ARTICLES

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

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TABLE OF CONTENTS

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

INTRODUCTION

A. Protecting Religious Freedom

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

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

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

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

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

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

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

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

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

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

Nelson, *supra* note 3, at 3.

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

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

7. *Xiaodong Li*, 420 F.3d at 505–06.

8. *Id*. at 506.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. An Interpretive Problem and the Chevron *Solution*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Changing the Chevron *Attitude*

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

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convention of calling that acceptance mere "deference."

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

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

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

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

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

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

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

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

33. *Id.* § 9.1.

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

35. *Id.*

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

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

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

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

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

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

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

I. THE PUZZLE'S BIG PICTURE

A. Basic Substantive Characteristics of Refugee Claims

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

40. 8 U.S.C. §§ 1–1799 (2000).

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

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

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

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

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

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

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

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

45. 8 U.S.C. § 1101(a)(42) (2006).

46. *Id.* § 1158(b)(1).

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

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

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

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

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

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

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

51. 8 U.S.C. § 1158 (b)(1)(A) (2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Basic Procedural Parameters of Refugee Claims[63]

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

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

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

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

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

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

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

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

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

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

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

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

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always served at the discretion of the Attorney General).

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

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

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

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

72. 8 C.F.R. § 1003.1(e)(3) (2006).

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

74. *Id.* § 1003.1(a)(5).

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

76. *Id*. at 10.

77. 8 C.F.R. § 1003.1(g) (2007).

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

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

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

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

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

80. *Id.* at 8.

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

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

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

84. 5 U.S.C. § 706 (2000).

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

C. Chevron*'s Interpretive Context*

1. The Governing Law

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

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

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

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

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

89. 5 U.S.C. § 706 (2000).

90. *Id.* § 706(2)(A), (E).

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

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

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

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

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

93. *Chevron*, 467 U.S. at 842–43.

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

95. *Chevron*, 467 U.S. at 865–66.

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

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

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

*2. The Pre-*Chevron *Landscape*

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

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rules").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Chevron *Case*

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

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

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

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

105. *Id*. at 841.

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

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

108. *Id.* at 841–42.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

119. *Id.* at 844.

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

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

122. *Chevron*, 467 U.S. at 865–66.

123. *Id.*

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

E. Chevron *and the INA*

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

1. Cardoza-Fonseca

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

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

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

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

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

2. Aguirre-Aguirre

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

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

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

133. *Id.* at 430–31.

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

135. *Id.* at 448.

136. *Id.* at 426, 450.

137. 5 U.S.C. § 706 (2)(B) (2000).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

161. As Professor Duffy has pointed out:

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

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

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

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

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

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

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

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

B. The Chevron *Framework Factors*

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

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

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

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

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

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

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

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

168. 533 U.S. at 237.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Krotoszynski, *supra* note 121, at 753.

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

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

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

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

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

Id. at 1572–73.

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

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

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

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

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

1. Agency Expertise as a Basis for Deference

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

206. 8 U.S.C. § 1158 (2000).

207. *Id*.

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

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

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

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

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

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

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

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

212. *Id.* § 6401(a)(4)–(6).

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

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

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

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

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

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

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

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

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

218. *Id.* at 829.

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

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

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

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

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

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

2. Uniformity as a Basis for Deference

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Ossification Issue

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

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

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

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

Id. (citation omitted).

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

236. *Id.* at 224.

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

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

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

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

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

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

Id. at 983–84.

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Political Accountability as a Basis for Deference

a. The Democratic Principle Rationale

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

deference, with various exceptions.[269]

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

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

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269. *Id.* at 1444–45.

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

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

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

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

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

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

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

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

b. The Actual Accountability Problem

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

280. *Id.* at 235.

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

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

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

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

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

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

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

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

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

285. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

296. *See id*.

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

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

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

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

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

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

6. General Lawmaking Authority as an Indication of Implied Delegation

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

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

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

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

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

304. *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

Chevron framework's foundation.[316]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

323. *Id.* at 230.

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

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

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

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

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

325. *Id.* at 233–34.

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

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

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

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

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

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

III. PIECES THE COURT HAS NOT REALLY EXAMINED

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

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

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

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

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

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

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

B. APA Revival

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. § 2000bb(b).

343. *Id.* § 2000bb-3.

344. *Id.* § 2000bb-1.

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

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

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

neutral government action.[348]

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

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

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

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

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

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

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

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

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

353. *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION—PUTTING THE PIECES TOGETHER

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

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

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

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

366. As Professor Hickman recently observed:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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