distinguishing between a statute's primary and special applications:

> If the special construction principle applies to the statute's main application, it might be more appropriate to carry that reading over to all applications, but if the special principle applies to the less central application, it might be most appropriate to read the statute polymorphically, so that the main application is not infected by the special case.[278]

Unfortunately, Siegel's proposal does not give courts much guidance in situations like *Zadvydas* and *Clark*, where LPRs and inadmissible aliens are both major classes of noncitizens and neither could accurately be called a "special case." Furthermore, which decisionmaker—courts, agencies, Congress—determines whether an application of the statute is "main" or "special"? Or is Siegel advocating a numerical approach to the classification, in which applications are "special" simply because they are infrequent?

The latter approach would be quite complex. For instance, in the birth control example discussed in Part II.C.2, under Siegel's approach the first interpreter might decide that if the banned drug is used to make numerous commercial products besides birth control, then the statute's "main"

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275. Siegel, *supra* note 21, at 353.
276. *Clark*, 543 U.S. at 378–79 (majority opinion) (emphasis omitted).
277. *See supra* note 271 and accompanying text (discussing requirements of "considered dicta").
278. Siegel, *supra* note 21, at 391.

application is to make other commercial products and its "special" application is for birth control. Since the "special construction"—the interpretation informed by the canon that requires a clear statement before statutes are interpreted as conflicting with international law—would apply to the statute's "less central" application, the court would not carry over that reading to the "main" applications, and the male petitioner would not receive the drug.[279] But what if the vast majority of people who bought the drug in any form bought it in the form of birth control? Which type of frequency counts? Additionally, there is the potential for a feedback loop: the "main" application of a statute may change once a court or agency, guided by polymorphism, reads the statute differentially. Also, whose burden is it to adduce evidence regarding the statute's various applications? After all, this information would be difficult for the court to gather on its own. For these reasons, Professor Siegel's proposed main–special distinction would fail to rein in potentially unruly polymorphism.

Instead, under this Article's proposal, courts and agencies need only determine which categories of petitioners are discrete and foreseeable. For instance, in the birth control example agencies and courts would simply observe that there are two legally relevant applications of the statute:[280] birth control and all other products made from the drug. The interpreter would then determine the meaning of the statute as applied to those two categories, perhaps explicitly reading in an exception to the federal ban for purchasers of birth control.[281]

This limitation to discrete and foreseeable future applications of a statute responds to Justice Thomas's reasonable concern that unitarianism requires the initial decisionmaker to canvass the many possible (and perhaps hypothetical) future applications of a statute.[282] Such a task presents obvious problems of judicial economy. It also risks frustrating congressional intent by invalidating multiple constitutional applications of a statute.[283] However, where a court or agency is confident that it can

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279. *Id.*

280. That is, there are two types of petitioners whose characteristics are relevant to the *Charming Betsy* canon.

281. This proposed test presents the question of whether courts should defer to an agency's determination that a given group of potential petitioners are foreseeable or that they are discrete. Perhaps a combination of judicial and administrative expertise is needed to answer this question: judicial, because courts know the legal issues and canons of construction that may call for a differential interpretation; administrative, because agencies are more likely to know *ex ante* what types of petitioners will challenge a rule.

282. See *supra* text accompanying note 28.

283. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1956 (1997) ("Congress might well want the Court both to construe a statute expansively, without shying away from constitutional questions, and also to sever any infirmities from the statute so as to leave the valid portions intact; the effect of such an approach would be to give the statute its

identify the legally relevant groups without waiting for future cases, this proposal empowers the decisionmaker to issue guidance regarding the absent group as well.

3. Applying Hybrid Polymorphism

To make hybrid polymorphism more concrete, imagine how it would have helped the *Zadvydas* Court. When presented with an LPR's challenge to the statute that seemingly permitted indefinite detention, the Court could recognize, as it did, that the other constitutionally relevant category of noncitizens is inadmissible aliens.[284] Rather than surveying the many future applications of the statute, the Court could clearly foresee that these were the two main groups of noncitizens to whom the statute would be applied.[285] Because inadmissible aliens were a foreseeable, discrete second group, a hybrid polymorphic court would have expressly read in a temporal limitation to the statute as applied to LPRs and would have expressly withheld that limitation from inadmissible aliens. While Justice Thomas is justifiably concerned that unitarianism permits a court to narrow a statute "once and for all based on constitutional concerns that may never materialize,"[286] hybrid polymorphism should only occur when the court or agency is certain that such concerns will materialize. Moreover, the polymorphic court does not narrow the statute; in fact, it expands the reach of the statute to the constitutional maximum by applying it fully to inadmissible aliens.[287] As a side benefit, this approach would have prevented the ensuing circuit split that arose between *Zadvydas* and *Clark*, in which the Eleventh Circuit concluded that the *Zadvydas* limiting

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maximum constitutionally permissible scope. . . . [I]n a significant range of circumstances, that is precisely Congress's preference."); *cf.* Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting) ("We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a *single* impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine.") (referring to the First Amendment overbreadth doctrine) (emphasis added); HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 13, at 190 (agreeing that "statutes should not be invalidated based on a few aberrant, hypothetical applications" but questioning where to draw line between aberrant and common applications of statutes).

284. *See* Zadvydas v. Davis, 533 U.S. 678, 682 (2001) ("We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question.").

285. In fact, the *Clark* Court phrased the issue in terms of a binary choice: when deciding between two possible interpretations of a statute, the Court explained, "If *one* of them would raise a multitude of constitutional problems, *the other* should prevail." Clark v. Martinez, 543 U.S. 371, 380–81 (2005) (emphases added).

286. *Id.* at 397 (Thomas, J., dissenting).

287. *See infra* Part V.B.3 (demonstrating how agency polymorphism responds to criticism that the modern avoidance canon drastically narrows statutes' applications, overprotecting constitutional values).

construction did not apply to inadmissible aliens[288] and the Ninth Circuit concluded that it did.[289] Considered dicta issued by the *Zadvydas* Court concerning the meaning of the statute as applied to inadmissible aliens would have been invaluable.[290]

B. Advantages of Hybrid Polymorphism

1. Litigation Sequence and Standing

As this discussion of how hybrid polymorphism would have played out in *Zadvydas* suggests, this approach ensures that litigation sequence is not outcome determinative. No longer would the length of an inadmissible alien's detention depend on whether an LPR challenged the statute first. In Quadrants I or III, the initial decisionmaker could impose a temporal limitation for LPRs yet expressly declare that future inadmissible aliens may not benefit from that reading. In Quadrants II or IV, the initial decisionmaker could uphold the indefinite detention of an inadmissible alien while expressly providing that future LPRs could not be detained indefinitely. Thus, in all four scenarios the outcome of the eight challenges brought by the LPR and the inadmissible alien are consistent.

In addition, hybrid polymorphism responds to Justice Thomas's concern that unitarianism allows litigants to "attack statutes as constitutionally invalid based on constitutional doubts concerning other litigants or factual circumstances."[291] As discussed above, when a court is confronted with a petitioner for whom the relevant constitutional (or subconstitutional concerns) are not raised, the unitarian's consideration of the concerns raised by the statute as applied to an *absent* petitioner seems to violate *Raines*'s prohibition on third-party challenges.[292] However, under hybrid polymorphism, even if the inadmissible alien succeeds in convincing the court to consider the constitutionality of the statute as applied to the absent LPR, the court will still interpret the statute as applied to the inadmissible alien just as it would have absent any consideration of the LPR. Therefore, while hybrid polymorphism may violate the letter of *Raines* by even *considering* the constitutionality of the statute as applied to absent

288. Benitez v. Wallis, 337 F.3d 1289 (11th Cir. 2003).
289. Xi v. INS, 298 F.3d 832 (9th Cir. 2002).
290. *See* Zal v. Steppe, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring and dissenting) ("[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding."). Note that this example is purely judicial hybrid polymorphism.
291. Clark v. Martinez, 543 U.S. 371, 396 (2005) (Thomas, J., dissenting).
292. *See supra* notes 13, 113–16 and accompanying text.

parties,[293] such consideration in no way affects the outcome of the inadmissible alien's case. In this way, hybrid polymorphism responds to Justice Thomas's concerns about standing.[294]

2. Modern Constitutional Avoidance

The modern constitutional avoidance canon requires a court to determine only that a statute's application raises constitutional *doubts*, not that it is actually unconstitutional.[295] An important criticism of this version of the canon is that it "overprotect[s] constitutional values through statutory interpretation."[296] That is, modern avoidance "enables courts to construe statutes not to encroach on constitutional norms even if that encroachment would be upheld in a constitutional adjudication on the merits."[297] In this way, opponents argue, modern constitutional avoidance undermines legislative supremacy because Congress would undoubtedly prefer that the Court construe a statute expansively and sever its occasional unconstitutional applications.[298]

Hybrid polymorphism responds to this important concern in a way that still preserves a distinct benefit of modern avoidance. It allows the court—or an agency, where it is appropriate for an agency to engage in constitutional avoidance—to arrive at a construction that avoids constitutional doubts in one application of the statute, but also to decide that the statute is constitutional in another application. This serves much of the same severing function as Professor Vermeule describes,[299] but it also preserves modern avoidance in the narrower realm of the questionable application of the statute. This is advantageous because courts are often justifiably reluctant to decide whether a statute actually violates the Constitution.[300]

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293. As discussed below in Part V.C.1, by reaching the merits of an absent petitioner's case, hybrid polymorphism continues to raise standing concerns.

294. *Cf.* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328–31 (2006) (in a case where "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem," the Court considered those overbroad applications, but also considered—and directed the lower courts to determine—whether a declaratory judgment and an injunction prohibiting only the statute's unconstitutional applications would comport with the intent of the state legislature).

295. *See* Vermeule, *supra* note 283, at 1949 (discussing the difference between classical and modern avoidance).

296. *Id.* at 1963 (citing CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 164–65 (1990)) (emphasis omitted).

297. *Id.*

298. *See id.* at 1969 (observing that "the Court often seems to combine a regime of expansive interpretation, even when facing constitutional problems, with a strong presumption of severability").

299. *See id.* at 1969–71.

300. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 301 n.13 (2001) (discussing the difficulty of

Moreover, as Professor Siegel points out, Congress could always override polymorphism. For example, Congress could "first pass[] one statute to cover the existing corpus of federal statutory law and by then includ[e] the strong unitary principle as a boilerplate part of the 'definitions' section of each subsequently enacted statute."[301] Alternatively, Congress could pass a "Strong Unitary Principle Act," directing courts that all federal laws must reflect the strong unitary principle (although this would raise concerns, which Siegel finds unfounded, as to whether Congress would be intruding upon the Judicial Branch).[302] In this way, Congress retains the ultimate authority over the methodology to be used in interpreting its statutes. Congress may declare that reviewing courts or agencies must be unitarians and, therefore, must apply an interpretation arrived at via the modern version of avoidance to every application of a statute. Thus, polymorphism answers the criticism that modern avoidance undermines congressional intent.

3. Suitable to the Administrative State

Hybrid polymorphism confers additional benefits in the agency-specific context. In scenarios such as Quadrant II, the court could first rule that inadmissible aliens could be detained indefinitely but LPRs could not be given the relevant constitutional concerns.[303] As discussed earlier, such considered dicta may satisfy *Brand X*'s requirement that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[304] Because inferior *courts* defer to the considered dicta of superior courts, and because it is assumed that courts, not agencies, are "the supposed experts in analyzing judicial decisions"[305] (and therefore do not grant *Chevron* deference to an agency's statutory construction if it is based on the agency's interpretation of judicial precedent),[306] *a fortiori* a subsequent agency should be bound by a court's considered dicta interpreting the statute in light of judicial precedent as applied to future categories of noncitizens. Moreover, because such

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determining precisely what the Suspension Clause protects as a reason to avoid a statutory construction which would raise that constitutional issue).

301. Siegel, *supra* note 21, at 393.

302. *Id.* at 395 & nn.265–66.

303. *See supra* notes 197–98 and accompanying text.

304. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

305. Akins v. Fed. Election Comm'n, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998).

306. *See supra* note 205 and accompanying text.

statutory construction questions are purely legal,[307] and not factual[308] or mixed,[309] it is particularly appropriate for the Judiciary to perform this interpretive task.[310]

Still, the applicability of other canons of construction may be inextricably intertwined with factual considerations. For instance, in the birth control example, a reviewing court faced with a man's claim for access to the drug might benefit from further factual development by the agency as to the future woman's claim. It might be useful to know whether, when the drug is sold for contraceptive purposes, it may be easily modified to facilitate the illicit purposes targeted by the statute. However, hybrid polymorphism accommodates such fact-intensive inquiries because the court can simply issue considered dicta phrased in the alternative. For example, if the court cannot yet know whether reading in an exception to the statute permitting contraceptive uses of drug X would open the door to proscribed uses of the drug, it could deny the man's suit and also state that women seeking to use the drug as birth control should be exempted *unless* the agency finds that the likelihood of illicit modification is high. This way, the court can still "adumbrate[] an unmistakable conclusion"[311] by guiding the agency in applying the law as declared by the court to the facts as found by the agency.

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307. *See, e.g.*, Doyle v. Huntress, Inc., 419 F.3d 3, 8 (1st Cir. 2005) ("A question of statutory construction presents a purely legal question.").

308. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 548 (1965) (defining *fact-finding* as "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect") (emphasis omitted).

309. *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (defining mixed questions as arising when the historical facts and legal rule are uncontested and the sole question is "whether the rule of law as applied to the established facts is or is not violated").

310. *See supra* notes 305–06 and accompanying text; *see also* Negusie v. Holder, 129 S. Ct. 1159, 1172 (2009) (Stevens, J., concurring and dissenting) ("In cases involving agency adjudication, we have sometimes described the court's role as deciding pure questions of statutory construction and the agency's role as applying law to fact."); HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 13, at 571–77 (explaining how appellate courts resolve pure legal questions de novo and defer to fact finders on credibility and other such determinations given their respective institutional capacities and limitations); *cf.* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 700–01 (2006) (explaining that federal question subject-matter jurisdiction was properly found in a prior case raising a "nearly 'pure issue of law,' one 'that could be settled once and for all and thereafter . . . govern numerous [future] cases,'" in contrast to the instant case, which was "fact-bound and situation-specific") (quoting HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 13, at 65 (2005 Supp.)). *See generally* Aaron G. Leiderman, Note, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1382–86 (2006) (reviewing leading definitions of "law," "fact," and "mixed questions of law and fact" and emphasizing the dependence of such definitions on practical considerations).

311. Reich v. Continental Cas. Co., 33 F.3d 754, 757 (7th Cir. 1994).

C. Challenges to Hybrid Polymorphism

1. Standing

Although not as problematic from a standing perspective as unitarianism,[312] hybrid polymorphism still poses a theoretical standing concern. As mentioned above, when the first adjudicator declares the meaning of the statute as applied to an absent petitioner, the declaration is in tension with *Raines* because it considers the constitutionality of the statute as applied to an absent party.[313] Still, this consideration does not affect the outcome of the case which is currently before the court. Therefore, any fear that hybrid judicial polymorphism violates prudential standing rules is misplaced. As for hybrid polymorphism where the initial decisionmaker is an agency, it suffices to say that administrative standing is not defined by Article III's case and controversy requirement or by prudential standing hurdles imposed by courts.[314] Rather, standing is governed by the agency's organic statute.[315] Therefore, the judicial limitation on third-party standing does not apply in the administrative context.[316]

2. Prohibition on Advisory Opinions

It might be argued that when a court is the initial decisionmaker, its considered dicta concerning the absent party amount to an advisory opinion. In broad strokes, the rule against advisory opinions provides that "there must be substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect."[317] This determination often involves a consideration of multiple factors, such as whether a dispute is concretely framed by adverse parties, whether the facts will be presented in a sufficiently adversarial fashion, the decision's likely

312. *See supra* Part V.B.1 (explaining how hybrid polymorphism responds to Justice Thomas's criticism that unitarianism violates prudential limits on third-party standing).

313. *See supra* note 293 and accompanying text.

314. *See* Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n, 194 F.3d 72, 74 (D.C. Cir. 1999) ("Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts. The criteria for establishing 'administrative standing' therefore may permissibly be less demanding than the criteria for 'judicial standing.'").

315. *See* Ecee, Inc. v. FERC, 645 F.2d 339, 350 (5th Cir. 1981) ("Administrative standing analysis must always begin with the language of the statute and regulations that provide for an administrative hearing.").

316. *Cf.* Joseph P. Tomain, *Four Failures of the Political Economy*, 6 TUL. ENVTL. L.J. 1, 16 (1992) ("[T]hird party standing before administrative agencies is fundamentally statutory (not constitutional).").

317. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, at 45 (1989).

res judicata and stare decisis effects on later judicial actions, and most importantly, the conclusiveness of the determination on other branches of government.[318] It might be argued that the hybrid polymorphic court's gratuitous statements about the absent future petitioner violate the spirit, if not the letter, of the prohibition on advisory opinions because such language brings about no immediate effect.

However, as Professor Lee has shown, while there are at least five types of advisory opinions only two implicate a "constitutionally-mandated core"; the others occupy a "large prudential curtilage."[319] Only advisory opinions in the sense of judicial pronouncements "subject to review by a co-equal branch of government" and "pre-enactment review" of another branch's contemplated action trigger the constitutional bar.[320] In contrast, other types of advisory opinions, such as where the court issues statements "not truly necessary to the disposition of the case at bar (*that is, dicta*)," are constitutionally permissible and fall within the Judiciary's discretion.[321] In Professor Lee's view, "whether to engage in dicta," even in reaching strictly unnecessary constitutional issues, "is a matter for the considered discretion of a court, and calling it an 'advisory opinion' changes that not one whit."[322] Therefore, the considered dicta of a hybrid polymorphic court directed at foreseeable third parties would not offend the constitutional prohibition on advisory opinions.

3. Practical Limitations

Of course, hybrid polymorphism has limitations. In *Zadvydas*, the Court could clearly foresee—and in fact did foresee—what the legally relevant categories of petitioners would be: LPRs and inadmissible aliens. Similarly, in the birth control example, it would not require great foresight for a court or agency to recognize that the two legally relevant classes are women seeking birth control and those interested in other uses of the drug. But in other situations there may be numerous potential types of petitioners. In those cases, the initial decisionmaker should eschew polymorphism and instead simply decide the case before it. While the first

318. *See* HART & WECHSLER'S THE FEDERAL COURTS, *supra* note 13, at 82–90 (setting forth these and other considerations).

319. Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 644 (1992).

320. *Id.* at 644–45.

321. *Id.* at 645 (citations omitted) (emphasis added).

322. *Id.* at 649 (discussing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341–56 (1936) (Brandeis, J., concurring), Culombe v. Connecticut, 367 U.S. 568 (1961) (Warren, C.J., concurring), and suggesting that Justices "regard[] dicta as a problem of judicial judgment and craftsmanship and not as a problem of legality").

adjudicator may sometimes decide to proceed in the alternative,[323] there may simply be too many potential classes to facilitate hybrid polymorphism.

CONCLUSION

Professors Vermeule and Sunstein have argued that the choice of a theory of statutory interpretation should be informed by empirical judgments about administrability and institutional setting, and not just by constitutional and theoretical considerations.[324] But such information is hard to come by, and this Article has not attempted to test its observations and assertions empirically. In the face of such uncertainty, Vermeule and others suggest that courts adopt "simple, straightforward doctrines that minimize judicial decision costs."[325] Ultimately, it is suggested, "the particular choice of rule will be less important than that some clear rule be chosen."[326]

This Article has exposed and evaluated polymorphism in the administrative state with an eye to organizing thinking about this underappreciated interpretive technique. Further research is needed to evaluate the frequency of polymorphism and its institutional costs and benefits. In proposing that courts and agencies engage in hybrid polymorphism when there are discrete and foreseeable categories of petitioners, this Article provides a practical approach to polymorphism in the administrative state, one that accounts for the particular competencies of courts and agencies and the distinct features of polymorphism and unitarianism.

Courts and agencies can make words mean so many different things. The trick is knowing when they should.

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323. *See supra* Part V.B.3 (proposing this approach for fact-intensive determinations).

324. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 76–77 (2000) (arguing that courts should attend to empirical considerations in adopting a theory of statutory interpretation, but that they cannot do so due to their institutional limitations); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 641 (1999) (arguing that a successful defense of formalism in statutory interpretation must prove "empirical claims about the likely performance and activities of courts, legislatures, administrative agencies, and private parties").

325. Vermeule, *supra* note 324, at 128; *see also* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2157 (2002) ("The most important features of an interpretive regime are that it be clear, predictable, and internally coherent, and that both promulgator and interpreter of text agree on the regime beforehand.").

326. Rosenkranz, *supra* note 325.